

1971

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### Recommended Citation

*Student Practice-Limited Appearances in Court by Third Year Law Students*, 6 U. Rich. L. Rev. 152 (1971).

Available at: <http://scholarship.richmond.edu/lawreview/vol6/iss1/11>

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## STUDENT PRACTICE—LIMITED APPEARANCES IN COURT BY THIRD YEAR LAW STUDENTS

The practice of law as it is known to our legal system has been a closely guarded institution since its development in England during the Middle Ages. In the fourteenth and fifteenth centuries the legal profession became organized and obtained the monopoly of legal work it still enjoys today.<sup>1</sup> Even before the end of the thirteenth century, it was generally recognized that although a litigant could personally appear and argue in his own behalf, the party represented by a lawyer, who was an expert in the law and its language, would have a decided advantage over his opponent.<sup>2</sup>

The practice of law is no less jealously guarded today than it was in early England. By statutory mandate one must be licensed to practice law,<sup>3</sup> and the states have been granted broad power to regulate the practice of law within their borders.<sup>4</sup> It is a misdemeanor in Virginia to practice law without a license.<sup>5</sup> The avowed purpose in such regulation is not to make a professional monopoly but to assure the public that the members of the bar possess the necessary moral and educational requirements.<sup>6</sup> In furtherance of these aims, the Virginia Supreme Court

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<sup>1</sup> See generally 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 484 (3d ed. 1924) [hereinafter cited as 2 W. HOLDSWORTH].

The beginning of the modern bar association may probably be marked when Cardinal Otho in 1237 required that no one could serve as an advocate in an ecclesiastical court until he had taken the oath before a bishop to do his duty and not to pervert justice. 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 215 (2d ed. 1968) [hereinafter cited as F. POLLOCK & F. MAITLAND].

In 1292 the King directed the judges to provide a certain number of attorneys and apprentices to follow the court who should have the exclusive right of practicing before it. See 2 W. HOLDSWORTH, *supra* at 314.

<sup>2</sup> F. POLLOCK & F. MAITLAND, *supra* note 1, at 211.

<sup>3</sup> VA. CODE ANN. § 54-42 (1967). See *Horne v. Bridwell*, 193 Va. 381, 68 S.E.2d 535 (1952).

<sup>4</sup> *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 6 (1964) (but in doing so, the state cannot ignore the rights of individuals secured by the Constitution).

<sup>5</sup> VA. CODE ANN. § 54-44 (1967).

<sup>6</sup> *Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n*, 167 Va. 327, 189 S.E. 153 (1937); *West Virginia State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959).

Even before one is granted a license it must be shown that he is a person of high moral character. *Campbell v. Third Dist. Comm.*, 179 Va. 244, 18 S.E.2d 883 (1942).

The right of a state to require high quality standards for the practice of law or to revoke or suspend the licenses of those guilty of unethical conduct is unquestioned. *NAACP v. Patty*, 159 F. Supp. 503 (E.D. Va. 1958).

has adopted the Rules for the Integration of the State Bar<sup>7</sup> defining the practice of law and prescribing codes of ethics and disciplinary procedure.

### I. THE PRACTICE OF LAW

In order to ascertain what constitutes the unauthorized practice of law, it must first be determined what activities comprise the practice of law. The definition adopted by the Virginia Supreme Court in the Rules for the Integration of the State Bar is very broad:

... [I]t is from the relation of attorney and client that any definition of the practice of law must be derived.

...

Generally, the relation of attorney and client exists, and one is deemed to be practicing law, whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.

Specifically, the relation of attorney and client exists, and one is deemed to be practicing law, whenever—

(1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.

(2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.

(3) One undertakes, with or without compensation, to represent the interest of another before any tribunal,—judicial, administrative, or executive,—otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and *bona fide* employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such presentation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.<sup>8</sup>

Prior to the adoption of the Rules for the Integration of the State Bar in 1938, “no official attempt had been made to formulate an all-

<sup>7</sup> VA. SUP. CT. R. 6, INTEGRATION OF THE STATE BAR, is authorized by VA. CODE ANN. § 54-48 (1967). See *Commonwealth v. Jones & Robins, Inc.*, 186 Va. 30, 41 S.E.2d 720 (1947).

