1990

The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education

Stephen T. Maher
University of Miami School of Law, smaher@shutts.com

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education

TABLE OF CONTENTS

I. Introduction ............................................. 538
II. The Common Characteristic of Externships: Field Placement ............................................. 544
III. A Categorization and Evaluation of Externships ........ 548
A. Case Supervised Clinical Programs ................... 549
B. Practice Supervised Clinical Programs ................ 562
IV. The Weaknesses of Practice Supervised Programs ...... 573
A. Two Preludes ........................................ 573
   1. The Shift from Service to Education .............. 573
   2. Supervision: Changing Perspective ................ 576
B. An Evaluation of Other Concerns .................... 583
V. Designing Better Practice Supervised Clinical Programs ................................................ 598
A. Prerequisites .......................................... 599
B. Course Component .................................... 600
C. Journals and Other Written Assignments ............ 602
D. Time and Activity Reports ............................ 603
E. Placement Selection .................................... 604
F. Program Materials ..................................... 604
G. Training and Monitoring Supervisors ................ 604

* Associate Professor of Law, University of Miami School of Law. While writing this Article, I directed a practice supervised clinical program. I would like to extend special thanks to faculty colleagues Terry Anderson, Steve Winter, and Rob Rosen, for their help in the development of this Article. In addition, several drafts were widely circulated for comment and dozens of individuals have read and responded to earlier drafts of this Article. Although these individuals are too numerous to thank individually, I acknowledge the substantial assistance that those responses provided. I thank Michael Freundlich for his research assistance and Jeffrey Bush for his careful editing. I also thank the University of Miami School of Law for its support of my efforts in researching and writing this Article.
I. INTRODUCTION

In this Article I have chosen to adopt the phrase "practice supervised" clinical program because I believe it is a precise description of a common variety of externship. Practice supervised clinical programs are a variety of externship clinical programs. Externships are offered by most American law schools. I use the phrase "practice sup-

3. The term "externship" is probably the most common description of a clinical program that sends students to off-campus placements. However, other terms are commonly used to describe these programs, notably "field placement" clinics, "farm-out" clinics and "out-of-house" or "outhouse" clinics. I will demonstrate that the latter description manages to capture the flavor of the relationship that exists between these programs and legal education in general. While practice supervised programs are commonly referred to simply as externships, I believe that such references are imprecise and sometimes create confusion.
4. These courses, like other clinical programs, are often called programs rather than courses, perhaps in recognition of the many differences that exist between clinical programs and the traditional law school curriculum. "[M]ost law schools still maintain the designation of 'program' for their clinics." The American Bar Association's National Conference on Professional Skills and Legal Education, 19 N.M.L. REV. 1, 42 (1989)[hereinafter Conference](comments of Prof. Dean H. Rivkind).
5. A recent study by the Consultant on Legal Education of the ABA found 143 judi-
supervised” to describe a program where students are placed off-campus in community law offices to practice law under supervision as court certified interns, and supervision of case work is provided exclusively by lawyers at the law offices. If any supervision of case work is provided by the faculty of the school, I describe the program as “case supervised.” Thus, I describe a program as “practice supervised” only if the involvement of the full-time faculty at the law school is limited to general supervision of the students’ practice experience: arranging the placement, monitoring the nature and extent of the students’ work in the placement, and encouraging and supporting the students’ learning during the practice experience. At the successful completion of the practice supervised program, the school awards the student academic credit.7

Very little thought has been given to the special contribution that practice supervised programs can make to the law school curriculum. In fact, it is widely assumed that they make no substantial contribution to the curriculum, but are offered for other reasons. Practice supervised programs generate more tuition dollars than they consume, and they are popular with students and local agencies.8 Their value as

---

6. I am indebted to Rob Rosen for the precise phrases that I use to describe these two categories. Where discussion is equally applicable to both practice supervised and case supervised programs, I continue to use the more general term “externship.”

7. Not all students in these programs practice law under supervision. Some students clerk for judges. Their work on cases is supervised by the judge and the law clerks in chambers. The placement is made and monitored by the school, and the school awards credit at its completion.

8. Law students want placement clinics because they provide real world experience and enhance job placement opportunities. The legal profes-
educational programs is suspect. If there is a conventional wisdom about practice supervised programs, it is that schools that are serious about clinical education should not operate such programs.

Practice supervised programs are quite prevalent despite this wisdom, but they exist on the periphery of the curriculum of most schools. The full-time faculty may be only vaguely aware that such programs are being offered. Where these programs are directed by a member of the faculty, they are rarely that faculty member's only responsibility and are often not even the faculty member's primary responsibility.9

Practice supervised clinical programs are not only at the fringes of the law school curriculum, they are at the fringes of clinical legal education.10 For example, the Section on Clinical Legal Education of the American Association of Law Schools ("AALS") is dominated by clinicians from in-house clinical programs,11 despite the fact that externships may well be the most widespread form of clinical legal

Memorandum from Marilyn V. Yarbough, Chair, Skills Training Committee, to Council of the Section on Legal Education and Admission to the Bar (Dec. 14, 1985) [hereinafter Skills Report] (available in University of Nebraska Law College Library).

9. This is an area in which there is not a great deal of good information, but the following is available from a recent study by the consultant. In the course category of non-judicial interns/externs, supervision of the course was 53.4% by practitioner and 46.6% by faculty member. The tenure status of faculty involved was 49.5% tenure track. See W. Powers, supra note 5, at 13. In the category of judicial externs/interns supervision the course was 56.8% by the judge, 7.1% by a practitioner and 36.1% by a faculty member. The tenure status of faculty involved was 34% regular tenure track. Id. at 12.

10. Professor Hoffman in AALS Section on Clinical Legal Education Newsletter aptly described the situation:

If clinical education has been a second class citizen in the law school world, externships have been second class citizens among clinicians. The Section [on Clinical Education of AALS] has only recently begun paying attention to the unique problems of this type of clinical education and it was only last year [1986] that Vermont Law School hosted the first conference devoted specifically to this subject. Yet externships have and will continue to play a central role in legal education.

Hoffman, Message From the Chair, AALS Sec. on Clinical Legal Educ. Newsl., Mar. 1987, at 3. The conference referred to in the quoted passage was attended by eleven people.

11. The in-house clinic is run by professors and/or other full-time employees of the law school who handle cases and supervise students working on those cases. Typically, the school funds and maintains a fully operational law office, either on campus or at a nearby location. The idea behind this approach is that the clinic's cases will be used as teaching vehicles and that students will begin their practice
education. Discussion at Section meetings usually assumes that clinicians are from in-house clinical programs. Conference programs rarely include meetings on topics that relate to field placement clinics, and when they do, the opportunities for discussion are brief and the important issues are not addressed. When practice supervised programs are even mentioned at clinical conferences, short, negative references are the norm. Trial-by-anecdote has taken the place of serious discussion. Moreover, articles on clinical education often dismiss "farm-out" programs in a footnote or a few paragraphs without serious discussion of their potential.

Much has been written about experience-based learning in other law school contexts, such as in-house clinics and simulation courses, but very little has been written about externships. Little thought under the watchful eye of a professor. One testimonial to the value of this approach runs as follows:

Time and again I have been told by law students that to undertake [practice] responsibilities for the first time as a student with close and helping supervision at each step of the way reduces the stress they would otherwise feel if doing it for the first time alone as a recently admitted lawyer. Part of this growing self-assurance comes from the opportunity the students have to thoroughly prepare their cases.

Swords, The Future of Clinical Legal Education in American Law Schools, STUDENT LAW. J., May 1971, at 26. Swords, like many clinicians, believes that one of the most important pedagogic aspects of this approach is that it teaches students to do careful preparation, a lesson that counters the temptation to take short cuts that occurs when young lawyers are faced with the time pressures of practice.

In May of this year at the National Clinical Teachers Conference in Boulder, a small group of people gathered to discuss externships. Little agreement was found about what an externship is, scant information was available about how many schools offered externships, and confusion abounded about whether there was enough interest in the topic to warrant a meeting on the subject.

There has been some improvement since that time, but serious discussion of the problems facing externships has not yet occurred.

At the AALS Annual Meeting in Miami in 1988, participants in the clinical program were treated to an anecdote about an externship program coordinated by an individual who was not proficient in English. Caricature is a substitute for serious discussion only if the purpose is ridicule.


For examples, see G. GROSSMAN, CLINICAL LEGAL EDUCATION: AN ANNOTATED BIBLIOGRAPHY (1974). My focus is primarily on externships, and I discuss in-house programs where comparison and contrast would be helpful.

Only a few articles on externships have been written. Several articles by externship clinicians appeared in a recent law review issue celebrating the ABA Confer-
has been given to the design of these programs, or to the nature or degree of involvement and oversight that should be provided by the school.\textsuperscript{17} No systematic study has been made of the strengths and weaknesses of externship programs as a part of a curriculum for educating lawyers.

Nevertheless, practice supervision is an approach to clinical education that offers much promise. Few other cost-effective ways to bridge the gap between law school and law practice have been suggested. Practice supervision gives students an opportunity to practice law under supervision in the community while they are still in law school. This can help students clarify career choices, see legal problems in a more realistic context, and begin to understand what it means to make decisions and to take responsibility for their decisions.

Moreover, it is important that law schools be committed to such programs because students' perceptions that they graduate unprepared for practice may create cynicism about law school.\textsuperscript{18} The insistence on sharp divisions between law school and law practice may also have an effect on the way that students view the practice after they graduate. The perception of a sharp division between the law and the practice might encourage graduates to treat the profession as an instrumental good with no intrinsic value of its own.\textsuperscript{19} Practice supervised programs allow students to explore the value of practice and to ask questions, such as why they want to be lawyers and what it means to be a lawyer, from a practitioner's perspective while they are still in school.

The purpose of this Article is to stimulate substantive discussion of practice supervised clinical programs. Part II of this Article describes the general educational advantages of field placement, since field placement is the defining characteristic of any externship, whether case supervised or practice supervised. In Part III of this Article I be-

\textsuperscript{17} In the words of the ABA's Consultant on Legal Education, externships "have been loosely conceived, and even more loosely administered. Often, there has been little coordination between the full-time law teacher charged with at least nominal administration of the externship or field placement program and the practicing lawyer with whom the student serves." White, \textit{Professionalism and the Law School}, 19 \textit{CUMB. L. REV.} 309, 319 (1989).

\textsuperscript{18} This cynicism often motivates students to enroll in programs that allow them to receive credit for off-campus work. It is ironic that those who operate such programs are regularly called upon to defend the utility of the traditional law school curriculum.

gin my evaluation of the current status of these programs by dividing “externships” into “case supervised” clinical programs and “practice supervised” programs. The lack of precise description in what little discussion there has been has obscured important differences among “externship” programs. Part IV assesses the strengths and weaknesses of both case supervised and practice supervised programs. I argue that, while case supervision may bring benefits, the adoption of additional case supervision by professors and the use of case conferences to discuss pending matters create a series of ethical concerns that clinicians and others are surprisingly unwilling to acknowledge.

Part V addresses some of the benefits of practice supervision and argues that practice supervision has great potential that has been largely unrecognized. I evaluate the weaknesses of practice supervision, attempting to separate stereotypes from real concerns. I conclude the discussion of practice supervised programs by focusing on ways that their strengths can be further enhanced through program design without resort to supervision of case-work by professors.

Part VI considers the intensifying regulation of practice supervised clinical programs by the American Bar Association (“ABA”). The neglect that has characterized the law schools’ approach to both the design and administration of many practice supervised programs has led to intervention by the ABA. The ABA has raised questions in the accreditation process about the creditworthiness of practice supervised programs as they have traditionally operated. For the most part, clinical programs have benefited from ABA intervention. Nevertheless, I suggest that current regulatory efforts threaten to do more harm than good. A more appropriate regulatory approach would, at the least, be open to input from those familiar with practice supervised programs. Optimally, it would encourage experimentation and development of practice supervised programs rather than require their abolition or conversion to alternative clinical models. I argue that a serious attempt to encourage scholarship and debate in this area should precede any attempt to set limits on “acceptable” clinical education through the accreditation process.

Part VII concludes with a discussion of the politics of clinical legal education, and outlines how politics may impact on practice supervised programs and ABA regulatory policy. I explore the politics of clinical legal education, and suggest that clinicians, as a group, are more concerned with maintaining and improving the conditions of their employment than they are with designing educational programs that benefit their students. I argue that most clinicians failed to support practice supervised programs for reasons of self interest, and that, by abandoning the potential of practice supervised programs, clinicians have acted to further secure the place of the in-house clinic in the law school. I also suggest that when the regulators received and evaluated
input in the regulatory process, they failed to distinguish between in-house clinicians, who are hostile to practice supervised programs, and clinicians who believe in such programs. I conclude that a thorough reexamination of practice supervised clinical programs, outside the accreditation process, is in order.

II. THE COMMON CHARACTERISTIC OF EXTERNSHIPS: FIELD PLACEMENT

The one thing that externships have in common is that they place students in law offices in the community.20 Placement can offer a law school a number of advantages.21 It allows a school to use existing law offices in the community rather than creating a law firm on campus. Placement, therefore, saves the school the substantial costs involved in establishing and operating a law office for training purposes. This cost savings may permit the school to offer a clinical experience to more students than could be accommodated in an in-house program. Enrollment limitations for in-house programs often preclude interested students from participating in clinical education while in law school.22

Field placement offers other advantages. Placement can avoid the artificial practice environment that is often created when students in in-house programs work on only a few cases each semester.23 Such in-house experiences may not prepare students to handle a caseload as

20. Some externships place students in communities far from the school. These long distance placements raise additional issues that are outside the scope of this Article. For an introduction to the special challenges of distance teaching, see V. Hodgson, S. Mann & R. Snell, Beyond Distance Teaching—Towards Open Learning (1987); A. Jones, E. Scanlon & T. O'Shea, The Computer Revolution in Education: New Technologies in Distance Teaching (1987); D. Keegan, The Foundations of Distance Education (1986); G. Rumble, The Planning and Management of Distance Education (1986); D. Stewart, D. Keegan & B. Holmberg, Distance Education: International Perspectives (1983).

21. For a general discussion of why a law school might choose placement over an in-house approach, see LaFrance, Clinical Education: To Turn Ideals Into Effective Vision, 44 S. Cal. L. Rev. 624, 640-43 (1971) and Stickgold, supra note 5, at 316-18.

22. It is important to remember that the clinical experiences of students in different clinical models may be significantly different. Therefore, I do not suggest that externships provide the same experience as in-house programs for less money. Rather, I suggest that the lower cost of externships can allow more students to have clinical experiences of various kinds.

23. There are still clinics that assign students a very limited number of cases. Indeed, one law school clinical assigns a team of two students to one case for an entire semester, and the experience sounds quite effective. Under the circumstances, it gives the instructor and the students an opportunity to unravel each and every aspect of that particular case. The norm, if there is one, is for students to handle perhaps six to ten cases in the course of the semester, more in a year long course.

Conference, supra note 4, at 44.
well as a case. Depending upon the kinds of law offices that exist near the law school, practice supervised programs may be able to place students in existing law offices that have a substantial and diverse workload. Since this workload exists before, during, and after the placement, opportunities for student practice can be far superior to those available in some in-house clinical programs. Additionally, students practice in a real law office, in the midst of lawyers engaged in the practice of law. While they are available to the students for consultation, those lawyers are not expected to provide the intensive supervision and control of student practice that is characteristic of some in-house programs, and is the ideal of many. Students in placements are often in an environment where, because there is less supervision and control than is characteristic of some in-house programs, they may be allowed to assume significant responsibility as they demonstrate competence. Such training is good preparation for the practice of law.

Careful placement can also permit the school to control the real-world variables that are inherent in the live client clinical model. If the placement is carefully selected, it can be both more realistic than in-house clinical training and, at the same time, do a better job of controlling real-world variables than a general practice would permit. Variables in the practice can be controlled if students can be placed in practices that offer circumscribed contexts that will provide students with relatively routine, limited situations. For example, a portion of the criminal justice system may be organized so that the same prosecutors and public defenders appear before the same judge on the same type of cases each day. A student placed in that system has the opportunity to learn and master a discrete area of the substantive and procedural law, to get to know a particular system and the personalities involved, and the way that they affect the operation of the law. If that system has a high volume of cases with rapid turnover, students will also have the opportunity to see cases from beginning to end. These are benefits that low volume in-house practices with a diverse client base and caseload are not able to offer. Placement in a professional context that students can master allows them and those around them to gain confidence in their abilities. Students placed in such settings will have substantial opportunities to gain trial experience during their externship.²⁴

Field placement may offer other advantages. It may provide opportunities in areas that in-house programs are not able to duplicate at any cost. Students can be placed in judicial clerkships, or as externs.

²⁴ Not all placement opportunities involve trial work. Placement in a city or county attorney's office may provide special opportunities for experience in nonlitigation matters. Students in a city attorney's office can become involved in drafting ordinances, contracts and other documents.
representing the government, in a prosecutor's, city attorney's, or attorney-general's office. These opportunities are popular with students, provide valuable experience, sometimes lead to employment after graduation, and introduce students to public service careers.

Placement programs avoid common problems associated with in-house clinics. The fact that a law school must run a law office to maintain an in-house program creates a series of problems. They range from the day to day practical questions, such as who will cover cases in the clinic during exams, to larger questions, such as how the fact that the school is running a law office should impact on its selection, promotion and tenure of faculty. The solutions that practice supervised programs can offer to these larger questions are the subject of a subsequent section.25

Placement can permit law students to make a substantial public service contribution to their communities as they learn.26 At a conference recently held in Albuquerque,27 it was suggested that in-house clinics may have to be satisfied with providing less public service as they move towards the goals for clinical education that were articulated by conference participants.28 Through field placement, students can continue to provide significant public service as they do their clinical work, because field placement does not require the expenditure of school resources to fund the operating expenses of law offices

25. These points are pursued in section VII.B.
26. The Skills Committee of the Section of Legal Education and Admissions to the Bar has recommended that Council of the Section adopt the following interpretation of AMERICAN BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Standard 302(a)(iv)(Nov. 1988)[hereinafter STANDARDS FOR APPROVAL]: "Law schools should make law students aware of the special needs of those groups often underrepresented in legal matters, including the poor, elderly and handicapped members of society; and law schools should facilitate students' services to these groups." Memorandum D8788-50, from James P. White, Consultant on Legal Education of the American Bar Association, to Deans of ABA Approved Law Schools 1 (Feb. 16, 1988)(seeking comment on the proposed interpretation)(available in University of Nebraska College of Law Library). Practice supervised programs provide an effective way for law schools to offer such opportunities.
27. The ABA's National Conference on Professional Skills and Legal Education was held in Albuquerque, New Mexico on October 15-18, 1987. The Conference proceedings were published in Conference, supra note 4, at 1-110.
28. "The Albuquerque Conference makes it very clear that the tie between legal service, in the sense of helping poor clients, and clinics is slowly loosening, never to end because there may not be very good mechanisms for helping a lot of these people." Id. at 69 (statement of J. Harbaugh). Professor Greenberg's perception that one subtle theme of the Conference was that clinical education could become more acceptable if it became divorced from its roots as a service provider led him to respond that, at that price, "[w]e should reject assimilation as a means of achieving legitimacy." Greenberg, Reflections on the New Mexico Conference: What Would You Have Said Before You Came to Law School, 19 N.M.L. Rev. 171, 172-73 (1989).
that have the dual purpose of educating students and providing public service. Instead, they are able to tap the resources of existing agencies that have a continuing commitment to provide public service. The students, the agency, and the community all benefit from this arrangement.

In-house clinicians may be aware that field placement can offer advantages not available in in-house programs, but such things are rarely the subject discussion at clinical conferences.\textsuperscript{29} Recognized or not, the benefits of field placement are significant. It is important to note that, to a significant degree, the resources available in a community will shape the form of a placement program. Some clinicians find it hard to accept the idea that resources should play a significant role in shaping clinical programs. For example, Professor Hoffman has suggested that the design of a clinical course should have three stages: First, the determination of course objectives; second, the selection of learning experiences to accomplish those course objectives; and, third, the arrangement of those learning experiences to maximize the achievement of those objectives.\textsuperscript{30} The problem with this approach, however, is that it begins the process of design in a non-contextual fashion and attempts to build the context around some ideal educational goal. That approach to design may work well if money is no object. Placement programs, on the other hand, provide the opportunity to take

\textsuperscript{29} The following benefits of externships were recently discussed at a clinical conference:

\begin{itemize}
\item [G]ranted that on the average [in-house clinicians] may be better teachers and that we can avoid the major pitfalls of many externship programs, we should also recognize the educational goals that in-house clinics cannot provide as well as externships:
\begin{itemize}
\item a. we cannot very well teach the economics or practicalities of survival of private law practice either on a macro office level or a micro case decision-making level, especially, in the latter regard, how a lawyer goes about preparing or trying a case where there is not time and money to go by the book, to do it the NITA way, or to plan for all contingencies and rationalize all of the options through sophisticated rule analysis techniques;
\item b. we cannot teach what a law office is like where colleagues are in perpetual tension or competition over such matters as promotions, division of projects and preferred clients;
\item c. we cannot teach what it is like to work for a superior who cares first and foremost about results and is not particularly sensitive about why he or she doesn't get them; and,
\item d. we cannot teach what it feels like to work where the client and employer expect a dollars \textsuperscript{sic} worth of work for a dollars \textsuperscript{sic} worth of pay.
\end{itemize}
\end{itemize}


\textsuperscript{30} Hoffman, \textit{Clinical Course Design and the Supervisory Process}, 1982 ARIZ. ST. L.J. 277, 278. He acknowledges that "[t]he sequence presented is rarely followed in reality." \textit{Id.} at 278 n.4.
advantage of existing community resources and design an educationally sound experience that encompasses the non-ideal conditions in which students will actually practice after graduation.

III. A CATEGORIZATION AND EVALUATION OF EXTERNSHIPS

There have been many attempts to describe clinical education in terms of various models categorized on a variety of bases. Central to such an attempt is the organizing principle or principles upon which the categorization will be premised. The categorization made here will focus on whether or not case work supervision is provided by professors. This focus is used primarily because it reflects the focus on supervision that has characterized recent regulatory efforts.

Most discussion that distinguishes among types of live client clinical programs uses two general categories: in-house programs and externships. In-house programs are those operated by the law school for primarily pedagogical purposes and staffed by professor-supervisors. Externships involve the placement of students in law offices that are not operated by the law school.

I suggest that it is important to distinguish between two different kinds of externships. In some externships, professors exercise significant control over the decisions made in the students' cases, even though the student is practicing under the supervision of a lawyer in a community law office. I refer to such programs as “case supervised.” In other externships, professors are not involved in student case

31. By “clinical education,” I refer only to work in law school where students handle actual cases, and I specifically exclude simulations from this discussion for that reason. I recognize that my definition does not correspond with the Guidelines, which define “Clinical Legal Studies” to include simulations. Association of Am. Law Schools—Am. Bar Ass'n Comm. on Guidelines for Clinical Legal Educ., Guidelines for Clinical Legal Education 12 (1980) [hereinafter Guidelines]. It will become clear in due course that this is not the only area in which I disagree with the Guidelines. For further discussion of the Guidelines, see infra subsection VI.A.2.

32. For example, Ferren, Goals, Models and Prospects For Clinical-Legal Education, in Clinical Education and the Law School of the Future 94, 98-104 (E. Kitch ed. 1969), suggests models that are differentiated primarily by location (clinic located at the law school, court-sponsored clinic, neighborhood law office, etc.). Grossman, Clinical Legal Education: History and Diagnosis, 26 J. Legal Educ. 162 (1974), divides clinics into the “service” model, the “law reform” model, the “participant-observer” model and the “teaching” model; thus the factor used to differentiate appears to be the main purpose the clinic would serve. Many others have categorized clinical programs on a variety of other bases.

33. I use the title “professor” loosely to mean any full-time employees of the law school, regardless of rank, in the earlier sections of the Article. I discuss the dispute over status and job security that is now occurring in clinical education in Part VII.

34. Those regulatory efforts are the subject of Part VI.
work, although other aspects of the externship are often monitored and/or controlled by the school. I refer to these as "practice supervised" clinical programs. When categorized on the basis of the nature and extent of the supervision exercised by professors, the variety of live client clinical programs can be conceived as existing on a continuum which extends from the purely in-house clinic, on one end, the case supervised program towards the middle, and the practice supervised clinic on the other end.

A. Case Supervised Clinical Programs

The case supervised approach attempts to merge supervision by a professor, something that is characteristic of in-house clinical programs, with the benefits of field placement. Thus, one benefit of case supervision is that it provides students with faculty supervision. Another contribution of the case supervision approach is that it may serve to legitimate field placement as part of clinical training. This may occur because case supervision joins clinical education in its more acceptable in-house form with field placement, which has largely failed to win acceptance in legal education.

The case supervision approach may offer benefits that go beyond those that can be calculated by simply adding the benefits of placement to the benefits of in-house supervision. The benefits of a second level of supervision, one that incorporates a second individual in the role of critic, separate from the role of day to day field supervisor, may provide the case supervision model with special benefits. Professor Condlin has noted that it is difficult for any supervisor to be an objective critic of his or her own work. Professors and attorneys have suggested that placement programs are more conducive to critique than in-house programs for this reason. Professor Ferren suggested that a second level of supervision be used in live client case supervision in response to

35. Within the phrase "involved in student case work," I include a wide variety of tasks, such as assisting in case preparation, critiquing student performance, and review of written work. I do not include inquiries into the types of cases that students are handling, how much time was spent on them, or class discussions on how certain categories of cases should be handled. These latter inquiries are characteristic of practice supervised programs as well as case supervised programs.

36. I refer to the attorneys in externships who provide case supervision in the field as "field supervisors." I recognize that the Guidelines use the term "cooperating attorney" when referring to such individuals. GUIDELINES, supra note 31, Guideline I.K. at 13.

37. That is, assuming the program chooses to create such a division of responsibility. Case supervised programs commonly do not divide responsibility as I suggest here. Instead, they simply use the professor as a second case supervisor.

Condlin’s critique “that the adversary system inherently forces lawyers to ‘manipulate’ third parties while ‘dominating’ their own clients. For Condlin, therefore, clinical teaching almost inevitably fails, since it immerses students and teachers in a faulty and even destructive system.” To this, Ferren replied:

I have long thought, apropos of Condlin’s argument, that advocate supervisors of clinical experience are not in the best position to stand back from a legal, ethical, or psychological standpoint. I once wrote I doubted “that one person should be counted on both to take charge of advocacy, as supervisor, and then preside alone over tough-minded analysis of what was done.”

Thus, one potential benefit of case supervision is that it can provide a supervisory format well suited to such a separation of functions.

Condlin has developed this point, and suggests that the supervising attorney and the professor might have different supervisory agendas. He gives an example of a field supervisor who might be concerned with obtaining information relating to a client’s defense for the purpose of dealing with the client and the court and testing the client’s story without rupturing the attorney-client relationship. The professor might have “a different yet complementary set of objectives,” including

exploring out-of-the-ordinary resolutions to the problem which had not occurred to the attorney or had occurred and seemed unpromising, or what is more likely, using the client’s behavior as a vehicle for examining the epistemological and moral difficulties inherent in the process of reconstructing historical fact in adversarial adjudication.

Condlin’s vision of the relationship between the professor and the field supervisor is one of little conflict. Because the issues raised by the professor are not closely connected with the preparation of the case, they may come up in discussions between the student and supervisor, but they will probably remain in the background. The supervisor would be interested in immediate returns, while the professor would take the long view. The professor would suggest readings, review transcripts and otherwise work with the field supervisor “to help the student discover how instrumental and critical perspectives intertwine to make a complete frame of reference.” In the Condlin approach, a competent outside lawyer and a moderately complex caseload is necessary, because the outside lawyer is the one responsible for representing the client and is thought of as data for critical

40. Id.
41. Condlin, supra note 39, at 64.
42. Id.
43. Id. at 64-65.
44. Id. at 66.
45. Id. at 65.
46. Id. at 66.
analysis.\textsuperscript{47} Case supervision can thus provide a framework for avoiding some of the concerns raised by Condlin about in-house legal education.

The case supervision approach is not without problems, however. Case supervision raises a series of practical concerns that have not been fully recognized or explored.\textsuperscript{48} I recognize that these issues can be solved as they arise by intelligent well-meaning people. However, I suggest that clinicians should not be satisfied with muddling through, deciding each issue that I raise here in an ad hoc fashion. I believe that these issues are important enough to merit discussion among clinicians so they can be decided in a consistent way, in advance of the particular crisis in which they may arise. Thus, the real problem is the absence of discussion and debate on the points that I shortly discuss. This has resulted from a lack of published literature and an unwillingness to address these issues in public forums such as clinical conferences.

The first question is: What is the proper role of the professor, given the provisions of student practice rules and ethical requirements, when students are placed with practicing attorneys, who act as field supervisors, and the students practice on the field supervisor's cases? Condlin's solution to the division of responsibility between professor and field supervisor is only one possible solution.\textsuperscript{49} His focus on critique has not proven popular with those who view instruction in

\textsuperscript{47} Id. at 68-69.

\textsuperscript{48} While the problems raised here have not entirely escaped notice, it is surprising how little attention has been paid to the concerns I now address. One example of an article that recognizes concerns, but does not follow through, is Spitzer, \textit{Clinical Education in Florida}, 12 NOVA L. REV. 797, 800 (1988):

The problems involved in close law school supervision of externship programs are many. The more detailed the supervision, the more professional time is consumed. Consequently, heavily supervised clinical education is perceived to be more expensive. The more involved the professor is in the extern's caseload, the more the extern is reporting to two bosses. This is potentially wasteful of the professor's time and can produce mixed signals, contradictory input, confusion and disruption. Problems of client confidentiality may arise. Often the external lawyers supervising the externs are wary and even resentful of an outsider from the school scrutinizing their practice. The problems are not insuperable. They can be handled with mutual tact and goodwill. The fact remains, however, whatever the expressed aspirations of close supervision may be, there are strong factors conducive to relaxation of supervision.

I view the situation somewhat differently. Because of the problems involved I suggest that faculties might decide not to become involved in supervision of student case work, and decide instead to operate practice supervised programs.

\textsuperscript{49} Condlin argues that clinical programs should focus on critique because critique is the university's reason for being. Condlin, \textit{supra} note 38, at 50. Condlin's position has been described as "[n]ot skills training, not client representation, but critique." Hegland, \textit{Condlin's Critique of Conventional Clinics: The Case of the Missing Case}, 36 J. LEGAL EDUC. 427, 427 (1986).
lawyering skills as a more appropriate educational objective for such programs. A focus on lawyering skills will tend to bring the professor and the field supervisor into conflict because they will no longer be focused on different supervisory agendas. Where case supervised clinics do not confine the professor to consideration of the “long view,” and he or she begins to question and intervene in decisions made in connection with the case work, the tension that is inherent in a system that subjects students to two quite different supervisors will begin to surface. Whether intervention by law professors is a strategy chosen by the faculty for pedagogical reasons, or whether it is chosen to provide a level of comfort to those who distrust practitioners and assume the competence of law professors, the result will be the same—an increase in tension. An arrangement that involves more than one supervisor and only one focus raises a series of questions concerning proper protocol that will be decided on an ad hoc basis as the program operates unless they are explored and decided in advance. They are explored here to show the difficulty of some of the questions that are raised, and to suggest that those who operate case supervised programs should discuss and attempt to resolve these questions as a policy matter before they are encountered. The resolutions of these issues should be communicated to all involved, perhaps as part of a program manual.

Where the professor is also involved in case supervision, who is in charge of the case and of the student’s handling of the case? When the student practice rule provides that the field supervisor is responsible for the case being handled by the student, the field supervisor should be responsible for litigation decisions. If so, what exactly is the professor’s role? I later suggest that, where the professor and field supervisor do not have different supervisory agendas, the review of student work products by the professor will tend to draw the professor into

50. As I will demonstrate in Part VI, instruction in lawyering skills is the focus of regulators who evaluate these programs, so we can expect a large number of programs to have or to find such a focus. Condlin’s approach explicitly places full responsibility for case supervision on the field supervisor, and thus fails to address the regulator’s concern with the law schools’ failure to guarantee the quality of that supervision through the involvement of full time faculty. For this reason, I think it is fair to say that Condlin’s approach goes some distance toward solving the problems that I will shortly discuss but that it does so in a way that may not be acceptable to regulators. Condlin’s approach has not been popular with clinicians. See, e.g., Bellow, On Talking Tough to Each Other: Comments on Condlin, 33 J. LEGAL EDUC. 619 (1983); Stark, Tegeler & Channels, The Effect of Student Values on Lawyering Performance: An Empirical Response to Condlin, 37 J. LEGAL EDUC. 409 (1987).

51. I recognize that some programs already have detailed manuals and program materials. I am aware of no model program materials that address the concerns that I raise. I am also aware of no published material that can give guidelines in the drafting of manuals responsive to the concerns discussed here.

52. See infra notes 312-14 and accompanying text.
the case. Therefore, I suggest that we must assume, absent some policy to the contrary, active involvement in litigation decisions in at least some matters when the professor reviews work products in case supervised programs. The critique of student performance will inevitably involve the professor in matters of strategy and substance. Sometimes the field supervisor and professor will disagree on such matters. Can a case be handled properly when key decisions are questioned, or reversed, by someone who is not responsible for, or fully familiar with, the case? If the professor is fully familiar with, and responsible for the case, the placement is identical to an in-house clinic, conducted off-campus.

If the supervisor decides not to follow a course of action when one is suggested by the professor, what does the student do in that situation? Who decides, and how is it decided? Some decisions in this area should be governed by a uniform policy. Whether a professor has the power to overrule a supervisor is the type of decision that should be made as a matter of policy. Factors that should be involved in that decision include the placement's position on this issue, the professor's expertise in the area, and his or her ability to spend significant time becoming familiar with the cases. The decision to grant the professor veto power over cases for which the field supervisor is legally responsible may affect the willingness of field supervisors to participate in the program, and the uniformity of case handling at the placement. On the other hand, if the professor is just an advisor, how much comfort does his or her involvement give those who have concerns about the quality of supervision at the placement? If these issues are not resolved in a way that is acceptable to all involved, the conflict that results may amplify tensions in a manner that makes it more difficult to convince agencies to participate in such programs.

