LAW SCHOOL DEVELOPMENTS

Once a year this department will carry figures on law school registration. In addition it will provide a medium for the description of experiments in curriculum, teaching method, and administration. Like "comments," the typical law school development note will be characterized by brevity and informality; unlike them, it will be descriptive rather than argumentative and will deal primarily with devices which have been tested in actual operation. As a general rule, the authors will gladly answer inquiries and, to the extent available, upon request supply copies of materials referred to.

THE KANSAS TRIAL JUDGE CLERKSHIP PROGRAM

ROBERT C. CASAD *

The late Justice Robert Jackson is credited with having said that "The unsolved problem of legal education is how to equip the law student for work at the bar of the court." [1] The Trial Judge Clerkship program recently instituted at the University of Kansas School of Law may provide at least a clue to the solution of this problem.

I

THE PROGRAM AND ITS PURPOSES

The heart of the program is the assignment of students to full-time service away from the campus for seven to eight weeks in the courts of selected state trial judges. During this time the students observe and participate in everything the trial judge does. The results of the program during its first year have been so favorable and its operation so utterly feasible that it may well be of interest to other law schools. The program is being financed for two pilot years by a grant from the National Council on Legal Clinics.

The purposes of the program are:

1. To give participating students a better education in the procedural arts and skills of law practice than is possible in a program that is limited to the classroom.
2. To promote a professional sense of responsibility, especially that connected with the trial of lawsuits, through a clearer understanding of court operations and the work of judges.
3. To provide data concerning actual practices in individual courts in different parts of the state.

The two most serious criticisms of current legal education in America are (1) that the law schools are not preparing students adequately for the practice of law, and (2) the law schools are failing to impart to students the deep sense of professional responsibility that a lawyer must have.[2] Much of this

* Professor of Law, University of Kansas.

1 Quoted in Cooper, *Preparation For the Bar*, 15 J. LEGAL ED. 300, 301 (1963).

2 See, *e. g.*, Harno, *American Legal Education*, 46 A.B.A.J. 845, 850–51 (1960).

HeinOnline -- 18 J. Legal Educ. 75 1965-1966

criticism probably is unjustified. The law schools certainly are trying to turn out graduates as well prepared as possible to take their place in the active profession. For most of the arts and skills of practice, the law graduates of today are probably better prepared than at any time before in history. Those who argue that they are not adequately prepared to practice law usually base their criticism on the fact that newly-graduated lawyers, by and large, are not so well oriented in the procedural skills of litigation as were the products of the old apprenticeship system. It is doubtless true that the law school graduates are not really prepared to represent clients in court immediately, but the law schools have generally disclaimed the ultimate responsibility for this phase of legal education. Procedural skills are very difficult to teach in the classroom, and young lawyers do learn these skills fairly rapidly after they have been through a few trials. But leaving this matter up to the organized bar or to the individuals themselves has not been too satisfactory. It is "chancy," and young lawyers can make mistakes in the process of learning that seriously prejudice their clients.

Accordingly, while denying ultimate responsibility, most law schools today seem to recognize that more can and should be done to make the process through which young lawyers become true professionals an easier and a shorter one. A number of methods of teaching procedural arts and skills have been proposed and instituted in law schools. The most prevalent, of course, is the practice court. In practice court, however, the students normally encounter only the trial experience itself, and usually in a mock trial without flesh and blood interest. The student does not normally encounter the wide variety of pre-trial and post-trial proceedings that he must become familiar with in practice. Some law schools have been able to supply some realism to their mock trial program by having students work on actual cases for indigent clients or handle small claim controversies. These, although they do involve flesh and blood interests, necessarily are limited to certain kinds of cases. Through legal aid bureaus or small claims courts, students do not encounter a truly representative sample of the kinds of cases they are likely to face in practice.

Law office clerkships have been suggested and tried in some schools and by some bar associations.[3] These programs have not been very successful insofar as providing orientation to "courthouse" practice is concerned. In the first place, unless there is some assurance that the student assigned to his office will enter practice with him after graduation from law school, the lawyer-preceptor frequently does not really want to teach the student-intern what he knows or should know about the practice of law. Sometimes the law office clerkship degenerates into a situation where the student clerk is exploited as an office boy, and learns relatively little about actual law practice. Even under the best of circumstances, unless he is assigned to a firm that specializes in trial practice, the student-intern normally will not spend much time in court, and so regardless of what else he may learn, he will not learn much about the arts, skills, and responsibilities of "courthouse practice."