<sup>8</sup> VA. SUP. CT. R. 6, INTEGRATION OF THE STATE BAR I. See 171 Va. at xvii.

inclusive definition of the practice of law.”<sup>9</sup> The court in 1942, however, quoted with approval a statement that the phrase “practicing law” or “the practice of law” has had such a definite meaning throughout the country that no further definition is necessary.<sup>10</sup> Notwithstanding such statements, what constitutes “the practice of law” and the “unauthorized practice of law” is subject to broad interpretation.

The definition given to the practice of law in Louisiana is quite broad, encompassing various activities of one who holds himself out to the public as being learned in the law including preparation of pleadings and legal instruments, conveyancing, all advice to clients, the drafting of wills and negotiation.<sup>11</sup> West Virginia has adopted a similar description of the type of activity in which a licensed attorney may engage.<sup>12</sup> It has been said that the character of the act determines whether one is practicing law, and it is immaterial whether such act is carried on in an office, before a court or before an administrative body.<sup>13</sup> In contrast to most interpretations, Massachusetts considers the traditional professional activities such as the preparation of pleadings and the management and trial of an action on behalf of clients before a tribunal to be the practice of law, but the gratuitous furnishing of legal aid to the poor is not the practice of law.<sup>14</sup> It has been consistently held that natural persons who appear in their own behalf do not engage in the unauthorized practice of law.<sup>15</sup>

## II. RIGHT TO COUNSEL

The sixth amendment to the United States Constitution guarantees

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<sup>9</sup> *Commonwealth v. Jones & Robins*, 186 Va. 30, 33, 41 S.E.2d 720, 722 (1947).

<sup>10</sup> *Campbell v. Third Dist. Comm.*, 179 Va. 244, 250, 18 S.E.2d 883, 885 (1942).

<sup>11</sup> *Meunier v. Bernich*, 170 So. 567 (La. 1936).

<sup>12</sup> *West Virginia State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959).

<sup>13</sup> *People ex rel. Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E.2d 941 (1937). See *Ferris v. Snively*, 172 Wash. 167, 19 P.2d 942 (1933) (dicta) (a law clerk who only does preparatory work such as research, from which an attorney would carry the matter to its conclusion, would not be considered involved in unauthorized practice).

<sup>14</sup> *In re Opinion of the Justices*, 289 Mass. 607, 194 N.E. 313 (1935).

<sup>15</sup> *Id.*; *West Virginia State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959).

The right of a party to appear in his own behalf and be heard in the courts is fundamental. It is an inalienable right common to all, guaranteed both by the Constitution of the State and the Constitution of the United States. The right to have some one else appear and speak for one, or the right of such other to appear in the courts as a representative of a litigant is not an inalienable right. To represent another in the courts is not a right but a privilege, to be granted and regulated by law for the protection of the public.

*Bryce v. Gillespie*, 160 Va. 137, 144, 168 S.E. 653, 655 (1933).

to criminal defendants ". . . the assistance of counsel for his defense," and the courts have granted a right to counsel at nearly every stage of a criminal proceeding.<sup>16</sup> Recently such a right to counsel has been required not only for felonies but also for certain misdemeanors,<sup>17</sup> thus emphasizing the underlying rationale that:

The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights. . . .<sup>18</sup>

The situation becomes more acute when an indigent defendant is involved, for as stated in *Gideon v. Wainwright*,<sup>19</sup>

. . . [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.<sup>20</sup>

Certain constitutional limitations have been placed upon the counsel provided in criminal prosecutions. Although the indigent must be furnished counsel at public expense, the standard is the same but not superior to that afforded fee-paying clients.<sup>21</sup> The standard in both situ-

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<sup>16</sup> See *Escobedo v. Illinois*, 378 U.S. 478 (1964) (in investigation of a suspect); *Miranda v. Arizona*, 384 U.S. 436 (1966) (at custody); *United States v. Wade*, 388 U.S. 218 (1967) (at lineup); *White v. Maryland*, 373 U.S. 59 (1963) (at preliminary hearing); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (at arraignment); *Hawk v. Olson*, 326 U.S. 271 (1945) (preparation for trial); *Powell v. Alabama*, 287 U.S. 45 (1932) (preparation for trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (during trial); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (during trial); *Douglas v. California*, 372 U.S. 352 (1963) (for first appeal).