Case supervision itself does not create the basic tension between education and service that underlies the program. Rather, the tension is a result of the participants' different missions. Nevertheless, the risk that problems will arise between the agency and the school is greater in the case supervised model because the professor's involvement may exacerbate the inherent conflict. The danger is more acute if the intervening professor is not skillful in handling both people and cases of the type handled by the agency. The difficulty of charting a course through agency policies and politics, and of demonstrating a level of proficiency in the area of the agency's practice, without spend-

53. This dilemma is not merely hypothetical. It is the natural consequence of the student's attempt to serve two masters. Students have felt this tension even from class discussion about how cases should be handled. "When the educator spoke of alternatives the students felt 'in the middle' of a dispute between teacher and supervising attorney." Redlich, Perceptions of a Clinical Program, 44 S. CAL. L. REV. 574, 589 (1971).
ing a significant amount of time at the agency's office, seems clear. This suggests that regular members of the full-time faculty may very well lack the time, the interest, or the qualifications for such a role. Therefore, the decision to embrace case supervision may require the school to hire more clinicians.\textsuperscript{54}

Other questions are raised by the case supervised model. What is the relationship between the professor and the client?\textsuperscript{55} Does the professor even see the client? How much time does the professor spend preparing the case? If the professor does not see the client, and is only generally familiar with the case, but is nevertheless reversing litigation decisions being made by others closer to the situation, is the professor demonstrating an approach to litigation that the law school should hold up as a model? Even if the professor is only questioning decisions and demanding justifications for decisions made by the student and the field supervisor, this second-guessing can create tensions and ego problems that could damage programs of this kind. If the professor is seeing clients, becoming familiar with the circumstances of individual cases, and either making or reviewing litigation decisions on cases, how many students can the professor supervise? The student-faculty ratio in such a program would approximate the ratio of an in-house clinic. If this kind of intensive involvement is not appropriate, what is the proper level of involvement? Will it vary case by case, and if so, what will determine such variations? Does the professor's level of involvement in student case work preclude him or her from supervising students in more than one placement? Significant involvement in cases would seem, at a minimum, to preclude the same person from supervising both prosecution and defense placements. How does the level of involvement affect the professor's and the school's liability for legal malpractice? Does the supervision of student case work in a case supervised approach require the prudent school or professor to

\textsuperscript{54} The problems that decision may occasion are the subject of section VII.A.

\textsuperscript{55} This question has been asked before, but there appears to be no easy answer. The following is a report from a meeting of externship clinicians in 1986:

Liz Ryan Cole opened the lunch discussion with an inquiry about confidentiality, specifically whether law school faculty members could properly be informed of sensitive information known by students without violating lawyer/client privileges or, in the case of a judicial externship program, judicial privileges. There was much discussion... and it did not appear that any consensus was reached on this point.

Cole & Daniels, \textit{supra} note 12, at 15. Kales suggested long ago that faculty members with full-time teaching responsibilities should not handle clients if they handle cases. "Taking care of clients, as distinguished from handling litigated cases, is an occupation which will always distract the law teacher from the subject matter of his courses and deprive him of the time which he needs to devote to his courses." Kales, \textit{Should the Law Teacher Practice Law?} 25 \textit{Harv. L. Rev.} 253, 254 (1911-12).
purchase malpractice insurance? How do the answers to these questions affect the cost of case supervised programs?

Case supervision also raises problems in judicial placements. First, there is the question of confidentiality. Judicial placements sometimes refuse to permit professors to review or discuss their student’s work at the court. Second, even where intrusion by the professor is permitted, the review of student work in the context of judicial placements could inject the professor into the judicial decisionmaking process. It is inappropriate for the professor to become involved in ways that could affect judicial outcomes, so some measures should be taken to assure that will not occur. To minimize this danger, the professor may decline to review memoranda until after the judge has issued the decision to which the student’s work relates. However, some may find that such a delay interferes with their pedagogy. Third, even if the review is delayed, problems persist. Student written work from such placements seems inherently difficult to evaluate fairly. The material reviewed may not be good in the professor's opinion. It may nevertheless be good in context. Whether it is good in context depends upon the time the judge directed the student to devote to the project and the result the judge directed the student to reach. The time limit may have been unrealistic and the result the student was directed to reach may have been incorrect. Thus, the professor's determination that the student's work is poor, may be a result of parameters established by the judge. If so, how should the professor proceed? Will the professor discover that the judge, rather than the student, is responsible for the poor quality of the work product? If he or she does, should the professor inform the student of the judge's “error?” Should the student discuss the professor's concerns with the judge? Should the professor speak directly to the judge? Should such a discussion include a debate over the merits? Can a debate over the merits be avoided if the matter is to be fully discussed? Will intervention create a tension which will make it more difficult to enlist judges in the program?

The inherent conflict in this model is illustrated when student work for the judge is to be graded by the professor. What grade should be given to a student when the professor thought the work was of poor quality, but was prepared in accordance with the judge's instructions and the judge thought the work was excellent? Is it fair to judge the work by the professor's standards? Would that not have the effect of penalizing the student for following the judge's instructions? Is that fair to the student? This is yet another illustration of the difficulties inherent in serving two masters. The concerns raised

56. If the judge's standards are simply too low, one solution is not to continue to place students with that judge. In this hypothetical I address a different problem. Assume the judge is well respected, and that the disagreement concerns a discrete body of work.
by case supervision have not been the subject of discussion in the literature or at clinical conferences. They will become more significant as more programs adopt case supervision. Some attempt should be made to address them.

Another significant problem with case supervised programs is also shared by some practice supervised programs. That problem results from the fact that some externship teaching methods have been adopted without thought from the in-house context. Because many assume that in-house programs are superior to externships, in-house teaching methods have been assumed superior and reflexively accorded deference. The importation of in-house teaching methods has not only failed to solve the problems of externships, it has created new problems which clinicians have been slow to recognize. For example, in-house programs frequently use case conferences so that all can learn from the discussion of the cases of each student. This approach makes some sense in-house because all the students in the clinic can be said to be members of the same "firm." However, students in placement programs are often placed at different firms. Sometimes they are at agencies, such as the state attorney and public defender's office, that regularly oppose each other. The problem presented by student case conferences in such a group is obvious. However, the problem is not solved by refusing to allow students whose offices litigate against each other to be in the same case conferences. As the following discussion will demonstrate, there is still a risk that the discussion of privileged information in case conferences which include students from different firms may waive the attorney-client privilege and violate the ethical mandate against disclosure of confidential information.

The potential problems that case conferences pose for waiving the attorney-client privilege and violating the ethical mandate against disclosure of confidential information have not been adequately ad-

57. I use the term "externship" because the following discussion relates to both dual and practice supervised programs.

58. The use of the classroom component to discuss cases, plan strategy, and evaluate results, in addition to other purposes, is not new. See GUIDELINES, supra note 31, Guideline V.B.5.c, at 22. However, Professor Gary Palm noted, at the ABA National Conference on Professional Skills, that this approach has again come to the fore:

The single innovation that I've heard about the most this year is taking the old group case conference and turning it into a learning and teaching process about the skills and their interrelationships in our overall litigation strategy. Some of that is being done through planning together in class. Another way is to use the actual preparation, the work product in progress, and have it critiqued and suggestions given for improvement. Conference, supra note 4, at 27 (comments of Prof. Gary H. Palm). For a discussion concerning how a conference might work, see Brickman, Contributions of Clinical Programs to Training for Professionalism, 4 CONN. L. REV. 437 (1971-72).
The attorney-client privilege only applies to communications made for the purpose of obtaining legal advice, when the client intends the communication to remain confidential. The privilege may be waived if post-communication circumstances indicate that the matter is no longer intended to remain privileged or if the communication is disclosed outside a permissible range of individuals. As one commentator has noted:

The potential conflict between the traditional, long established attorney-client privilege and the classroom component of student legal programs is obvious. The ramifications of the conflict are less clear. Students' pending cases are used, to varying degrees, as the format for class discussions. The use will differ according to the type of program, the degree of supervision, and the format of the clinical classroom. These disclosures are arguably incompatible both with the modern justification for the privilege and with judicial restrictions on application of the privilege.

Classroom disclosure and use of the material, especially in circumstances where client interviews are mechanically recorded and played in class, "create serious doubt about whether communications are reasonably intended to be confidential." Further, the fact that the communication was made for the dual purpose of educating students and obtaining legal advice may render the communication unprivileged. The extension of the privilege to members of a firm has been recognized, but whether the class is a "firm" is unclear even in the in-house context. This rationale is altogether unavailable in classes held in connection with case supervised and practice supervised placements, because the students practice under the supervision of attorneys in different law offices. Therefore, it seems likely that discussion...
of client confidences in the classroom component of placement clinics will waive the attorney-client privilege. Given the fact that "[o]nce the attorney-client privilege has struggled into existence, it lives a fragile life threatened by forces that can snuff it out," the question of the effect of teaching methods on the continued existence of the privilege should at least be a matter of concern and discussion.

The second problem is that use of communications in class may violate ethical rules relating to disclosure of confidential information. Rule 1.6(a) of the Model Rules of Professional Conduct provides, in relevant part, that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." This ethical requirement is enforceable by bar disciplinary proceedings. When an individual accepts representation by a student intern, does the client impliedly authorize disclosure of client information to the class? If not, what must clients be told before the class may discuss their cases? Since the Model Rules require consultation, disclosure would entail explaining to clients that confidential information will be disclosed during in-class discussion. Merely mentioning that others at school may be consulted may not satisfy this requirement. Moreover, the requirement of consultation may make it necessary to inform the clients that their permission to discuss the matter in class could constitute a waiver of the attorney-client privilege. This might be a difficult subject to explore with the clients, particularly at an initial interview where students may already have difficulty gaining the clients' confidence and obtaining the necessary information to make a good presentation to the class. Even if they succeed, a detailed request for permission to discuss confidential information with the class may make it more difficult to win client trust.

What happens if a client does not want to have confidential information discussed in class, or is hesitant to take the risk of waiving the privilege? Even if waiver of the privilege is the only concern, it is unlikely that the problem can be avoided through careful presentation of the case in class. It is unrealistic to expect students uniformly to pres-

69. C. WOLFRAM, supra note 63, § 6.4.1, at 268 (footnotes omitted).
70. Comment, supra note 59, at 678. MODEL RULES, supra note 67, Rule 1.6 comment provides in part:

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. . . . The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

71. See MODEL RULES, supra note 67, at 7 (Scope); Comment, supra note 58, at 678-79.
ent and discuss their cases in a way that carefully omits all confidential information. Students have not yet developed the ability to make such distinctions and to keep them clearly in mind, especially when they are being pressed for information by fellow students. If some clients refuse to permit class discussion of confidential information, will the result be that some clinic cases will not be discussed in class, or will those clients be denied representation? If the client has no choice but to consent, or the client does not clearly understand the choices, how voluntary is the "consent" that is obtained? Until this area of the law is clarified or remedied by amendments to existing law, the use of case conferences in externships will be fraught with danger.

How do clinicians respond to these concerns? When they have been raised at clinical conferences they have been largely ignored. A common response has been to contend that no problem exists because the client has consented to this use of confidential information. It has also been suggested that clinicians need not worry because the issue will probably never come up. Some believe that the issue can be avoided by not using names in the case conference. Each of these responses is problematic.

The answer that "the client consented" is untenable. First, the validity of the consent depends on the information and alternatives that have been given to the client when the consent is obtained. It seems unlikely that clients with a choice would routinely assume the risk of disclosure of confidences in order to obtain the benefit of student representation. It is also unlikely that clients are being fully advised of the risks involved and that they are given alternatives to disclosure. Unless that is done, any consent obtained is not voluntary. Second, even if the client consents after full disclosure in every case, the consequence is unacceptable: an ethically "acceptable" system that routinely compromises client confidences.

Similarly, the fact that an opposing attorney has not yet thought to depose a fellow student who attended a case conference is also an inadequate response. Everything clinical teachers do serves as a model. If clinical teachers use methods that suggest that teachers can protect themselves from real concerns by ignoring them, they send students the wrong message. They would also fail to hold themselves to the same standards of lawyering that they say that they demand of students.

72. This is my understanding of Professor Bryant's response when I raised this issue at a Sunday afternoon session at the AALS Conference on Clinical Legal Education in Bloomington, Indiana on May 21-26, 1988.

73. This is my understanding of Professor Palm's response when I raised this issue at a Sunday afternoon session at the Bloomington Clinical Conference.

74. This is my understanding of Professor Moscowitz's response when this issue arose in an externship session at the 1989 AALS Meeting in New Orleans.
The suggestion that names not be used is also not a solution. The decision not to use names will not prevent confidential information from being disclosed, it will just make that information more difficult to identify. Connections can perhaps be made despite the fact that names are not used, especially where names are used in connection with the discussion of nonconfidential aspects of the case and omitted only when confidential information is discussed. In order to permit class discussions of ongoing cases, week after week, pseudonyms may need to be used for the actors involved. However, the use of pseudonyms will prevent the discovery of conflicts.

Just as the adoption of the case conference in externship programs creates a host of new problems, other assumptions made in in-house programs about the relationships between the clinician and the client may not hold true in the context of externships. For example, at a recent clinical conference, a clinician who directed a practice supervised program discussed a recently encountered problem. She learned that a student had made an error while handling a case that prejudiced a client, and had to decide what to do. She asked those in the small discussion group how they would have responded. The in-house clinicians in the group immediately assumed that they represented the client, and responded on that basis, taking the client's position against all others, including the student. The clinicians who operated placement programs did not assume they represented the client.

These two positions reflect the backgrounds of those advancing them. The position that the faculty member directing a placement program should not represent the client is based upon the fact that in a practice supervised clinic, where the faculty member only oversees the program, the faculty member does not represent the client. This determination may affect how the faculty member responds when a student commits an error that prejudices the client. While the faculty member will have the same responsibility as any other licensed practitioner to report violations of the applicable Model Rules,75 that will not determine the faculty member's subsequent actions. The faculty member may view his or her primary interest as the protection of the school and the program, and may take actions designed to preserve the long term relationship between the school and the agency participating in the program. For this reason, after a violation is reported, the faculty member may have an interest adverse to both the client and the student. The school's non-involvement in supervision may serve to insulate it from legal liability to the client for the student's error. But even so, the participating agency, the field supervisor, and the student may still be responsible, and this may affect how the program

75. See Model Rules, supra note 67, Rule 8.3.
director responds. The faculty member may want to protect the student because the student was the faculty member's educational charge, because the student may be at a serious disadvantage in the situation, and because bad experiences by students in the program may ultimately harm the program's reputation and attractiveness to new students. It would probably be best for the student if the school secures independent counsel for the student at the outset. Therefore, according to this view, what is a proper faculty response to such a problem may vary depending upon the clinical model involved. Thus, since what is a proper response may depend upon the degree of faculty supervision, it may vary program by program, or perhaps even case by case.

The second possible position is that any response by the program director, other than one in defense of the client, is inappropriate, even in a placement program. This approach views the director as having the same ethical responsibilities to the client in such programs as if he or she were counsel, even if, through program design and in practice, the director had no role in supervising the substance of the legal work. This conclusion appears to be based on a responsibility arising from the role of the program director and the school in making student counsel available to the client, but it could perhaps be advanced on some other basis. According to this view, institutional loyalty should not be permitted to override ethical duty. Its adherents might argue that any structure that encourages or permits a clinician to protect others from claims by the client in such circumstances is untenable, in light of the service purpose of the program. These issues are important and deserve attention, but thus far little thoughtful discussion has occurred. Because these issues arise in the field in the most difficult of times, clinicians would be aided by a thorough exploration of these issues while they are still hypothetical.

Case supervised clinics have tried to join the strengths of placement with the strengths of the in-house clinic. Unfortunately, little

---

76. The school might be able to secure an alumnus experienced in legal malpractice defense work to represent the student on a pro bono basis, and the school might have the obligation to provide counsel, in such circumstances, to avoid an educational catastrophe for the student. With proper counsel, the experience could be transformed into an effective, though painful, learning experience.

77. There is good argument that these problems should be anticipated and the relationship should be defined in a contract between the placement and the school, or at least in a program manual, or in some other concrete way. Nevertheless, that determination may be subject to modification by conduct if the faculty member has intervened in the case that is the subject of the controversy in a manner not contemplated by the stated policy.

78. The problem that this view creates is clear. If the program director is counsel for each client served by an extern in the program, how can the same program place students in public agencies that litigate against each other, or even in a variety of different agencies that do not?
thought has been given to the consequences of this merger. Additional discussion in this area is warranted before case supervised programs are held up as models for operating practice supervised programs.

B. Practice Supervised Clinical Programs

The practice supervised approach incorporates the benefits of placement and avoids some of the concerns raised by the case supervision model. Practice supervised clinical programs award academic credit to students for practice in off-campus law offices under the supervision of attorneys practicing in those offices, or for judicial clerkships. In practice supervised clinical programs, the school does not inquire into, participate in, or direct the litigation decisions in the cases handled by the externs.79 Involvement by law school faculty is limited to periodic review of the program to insure that, in its actual operation, the program is achieving its educational objectives and that the credit allowed is commensurate with the time, effort, and educational benefits.80

Practice supervised programs share many of the benefits of field placement discussed earlier. These benefits are substantial, but the major strength of practice supervised programs may be their ability to provide students with opportunities to take real responsibility in actual practice environments while they are still in law school. Students who practice under supervision in a busy prosecutor's office, for example, can learn valuable lessons about the law and the practice of law. The student can apply knowledge learned in the traditional classroom, and gain new insight on how classroom lessons apply in practice. This opportunity usually occurs in the third year of law school, when students are still in school and can relate their work in the placement to their regular classwork.

The absence of case supervision by professors not only avoids some of the problems created by case supervision, it may provide opportunities for students to take more personal responsibility for their own

79. Notwithstanding the existence of a firm policy not to inquire into case decisions, there are times when such inquiries will need to be made. Such inquiries are rare, but it must be acknowledged that they do occur in unusual circumstances.

80. There are a variety of different approaches to periodic review. The various methods that faculties can use to monitor and enhance the learning environment in externships are the subject of Part V.
learning. Such opportunities are rare in law school. There is some question whether law school even treats students as adults. While much of the skills curriculum of law school is experience-based, the experience-based curriculum varies significantly in the degree to which it is student-centered. In fact, much of the experience-based

81. At a recent meeting of clinicians, this aspect of such programs was discussed. In particular, externships were described as especially appropriate vehicles for developing skills of self-assessment of skills of learning from supervision and observation. As these objectives require student-centered learning and responsibility, externships provide a unique opportunity for students to learn to ask the questions, [for] students to learn to set standards, and [for] students to learn to evaluate their own performance. This opportunity for lifelong learning skills was contrasted with the more traditional pedagogical methods of the classroom, which tend to cast students in a passive role.

Professor Glesner's Notes (Oct. 19, 1987) [hereinafter Glesner Notes] (available in University of Nebraska Law College Library). Professor Barbara Glesner recorded her notes and recollections of the Sunday session of the ABA's National Conference on Professional Skills and Legal Education in memorandum form, and they were circulated to interested persons.

82. "Most legal education today does little to foster a sense of personal responsibility or 'to encourage students to use initiative in educating themselves.' Noting 'the passive and doctrinaire qualities' of many law students, educators have been advocating greater 'student initiative and creativity in learning.'" Himmelstein, Reassessing Law Schooling: An Inquiry Into the Application of Humanistic Educational Psychology to the Teaching of Law, 53 N.Y.U. L. REV. 514, 545 (1978) (quoting ASSOCIATION OF AM. LAW SCHOOLS, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: 1971 (P. Carrington, ed. 1971), in 1971 AALS PROCEEDINGS Part I, & II, at 57). Such advocacy is not a recent phenomenon:

The chief difficulty arises from the tacit assumption, one by no means clearly established, that the only work meriting credit toward a law degree is that done in the classroom under the watchful eye of the instructor and at the measured pace dictated by the slower men. Reluctant as some instructors imbued with the "spoon-fed" idea of instruction may be to grant it, surely much more can be done in law schools than has been done in the past to put the student on his own responsibility.


83. "Although they cater to academically gifted students, law schools do not treat most students as adults. Faculty, with varying degrees of intensity, view many students as ignorant, unmotivated, insincere, selfish, materialistic, and unwilling and unable to take greater responsibility for their professional growth and development." Pepe, Clinical Legal Education: Is Taking Rites Seriously A Fantasy, Folly, or Failure?, 13 J.L. REFORM 307, 323 (1985). But cf. Bloch, The Andragogical Basis of Clinical Legal Education, 35 VAND. L. REV. 321, 334-336 (1982) ("[S]ome aspects of traditional law teaching methods not only are fully consistent with andragogical theory, but also are premised—at least to some extent—on a recognition that law students are adult learners.").

84. While all experience-based learning is to some degree student-centered by virtue of the fact that the students' experiences are the basis of learning, I use the term "student-centered learning" here to describe an approach to learning that is experience-based and requires students to take substantial responsibility for their own learning. This does not mean they must act without direction; it means they have significant control over decisions which are made by faculty in other approaches.
learning that occurs in law school is short on the experience and long on faculty involvement. This involvement is not only designed to ensure that students do not make mistakes, it is also designed to help students take full advantage of the learning experience by encouraging, and perhaps even requiring, that the students reflect upon and generalize from the experience. Encouraging reflection and generalization is an important goal of clinical education, but it is not the only one. It is also important to create a high quality experience from which to learn and to encourage student-centered learning. Students who learn how to become more involved in their own learning will fare better in practice than those who simply master the legal materials presented in law school.

The learning which occurs in a practice supervised clinical program is not limited to the instruction provided by the supervising attorney at the placement. The learning experience is student-centered. The students’ supervised practice gives them the opportunity to apply what

Students can be guided in this new responsibility by suggestions from the faculty concerning structures that they might impose on themselves in this new learning environment. For example, faculty might provide students with reading material, assignments, or other support and might suggest that students set learning goals for their practice supervised experience, and periodically monitor their progress toward these goals, making adjustments in them as needed. This approach permits significant student autonomy with assistance in the learning process. The design of such structures is the subject of Part V. An exploration of the learning theory involved in experiential learning is outside the scope of this Article. To be credible, such a review must be done by someone trained in the education field who is not a partisan in the current debate over the future direction of clinical legal education. However, for an introduction to the area, see J. Dewey, Experience and Education (1938); J. Dewey, How We Think: A Restatement of the Relation of Reflective Thinking to the Educative Process (1933); D. Kolb, Experiential Learning: Experience as the Source of Learning and Development (1984); D. Schön, Educating the Reflective Practitioner (1987)[hereinafter D. Schön, Educating]; D. Schön, The Reflective Practitioner: How Professionals Think in Action (1983)[hereinafter D. Schön, Reflective Practitioner]; K. Wain, Philosophy of Lifelong Education (1987).

85. The “experience” upon which learning is based may be a short simulation or one activity in an in-house clinic.

86. Students in simulations generally have limited responsibility for their own learning because simulations are often structured to focus student learning in predesigned areas, and faculty direction further focuses students on what the simulation was designed to teach. Similarly, students practicing under the direct supervision of faculty in in-house programs generally have less responsibility for their own learning because their learning is teacher-directed. This is especially true where the faculty member prepares the student for each real activity, and then critiques each activity in detail after it has occurred.

87. I use the word “experience” here to refer to the activity that forms the basis for the learning. This is an area where the simulation and the in-house clinic do not excel. It seems clear that even the best simulation will have a limited ability to teach students to accept real responsibility, and that activities that provide students with opportunities to handle real-world responsibility are better suited to that goal.
they have learned in their law school course work, both in simulation courses such as trial advocacy, and in traditional courses in evidence, procedure, and substantive law. Practice supervised programs challenge students to find their own answers; by doing so, students may become more critical, assertive, and self-directed in their learning than they would in a teacher-directed environment. The pressure of real-world responsibility, the excitement of finally being able to apply the knowledge they have been working so hard to acquire, and the discipline they are taught in rigorous law school courses, help to provide motivation and structure for students, even though they operate outside the watchful eye of the full-time faculty.

Educational objectives in practice supervised programs may differ from similar programs conducted in-house. For example, students in both an in-house and practice supervised program may be engaged in the defense of misdemeanor cases. The similarity of the type of student practice does not mean that the educational objectives of the programs are the same. The in-house program may have as its principal objective the instruction of litigation skills with teaching students to accept responsibility being only a secondary goal. However, the principal objective of the practice supervised program may be teaching students to accept responsibility with learning litigation skills being the secondary objective. This shift in emphasis is important because, while instruction by full-time faculty may be a good way to teach litigation skills, a student-centered approach may be superior for learning to accept responsibility.

The difference between practice supervised clinical programs and other law school programs is their ability to provide a suitable environment for student-centered learning. For this reason, they may

---

88. "It is axiomatic in learning theory that when cognitive studies are accompanied by active engagement in their application to concrete problems, a likely result is fuller comprehension, better retention and apter recall of the cognitive material." Michelman, The Parts and the Whole, Non-Euclidean Curricular Geometry, 32 J. LEGAL EDUC. 352, 353-54 (1982).

89. Students will respond in different ways to this challenge. Some students will thrive without teacher direction and others will not. Part V will discuss ways the program can be designed to assist students to find their own way without direct intervention by faculty.

90. There are some who contend that both in-house and practice supervised programs provide students with a suitable environment for student centered learning. I argue that since, on a programmatic level, there is a significant difference in the level of control exercised by faculty between the two models, the practice supervised model provides students with a greater opportunity to take responsibility for their own learning. In response to in-house supervisors who argue against this point, I ask what they stress when they are pressed to justify the significant resources that their programs consume. Do they advance the freedom that such programs provide for their students to develop autonomy and self-reliance, or do they describe, in great detail, how every move the student makes is observed and critiqued by the ever watchful clinic faculty?
have the ability to prepare students for the demands of practice in ways that other parts of the law school curriculum, including other models of clinical education, may not. Encouraging students to take more responsibility for their own learning and providing students with an opportunity to develop better evaluative skills are common educational objectives of practice supervised placements. Too much direct supervision by a faculty member during a clinical experience may be destructive to the objective of developing student autonomy.  

Practice supervised clinical programs may also provide special benefits for students who have learning styles that do not adapt well to the Socratic method, or to lecture in the classroom. Some students learn better by doing. Students who learn better by doing may have better learning opportunities in clinical placement. Students who have not been successful academically may discover they can nevertheless function effectively in the real world.

Moreover, practice supervised clinical programs are more likely to provide women with problem solving models than is characteristic of law school in general because women are more likely to be represented as field supervisors in those programs than they are in the full-time faculty. Women generally lack opportunities to serve as models

91. In fact, it may be necessary to minimize the role of the faculty member in the process in order to succeed in the attempt to encourage students to take responsibility for their own learning:

A major effort is necessary to get students to change their passive approach to learning and to encourage them to take responsibility for what they often exercise elsewhere; for example, in their family life, in their hobbies and sometimes in their work. It is a tragedy that as soon as normally responsible adults come into contact with education they expect to be told what to do and what to learn. Worse still, we as teachers play along with this and find it much easier to meet these expectations than to create the conditions in which students will take responsibility for their own learning.

Farnes, An Educational Technologist Looks at Student-Centered Learning, 7 BRT. J. EDUC. TECH. 61, 62 (1976).

92. "There is a general belief that experiential learning is good for disadvantaged children and youth, while information assimilation is better for those who are educationally advantaged." Coleman, Differences Between Experiential and Classroom Learning, in EXPERIENTIAL LEARNING 49, 51 (M. Keeton ed. 1976). See also O. DE SILVA & E. FRUEND, A TUTOR HANDBOOK FOR TRIO PROGRAMS, OPERATION SUCCESS (1985)(handbook for tutors in college level federally funded program to aid students from disadvantaged backgrounds, which incorporates student-centered learning); Menkel-Meadow, Portia in a Different Voice: Speculations on a Woman's Lawyering Process, 1 BERKELEY WOMEN'S L.J. 39, 59 (1985)(feminist perspective on legal reasoning “might include more interdisciplinary work as educationally relevant to law school”).

93. I recognize that there is a greater percentage of women in in-house clinical teaching than there is in law school teaching in general. See Angel, Women in Legal Education: What It's Like to be Part of a Perpetual First Wave or the Case of the Disappearing Women, 61 TEMP. L. REV. 799, 803 n.22 (1988)(40% of clinical teachers are women).
in traditional law school programs.94 Practice supervised clinical programs can bring more women into legal education.

Practice supervised clinical programs may also have traditional educational objectives, such as teaching professional skills. As a later section will demonstrate,95 regulators seem to assume practice supervised programs will have skills training as a primary objective. The problem with articulating skills training as an objective in the current regulatory environment is that regulators may contend that a practice supervised program is not well suited for teaching professional skills because of the limitations consciously placed on the the full-time faculty in such programs. Nevertheless, many students enter such programs with such objectives in mind, and many programs articulate skills training objectives.

Another traditional objective of practice supervised programs is teaching professional responsibility.96 It has been widely recognized that the clinical setting can bring issues of professional responsibility alive for students.97 The lack of faculty supervision does not prevent a professional responsibility focus, but some structure for addressing professional responsibility concerns must be created if this objective is chosen as a focus in the practice supervised setting. Classroom discussions, readings, written assignments, and other devices can be used to this end. However, discussions of actual cases in the classroom are not consistent with the practice supervised model.

Women have been taught by generations of men that males have greater powers of rationality than females have. When a male professor presents only the impeccable products of his thinking, it is especially difficult for a woman student to believe that she can produce such a thought. And remember that in the groves of academe, in spite of the women's movement, most of the teachers are still male, although more than half of the students are now female. Women students need opportunities to watch women professors solve (and fail to solve) problems and male professors fail to solve (and succeed in solving) problems. They need models of thinking as a human, imperfect, and attainable activity.

M. BELENKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, WOMEN'S WAYS OF KNOWING 216-17 (1986).

95. See the discussion in Part VI.

96. In the clinical context teaching professional responsibility has included “both ... making students more sensitive to personal ethical consideration in law practice and ... making them aware of the social responsibilities of the legal profession.” G. Grossman, Clinical Legal Education: Past Present and Future 16, 18-19 (1975)(manuscript available in University of Nebraska Law College Library).

97. “Clinical courses are superior vehicles for sensitizing students to these issues, because the student must actually make a choice between competing options . . . . His decision may well be irreversible, and he will have to live with its consequences . . . .” Meltzer & Shrag, Report From the CLEPR Colony, 76 COLUM. L. REV. 581, 588 (1976). However, critics have raised questions concerning the value of clinical education as a vehicle for teaching professional responsibility. Condlin, The Moral Failure of Clinical Legal Education, in THE GOOD LAWYER 317 (D. Luban ed. 1983).
Practice supervised programs may have non-traditional educational objectives and may make such objectives feasible even where they do not make sense in other models. For example, the objective of learning how the legal system really works might be dismissed as not worth the resources involved in providing in-house training, but the relatively low cost of practice supervised programs might justify such an objective in the practice supervised context. A study of the court system through placement in the prosecutor’s office might lack some rigor, but it can nevertheless be a significant educational experience. Students must deal with life and death issues in a system that does not work like they thought it would or think it should. When they are working in the system, students can no longer ignore the incongruities; they must take action. But the students do not face their dilemmas alone. Students benefit from their student role because they can demand the time of supervisors and expect academic support from their school. Readings and class discussion can help them explore reactions to their experiences. The guidance they are able to obtain helps them to make difficult choices in a more informed way than might be possible if they had the same experiences outside an academic program.

Practice supervised clinical programs may have other non-traditional objectives, such as reducing the level of reality shock that occurs on the first job. Externs are expected to have an easier transition from school to work because they experience less reality shock on starting permanent jobs than do other students. Practice supervised clinical programs may also assist students in the crystallization of their vocational self-concept by facilitating the identification

98. For a glimpse of that world, see Brill, Fighting Crime in a Crumbling System, AM. LAW. July-Aug. 1989, at 3.

99. High levels of reality shock occur when individuals find that many of the work standards and procedures learned in school directly conflict with those required on the job. Consequently, they lose confidence in their preparation for work and experience high levels of anxiety that lowers their job performance, job satisfaction, and the probability of remaining on the job.


100. Id. (summarizing HALL, CAREERS IN ORGANIZATIONS (1976) and M. KRAMER, REALITY SHOCK: WHY NURSES LEAVE NURSING (1974)). Research involving student nurses suggested that:

[Internships may reduce the level of reality shock on the first job because participants experience these conflicts between work requirements and academic preparation while still in school and, thus, still exposed to both school and work cultures. Therefore, interns are more likely to resolve the conflict before starting their permanent jobs and feel less threatened at that time.

Id. at 393-94. “[T]here is mixed support for the reality shock hypothesis in the literature, although it has not yet been thoroughly examined . . . .” Id. at 394.
of vocationally relevant abilities, interests, and values.\textsuperscript{101} One study has hypothesized that "by performing job tasks relevant to the chosen vocational field, interns are expected to identify personally valued, work related outcomes (e.g., co-workers pay [sic], autonomy, and responsibility) and the vocational abilities and interests needed to attain satisfaction from the work arena."\textsuperscript{102}

Thus, it is not true, as some assume, that practice supervised programs provide students with no real benefit because students will have the "same experience" after they graduate. The fact that placement occurs as part of an academic program provides the school with opportunities to provide the students with structure, guidance, and insight that they would not have if they had the same experience for the first time in practice. The experience gives students the ability to make informed decisions about important matters, such as whether they want to commit their lives to a particular career choice. But the benefits of court certified practice in placements go beyond that. Jobs available through externship programs may not be available to law students after graduation. Even the types of experiences available through placement may be unavailable to the same students after graduation.\textsuperscript{103} For example, through an externship program, students may be placed in a state attorney's or public defender's offices in large urban centers. These placements may afford the students the opportunity to work in various capacities within large offices, to take gradually larger amounts of responsibility, and to spend significant time in court. These placements sometimes provide students with the opportunity to conduct or participate in jury trials while still in law school. It is clear that a significant number of lawyers do not have the opportunity to conduct jury trials, and few are fortunate enough to secure employment after graduation with state attorney's and public de-

\textsuperscript{101} Id. at 393 (discussing potential benefits of internship in general). Crystallization of vocational self-concept is a significant contribution because "the generalist tradition in legal education attracts many who are still undecided about their vocation." Stone, Legal Education on the Couch, 85 HARV. L. REV. 392, 400 (1971).