Courtroom television has been suggested as a means of permitting the students to learn more about courtroom practice. This device has the

[3] See, *e. g.*, Kessler, *Clerkship as a Means of Skills Training*, 11 J. LEGAL ED. 482 (1959).

HeinOnline -- 18 J. Legal Educ. 76 1965-1966

advantage of permitting the student to observe as many trials as he has time for during his law school career, but it does not necessarily provide him any understanding of the process by which the case got to trial nor what will become of it after the verdict is rendered. The most serious drawback to courtroom television is that it is so costly that very few law schools can afford it. This is not to suggest that all of these programs—practice court, law office clerkships, and courtroom television—do not have value. But, each of them does have some serious inadequacies.

The Trial Judge Clerkship program was designed to avoid some of the drawbacks of alternative programs. Under it, law students are able to participate in the trial of several actual lawsuits under conditions which require them to understand thoroughly what is being done, but in which they are not representing actual clients. Thus, they have an opportunity to learn their way around the courts at no risk to the public. Unlike interns in law offices, they are not subject to exploitation. Judges, as salaried public servants, have no reason to exploit students; unlike many busy practitioners, they have an incentive to try to teach the students as much as possible. The relationship between the students and the court requires them to be familiar with all the pleadings, processes, motions, and orders incident to getting the case ready for trial. They observe jury selection, presentation of evidence, arguments of counsel, instructions to the jury, and post-trial procedures. In the course of being in court full-time for eight weeks, the law student may observe as much court activity as an average practitioner does in two years.

Besides first-hand experience with trial procedures, the student in the program acquires a store of observations upon which a really meaningful program of education in professional responsibility can be built. One of the reasons law schools have failed so miserably in education for professional responsibility surely must be that most students have no first-hand experience with the relation between lawyer and client, lawyer and lawyer, and lawyer and judge, thus preventing any meaningful discussion. Moreover, all too frequently the professor is not much better off in this regard than the students. Employing practicing lawyers to teach the course is not necessarily better. All too often, practicing lawyers become callous to problems of professional responsibility. There are drawbacks, then, to having either a professor or a practicing lawyer teach this subject.[4]

The judge may well be in a better position than anyone to instruct as to professional responsibility. Many judges have frequently remarked that they would like to have a chance to instruct young lawyers in their responsibilities to the court and to their clients before they develop bad habits from observing some of their colleagues at the bar. From his position in the court, the student may be able to gain a deeper understanding of the responsibility that the legal profession must bear by virtue of its holding a state-protected monopoly over the means of effective access to the courts for the vindication and protection of human rights. Although he has been told in school that everyone is entitled to a fair day in court, he may not fully realize, until he sees it, how hollow this right may be without effective legal counsel. He will see instances

[4] See Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL ED. 1 (1963).

HeinOnline -- 18 J. Legal Educ. 77 1965-1966

of indigent criminal defendants being defended by court-appointed counsel, and in such cases he will surely observe examples of both responsible and irresponsible conduct on the part of lawyers in their relation to other lawyers and to the judge. Since his role in the court will be non-partisan, he will probably be able to gain a better understanding of the proper balance which the advocate must maintain between his duty to his client and his responsibility to the court and to the public, although this fact may prevent him from sensing the full impact of the problems on the minds of the adversary lawyers. He will probably observe examples of lawyers so bent upon winning that they misuse the sources provided by the law for the protection of their client's rights. On the other hand, he will probably see instances in which the lawyer gives in too readily to suggestions of compromise urged by opposing counsel or by the court. He will probably observe instances of procrastination and unnecessary delays caused by irresponsible conduct on the part of lawyers, and these the judge will surely call to his attention.