The right to assistance of counsel is extended to state prosecutions through the fourteenth amendment. See *Martin v. Commonwealth*, 210 Va. 686, 173 S.E.2d 794 (1970); *Buchanan v. Commonwealth*, 210 Va. 664, 173 S.E.2d 792 (1970), *commented on in* 5 U. RICH. L. REV. 442 (1971).

<sup>17</sup> *Marston v. Oliver*, 324 F. Supp. 691 (E.D. Va. 1971).

<sup>18</sup> *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

[I]t is all too easy for the bench and the bar to dismiss certain cases as simple ones; we fail to perceive the judicial process as do laymen with less or different education. "That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious."

*Marston v. Oliver*, 324 F. Supp. 691, 695 (E.D. Va. 1971). See also *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7 (1964).

<sup>19</sup> 372 U.S. 335 (1963).

<sup>20</sup> *Id.* at 344.

<sup>21</sup> *United States ex rel. McCoy v. Rundle*, 419 F.2d 118 (3d Cir. 1969).

ations, then, is for "effective" assistance of counsel;<sup>22</sup> that is, assistance not necessarily successful but sufficiently competent to prevent the trial from becoming a "farce" or a "mockery" of justice.<sup>23</sup>

The competence and experience of counsel representing a criminal defendant may have to be commensurate with the seriousness of the charge. An imposter posing as a qualified member of the bar was held not to meet the sixth amendment demands in a homicide prosecution.<sup>24</sup> Where a defendant was indicted for a capital crime but arraigned on a non-capital felony, his appointed counsel, who had been dropped from the roll of the bar for non-payment of dues, was held to be incompetent and the defendant denied due process of law.<sup>25</sup> However, where appointed counsel was merely a young member of the bar, lacking experience and background in trial work, due process was held not to have been denied.<sup>26</sup>

Where two law students, not licensed to practice law, were appointed to represent an indigent defendant and the right to counsel had not been waived, the sixth amendment requirement of assistance of counsel was held not to have been met.<sup>27</sup> However, where a former justice of the peace, learned in the law, represented a manslaughter defendant, the constitutional requirement was met although counsel was not a member of the bar.<sup>28</sup>

The plight of the poor and of those in penal institutions necessarily demands a relaxation of strict constitutional limitations on the qualifica-

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<sup>22</sup> Powell v. Alabama, 287 U.S. 45 (1932).

<sup>23</sup> See, e.g., United States ex rel. Carey v. Rundle, 409 F.2d 1210 (3d Cir. 1969); United States v. Dilella, 354 F.2d 584 (7th Cir. 1965); Schaber v. Maxwell, 348 F.2d 664 (6th Cir. 1965); Mitchell v. United States, 259 F.2d 787 (D.C. Cir. 1958).

<sup>24</sup> Harrison v. United States, 387 F.2d 203, 212 (D.C. Cir. 1967), where the court said: . . . [the sixth amendment] demands are not satisfied when the accused is "represented" by a layman masquerading as a qualified attorney; it is unthinkable that so precious a right, or so grave a responsibility, can be entrusted to one who has not been admitted to the practice of the law, no matter how intelligent or well educated he may be. This is particularly so where, as here, the accused is on trial for an offense upon the conviction of which his very life could become forfeit.

<sup>25</sup> McKinzie v. Ellis, 287 F.2d 549 (5th Cir. 1961).

<sup>26</sup> Achten v. Dowd, 117 F.2d 989 (7th Cir. 1941). But see People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957), where a homicide defendant was held denied due process because his attorney had not been licensed, but representation by one not licensed was not *ipso facto* a denial of rights.