\textsuperscript{102} Taylor, supra note 99, at 393. This hypothesis is largely unexamined. Taylor's study provided partial support for it. Her significant finding was that with regard to both reality shock and crystallization:

[H]igh autonomy interns showed significantly greater benefits than did their cohorts on many of the hypothesized crystallization and reality shock variables . . . . The consistency of the moderator results suggest that the relevant question may not be whether vocational crystallization and decreased reality shock are benefits of internship, but rather, under what conditions they are benefits.

\textit{Id.} at 399. If, as Taylor's work suggests, high autonomy is the variable that increases these values in internships, practice supervised clinical programs, which are characterized by high levels of student autonomy, should be particularly well-suited to achieving them.

\textsuperscript{103} The benefits of placement are advantages shared by practice supervised and case supervised programs.
fender's offices.104 Similarly, students commonly obtain placement as law clerks to federal judges through externship programs. The idea that such an experience is easily duplicated or that such jobs are generally available to graduates needs no refutation; it is clearly not correct.

Practice supervised clinical programs also provide schools with flexibility in meeting student demand for various kinds of experiential learning programs. The interests of students change, and there is evidence that student preferences in field work may be changing. Students today are unlike their counterparts in the 1960s and 1970s, and law schools reflect, or will soon reflect, that change.105 They seem less interested in the legal aid and public defender opportunities clinics typically present, and more interested in working in government offices and with prosecutors.106 This trend is hard to document because students who seek to enroll in clinical programs must usually choose from available options, and those options may not reflect the students' true preferences.

Practice supervised clinical programs can offer a variety of placements, so they can play a significant part in satisfying this developing shift in student demand.107 Schools using field placement do not

---

104. Low turnover and limited budgets sometimes make positions in these offices scarce. These offices often seek job applicants with different qualifications than are characteristic of those sought by private firms. Participation in a clinical program gives students an opportunity to demonstrate their abilities. It is not uncommon for government offices to hire students out of the clinical program, another benefit of externship placement.

105. The Yuppie generation of students is upon us; the public-interest job market is collapsing; students are graduating from law school with increasingly heavy loads of educational loan debts to repay, which make it impossible for many of them to take public-interest jobs even if they wanted to. For all of these reasons, it is getting very tough today, and will soon be impossible to replicate the ethos of the clinics that so many of us know and love: those cadres of committed commandos out to do or die for social reform.


106. The development of clinical opportunities in prosecutors' offices has been a more recent development. G. Grossman, supra note 86, at 21. The students' move towards prosecution and away from defense work is evident at Miami.

107. The potential may be even more significant than its usefulness in responding to current student preferences suggests. It has been argued that clinical programs
need to create law offices to place students in these new environments. The fact that students want to work in government offices raises significant hurdles to the creation of in-house clinics. The school can open a legal aid clinic, but it cannot open a city attorney's office. Even if an in-house clinic doing government work could be created, other concerns arise. If the school has the resources to maintain both the old and new clinic, new staff must be hired. If not, the in-house clinicians must be transferred to the new program. This may require the clinicians to alter their traditional practice significantly, a prospect they may find unappealing. They may have an ideological attachment to their old clinic or a philosophical objection to a new one. Case supervised clinics share this limitation of staff expertise and interest, although they are more flexible than in-house programs because they take advantage of existing placements. In sum, in-house clinics and case supervised clinics are not as flexible in the face of changing student demand as are practice supervised clinical programs. Thus, practice supervised programs can offer the diversity and flexibility necessary to meet student demand for new kinds of learning experiences while allowing law schools to stay within resource limitations.

The potential of practice supervised programs remains largely unrecognized. Perhaps one reason for this is a general lack of clarity in the educational objectives of such programs. Too often, there is no real understanding or consensus on what these programs are supposed to achieve. School involvement and support has at times been almost completely lacking. When faculty are assigned to these pro-

---

108. In-house clinics could be set up to do government work, but that is rarely the case. For example, in what might be called a "farm-in" approach, to contrast with the "farm-out" label sometimes given to practice supervised clinics, a school could take its pick from the ongoing cases of a state attorney general's office, and students could work on those cases during the term with faculty supervision. The cases would then be returned to the agency at the end of the term for completion by agency lawyers.

109. In this regard practice supervised clinical programs are probably not alone. This has been a problem in the movement as a whole. See Gee & Jackson, Bridging the Gap: Legal Education and Lawyer Competency, 1977 B.Y.U. L. REV. 695, 887.
grams, they have little to guide them in determining how the programs can be improved. Even if they are able to seek out the small group of clinicians nationally who have some experience with practice supervised programs, and are able to decide on objectives, they may still have problems implementing them.

For example, problems may be encountered if the development of self-learning skills is selected as an educational objective of the program. One problem with this choice is its novelty. The development of self-learning skills is not usually the central objective of a law school course. For this reason, it is possible that some will object to the award of credit for such an exercise. Another problem is that even if the self-learning objectives are explicit, they may not be understood as the real point of the course. The assumption may be made that, where students are involved in supervised practice, the point of the program is to teach lawyering skills. There is a tendency to associate clinical programs with lawyering skills. The more explicit the self-learning objective, the less chance of misunderstanding. If the focus is not on lawyering skills, it is probably a good idea to require each student seeking placement to complete a simulation course with the explicit objective of teaching lawyering skills as a prerequisite to placement. Another problem with the self-learning objective is that, no matter how clearly that objective is articulated, the students may nevertheless focus on lawyering skills as their principal objective in the program. This problem will be addressed in the following section which discusses how a practice supervised placement might be better suited to a self-learning objective than to an objective that relies more heavily on the field supervisor for instruction. Further problems that

110. This approach seems anomalous in the law school curriculum because other courses involve "instruction," not self-learning, and because other law school courses are designed to teach either substantive law or skills that are less generic, and more closely associated with lawyering.

111. The rationale for awarding credit for a course that promotes student self-learning is developed in Part IV.

112. The refusal to acknowledge stated objectives may be significant because the choice of self-learning as an objective, if explicit, may serve to insulate the program from some of the criticism that might otherwise be leveled if, for example, the same program had the teaching of lawyering skills as its objective. A practice supervised program may be vulnerable to criticism as a vehicle for teaching lawyering skills because of the lack of full-time faculty control over the teaching that occurs. It is not subject to the same criticism if the objective is self-learning, because self-learning, by definition, must take place in the absence of strong faculty direction and control. Thus, a refusal to acknowledge stated objectives may result in unwarranted criticism of the program.

113. "Many see skills-training as the only educational goal of clinical education . . . ." G. Grossman, supra note 96, at 41. This focus may be seen as desirable by those who believe that the future acceptance of clinical education depends on its ability to address the skills and competence concerns expressed by practitioners. For further discussion of the political nature of such choices, see section VII.B.
Clinicians operating practice supervised programs can expect to encounter are discussed in connection with a later discussion of regulatory developments.114

IV. THE WEAKNESSES OF PRACTICE SUPERVISED PROGRAMS

If practice supervised programs have such great potential, why are they routinely condemned without discussion? There are many reasons. The political reasons for that response are the subject of a later section.115 A discussion of the weaknesses of the approach, both real and imagined, follows. As a general matter, I suggest that observers who are unfamiliar with practice supervised programs have had difficulty putting concerns in proper perspective, which has led to overreaction. A proper perspective would acknowledge that some limitations inherent in practice supervision can be avoided or minimized by careful program design, and by shifting to objectives better suited for practice supervised placements. The impact that adjustments in program design and educational objectives can have on the traditional, and sometimes valid, critiques of practice supervised programs will be suggested as each criticism is discussed. Other enhancements that might be adopted to make programs more effective in achieving the objectives suggested are the subject of the following section.

As a prelude I discuss two points: first, the impact that the change from a service focus to an educational focus among clinicians has had on educators' perceptions of practice supervised programs; and, second, the impact that difficulties with supervision in the in-house context may have had on educators' perceptions of the difficulty of providing good supervision in the practice supervised context. I suggest that perceptions from these experiences have influenced perceptions of practice supervised programs.

A. Two Preludes

1. The Shift From Service to Education

There is no question that the change of emphasis in clinical education over the last twenty years from service to education has affected the way that practice supervised programs have been perceived and received. When clinical education blossomed in the 1960s, service was the main purpose of the endeavor. Slowly, education replaced service as the raison d'être of clinical education.116 Practice supervised

114. This discussion is contained in Part VI.
115. See infra section VII.A.
116. In addition to the general political concerns discussed in Part VII, there were some particular influences on the shift in emphasis from service to education.
clinical programs have been, to some degree, a victim of the change in the justification advanced to support the legitimacy of including clinical education in the academy.

Practice supervised clinical programs are an excellent vehicle for involving law students in community service. In fact, service-oriented clinical programs generally adopt a practice supervised model, placing students in community law offices. It has been observed that "clinical education began with law students working in local legal services offices." For years, community service was advanced by CLEPR and others as the primary objective of clinical education. The preeminent position of the service objective was evident in the statement of purpose of the ABA Model Student Practice Rule, which served as the model for many state student practice rules. The ser-
vice purpose is also clear from the text of the Model Rule.\textsuperscript{123}

Gradually, the focus in clinical education shifted from service to education.\textsuperscript{124} CLEPR played an important role in this transition.\textsuperscript{125} "CLEPR provided seed money for the development of programs that would make available legal services to the poor within the academic-setting [sic]. Faculty members sympathetic with CLEPR's goals saw the opportunity of hiring lawyers to staff offices in the law schools, and the first in-house clinics were established."\textsuperscript{126}

Another important reason for the shift to an educational focus was the changing financial picture. Foundation support for clinical education waned in the 1970s, and clinics were forced to depend more on law school support for their survival.\textsuperscript{127} The educational focus was more compatible with requests for law school funding, as the educational focus aligned the clinic with a major mission of the school. The trend away from service towards education continues in clinical education today.\textsuperscript{128} For this reason, threats to the continued existence of prac-

\textsuperscript{123} The purpose of the A.B.A. model rule is social: to provide "competent legal services for all persons, including those unable to pay for those services." This justification is reflected in the text which, though allowing students to take part in a broad range of legal problems, limits students to representing indigents. Only four states [in 1969] do not limit students to indigents or legal aid clients: Iowa, Nebraska, Oklahoma and Wyoming. The primary objective of these rules is educational. Ridberg, Student Practice Rules and Statutes, in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 223, 224 (E. Kitch ed. 1969).

\textsuperscript{124} "Even C.L.E.P.R. has come to accept the predominance of 'academic' ends of clinical programs although, in the transition, C.L.E.P.R. and much of clinical education may have developed its own strain of schizophrenia." Grossman, supra note 32, at 186. The shift towards education has also purged clinical education of its character as a left of center experience. See Kennedy, The Political Significance of the Structure of the Law School Curriculum, 14 SETON HALL L. REV. 1, 7 (1983) (clinical education "is moving towards a politically more moderate, calm, and centrist picture of what it can do and what it ought to do").

\textsuperscript{125} "CLEPR's original emphasis was on encouraging law schools to supplement the work-force of local legal services offices, but CLEPR later shifted its priorities to support for clinics housed and staffed directly by the schools." Kotkin, supra note 14, at 191 n.29. CLEPR became "a political advocate" for the development of in-house programs. Stickgold, supra note 5, at 297.

\textsuperscript{126} Kotkin, supra note 14, at 191 (footnote omitted).


\textsuperscript{128} This transition became "official" when the Guidelines declared: "The primary purpose of clinical legal studies is to further the educational goals of the law
tice supervised programs are a serious threat to the law school's ability to remain faithful to the community service ideal that played such a large role in the creation of clinical programs in the first instance.\textsuperscript{129}

The move away from service has left practice supervised programs isolated from much of clinical education as well as from traditional education. Because of the traditional connection between practice supervised programs and service, and the tension that exists between service and education in all live-client clinics, practice supervised clinical programs have become educationally suspect. Because of the general lack of faculty involvement and support of such programs, they have reacted more slowly to this change in emphasis than in-house programs. However, even practice supervised programs that are currently out of step with the new focus have the potential to provide both service and educational opportunities.

2. \textit{Supervision: Changing Perspective}

The central concern about practice supervised programs is supervision.\textsuperscript{130} The absence of full-time faculty supervision of student case work has raised serious concerns about the educational quality of practice supervised programs. Before discussing this concern, it is necessary to put the concern in context. Supervision is a concern even in in-house clinical education. It is the cornerstone of the in-house approach, and the success of the in-house model hinges on the proper use...
of the supervisor's time.\textsuperscript{131} The supervisor plays a central role in managing and supporting the learning process.\textsuperscript{132} This places significant demands on the in-house supervisor.

The working conditions of professors who supervise student casework in in-house programs are poor when compared to those of regular faculty members. Traditionally, in-house supervisors have been accorded second-class faculty status; they have also suffered "burnout" occasioned by too little time for reflection, a heavy workload caused by high student-faculty ratios (even ratios considered low in the traditional curriculum can be high in the context of one on one supervision), the longer work year required because in-house cases must be handled even when (or especially when) students are not present, and the difficulty of research and writing while supervising.\textsuperscript{133} Moreover, the casework done by these clinicians is often not intellectually stimulating:

By definition, cases appropriate for law students in which they can ethically assume major responsibility for the representation of the client are relatively routine. There is an inverse relationship between a case's complexity and its suitability as a vehicle for clinical education. [I]ncrease in complexity may make the case of greater interest to the experienced faculty supervisor, but render it less suitable for instructional purposes.\textsuperscript{134}

Thus, in-house clinicians suffer the pressures of practice without the intellectual or financial rewards.\textsuperscript{135} Not only are the working conditions poor, the job itself is difficult:

Few are willing to recognize that the role of the fieldwork supervisor is indeed a very difficult one; it requires the ability to abstract and theorize (as required of the traditional teacher), the ability to translate theory into practical solutions so as to bridge the gap between theory and practice, and a substantial skill in interpersonal relations.\textsuperscript{136}

Thus, while close supervision by professors is central to the traditional in-house approach, heavy reliance on supervision presents substantial problems.

Professor Amsterdam raised this inherent difficulty in his keynote address to the Clinical Teachers Conference in Boulder, Colorado in 1986.

The perspective that I want to suggest is that supervision, while a good

\begin{itemize}
  \item \textsuperscript{131} Nevertheless, "[t]he dynamics of the supervisory relationship are difficult to describe with any degree of precision." Hoffman, \textit{supra} note 30, at 280.
  \item \textsuperscript{132} Kreiling, \textit{Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision}, 40 Md. L. Rev. 284, 297-306 (1981)(describing in detail the demands of the field supervisor's role and the importance of the supervisor-student relationship in the process of learning from in the in-house clinic).
  \item \textsuperscript{133} See \textit{id.} at 316-17; Gee & Jackson, \textit{supra} note 109, at 890-91.
  \item \textsuperscript{134} Tyler & Catz, \textit{The Contradictions of Clinical Legal Education}, 29 CLEV. ST. L. REV. 693, 701-02 (1980)(footnote omitted).
  \item \textsuperscript{135} \textit{id.}
  \item \textsuperscript{136} Kreiling, \textit{supra} note 132, at 316.
\end{itemize}
thing, can be too much of a good thing. Teaching and learning through the intensive interaction of clinical teacher and student is an indispensable part of the clinical method, but it is not the only part, and it can often be too big a part. There is a real danger that, as we concentrate on it, improve our techniques of supervision, make it more effective, and find more satisfaction in it, we will come to make it much too big a part indeed. There is a danger that we will forget its inherent high costs and deficiencies, and focus solely on finding ways to do it better, instead of trying also to find ways to do without it.137

Amsterdam stressed the financial, professional and personal costs of intensive interaction with students. Supervision is not only dollar intensive, it takes faculty and students away from other efforts,138 and requires substantial intellectual and emotional energies.139

Given all the difficulties that in-house programs have with supervision, how can placement with a field supervisor possibly provide a student with a high quality educational experience? The answer to this question requires an analysis of how practice supervised programs can use supervision differently than in-house programs. Supervision is often used by in-house programs in place of alternative teaching methods.140 It is unrealistic to rely on supervision to do much when the supervisors usually have full-time responsibilities that are in addition to time spent supervising student interns. However, thoughtful clinicians have recently been advocating the restructuring of clinical teach-


138. Amsterdam noted that Standards for Approval, supra note 26, Standard 405(e) will result in many schools' demanding scholarship from clinicians, and clinicians' requiring time to write. Amsterdam, supra note 137, at 27. Standard 405(e) is the subject of further discussion in section VII.A.

139. Amsterdam warned that "the whole history of clinical education is eloquent that, while the burnout which comes with advancing age can be alleviated, it cannot be wholly avoided. A larger and larger percentage of clinicians is going to be looking for alternative, less demanding—or at least periodically rejuvenating—teaching formats." Amsterdam, supra note 137, at 27.

140. "[W]e often tend to exaggerate the importance of supervision because it is usually the part of the exercise in which we are most active, certainly the part over which we have the most control, therefore the part that has been the principal focus of our attention as we have struggled to define our own identity as clinical teachers, and therefore the part that we have most articulately conceptualized. In fact, much learning and therefore much teaching in any clinical exercise are not the direct product of supervision."

Id. at 29. Amsterdam describes the other parts of the clinical exercise as:

(1) The student's initial assimilation of the problem and the process of getting started in finding a conceptual framework in which to view it.
(2) The student's initial planning; and, if the students are working in teams, the process or articulation and response between students.
(3) The student's performance, and the experience of it.
(4) The student's own perception of and reaction to his or her performance.
(5) The student's self-critiquing and formal or informal peer critiquing.

Id.
ing so that less emphasis is placed on supervision and more on other methods.\(^{141}\) This trend, when adapted to practice supervision, suggests that concerns about supervision may be best addressed through reallocating responsibilities borne by in-house supervisors to field supervisors.

The perspective articulated by Amsterdam may be applied to practice supervised programs to open up new possibilities. If the only option were to require the same level of supervision from field supervisors as is required of in-house clinicians, then the potential of practice supervised programs would be open to serious question. However, practice supervised programs might take a more student-centered approach than in-house programs typically do. If it is possible to restructure the role of the field supervisor to divide responsibility for the students' learning among the field supervisor, the full-time professor, and the students themselves, then the field supervisor will not suffer the same burdens as the in-house supervisor.\(^{142}\) Following this approach, the field supervisor would not bear the full teaching burden, the law professor would not bear the burden of case supervision, and the students would assume more responsibility for their own learning.\(^{143}\) This division of labor might have other benefits, such as preventing faculty burnout and providing faculty time for reflection and writing on important clinical issues.\(^{144}\)

---

\(^{141}\) The first thing we have to do is to disabuse ourselves of the notion that supervision is the clinical method. It is not. It is only a part of the clinical program. There are other parts, and there is a vast potential for developing other parts which are currently undeveloped.

\(^{142}\) This approach may at first seem similar to the case supervision approach. As is explained shortly, there are important differences, notably that in this formulation the professor is not involved in the supervision of the students' case work.

\(^{143}\) No specific division of responsibility is necessarily appropriate in all cases. However, it may make sense for the school to conduct instruction in lawyering skills on campus before placing the student, and to enlighten the students concerning this approach, and in some aspects of learning theory, during a course component that is offered simultaneous with placement. The students' progress can be monitored by the professor through weekly written assignments and journal entries. If they are reviewed and returned weekly, the students can be guided in achieving their educational objectives without interference in case supervision. The school can prepare manuals designed to familiarize students with the program and the placement. The agency can provide agency specific training. The students can advise both of weaknesses in training that need to be addressed. This cooperative effort can work as long as it proceeds according to a master plan and all work together.

\(^{144}\) One potential critique of this proposal can be gleaned from the literature: It simply is not an adequate solution to divide responsibilities so that substantive instruction and simulated exercises are given in the law school classroom while practical training is provided in field offices. The whole point of the clinical experience is to merge and intertwine the substantive and procedural aspects. Separating these teaching functions frequently leads to conflict between the "academicians" and the "practi-
The practice supervised model provides students with opportunities to move away from the in-house model of supervision and to take more responsibility for their own learning. The detrimental effects of the traditional model, where responsibility for directing and evaluating the students' work falls primarily upon the supervisor, are obvious.

As passive recipients of whatever shape or form the supervision takes, students are neither expected nor encouraged to participate actively in the process of their practical legal education. When students assume no affirmative responsibility for structuring the supervisory role of the employer, they abdicate the power to influence the relationship in ways that could maximize the educational value of their work experience. . . . Moreover, students lose a valuable opportunity to develop a vital life skill—the ability to identify what they need and how to get it when their performance is on the line.145

An alternative model of cooperative supervision has been proposed which "contemplates an active interplay between the employer and the student with responsibility for supervision divided between them."146 That model suggests that the supervisor is expected to perform traditional supervisory functions of making assignments and evaluating performance. However, when supervision is inadequate "the student is expected to offset the employer's shortcomings through reliance on the processes of Self-Assessment and Clarification."147 Thus, when direction is lacking, the student may be responsible for seeking clarification. When feedback is lacking, the student may be responsible for focusing the supervisor on specific needs the student has identified through self-assessment.148

146. Id.
147. Id. at 210.
148. Id. at 210-11. Thus, this approach fits well with the externship, perhaps more common in past years, whose primary purpose was client service. The supervision provided in that setting has been described as follows:

Theoretically, the attorneys are also expected to supervise the students working in the office. Actually they do not. What happens is that those students who are interested in getting help take advantage of the attorneys' open door policy. They frequently have conferences with one attorney or another and go over their work or discuss case strategy. The remaining students work on their matters by themselves and rarely seek out supervision. Students working with attorneys on more complex cases, however, are provided considerable supervision.

Can the volunteer supervisor handle certain responsibilities, while the students and the full-time faculty handle others? If such a methodology can be developed, practice supervised programs could become good environments for students to learn how to learn. Greater emphasis on student responsibility for their own learning could be good preparation for the learning they will do in practice. Students would need encouragement to accept this role shift in legal education, because it is so different from the usual passive role taken in law school. The students’ need could be addressed through classroom training and written materials designed to encourage students to be more assertive with their supervisors when their supervisors deviate from models that they learned in law school, and to take responsibility for their own learning, with a field component designed to permit students to apply those lessons in the field.149 Students who have successfully adjusted to this approach might be used as teaching assistants, or be paired with students entering the process, so that they can assist their fellow students in making the adjustment.

The fact that a supervisor is a practitioner rather than a member of the full-time faculty should not, in itself, create panic.150 Practicing

149. The unfamiliarity of this role must be recognized and addressed.

One of the most difficult problems in assuring the quality of student work is that almost all traditional-age students and many adults have not yet learned how to take initiative in defining their goals and in the setting of appropriate expectations for their own learning. This problem is compounded if the faculty are disinclined to allow the learners to take such initiatives.

The key to the student’s being a guarantor of quality assurance in experiential learning, we would argue, lies in the ability of the faculty and field personnel to strengthen the student’s capacity for self-direction. Students must be assisted in achieving self-awareness, clarifying purposes, setting goals, and developing strategies for reaching goals.

Shipton & Steltenpohl, Self-Directedness of the Learner as a Key to Quality Assurance, in DEFINING AND ASSURING QUALITY IN EXPERIENTIAL LEARNING 11, 14 (M. Keeton ed. 1980).

150. It may be that the level of concern raised by student exposure to field supervisors reflects a larger weakness in legal education, the failure to articulate criteria for measuring student competence.

Law schools appear to have proceeded on the assumption that as long as the faculty is composed of persons who have high standards and have demonstrated competence, it is reasonable to assume that an individual student is competent if his or her products have been assessed and found adequate by twenty to thirty different law teachers in a variety of contexts over a three year period.

Anderson & Catz, Towards a Comprehensive Approach to Clinical Education: A Response to the New Reality, 59 WASH. U.L.Q. 727, 733 (1981). This substitute for measuring student competence tends to break down in the context of practice supervision. Field supervisors are suspect because they are not members of the
attorneys are not unsuited by experience, temperament, or other immutable characteristics, to be good teachers. In fact, such an attack, when advanced too vigorously, cuts against professional clinicians, because it demeans a significant job credential: experience in the practice, including experience in supervising others. Since professional clinicians, as a group, have different, and in traditional terms, worse academic credentials than regular faculty, their practice experience is a particularly important credential to their claim to professional status.\textsuperscript{151} Practitioners do not inevitably fail to reflect on or generalize from their experiences, and they do not necessarily teach students shortcuts, bad practice, or to maintain the status quo.\textsuperscript{152} Even where practitioners exhibit such limitations, the problem can be dealt with through measures short of abolishing the program or requiring full-time faculty to supervise field supervisors.

Weak field supervision is not always the serious problem that one might expect.\textsuperscript{153} Even assuming an absence of supervision, role assumption provides educational benefits.\textsuperscript{154} Moreover, there are three dynamics of practice supervised programs that help students who experience weak supervision. First, students in practice supervised programs are less reliant on field supervisors to achieve educational objectives than are students in-house. The adoption of student-cen-

\begin{itemize}
  \item Pepe has suggested that clinical teachers are not only different, but inferior to regular faculty. "Many are undistinguished in either their academic or practice backgrounds and are considered of lesser intellectual merit than the average traditional law teacher." Pepe, supra note 83, at 334.
  \item Some would disagree, and argue that supervision by a law professor has special educational value.
  \item Silverberg, Law School Legal Aid Clinics: A Sample Plan; Their Legal Status, 117 U. Pa. L. Rev. 970, 977 (1969). Even if this is true, there is reason to doubt that most clinicians are in fact legal scholars.
  \item Approaches that enhance programs without additional case supervision are the subject of Part V.
  \item Even without supervision, role assumption provides knowledge about the skill and some degree of comprehension.
\end{itemize}

Role assumption can accomplish a second objective of imparting knowledge about aspects of the legal environment with which the student has contact. \ldots The acquisition of knowledge in a role assumption is inevitable to a certain extent since students will invariably learn about whatever they encounter, but this process can be enhanced by supervision.

Hoffman, supra note 30, at 286.
tered learning objectives serves to render poor supervision less problem-
atic. Second, since students in the practice supervised clinic are
explicitly given more responsibility for their own learning, the prob-
lem of poor supervision is not just an obstacle, it is an opportunity for
the student to learn how to recognize and deal effectively with the
problem. If learned, this lesson will prepare students for life after
graduation, when they are sure to run into poor supervision with some
frequency. Third, the role of student can itself be an important aid to
students who experience weak supervision because it frees them from
the constraints that those new in a job might feel about asking ques-
tions, or otherwise displaying their ignorance.155

B. An Evaluation of Other Concerns

The suggestion that practitioners are not as open to allowing stu-
dents to question their strategy and techniques has been made.156 Can
it be that professors are more open to challenge than field supervi-
sors? Logic seems to dictate otherwise. The in-house clinician has
more to lose than the field supervisor when his or her approach is
questioned, because educating the student is the in-house supervisor’s
major responsibility, while it is only part of the field supervisor’s
role.157 Moreover, the dynamics of practice supervised programs sup-
port critique. Students may have outside encouragement from the
program director to challenge field supervisors, while students have
no outside assistance in challenging their in-house professor. Further,
students may correctly believe that the in-house professor’s admoni-
tion “challenge me” is merely a set-up.

Similarly, claims that in-house programs provide better forums for
encouraging students to challenge the system seem counter-intuitive.
In practice supervised clinical programs, students are placed inside the
system, and are therefore in a better position to critique the problem
areas in real practice than are students who practice in the artificial
environment of the in-house clinic. Placement in a local prosecutor’s
office, for example, may provide real insight into the problems that
the criminal justice system faces on a daily basis. An in-house clinic

155. “Even students have to be encouraged to make full use of the potential benefits of
their student role. Law teachers are struck by how early in their careers many
students find it difficult to admit to not knowing the answers.” Meltzer, Rowan
& Givelber, The Bike Tour Leader’s Dilemma: Talking About Supervision, 13

156. Field supervisors may not be “sufficiently open to allow students to question
freely the strategy and techniques utilized to further client goals.” Rose, Legal
Externships: Can They Be Valuable Clinical Experiences For Law Students?, 12

157. Condlin suggests that students are not good critics of their professors and that
“teachers have the upper hand, and often use it to suppress nonconforming
views.” Condlin, supra note 39, at 55.
does not expose students to this reality in the same way that placement inside that system does; therefore, it cannot give students similar insights. Finally, it should be recognized that getting law students to challenge the system or anyone in it today may be quite an achievement, wherever it occurs. Law students today do not want to shake up the system; they want to make it in the system. Most no doubt come to law school with the predisposition to uphold the system, and their education and socialization in law school only reinforce it.158

There is nevertheless a valid concern about the effect that the field supervisor's other responsibilities will have on the priority they give to their role as a teacher.159 Critics note that the education of students is often not the highest priority in the offices in which they are placed. Volunteer supervisors who may be responsible for large caseloads sometimes use students in ways designed to satisfy the service needs of that office, not the students' educational objectives.160 However, field supervisors are usually volunteers,161 and those who have volunteered presumably have some interest in working with students, and might even be looking forward to teaching for some of the same reasons that clinicians left practice for teaching.162 The widespread use of practicing lawyers as adjunct faculty in more traditional courses suggests that the law schools have some faith in lawyers' abilities as teachers. The knee-jerk rejection of a role for practitioners in legal education appears to be the result of "academic arrogance."163

These concerns are said to reflect "a fundamental conflict of goals existing in many placements"164 between the field supervisor (who is loyal to office goals) and the student (who is primarily interested in educational goals) and an inherent flaw in the educational potential of

---

158. Halpern, supra note 105, at 390.
159. See Guidelines, supra note 31, at 116.
160. To the extent that students can make some concessions to service, but secure employment in the office upon graduation, students may not be unhappy with the compromise.
161. "Virtually all field supervisors—the 'adjunct' clinical faculty—work for free, and amounts paid in those few instances where payment is made is more token than real." Stickgold, supra note 5, at 301 (footnote omitted).
162. While some supervisors have little interest in teaching, or are simply not very good teachers, they can be identified and removed from the supervisor's role, provided the effort is made to monitor this aspect of the program.
163. That "arrogance" seems to demand that law school faculty control every aspect of the student's learning; that faculty should review all work done by the students in the field, even overruling the judgments and decisions of the field supervisor; that field supervisors presumptively do not know how to teach, do not want to teach, or teach the wrong things; that law faculty know more about anything of teaching importance than the supervisor.
164. Rose, supra note 156, at 104.
externships. The schools' leverage in this tug-of-war has been questioned because supervisors are usually not compensated. While this critique has some validity, it is often overstated. The conflict between service and education is not unique to practice supervised programs, it is inherent in all live-client clinics. Extreme responses to this conflict are not appropriate, because it is not a problem to be solved, but a tension with which all live-client programs must live.

The best way to deal with this concern is to identify where identities of interest exist, and exploit them. Both the school and the office in which the student is placed share the goals of client service and the effective functioning of the office. How can the students' experiences be structured to allow them to achieve their educational objectives while providing service and not disrupting the functioning of the office? Which educational objectives can most reasonably be achieved, and which are unreasonable, given the dynamics of the office? Conflicts with the placement can be avoided or minimized by adjusting educational objectives in ways that take the realities of the situation into consideration. In addition to adjusting educational objectives to take better advantage of the placement, how should a practice supervised program proceed? What other common interests can be identified and emphasized?

165. Law schools place students in law offices to provide them with valuable educational experiences. The law offices, on the other hand, participate in externship programs to obtain assistance with their own caseloads. For many site supervisors, the balance between training students and receiving assistance in practice must tip in favor of practice. This perspective limits provision of the systematic, thoughtful supervision and evaluation which should occur in an externship placement.

166. "[I]n almost every outside placement there arises an irreconcilable tension between the demands of clients and the education needs of students." Wizner & Curtis, supra note 144, at 681.

167. "As clinical programs began operations, almost at once questions were raised about the assumption that the goals of service and education are compatible." Grossman, supra note 32, at 176.

168. It is not appropriate to label limitations on clinical program caseloads as "intellectual elitism." See id. at 174. It is also improper, however, to limit the students' clinical experience so that no client service results.

169. The suggestion, in Wizner & Curtis, supra note 144, at 681, that "from the students' perspective these tensions can be resolved better in a law school program than in actual law offices" strikes me as more of an article of faith than an objective truth. What resolution is "better" from a students' perspective? The field supervisor may indeed be less attuned to the students' limitations, but this could lead to a better, not a worse, clinical experience. To succeed, students with a less attentive supervisor will have to develop assertiveness and interpersonal skills that may serve them well when they enter practice. Certainly in practice we expect them to encounter inattentive supervisors (that, after all, is the basis of the critique). Which students will be better prepared when that occurs? How well prepared will students be to deal with future inattentive supervisors if their in-house supervisors gave them little opportunity to develop assertiveness skills?
Field supervisors have some good reasons for supporting the educational development of their student interns. Under applicable student practice rules, the supervisor may be immediately responsible for the student's work. An educated student will be less likely to make mistakes. Better trained students can better assist in handling a heavy workload. The field supervisor may also give the student's education priority if the office is recruiting the student. Placements often recruit students who intern there. An internship allows the prospective employer to observe the prospective employee in action without making a commitment beyond the period of the internship. It is in the prospective employer's best interests to give the prospective employee as many demanding tasks as possible so the intern's abilities can be accurately assessed. Moreover, since the office is recruiting within the ranks of its interns, and can expect to hire at least some of them, it is in the agency's interest to train them all well; effective recruiting may involve providing adequate training and supervision so that the intern will want to work at the placement in the future. Furthermore, the supervisor may value the opportunity to work with the student because teaching can give new meaning to what might otherwise be the repetition of a routine caseload. Thus, the inherent conflict between service and education in practice supervised programs is not a fatal flaw.