One of the principal reasons why the law schools have not done more in the area of teaching professional competence and professional responsibility in litigation-oriented situations, is that the regular faculty is not normally either capable of or interested in (which may be really the same thing) this kind of teaching. Hiring practicing lawyers to teach on a part-time basis has many defects, too. The trial judge, however, at least in this part of the country, is normally one of the best qualified lawyers in every community, since the district judge's position is one of considerable prestige. He is likely to be capable and concerned about problems of improving practice skills and professional responsibility. He will have a definite interest in seeing to it that the oncoming generation of lawyers is better prepared and more responsible than the last. Moreover, the barrier which our Socratic method of instruction is said to build up between professor and student, and which serves to deter effective teaching of professional skills and attitudes by professors, does not exist in the relation between the student and the judge. Students have been told that the trial judge is the principal figure in our legal system, and the setting is almost ideal for the utilization of the "hero theme" instruction technique. Moreover, the judges' position is a lonely one: they want and need someone to whom they can talk about the problems facing them for decision. Our experience has shown that they are not at all reluctant to discuss cases pending before them with the student clerks, including the special ethical questions and problems of professional responsibility that are presented.

In short, then, the trial judge clerkship seems to be a better device than alternatives that have so far been tried, not only for orienting law students in the procedural arts and skills of litigation, but also in providing them with the groundwork for the understanding of professional responsibility.

When the late Judge Jerome Frank said the "law students should be given the opportunity to see legal operations," [5] he meant that law students should be given the opportunity to observe the trial of lawsuits and the litigation process in the same way that medical students are given the opportunity to observe surgical operations. It is strange, in view of the many obvious advantages in this, that very few attempts have been made to do it until now. The University of Louisville has, as I understand, instituted a trial court clerkship

[5] JEROME FRANK, COURTS ON TRIAL 233 (Atheneum ed. 1963).

HeinOnline -- 18 J. Legal Educ. 78 1965-1966

arrangement, but it involves part-time service by the student one afternoon a week, which consists largely in assisting the court in research and drafting.[6] This program is extremely valuable no doubt, but obviously is quite different from what Judge Frank had in mind. Our experience with the trial judge clerkship program bears out the wisdom of Frank's suggestion.

II

THE INTERNSHIP ELEMENT

It would, of course, be much easier to arrange to have students working in the court during the summer session. This would not involve any general disruption of the law school course offerings. Unfortunately, in Kansas at least, most district judges do not have a typical docket during the summer months. Jury trials are relatively uncommon except in the very largest cities. Moreover, the volume of activity in general is reduced during the summer months. Accordingly, in order to achieve maximum benefit from the two months spent in the clerkship, a way had to be found to permit the assignment of students to work during the regular school year. It was felt that the most advantageous time for this would be at the beginning of the fall term of court, which nearly coincides with the beginning of the fall semester of school.

Participating students commence their clerkship assignment during the second complete week in September. They go to the city that is the seat of the court which they are to serve. If the judge has a multiple county district, the student clerk accompanies the judge to the other cities in which court is held. They remain in residence with the judge for seven to eight weeks. They are to perform such tasks as may be assigned them by the judge, including research and the preparation of legal memoranda on points of law assigned by the judge, assisting the judge in drafting orders or jury instructions, and such other jobs as the court may see fit to assign. Since the primary purpose of the program is to enable the student to observe as much as possible of what goes on in court, the judges were instructed not to expect the student to work on such projects more than ten to twelve hours a week when court was holding regular sessions. As it turned out, none of the judges in fact assigned the students as much as twelve hours work per week to do, and more than half of the judges did not assign the students any specific research projects.

The students were expected to attend all trials and hearings, including all matters presented in chambers, as far as possible. They were to familiarize themselves with the files in all of the cases beforehand so that they would know the background of the cases presented. The judges usually helped the students out by explaining significant matters that did not appear in the files.

The students were to record everything they observed in a notebook, and to submit weekly reports to the professor in charge of the program concerning their activities. These notebooks were to be a fairly detailed account of what the student in fact observed during his clerkship period, with comments concerning any special problems in connection with the cases, the court's disposition of the cases, and any other noteworthy matters. When no trials

[6] See Peden, *Obtaining Courtroom "Know How": The Judicial Assistanceship Program at the University of Louisville*, 12 J. LEGAL ED. 431 (1960).