<sup>27</sup> Jones v. State, 57 Ga. App. 344, 195 S.E. 316 (1938).

<sup>28</sup> State v. Bridges, 109 La. 530, 33 So. 589 (1903).

tions of court appointed counsel. In *Hackin v. Arizona*<sup>29</sup> counsel was a graduate of an unaccredited law school and had been refused admission to the bar. The Court dismissed the case for want of a substantial federal question, but Justice Douglas dissented, saying that “. . . there is a dearth of lawyers who are willing, voluntarily, to take on unprofitable and unpopular causes.”<sup>30</sup> Douglas noted that some states, aware of the acute shortage of lawyers to help indigents, have allowed qualified law students to advise and even represent indigents in limited circumstances. Until the goals of free legal assistance to the indigent are achieved, the poor will not be harmed by the well meaning, charitable assistance of laymen; indeed, this may be the only hope for many indigents to achieve equal justice.<sup>31</sup>

In *Johnson v. Avery*<sup>32</sup> the United States Supreme Court invalidated a Tennessee statute which prohibited prison inmates from assisting other poorly educated inmates in preparing petitions for post-conviction relief. Such “jailhouse lawyers” provided the opportunity for certain prisoners to be heard in court who otherwise would not have been heard. In his concurring opinion, Justice Douglas emphasized that there are not enough lawyers to handle all such claims and that the “traditional, closed-shop attitude is utterly out of place in the modern world.”<sup>33</sup>

### III. STUDENT PRACTICE

In June, 1971 the Council of the Virginia State Bar Association rejected a proposed new rule for the Rules for the Integration of the State Bar providing for the appearance in court by certain third-year law students.<sup>34</sup> The proposed draft was based upon the model rule promulgated by the American Bar Association in 1969.<sup>35</sup> The terms of the proposed rule provided that third-year law students, certified by

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<sup>29</sup> 389 U.S. 143 (1967).

<sup>30</sup> *Id.* at 146.

<sup>31</sup> *Id.* at 152.

<sup>32</sup> 393 U.S. 483 (1969).

<sup>33</sup> *Id.* at 492.

<sup>34</sup> The rule was submitted by a special Bar committee set up to study the proposal. A similar committee had submitted a proposed rule in October, 1970 which met with opposition at that time. The consideration of law students' appearance in court was referred back to the committee for further study, the result of which was the adoption of an amended rule. See 19 Va. Bar News, May 1971, at 9 and appendix.

<sup>35</sup> Compare the proposed Virginia rule in the appendix to this Comment with the A.B.A. MODEL RULE. See CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 228 (E. Kitch ed. 1970) [hereinafter cited as CLINICAL EDUCATION].

the dean of their law school, could appear and participate in courts not of record on behalf of indigent persons in both civil and criminal matters when under the supervision of an attorney.<sup>36</sup> The majority of the states allow such practice either by rule of court, statute or case decision.<sup>37</sup>

Permitting certain law students to practice law on a limited basis fulfills two important goals in our legal system. First, by providing additional counselors, the pressing and expanding need for legal services for the poor is met; and second, the quality of legal education is enhanced by clinical experience affording the law student sophisticated knowledge of the legal process.

### A. *Legal Services for the Poor*

With the expansion of the right to court-appointed counsel in indigent cases marked by *Gideon v. Wainwright*,<sup>38</sup> the demand for more lawyers has become phenomenal. A perceptive statement by Dean Paulsen of the University of Virginia Law School recognizes this fact:

The needs of the poor demand the services of many more lawyers—perhaps thirty thousand. This fact has implications for legal education, for the public fisc and for law students. Law students and law schools must and will meet the challenge of effective service for the disadvantaged.<sup>39</sup>

<sup>36</sup> See appendix.