Externships have also been criticized because "[s]tudents in externship placements frequently have very little contact with clients or other actors in their cases" and because "too often in externships, students are given only a piece of a case to work on and the work may include only legal research." At the farthest end of this spectrum lies "the mythical student who spent his or her entire semester xeroxing depositions, getting coffee for lawyers, or reading Ross MacDonald in the firm library." These problems are not serious because, if the school is serious about its program, it can assure that these kinds of problems do not exist, or do not exist for very long. Activities can be effectively monitored through time and activity reports which, when properly kept and promptly reviewed, will indicate a problem and permit an immediate response. Moreover, concerns about students not

170. Rose, supra, note 156, at 105.
171. Id. at 104.
172. Stickgold, supra note 5, at 319. While this student may be mythical, at least in programs that monitor their students' activities, the stereotype has apparently made a significant impact on regulators. The Consultant indicates that interpretation 2 was adopted to respond to concerns such as: "Is the law student only present to perform those tasks that the British press has suggested will be Prince Edward's duties in assisting Andrew Lloyd Weber: fetching coffee or tea, copying legal materials, filing papers, and carrying briefcases? These have been concerns of many legal educators." White, supra note 17, at 319. How familiar with field placement programs are the legal educators who harbor these concerns?
being involved in worthwhile activities tend to ignore the fact that students can and usually do object to being given menial tasks. The program director can provide any additional support the student needs to alleviate concerns about the quality of tasks assigned. If there is a genuine problem concerning availability of work for interns, the placement simply may not be suitable for a practice supervised clinical program. If the placement does not offer good opportunities for students, another placement should be located. If the school is in a rural area that simply does not offer good placements, the in-house model may be a more appropriate alternative.

The real problems lie on the other end of the experiential spectrum. Because third year students are so much like recent graduates, there is sometimes a tendency to give them too much responsibility. Care must be given to the monitoring of students in the placement so they do not abandon the classroom for the courtroom. Students anxious for trial experience must be monitored so they balance their new responsibilities in the office with their ongoing responsibilities at school. Again, this is not difficult to do, but the school must have an effective monitoring system. Such systems are the subject of the following section. There is also a concern that students’ enthusiasm may exceed their actual abilities. Students may be given too much responsibility before they are ready to handle it. This is a danger because the public agencies in which the students may be placed may be chronically understaffed, especially at certain times of the year, for example, around the time of the bar examination. In situations where the agency hires most of its entry level people right out of school, and has a high turnover, the agency may be attractive to students because of job opportunities. However, those very same factors may mean that the student may not be well supervised during the externship. Indeed, some students may be supervised by new lawyers who were last year’s externs. This is not as bad as it sounds.\footnote{Having seen students outnumber staff attorneys 35 to one in our own neighborhood office in Cambridge, which deliberately encourages a good deal of student responsibility for each case . . . I have become less and less worried that the client will get a bad deal. . . . The real problem for legal education, therefore, is not avoiding disasters for the clients represented by students. The problem is in the regular failure of a student to learn as much as his case has to offer. \cite{Ferren1969}} Where the new lawyers practice only in a limited area, such as the division of a prosecutor’s office that specializes in DUI prosecution, even new lawyers may become very good at what they do in a short time. Such placements provide good opportunities to do trial work, but no supervision by experienced lawyers because lawyers in the division aspire to become felony prosecutors and accept such a promotion as soon as it is offered.
Lack of experienced supervisory staff alone should not disqualify these placements from use in practice supervised programs. Students in such placements learn about the real pressures of practice, learn to allocate their time and energies, and learn to make decisions and to take responsibility for their actions. While placement with last year's graduates may cause some educators to shudder, students often report that such placement was the best experience of their law school career. The challenge for the practice supervised program is to prepare the student to handle responsibility and to ensure that the student is learning from the experience.

Students are given more responsibility in practice supervised programs than they are in other clinical models. While most in-house programs are designed to prepare students for the practice of law, in-house clinics often do not actually expose their students to the real life demands of law practice during the clinical experience. In order to make it possible to focus on education, service demands on the program must be kept in check. Case selection in in-house clinics tends to be responsive to concerns about the manageability of cases and their value as teaching vehicles, rather than the concerns about economics and service delivery that dominate the practice in real private and public law offices. Although careful case selection can provide educational benefits, the fact that a clinic serves real clients does not ensure that the student's experience in the program will be realistic. For example, students may learn much if they spend all semester working on just a few cases, but they may get a somewhat distorted view if they take their clinical experience as representative of the dynamics of an actual law practice. They may not learn the skills needed to balance the competing demands of practice or even that such balancing is necessary. Students in practice supervised programs may thus have learning opportunities that are not otherwise available in law school.

It might be argued that university legal education has replaced community based legal training. Similarities between apprenticeship and practice supervised programs have been noted by those who seek

174. Thus, such experiences prepare students for the demands of practice. The fact that law school generally does a poor job of preparing students to handle a caseload as well as a case has been noted.

Law schools expend little or no effort preparing students to deal with life in an adversary system.... We find with shock and amazement that they are not prepared at all for dealing with the actual stress of handling not one case at a time, but twenty. They are unprepared to live a life in which you do not sit quietly in a library or even in an examination room for three hours, but instead a life in which research must be done in short periods of time, the telephone interrupts you constantly, and you rarely have the luxury of dealing with one matter at a time.

Conference, supra note 4, at 13 (comments of Roberta Ramo, Esq.).

175. "There is a sense of the 'sheltered child' in many simulation and in-house programs." Stickgold, supra note 5, at 515.
to exclude practice supervised programs from the law school. This re-
action places too much emphasis on the similarities between practice 
supervised programs and apprenticeship, and ignores several impor-
tant points. First, there are dissimilarities between practice su-
ervised clinical programs and apprenticeship. Practice supervised 
programs are educational programs of law schools and, if schools pay 
attention to those programs, they can structure and oversee them in 
ways that ensure that the kinds of weaknesses that were reported in 
the apprenticeship system, such as too much time spent carrying a 
briefcase, do not occur in these programs. Second, practice supervised 
programs are only a small part of the larger law school educational 
program. No matter how different they are from the model some be-
lieve legal education should follow, they represent only a short detour, 
not a wrong turn. The diversity they provide enhances the total law 
school program. Finally, practice supervised programs should be 
judged on their merits, not based upon their similarity to an approach 
to legal education that is no longer officially approved.

There are those who insist that even if practice supervised pro-
grams could become good learning environments, they are not worthy 
of academic credit.\footnote{Sending students out to a legal aid office to do routine chores and report back to a faculty member periodically may add to the students' personal growth as all new experience does, but it is not within the definition of education for academic credit. Academic credit has to do with the systematic and measurable accumulation of knowledge and development of skills; if it were otherwise, then all law firm employees would draw credit . . . . If true clinical education is to be offered to law students generally it will cost vast sums of money, which clearly are not forthcoming.\textsuperscript{176}} This argument is based on a view of education that discounts or completely ignores the learning that is occurring in practice supervised programs. This argument tends to focus more on the resources that the school is putting into the program than on what the students are getting out of it. It is true that law schools usually must expend less resources on practice supervised clinical programs than they would have to expend to operate case supervised or in-house programs. There is nothing inherently wrong with the decision not to spend each tuition dollar paid for the program on that program. Certain-ly such a standard is not applied in other legal education contexts. If traditional courses were judged on that basis, law schools would be forced to undergo radical change. The large classes typical of many schools, especially during the first year, would have to be abolished, as would the small seminars those large classes make possible. It is clear that law schools would never accept such a standard; therefore, it should not be used to judge practice supervised programs.

The question whether academic credit should be granted for work
done under the supervision of a field supervisor who is not a member of the full-time faculty has also been raised. A representative statement of the case against credit comes from Professor Schön, who addressed the question in the context of field experiences at M.I.T.'s School of Architecture and Planning:

It seems to me, first of all, important to separate out the question of credit from the educational utility of an experience. All of life is potentially educational and need not on that account receive academic credit. What should be credited is the student's acquisition of knowledge, new for him, which it is the business of a particular degree program to help the student acquire—knowledge, that is, in the sense of information, theory, skills for inquiry, and most especially competence at the building of new theory. The student should be able to signify his new knowledge through performance—tests, papers, discussions—which faculty members certify. Moreover, faculty should not only function as gatekeepers for credit but should be closely engaged with students in the task; otherwise, faculty are thrust into a merely regulatory role which is at odds, it seems to me, with the functions of a university. Faculty should be charged with helping students acquire knowledge, not merely with judging after the fact whether they have done so.177

Do practice supervised clinical programs meet this test of faculty involvement in acquisition of knowledge? Although they involve faculty in design and general oversight, they consciously exclude the professor from case work. Is this type of oversight enough of a role to meet the standard articulated by Schön? Perhaps not.

On these criteria, students should not receive academic credit for field experiences in which university faculty are peripherally involved or in which they play only the gatekeeper role. It does not improve matters for students to be required to keep diaries or logs, to prepare evaluative papers, or to participate in concurrent seminars of the kinds often associated with such activity. The task of helping the student make sense of his experiences in the field and his efforts at intervention is an extraordinarily difficult intellectual task, for which there exists very little helpful theory, and it requires the main attention of a faculty member whose gifts and interests run along this line.178

Thus, the case supervised approach would probably pass muster under such an analysis, but the practice supervised approach probably would not.

Similar arguments have been advanced in the law school context. Dean Milstein, at a recent AALS-ABA workshop, suggested that the experience a student receives in externship programs is itself not creditworthy.179

I would suggest, however, that the award of credit is proper, even

177. D. Schön, Field Experience and Professional Education in M.I.T.'s School of Architecture and Planning 61-62 (Aug. 1974)[hereinafter D. Schön, Field Experience](unpublished manuscript available in University of Nebraska Law College Library).
178. Id. at 62. Schön subsequently made significant contributions to the literature in this area. See, e.g., D. Schön, Educating, supra note 84; D. Schön, Reflective Practitioners, supra note 84.
179. I guess the question that I would ask is should the award of academic
in the absence of faculty involvement in student case work. Credit is an artificial construct which, as Schön notes, is not based exclusively on the educational utility of a situation.\textsuperscript{180} The amount of learning associated with a unit of credit is highly variable from instructor to instructor, from campus to campus, from subject to subject, and its value varies from time to time.\textsuperscript{181} Thus, the decision concerning what is creditworthy is not tied to some fixed quantity of teaching or of understanding. It is ultimately a question for law schools and regulators to decide. Old understandings of credit should not be applied mechanically to new programs.

What should guide regulators and law schools in deciding whether non-traditional law school programs should be creditworthy? The history and purpose of credit in post-secondary education will provide helpful insights. A look there should convince them that their decision should be guided by practical concerns, not constrained by the traditional view of credit developed in the context of classroom courses. The only limitation on their decision is that it must remain within the bounds of public acceptance because, "[l]ike the dollar, the academic unit of credit is valuable only as long as people have confidence in it."\textsuperscript{182}

The concept of academic credit is a relatively recent creation. It was not completely accepted in higher education until the beginning of this century. Before then, the university curriculum was fixed so that the concept of credit was unnecessary.\textsuperscript{183}

The concept of credit has undergone significant changes in recent

\begin{itemize}
  \item \textsuperscript{180} The system of credits has become an important device for allocating financial and personnel resources to instructional activities, for setting fees, and for comparing educational costs but "the credit as a unit of educational output is as poorly defined as the degree." Warren, \textit{Awarding Credit}, in \textit{PLANNING NON-TRADITIONAL PROGRAMS} 116, 143 (K. Cross & J. Valley eds. 1974).
  \item \textsuperscript{181} Cross & Valley, \textit{Non-Traditional Study: An Overview}, in \textit{PLANNING NON-TRADITIONAL PROGRAMS}, supra note 180, at 6-7.
  \item \textsuperscript{182} Id. at 6.
  \item \textsuperscript{183} Id. See also Warren, \textit{supra} note 180, at 118:
  \begin{quote}
    Thus credits have derived their meaning entirely from the degree. Once qualifications for a degree are established, the definition and use of credits are arbitrary procedures for the purposes of permitting educational activities to be quantified for management and accounting reasons and for indicating the progress each student has made toward a degree.
  \end{quote}
\end{itemize}
years. In undergraduate institutions, the award of credit for off-campus work has developed along four tracks:

(1) study sponsored by educational institutions; (2) interinstitutional examination programs such as the College Level Examination Program (CLEP); (3) credit recommendations for extramural instruction such as courses and training programs offered by business, industry, and the military; and (4) nonsponsored experiential learning such as job experience, self-directed learning and so on.\footnote{Martorana & Kuhns, The Politics of Control of Credit For Experiential Learning, in TRANSFERRING EXPERIENTIAL CREDIT 1, 3-4 (S. Martorana & E. Kuhns eds. 1979)(citation omitted). These authors suggest that "[o]rganizational and group alignments on credit for experiential learning appear to be based less on questions of its educational merit than on its likely impact on the status of these organizations and groups." \textit{id.} at 11.}

Practice supervised clinical programs fall into the first category, the least radical of the four types of credit to win at least some acceptance in the undergraduate curriculum. Law schools do not award credit for any of the types of activities included in the second through fourth categories. This is true although work experience outside sponsored programs, or experiences in educational programs not affiliated with the law school, might increase the student’s competence to practice law. Thus, it is clear that even an extension of the concept of credit to include work in practice supervised programs is only a modest extension of the traditional concept of credit, and falls far short of what has been found acceptable in the undergraduate context. This suggests that the traditional classroom curriculum is more firmly established in law schools than it is in the undergraduate curriculum. This presents what some might consider an irony: life experience credit is available towards a liberal arts degree for demonstrated ability, work experience, and technical training obtained outside of school but is not available towards a degree in law school, where one might expect demonstrable increases in professional competence to be more highly valued than they would be in a liberal arts context.

The extension of the traditional view that I suggest is to award credit for work in a law school program that is designed, operated and monitored by the faculty. The award of credit will help the law school address problems that a more limited view of credit will permit to go unsolved. It will allow the law school to take a broader view of its responsibility for training lawyers.\footnote{For example, law schools have generally left the question of where the student would practice to the student and the placement office. However, law schools could take a different approach.}

Exploring these different ways of being a professional—especially through practical experience—seems to us to be a necessary part of professional education. It provides students with opportunities to taste their own reactions to various activities, roles, situations, and relationships and to find out what parts of the self are evoked. Inevitably, they begin to gravitate towards some activities, roles, and relationships and to avoid
that credit has not been earned. Practice supervised programs are demanding of student time and attention, and despite the suggestions of some critics that they are worse than no program at all, they provide students with valuable learning experiences.

The decision to make a distinction between learning from experience and learning from teacher direction, and to argue that credit is properly given only for the latter, exemplifies the overvaluation of control and the devaluation of experience that have been in evidence both among some faculty and in the accreditation process. This overvaluation of control and devaluation of clinical experience is not a phenomenon unique to externship programs. The conflict between traditional education and clinical education has been falsely characterized in terms associated with gender hierarchy. This false characterization has been described as follows: “Clinical education concerns people, unstructured situations, and feelings, all of which in our culture are generally associated with being female. Traditional education concerns abstractions, structure, and reason, all of which are associated with being male. Those associations contribute greatly to the unoriginality of clinical education.” Professor Tushnet suggests that “[t]here are two possible responses to marginality”: “Clinicians could say that clinical education is less female than it appears. This defensive posture claims that clinical education does just what traditional classroom instruction does; they could assert the positive value of femininity over the negative masculinity of the classroom.”

I suggest that in-house clinicians have largely chosen the first response, and that the regulatory efforts discussed later have reflected this choice as well. Those efforts have attempted to make clinical programs more structured and more faculty controlled. The suggestion that it is the classroom work associated with the more unstructured placement experience that gives the programs their “real” value is characteristic of the attempt to escape from the marginality of clinical education by adopting a more masculine approach. A clear example of this is the way that externships were described at a recent AALS-ABA meeting:

I like to think of the field placement as the equivalent of the textbook, the

---


187. Id. at 276.

188. Id.
equivalent of reading the case, it is the beginning point for education, it is not
the education itself. And I don't think it can be delegated from the law faculty
to some person outside the law school. 189

Dean Milstein argues that until the less structured clinic experience
can be transformed into a replica of case teaching it should not be wor-
thy of credit. This suggests that he and perhaps many others are un-
willing to recognize the placement experience for what it is and will
see it only in terms of the raw material it may provide the teacher.
This view denies the female nature of clinical teaching and much of
the value of field placement.

My defense of practice supervision is based on the inherent value
of the programs and their potential to solve problems law schools now
face. My defense does not deny the importance of enhancements that
can assist students who need help structuring or processing their ex-
perience. It does, however, deny that the assistance given students in
structuring and processing their experience is the only value these
programs offer. The non-traditional objectives and other possible ap-
plications of the technique discussed here are examples of the new and
different contributions that the practice supervision approach can
make to legal education.

The concept that only close work with regular faculty is
creditworthy will inevitably require schools to face the question of
what to do about finding faculty "whose gifts and interests run along
this line," as Schon characterizes faculty willing to work closely with
students in connection with their field experiences. The problems
that this lack of faculty has created in legal education are the subject
of Part VII, but for current purposes, suffice it to say that problems
are created when the interests of traditional faculty do not "run along
this line." 190 The hiring of new faculty with different credentials, in-

189. E. Milstein, Remarks at the AALS/ABA Joint Site Evaluation Process Work-
shop, AALS Annual Meeting (Tape 12, 1990 Conference Audio Cassette). Dean
Milstein is of course not the first to make this analogy.

Each clinic case may be taken by the student to the classroom of the
professor dealing with the subject under which the case logically falls.
The clinic thus becomes a "case book"—not, however, of dead letters de-
scriptive of past controversies, but always of living issues in the throb-
ing life of the day, the life the student is now living.

Rowe, Legal Clinics and Better Trained Lawyers—A Necessity, 11 ILL. L. REV.
591, 607 (1917).

190. Schon anticipated some of these concerns. He recognized that:

Graduate and undergraduate students vary greatly in their ability to be
articulate about field/academic dialogue and about the fundamental in-
quiry in which they are engaged. . . . The question is whether the student
may be helped in this process.

The very question poses a dilemma. If it is of the essence of the dis-
covery that the student learns to use the field/academic dialogue to be-
come active in relation to his own learning, what kind of "help" could
enable him to do so? What kind of help would not carry with it the
terests, and responsibilities has led to tensions between the two types of faculty. I later suggest that practice supervised programs can provide a solution to this problem. A narrow view of credit would prevent the school from using the practice supervised program as part of a solution to that problem.

Practice supervised programs also provide the law school with a possible solution to another significant problem: the widespread dispersion of its students to completely unsupervised clerkships. Students clerk primarily because they are bored with law school. There is some literature attesting to the fact that boredom is a significant and constant problem, particularly in the third year. Many if not most students have created their own extracurricular solution to this problem: they clerk during the school year and the summer for local attorneys. Part-time work during law school is common, and commonly condemned. However, “recent empirical studies suggest that part-time work during law school is not only not harmful to a law student’s learning, but may in fact be beneficial.” The challenge is not to find ways to eliminate part-time work, but to find ways to make such work

contrary message of submission to someone else’s notion of what is good for you?

This seems to me to go to the heart of what may be involved in effective “advising” and even in certain elements of effective teaching. . . . This would mean . . . hiring, promotion and tenure decisions reflect a priority on this type of competence. Traditionally, faculty members primarily interested in field experiences have been peripheral members of the Department.

D. Schön, Field Experience, supra note 177, at 56-59. Practice supervised programs attempt to address this dilemma by limiting the advisory role of the faculty member to some degree, and by using readings and class discussions instead of intensive one-on-one meetings with faculty advisors. For a further discussion of program enhancements, see Part V.

191. See, e.g., H. PACKER & T. EHRlich, NEW DIRECTIONS IN LEGAL EDUCATION 32 (1972)("No law faculty has succeeded in revamping the second and third years to eliminate the tedium." ); Doyel, The Clinical Lawyer School: Has Jerome Frank Prevailed? 18 NEW ENG. L. REV. 577, 582 (1983)(citing surveys on boredom and quoting from the Michelman Report); Dunne, The Third Year Blahs: Professor Frankfurter After Fifty Years, 94 HARV. L. REV. 1237, 1240 (1981)(reprinting a memorandum written by Frankfurter confirming that the third year is "largely a bore"); Gellhorn, The Second and Third Years of Law Study, 17 J. LEGAL EDUC. 1, 2 (1964). Boredom has been given at least partial credit for fueling the demands for clinical studies in the 1960s. See R. STEVENS, supra note 120, at 216.

192. The Consultant noted that “during the regular nine-month academic year many students are employed on a part-time basis working with law firms and in law related activities, especially those connected with the courts. During summer, many, if not most, law students now serve as summer clerks.” White, supra note 17, at 318.

even more beneficial to students.\textsuperscript{194} I suggest that the most promising solution to this problem is to integrate off-campus work into the law school curriculum, and that the best vehicle for accomplishing this goal is the practice supervised clinical program.

A great deal of the learning occurring while students are in law school is occurring completely outside the control of the law school.\textsuperscript{195} Practice supervised clinical programs provide the best opportunity available for law schools to exercise control over that off-campus learning. This opportunity has been largely ignored. Like clerkships, practice supervised programs are attractive to law students who are tired of the law school routine and yearn to begin to apply what they have learned. However, they offer the school the opportunity to exercise more control over off-campus learning than is possible when students clerk. Evaluation of the creditworthiness of practice supervised programs should be viewed in this context.

The position that practice supervised programs are creditworthy is consistent with current practices in legal education. If practice supervised programs were denied credit because a field supervisor, rather than a member of the full-time faculty, was involved in case supervision, it would be inconsistent with the way adjunct faculty have traditionally been used in legal education. A double standard may exist. For example, an outside individual who may not be trusted to supervise one student working on that individual's own cases may yet be judged competent, once designated an adjunct faculty member, to teach a classroom full of students in a more traditional setting. Is such a distinction fair, or even rational? If any distinction should be made, it should favor the practitioner doing clinical supervision, not classroom teaching. The practitioner may have no experience teaching in the classroom and may find the adjustment to classroom teaching difficult. At least in the clinical setting, the practitioner is doing what he

\textsuperscript{194} Examining the same problem in the context of students attending school in architecture and planning, Professor Schön noted that "[w]e probably could not obstruct this process if we wished to, and there seems to be no reason to wish to." Schön, Field Experience, supra note 177, at 54. That is true in the law school context as well. He noted that "[f]rom the students' point of view, field experience serves as yardstick, laboratory, escape, gap-filler, career compass, and, most importantly, as the means by which they are able to become active in relation to their own learning and educational development." Id. at 53-54.

\textsuperscript{195} The ABA does require that the law school limit the number of hours a full-time student may clerk to no more than 20 hours a week. However, there are those who believe that the law school's duty should extend beyond such minimal involvement. See, e.g., Pound, The University and the Legal Profession, 7 Ohio St. L.J. 3, 25 (1940): "If the University is to do the whole of the task which has devolved upon it because of its replacing the law office in legal education, it must learn how to replace the apprentice training on the side of training in the profession as well as training in the law."
CLINICAL LEGAL EDUCATION

or she does for a living: practicing law. If adjuncts are to be trusted in the classroom, they should be trusted in the field as well.

Moreover, schools operating practice supervised programs are suspected of having motives for doing so that do not relate to the educational value or potential of such programs. Because the cost of placing students under the supervision of volunteer practicing lawyers is small, and the credit allowed for such work is sometimes substantial, some argue that schools operate such programs because they are profit-centers, and because they appeal to students, practitioners, and local agencies. I believe that it is true that most schools have failed to realize the potential of practice supervised programs and have instead exploited them for their own purposes. It is also probably true that most schools have no interest in developing the potential of practice supervised programs. This is disheartening, but not surprising, given that full-time faculty has very little contact with practice supervised clinical programs, and that practice supervised programs are unpopular with most clinicians, the group that might be expected to be the most knowledgeable and supportive. Nevertheless, value and potential exist, and the challenge is to improve existing programs and to build a constituency around them.

Thus far, law schools have largely received results from practice supervised programs in proportion to what they have put in, in terms of thought as well as other resources. What can be done to support efforts to preserve and improve field supervised programs? The answer to this question is presented in several parts. Program enhancements may make practice supervised programs more attractive. In the next section, I explore the enhancements that could be employed to maximize the potential of practice supervised programs. Familiarity with regulatory developments is a prerequisite to informed action to preserve and improve practice supervised programs. In Part VI, I review the regulation of practice supervised clinical programs by the ABA and argue that a change in regulatory course is necessary if practice supervised programs are to be permitted to reach that potential. An understanding of clinical politics is necessary to a complete under-

196. A recent ABA study found that, of 289 non-judicial intern/extern courses surveyed nationwide, in 37.4% of the courses no full-time faculty was involved, in 55.0% of the courses one member of the full-time faculty was involved, in 2.2% of the courses two members of the full-time faculty were involved, and in 5.4% of the courses more than two members of the full-time faculty were involved. W. Powers, supra note 5, at 17. The survey also showed that only about half (49.5%) of the faculty involved were tenure track. The results of the survey for judicial externs/interns showed even less full-time faculty involvement, and fewer (34%) on the tenure track. Part-time faculty participation in non-judicial extern/intern courses was minimal (15% of the courses). Id. at 16-17.

197. The reasons for that unpopularity will be explored in section VII.A.
standing of the task. In Part VII, I discuss the politics of clinical education.

V. DESIGNING BETTER PRACTICE SUPERVISED CLINICAL PROGRAMS

We have really just begun to think about how to use externships in legal education. Such a statement might at first seem to be at odds with the evidence because field placements, with or without supervision from the school, have been a part of the law school curriculum for so long. Unfortunately, that long experience has not been of great value. The potential of practice supervised programs remains largely unexplored. Little attention has been directed to questions of program design, and less still to improving programs while maintaining practice supervision. That is why, where practice supervised programs are concerned, everything should still be considered experimental. There has been some sharing of materials designed for practice supervised programs at clinical conferences, but there are few law review articles that attempt to add to the discussion in this area and there are no standard texts. There is no formal system for sharing materials, despite attempts to establish one.

The "improvement" of practice supervised programs seems to be viewed exclusively in terms of the unthinking adoption of in-house techniques, such as the addition of more case supervision and the adoption of case conferences. The use of other kinds of enhancements has not been the subject of serious study. There is no one program that can be held up as ideal. The following is a summary of enhancements that have been employed or suggested by a few clinicians from around the country. These enhancements represent attempts to improve practice supervised clinics without transforming them into in-house or case supervised programs. They are advanced here only for purposes of discussion and they are not suggested as essential requisites of practice supervised programs. This is an important point to emphasize because the danger exists that enhancements

---

198. Legal aid clinics began to appear after the turn of the century. See Johnstone, Law School Legal Aid Clinics, 3 J. LEGAL EDUC. 535, 541 (1951). Professor Bradway was probably the most tireless apostle of the legal aid clinic in its early years. See Bradway, The Beginning of the Legal Clinic of the University of Southern California, 2 S. CAL. L. REV. 252 (1929); Bradway, Some Distinctive Features of a Legal Aid Clinic Course, 1 U. CHI. L. REV. 469 (1934); Bradway, The Objectives of Legal Aid Clinic Work, 24 WASH. U.L.Q. 173 (1939); Bradway, The Unending Quest, 1 CAL. W.L. REV. 46 (1965).

199. Professor Janet Motley of California Western has shared written materials that I adopted. Arguably Professor Motley runs a case supervised program because of her involvement in cases. See Motley, supra note 16, at 212-13, 216, 219, 223. Professor Leah Wortham of Catholic University has also shared materials, as has Professor Liz Ryan Cole of Vermont.
suggested as innovations will be embraced as minimums, and they will be used to discourage those with different ideas and approaches from pursuing their vision of a practice supervised program.\textsuperscript{200} It is too early in the process of developing enhancements to call for consistency among programs.\textsuperscript{201} Flexibility in this area needs to be preserved in order to permit continued development. Ideas are advanced here to support the concept that there are indeed ways to conduct practice supervised programs with integrity. None of the enhancements is intended to create case supervision, although that may prove a difficult line to hold. Each enhancement should be reviewed critically, and should be discarded if it does not benefit any particular effort. The suggested enhancements should be used in combination. In the discussion that follows, I will discuss some of the enhancements that I believe can work well together to strengthen practice supervised programs without adding additional case supervision by professors.

A. Prerequisites

The completion of a certain number of credits is usually a prerequisite to clinical placement. One way to improve the experience is to require students to complete specified courses prior to placement. Students wishing to enroll in the placement can be required to complete certain standard courses that would benefit them in the placement, such as evidence or advanced procedure courses, and they can be required to complete courses specifically designed to prepare the student for the types of placement offered by the school. Similarly, co-requisites, courses which must be taken simultaneously with the placement, can also be prescribed. In addition, courses can be recommended for students who plan to select particular placements. For example, a school could require students to complete a simulation course in litigation skills as a prerequisite to placement in an office that provides significant litigation opportunities. It could require evidence or procedure courses as prerequisites for that skills course. In addition, it could recommend that students seeking placement enroll in relevant substantive law courses either before or during the placement. These course requirements and recommendations provide some comfort that the students have been prepared, through their coursework, for some aspects of the challenges that they are about to face. Care must be taken to ensure that the placement does not carry so many requirements that few students will be eligible to participate.\textsuperscript{200}

\textsuperscript{200} As will be demonstrated in Part VI, that is the pattern that has occurred in the present regulatory scheme.

\textsuperscript{201} "[C]onsistency is a meaningless term to apply to an explorer. If he wanted to be consistent, he would stay home." G. STEARN, McLuhan: HOT AND COOL at xiii (1967)(quoting Marshall McLuhan).
The type and number of requirements that should be imposed are matters for discussion in each school. One type of course that is often required in connection with externships requires special discussion. That is the course in which students must enroll while they are in the placement—the "course component" of a practice supervised program.

B. Course Component

Course components vary widely. Some are used to provide the student with an opportunity to study substantive law, others focus on skills, from litigation skills to communication skills. Some programs can assume their students have basic skills and knowledge of the law because of program prerequisites. In those situations, the course may be used to broaden the students' view of the fieldwork. The concerns raised by using the course component to discuss particular cases were discussed in section III.A. Those who wish to avoid those concerns may decide not to discuss actual cases in the course component. A prohibition on the discussion of actual cases will have an impact on the potential of the course component, but this does not mean that the course component must be irrelevant to the student's experience. Such a prohibition might encourage students to work harder to relate the readings and hypotheticals that are used in the course to their particular cases.

The course component should attempt to help students process what they are learning in the placement and seeing in the real world. It has been noted that:

[I]t is not enough to let students see these things. Mere exposure may breed cynicism, despair, or disgust. It is essential to give students perspective on what they see: the causes of the problem; what is being done about it; the special responsibilities of the legal profession, if any, in the area. Thus, a strong classroom element should accompany any fieldwork experience.202

The classroom is a particularly good place to provide such support,203 and the full-time faculty is particularly well suited to provide it. The problem seems to be that, thus far, little attention has been paid to the importance of developing class materials to support student centered learning in practice supervised programs.

Course components may also address nontraditional concerns, such as how the student is learning in the placement and how that learning differs from the type of learning that is occurring in other law school courses. Issues of professionalism can be addressed, and professional

203. "If we are bold enough to expose students to truly unsettling experiences, then we are obligated . . . to help the student understand what has happened. Such backstopping, it seems to me, is a classroom function." Ferren, supra note 173, at 46.
responsibility can be discussed in the classroom as the student experiences real responsibility for the first time at the placement. Some standard materials may be useful, but I know of no standard text for such a course. When the discussion turns to nontraditional topics such as learning theory, the teacher may have to develop materials or borrow them from other clinicians who have done so.

I am not convinced that the course component should be as structured as other law school courses. The course plan should remain flexible enough to permit attention to problems that are identified during the semester. I do not suggest that the course have no agenda or that it serve merely as a forum for complaints. However, sensitivity to what the students need to enhance their field experience is essential, or the course component may lose relevance to the field experience. For example, students in a prosecution placement may have difficulty understanding, accepting, and applying the principle that a prosecutor is different from other litigants in that he or she has the duty to do justice, not simply win cases. Where concern about these issues arises in class discussion, time should be taken to address these concerns through readings, class discussion, and hypotheticals. It might be helpful to invite a career prosecutor to visit the class and discuss how he or she has resolved this issue. Too much structure might not leave time for such discussion.

One area which is of special interest is how the course component can be used to encourage students to be reflective and to generalize from their experience in the placement without significant faculty involvement in the students' case work. Some externship clinicians are currently involved in attempting to develop methods for encouraging student reflectiveness and generalization without intervention in case work. These efforts have focused on a number of questions. What existing relationships might foster reflection and generalization? Students may discuss some aspects of their placement experience with classmates and with faculty members who are not connected with the clinic. When students continue to attend class while in their placement, they can be expected to relate what they have learned in the placement to their other classes. This will result in some degree of reflection and generalization, but how can that level of reflection and generalization be increased? In addition, students have varying degrees of contact with the faculty member who is directing the clinic. Where that individual teaches the course component, that contact is more regular and more structured. The course component itself can emphasize the need for reflection and generalization. Written assignments can assist in this effort.

There is no consensus concerning how a course component should
be structured. The situation is complicated by the fact that students often resist the course component. The alternatives to large group meetings are smaller meetings, perhaps by placement, or individual meetings with students. Further experimentation with the course component is necessary.

C. Journals and Other Written Assignments

Some programs have attempted to formalize the encouragement of reflectiveness and generalization by requiring that students maintain journals of their experience. Journals can take many forms and different uses can be made of them. An unstructured journal may ask students to periodically record their thoughts on what they are learning from their experience. A more structured journal might give students various questions to answer about their experiences. For example, they can be told to take a decision that they have made or observed, and to analyze the choices involved in it. Even more elaborate and more structured journals can be required.

Unstructured journals may ask students to periodically record their thoughts on what they are learning from their experience. A more structured journal might give students various questions to answer about their experiences. For example, they can be told to take a decision that they have made or observed, and to analyze the choices involved in it. Even more elaborate and more structured journals can be required.

204. See e.g., Motley, supra note 16, at 227: "Many of us have tried classroom components, some more successfully than others. Generally, we have not been very satisfied with what that form has produced. Where 25-60 students are each doing very different work, it is difficult to create a relevant classroom component for all of them."