HeinOnline -- 18 J. Legal Educ. 79 1965-1966

or hearings were scheduled in the court to which he was assigned and no research or writing tasks had been assigned him, the student was expected to go to other courts, such as the probate court or the municipal and county courts, and to familiarize himself with their activities. He also was expected to get acquainted with the operations of the office of the clerk of the district court, the sheriff, the register of deeds, the county treasurer, and other offices in and around the courthouse that are so important in ordinary law practice.

Ordinarily, the student's day started shortly before the judge arrived. The student would appear in court, check over the files of the business of the day and become familiar with them, check over the docket of the inferior courts to see if anything special would be presented during that day, and there would usually be a brief period before actually scheduled hearings when he could ask the judge any questions he might have about matters to be presented that day or matters which were treated the previous day.

The judges were surprisingly eager to help in enabling the students to get maximum value out of the time spent with them. Usually they made a special point of seeing to it that the students observed everything of interest that happened to come up in and around the courthouse during the clerkship period.

Participating students received three semester hours of credit, without grade, for the clerkship itself. This seems to be a fairly reasonable "credit subsidy" out of a total of 90 required hours.

III

THE CLASSROOM ELEMENT

Of course, mere observations, while they can be of some educational value, are not of great effect unless the matters observed are explained and placed in perspective. The judges were very helpful to explain particular matters that came up during the clerkship, but it was felt that a formal academic element was necessary in order to achieve the maximum benefit from the program. Accordingly, all participating students were required to enroll in a seminar in judicial administration when they returned to the campus after the clerkship period. The purpose of this seminar was to provide a means of relating the students' experiences to the over-all purposes of the program in advancing their understanding of practice skills and professional responsibility. Since all students who participated had taken the regular course in Legal Profession before, it was felt that the focus of the seminar's attention could be upon problems of judicial administration, a subject that concerns both procedural practices and professional responsibility. Each student in the seminar was to prepare an oral and a written report on some particular problem in the area of judicial administration. The report was supposed to be based partly on the student's own experience and partly on library research. Each reporting student was to pose certain questions for discussion which would tie in his subject with more basic problems of professional responsibility. The professor was to direct discussions so that they accomplished these ends.

Students were given two hours credit for participation in the seminar (three hours if they expanded their seminar report to a thesis). Experience during

HeinOnline -- 18 J. Legal Educ. 80 1965-1966

the first year of the program indicates that for the best results there should be no more than twelve students in each seminar group, and preferably fewer.

IV

ADMINISTRATIVE PROBLEMS

The professor in charge of the program, of course, had to coordinate the activities of twenty-five clerkship students and to carry on a regular correspondence with some fifty-seven district judges. But the operation of the clerkship program posed some administrative problems to the rest of the faculty and the school administration in general. These were the problems caused by the fact that the students were absent from the campus for an extended period of time during a regular semester. In order to permit the students to get twelve semester hours credit (which, according to university regulations, constitutes a full semester of residence), arrangements had to be made to permit the students to enroll in six hours of course work in addition to the seminar when they returned to the campus at the end of October. This meant that certain courses had to be scheduled to commence at the time the clerks returned to the campus, and that these courses had to be compressed into a nine-week period. This fact alone presented no serious obstacles. During our regular summer sessions, we compress regular courses into five-week terms. There was a serious problem, however, in allocating faculty manpower to teach those courses, and in scheduling the courses so that other students who were not involved in the clerkship program could select those courses if they so desired. Since we have a relatively small faculty, we could not simply offer the same courses twice, once to the clerks and once to the students who were not engaged in the clerkship during the same semester. But if the students who were not participating in the clerkship were to take those compressed courses, there was a problem in arranging the schedule so that they did not have too heavy a schedule of classes during the last half of the semester.

These problems proved to be surprisingly easy to solve. Since only third-year students were involved in the clerkship program, we only had to alter the class schedule for those courses normally elected primarily by third-year students. We made a survey of all the students engaged in the clerkship program to ascertain what courses most of them felt they had to take during the fall semester. Fortunately, nearly all of them designated two of the following three courses: Conflict of Laws, Insurance, and Future Interests. If those three courses were offered on the schedule compressed in the last half semester, the student clerks would be able to take the courses they intended to take anyway.