<sup>37</sup> See, e.g., COLO. REV. STAT. § 12-1-19 (1963); COLO. R. CIV. P. 226; CONN. CIR. CT. R. 894; D.C. CT. GEN. SESS. R. 2 (Small Claims and Conciliation Branch); FLA. R. CRIM. P. 1.860; GA. CODE ANN. § 9-401.1 (1967); ILL. SUP. CT. R. 711; IND. SUP. CT. R. 3-2A; IOWA SUP. CT. R. 120; KAN. SUP. CT. R. 213; ME. SUP. JUD. CT. R. 90; MASS. SUP. CT. R. 3:11; MICH. SUP. CT. R. 921; MINN. SUP. CT. R. FOR SENIOR LAW STUDENTS; MONT. REV. CODE § 93-6704 (1947); MONT. ORDER OF THE SUP. CT. (1966); NEB. REV. STAT. § 7-101.01 (1967); N.J. SUP. CT. R. 1:21-3; N.Y. JUD. LAW §§ 478, 484 (McKinney Supp. 1967); OHIO SUP. CT. R. XVII A; PA. R. 12-3/4; S.C. CODE § 56-102 (1962); TENN. SUP. CT. R. 37 § 21; WYO. SUP. CT. R. FOR BAR ASSOC. 18. See also Application of Legal Aid Society of Albany, Inc., 27 App. Div. 2d 687, 277 N.Y.S.2d 632 (1967) (permitting third year law students to engage in limited practice under supervision); Application of Cornell Legal Aid Clinic, 26 App. Div. 790, 273 N.Y.S.2d 444 (1966). Cf. *In re Opinion of the Justices*, 289 Mass. 607, 194 N.E. 313 (1935).

<sup>38</sup> 372 U.S. 335 (1963).

Gideon's little regiment had no difficulty in running up its colors, but it is quite apparent that an army—a very large one—must be raised if the victory is to be a lasting one. Monaghan, *Gideon's Army: Student Soldiers*, 45 B.U.L. REV. 445, 446 (1965) [hereinafter cited as 45 B.U.L. REV.]

<sup>39</sup> Paulsen, *The Need for Legal Aid*, 19 VA. L. WEEKLY DIGEST COMP. 30, 36 (1968).

In his dissent to *Hackin v. Arizona*,<sup>40</sup> Justice Douglas observed that:

The need of America's poor for legal assistance vastly outstrips the legal resources which will be available in the foreseeable future. Law students represent a large, interested and capable source of assistance. They can provide legal assistance to the poor and improve the quality of their legal education at the same time. . . .<sup>41</sup>

At present the burden of handling indigent cases falls upon the Bar in Virginia and, in a few instances, upon legal aid societies set up within the Bar.<sup>42</sup> Unquestionably, the addition of selected law students to the available force of lawyers to handle indigent cases would provide a tremendous relief to the work load of those attorneys handling such cases.

The argument has been made that representation of indigents by law students in criminal matters would not meet the constitutional limitations of the sixth amendment right to counsel. In response, advocates of student practice contend that although lacking in experience and maturity, law students will compensate with a high degree of preparation and enthusiasm.<sup>43</sup> In effect, law students could provide representation equivalent to that given by young members of the Bar, and possibly better than that given by older members of the Bar whose work schedule prohibits a time-consuming, in depth investigation into the case.<sup>44</sup> Student practice would not constitute a "farce" or a "mockery of justice" so as to violate constitutional limitations on the effectiveness of counsel,<sup>45</sup> where the indigent has consented to such representation in writing and where he has a right to an appeal *de novo* to a court of

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<sup>40</sup> 389 U.S. 143 (1967).

<sup>41</sup> *Id.* at 147.

<sup>42</sup> However, there has been an appellate litigation seminar at the University of Virginia since 1965 which handles three indigent cases per year before the fourth circuit. See Sokol, *In Forma Pauperis Appeals: The University of Virginia Experiment with a Neglected Asset*, 18 J. LEGAL ED. 96 (1965).

<sup>43</sup> See, e.g., *Hackin v. Arizona*, 389 U.S. 143, 147 (1967) (Douglas, J., dissenting).

It is agreed that a law student would provide service that is at least equal with that which the average practitioner would provide in the average case. Fleisher, *The Practice of Law by Law Students: An Analysis, appearing in CLINICAL EDUCATION*, *supra* note 35, at 130 [hereinafter cited as CLINICAL EDUCATION NOTE].