205. See id.

206. Motley has had success with individual meetings, but recognized that they are very labor intensive for program personnel. Id. at 228. Schön's work is useful in working through these concerns. Schön talks about the professor's role in this context as that of a coach. See D. SCHÖN, EDUCATING, supra note 84, at 311. There, he quotes John Dewey:

'It requires judgment and art to select from the total circumstances of a case just what elements are the causal conditions of learning, which are influential, and which are secondary or irrelevant. It requires candor and sincerity to keep track of failures as well as successes and to estimate the relative degree of success obtained. It requires trained and acute observation to note the indications of progress in learning, and even more to detect their causes—a much more highly skilled kind of observation than is needed to note the results of mechanically applied tests."

Id. at 312 (quoting J. DEWEY ON EDUCATION: SELECTED WRITINGS 181 (1974)). It remains to be seen whether the enhancements discussed in this section can effectively take the place of intensive, one-on-one coaching. I suggest that students might, with proper guidance, be taught to play a supporting role in such efforts, and thus the classroom and the other enhancements discussed in this section, when used together, might take the place of regular one-on-one meetings in the law school context.

207. See, e.g., Walker, Writing and Reflection, in REFLECTION: TURNING EXPERIENCE INTO LEARNING (D. Boud, R. Keough & D. Walker eds. 1985)(describing the use of a confidential portfolio as a tool to encourage reflection in experience-based learning). Requiring additional structure in the journal permits greater faculty control of student reflectiveness and generalization, without ongoing faculty intervention.
 journals can be used together with a highly structured set of written assignments. Such an approach focuses the students on particular aspects of their experience, like the need to reflect and generalize, and then permits them to record how those insights affected their learning experience in a relatively unstructured journal.

Different uses can be made of these written materials. They can be reviewed by faculty, either on a weekly or periodic basis, but should not be used as a vehicle to draw faculty members into the litigation being handled by the student.208 Even if these materials are not reviewed by faculty, faculty can nevertheless assist students in learning methods for keeping and using journals, by suggesting a journal structure, by suggesting additional readings, and by suggesting ways that the student might use these materials to evaluate things ranging from changes in perception to progress in achieving educational objectives in the placement.

D. Time and Activity Reports

Another significant development in the evolution of placements has been the requirement of detailed time and activity reports. Some schools require that the reports be filled out by the student and reviewed and signed by the supervising attorney. In some programs these time sheets are regularly reviewed. In some they are regularly fed into a computer which reformulates the data to show how much time each student has spent in court, in speaking with supervisors, in training, or in other activities. The time spent by individuals can be aggregated, so that the time spent in various pursuits by all the students in an agency, or in an entire program, can be monitored. In this way trends can be identified, and if the information is regularly shared with students and supervisors during the time in placement, the development of negative trends, such as too little training and too much responsibility, or too much court time and too little time preparing or discussing cases with supervisors, is easily identified and can be addressed. Current students are not the only beneficiaries of such a system. Potential students can be given a more accurate description of what kind of experience they can expect if they should accept such placements. Thus, the use of computers together with a sophisticated

---

208. Faculty review also raises issues concerning client confidentiality. If the director of the program is reviewing journals from a series of placements, he or she is probably not counsel for the client. Therefore, inclusion of confidential client information in the journal may waive the attorney-client privilege. Students can be instructed not to include such material in their journals, but this might not always prove effective because of the student's lack of sophistication in dealing with privileged information. Moreover, inclusion of confidential information may violate the extern's duty to maintain confidentiality. For further development of these concerns, see the earlier discussion concerning case conferences in section III.A.
time and activity reporting system allows detailed monitoring of student activities in ways that even regular student visits with a full-time faculty member might not permit. The value of such systems should not be ignored or discounted.

E. Placement Selection

Another way that schools have attempted to ensure the educational value of the placement is through placement selection. Decisions concerning where students should be placed do much to ensure the placement’s educational value. Placement with a good supervisor, or in an office in which supervision is generally good, or even in an office in which the raw material for a valuable experience is present, all add value to the placement.209 As was demonstrated earlier, placement may provide the student with the opportunity to practice under supervision in offices where he or she would not be hired after graduation doing tasks he may not have the opportunity to do after graduation.210 Thus, it is wrong to assume that there is no educational value added to the externship through the placement selection process. Even if the value of such placements is monitored in more general ways, for example as the quality of adjunct professors is generally monitored, by not retaining them in future years, the selection process adds value to placements.

F. Program Materials

There are a variety of program materials that can be developed to enhance a practice supervised program. Program manuals can explain the nature of the program, define the responsibilities of participants, and provide training and resource materials for students as well as field supervisors. Where problems can be anticipated, it makes sense to attempt to define responsibilities in writing to avoid misunderstandings. I know of no model set of program materials.

G. Training and Monitoring Supervisors

Some programs have tried to improve the quality of practice supervision by training and monitoring field supervisors.211 Techniques for accomplishing this goal include drafting manuals for supervisors, holding training events for supervisors, using supervisors as adjuncts.

209. For example, placement of a student in an office not known for its supervision can be valuable if opportunities to do trial work abound, real office pressures exist and students can obtain help if they need it. As was noted earlier, the fact that the educational objective of the school in making the placement is furthered in the selection should not be discounted or ignored.

210. See supra text accompanying notes 103-04.

211. See, e.g., Cole supra note 16.
faculty in required clinical courses, monitoring supervisor-extern contact on time and activity reports, talking with externs about the quality of the supervision they are receiving, and consultation between the school and the agency in the selection and retention of supervisors. Some programs have designed written evaluations that permit students and supervisors to evaluate each other more formally. Some programs have formalized agency commitments to student supervision and others have negotiated written agreements with participating agencies that attempt to define the supervisors' roles. Another approach to increasing the quality of supervision is to reward field supervisors either through the payment of supervisors for their work with the student, through conferring titles such as "adjunct professor" or by conferring other benefits on agency personnel who make a significant contribution to the program. These rewards and incentives may permit the school to place demands on supervisors that might otherwise be viewed as unreasonable.

As of this date, there have been limited opportunities for clinicians who direct practice supervised clinical programs to develop and share program enhancements. Until full discussion occurs, it is not possible to establish a customary approach in this area that does not risk causing more harm than good. The rejection of the concept that preparation, placement, monitoring, and training can take the place of full-time faculty supervision of the case work conducted by the student and field supervisor is, in effect, a rejection of the practice supervised clinical model.

VI. THE REGULATION OF PRACTICE SUPERVISED CLINICAL PROGRAMS

This section of the Article explores the regulation of field placement clinical programs by the ABA. The ABA developed and implemented its regulatory policies through the law school accreditation process. This section reviews the history of that regulation, with particular emphasis on the process that the ABA employs to develop and apply regulatory standards governing practice supervised clinical programs. The substance of the regulation is examined and critiqued, and the impact of the emerging regulatory trend on existing and future programs is suggested.

The evidence suggests that the ABA is in the process of developing accreditation standards that may force substantial changes in the way that practice supervised clinical programs are required to be operated if credit is to be awarded for student participation. Practice supervised clinical programs do not include full-time faculty supervision of

212. "The work of the American Bar Association and the Association of American Law Schools tends to move in one direction: to either abolish externships or con-
student case work in the placement. Student case work is supervised by lawyers who work in the offices where the students are placed, and the schools' role is generally limited to selection of the placement and general oversight. The emerging regulatory trend suggests that the ABA is moving towards requiring field placement programs conducted for credit to provide more full-time faculty involvement in the supervision of student case work. If this trend continues, case supervision would be required, and if this trend reaches its logical extreme, the full-time faculty would be required to take over case supervision from the field supervisors. If this occurs, practice supervised programs would be converted into in-house programs, conducted off-campus. It does not appear that the consequences of the trend towards case supervision and beyond have been fully appreciated.

A. Regulation by the ABA

The development of accreditation standards in legal education, like the development of standards in other professions, was influenced by developments in the field of medicine. This approach transfers governmental power to the dominant professional association. Typically, the dominant professional association in a given field establishes an accreditation process, and accreditation by that association is then made a requirement before the degree will be accepted by the field's licensing agency.

The ABA is the "designated guardian of the quality of legal education in the United States." Its concern for legal education has been longstanding. A standing committee on Legal Education and Admissions to the Bar, the forerunner of the present section of that name, was established at the first meeting of the ABA in 1878. In 1921, the ABA passed resolutions that provided that candidates for admission to the bar should be graduates of a law school and, for the first time, they established standards that law schools must meet to become approved. A list of approved schools was established and has been subsequently maintained.

The ABA's accrediting authority stems from two sources: the judiciary of each State (or in some cases the legislature), which determines who may seek...
admission to practice before its courts, and grant-making agencies of the federal government—primarily the new Department of Education which determines what institutions are eligible to seek public funds and which normally delegates that function to "private" accrediting bodies such as regional accrediting bodies or, in the case of law, the American Bar Association. Both sources of accrediting power—the state judiciary and the federal government—tend to defer automatically to the ABA's determination.

Thus, it is accreditation that permits students enrolled in a school to participate in major grant or loan programs, and that permits a school's graduates to take the bar exam. Lacking accreditation, a school will be "hard put to attract students." The approval of a course or program by the ABA is also important. A school with a clinical program offered for credit that does not conform to ABA standards must change or eliminate the program. Therefore, ABA approval is essential to continued student participation in law school clinical programs.

The ABA regulates legal education pursuant to written requirements. Since 1973, the ABA's Standards for the Approval of Law Schools have established the criteria against which law schools have been measured. The Standards were adopted by, and can only be amended by, the full ABA House of Delegates. The Council of the Section of Legal Education and Admissions to the Bar has authority "to interpret the Standards." When a law school violates the standards as interpreted by the Council, the violation may be brought to the attention of an accreditation committee.

220. Id.
221. Id.
222. Regulation by the ABA is only one part of the regulation of clinical education. ABA regulation is focused upon whether programs are credit-worthy. Other concerns are addressed by other regulators. State supreme courts regulate the practice of law students in clinical programs. The courts certify students to practice law while they are enrolled in clinical programs. In this endeavor, they are commonly interested in whether students participating in the program are of good moral character, are familiar with professional responsibility requirements, and have sufficient academic preparation for the clinical experience. State supreme courts also regulate the law practice of interns and their supervisors through the Rules of Professional Conduct or Code of Professional Responsibility. Both student-intern and lawyer-supervisor are bound by those rules generally in their practice. Of particular interest to interns and their supervisors are MODEL RULES, supra note 67, Rule 1.1 (Competence), Rule 1.6 (Confidentiality of Information), Rule 5.1 (Responsibilities of a Partner or Supervisory Lawyer), Rule 5.2 (Responsibilities of a Subordinate Lawyer), and Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants).
223. STANDARDS FOR APPROVAL, supra note 26, Standard 902(a).
224. Id. at Standard 801(i).
225. AMERICAN BAR ASS'N, RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS Rule 34 (Nov. 1988) [hereinafter RULES OF PROCEDURE].
1. The Development of Standard 306

In 1973, there was a major revision of ABA accreditation rules. ABA accreditation rules had previously been composed of the “Standards,” adopted in 1921 by the House of Delegates, and “Factors Bearing on the Approval of Law Schools by the American Bar Association.” The Standards were a one and one-half page statement of general principles and the Factors a twenty-page statement of more specific rules. The Standards were the product of action by the ABA House of Delegates and the Factors of action by the Council of the ABA Section of Legal Education and Admissions to the Bar.226

Before 1973, the accreditation rules did not contain a standard specifically directed to off-campus activity. Under Factor XIII, which was entitled “Additional Means of and Methods of Law Training,” “legal aid” was listed, together with other activities such as law review, as an additional method of obtaining legal training. Schools were not required to offer these alternatives, but the standard noted that: “What the school does along these lines may be an important indication as to its progressiveness and the results which it achieves.”227 At no point do the old standards relate any reservations about legal aid placement as an educational program. The first indication of concern appeared in proposed standards that were circulated in 1968. Proposed Factor B:2:8 revised Factor XII and provided:

In addition to regular courses in the curriculum, consideration will be given to additional means and methods of law training provided or made available to students. Activities such as law review, legal aid and defender clinics, law clubs, student bar association, briefing service, and the like may be an indication of an active, alert, forward looking professional program of a highly beneficial nature. On the other hand, these activities, if not properly oriented, may constitute a serious interference with the achievement and maintenance of a sound educational program.228

Thus, the concern that activities like clinical programs have a proper orientation emerged in the late 1960s, but it was not clear from the draft what being “properly oriented” might mean or how that requirement might be satisfied. However, at this point clinical programs were still not separated, in the concern expressed, from activities like law review. The proposed standards were apparently not adopted.

On February 12, 1973, Standards for the Approval of Law Schools by the American Bar Association were adopted by the ABA House of Delegates.229 The new Standards were the result of the work of a special committee, which held a number of drafting sessions, circulated


227. AMERICAN BAR ASS’N, FACTORS BEARING ON THE APPROVAL OF LAW SCHOOLS Factor XIII (1943).


drafts to law deans, the judiciary, and bar examiners, and received oral
and written comments. Standard 306 governs programs which per-
mit or require student participation in studies or activities away from
the law school if the time spent in such activities is to be included in
satisfying class hours or residency requirements. Subsection (c) of
Standard 306 provides:

(c) Each study or activity, and the participation of each student therein,
must be conducted or periodically reviewed by a member of the faculty to
insure that in its actual operation it is achieving its educational objectives and
that the credit allowed therefore is, in fact, commensurate with the time and
effort expended by, and the educational benefits to, the participating student.

The Standard suggests that there are two basic approaches to satisfy-
ing the requirements it imposes: through direct faculty supervision of
the off-campus activity ("conducted . . . by") or periodic faculty review
("periodically reviewed by") of the activity. Thus, the Standard seems
to recognize that both case supervised and practice supervised clinical
programs are acceptable educational programs. Although some have taken the position that practice supervised
programs should not be considered clinical programs, until recently
it appeared that the ABA considered practice supervised clinical pro-
grams as worthy of academic credit as other clinical models, provided
that they had been conducted or periodically reviewed by a member of
the faculty to insure that in their actual operation they were achieving


231. The Standard does not require active supervision of either students or field super-
visors, only "periodic" review of the "program" to insure that it is achieving its
educational objectives. I attempted to secure drafts of the proposed Standard 306,
and copies of comments received on that proposed standard in order to gain a
better understanding of the concerns that the drafters were trying to address. I
contacted the office of the ABA's Consultant on Legal Education for this informa-
tion, pursuant to my understanding that "[a]s the nationally recognized ac-
crediting agency for law schools, the Association through its Section of Legal
Education and Admissions to the Bar is required by the U.S. Department of Edu-
cation to maintain a complete, historical record of its accreditation activities . . . ."
A.B.A. 894, 896 (1984). I was denied this material, based upon the assertion that
the comments were confidential: "The position of the Officers of the Section has
always been that written comments regarding proposed new standards are confi-
dential, and my [sic] not be released without the consent of the parties." Letter
from James P. White to Stephen Maher (Apr. 4, 1989)(available in University of
Nebraska Law College Library). When I asked for the names of those making
comments so I could secure their permission, my request was ignored. Not even
the drafts were made available, although they were outside the claim of
confidentiality.

232. For example, William Pincus has opined that "[a] mere farmout of students in
law offices, without daily on-the-job supervision by law school personnel, cannot
properly be termed clinical legal education." Pincus, What Every Lawyer Should
Know About Legal Education, in CLINICAL EDUCATION FOR LAW STUDENTS 393,
394 (W. Pincus ed. 1980).
their educational objectives and that the credit allowed for them was, in fact, commensurate with the time and effort expended by, and the educational benefits to, the participating students.233

Recent regulatory developments suggest that at least some within the ABA may be rethinking the position established by Standard 306.234 This was the conclusion of some clinicians who attended the Albuquerque Conference. After the official program ended, clinicians involved with practice supervised programs had planned to meet to talk about matters of mutual concern,235 since that conference, like most clinical conferences, had paid little attention to the problems faced by such clinicians during the official program. The session was attended by a number of important ABA and AALS representatives who had attended the conference, and they discussed their views on current accreditation standards for practice supervised programs. The discussion at that meeting suggested that a storm of opposition to practice supervised clinical programs was rising within the ABA. While discussion at the meeting focused on “substandard” programs, there were those among the critics who had never seen a practice supervised program that they believed was not substandard.236 The discussion at that meeting created concern that practice supervised clinical programs were in danger of abolition or transformation into case supervised programs through application of accreditation standards.237 Developments since that conference confirmed the fears of many practice supervised clinicians. Although Standard 306 has never been changed, since 1987 practice supervised clinical programs have been

233. This is a paraphrase of Standard 306(c).

234. A full discussion of the regulatory developments upon which this statement is based follows.

235. The meeting was advertised as Running Effective Externships, AALS Sec. on Clinical Legal Educ. NewsL., June 1987, at 5-6.

236. Professor Glesner’s Notes reflect that Richard Nahstoll believes that even externships where faculty members screen, train and supervise the field supervisors, and review the students’ logs and journals, are substandard. Glesner Notes, supra note 81, at 2. This approach, if adopted by the ABA, would preclude schools from operating practice supervised clinical programs. Requiring direct faculty supervision of the placed students would change the nature of these programs from practice supervised to case supervised.

237. Professor Glesner’s Notes reflect the discussion at the meeting: “The fear expressed by some participants, upon hearing this interpretation of the accreditation requirements, was of the ABA requiring all externships to become little different in effect from in-house clinics conducted off-campus.” Id. Nahstoll, in the Sunday meeting, made it clear that he understood the ABA accreditation standards to require that full-time faculty provide direct supervision to students in all externship programs. Id. This understanding was not shared by all who attended, but Mr. Nahstoll has played an important role in this area for many years. He was the Chair of the Special Committee on Law School Standards that drafted the Standards. 97 REP. A.B.A. 453 (1972).
encountering significant difficulties in the accreditation process.238

Do practice supervised clinical programs fail to meet minimum accreditation standards? What are the accreditation standards by which practice supervised clinical programs should be judged? Standard 306's requirements seem straightforward enough, and practice supervised clinical programs seem to meet the letter as well as the spirit of this standard. Indeed, for more than ten years after the adoption of Standard 306, traditional practice supervised clinical programs had apparently survived without challenge. How have regulators now come to the conclusion that practice supervised programs are "substandard"?

2. Groundwork For Future Regulation

Opposition to practice supervised programs among in-house clinicians has been longstanding for reasons which are discussed in the next section. Such opposition failed to influence a wider audience in the 1970s. In 1972, there was "a serious but abortive effort" by a committee of the AALS to draft a list of minimum standards for clinical education.239 Broad guidelines were proposed by Professor Gorman in a 1971 article.240 These proposed guidelines stressed that such programs should possess educational value and should involve teachers with faculty status. CLEPR also played an important part in attempts to develop standards. Since it was a significant funding source, it could and did insist on compliance with "a few broad principles" of clinical legal education: "(1) that credit be given; (2) that the clinic directors be members of the regular faculty; (3) that clinic courses be integrated into the regular curriculum; and (4) that the law school have some financial investment in the program."241 However, despite a decade of work by CLEPR, which was at that point strongly supportive of in-house programs and against what it called "farm-out" programs, the results were disappointing. While CLEPR reported "continuing movement" from farm-out to in-house from 1968-1978, in 1978 about sixty percent of clinical programs still were of the farm-out variety.242

In the 1980s, the tide began to turn. The first big victory for in-house clinicians was the adoption of Guidelines for Clinical Legal Education.243 The Guidelines were drafted by a committee under the

238. See infra note 324.
241. Allison, supra note 239, at 276.
242. CLEPR FIFTH BIENNIAL REPORT 7, 41 (1977-78). There is reason to believe that externships are still more prevalent than in-house programs. See supra note 5.
243. That document included a Committee Report, the Guidelines, Project Director's Notes and Consultant's Reports.
joint sponsorship of the ABA Section on Legal Education and Admissions to the Bar and the AALS and funding for the effort was provided by CLEPR. The Guidelines reflect a strong bias against practice supervised clinical programs. The Project Director's Notes acknowledge that fact: “The Committee's majority positions suggests that programs known as 'farm-out' clinics usually do not satisfy the Guidelines.”

The Guidelines attempt to provide “guidance” in a variety of areas. For example, the Guidelines establish a structure that requires identifying substantive educational objectives; conducting a classroom component; relating fieldwork to substantive legal issues; faculty responsibility for determining and overseeing the accomplishment of the course's substantive objectives; and faculty responsibility for supervising cooperating attorneys [the Guidelines' term for field supervisors] in fulfilling their teaching responsibilities.

The guidance provided was designed to reinforce the in-house vision of the clinic and ignored the potential of alternative approaches. For example, the Guidelines’ concern with the “teaching” being done by cooperating attorneys seems to ignore the fact that the achievement of a student’s educational objectives in practice supervised programs may be less affected by the quality of the field supervisor’s teaching than would be true in-house.

The adverse effects that the Guidelines could have, if enforced against practice supervised programs, were clear, and “[d]uring the Committee’s deliberations, significant concern was expressed” that the Guidelines would hamper educational programs conducted by public interest firms. It was also recognized that one effect of enforcing the Guidelines “would be to increase the cost of courses using cooperating attorneys because of the faculty responsibilities for participating in the planning of the course; supervising, training, and evaluating the cooperating attorneys; and teaching some part of the course.”

Another important aspect of the Guidelines is their focus on the formalities of faculty title and source of income instead of educational outcome. This focus is consistent with the emphasis that in-house cli-

244. Guidelines, supra note 31, at 3.
245. Id. at 77.
246. Id.
247. Id. The use of the term “substantive educational objectives” suggests that the range of choices a school could have in choosing objectives should be limited in some way, but the thought is not developed.
248. Id. at 108-109. For a more complete discussion of how the responsibilities traditionally placed upon an in-house supervisor may be shared among the student, faculty member and field supervisor without involving the faculty members in practice supervision, see supra subsection IV.A.2.
249. Guidelines, supra note 31, at 110.
250. Id. at 109.
nicians have continued to place on these matters. It was the subject of a dissenting comment, which argued that such a focus is inappropriate because it places form over substance.

It does not appear that the adoption of the Guidelines had any appreciable effect on practice supervised programs in the early 1980s. However, they were effective in changing the nature of the debate itself. By providing "standards" that practice supervised programs admittedly could not meet, they enabled opponents of practice supervised clinical programs to claim, with respectable support, that practice supervised programs were "substandard." The discussion ceased to be about competing clinical models and became instead a question of quality control and educational value. This change proved to be a decisive stroke. In-house clinicians were quick to take advantage of this aspect of the Guidelines. Shortly after the adoption of the Guidelines, one in-house clinician wrote: "At a minimum, the Guidelines may cause law schools and clinical teachers to critically examine their programs and upgrade those that are educationally deficient. If so, the Guidelines will have served a valuable purpose.

The importance of the Guidelines in the development of accreditation standards has since been recognized. Nevertheless, the Guidelines themselves "emphatically" deny that they are intended as accreditation standards, and they specifically acknowledge the impor-

---

251. See infra section VII.A.

252. In our view, the Guidelines should focus not on such formalities as faculty title and source of salary, but on educational outcomes; not on the process by which a clinical program has been developed, not on the formal relationship between law schools and those who perform teaching functions within the program, but on the quality of the clinical education which the program delivers. To do otherwise is to confuse means with ends, and to substitute a convenient but irrelevant litmus test for a relevant and essential substantive standard of educational value. Obviously a law school cannot be expected to vouch for the creditworthiness of any program unless it has a way of ensuring that the program maintains high standards. But this consideration requires only that schools undertake a careful evaluation before granting academic credit and monitor programs to ensure that they do not deteriorate. This is, after all, the only control which the school has even on the quality of courses taught by its own faculty.


253. This lack of effect is not surprising given the fact that the Guidelines failed to acknowledge the differences in educational objectives that may characterize practice supervised programs, and in effect took the position that, if a school were serious about clinical education, it would begin by converting its practice supervised program to either a case supervised or in-house program.

254. Hoffman, supra note 30, at 277 (emphasis added).

255. "[The Guidelines and the work of people here at the ABA Conference on Professional Skills] led to the accreditation standards on which the entire movement heavily depends." Conference, supra note 4, at 107. Professor Robert B. McKay, who made this comment, chaired the committee that drafted the Guidelines.
tance of flexibility and experimentation.\footnote{256} Such a disclaimer was perhaps necessary because the committee drafting the Guidelines was specifically told not to develop accreditation standards.\footnote{257}

The suggestion that the accreditation process should be used to develop and enforce policy in this area also runs directly contrary to the Cramton Report.\footnote{258} That Report recommended that “[t]he Council of the Section of Legal Education and Admissions to the Bar should continue to maintain a hospitable attitude towards experiments in legal education directed at improving lawyer competency.”\footnote{259} Dean Cramton’s cover letter transmitting the Report summarized its approach by stating it “reject[ed] the views that every law school should be the same and that external regulation of legal education is the path to its reformation.”\footnote{260}

Thus, despite the fact that the Guidelines’ effort was not intended to create accreditation standards governing clinical programs, it was probably the most significant development in the creation of such

\begin{itemize}
\item \footnote{256} [The Guidelines] are emphatically not intended as standards for purposes of accreditation or in any other way to force clinical legal education into a particular mold. Clinical training, like other aspects of legal education, is too vital to be denied the flexibility of diverse experimentation and adjustment to meet the needs of individual legal education programs.
\end{itemize}

\begin{itemize}
\item \footnote{257} The letter from the AALS and ABA which gave the Committee its charge warned: “It is not the purpose of this Committee to recommend accreditation standards for clinical education.” Letter from Joseph R.Julin and Eugene F. Scolts to Deans of AALS Member and ABA Approved Law Schools (Jan. 10, 1978), reprinted in GUIDELINES, supra note 31, at 3 (emphasis in reprint).
\end{itemize}

\begin{itemize}
\item \footnote{258} How can the present trend toward more effective and more complete lawyer training in law schools—which the Task Force views as a desirable one—be encouraged? We have considered a range of methods, many of which seem unsuitable.
\end{itemize}

\begin{itemize}
\item For example, we stand opposed to suggestions that the pace or direction of the movement be closely shaped through regulatory measures. Regulatory measures include changes in ABA Standards of Approval for Law Schools which would impose detailed requirements on approved law schools . . . . Diversity and experimentation rather than mandated uniformity offer the most likely path to more effective law school training.
\end{itemize}

\begin{itemize}
\item \footnote{259} \textit{Id.} at 5. The Cramton Report also recommended that: “Although the law faculty must retain responsibility for course content and quality control, law schools should make more extensive instructional use of experienced and able lawyers and judges, especially in structured roles in which they utilize their professional knowledge and skill.” \textit{Id.} at 4. Practice supervised clinical programs provide such opportunities, and are probably the clinical model best suited to make full use of practitioners while maintaining structure and quality control.
\end{itemize}

\begin{itemize}
\item \footnote{260} \textit{Id} at v.
\end{itemize}
standards. Moreover, despite carefully stated reservations about using the accreditation process to develop and enforce policy in this area, the transformation of abstract discussion about clinical models into a debate about “standard” and “substandard” programs naturally led to the development of standards in the accreditation process. The Guidelines laid the foundation for future regulatory developments, and inhouse clinicians and their supporters were quick to encourage the ABA to build on that foundation.

In May 1984, the Section of Legal Education and Admission to the Bar, upon request of the Consortium on Professional Competence, determined to undertake implementation of a recommendation of the Task Force on Professional Competence that a “model plan” be distributed to externships and clerkships to help them become better educational tools.261

The Council of the Section of Legal Education and Admissions to the Bar referred the matter to the Skills Training Committee of the Section, which reported back on December 14, 1985.262 The Committee was very critical of “placement clinics.”263 It found that “probably fewer than five, possibly as many as ten” clinics operated as it believed such clinics should.264 However, it did not even identify them.265 The Report acknowledged that “[e]ven where there is sufficient motivation for improvement, there are serious practical problems to be overcome, primarily related to resources.”266 Nevertheless, the Report concluded that “[a]ny school that really wants a sound placement clinic and is willing to support it adequately will have little trouble designing an educationally sound course.”267 It is not clear from the Report exactly what an acceptable placement program would look like.

The Report recognized that serious attempts at improving practice standards may supplement law school instruction. We recognize the limited value of poorly planned and supervised externships and clerkships. If they are to be effective educational tools, they require an appropriate purpose, plan, breadth and structure. Guidelines and a model plan for externships and clerkships should be developed. It may well be that the appropriate models have already been developed by certain law firms and law schools, but have not been widely disseminated. A model plan, distributed to externship supervisors and to prospective supervisors and to prospective employers of clerks, would serve a useful purpose.

We recommend that the Section of Economics and Law Practice, the Section of Legal Education and Admissions to the Bar, the Young Lawyers Division, and the Law Student Division work together to that end.

Skills Report, supra note 8, at 1.

261. Id.
262. Id.
263. Id. at 4.
264. Id.
265. Id.
266. Id. at 5.
267. Id. at 2.
supervised clinical programs had not yet occurred, and that flexibility was necessary because professional skills instruction is still evolving, and "[i]t would be premature to look for any set of standards for professional skills instruction which would be thorough in scope and rigid in application." Nevertheless, the Report specifically recommended that the Section "encourage law schools (through the accreditation process, articles, and seminars) to comply with the principles of the AALS/ABA Guidelines for Clinical Legal Education in all components of their programs for professional skills, including placement clinics." 

The Report concluded by calling for the Section "to pay increased attention to placement clinics during the normal processes for interpreting and enforcing law school accreditation standards." The fact that the use of the Guidelines as accreditation standards is contrary to the terms of the Guidelines themselves is not made clear in the Report.

The Report's adoption of the Guidelines means that, in the Committee's view, practice supervised clinics would never be acceptable. Thus, the Report in fact recommended that all practice supervised programs be abolished or converted into case supervised programs. Nowhere in the Report was this made clear. In fact, the Report made it sound as if the problem was a question of seriousness of purpose, rather than a matter of serious disagreement among legal educators concerning the merits of different program designs. The Report did not respond to the actual charge given to it by the Section: to provide externships with a model plan.

268. *Id.* at 2.

269. *Id.* at 3 (emphasis added).

It would be a mistake to extract the portions of the Guidelines with particular relevance to placement clinics or to suggest modifications to the Guidelines at this time. No placement clinic can be appropriately evaluated except within the context of that school's overall professional skills instruction program. The Guidelines recognize this and provide adequate suggestions for accomplishing an overall evaluation.

*Id.* at 2.

270. *Id.* at 3 (emphasis added).

271. For example, the Report stated that "placement clinics have a well-deserved but unnecessary, bad reputation." *Id.* at 4. The use of the term "placement" obscured the differences between two types of clinics that operate using placements: case supervised and practice supervised. This lack of clarity permitted the Committee's recommendation, that practice supervised be abolished or converted to case supervised clinics, to remain clear only to those who were very familiar with the background documents to which the Report refers. Thus, the ambiguity in terminology helped to mask the substantial nature of the change recommended.

272. "The Committee has been charged with review and consideration of a request of the Consortium on Professional Competence. It will report to the Council its recommendations for a model plan for externships to be distributed to externship supervisors and to prospective employers of clerks." *Report of the Section of Legal Education and Admissions to the Bar*, 109 REP. A.B.A. 894, 897 (1984). Un-
3. **The Development of Two Interpretations**

Shortly after the Report was issued, an interpretation of Standard 306, known as "interpretation 2," was adopted. The interpretation was an attempt to define more clearly the degree of faculty involvement in externships. The circumstances leading up to the adoption of the interpretation were recounted by Dean Rudolf Hasl at AALS Annual Meeting held in Los Angeles in 1987. He reports that interpretation 2 grew out of an attempt to respond to critics' charges that students placed in practice supervised clinical programs were being exploited as a source of free labor. In that regard the dispute that led to interpretation 2 is integrally related to another dispute that involved the Council, an ongoing effort by some schools to gain approval for the award of both pay and credit for the same clinical work. The two matters are integrally related because one possible solution to the criticism that practice supervised programs exploit students is to permit students in such programs to get paid at the same time they receive credit. In the interest of clarity, I will begin by discussing the credit-plus-pay issue, which was addressed by interpretation 1 to Standard 306, and then continue the discussion of the developments leading to interpretation 2.

Credit-plus-pay is an important issue for clinical education, and is especially important for clinical programs that involve off-campus placement. Credit-plus-pay offers solutions to a number of problems, especially in externships. When students receive both pay and credit, the law firm's stake in the student is increased. This could encourage

---

273. Upon recommendation of its Special Sub-committee to Study Standard 306, the Accreditation Committee of the ABA Section on Legal Education and Admissions to the Bar, at its November 7-9, 1986 meeting, unanimously recommended that the ABA Council adopt interpretation 2 of Standard 306. The Council of the Section, at its December 6-7, 1986 meeting, adopted the interpretation. R. Stuckey, A Compilation of Standards, Guidelines and Recommendations Related to Professional Skills Instruction 4 (Sept. 1987) [hereinafter Compilation] [available in University of Nebraska Law College Library]. The text of interpretation 2 can be found in Stickgold, supra note 5, at 296 n.49.

274. The Consultant has characterized the interpretation as a response to concerns about the design and administration of externships and about coordination between the full-time faculty member administering the program and the field supervisor, and about what the student is learning in the placement. White, supra note 17, at 319.

275. I did not attend the session. I relate the history of interpretation 2 as it was described in a Letter from Dean Hasl to Stephen Maher (Feb. 12, 1988) [hereinafter Hasl] [available in University of Nebraska Law College Library]. Dean Hasl was in a position to know this history because he was a member of the committee that drafted the interpretation, and was Vice Chair of the Accreditation Committee at the time he wrote.
better supervision and discourage the assignment of menial tasks.\textsuperscript{276} It has also been noted that credit-plus-pay will provide the school with even more influence, should it attempt to exert control over the part-time work that now exists totally outside the law school's sphere of influence.\textsuperscript{277} Students with a choice of receiving pay and credit in a school's placement, as opposed to pay alone at an outside job, might be more inclined to enroll in the school's program. The need to exercise better control over off-campus activity has been periodically suggested.\textsuperscript{278} In addition, credit-plus-pay programs could allow financially needy students to participate.\textsuperscript{279} Allowing credit-plus-pay would also undercut the exploitation arguments currently leveled by critics at credit only placement programs.\textsuperscript{280} Credit-plus-pay programs could even generate funds for the law school.\textsuperscript{281}

Ironically, the principal opponents of credit-plus-pay are the same people who criticize placement programs as exploitative: in-house clinicians. The principal educational arguments against credit-plus-pay were set out in the \textit{Project Director's Notes} that accompany the Guidelines.\textsuperscript{282}

The primary focus of a law firm is representation of the client. Clinical legal studies involving fieldwork are concerned with both the student and the client. They seek to educate students in the context of client representation. The Committee felt that payment of student salaries provides the law office with a powerful element which can distort the relationship between the law school and law firm.


