

MILESTONES AND MEMORIES: STETSON'S PUBLIC DEFENDER CLINIC FACES THE FLORIDA SUPREME COURT

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Solomon, the wisest man who ever lived, remarked, "There is an appointed time for everything."¹ The confirmation of that ancient truism is found in the more modern adage that the convergence of time and place are most often the key to success. The advent of The Law Student Practice Rule (The Rule)² in the State of Florida can be attributed to its formulation in accordance with the dictum of that modern maxim. The Rule, having been conceived at the right time and in the right place, suffered a longer than normal gestation period, but its birth produced a unique facet of legal education that intrinsically possesses enduring qualities.

The conception of The Rule occurred in 1961 at a time and under circumstances that did not appear, on the surface, to be favorable for its development. The date of 1961 is significant, because Pinellas County had appointed Robert E. Jagger as the first public defender in the State. The need for this new form of representation was evident; however, just as apparent was the loud, vocal opposition to what was considered, by some lawyers, to be an encroachment on the private practice of criminal law. Not only did the new appointee have an overload of indigent defendants, he also had to contend with the forceful opposition to the existence of his

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After receiving his Masters degree in clinical psychology, Paul Barnard served four years as a special agent for the Federal Bureau of Investigation and then became a special investigator for the Palm Beach County state attorney. It was Barnard's sole responsibility to investigate the murders of a well-known circuit judge and his wife. That investigation furthered Barnard's interest in the law, and he later received his law degree from Stetson University College of Law.

Following graduation from law school, Barnard became a member of Stetson's faculty, teaching for eighteen years. During his tenure, Barnard established the Christian Legal Society, authored the *Florida Criminal Defense Trial Manual*, and pioneered the formation of the Stetson Public Defender Clinic.

1. *Ecclesiastes* 3:1.
2. R. Regulating Fla. B. 11-1 (1999).

office — all the while attempting to function with inadequate facilities and under-funding. Given that set of circumstances, he appealed to the only available source he believed could or would render timely assistance.

Perhaps because of my background and manifest interest, the request found its way to my office and with it began a long and mutually respectful relationship with Robert E. Jagger and the office of public defender. The immediate result was for me to begin to spend as much time as possible working with the public defender, not only to become familiar with local procedures while assisting with the cases, but also to determine if law students could be utilized, and, if so, the manner in which they might participate. During this time, Professor Calvin A. Kuenzel³ and I even undertook several appellate cases in an effort to visualize how law students could function at the appellate level.

After a judicious period of time and with the understanding and gracious permission of Judge John U. Bird,⁴ the first volunteer law students were allowed to make legal arguments to the court in non-jury matters. All of this occurred under the supervising presence of the lawyer assigned as counsel of record and over the frequent and vocal protests of the state attorney for the Sixth Judicial Circuit.

An appropriate excursus should be inserted here to explain what the general nature of the academic environment was, not only at Stetson University College of Law, but as it existed within the State and around the country. The first impediment was the recognition that the time-honored tradition of legal education was singularly academic in nature together with vested interests in that heritage prevalent within the average law school faculty. That fact translated into a natural resistance to any departure from the established norm that could affect individual feudal tenures within the curriculum. The second disincentive was the uncontrived challenge of rethinking an established and historical curriculum to accommodate the vicissitudes contemplated by the potential injection of the actual practice of law into a structure that had previously been studied only in cloistered classrooms. Vicissitudes, such as the transcript credit to be assigned, the limit of student participation in terms of hours spent, the problem of student absences from regular course instruction because of necessary court

3. Professor Kuenzel taught at Stetson University College of Law from 1958 to 1998. *In Memoriam: A Tribute to Professor Calvin Arnold Kuenzel*, 28 Stetson L. Rev. 965 (1999).

4. Judge Bird was a criminal trial judge in the Sixth Judicial Circuit of Pinellas County.

appearances demanded by their case, how a grade would or could be assessed, teaching load for the professor assigned clinic responsibility, and other related problems, had to be considered.

A third concern, attendant to any clinical program, was finding the appropriate public vehicle through which the student could find the experience sought. Not only that, but it had to be one that was compatible with the ethic of the University to which it became a necessary adjunct. In Stetson's case, that feature could not have been more adequately fulfilled than in the relation between the College of Law and the public defender for the Sixth Judicial Circuit. In fact, Robert E. Jagger was of great assistance in overcoming the fourth impediment to the implementation of a clinical program. In addition to the personal sacrifice of untold hours devoted to the development of the practice concept, he was influential in our securing a grant from the Ford Foundation, which was absolutely critical to the formulation and initial operation of the clinic program. The law school had not budgeted, nor even contemplated, the additional financial burden involved; therefore, outside help was definitely necessary.