<sup>44</sup> 45 B.U.L. REV., *supra* note 38, at 460.

<sup>45</sup> See note 23, *supra*.

record.<sup>46</sup> In any event, "it is undoubtedly better for indigents to get some legal assistance rather than none."<sup>47</sup>

### B. *Clinical Legal Education*

In thirteenth century England legal education was conducted as an apprenticeship, and those who were responsible for giving legal education were charged with the duty of selecting those students who should be privileged to practice in the courts.<sup>48</sup> In the early history of American legal education, a student "read law" in the office of a practicing attorney as an apprentice until he was competent to practice on his own. Education was by way of practical experience. Indeed, the first American law schools were said to be "merely the apprentice system on a group basis."<sup>49</sup>

Law schools today generally teach law by the case system, and the critics of this system are legion. In 1947 Jerome Frank, in suggesting clinical teaching methods, commented that:

American legal education went badly wrong some seventy years ago when it was seduced by a brilliant neurotic. I refer to the well-known founder of the so-called case system, Christopher Columbus Langdell.

. . . .

The neurotic escapist character of Langdell stamped itself on the educational programs of our leading law schools. . . . The Langdell spirit choked legal education.<sup>50</sup>

Today legal education reform is still very much a topical issue dominated by arguments for clinical reform, curriculum change and abolition of the third year of law school.<sup>51</sup>

The proponents of clinical legal education are numerous and quite prominent. At the August 10, 1969 Annual Convention of the American Bar Association, Chief Justice Burger compared law graduates

<sup>46</sup> Carefully constructed programs for student representation of indigents seem to me to pose no threat to the policies embodied in the sixth amendment. Quite to the contrary, they give real meaning to the amendment's aims.

<sup>45</sup> B.U.L. REV., *supra* note 38, at 461.

<sup>47</sup> CLINICAL EDUCATION NOTE, *supra* note 43, at 135.

<sup>48</sup> 2 W. HOLDSWORTH, *supra* note 1, at 315.

<sup>49</sup> Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947) [hereinafter cited as 56 YALE L.J.].

<sup>50</sup> *Id.* at 1303-04.

<sup>51</sup> See Allen, *Legal Education Reform: The Third Year Problem*, 16 S.L.J. 4 (1971).

today with doctors who never see live patients.<sup>52</sup> In previously making the analogy between law schools and medical schools, Jerome Frank had asked:

What would we say of a medical school where students were taught surgery solely from the printed page? No one, if he could do otherwise, would teach the art of playing golf by having the teacher talk about golf to the prospective player and having the latter read a book relating to the subject. The same holds true for toe-dancing, swimming, automobile-driving, haircutting, or cooking wild ducks.<sup>53</sup>

Justice Douglas has frequently noted the improvement that would occur in the quality of legal education if law students were allowed to represent indigents.<sup>54</sup>

### C. *Objections to Student Practice*

Besides objections to student practice on the basis of the constitutional limitations on the right to counsel<sup>55</sup> and on the basis of lack of maturity and experience,<sup>56</sup> many lawyers feel that they will lose clients to students offering gratuitous services. This argument is untenable because student practice would only involve indigents.<sup>57</sup> Another obstacle is the interruption in client service upon graduation or during examinations. This problem may be overcome by well-planned administration.<sup>58</sup> Some say that clients represented by law students will feel like "guinea pigs," but here again some legal assistance is better than none.<sup>59</sup>

It is urged that student practice is not the unauthorized practice of law when the primary purpose is the education of law students and the benefit to the public is great.<sup>60</sup> In addition, the safeguards imposed by

<sup>52</sup> *Id.*

<sup>53</sup> 56 YALE L.J., *supra* note 49, at 1311. See also Wright, *Poverty, Minorities, and Respect for Law*, 1970 DUKE L.J. 425.

<sup>54</sup> See note 41 and text *supra*.

<sup>55</sup> See note 46 *supra*.

<sup>56</sup> Experience cannot be equated with competence, nor can inexperience be equated with incompetence. See 45 B.U.L. REV., *supra* note 38, at 461.