\textsuperscript{277} \textit{Id.} at 1022.

\textsuperscript{278} That was the concept behind the charge that led to the Skills Report, and I suggest that practice supervision provides the best opportunity to control and structure off-campus learning of various kinds.

\textsuperscript{279} Simon \& Leahy, \textit{ supra} note 276, at 1022-23. The exclusion of needy students from participation in practice supervised clinical programs is an important problem that has gone largely unaddressed. Because it is difficult, if not impossible, for students to attend regular classes, work at a field placement for credit, and work in a paying clerkship at the same time (some schools wisely, I believe, simply prohibit students in the clinic from outside work), needy students are generally excluded by economic forces from clinic unless they can obtain financial aid sufficient to cover their lost clerking income, or can take the clinic as part of a work-study program. Taking the clinic work-study allows the student to receive credit for a portion of the clinic, and to receive pay for the balance. Work-study students do not receive both credit and pay for the same work. The disadvantage of work-study is that it may pay less than the prevailing clerking wage and, more significantly, that work-study students must enroll in an additional course or courses to make up for the credit lost to permit compensation. The work-study students' heavier academic load takes time and attention away from the clinic.

\textsuperscript{280} \textit{Id.} at 1024.

\textsuperscript{281} \textit{Id.} at 1043-45.

\textsuperscript{282} Simon and Leahy have characterized the following argument as the major educational objection, and have labeled it the "conflict of interest" objection. \textit{Id.} at 1025-26.
The problem presented by the joining of credit and compensation is that it dangerously tips the balance away from the educational focus and toward a focus on client service in a context which properly starts with this predilection. . . . The thrust of the Guidelines is to assure the educational purpose of clinical legal study. Student salaries tend to blur the distinction between a job and educational study for the employer, the student, and the law school.283

On the merits, the conflict of interest arguments are unpersuasive. No live-client clinical experience is purely educational, because, by definition, live-client clinics require service to clients. There is always a tension between education and service. Credit-plus-pay may give the placement a bit more leverage in that tug-of-war. If it does, the school is capable of responding to that extra pressure through the numerous controls discussed earlier. The concept that ten dollars an hour somehow transforms the same experience from education into work shows just how fragmented our concept of legal education has become. It also demonstrates that we do not really understand work if we see it as something that is completely separate from the professional training of law school. The message that law schools should be communicating to their students is the continuity in their learning and professional development through both school and their life in the law.

A second educational objection is that student salaries would undercut the school’s capacity to enforce Guideline VIII, relating to supervision, and Guideline XIII, which relates to “cooperating attorneys,” those individuals that I refer to as field supervisors.284 This objection is based on the same misguided premises employed by the conflict of interest arguments, and is similarly unpersuasive.

The other concerns raised by credit-plus-pay relate to the ability of lawyers to teach,285 which have been addressed in Part IV. There is also the concern that students may be improperly motivated by the money and might not be permitted to actually represent paying clients in court, because paying clients, unlike indigents, could afford better.286 I find the improper motivation argument unpersuasive given my experience with work-study students, who traditionally have been paid and have shown no indication of improper motive as a result. The argument that paying clients would not have student lawyers is inconsistent with the view discussed earlier that consents obtained from clients to permit the use of their confidential information in class for

283. GUIDELINES, supra note 31, at 99-100. Simon and Leahy note that Guideline X.B itself does not absolutely prohibit credit-plus-pay (“ordinarily” both should not be awarded) and that language passed only by a 4-3 vote. Simon & Leahy, supra note 276, at 1025-26.


285. Id. at 1028-29.

286. Id. at 1029-30.
teaching purposes are voluntary. If paying clients would not agree to student representation, how can anything but desperation motivate indigent clients to allow their confidences to serve as the grist of class discussion, where waiver of the attorney-client privilege could result?

There are also the following economic arguments against credit-plus-pay: (1) that credit-plus-pay would be too expensive; (2) that it would draw students away from programs for the poor; (3) that it would drive down student wages and put pressure on schools to give credit for part-time work; and (4) that credit-plus-pay would constitute unfair competition with classroom courses. Each of these objections may be briefly answered. First, expense is a matter for each school to consider, and not a basis for an outright prohibition. Second, the idea that the addition of credit-plus-pay would put pressure on programs for the poor is of minor concern given that regulators are now in the process of abolishing practice supervised programs, which have always been the mainstay of legal service to the poor. Third, it is unlikely that credit-for-pay programs will "force down student wages." If they did, however, it would be a benefit because it could serve to make credit-plus-pay programs more competitive with private clerkships. This might be just what the law schools need to reassert control over their students' learning, which they are now content to cede, in large part, to law firms through clerkships. Fourth, the argument that schools would be forced to give credit for part-time work is dubious. Credit-plus-pay would be awarded in the context of a clinical program, and for that reason would be distinguishable from part-time clerking. Finally, as for the claim of "unfair" competition with classroom courses, the unfairness of the competition depends to a significant degree on one's perspective. Members of the law school community now seem willing to ignore the unfair competition provided by law student clerkships. If concerns about competition with course-work are real, credit-plus-pay offers schools an opportunity to gain control over off-campus work. These counter-arguments, taken as a whole, show that the economic objection to credit-plus-pay is based more on philosophy (or more accurately, on interest) than on logic.

Nevertheless, after considering the issue, the Council issued interpretation 1 of Standard 306(a) which provides: "Student participants in a law school externship program may not receive compensation for a program for which they receive academic credit." What went wrong? There is no written "legislative history" to explain the Coun-

287. See supra text accompanying notes 72-74.
288. Such arguments are discussed in greater detail by Simon and Leahy. See Simon & Leahy, supra note 276, at 1031-34.
289. Id. at 1031.
290. Id. at 1016.
CLINICAL LEGAL EDUCATION

I believe that credit-plus-pay was opposed by those who seek to make placement programs less competitive. But even assuming a more noble motive, such as protecting the image of clinical education as a "serious academic endeavor[,]" the goal was achieved at a substantial cost. When credit-plus-pay was sacrificed, a powerful solution to many problems facing field placement clinical programs was lost. The prohibition against earning both pay and credit has been identified as "[a] major reason for the failure of clinical programs to expand into private practice." I believe that the sacrifice was not worth the gain and that the image of clinical education as a serious academic endeavor is being preserved, not for students, but for clinicians who seek to use it as their vehicle into the academy. It is my position that the Guidelines and Project Director's Notes are essentially political documents in a political struggle.

The decision not to permit credit-plus-pay did not end the matter. In the mid-1980s, a number of schools applied for a variance to permit the offering of both credit and pay. The Accreditation Committee tried to determine the situations in which a student could appropriately receive both credit and pay for clinical work. What constituted an acceptable field placement program under Section 306 was viewed as a fundamental question in the settlement of the credit and pay variance issue.

At the time that the issue was considered, neither the Standards nor existing interpretation provided guidance. Initially, the Accreditation Committee developed a rule of procedure concerning the granting of variances, but the basic question of what constituted an acceptable Standard 306 program remained. Quite a few site evaluation reports discussed field placement programs, but they usually did not provide much information concerning the way in which the programs were structured. It was with this background that the Accreditation Committee established a working group to develop what became interpretation 2 of Standard 306. Interpretation 2 was drafted in a factual context that is also significant; some of the cases before the Accreditation Committee had caused great concern.

Interpretation 2, according to Dean Hasl, represented an effort to

291. Id. at 1016 n.6.
292. Id. at 1030.
293. Id. at 1016.
294. For further discussion of the politics, see infra section VII.A.
296. Id.
297. Id.
298. Dean Hasl has reported that: "There were programs which charged students with full tuition and provided a full semester's credit for an essentially unsupervised experience thousands of miles from the home campus." Id.
state the minimum requirements for a program meeting the requirements of Standard 306, without inhibiting growth and experimentation in what is still a developing area. It was developed as a “process oriented rule” which would ensure that programs were thought through before they were implemented. Finally, it represented a compromise between those who wanted more elaborate requirements and those who wanted somewhat less restrictive requirements.

4. Unpacking Interpretation 2

Interpretation 2 contains several paragraphs of requirements. First, it requires that a law school which has a program that permits or requires student participation in studies or activities away from the law school (except foreign programs) shall develop, publish, and communicate to the students and “field instructors” a statement which defines the “educational objectives” of the program. To the extent that the requirement was adopted to ensure that some thought be given to what the students are learning and could learn in placements, it is a welcome development. In the past, faculties had not given enough thought to what students are learning and could learn in practice su-

299. Id.
300. Id. Dean Hasl has taken strong exception to my suggestion, in this Article, that the interpretation was part of an effort by in-house clinicians to put practice supervised clinical programs out of business. “Interpretation 2 was not intended to be an assault on externships. The assertion that the basis for the hostility is the economic threat to clinicians who are operating in-house programs is simply unfounded. At no time in the discussions surrounding the adoption of Interpretation 2 did such an assertion arise.” Id. at 1.
301. The main features of interpretation 2 have been described this way by the Consultant:

First, the law school must establish and define the educational objectives of the program. What is the purpose of the program? What are the educational objectives of the program? The law school faculty must determine and define the educational objective of the program by the same process which would be followed with respect to in house law school programs. The program shall be approved and periodically reviewed in accordance with normal law school approval and review procedures. Second, the field instructor (practicing attorney or judge) must undertake a continuous evaluation of the student’s experience throughout the duration of the program. Thus, dialogue and evaluative action is required. Third, a member of the faculty must periodically review the program to ensure that it meets its announced educational objectives. The program cannot be a farming-out or warehousing of the law student. There must be a periodic review of the program and the individual student’s experience to assure its educational quality. This review must be undertaken by a member of the faculty in accordance with the basic premise and requirement that responsibility for the law school curriculum rests with the full-time law school faculty.

The interpretation then lists a variety of factors which might be used in evaluating the program.

White, supra note 17, at 319-20.
supervised programs. As a result, even the meager resources allocated to these programs have not been well directed.

The interpretation's solution to the problem of faculty non-involvement is to treat practice supervised programs much like other courses taught by full-time faculty. It is questionable whether this is the best approach. A better approach would recognize the student-centered nature of such programs and allow the students to decide their own educational objectives, rather than having the faculty decide the objectives on a program-wide basis. A practice supervised program will place students with different interests in a variety of offices. It is unlikely that each office participating in the program will be equally well-suited to achieving the same objectives. A program that has a single predetermined educational objective, or even a standard set of objectives, deprives the students who participate in the program of the opportunity to make those decisions for themselves. It makes more sense, in a student-centered program, to encourage students to take greater responsibility, not just for achieving objectives, but for setting them as well. After being given sufficient background information, and the opportunity for reflection and discussion, students are capable of selecting their own educational objectives. The students can then be encouraged to monitor their success in achieving the objectives they have established. Such flexibility will permit practice supervised programs to address the educational interests of their students. It is not clear why it was thought necessary or desirable that all students in the program have the same objectives. It perhaps reflects the incorrect assumption that the objective of all placement programs is the teaching of lawyering skills.

The characterization of field supervisors as "field instructors" reflects that bias. This choice of language here and elsewhere in the interpretation suggests that the regulators view the students as learning what their field supervisors are "teaching" them, in the same passive way they would learn in a classroom. In fact, the students in a practice supervised clinical program are learning much differently in their placement than they learn in class. Much of their learning in the placement is and will be student-centered, and will differ in significant ways from the passive teacher-directed learning that students become accustomed to in law school. Thus, the focus on instruction demonstrates an insensitivity to both the opportunities for student-centered

302. Denying students the opportunity to select their own objectives deprives them of a truly student-centered learning experience. "Student-centered teaching results when students are allowed (1) to set classroom objectives, (2) to establish means of arriving at these objectives, and (3) to evaluate progress toward attainment of these objectives. Before students can assume this novel role it is usually necessary to un freeze traditional forms of response." Martell, Age of Creative Insecurity: Student-Centered Learning, 15 J. Educ. Libr. 112, 113-14 (1974).
learning that practice supervised programs offer and the benefits that such an educational approach can provide for the practice of law.303

The interpretation specifically addresses the types of educational objectives that might be acceptable: "Among educational objectives of such programs may be instruction in professional skills, legal writing, professional responsibilities, specific areas of the law, and legal process."304 This listing of educational objectives confirms the orientation suggested both by the requirement of faculty preselection of objectives and by the characterization of supervisors as instructors. First, the interpretation recognizes only "instruction" in the indicated areas as acceptable.305 This focus on passive learning appears to be intentional. This is a concern because the strength of practice supervised clinical programs lies in their ability to provide students with opportunities for student-centered learning, not "instruction." Second, although the word "among" suggests that the listed educational objectives are not exclusive, the fact that certain educational objectives have been specified in an accreditation document is itself a concern, because it sug-

---

303. This approach to learning is nevertheless typical of prevailing attitudes. Harold Taylor expressed his frustration with this situation in the following manner:

If you want to ride a horse, dance a jig, climb a mountain, build a boat, write a novel, study history, think intelligently, become educated, a certain amount of instruction in a class in the subject will be useful—perhaps for two or three sessions. After that you will need to get a horse, start dancing, climbing, building, writing, thinking and educating on your own. Otherwise you will not have learned what you needed to know, that is, how in fact to do the thing you have set out to learn to do. To learn to do something it is necessary to practice it.

Although this is astonishingly clear as a general proposition, the entire American educational system is built on the opposite principle, that learning is done only through instruction and intervention by a teacher who explains, describes, instructs, and then certifies that the learner was present in a class while the explanations and descriptions were being given.

So prevalent is this view of learning, and so pernicious its effect in educational institutions that it has taken years of struggle, research and rebellion to return to the simple clarity of the original truth about education and to put its consequences into practice. The idea that knowledge stems from experience and that knowing is an activity of the one who knows has a respectable ancestry in the British empirical philosophers, the psychology of William James, the views of the existentialists, and the educational theories of Alfred North Whitehead and John Dewey, among others. The idea also has the advantage of being continually affirmed in the experience of anyone who has ever learned anything.


305. Modern methods of instruction are no panaceas. In fact, some adhere to the position that freedom of inquiry can be more important. "It is in fact nothing short of a miracle that the modern methods of instruction have not yet entirely strangled the holy curiosity of inquiry; for this delicate little plant, aside from stimulation, stands mainly in need of freedom; without this it goes to wrack and ruin without fail." C. Rogers, *Freedom to Learn* at iv (1969)(quoting Albert Einstein).
suggests that the listed objectives are the ones that the faculty is expected to select. Especially where faculties unfamiliar with field placement programs are forced to look at them for the first time by the interpretation, this handy list may well have an impact on the choice made by the faculty. This could create problems at the time the program is evaluated because programs are evaluated against their stated objectives. Objectives such as instruction in litigation skills and research and writing may be better taught in-house or in a simulation course. Some would argue that objectives such as instruction in specific areas of the law are better taught in a traditional classroom. If the regulators are suggesting the adoption of educational objectives that other types of courses or programs are better suited to achieve, regulators may be setting up practice supervised clinical programs to fail. If such programs are judged only by criteria that are better suited to evaluate more passive learning environments, much of the learning which is occurring will not be recognized.

Why are these objectives suggested? Why have objectives that practice supervised clinical programs are better suited to achieve been left out? One answer is that the regulators are not familiar with the programs they are regulating. By viewing the universe of possible educational objectives as bounded by the limits of instruction in lawyering skills, regulators miss possible educational objectives for practice supervised programs suggested earlier. They also fail to appreciate the various ways that practice supervised programs can be made a part of a curriculum for educating lawyers: as a foundation for simulation training; as a reinforcement of simulation training; as enrichment of legal education in general; or for some other purpose. Perhaps regulators have an unconscious bias in favor of the passive learning that pervades the traditional classroom, and the more teacher-directed experimental learning that is typical of the simulation and the in-house clinic. If that is the case, although the interpretation may not be intended to stifle experimentation, programs may not in fact be free to pursue their own educational objectives. It may prove difficult to encourage student-centered learning without running afoul of regulators who are looking for instruction.

The interpretation next requires that the “field instructor or a
faculty member” engage the student on a “regular basis” throughout the term in a “critical evaluation” of the student’s field experience. The interpretation’s use of the disjunctive seems to indicate that as long as the field supervisor regularly engages the student in a critical evaluation of the student’s experience, the externship meets minimum standards. Thus the engagement discussed by this portion of the interpretation does not seem to require direct faculty supervision of students in the externships. However, by requiring that either the supervisor or faculty member regularly engage the student in a critical evaluation of the field experience, the interpretation ignores the fact that other methods, such as requiring students to complete a series of written assignments over the course of the semester or to keep journals of their experience, have been developed to encourage student reflection and generalization without direct intervention by faculty members or field supervisors. The requirement of intervention may inhibit experimentation in practice supervised clinical programs, despite the professed intent of the drafters to permit such development.

The interpretation also requires that a member of the faculty “periodically review any program conducted by a field instructor to ensure that the program meets its educational objectives.” The interpretation specifically requires that,

[in conducting such review, the faculty member should consider the time devoted by the student to the externship, the tasks assigned to the student, selected work products of the student, and the field instructor’s engagement of the student on a regular basis in a detailed evaluation of the student’s field experience.]

The interpretation’s requirement that faculty members review “work products” may create some immediate problems and has the potential to create others. The requirement that full-time faculty must review “work products” may threaten the viability of some excellent placements of students as judicial law clerks. Some courts do not permit students to discuss their work, to remove their written work from the building or to show it to their professor. Are schools permitted to place students with widely respected judges in such courts under the interpretation? If not, what thought has been given to the impact of

308. Standards for Approval, supra note 26, Standard 306 interpretation 2(c).
309. Id. at Standard 306 interpretation 2. The requirement is that the faculty member ensure that the program, not the individual student, meets the schools’ educational objectives.
310. Id.
311. At the AALS meeting in Miami in 1988, Dean Joseph Harbaugh, when asked this question, answered in the negative. The Dean was a member of the Accreditation Committee at the time. The response came in a question and answer period which followed a presentation on the Standard and the interpretation designed to inform legal educators about accreditation standards. Despite this opinion, the educational value of clerking for such a judge is hard to ignore, and goes beyond research and writing. Students learn how judges think, how the court functions,
such a decision on what many consider to be valuable academic programs? The requirement has the potential to abolish practice supervised programs and to replace them with case supervised programs. This may be true even where faculty members seek to preserve their traditional role. The dynamics of the situation may lead to such a result.

The requirement that work products be reviewed may prove to be a slippery slope. To review student work products from the placement intelligently, a significant level of inquiry by faculty concerning the particulars of individual cases may be necessary. As was noted earlier, in connection with the discussion of case supervision of judicial placements, the fair evaluation of student work done at the direction of another is difficult because it must be evaluated in context. That context includes the limitations that were placed on the student by the supervisor and the limitations inherent in the factual and legal background, as well as the limitations that are being graded, those involving the student's abilities. To sort out one set of limitations from another, a significant inquiry is necessary.

Furthermore, looking at writings out of context may cause the faculty member to miss some of the real-world lawyering that is occurring. Writing a memo to a court is different from writing a memo for class because the point is not to show the judge you know the material, but to win the argument. Part of being a good advocate is knowing what to leave out, as well as what to put in. How can a faculty member who is not fully familiar with the case appreciate the soundness of judgments of this kind? If enough time is taken to address these concerns through the full attention of faculty, these programs are changed in ways that make them less attractive to faculty and less cost-effective. To the extent that added attention requires the hiring of a special faculty to teach in these areas, the labor problems discussed in a later section can be expected to arise.

The interpretation's whole approach of examining work products can be criticized as embracing an objectivist view of lawyering. Related through their experience are able to demystify a process they have studied for years in a classroom setting. It is often the student's only view of the process from the other side of the bench, since that experience cannot be duplicated in law school or in practice, and most students do not clerk for judges after graduation.

312. See infra text accompanying note 56.
313. This is not to suggest that students should leave out contrary authority. The point is a more subtle one about litigation strategy. For example, it might be important to leave out discussion about the standard that a litigant wants a court to adopt in order to avoid dissolving the consensus for the litigant's position that the argument seeks to build. A teacher might look at such a brief and note that the standard was missing—but that may have been a strategic decision that cannot be appreciated without a more complete understanding of the case.
314. See infra text accompanying notes 393-97.
tionships between lawyer and judge and lawyer and client are relativistic. The objectivist focus is both false and one of the things that practice supervised programs are helping students escape. When students return to the classroom after spending time in the practice supervised program, they ought not be content just to read the case.

Moreover, it is not entirely clear what the interpretation means by "work products." If the requirement of the review of work products is given a narrow reading, to avoid the problems that a broader reading could create, it could perhaps be satisfied by the review of the students' time and activity reports, written assignments made by the program (as opposed to written work done in connection with the student's case work), and the student's journal. By permitting review of written work assigned by the school to satisfy this requirement, rather than requiring review of written work assigned by the placement, the problems posed by case supervision may be largely avoided.315

The fact that the regulatory trend is moving in the direction of case supervision is not just suggested by the requirement of the review of work product that is contained in the interpretation. Case supervision had been unambiguously recommended in an earlier draft of the interpretation that was proposed but not adopted. This draft of the interpretation had been drawn up by Dean Rudy Hasl and was circulated by Roy Stuckey at a meeting of externship clinicians in 1986. In pertinent part, the draft provided:

6. Consistent with applicable ethical rules and considerations and attorney-client confidentiality, written student work requiring analysis or critique shall be submitted to the supervising faculty members.

7. The supervising faculty member has an independent obligation to make a qualitative review of the student's work product and to communicate an evaluation of that work to the student.316

These criteria, if adopted, would have forced faculty in practice supervised programs to inquire into the substance of pleadings in ongoing cases, and this intervention would place practice supervised clinics on the slippery slope towards case supervision. The interpretation does not go as far as the draft in requiring law school faculty involvement in case supervision, apparently because of opposition by practice supervised clinicians.

At the 1986 meeting, when these criteria were reviewed, clinicians questioned them, asking: "If competent field supervisors are selected, isn't the faculty supervisor just second-guessing the field supervisor if he or she asks too many questions, or probes too far into specific case

315. Such problems may not be completely avoided, because, for example, students may include confidential information in their journals.

decisions?" The discussion was attended by eleven people, not all of them externship clinicians, in a meeting in Vermont that was not held in connection with any major conference. The fact that this level of discussion was inadequate is suggested, not just by the attendance figures, but by the nature of the input provided at the meeting. For example, on the subject of review of student work product, Cole and Daniels summarily report that "[t]he consensus of the group was that faculty supervisors should review representative work of their students but not necessarily all written products." The fact that no objection was raised at that meeting to the review of work products is probably responsible for the incorporation of this pernicious requirement in the interpretation. A decision as important as the parameters of acceptable clinical education should not be decided with such limited input.

The interpretation concludes with a list of the factors which the Accreditation Committee shall consider in determining whether a program complies with the requirements of Standard 306. These factors include the prerequisites for and the extent of student participation; the method of evaluation of student performance; the qualification and training of field instructors; the method of evaluation of field instructors; the classroom component; student writings; the adequacy of instructional resources; the involvement of full-time faculty; and the amount of academic credit awarded. The interpretation, however, provides no guidance concerning what these factors mean or how much weight the presence or absence of each should be given.

When the meaning of the interpretation was explored by a group of externship clinicians at the AALS Workshop on Clinical Legal Education held March 12-14, 1987, in San Antonio, their questions and concerns filled a four page memorandum. Professor Elson also responded to the interpretation and the January 1987 memorandum:

My biggest problem with these documents [the interpretations of ABA Standard 306 and the guidelines on the review of professional skills programs that are given to ABA site evaluation teams] is that by elaborating in great detail on all of the factors that would be well to consider in designing the best

317. Id. at 15.
318. Id. at 13. Approximately 25 people indicated that they were unable to attend but were interested in the outcome. Id.
319. Id. at 16.
320. The Consultant ends his descriptive piece on the interpretation by noting: "Adherence to the factors set out in the interpretation assures the law student that the experience in practical lawyering skills is a satisfactory introduction to the practice of law." White, supra note 17, at 320. Thus, the focus here on skills training is clear.
321. See STANDARDS FOR APPROVAL, supra note 26, Standard 306 interpretation 2(e).
extern program, the guidelines detract from focusing on the critical issue of the identification of the vital prerequisites of a worthwhile extern program.\textsuperscript{323}

From a comparison of these reactions, the nature of the document as a compromise can be seen. Both Elson and the externship clinicians are troubled by the interpretation's ambiguity. Elson, an in-house clinician, is concerned that the interpretation does not clearly delineate which programs meet accreditation standards. Externship clinicians are also concerned about ambiguity because they are unsure whether their programs meet the requirements of the interpretation, and sense from this and other developments that forces are at work that are seeking to make fundamental changes in their programs. While a reading of the plain language of the interpretation may not establish that limiting acceptable educational objectives or requiring case supervision in field placements are the purposes or will be the effects of the interpretation, there is nevertheless reason to suspect that regulation is headed in those directions.

5. Living With Interpretation 2

The Sunday discussion at the Albuquerque Conference suggested that important figures in ABA accreditation believed that practice supervised clinical programs are substandard. A review of the interpretation's history and language does not seem to bear out such a judgment. How has the interpretation actually been applied? Surprisingly, the Accreditation Committee has found reason to believe that practice supervised clinical programs are not in compliance with Standard 306 with regard to adequacy of supervision.\textsuperscript{324} This is surprising because the interpretation, as its intent has been described, and as it is written, does not seem to support such a result.

How can such a result be explained? While the interpretation does not explicitly prohibit practice supervised programs, it focuses on their weaknesses and ignores their strengths. In the accreditation process, this could cause difficulties for such programs. Furthermore, the interpretation is far from clear. The fact that the interpretation was drafted by a group which included no externship clinicians may explain why even externship clinicians have been confused by the interpretation. The fact that the interpretation represents a compromise,

\textsuperscript{323} Elson, supra note 29, at 11.

\textsuperscript{324} The particulars of individual cases are confidential, but the fact that a significant number of schools were experiencing difficulties with their externship programs in the accreditation process became clear from the discussion at the Externship Committee meeting of the AALS Clinical Section at the 1989 AALS Annual Meeting in New Orleans. Representatives of a number of schools, including a few deans, reported that their externship programs had experienced difficulties in the accreditation process, and they came to the meeting because they wanted to know what was going on.
but not a consensus, may also be responsible for this anomaly. Dean Walwer and Richard Nahstoll were both on the committee that drafted the interpretation, and they were both at the discussion in Albuquerque, where they did not agree on its meaning. Ambiguity in the interpretation, and its general tone, may permit those who are hostile to practice supervised programs to press their agenda through secret school-by-school decisions in the accreditation process.

Because of the secrecy involved in the accreditation process, it is hard to know what is happening at individual schools. However, it

---

325. Nahstoll’s views are clear from the remarks he made on Sunday morning, immediately before the externship meeting.

I’m alarmed by what I’ve heard around here about how some of these externships are being conducted to the extent that they are, or approach, a program in which a school accepts a student’s tuition with its left hand and points with its right hand out to the horizon and tells the student to go get a job and return at the end of the semester, or anything close to that. Those externships are unacceptable. They are not meeting the minimum requirements, the very minimum requirements of the standards, and I think that perhaps in this afternoon’s session, which is piggy-backing on this conference, there may be some time for some more discussion of that.

Conference, supra note 4, at 98 (statement of R. Nahstoll). I think it is fair to say that Nahstoll has never seen a practice supervised program that he believes satisfies accreditation standards. Dean Walwer, on the other hand, did not agree that all practice supervised programs are substandard. His remarks in the morning session before the afternoon meeting similarly reflected his approach: “And let’s be more mindful of what adjuncts can competently do—not because using adjuncts is education on the cheap, but because you can engage magnificent adjuncts to do a marvelous job with the same kind of credentials law teachers have when they enter the academic realm.” Id. at 100.

326. “[T]he entire tone of the ruling evidences a basic, and obvious, distrust of the field supervisor. It seems to demand that the faculty review much of the student’s work, as well as the supervisor’s work, as if the supervisor were but another student.” Stickgold, supra note 5, at 323.

327. RULES OF PROCEDURE, supra note 225, Rule 36, entitled “Access to Site Evaluation Reports and Committee and Council Action,” provides that site evaluation reports are confidential and may be disclosed only with the approval of the chairperson of the Council of the Section of Legal Education or the consultant on legal education. The consultant’s action letter may be disclosed by the school (although disclosure is rare because it is unlikely that it would be in the school’s best interest to do so), but only a full release of the letter, not a release of excerpts is permitted. One year after the initial transmittal of the determinations of the Accreditation Committee, including specific findings of compliance and noncompliance with the Standards, the consultant shall, at the request of any person, make available the remaining specific findings of noncompliance.

328. At the Sunday meeting in Albuquerque, Professor White, the ABA Consultant on Legal Education, in answer to a question about whether it was proper for externship clinicians to ask each other about the difficulties they were experiencing at the hands of the ABA in the accreditation process, stated that members of the law school faculty of the schools experiencing difficulty would presumably want to be limited in their discussions so the matter would not become public and harmful to the school with regard to such matters as student recruitment, fundraising, and so forth.
is no secret that, in the Accreditation Committee, "the hot topic is, has been, the promulgation and application of interpretation 2 of Standard 306, having to deal with externships." Schools are visited during the regular reinspections conducted every seven years, and sometimes at other times as well. The teams prepare the inspection reports which are used by the Accreditation Committee to evaluate the school's externship program. Thus, one source that may shed some light on what standards are actually applied in the accreditation process are the written instructions given to members of site evaluation teams. In January 1987, shortly after interpretation 2 was adopted, and then again in September 1988 and September 1989, the Consultant on Legal Education to the ABA issued new instructions to members of site evaluation teams. The site evaluator's instructions

---


330. A sample inspection report, released as an enclosure to a Memorandum from Kathleen S. Grove to Persons Attending the AALS Clinical Legal Education Program (May 31, 1988 |hereinafter Grove Memorandum| available in University of Nebraska College of Law Library), provides an interesting insight. The report, which has names deleted, praises the in-house clinic as "well-planned and well-executed, but underfunded." Id. at 11. The report suggests that the in-house clinic needs more money, more space, and raises concerns about the faculty status of the clinicians under Standard 405(e). Id. at 11-12. In contrast, the portion which discusses the school's placement program is quite critical of the clinical director, who, the report contends, is making decisions by "unguided ad hoc judgment" devoid of general faculty review. This criticism is leveled because there are "no written standards or criteria for determining the appropriateness of any particular field placement or field instructor." The sample report goes on to explain that "[a]lthough the Clinical Director, who had previous experience in clinical teaching, had a sophisticated understanding of the elements of an educationally valuable experience, it was clear that the dean and faculty had no involvement in such determinations on an individual or policy level." Id. at 8. The report did not call for case supervision in the placement, but the specific criticisms raised in the report suggested that, to satisfy concerns raised in connection with subsection (e) of interpretation 2 of Standard 306, the school would need to make significant changes in the program.

331. "The evaluation of a law school in operation naturally reflects the experiences and predilections of those who draft and adopt the standards for accreditation and, to a certain extent, of the evaluation team and those who have to act on their reports." Cardozo, Accreditation in Legal Education, 49 CHI.-KENT L. REV. 1, 12 (1972). Site evaluators' instructions provide some insight into the understandings of the evaluators and those who sent them. Those instructions provide, on the first page, in capital letters, underlined: "THIS DOCUMENT SHOULD NOT BE READ OR USED AS STATING MANDATORY REQUIREMENTS FOR SKILLS TRAINING PROGRAMS." Memorandum from James P. White, Consultant on Legal Education to the American Bar Association, to Site Evaluation Teams 1 [hereinafter White Memorandum]. The contents of the instructions can, nevertheless, be expected to have a significant impact on the accreditation process. They provide specific directions to inspection teams concerning points that should be covered in conducting inspections and they reflect the consultant's interpretation of applicable standards.
include interpretation 2 and add additional commentary and questions. Although these instructions have changed almost every year, it is reasonable to expect that they shaped the understandings of the accreditation standards held by team members who conducted site visits during the time of their use.

The January 1987 instructions were very problematic. That version of the site evaluator's instructions, under the section titled "Placement Clinics" provided, in part:

In addition to the topics applicable to all clinics, the following areas of inquiry relating particularly to placement clinics should be covered.

Do faculty supervisors visit each placement clinic on at least a weekly basis? Do the faculty supervisors meet regularly with each student? Do they review student work regularly? Do they observe student performances in court? Do they participate in grading the student? Do they monitor the quality of instruction and meet regularly with the field supervisor to make suggestions and answer questions?

These questions clearly suggested that only case supervised programs were acceptable. That position is not supported by either Standard 306 or interpretation 2. This section of the instructions was criticized in a circulation draft of this Article, and it was not included when the September 1988 instructions were issued. Nevertheless, the fact that such questions were included in the first place suggests that there is pressure somewhere in the system to require case supervision. A clear requirement of case supervision may emerge if a third interpretation of Standard 306 is adopted.

The September 1988 instructions also included some commentary inconsistent with the basic assumptions that underlie practice supervised clinics. One example was the observation that "in all clinics, a major part of the educational experience occurs through the one-on-one meetings between students and their direct supervisors." This observation may be incorrect in the case of practice supervised clinics, and certainly ignores the importance of student-centered educational objectives in such programs. If the true educational experience is the reflection and generalization that follows from the experience, as some contend, then in structured practice supervised programs most of the educational experience is occurring as the student makes entries in the journal, completes written assignments, thinks about assigned readings, and participates in the class component. Critics should not be permitted to claim, on the one hand, that placement without assurances of reflection and generalization is not an educational experience, and then turn around and claim that most of the learning in a practice supervised program is occurring during the experience in the placement, not in connection with the measures taken

332. White Memorandum, supra note 331, at 9.
by the school to assure reflection and generalization. The instructions proceeded to list more than fifty specific questions that should be asked during the evaluation of placement clinics.334

In September 1989 the site evaluator's instructions were significantly revised. The new format was designed to facilitate an in-depth review of externships as well as professional skills programs in general. Those familiar with the accreditation process expect the professional skills section of the report to be the longest section in the site evaluator's report submitted to the Accreditation Committee, in large part because of all the information that must be reported about externships.335 The report must describe the externship in detail, and must address each of the criteria set out in interpretation 2.