The fifth obstacle appeared in the realization, based on our initial experimentation, that the Florida Supreme Court needed to add The Rule to its jurisdiction over the practice of law in the State. To bring about adoption of such a rule, it was recognized that there first had to be the sponsoring agency of the law school and some support from the practicing bar for this innovation.

My initial conference with then-Dean Harold L. Sebring provided a favorable response to the request to pursue the possibility of achieving such a rule. Having recognized that there would obviously be some opposition, Dean Sebring asked what opposition I anticipated. My naive response was that I certainly did not anticipate that it would come from the practicing bar since many of those in practice already had strong ideas concerning the adequacy of their legal education. The dean's reply was that I was wrong and that the major resistance would come from precisely that source. Later experience proved him to be a seer. Nevertheless, with the dean's permission, I drew a prospective rule allowing student participation, but placing that participation in the discretion of the court. Dean Sebring, in the wisdom he had gained from his service as a Florida Supreme Court justice, vetoed the permissive or discretionary clause that had been placed in the draft of the proposed rule. The Rule was redrafted accordingly.

With the continuing permission of the dean, Robert E. Jagger and I visited several local bar associations throughout the State, presenting them the proposed rule and its possible adoption. The overwhelming response to these presentations was exactly as Dean Sebring had predicted. There was not only opposition, but rejection that was highly vocal and active in nature. The proposal of student practice, when unavoidably matched with the general resistance of the practicing bar to the concept of a public defender at that time, produced a legal "anathema." Because of the resolutions that were formally adopted by several of the local bar associations and because of a letter writing campaign to the justices of the Florida Supreme Court, it began to appear that the adoption of The Rule would never come to fruition.

As a result of the mounting expressions of rejection, there accrued a rather lengthy list of stated objections to what was being proposed. A partial list of these resembled the following:

1. The Rule results in inferential scorn of the criminal practice in that it suggests the practice of criminal law is less complex than civil practice.

This objection lost its force, because it was based on the presupposition that whatever services were rendered by the supervised senior law student would, *a priori*, be of inferior quality. What the practicing bar did not know was that our early experimentation had demonstrated an acumen and motivation in students afforded this responsibility that resulted in a high caliber of performance, many times exceeding that of some members of the practicing criminal law bar.

2. It invades the practical realm, which should be precluded from the law schools.

Apart from the fact that the question of the content of the law school curriculum was quite generally conceded to be a matter of unique concern of the law school itself, evidence in the form of testimony from multiple, knowledgeable authorities indicated a contrary view. This included evidence from medical schools that medical students routinely performed medical techniques of advanced degrees of difficulty, while under supervision and in the absence of any enabling or permissive rule.

3. It places the student beyond the control of the Bar or the court as to disciplinary measures or matters involving professional ethics.

That a rule of the Supreme Court of Florida, allowing a qualified privilege to a senior law student granting him practical experience in the profession of law, should at the same time place the student beyond the reach of the court and Bar in matters of ethics and professional discipline is inconceivable. Any student submitting himself to this type of program must necessarily, by implication, render himself amenable to all processes and sanctions of both the court and Bar as if he were a duly licensed practitioner.

4. The Rule results in loss of income to practicing attorneys.

By accepting only those cases already within the jurisdiction of the public defender, the law school is assured there will be no infringement on the private practice of law. The argument here is improperly addressed. It should go to the merits of the public defender system itself rather than to the proposed rule.

5. The phrase “general supervision of a public defender” is too broad.

The phrase “general supervision” in the proposed rule was a purposeful phrase that was modified by other phrases of The Rule such as the following: control of the Florida Supreme Court, control of the law school, control of the public defender, and control of the trial or appellate judge. Additionally, the permissive rule should not have been confused with the “unauthorized practice of law” problems. Senior law students, who are to become full fledged members of the Bar, are not to be confused with real estate brokers or insurance salesmen who are devoid of any training in the law and not subject to discipline by the court or Bar.

6. The Rule would be a violation of the principle laid down in *Gideon v. Wainwright*.⁵

This is a more complex objection, but it has many answers, among which is the assertion that due process cannot be denied by the mere presence of a law student unless the student has in some way acted prejudicially to the defendant. If that were to occur, there

5. 372 U.S. 335, 341–343 (1963).

could be a denial of counsel and due process, rendering the trial a nullity.