<sup>57</sup> Suggested in a Memorandum in Support of the Proposed Rule Change to Admit Law Students to Limited Practice in the Courts of Louisiana, filed by Art Smith and others.

<sup>58</sup> See 45 B.U.L. REV., *supra* note 38, at 132.

<sup>59</sup> *Id.* at 132, 135.

<sup>60</sup> See note 57 *supra*.

the model rule and the proposed Virginia rule satisfy the restrictions on the unauthorized practice of law. Students must meet eligibility requirements, must be certified by their dean, and must always function under the supervision and personal responsibility of an attorney.<sup>61</sup>

The most serious objections concern the ethical responsibility of those not admitted to the Bar. Certainly, students not admitted to the Bar cannot be fully bound by the canons of ethics, but the supervising attorney will be bound. It would be feasible to require an oath of each practicing student that he would observe certain ethical standards, and for failure to do so or for malfeasant conduct, his admission to the Bar would be placed in jeopardy.<sup>62</sup>

#### IV. CONCLUSION

It is the duty of every lawyer to assist in making legal counsel available pursuant to the Code of Ethics.<sup>63</sup> The Ethical Considerations urge that:

The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of the individual lawyer are often not enough to meet the demand. Thus, it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this demand for legal services.<sup>64</sup>

Since there is a demonstrative need for legal services for indigents, and since third year law students can meet this need and benefit their education in the process, the Bar has an ethical duty to support the proposal to allow the limited appearance of certain third year law students in court.

C.J.S., Jr.

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<sup>61</sup> See appendix.

<sup>62</sup> Cf. Zimroth, *Group Legal Services and the Constitution*, 76 YALE L.J. 966, 992 (1967):

The old justification for the rules of legal ethics will no longer suffice. . . . [T]he Court is asking that these rules focus on the actual harm to the client or to the public. The reform in legal ethics, which had only been a matter of sound policy and good sense now may be a matter of constitutional imperative.

<sup>63</sup> ABA CANONS OF PROFESSIONAL ETHICS No. 2.

<sup>64</sup> A.B.A. CANONS OF PROFESSIONAL ETHICS, ETHICAL CONSIDERATIONS No. 2-25.

## APPENDIX

PROPOSED NEW RULE  
OF  
RULES FOR INTEGRATION OF THE VIRGINIA STATE BAR  
Appearances in Courts by Certain Third Year Law Students.

I. *Purpose*

The bench and the bar are primarily responsible for providing competent legal services for all persons, including those unable to pay for these services. As one means of providing assistance to lawyers who represent clients unable to pay for such services and as a means to encourage law schools to provide clinical instruction in trial work of varying kinds on a voluntary basis, the following rule is adopted.

II. *Activities*

A. *On Behalf of Any Indigent Person.* An eligible law student may appear and participate in the proceedings in any court not of record or before any administrative tribunal in this State on behalf of any indigent person if the person on whose behalf he is appearing has indicated in writing his consent to that appearance and the supervising lawyer has also indicated in writing approval of that appearance, in the following matters:

1. Any civil matter provided the supervising lawyer is personally present in court throughout the proceedings; and,
2. Any criminal matter in which the defendant is charged with an offense the penalty for which does not involve confinement in a penal institution provided the supervising lawyer is personally present in court throughout the proceedings.

B. *On Behalf of the State.* An eligible law student may also appear and participate in the proceedings in any criminal matter on behalf of the State with the written approval of the Attorney for the Commonwealth or his authorized representative, of the supervising lawyer and of the court. In each case, the Attorney for the Commonwealth or the supervising lawyer shall be present in court throughout the proceedings.

C. *As an Assistant to a Supervising Lawyer Engaged in Private Practice.* An eligible law student may appear and participate in the proceedings in any court or before any administrative tribunal in

this State on behalf of a client represented by the supervising lawyer as an assistant to the supervising lawyer engaged in private practice provided the supervising lawyer is personally present throughout the proceedings and in full charge of the manner in which they are conducted.