Neither Standard 306 nor interpretation 2 seems to require case supervision, yet activity in the accreditation process suggests that these writings do not tell the whole story. Occasionally, members of the Accreditation Committee give a public glimpse of how they view these requirements. Dean Joseph Harbaugh, a former in-house clinician, was a member of the Accreditation Committee when he made the following observations during a role play at the National Conference on Professional Skills:

If we're using externships, we may use placement with other lawyers. However, we must have the involvement of our full-time faculty because it's there that we can give the critique and analysis that is not likely that the placement supervisor cannot provide [sic]. There are others who would disagree with that, who would say that we can simply rely on the placement supervisors. Yet, we do have an interpretation by the ABA of Standard 306 that will require us to have some form of involvement by the law school. Preferably, it's very active involvement by a member of our faculty.336

This understanding of the requirements seems at variance with the requirements as written, which do not prefer active involvement by faculty in case handling (which I understand is suggested by Dean Harbaugh) to other forms of monitoring. Because individual understandings of the requirements held by those on the Accreditation Committee are not usually subjected to scrutiny outside the secret accreditation process, it is impossible to know the real requirements that are governing accreditation decisions.

334. Id. at 10-12.
336. Conference, supra note 4, at 71. Richard Huber, the President of AALS at the time, responded as follows:

One advantage of being a dean is that you get to do a lot of accreditation inspections, and I am happy to hear you speak this way about outside placement programs. I think one of the real issues is that some of these programs do not seem to be educationally controlled nor are students suitably evaluated.

Id.
In a similar vein, when individuals are called upon to describe the accreditation process at events held for that purpose, a view emerges that does not always square with the written record. Dean Elliot Milstein spoke at the AALS-ABA Joint Site Evaluation Process Workshop, as an individual selected by those organizations to explain the site evaluation process. He suggested that, as a site evaluator of externships, "[y]ou ought to be looking for . . . faculty critique of student work [and] faculty participation in the preparation [of cases]." This assessment does not seem to find support in the written materials just reviewed, but it was nevertheless being suggested at a training event for site evaluators. Perhaps Dean Milstein finds authority for such an inquiry in the AALS Bylaws; he spoke at the invitation of the AALS and suggested that the AALS Bylaws, which are much less defined than the ABA requirements, may play a part in the reinspection process. Dean Milstein reported that the AALS Accreditation Committee has drafted comments explaining its concerns about externships, and it is not yet clear where that effort will lead.

B. A Critique of ABA Regulation

It appears that the regulatory scheme that is currently being developed will, for the first time, attempt to draw the borders of "acceptable" clinical legal education. This is a significant event; in a sense it is the end of an era in clinical legal education. What is perhaps most remarkable about this event is that, from all appearances,


338. Id.

339. Id. An evaluation and critique of AALS accreditation efforts is outside the scope of this Article.

340. This trend is also evident within the AALS Clinical Section. The Section's Externship Committee, which I believe has not and does not effectively represent the interests of practice supervised clinical programs, met during the AALS Clinical Section meeting in Washington, D.C. in May 1989, to discuss the proposal that the Section develop its own standards for externships. I opposed this idea along with others who see the establishment of standards to be a serious threat to the development of practice supervised clinical programs. Little progress has yet been made in this effort, but it remains a threat, because such standards could be used against programs in a number of ways, including in the accreditation process. Any assurance that such standards would not be used in the accreditation process is of little comfort, given the history of the Guidelines.

341. This event has not come unheralded. In 1974, one dean observed:

If this diversity of program and view point is allowed to continue much longer, those who predict the future of clinical education is limited by the extent to which outside grant support continues may well be proven correct. The time for experimentation, it would seem, must soon come to an end, and time and thought and even money now must be invested in an evaluation of the experiments that have been occurring. . . . Hopefully, it also will be possible to establish some criteria to use in determining whether a clinical program in a law school has viabili-
whether through a review of the scholarship, or through attendance at clinical conferences sponsored by the ABA and AALS, one would hardly know that it is taking place.

There is a finality to the present efforts that seems to escape notice. Branding practice supervised programs "academically unacceptable" through the accreditation process threatens to destroy or seriously damage the programs. The protest that these efforts are not intended to prevent experimentation is inconsistent both with the foreseeable consequences of the decision and with the very concept of drawing boundaries. The regulatory efforts described here are designed to set the limits which will shape the nature of acceptable experimentation for years to come.

The judgments that underlie the current regulatory approach have not been tested, but are nevertheless being applied in the accreditation process. Programs are being evaluated according to regulatory standards before those standards have been given full consideration in a process conducted according to a sound methodology. There is a good argument that the interpretations that have been made in this area are in fact new standards and that the policy judgments that they embody should be adopted, if it all, by a vote of the full house of delegates. Adoption by the Council alone does not satisfy the letter or the spirit of the ABA standards.

Studies of the costs, benefits, and possibility as a part of the overall academic program . . . . Then it will be time for the agencies of accreditation to take a stand.

Spring, Realism Revisited: Clinical Education and Conflict of Goals in Legal Education, 13 WASHBURN L.J. 421, 430 (1974). Similarly, LaFrance has recognized that the Clinical Section of the AALS has been wrestling with "the content and outer bounds of clinical education" when it deals with questions involving whether agency placements and externships should be included, and he has noted that this suggests "that clinical education is now in the second stage of development in law schools." LaFrance, Clinical Education and the Year 2010, 37 J. LEGAL EDUC. 352, 353 (1987).

The Institutional Bill of Rights in Accrediting, proposed in Proliferation and Agency Effectiveness in Accreditation: An Institutional Bill of Rights, 1980 CURRENT ISSUES IN HIGHER EDUCATION 19, 25 (No. 2 1980) provides that schools have "[t]he right to expect all accrediting agencies to conduct studies of the validity of their standards and to publish the results of such studies." This has not been done. Dean Hasl has conceded that more information may be needed.

You suggest that there is incomplete information concerning the nature of the problem. To a certain extent your observation is accurate. The purpose of the rule was to provide a means of obtaining more information about how externships are supervised. What may well develop from such information is a further refinement on the requirements of a program under Standard 306.

Hasl, supra note 275, at 2-3. I suggest that the possession of such information should be a prerequisite to, rather than an object of, regulatory action that has the effect of putting educational programs out of business.

This point has already been made with respect to the adoption of the interpretation of Standard 306 that prohibits credit-plus-pay programs. See Simon & Leahy,
tential of various models should precede the drafting and enforcement of accreditation standards that have the effect of forcing law schools to suspend experimentation and to make fundamental changes in their educational programs.

The use of the accreditation process to develop educational policy is the approach most likely to stifle experimentation. This is true as a general rule. The risk that standards set by the profession will stifle creativity and innovation in professional education is present in law, as it is in other professions. Given the existence of this risk, the accreditation process should be avoided as a way of attempting to develop or refine educational programs. The normal risk is multiplied in this situation because it does not appear that regulators are fully familiar with practice supervised clinical programs, or fully understand and appreciate their potential. It also appears that they did not understand that all clinicians do not have the same interests in regulatory outcomes. The decision to limit input into the process has contributed to these failings. To the extent that the regulators have permitted only limited input into the process (e.g., through the review of the Report of the Skills Training Committee without considering other points of view), they have been misled by the incomplete picture provided by that limited input. The problem is not simply lack of will on the part of the law schools, as the Skills Training Committee’s Report suggests. If it were, arm-twisting might be an appropriate regulatory strategy. In fact, practice supervised programs offer benefits that have simply been ignored while requirements that will benefit in-house clinicians have been favored. The regulators would have discovered this had they inquired.

It appears that, as a second and related problem, regulators have failed to differentiate between input from in-house clinicians, who are naturally and often actively hostile to practice supervised programs, and input from clinicians who run practice supervised programs. It is true that, especially thanks to the efforts of in-house clinicians, this

---

344. “Where a national association sets guidelines that must be met for accreditation purposes and these guidelines are adopted by licensing boards, significant limitations are imposed on the ability of educational institutions to develop innovative training tracks for professionals.” Hogan, supra note 214, at 19. This observation holds true, for example, in the field of psychiatry, where it was observed that the accreditation system in operation there had a “destructive influence on the evolution of psychiatric education.” Id. at 19 (quoting Taylor & Torrey, The Pseudo-Regulation of American Psychiatry, 129 Am. J. Psychiatry 658, 661 (1972)). The fact that the accreditation process in law tends to “freeze the educational process or impose some monolithic mold” has been recognized in other contexts. Cahn, supra note 219, at 485.

345. See Skills Report, supra note 8, at 2, 4.

346. Externships have been attacked by “[f]aculty clinicians in the ‘in-house’ pro-
has not been obvious. One commentator has characterized the battle between in-house clinicians and the supporters of externships as a "veiled struggle." The failure to see beyond the label "clinician" seems to have interfered with the regulators' ability to fairly judge the limited input they have received.

The accreditation process effectively prevents input by those who have the expertise and interest to develop innovative practice supervised programs. What is the likely result when a school is notified that the Accreditation Committee finds reason to believe that its externship program does not meet Standard 306? The dynamics of communication in this process are not well suited to policy development. First, the process never involves direct communication between the clinicians and the regulators. This insulates those who are making the rules from those who have actual experience in the regulated activity. Second, this process prevents communication that is free of institutional concerns that need not be made a part of this debate. In fact, because the process places the well-being of the institution on the line, it ensures that the merits of any debate about externships which might occur will not necessarily be controlling, and it encourages schools not to engage in debate in the first place. How many schools are willing to raise issues like those discussed in this Article at such a time? The likely result is an attempt to appease the regulators, not a resort to principle or to educational theory. It is a safe bet that when a school is told that its practice supervised clinical program does not meet minimum standards because supervision in the program is inadequate, there will at least be a temptation, and perhaps an impulse, to respond by dismantling the program. The regular faculty normally

---

grams, partly out of convictions about deficiencies, and partly out of the fight for survival and legitimacy." Stickgold, supra note 5, at 290.

347. Id.

348. Schools with firm reputations can ignore criticism if they feel it unwarranted, but they are likely to be highly sensitive to adverse reports that sully their records. Adverse comment on such schools' novel curricular or teaching techniques, moreover, can chill the enthusiasm for similar innovation in schools less confident of the strength of their standing. For the latter, even a hint of disaccreditation can cause apprehension and turmoil on a campus; actual disaccreditation can be a death blow. Cardozo, supra note 331, at 12.

349. Another temptation may be to fire the clinician running the program. When the Accreditation Committee routinely raises concerns about practice supervised clinical programs during law school reinspections because of a philosophical opposition to the clinical model, such concerns are not based on the clinician's performance. Nevertheless, when such a program is flagged during a reinspection, it does tend to reflect poorly on the clinician. This approach puts clinicians, who are often not within the mainstream of the faculties in the first place, in the unpickable position of explaining to their school why they are running a "substandard" clinic. The answer is often that regulators are unhappy with the school's design of the program and the resources the school is willing to devote to it. How receptive the school will be to such a response will vary. Some may be
CLINICAL LEGAL EDUCATION has little connection with the clinic, and may readily support the abolition of an academic program condemned by the ABA. If the faculty will not support outright abolition, it may support limiting the number of students in the program, the credit awarded for the program, or the placement options of the program in order to placate the ABA. Even if the school’s response is less dramatic, and thus fails to resolve what is clearly a sensitive matter expeditiously, it is likely that the school will respond to unspecific complaints of inadequate supervision by insisting on more faculty control of the day-to-day operation of that program. The tightening of faculty control merely to appease regulators will minimize opportunities for student-centered learning, and thus interfere with the program’s educational objectives.

The impact of the use of the accreditation process to abolish or modify existing programs is already having an effect. It is not possible to know the details because it is not in the best interests of the law schools to discuss their accreditation problems. Nevertheless, the indications are clear. For example, at the meeting of the Externship Committee of the Section on Clinical Legal Education of the AALS held in conjunction with the AALS Annual Meeting in New Orleans in January 1989, attendance was far greater than expected. The small room that had been reserved for the meeting was packed, and several deans (whose presence at the meeting was itself testimony to the seriousness of the problem) were demanding to know what was going on. A number of schools reported that their externship program had caused difficulty in the accreditation process and a number indicated that they had made changes in their programs as a result of their experiences in the accreditation process. A great deal of puzzlement was expressed concerning what type of externship program the ABA would find acceptable, since the Accreditation Committee’s expressions of displeasure have not been accompanied by specifics. The full effect of the assault against practice supervised programs taking place in the accreditation process is not yet known. It has set in motion a series of decisions by faculties and regulators which are changing clinical offerings around the country. There is simply no way to know the extent of the damage that is being done to practice supervised programs.

more comfortable firing the clinician who is probably untenured. Such a dynamic is in stark contrast to the support the ABA has traditionally given in-house clinics.

350. The rationale for this is apparently that ambiguity in the expression of concern preserves academic freedom, although it is likely to have the opposite effect in this context. Ambiguity may encourage more dramatic changes to avoid future difficulties.
VII. CLINICAL POLITICS AND THE AGENDA OF SELF-INTEREST

A. The Ramifications of Standard 306

An understanding of the politics that have influenced regulatory policy in this area is necessary to the full evaluation of the process. The dynamics of clinical politics are shaped by the position of clinicians within legal education. Clinicians, as a group, do not feel secure in their jobs, and have not been accepted into the mainstream of legal education.\(^{351}\) This insecurity and lack of acceptance has caused them to become so preoccupied with questions of job security and status that such concerns permeate their work.\(^{352}\)

In-house clinicians feel especially threatened by practice supervised programs. There is no question that in-house clinical education is expensive, and practice supervised programs can be significantly less expensive.\(^{353}\) Clinical education developed in an environment of soft money.\(^{354}\) Things have changed. Schools are cost conscious. "When faculties feel pressure to reduce budgets or to restrain rates of increase, they look first to, and often not beyond, the clinical curriculum."\(^{355}\) In-house clinicians view the practice supervised model with

\(^{351}\) "Despite the supportive talk one hears at meetings of the American Association of Law Schools, clinical education remains a marginal aspect of the law school curriculum." Tushnet, supra note 186, at 272.

\(^{352}\) One critic has described the "world view of far too many clinical teachers" in these terms:

"Like Soviet bureaucrats, these clinical teachers divided the world into a beleaguered "us" and a menacing "them." On this world view, clinicians do one thing and traditional teachers do something totally different. Neither group likes the other, and each avoids the other altogether when it can. Traditional teachers hold the power in law schools because of historical accident and use that power to perpetuate themselves, largely by denying full faculty status to a sufficient number of clinical teachers. Traditional teachers talk about standards, scholarship and intellectual content, but that is no more than an elaborate smoke screen for what, at its root, is an unadorned power play to preserve the dominance of the traditional law-teaching role. Some traditional teachers are sympathetic, but they are few in number and unrepresentative of law teachers generally. More traditional teachers are hostile, not because they want to be but because they need to protect the only job they know how to do."

Condlin, supra note 97, at 336. Condlin suggested this world view "produces a profound intellectual and emotional insularity in those who hold it." He also suggests that much of it is "overstated." \(\text{Id.}\)

\(^{353}\) An article published with the Guidelines as a Consultant's Report suggested that the median cost per student credit hour was $510.00 for in-house programs and $40.00 for externships. Swords & Walwer, \textit{Cost Aspects of Clinical Education}, in Guidelines, supra note 31, 133, 153.

\(^{354}\) "[F]oundations were the major supporters of clinical education in its formative years." Gee, supra note 127, at 4.

\(^{355}\) Tushnet, supra note 186, at 273. \textit{See also} LaFrance, supra note 341, at 355: "Clinical law offices are the most vulnerable for trimming, particularly in those schools, probably the majority, in which the clinical faculty lack tenure. The
alarm because they fear that in-house programs, which were finally established after years of effort, will be replaced or partially displaced by less expensive practice supervised programs.\footnote{356}

It is clearly in the economic self-interest of in-house clinicians to favor case supervision over practice supervision. The requirement of more full-time faculty supervision of student case work creates jobs for clinicians. It also tends to drive up the cost of practice supervised programs to a level that makes them financially unattractive alternative most likely to be employed will use placements with existing agencies.”

\footnote{356. Although not all in-house programs are threatened, I believe it is fair to say that in-house clinicians, as a group, view practice supervised programs as a threat. The AALS Section on Clinical Education created a Committee on the Future of the In-House Clinic in 1986 for the purpose of exploring solutions to certain common problems that seem to be confronting in-house, live-client clinical programs across the country. These developments include cut backs in clinical faculty, displacement of in-house programs with externships, limits in student demand, and is of inappropriate criteria for firing and promotion of clinical faculty.}

Letter from Marjorie Anne McDiarmid to Stephen Maher 1 (Oct. 8, 1987)(on file with author)(emphasis added). Professor Elson elaborates:

\begin{quote}
Externships may result in a significant decline in student interest in-house clinical programs. There are several possible reasons for this:
\begin{itemize}
  \item a. externships may help in the search for jobs;
  \item b. students may gain experience in career-related areas of law practice not covered in the in-house programs;
  \item c. externships may be less demanding of students time than in-house programs;
  \item d. academically marginal students may believe that ungraded externships will reduce their risk of failure;
  \item e. students may gain from the externship environment a sense of reality and independence that can’t be duplicated in in-house clinics.
\end{itemize}
\end{quote}

Elson, supra note 29, at 8.

It is not clear that practice supervised programs are in fact less demanding of student time than in-house programs. The traditional faculty complains that practice supervised programs are too time consuming, and worries that the absence of full-time faculty supervision permits students to spend time in the new and exciting world of practice at the expense of their traditional courses. Whether externships draw marginal students is also a matter of conjecture at this point. Clearly to the extent that field placements are ungraded, and marginal students are seeking ungraded courses to slide through school, this danger exists. However, it may also be true that marginal students are not doing well because they do not relate well to the educational approach used in traditional courses, and that they may be more receptive to student-centered learning. Also marginal students may be attracted by the placement opportunities practice supervised programs provide. That does not mean that placement programs are ideal for marginal students. Because practice supervised programs require students to accept responsibility for actual cases, they have the potential to divert a student’s time and attention away from regular studies. Marginal students would be most at risk if they experienced difficulty in balancing the demands of supervised practice with the demands of regular courses.
tives to in-house programs. Implementation of regulatory requirements that encourage greater supervision by full-time faculty serve another purpose. They remind law schools that the ABA remains a powerful friend of the in-house clinician. The current regulatory trend is a continuation of the long history of ABA support of the clinical movement. It is human to begin to equate the movement with the individuals who have been active in it for years, and professional clinicians are more characteristically involved in in-house programs than in practice supervised clinics. To some degree, that dynamic appears to have affected regulation in this area. Too little

357. This much was recognized in the Project Director’s Notes, GUIDELINES, supra note 31, at 109. It was also recognized at the ABA Conference on Professional Skills, where Dean Kramer observed, in a role play:

[I]f you just have out-house placements, with a supervisor who looks at daily or weekly diaries, you’re talking about zero dollars, or close to it, but that, as I think [Dean Harbaugh] has said, is questionable on an educational basis. There are lots of intermediate models, some of which are as expensive as clinics.

Conference, supra note 4, at 72.


359. At the ABA National Conference on Professional Skills and Legal Education it was recognized that: “Sometimes clinical educators have convinced the ABA House of Delegates to vote with them or have gained the requisite political allies on various committees. Sometimes they have succeeded in using threats of accreditation inspections to prompt law schools to devote adequate resources to clinical education.” Id. at 16 (statement of D. Gifford). The need to continue this pressure was recognized at the conference by Gary Palm, an in-house clinician who is a member of the Accreditation Committee.

I think it’s time to say that we should have mandatory skills and live client training in law schools for all students before they are allowed to go into practice. I imagine we must continue to have vigorous action by the accreditation authorities, to help move law schools, to urge them forward. I don’t think it’s going to come from the academy, and we aren’t a large enough constituency within the institution. We need the help of the bar to accomplish this.

Id. at 27.

That support has not been without substantial opposition within the ABA. At one point in 1973, for example, Edward Benoit sought to delete Standard 405(a)-(d), the sections that detail the responsibilities of the law school to its faculty (405(e) had not yet been added to the Standards when they were first proposed for adoption). In support of this motion, W.B. Spann, Jr. opined that “under the Standards as drafted the Association would be a ‘sort of collective bargaining agent for law professors.’” 98 REP. A.B.A. 157 (1973). The motion was defeated 132 to 115. Id.

360. The personal dimension is clearest at conferences. Remarks at the ABA National Conference on Professional Skills and Legal Education provide one example:

All of us with an interest in professional skills education owe an enormous debt to the people—many of whom are attending this conference—who have established the beachheads of clinical education in the law schools and who have made professional skills education an integral part of the American legal education.

Conference, supra note 4, at 16 (statement of D. Gifford).
input was received and the conflict of interest between in-house and practice supervised programs was not recognized in the process.

Clinician preoccupation with improving their status in the legal community was the major reason for forming a Section on Clinical Legal Education within the AALS. That organization has become the trade association of in-house clinicians, and the Section and its members routinely advocate in favor of proposals that advance the interests of clinician job security and improved clinician status. For example, the Section strongly supported the adoption of Standard 405(e). Adoption of 405(e) was the immediate result of an ABA study of the possibility of adding a standard on the tenure of clinical teachers. The Special Subcommittee of the Accreditation Committee to Study Access to Tenure by Clinical Teachers was formed, and it proposed a standard which required “substantially equivalent status” for clinical teachers, a requirement that could be satisfied by including clinical teachers in the conventional tenure track, by creating a second tenure track, or through long term contracts. The Executive Committee of the AALS originally urged that the proposed Standard be withdrawn, to permit individual schools to continue their experimentation with various clinical education models, allowing differences in the number, qualifications, and faculty status of individuals providing clinical instruction. They recommended that information be gathered on what schools are doing to accord appropriate status to clinicians and that clinical models be appraised to deter-

361. Munger, supra note 14, at 721 n.27.
362. STANDARDS FOR APPROVAL, supra note 26, Standard 405(e). See Kotkin, supra note 14, at 191 n.33.
363. The ongoing battle for parity, spearheaded by the A.A.L.S. Section on Clinical Education, led to the adoption in 1984 of the American Bar Association Accreditation Standard 405(e), which recommends, if not requires, that clinicians be afforded a measure of job security in the form of tenure or long-term contract eligibility.
364. The groundwork for this development had been laid in GUIDELINES, supra note 31, Guideline XVI, at 33. Guideline XVI (Status of Individuals Teaching the Clinical Legal Studies Curriculum) recommended enhancing the status of clinical law professors. See generally Morris & Minn, Confronting the Question of Clinical Faculty Status, 21 SAN DIEGO L. REV. 733 (1984).
365. Feldman, supra note 121, at 622 (quoting REPORT OF THE ABA SPECIAL SUBcomm. OF THE ACCREDITATION COMM. TO STUDY ACCESS TO TENURE BY CLINICAL TEACHERS (Mar. 24, 1982)).

Id. Feldman has noted that, [a]ccording to one member of the subcommittee, 405(e) was designed to provide law schools flexibility while encouraging them to upgrade the status of those involved in their clinical programs. "There was considerable fear that if we [the subcommittee members] were to require real equivalency, the response of the schools would not be to improve their treatment of clinical people; rather, they would get rid of them in wholesale fashion. We wanted to avoid this sort of bloodbath.’'
mine which of them provides the best institutional environment for clinical education.\textsuperscript{366}

Such a study was never conducted. The AALS and ABA agreed to a compromise, in which the AALS agreed not to oppose the adoption of a purely aspirational standard, one which provided that law schools "should" rather than "shall" provide clinicians with "a form of security of position reasonably similar to tenure."\textsuperscript{367}

Standard 405(e) is now the focus of Section efforts to further the interests of its members. Discussion at Section meetings focuses on how more clinicians can be appointed to inspection teams to document 405(e) violations in inspection reports, so that sympathetic members of the Accreditation Committee can bring pressure to bear on law schools to improve their clinicians' lot.\textsuperscript{368} Clinicians have enjoyed some success through this process, but must press their claims carefully and seek gains in individual cases because, as the subcommittee noted, bolder moves threaten the in-house clinician's continued existence.

The connection between Standards 306 and 405(e) may not be obvious at first glance. However, they are two of three regulatory standards, Standards 405(e), 306 and 302(a)(3), that figure prominently in the plans of in-house clinicians who dream of achieving a larger and more secure presence in the law school community. Standard 306, if interpreted as in-house clinicians believe it should be, can be used to improve the bargaining position of clinicians struggling to implement 405(e) with recalcitrant schools. If Standard 306 can be used to shut down or convert practice supervised programs to programs which require clinician supervision, it can effectively deny schools who refuse to deal with clinicians the option of simply firing them and farming out students to community agencies. This significantly increases clinician bargaining power, because where schools have the option of firing clinicians and still offering students clinical education through practice supervised programs, demands must be pressed more carefully or the decision to make demands may prove self-defeating. If schools are unable to offer viable alternatives to the in-house clinic, claims may be pressed more vigorously. If there are no live-client alternatives to in-house clinics, it is unlikely that the clinicians who press demands will be fired, because it is unlikely that the students will tolerate complete

\textsuperscript{366} Morris & Minan, \textit{supra} note 363, at 794.
\textsuperscript{367} \textit{STANDARDS FOR APPROVAL}, \textit{supra} note 26, Standard 405(e).
\textsuperscript{368} The Site Evaluation Instructions requested that the team
[p]lease discuss the faculty status of the professional skills faculty.
Of particular interest should be whether there is an adequate form of job security available to the full-time professional skills teachers and whether indicia of appropriate status exist: title, compensation, role in law school governance, research leaves, research assistants, and so forth.
Compilation, \textit{supra} note 273, at 33.
abolition of live-client clinical education, and the in-house clinics are certainly in no danger of being taken over by traditional faculty. Traditional faculty are not willing to do clinical work. After all, that is what motivated the hiring of clinicians in the first place. In this way, enforcement of Standard 306, as its requirements are envisioned by the Guidelines and the Skills Training Report, rather than as actually written in the Standard, can assist clinicians in pressing claims for job security and status which are suggested, but not guaranteed, by Standard 405(e).

Standard 302(a)(3) is the final piece in the puzzle. It requires law schools to provide adequate instruction in professional skills. Once the danger posed by practice supervised programs is eliminated through vigorous enforcement of Standard 306, vigorous enforcement of Standard 302(a)(3) can begin. The requirement of this section is unclear, but lack of clarity has helped, not hampered the related enforcement efforts. Professor Roy Stuckey recently announced that this next stage of enforcement activity has already begun. It will not come as a big surprise if the Accreditation Committee begins to find that schools do not have enough clinical programs, now that the alternatives to hiring more clinicians are being held in check through Standard 306, and alternatives to paying clinicians and treating them like regular faculty are being held in check through 405(e). I expect such decisions to begin to appear shortly.

The real danger to the success of this operation comes from practice supervised programs. They do not require the hiring of more clinicians. Instead, they rely on practitioners who have not become full-time clinicians to do case supervision. Those who leave practice to become full-time clinicians will not be a threat because they will have a personal stake in the outcome of the dispute and can be expected to cooperate with clinician efforts, by demanding job security and status from their school, and by showing solidarity and acting in concert with other clinicians who seek to improve working conditions. Practicing lawyers who supervise students but retain outside employment are a threat because it is unlikely that they will share the clinicians' interests in job security or status and, to the extent that schools can use such persons as substitutes for clinicians, schools will be under no pressure to make security and status concessions, and will be able to abolish clinician jobs when a dispute concerning job security or status

---

369. The similarities with the process through which regulatory relief was obtained in connection with the other Standards is clear. Explicit regulatory support for the positions advanced by in-house clinicians was not achieved in either of the other cases. In both cases, success in the regulatory process depended on the vigor with which an ambiguous standard (interpretation 2) or a permissive standard (405(e)) were enforced case by case. The secrecy of the process prevents the discrepancies between public compromises and private compromises from being effectively measured.
reaches a critical point. The threat posed by those who retain full-time employment outside the law school, and who work for free or for a small honorarium, is especially great. They may not even think of themselves as clinicians, and may even feel that it is an honor to serve without pay or status. Schools will recognize that these volunteers possess many of the skills that it values in its clinicians, and that there is virtually no chance that this group will organize and make demands. Therefore, the in-house clinician's success in achieving status and security requires that schools be prevented from using practitioners on a part-time or volunteer basis as substitutes for full-time clinicians. I believe that is how Standard 306 is being used, although I do not believe that was its original purpose.

Schools may see little difference between clinicians who have not published serious scholarship, and their practitioner substitutes. The strongest argument the clinicians have against these substitute clinicians is an objection to the quality of their teaching. Schools may be unsympathetic to this argument because of their low estimation of the clinicians they replace. However, one would expect that clinicians would be able to demonstrate expertise beyond that of the average practitioner in the areas of teaching and case supervision. Because practitioners are not inherently worse teachers or case supervisors, success in placing substitutes off-limits may depend on whether systems are available to integrate practitioners into clinical teaching. The more that these substitutes can be made part of an effective system of supervision, the less the clinicians can credibly argue that in-house supervisors are indispensable to a quality program. An example of a system that could effectively integrate field supervisors into a law school program would be the approach described earlier, one that seeks to (1) divide the job that in-house clinicians do; (2) train the volunteer, part-time practitioner to do a portion of what in-house clinicians do; (3) delegate the portion of what clinicians do that is most like traditional teaching to regular faculty; and (4) place greater demands on students, so they are required to take more responsibility for their own learning.

Who will design these systems? Although clinicians have the ex-

---

370. Many clinicians were in fact drawn from these ranks.
371. I recognize that this perception is not shared by those who were closely involved in the process. Dean Hasl, who was on the accreditation committee and involved with the drafting of the interpretation 2, reviewed an early draft of this Article, and believes that my analysis is "fundamentally flawed." He reports that: "Interpretation 2 was not intended to be an assault on externships. The assertion that the basis for hostility is the economic threat to clinicians who are operating in-house programs is simply unfounded. At no time in the discussions surrounding the adoption of Interpretation 2 did such an assertion arise." Hasl, supra note 275, at 1.
372. See supra subsection IV.A.2.
pertise to design systems to integrate practitioners into clinical teaching, it is against their self-interest to take an active role in such an activity. The traditional faculty and the practitioners they seek to use as substitutes lack the expertise, the familiarity with the clinical curriculum, and the time needed to design and implement an effective system. Attempts to develop such systems have just begun, with the few full-time faculty members who run practice supervised programs leading those efforts. The danger exists that the enforcement of Standard 306 as it is now being interpreted and enforced will prevent the development of systems that can effectively integrate practitioners into clinical teaching. If such efforts are effectively prevented, the use of practitioners as "scabs" will be foreclosed, and additional pressure will be placed on schools to provide clinicians with additional job security and status.

The identification of ordinary practitioners as unacceptable substitutes for clinicians could have additional benefits for the clinical movement. By defining a group with similar credentials as unacceptable, clinicians may be able to increase their own status, and draw a line of demarcation between themselves and practitioners that would be helpful in their battle for status with the schools. There could

373. In the political struggle to build and strengthen the "in-house" programs—an admirable goal—clinical faculty joined in undermining field-based externships. Rather than applying their different insights, skills, and energy to determining whether there was educational value in field-based externships which could be extracted, refined, and strengthened, clinicians often led the attack against them, or at best, ignored them. Stickgold, supra note 5, at 291.

374. The fact that the ABA, the clinicians' regulatory patron, would be sympathetic to the argument that schools should not be permitted to use practitioners as substitute clinicians is on its face ironic, since it is an organization of practitioners. However, the ABA has invested in the clinicians' success. It sponsored clinicians in their initial attempts to establish themselves within the schools, and it may not want to see the fruits of that labor lost. It may distrust the motives of the schools because of previous experiences, and, in the absence of a working model, it may doubt the abilities of practitioners with full-time responsibilities outside the law school to be effective substitutes for full-time clinicians.

375. This is, of course, similar to the strategy used by law teachers to become accepted in the university over the last hundred years. In a remark that could as easily be directed today against clinicians as it was directed years ago against law schools, Thorstein Veblen said in 1918 that “[t]he law school belongs in the modern university no more than a school of fencing.” Note, Modern Trends in Legal Education, 64 COLUM. L. REV. 710, 710 (1964). Nevertheless, traditional law teachers overcame such perceptions in a manner similar to the one being pursued now by clinicians. “These academics created this niche for themselves largely through hard work and effective propaganda. Wherever they went they pushed their own distinctiveness—their distinctive way of teaching, their distinctive conception of the subject matter to be studied, and their distinctive status in the profession.” Schlegel, Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor, 35 J. LEGAL EDUC. 311, 315 (1985) (footnotes omitted). Traditional academics became active in the ABA Sec-
also be psychological benefits from acting like the traditional faculty did in attempting to exclude them. That action might help give clinicians the feeling that they are no longer the practitioners they once were, that they have been transformed into the law professors they yearn to be.

B. The False Dichotomy of Theory and Practice

Why has the debate about working conditions and status not been more obvious to those not directly involved in it? One reason is that the debate is carried on in rhetoric that recasts personnel issues in educational rather than labor terms. The source of this rhetoric is the dichotomy between theory and practice. There are legitimate differences between experienced-based education and traditional classroom teaching, but the commonly stated difference that one teaches practice skills and the other teaches theory is not one of them. In legal edu-

ation on Legal Education and the AALS, and sought to use regulatory requirements to further their ends, just as in-house clinicians have. For a more complete discussion of the history of legal education, see J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976); R. STEVENS, supra note 120; Stevens, Two Cheers for 1870: The American Law School, 5 PERSP. AM. HIST. 405 (1971). Langdell's approach allowed the legal academic exclusive control over a corner of the university community and thus the chance to profit from that control. Part of that profit hinged on the ability to exclude others from teaching law through the attempt to establish the full-time, day, university-affiliated law school as the only route to the practice of law. Konefsky & Schlegel, Mirror, Mirror on the Wall: Histories of American Law Schools, 95 HARV. L. REV. 833, 843 (1982)(footnote omitted). Clinicians are now making a similar attempt to professionalize themselves by defining as their exclusive preserve a portion of legal training that legal academics have neglected.