It should be remembered, however, that any counsel may be subject to this charge, thus entitling the defendant to a new trial.

7. The Rule would be a violation of the “privileged communication” Rule as between attorney and client.⁶

Students participating under the privilege of The Rule automatically place themselves under the sanction of the court and become, as to that particular client, the same as any other lawyer and therefore necessarily bring themselves within the Rule of privileged communication.

8. The adoption of The Rule results in a lowering of the standards of the Bar.

Without any comment about the standards of the practicing criminal law bar before the adoption of The Rule, there can be no doubt whatsoever that the whole thrust of the Public Defender Clinic, as envisioned at Stetson, was toward raising the ability, motivation, education, and skill of the law student. Instead of lowering Bar standards, the necessary consequence of The Rule was a raising of the standards of the Bar, to which the students would soon be admitted.

In conversations with members of the practicing bar, I learned that the greatest personal objection to The Rule was that law students receiving internship-type experience would graduate more adequately prepared for legal practice than my peers when they graduated. Their fear was that they would be disadvantaged because of the length of time it took them to achieve a similar acumen in the practice. That confided objection, of course, merited no answer.

In the course of research, it was discovered that several universities had professional responsibility programs, although collectively they appeared to be in amorphous and informal status. Most of those programs were informally operating either with an inadequate rule or in the absence of a rule.

To most persons who were familiar with medical school procedures, it was apparent that the law schools were perceptively

6. R. Regulating Fla. B. 4-1.6 (1999) (stating that a lawyer shall not reveal information relating to representation of a client except under certain circumstances).

behind in preparing their students for actual practice. So, with that perception in mind, a number of leading medical schools throughout the country were contacted and asked to describe the nature of the medical techniques they allowed their students to perform during the period they were under the guidance of the medical school. Of course, the uniform response was that medical students in the third and fourth years were not only allowed but were required to participate in a number of medical procedures under the supervision of the medical faculty. Significantly, this activity was done without question and without an extant permissive rule.

By 1964 the proposed rule had been rewritten and refined, the research had been concluded, and the “Brandeis Brief,” urging the adoption of The Rule, had been submitted to the Florida Supreme Court.⁷ The Florida Bar, through retained counsel, entered a reply brief in opposition and the time for oral arguments was set.⁸

On the day of the arguments, I drove to Tallahassee not fully knowing what to expect. The lawyers’ lounge was crowded; however, that did not prepare me for the “standing room only” press of the courtroom itself. When the full court assembled on the bench, the only seemingly friendly face in the entire tension-filled room was that of my wife. I sat alone at counsel table with no supporting cast behind me. On the other side, The Florida Bar was represented by dual counsel, and immediately behind them sat representatives from the Bar and other law schools. Time limits had apparently been waived in the interest of a full hearing on the matter. Never before, nor since, did I experience such emotional loneliness or feel such tension present in the spectator section. My impression, whether real or imagined, was one of animosity toward me personally for having the audacity to propose such a departure from the status quo.

However, as the arguments proceeded, I felt the personal exhilaration that attends the public espousal of a cause in which one is emboldened by the “rightness” of its nature. I am ever grateful to Justice Campbell Thornall,⁹ to whom most of my comments were

7. Br. of Respt., *In re Crim. P.R. No. 1*, 151 S.2d 634 (Fla. 1963) (per curiam). The Author refers to the respondent’s brief as a “Brandeis Brief,” because it is an appellate brief addressing an issue of compelling interest for which there is little or no legal precedent; therefore, the brief must contain social, cultural, or institutional arguments.

8. Br. of Pet., *In re Crim. P.R. No. 1*, 151 S.2d 634 (Fla. 1963) (per curiam).

9. Governor Leroy Collins appointed Justice Benjamin Campbell Thornall to the Florida Supreme Court in May 1955, and he served until his death in November 1970. *The Florida Supreme Court*, 35 U. Miami L. Rev. 1019, 1059–1060 (1981).

addressed, because he seemed to be intensely interested in the issues. At the conclusion of the lengthy arguments and as I was walking down the courthouse steps, the dean of the University of Florida College of Law, who had sat with the opposition, put his hand on my shoulder and expressed a kind evaluation of my presentation with the addendum that it was regrettable the effort had been expended in an obviously losing cause. My thought was, surely the practice of law is remarkable for the opportunities it provides to be involved in significant causes, regardless of their resolution.