### III. *Requirements and Limitations*

#### A. *Requirements*

In order to make an appearance pursuant to this rule, the law student must:

1. Be a student in good standing of a law school in this State approved by the American Bar Association;
2. Have completed legal studies amounting to no less than two of the customary three school years of such studies;
3. Be certified by the dean, or a faculty member designated by the dean, of his law school as being of good character and competent legal ability, and as being adequately trained to perform as a legal intern; and,
4. Certify in writing that he has read, is familiar with and agrees to be bound by the Code of Professional Responsibility of the Virginia State Bar.

#### B. *Limitations*

No appearance may be made pursuant to this rule until the eligible law student shall have:

1. Filed the written consent and approval, as applicable, required under Paragraph II (A and B) of this rule in the record in the case;
2. Filed his statement in the record that he has not accepted and will not accept any compensation or remuneration of any kind for his services from the person on whose behalf he rendered services, but this shall not prevent a lawyer, legal aid bureau, law school, public defender agency, or the State from paying compensation to the eligible law student, nor shall it prevent any agency or private practitioner from making such charges for services as may otherwise be proper; and,
3. Been introduced to the court in which he is appearing by the supervising lawyer admitted to practice in that court and where

required taken an oath similar to that taken by the supervising lawyer.

#### IV. *Certification and Termination*

##### A. *Certification*

The certification of a student by the law school dean, or his designee:

1. Shall be filed with the clerk of this court and, unless it is sooner withdrawn, it shall remain in effect until the expiration of fifteen (15) months after it is filed, or until the announcement of the results of the first bar examination following the student's graduation, whichever is earlier; and,
2. Shall contain a certificate of the mailing of a copy thereof to the supervising lawyer whose full name and office address shall be shown therein.

##### B. *Termination*

The certification may be terminated at any time without notice or hearing and without any showing of cause by:

1. The dean, or his designee, or by any judge of a court of record within whose jurisdiction the student has taken any action under this rule, by mailing a notice to that effect to the clerk of this court with a copy of said termination being mailed to the supervising lawyer and the student; or,
2. By this Court. Notice of the termination shall be filed with the clerk of this court who shall immediately forward a copy of such notice to the supervising lawyer and the student.

#### V. *Other Activities on Behalf of Indigent Persons*

- A. An eligible law student may engage in other activities on behalf of indigent persons relating to the matters set forth under paragraph II, A, 1. and 2., under the general supervision of the supervising lawyer, but outside the personal presence of that lawyer, including the preparation of pleadings, briefs, abstracts and other documents filed in any matter in which the student is eligible to appear and when any such matter is appealed to a court of record, the preparation of briefs, abstracts and other documents to be filed in such court of record; but such pleadings, briefs, abstracts or

other documents must contain the name and address of the eligible law student who participated in the drafting thereof and must be signed by the supervising lawyer. If the eligible law student participated in drafting only a portion of the document, that fact may be mentioned.

- B. In addition to the foregoing, an eligible law student may participate in oral argument in courts of record on matters referred to in V. A. above, but only in the presence of the supervising lawyer.

#### VI. *Supervision*

The member of the bar under whose supervision an eligible law student does any of the things permitted by this rule shall:

- A. Be a member of the Virginia State Bar who has had at least three years experience in the practice of law as a duly qualified and licensed attorney whether in Virginia or elsewhere, and whose service as a supervising lawyer for this program is approved by the dean, or his designee, of the law school in which the student is enrolled;
- B. Assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work;
- C. Assist the student in his preparation to the extent the supervising lawyer considers it necessary;
- D. Be limited, if he be in private practice, to the supervision of only one eligible law student at any given time;
- E. Report to the dean, or his designee, at the conclusion of his supervisory period as to any work undertaken by the student and as to the quality of the student's work; and,
- F. Make such report as may be requested by the Council of the Virginia State Bar as to enable it to evaluate from time to time the desirability of changes or modifications to this rule.

#### VII. *Miscellaneous*

Nothing contained in this rule shall affect the right of any person who is not admitted to practice law to do anything he might lawfully do prior to the adoption of this rule.