The professors who were assigned to teach those courses were assigned them only during the last half-semester. They were assigned an off-setting third year course to be taught the first half-semester to the students who were not engaged in the clerkship program. Those students who were not engaged in the clerkship who desired to elect either Conflicts, Future Interests, or Insurance, which were offered only during the last half-semester, had to enroll in one of the off-setting courses the first half-semester. These courses were Labor Law and the Legal Process. Thus, the professors who normally would have taught two courses spread out over an entire semester instead

HeinOnline -- 18 J. Legal Educ. 81 1965-1966

taught one course complete in the first half-semester and another course complete in the second half-semester. This entailed no addition to their teaching loads. By requiring the students not engaged in the clerkship to elect one of the first half-semester courses to offset any they elected to take the second half-semester, the hourly class schedule for those students was kept in balance. It may be noted that as a beneficial side effect a number of students who might not otherwise have done so, elected to take the "jurisprudential" course in the Legal Process.

This system of compressed courses served satisfactorily. It did raise some problems, but it is believed that the benefits of the trial judge clerkship more than offset the administrative problems that it raises.

V

SELECTION OF STUDENTS

Only students in their last year of law school were permitted to take part in the program. It was considered essential that participating students have a thorough grounding in basic law if the program was to be effective. Moreover, students who participated must have already had the courses in Evidence, Basic Procedure, and The Legal Profession.

All eligible second year students were summoned to a convocation where the principles of the program were described. The students were asked to fill out a form indicating their interest in the program, the locality in which they would prefer to serve, the courses that they would want to be offered on the compressed schedule, and the expense that would probably be entailed by their participation. Since we could not permit this experimental activity to weaken sound existing programs, we declared at the outset that members of the Board of Governors of the Law Review were ineligible for participation. We feared the Law Review would suffer if members of the top editorial staff were to be absent from the campus for any extended period of time.

With the information submitted by the students on the forms described, the process of selection consisted mainly of choosing those students who wanted to work in the localities where there were cooperating judges to whom we wanted to assign students. Other things being equal, a student who could participate at less expense was generally preferred.

VI

SELECTION OF JUDGES

A letter describing the program was sent to all fifty-seven district judges in Kansas and inquiry was made concerning their interest in participation in the program. Forty-eight responded to the letter and of those, forty-four expressed willingness to participate, although some of them frankly admitted there was probably not a sufficient volume of business in their court to warrant assigning a clerk to them. The judges generally seemed very enthusiastic, and two of them offered lodging in their own home should a student be assigned to them. The selection from among the judges interested in participating was made primarily by choosing from among those judges whose

HeinOnline -- 18 J. Legal Educ. 82 1965-1966

regular case load volume was sufficiently large to warrant assigning a clerk, and those judges sitting in localities where students desired to serve.

VII

REACTION OF PARTICIPATING STUDENTS AND JUDGES

Students were expected to submit weekly reports during their clerkship period, and from these we were able to tell something of the impact that the program had upon the students as they became progressively more involved in and familiar with the court. Their reactions were quite enthusiastic. At the end of the clerkship, all students were asked to submit an evaluation of the program and their experience with it. All of the students reported that they considered the program of great value. Some felt that the time could be reduced to five or six weeks, as their interest had begun to wane after that time and the matters observed became repetitive. Other students, however, felt the time was not too long, and some of them voluntarily served a longer period than was required of them.

The reaction of the judges was uniformly very favorable. Most of them did not actually take advantage of the student for research and drafting assistance. All were apparently happy to take time out to discuss with the student the pending cases and to explain to him any matters he felt uncertain about. They apparently enjoyed doing this. Several judges remarked that they found it not only pleasant, but helpful, to be able to share some of their ideas and thoughts about the cases with someone sufficiently well schooled in law to appreciate the problems, but who did not have a partisan interest in the outcome of the cases. All judges indicated they would be happy to participate in the program again, and some of them indicated that they would be willing to have more than one clerk assigned to them simultaneously if the need for that should arise.