376. Stickgold expressed it this way:

Just as non-clinical academics, out of a combination of conviction and fear of the unknown, attacked these new in-house clinical program as “anti-intellectual” and “relevant at any price,” clinicians needed a whipping boy to legitimate their own struggling, fledgling academic innovations. The “externships” offered at many schools (often begun as a quick-fix response to student and community unrest in the 1960s), became the scapegoat which demonstrated to the opponents of clinical education the “unacceptable” alternative to supporting “in-house” models. Stickgold, supra note 5, at 290 (footnote omitted).

377. This point was recently made, I believe quite definitively, in Speigel, supra note 306, at 577. It has been made elsewhere. The dichotomy between legal theory and practical skills is false. “The practice skills underlying lawyering have a theoretical foundation that should be developed and articulated. More importantly, clinical cases can and should be used to develop and expand the kinds of . . . legal and factual analytic skills now sought primarily through the classroom.” ANDERSON & CATZ, supra note 150, at 730 (suggesting the need for a model that integrates classroom, simulation, and clinical instruction in all three years of the curriculum). There are four categories in the “Is law school too theoretical?” debate:

One group demurs to the allegation by denying that being practical is the law school’s job. . . . Another group appears to confess and avoid. It
Clinical education, clinical training has been the type of educational approach that is most likely to raise "the long and often confusing debate over objectives which has dominated the history of legal education."\(^{377}\) Explicitly or implicitly, the speaker’s position on the theory or skills dichotomy may become a part of any discussion about legal education. The debate has not changed many minds on either side, and it does not appear likely that any resolution will be achieved.\(^{379}\) While the literature has recognized the unity of theory and practice,\(^{380}\) the distinction recurs on a regular basis.\(^{381}\) If logic suggests there is no dichotomy, why does it continue to recur? I believe the reason is that the dichotomy provides a comfortable set of masks for the ongoing labor dispute between law schools and clinicians. It allows educators uncomfortable with admitting that they are involved in a labor dispute to engage in such a dispute while appearing to carry on an argument about education. The focus on education permits each side to deny or at least ignore the fact that they are each motivated by self-interest, because dialogue about education is presumably being engaged in for the benefit of the students.

Thus an argument in favor of the traditional curriculum, using the dichotomy to mask self-interest, would sound somewhat as follows: An understanding of legal theory is most important to success in practice. There is not enough time in the law school curriculum to teach the various practice skills, but with a good background in theory, stu-

---

\(^{377}\) Cort & Sammons, The Search for “Good Lawyering” A Concept and Model of Lawyering Competencies, 29 CLEV. St. L. Rev. 397, 397 (1980). This debate has been variously formulated. “Other formulations include: theory vs. practice, academic education vs. training, abstract vs. applied, Langdell vs. Frank, intellectual skills vs. lawyering skills, and others.” Id. at 398 n.4. It should be recognized that this debate is not unique to law schools. It occurs in all professional education. If the school becomes too academic, it alienates the profession, but if it swings too far in the direction of application, it jeopardizes its reputation with other academics and with prospective students. See generally L. Mayhew & P. Ford, Reform in Graduate and Professional Education (1974).

\(^{379}\) With great confusion of terms, and arguments filled with unexpressed values, the forces of logic and experiment alone have not sufficed to produce any movement from one school of thought to another. In fact, occasional transfers of allegiance seem to be better understood as conversion experiences, which cannot be forced. In such circumstances, unresolved debate seems inevitable.

\(^{378}\) Cort & Sammons, supra note 378, at 398 (footnote omitted).

\(^{380}\) Id. at 399.

\(^{381}\) When Gee and Jackson were doing their study of legal education, they “were struck by the repeated emergence of one issue: the tension between ‘practical’ and ‘theoretical’ orientation in professional training.” Gee & Jackson, supra note 109, at 927.
dents can learn the needed skills in practice. Coincidentally, unlike practice skills, theory can be taught in large classes through teaching methods that do not require close student-faculty working relationships.

This argument may be advanced in terms of helping students by teaching them the most important things in the limited time available. Nevertheless, it is at the same time a vehicle for allocating resources within the law school. The theoretical standpoint favors the allocation of resources in ways that preserve the routine of traditional faculty from encroachment by time consuming activities, such as close student-faculty contact outside the faculty member's area of interest. It favors large classes for basic courses, and seminars in the faculty members area of scholarship over other student interests.

In order to explore this point further, it is necessary to look more closely at how the traditional faculty view themselves, and how they reacted to demands for changes in the traditional curriculum. Legal academics belong to a more exclusive club than lawyers in general. Its entry requirements are more rigorous and its values are different. Intellectual achievement is prized over material success. Academics have sacrificed monetary reward for freedom from the demands of practice; as a result they have time to think and write as well as the licence to be critical when practitioners might hesitate to speak.

The values and goals of the traditional faculty are significantly different from those of practitioners. "[L]aw teachers are lawyers who have made a career choice not to practice law .... The decision not to practice law is itself a significant statement." For these reasons,

382. Professors recognize at some level, often quite consciously, that they must make themselves relatively inaccessible to students if they are to have the time to work on their own difficult and frustrating scholarly research, not to mention their outside activities. The problem [then is for the professor] to establish some reasonably acceptable social device for avoiding students. Stone, supra note 101, at 404.

383. "Law schools have perhaps the greatest number of students per faculty member of any institution of learning within the educational system. The possibility of all students having continuous and significant contact with faculty outside class is negligible." Id.

384. "Despite the old adage that those who can't practice teach, professors of law tend to believe—and some with good reason—that they have sacrificed the prospect of great wealth and power by foregoing the practice of law in order to teach and do scholarly work." Id. at 402.

385. Tyler & Catz, supra note 134, at 697.

There will, of course, always be a separation of sorts between those who choose an academic career in law and those who practice their craft in some more worldly setting. In this country, such a separation has existed for at least a century, since legal education began to assume an academic character. In recent years, however, the separation has widened considerably.

Kronman, supra note 19, at 873 n.58.
academics can be expected to be fierce in the protection of their time from encroachment. In recent years, the argument that teaching theory alone is sufficient has not held up. Since students schooled in "theory" alone will not in fact be ready upon graduation for the unsupervised practice of law, law schools have been placed under increasing pressure to make changes in the traditional curriculum.\textsuperscript{386}

In the 1960s and 1970s law schools began to yield to the pressure by adding simulation and clinical courses to the existing curriculum.\textsuperscript{387} Who would teach the students in these new programs? The prospect of working with students who, every time they become competent, are replaced by new students who are not, on cases that, to be good vehicles for training the inexperienced, are routine, repetitive, and low on prestige at a wage below that which the faculty member could command in practice, does not hold much appeal for traditional faculty members.\textsuperscript{388} Involvement is seen as a situation where law professors are increasingly deprived of their privacy because of increased obligations to students; they are thrown into an endless series of human contacts which may well be meaningless to them, no matter how important they are to students. The conditions of employment as a professor of law are therefore changing with or without the professor's consent because of the changing values of the students.\textsuperscript{389}

---

\textsuperscript{386} The truly competent lawyer is an artist, and to become an artist at law requires the better part of a lifetime. Social need and economic reality, however, limit the time and resources that can be allocated to pre-admission training. Democratic ideals have dictated, perhaps most clearly in this country, that upon admission to the bar the newest lawyers be presumed the equal of and licensed to handle any matter available to, the most experienced members of the profession. Contemporary shifts in the profession and in the legal system have brought this ideal distressingly close to reality. This new reality has forced the legal profession, law students and society itself to question with greater intensity whether the training students receive in law school prepares them adequately (or as well as it might) for the practice of law.

Anderson & Catz, supra note 150, at 728-29. This is, of course, not a new question. It has arisen, with different intensity and different effect, on a regular basis. For the classic article that stirred debate in the 1950s, see Cantrall, Law Schools and the Layman: Is Legal Education Doing Its Job? 38 A.B.A. J. 907 (1952).

\textsuperscript{387} Gee & Jackson, supra note 109, at 877-82.

\textsuperscript{388} One approach to the problem of routine, repetitive case work has been the establishment of clinics that focus on law reform. While this may spark faculty interest, such programs have serious flaws as vehicles for providing students with clinical opportunities.

The actual litigation is usually done not by the students, but by the faculty. Cases can be complex and litigation protracted. Consequently, individual students may receive uneven, unpredictable, and fragmented exposure to cases. The contribution of (and to) students can often consist of little more than fragments of unorthodox legal research, and the danger of student exploitation for partisan community purposes remains, hand in hand with the danger of involving the university in controversy.


\textsuperscript{389} Stone, supra note 101, at 404.
Schools handled this problem in one of two ways. Some created in-house programs and hired clinicians to supervise students' practice. Others decided not to hire specialized faculty and instead established practice supervised programs, drawing on community resources for supervision. The decision concerning what model of clinical program to establish is inseparable from the question of who will be hired to do such work. If clinicians were to be hired, an in-house program could be started. If not, practice supervision was the only option.

If a school decided to establish an in-house program, capable individuals had to be found to supervise the students. Individuals with credentials similar to traditional faculty were difficult to attract. Such individuals would understandably prefer regular teaching or positions in private practice that their credentials make available to the second class status and poor working conditions of the in-house clinic. As a result, clinicians have often been drawn from the ranks of practitioners who were experienced at the type of routine work that needed supervision in the typical in-house clinic. Legal aid lawyers, public defenders, and government lawyers were the logical candidates, and many clinicians have been drawn from those ranks. Thus, by design, the background and qualifications of the typical clinician is often quite different from the traditional faculty member at the same school.

Traditional faculty have hesitated to allow clinicians to share all

\[\text{390. The ideal clinical law teacher is a person with substantial successful experience as a practitioner, who not only has both the interest and the ability to teach, but who also wants to continue to practice law. The description suggests the problem—very few such idealized clinicians exist. If a person succeeds in the practice of law, he has found satisfaction in lawyering, in representing clients, and has found a way of coping with the problems and pressures which accompany practice. The likelihood of such a person being attracted to teaching is not great. If he is attracted to teaching, it is highly likely that he is motivated by a desire to do the things traditionally associated with law teaching: classroom instruction, research, scholarly writing and service to the profession. Thus, on examination, the notion of clinical teacher is something of a contradiction in terms.}\]

Tyler & Catz, supra note 134, at 698-99. Thus, Langdell's ideal law professor, who "is not experience[d] in the work of a lawyer's office, not experience[d] in dealing with men, not experience[d] in the trial or argument of causes," is entirely unsuited for clinical teaching. Id. at 698.

\[\text{391. "[L]aw school personnel committees find it difficult to attract well-qualified clinical teachers." Gee & Jackson, supra note 109, at 890.}\]

\[\text{392. "In the past, different entrance requirements have permitted the hiring of lawyers who have not come exclusively from the prestigious jobs in the profession; instead, clinicians have primarily come from other backgrounds like government agencies, legal services and public defender programs." Bryant, Message From the Chair, AALS SEC. ON CLINICAL LEGAL EDUC. NEWSL., Mar. 1985. "The lawyers staffing [in-house clinical] programs were largely drawn from the legal services and public interest community." Kotkin, supra note 14, at 191.}\]
the benefits enjoyed by the traditional faculty. Clinicians “became conscious of and discontented with differences in pay, status, perquisites, and title.” This tension has set the stage for the ongoing dispute relating to working conditions, status, job security, and curriculum that continues today. This tension has been aggravated by cost concerns. It is predictable that this tension will not end even if the individual clinician is given status and job security equal to his traditional colleagues. This is so because, at the point the clinician receives equal status and tenure, he or she may elect to resign from the clinic and become a member of the traditional faculty in all respects. This is not an uncommon occurrence because “[a] clinical supervisor often feels he or she is on a treadmill from which there is no escape, except to the more manageable environment of the classroom.”

This tension has set the stage for the ongoing dispute relating to working conditions, status, job security, and curriculum that continues today. This tension has been aggravated by cost concerns. It is predictable that this tension will not end even if the individual clinician is given status and job security equal to his traditional colleagues. This is so because, at the point the clinician receives equal status and tenure, he or she may elect to resign from the clinic and become a member of the traditional faculty in all respects. This is not an uncommon occurrence because “[a] clinical supervisor often feels he or she is on a treadmill from which there is no escape, except to the more manageable environment of the classroom.”

This pattern follows from the basic tension that exists in clinical teaching. The “retirement” of the clinician to the classroom-teaching faculty leads to the hiring of a new clinician, and the debate begins all over again in connection with the new individual. The realization that the repetition of this process could transform the traditional faculty into the retired clinical faculty, and could thus shift the focus from the hiring of scholars to the hiring of practitioners who do not have traditional faculty credentials, could give schools new resolve to resist clinician efforts to obtain equal status and job security.

Such a prospect, however, makes practice supervised programs look more attractive because they can permit schools to reduce clini-

---

393. The rewards of academia are intrinsic and partly extrinsic. There is status, leisure, the opportunity to pursue scholarly interests, and the personal satisfaction of attracting a few of the brightest students as proteges. The ego satisfaction that comes from teaching a large class with consummate artistry is akin to what an actor in a star role with a captive audience or the conductor of an orchestra may feel. The pay, fringe benefits, and the job security all combine to make academic life relatively idyllic; or at least it did so until the advent of the sixties when student activism, concerns over poverty, racism, sexism, Viet Nam, consumer fraud, student participation, admission policies, and grading systems invaded even these hallowed halls. At present those concerns appear to be diminishing in intensity and some measure of the old tranquility against [sic] prevails.

Cahn, supra note 219, at 476.

394. Kotkin, supra note 14, at 191. Kotkin suggests that this occurred as “[clinical teachers felt the influence of their surroundings and adopted the values of those around them in the academic community.” Id.

395. Cahn supra note 219, at 481.

396. “A predictable consequence of this basic tension is that the tenure of most clinical law teachers as clinicians is short, with the clinician being reincarnated either as a member of the classroom-teaching faculty or as a practicing lawyer who has left legal education.” Tyler & Catz, supra note 134, at 700 (footnote omitted). The reincarnation of clinicians as classroom teachers has created a “back door” means of entry to law school faculties for persons who might not otherwise have gained admission, because they “often do not possess the traditional law faculty credentials.” Id.
cian burnout. Thus, practice supervised programs may provide an effective response to calls for separate clinical tracks because they remove much of the incentive for the "retirement." Arguments that separate tracks are not necessary to prevent "retirement" where in-house programs are involved are unconvincing. 397

The dichotomy between theory and skills provides a perfect mask for the ongoing negotiation between clinicians and traditional faculty over status and job security that has resulted from the decision to hire a separate faculty to supervise clinical work. 398 Both clinicians and traditional faculty can use the dichotomy to argue that they seek to use scarce resources of legal education in ways that are best for students, while they are actually attempting to advance their own interests to a greater share of those educational resources. 399 Thus, the discussion can remain on the dignified and altruistic plane of the needs of students in legal education while clinician claims to greater status and job security are the real issue.

Both clinicians and regular faculty have an interest in keeping the discussion on this higher plane. Neither wants to be seen as acting in

397. See Morris & Minan, supra note 363, at 797. Thus, the suggestion that a separate clinical track is not necessary because "a person's motivation and commitment can be determined prior to hiring" ignores the pressures that drive clinicians out of clinical teaching. It is nevertheless true that "[i]ndividuals employed in less than tenure track arrangements are relegated to second-class status," and that such an arrangement can have an adverse impact on the individuals and the institution. Id. at 798. As one of my colleagues has noted, it conjures up the vision of "one of our children eating in the kitchen." Despite the potential which separate clinical tenure offers for addressing the problem of clinician retirement, it may not be widely adopted as a solution. This solution runs contrary to the myth of the legal academic. "Law schools tend to be run on a theory of academic laissez-faire which is supported by two closely related myths: 1) that law teachers are academic generalists and 2) that all academic activities have equal worth." Tyler & Catz, supra note 134, at 701. It may also fail to be adopted widely because such a system publicizes and institutionalizes a solution to the ongoing dispute that affirms much of what the participants seek to keep below the surface.

398. There is no question that negotiations are in progress, although they are happening school by school, sometimes clinician by clinician. The Clinical Section and others have an interest in these negotiations, and may attempt to provide support or give advice. An example of such advice giving occurred at the ABA Conference on Professional Skills and Legal Education. Professor Gifford, a former clinician who is now a member of the academic faculty, urged advocates of lawyering skills education to consider how to most effectively choose a negotiation strategy. "The negotiation under consideration is the 'meta-negotiation' between representatives of the practicing bar and clinical teachers, and the more traditional professors and law school deans who control legal education." Conference, supra note 4, at 16.

399. The suggestion that self-interest plays a critical role merely recognizes human nature. "To expect that very many people are going to act against their own self-interest and the values of their peers for any significant period of time ignores fundamental and largely universal traits of human nature." Tyler & Catz, supra note 134, at 693.
ways that are designed to promote self interest. Clinicians do not want to be seen as putting their self interest before the interests of their students. Many clinicians have a public interest or public sector background, and are uncomfortable with traditional labor rhetoric and activity because it may be viewed as contrary to the interests of students. It is more likely that such an individual will phrase the argument in public interest terms which ally clinicians with students against the traditional faculty. For example, it is more likely that clinician claims will be advanced in consumer protection terms rather than in traditional labor terms. Thus, clinician demands for more resources may be transformed into consumer protection arguments: In the large traditional class or in the practice supervised clinic the student is not “getting his money’s worth.” Demands for better working conditions may be similarly re-worked: If students are to have a good experience, student to faculty ratios must be kept low. The dichotomy also fits the approach well, as it allows the clinicians to argue that they are essential to a complete education.

There is a second reason why clinicians want to talk about education, rather than directly about their poor treatment at the hands of their colleagues. Discussion of poor treatment emphasizes the clinicians' weak position within the legal education establishment and tends to minimize the successes they have achieved. The use of educational rhetoric allows the debate to proceed without dwelling on the clinicians' weakness.

Not only does the dichotomy provide a useful mask, it is useful to clinicians in gathering support for their position from outside the academy. It permits them to exploit the concerns of their patrons, the practicing bar, in securing additional support in their fight against the law schools.

Politically, clinical education needed allies. It had received its impetus from an alliance with outsiders—CLEPR and students—and in order to sustain itself it understandably looked to support from the bar. Judges and the practicing bar during the 1970's had renewed complaints about the competence of lawyers. They could look to clinical education as a way of translating these complaints into demands for change in legal education. This "natural alliance" tended to merge clinical education and competence training. Moreover, as with the focus on relevance, the focus on competence tended to emphasize the skills aspects of clinical education to the exclusion of its other possibilities.

Similarly, the traditional faculty does not benefit from characterizing the dispute in labor terms because they also do not want to appear to be self-interested, and do not want to be viewed as management. That characterization emphasizes the fact that they have hired others to do work that can fairly be characterized as their responsibility, and they have done so in order to preserve the benefits of their position.

400. Spiegel, supra note 306, at 605-606 (footnote omitted).
The traditional faculty also benefits from the message when the dichotomy is used in the debate. By connecting clinical education with practice, the traditional faculty can marginalize it in the law school environment.\textsuperscript{401} Thus, it seems to be in the best interests of all concerned to find a way to have the debate in non-labor terms.

Because traditional labor remedies may be viewed as inappropriate, it is not surprising that rather than taking direct action against the law school, clinicians have sought to ally themselves with outside sources of power like the ABA. The clinical movement has attained its acceptance primarily through the support of third parties. Without the help of foundations, government funding, and the intervention of the ABA, clinical education may not have even passed through the door of legal education. Third party power has created a level of acceptance of clinicians, but it has been unsuccessful in bringing them complete acceptance. The situation in many schools remains tense. This has made even those who have made great progress wary of backsliding and threats to the progress that they have made. These fears are often real because, as a largely untenured group, clinicians are most at risk in times of economic difficulty and changing priorities.

The dynamics that have just been described have had almost predictable consequences on scholarship and on curriculum development. Because of the connection between scholarship, status, and job security in academia, scholarship has been transformed into the central battleground in the defense of the academy from the clinicians' assault. Clinicians who have been given the opportunity to participate as tenure-track faculty have had difficulty creating acceptable scholarship. There are a number of reasons for these difficulties. First, there is the clinician's difficulty in finding the time to do scholarship because of the time that must be spent with students.\textsuperscript{402} The clinician soon discovers that his responsibilities to his students and his self-interest conflict. Time spent with students produces "nothing tangible for which he will gain any academic recognition even if the results of his efforts is superb teaching and the quality representation of clients."\textsuperscript{403} Second, the work products produced by clinicians may not be consistent

\textsuperscript{401} "The way to ensure that clinical education has minimal impact within the law school world is to equate it with skills training. Skills training, by definition, is a marginal activity within academic circles." \textit{Id.} at 606.

\textsuperscript{402} In a role play at the ABA National Conference on Professional Skills, Dean Harbaugh summarized the problem this way:

\begin{quote}
As you know, one of the serious problems that confronts clinical educators is the inability to block off one or two days a week for research and writing, an approach that many traditional faculty are able to follow. Nor are they able to close the door with the same amount of frequency as some of our colleagues who try to work on their scholarship each and every day.
\end{quote}

\textit{Conference, supra} note 4, at 74.

\textsuperscript{403} Tyler & Catz, \textit{supra} note 134, at 699.
with the expectations of the traditional faculty because they may include briefs, memoranda, and other nontraditional material. 404 Third, the topics chosen may not be acceptable to the traditional faculty, especially if the topic is clinical work. It is natural for clinicians to write about their work but doing so may make acceptance more difficult. On the other hand, clinicians taking a more realistic view of the situation might choose to write more traditional scholarship. This has discouraged some clinicians from making contributions in areas that clinicians can arguably have an important impact, such as in the improvement of clinical education or in empirical work. 405 Some have gone so far as to suggest that while tenure is intended to further academic freedom, it may have the opposite effect when applied to clinicians, because "[i]t stifles the academic freedom of the [clinical] teacher on the tenure track." 406

A call for the relaxation of traditional scholarship requirements is the logical demand, 407 often heard, and can be persuasively argued. Clinical teachers necessarily engage in different forms of educational innovation or experimentation in order to shape a clinic. The development of manuals, grading criteria, scoring sheets, simulation exercises, intensive instructional materials in substantive and procedural law, case management systems, and unique patterns of delegation and quality control all constitute investments in education innovation that should be regarded as scholarship in the field of pedagogy. Likewise, particularly outstanding appellate briefs, pleadings, or creative settlement agreements constitute demonstrations of professional competence as role model, teacher and practitioner and should also be regarded as scholarship in the sense that they represent a contribution to the available body of knowledge and materials which can be used by students, clinical teachers and practitioners in the future. 408

404. "When scholarly contribution is required [for tenure], the work products most heavily relied on are either law review articles, casebooks, or analytical studies which involve doctrinal analysis." Leleiko, The Opportunity To Be Different and Equal—An Analysis of the Interrelationships Between Tenure, Academic Freedom and the Teaching of Professional Responsibility in Orthodox Legal Education, 55 Notre Dame Law. 485, 489 (1980).

405. Professor Leleiko has reported this phenomena. "If there is passion in the preceding analysis, it is because of the pain I have witnessed watching colleagues struggle to produce articles designed to satisfy others while their own intellectual interests, originality and idealism were being suppressed." Id. at 506-07. The need for more empirical work has been recognized. See, e.g., Shuck, Why Don't Law Professors Do More Empirical Research? 39 J. Legal Educ. 323 (1989). The need for more writing in the clinical area, if it was ever in doubt, is demonstrated in this Article.

406. Leleiko, supra note 404, at 506.

407. The Guidelines provide that clinicians should be evaluated, as applicable on "contributions to empirical or theoretical research, such as law review articles, treatises, case books, and other forms of legal writing of an original nature, including briefs and memoranda, provided appropriate time is made available for research." GUIDELINES, supra note 31, Guideline XVII.A.2, at 35.

408. Cahn, supra note 219, at 481. Tushnet agrees: "Briefs do resemble the traditional faculty's writing except that the traditional faculty calls its pieces articles and..."
It is reasonable for clinicians to argue that they should be judged based upon what they do and not on the same basis that traditional faculty are judged. The differences in job qualifications, working conditions, and areas of interest and expertise all support their claim. After all, the fact that clinician work is time intensive and emotionally draining was the reason that clinicians were hired to do it in the first place.

Some have gone beyond these essentially defensive arguments and have attacked legal scholarship itself in order to advance the clinicians' cause. The tactic is apparently to paint scholarship as an obstacle not just to clinician advancement, but to law student competence. Tushnet suggests that "it would be a tactical mistake for clinicians to deprecate the importance of writing and research." Nevertheless, this approach is attractive because it reinforces the link between clinicians and their patrons at the bar who are already critical of the competence of recent graduates, and it places blame for the problem at the feet of the academic faculty. However, this apparently offensive tactic is really defensive because there is no chance that the traditional faculty will be convinced to stop writing articles and instead teach in the clinic. The real point is to cement the clinicians' relationship with the practicing bar and perhaps make the traditional faculty feel some-
what guilty about pursuing their own interests at the expense of their students.

An example of this tactic appeared in a recent issue of the Journal of Legal Education that was devoted to legal scholarship. Professor Elson attacked legal scholarship because of the effect that devotion to scholarship has had on "education for professional competence." The "challenge to the orthodox view of the preeminence of legal scholarship" advanced by Elson "relies on four related propositions":

[F]irst, law schools have a paramount duty to educate their students for practice competence; second, law schools generally are not fulfilling that duty satisfactorily; third, the more emphasis law schools give to the production of legal scholarship, the less satisfactory their education for professional competence is likely to be; and, fourth, the reasons commonly asserted for the primacy of law schools’ scholarly mission do not justify the resulting cost to their mission of professional education.

The argument is based on the dichotomy. It opens with the standard vision of "advocates of practical training," being denounced as "anti-intellectual" by academics. Predictably, it is based on a consumer protection, rather than a labor-management, rationale. The argument’s central premise, that law schools exist to train students to practice law, may be a catchy theme with students and practitioners, but it seems to ignore the fact that law schools have more than one mission, and that there is a tension between scholarship and training students inherent in all professional education. The argument’s suggestion that there is an inverse relationship between scholarship and “training for professional competence” seems to assume a zero sum game: that all training for professional competence in law school is through instruction by full-time faculty, who would otherwise be writing legal scholarship. This assumption is not yet true, and will only be true if in-house clinicians succeed in driving all clinical programs either in-house or out of business. Until that occurs, there will not be an inverse relationship between scholarship and professional education because law schools will still be permitted to draw upon other resources outside the full-time faculty to assist students engaged in

412. See, e.g., Elson, The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?, 39 J. LEGAL EDUC. 343 (1989).
413. Id. at 344.
414. Id. (footnotes omitted).
415. Id. at 343.
416. “First, students entrust three years of their lives to law faculty and pay substantial sums with the expectation that the faculty will give them a first-rate professional education. By taking students’ time and accepting their money, law schools assume a duty to fulfill the expectations they have engendered.” Id. at 345. The second argument is based on the schools’ monopoly position in the education of practicing lawyers, and the third is from a trust relationship with the student. Id.
professional education. They will continue to use practitioners as field supervisors, and adjunct faculty. Moreover, as long as practice supervised clinical programs continue to exist, students will themselves be available to supplement the full-time faculty, field supervisors, and adjuncts, as they take more responsibility for their own learning.

The calls for different standards have drawn the predictable response from traditional faculty that lower standards are only appropriate for forms of job security less than tenure. A debate on the form of status and job security (short of tenure) appropriate for clinicians is ongoing with the current consensus, to the extent that one exists, embodied in Standard 405(e). Curriculum decisions will also be made in the shadow of the dispute. From the time that clinicians are added to the “traditional faculty,” curriculum decisions will be made with due regard for how many more clinicians will have to be hired to accomplish any curriculum change.

Thus, the decision to hire professional clinicians has created and will continue to create problems for the law school. These problems are neither surprising nor unique to this context. They are inherent in the process of “professionalization.” The efforts of in-house clinicians to keep practitioners from participating in legal education are consistent with the dynamics of that process. “Professionalization is ... an attempt to translate one order of scarce resources—special knowledge and skills—into another—social and economic rewards. To maintain scarcity implies a tendency to monopoly: monopoly of expertise in the market, monopoly of status in a system of stratification.”

The attempt to draw boundaries, as professional clinicians have, is similarly quite predictable:

In [the professionalization] process, particular groups of people attempt to negotiate the boundaries of an area in the social division of labor and establish their control over it. Persuasion tends to be typically directed to the outside—that is to relevant elites, the potential public or publics, and the political authorities. Conflict and struggle ... mark the process of internal unification of the profession.418

Practice supervised programs should not be permitted to fall victim to the professionalization process. While the politics at work in clinical education today threaten the future of those programs, they can be saved if the benefits of practice supervised programs are ac-

417. M. LARSON, THE RISE OF PROFESSIONALISM at xvii (1977). Thus, clinicians, like their traditional colleagues before them, are attempting to exclude others from their preserve, which may be broadly characterized as teaching professional skills. See supra note 375. Despite the fighting rhetoric, clinicians are not trying to beat traditional academics, but rather trying to join them. Perhaps Gee and Jackson put it best when they asked “Will Langdell Take a Bride?” Gee & Jackson, supra note 109, at 841.

418. M. LARSON, supra note 417, at xii.
knowledged and the consequences of clinician professionalization are understood.

Like an endangered species, the clinician remains a marginal member of the law school community, protected to some degree by the ABA. Is the protection of the professional clinician worth the cost? Protection is obtained at great cost if the potential of practice supervised programs is sacrificed in that effort. If additional school resources must be spent on case supervised and in-house programs to replace practice supervised programs, the future of other law school programs will be adversely affected as well.

VIII. CONCLUSION

If the approach to practice supervised clinical programs advocated in this Article were to become widespread, there might be a need for fewer clinicians, because some of the work done by in-house supervisors could be shifted to field supervisors and to students. The role of the full-time faculty member in the approach suggested here makes it possible to fill the position with a traditional faculty member, not a clinician, because no direct case supervision is occurring. Just because fewer clinicians would be needed, it does not follow that those who filled those roles, and the schools and the students, would not benefit. The approach suggested here would be less expensive, the clinician would have more time to write, and, since a more traditional faculty candidate would be eligible to fill the role, the individual directing the program would be more likely to be treated like other faculty members in terms of hiring, promotion, and tenure. As the dispute over tenure diminished, the labor dispute would end, the dichotomy could be discarded, and there would be less pressure to draw divisions between clinicians and regular faculty. Similarly, it would be more likely that clinicians would lend their aid to the development of quality practice supervised programs. The Clinical Section may not see this solution as a benefit because all the people now employed as clinicians may not obtain jobs under such a regime. But faculties desiring to find a way out of the endless conflict guaranteed by the hiring of more and more clinicians might appreciate the alternative to that conflict offered by practice supervised programs.

Despite the great potential of practice supervised programs, their future seems as bleak as their past. No organized group has given

419. It may be that practice supervised programs alone cannot be used as a substitute for in-house programs if in-house educational objectives are to be maintained. However, it may be possible to use practice supervised programs together with other alternatives, such as simulation courses, to address educational objectives that practice supervised programs alone may not be suited to address.

420. "The out-of-house placement has long been ignored, serving as the orphan child of legal education. Even most clinicians have looked with disdain upon these
them support and no champion within legal education seems likely to emerge.\textsuperscript{421} Individual programs are themselves often in various degrees of disarray. The law schools operating practice supervised programs sometimes lack the purposes suggested here, and even those with good purposes lack guidance on how to build better programs. Clinicians who operate such programs not only have no effective trade organization, but their supposed trade group, the Clinical Section of the AALS, is actually hostile to the success of practice supervised programs. Thus, “progressive” clinician efforts, like the adoption of the \textit{Guidelines} and clinician involvement in subsequent efforts to enforce Standards 306 and 405(e), create the incorrect impression that all clinicians believe that practice supervised programs are unworthy of support.

Although the ABA has caused much harm to practice supervised programs through its misguided regulatory efforts, the ABA is probably the best hope for the survival of practice supervised clinical programs. The ABA is a natural ally of such programs because the mainstay of practice supervised programs are the practitioners that the ABA at least in theory represents. Practice supervised programs are, in turn, the mainstay of law school efforts to provide legal assistance to the poor, a cause to which the ABA has shown some devotion. Practice supervised programs desperately need the ABA's help. The ABA’s regulatory efforts have not been completely misguided. They have correctly determined that most law schools lack a commitment to practice supervised programs. Schools are often guilty of the neglect that the ABA regulatory efforts are designed to correct, and the ABA has the power to make the schools respond more appropriately to those programs. The current regulatory approach errs not because it is based upon the belief that law schools cannot be trusted to operate effective practice supervised programs, but because it seeks to solve the problem of inadequate law school support of such programs by encouraging schools to replace practice supervision with case supervision. That regulatory response unnecessarily sacrifices the potential of practice supervision. If the ABA can be convinced of the value of placements, denying ownership and disclaiming their role as a legitimate form of legal education.” Motley, \textit{supra} note 16, at 211.

\textsuperscript{421} The California Bar seems to be embracing internships even as the ABA has been moving in the other direction. Proposal 1B in a recent set of California Bar Proposals suggests that “the Board of Governors should implement an internship requirement as a condition for admission to the Bar.” Memorandum from Philip S. Anderson to Office of Professional Standards, State Bar of California 2 (June 16, 1989)(available in University of Nebraska College of Law Library). The ABA has responded, resisting this effort, and notes that “the educational value of internships has been a subject of great debate.” \textit{Id.} at 3. Perhaps support for practice supervised programs will come from outside the traditional forces in legal education.
practice supervised programs as part of a curriculum for educating lawyers, perhaps current regulatory efforts can be redirected. If current regulatory efforts are abandoned in favor of efforts designed to encourage schools to enhance rather than destroy practice supervised programs, the public, the profession, the students, and the law schools will be well served.