When the favorable ruling came down by a unanimous court, there were many surprised lawyers. However, my sense of elation was greatly subdued by the realization that the burden had grown heavier, because I now had to assemble an adequately structured program to meet the tremendous responsibility of assuring that The Rule was implemented in such a manner as to avoid the objections that had been advanced. It was now Stetson's duty to become operational in such a manner as to incur the favor of The Florida Bar and justify The Rule's anticipated place in the structure of modern legal education.

Toward that end, separate facilities were provided at the law school for the operation of the clinic. The necessary equipment, including secretarial help, telephone facilities, dictating machines, and other necessities resembling a law office environment, was provided.

From the perspective of the law school, classroom time was scheduled for one evening each week, during which course content had to be devised. This content included, among other things, instruction concerning local court procedures, lectures from court reporters concerning their function and difficulties, presentations by judges and trial lawyers, and sessions involving investigative techniques and limitations. As cases were assigned to the individual students, there was classroom discussion concerning those cases and the problems they presented. In most instances, duplicate case files were maintained in the clinic office so the faculty supervisor could be aware of the progress in each case. The investigation, research, and motions drafted by the students were required in written form and placed in the files. This necessitated practice in the use of dictating equipment — a procedure with which most students were unfamiliar.

One of the avenues providing a great learning experience for the students was the preliminary hearings, which at that time were

conducted by the judges in the justice of peace courts then in existence. The nonjury nature of these hearings, which often involved the presentation of evidence, provided a great insight to the jury trial format. Judge Jack Dadswell,¹⁰ who then presided over one of these courts, provided a great introduction to the jury trial format and was receptive and helpful in the instruction of the students. One of the problems that arose in the development of this experience was how to instruct the student while he was on his feet before the court. The method chosen to alleviate this difficulty was a wireless FM transmitter with a receiver that was placed in the ear of the student. By means of this process, I could sit either at counsel table or in the spectator section of the court and speak to the student by means of this wireless transmission. As the student became more familiar with his function, the necessity for this diminished. It is amusing to me now to see an adaption of this technique in use between coaches and quarterbacks in the National Football League.

Since 1964 history has provided the justification for what was done regarding the introduction of student practice. The evidence for this has been provided not only by the personal testimony of those who have participated in clinical activities, but also by the law school itself, with the development of additional clinics for prosecution, civil matters, and appeals. Recognition for courage and foresight is due Stetson in assuming the leadership in the quest for the improvement of legal education.

The value of the experience provided by the introduction of student participation in the practical application of academic learning will be severely restricted if its benefit is limited solely to the individual student's professional performance. It must teach us that our rapidly changing culture continues to present us with new frontiers and complexities that demand a flexible and expansive mode on the part of legal educators. The cohesiveness of our legal society depends first and foremost on problem resolution provided within the integrated context of an adequate legal system. Legislation directed to burgeoning fields of societal activity is pointless without legal professionals, prepared by training, to guide and implement the required legal remedy. That inexorably means that legal education cannot afford to rest on its historical laurels while the society it is calculated to serve accelerates beyond it. The bright new minds of the current generation must provide the energy and

10. Judge Dadswell received his J.D. from the University of Florida.

vision to experiment with innovative concepts such as a multi-track curriculum that offers a core requirement of legal theory, but that, like the nine-headed hydra of Greek mythology, would allow multiple choices of specialization arising from the foundation of the essential body of legal theory. Other areas of exploration may include the idea of a required internship period following graduation. While this idea is certainly not new,¹¹ the means by which it might be made feasible and operative, based on expanding curriculum concepts, is open for modern exploration. New teaching and examination techniques also remain to be explored, along with liberal ideas of time for faculty practice. The field of undergraduate preparation, long considered by some as “off limits,” may be ripe for fresh examination. The legal profession desperately needs to find unification of its teaching and practice modes, a by-product of which is the serendipity of the ever illusive “better image.”

11. Gary S. Laser, *Educating for Professional Competence in the Twenty-first Century: Educational Reform at Chicago-Kent College of Law*, 68 *Chi.-Kent L. Rev.* 243, 289–290 (1992); Andrew J. Rothman, *Preparing Law School Graduates for Practice: A Blueprint for Professional Education Following the Medical Professional Example*, 51 *Rutgers L. Rev.* 875, 877–878 (1999).