The zeal with which these judges undertook the program, and the effectiveness of their work with the students indicates that there is among trial court judges a great and largely untapped resource for legal education of which the law schools have not been sufficiently aware. This, I believe could be a major discovery. It is possible, of course, that the results apparent here would not obtain in other states. I suspect, however, that they would. The law schools have powerful allies within the ranks of the district judges, who are as concerned as are we about the education of new lawyers in professional competence and responsibility. It may well be that the key to the solution of this problem will be found in combining the efforts of the judges and the law schools.

VIII

OTHER EFFECTS OF THE PROGRAM

As one of the side effects, we hoped the trial judge clerkship program would help remedy the phenomenon of declining interest of third year law students. After two years of our case study-socratic method of instruction, many, if not most, students have become almost immune to it, and so the third year

HeinOnline -- 18 J. Legal Educ. 83 1965-1966

poses special problems in the matter of motivating students. It was believed that this trial judge clerkship program would have a beneficial effect on the motivation of the participating students, and that they, upon their return to the campus, would impart some of their enthusiasm to the students who did not participate.

It is not clear that the program had any great effect in motivating students to make better grades during their final year. The grade averages of the students for their first two years' work were compared with the grades they received after returning from the clerkship. In some cases a marked improvement was shown, but in others a decline was noted. A similar study comparing the grades for the last year's work with the average of the first two years was made for students who did not participate in the program. On the average, there was a decline of grade averages during the final year in both instances (after the grades in such courses as Law Review and the thesis were counted out). The average decline in the case of the clerkship program students was less (0.013 on a three point scale) than that of the students who were not engaged in the clerkship (0.054). When Law Review people and persons who were candidates for Coif were removed from both categories of students, the difference in the average decline (0.147 for non-clerkship students as compared to 0.030) was rather pronounced, and probably was significant.

The most important side effect of the project, however, I believe, was the discovery of the great interest and educational potential that exist among the district judges. Placing the students in this close contact with district judges caused a profound effect in the students which will not soon be forgotten. The district judge has been referred to as the forgotten man in the American legal system.[7] Experience with this program indicates that we must not forget him any longer. There is no need for the law schools to bear the full burden of education in professional competence and responsibility when the district judges have so great a stake in this phase of professional education, and when they are so willing and able to assist.

IX

FUTURE OF THE PROGRAM

Experience with the program so far has been so good that it must be given a fairly high priority in future curriculum planning. Of course, there are changes that will have to be made in it, and we expect considerable improvements in it before it will finally be regarded as a mature program. This will come with time, however.

There is no reason why this program could not be adopted by other law schools if they are willing to undergo the administrative upset caused by the necessity of dividing the fall semester into two parts. Schools that are already on a quarter system could adopt this program with relatively little difficulty. There are 2,800 state district judges in the United States.[8] There are about 12,000 third year law students. There should be no problem in finding district judges willing to participate in sufficient numbers to accommodate most of the

[7] See Rutter, *The Trial Judge and the Judicial Process*, 15 J. LEGAL ED. 245 (1963).

[8] *Ibid.*

HeinOnline -- 18 J. Legal Educ. 84 1965-1966

students who would be interested. Problems of coordination would be posed in states where there are several law schools and a high ratio of students as compared to district judges, but these problems can be worked out.

I do feel, however, that participation in the program should not be allowed to reduce the amount of formal classroom education below the minimum level of 80 hours prescribed by the Association of American Law Schools. For those schools who have the 80 hour minimum requirement, participation in a program such as this should be regarded as additional to the 80 hour figure. But for law schools such as ours, where the requirement is 90 hours, I believe that three or four hours could be allowed for participation in this type of program without jeopardizing the basic academic value of the law school experience.

We were fortunate to have the assistance of a grant from the National Council on Legal Clinics during this first pilot period of the program. This grant enabled our students to participate in the program at little personal sacrifice. Whether the enthusiasm of the students would be so great if participation meant a considerable cost to them, we cannot say, although about half of the students indicated that they would have been willing to participate in the program even if financial support had not been provided. It is possible that students will be willing to bear their own expenses, just as students in schools of education normally bear the cost of their student teaching assignments away from the campus.

HeinOnline -- 18 J. Legal Educ. 85 1965-1966