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Legal Internship in Missouri

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LEGAL INTERNSHIP IN MISSOURI

I. INTRODUCTION

The Missouri Supreme Court has tentatively adopted a student internship rule which will permit law students, under the supervision of licensed attorneys, to advise and represent indigent clients both in and out of court in non-fee producing civil and criminal cases. This proposal is not an original concept. Twenty-six states and the District of Columbia now have either a court rule, a statute, or a practice of permitting law students to appear in court.[1] This group includes six states bordering Missouri.[2] Kansas now permits law students, who reside in Kansas but attend the University of Missouri at Kansas City, to act as legal interns in its 10th and 29th Judicial Districts.[3]

Missouri has four excellent law schools. However, they have been operating at a disadvantage compared to schools in states providing for law student internship. The law students, the state, and the bar in states permitting student internship have a tremendous opportunity to reap such inestimable benefits as increased legal services for the poor, relief for the bar from some of the burden of providing legal services in non-fee producing cases, an increased awareness on the part of law students of the law's relation to the problems of society, and an increased competence of lawyers educated in the schools of the state.

The goal of this comment is to review the purpose of the Missouri rule, to outline the provisions proposed, and to review the legal precedent for such a program.

II. THE PURPOSE OF LEGAL INTERNSHIP

The purpose of the rule is to encourage law schools to provide the practicing bar assistance in the representation of the indigent client and "to encourage law schools to provide clinical instruction in trial work of varying kinds."[4] The states, since the *Gideon v. Wainwright* decision in 1963,[5] have been burdened with the responsibility of providing counsel for persons who never before had the advantage of professional legal advise. Also, legal education has been criticized by such outstanding legal minds as Chief Justice Warren Burger and Justice Tom Clark for failing to adequately prepare the law student for the practical problems of the profession.[6]

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1. See Appendix A for a compilation and comparison of states which allow student practice.

2. Kansas, Iowa, Illinois, Nebraska, Tennessee and Oklahoma.

3. KANS. SUP. CT. R. 213 (III) (A).

4. See Appendix B for the text of the Missouri Rule Relative to Legal Assistance by Law Students and Paragraph I, *Purpose*. The Missouri Rule is quite similar to the ABA Proposed Model Rule Relative to Legal Assistance by Law Students.

5. 372 U.S. 335 (1963). Gideon extended the right to counsel guarantee to the states, thus imposing on the states the burden of providing legal assistance where none had theretofore been provided.

6. At the 1969 American Bar Association Convention, Chief Justice Warren Burger stated that law schools ought to make a greater effort to give students

One response to the mushrooming need for legal services has been legal aid and public defender programs. However, even with the massive influx of federal funds through OEO grants, the profession's present ability to serve the legal needs of the poor is far from sufficient. The problem is more acute than mere lack of funds; there is a need for trained personnel.[7] A practicing attorney, even one with a high sense of social responsibility, cannot devote a large amount of time to non-fee producing cases. However, the student, unlike the practicing attorney, will gladly work for nothing in order to gain experience. Also, a student can gain as much experience from a non-fee producing case as from a fee producing case and, at the same time, provide the public with effective and inexpensive legal service to the poor.

The rule also attempts to meet the challenge of those who charge that law schools place undue emphasis on the "so-called scholarly skills and standards" of appellate decisions, statutes, and legal treatises.[8] One critic charges that the favored position of law review and similar research experiences in law school is largely due to the fact that this type of scholarship most closely parallels the aptitude of the teaching fraternity and "is the kind of research and writing which may qualify a student to become a law teacher and legal scholar."[9] Regardless of whether undue emphasis is placed on the "so-called scholarly skills," there is a growing acceptance of the proposition that too little emphasis is being placed on practical training.

Lack of internship has not always been characteristic of the legal system. Before 1900, most lawyers were apprentice trained.[10] In the 20th century, however, the legal profession has lagged far behind other professions,[11] especially the medical profession,[12] in providing practical training to its students.

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practical experience in dealing with "raw facts and real life problems." Burger contended that there is more to the practice of law than the ability to write. He stated that rare is the graduate who "knows how to ask questions—simple, single questions, one at a time, in interviewing a witness or examining him in a courtroom." TIME, August 22, 1969, at 58. On the same subject retired Justice Tom Clark has observed that a major deficiency in legal education is its failure to bridge the gap between the law student and the lawyer. He states that a lawyer is one of the few professionals beginning his practice without an internship to prepare him for the practical problems of the profession. Justice Clark points out, "[e]ven an embalmer has to go through some form of internship." THE NATIONAL OBSERVER, May 6, 1968 at 1-2.

7. G. Anderson, Explanation and Comment in Support of Proposed Missouri Rule Relative to Legal Assistance by Law Students 13, October, 1969, (unpublished brief submitted to the Missouri Supreme Court).

8. *Supra* note 6. See also Council on Legal Education for Professional Responsibility, Inc., Vol. II, No. 1, Sept. 1969, at 1 (Newsletter).

9. *Id.* at 2.

10. Wright, *Progress Toward Legal Internship,* J. AM. JUD. SOC'Y. 184 (1969).

11. THE NATIONAL OBSERVER, May 6, 1968 at 1-2.

12. Third and fourth year medical students work regularly in teaching hospitals, under supervision, with increasing responsibility for diagnosis and treatment as their clinical experience grows. Upon graduation from medical school, the medical intern is endowed with both practical experience and scholarly skills. *See generally,* Creger & Glaser, *Clinical Teaching in Medicine: Its Relevance for Legal Education,* UNIVERSITY OF CHICAGO LAW SCHOOL, CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 77 (1970).

One reason sometimes offered for the failure of law schools to provide practical experience comparable to that provided in medical schools is that no institutions exist comparable to hospitals in which practical training of law students would be possible. Such is no longer the case. Public defender offices, set up pursuant to the decision in *Gideon v. Wainwright*,[13] provide a new teaching facility analogous, in legal matters, to a hospital in medical matters. The legal profession also has other institutions in which practical training is possible. These include various state agencies (prosecuting attorney offices and other agencies employing legal assistants), legal aid societies and law school clinics which allow the student, under the direction of a supervising attorney, to handle non-fee producing criminal and civil cases. It is hoped that with the adoption of the internship rule, Missouri can use such institutions to better train law students before their entrance into unsupervised practice.[14]

III. The Rule[15]

A. *Activities in Court*[16]

Paragraph II of the rule provides that student interns, under the supervision of an attorney, may appear in any court or before any administrative tribunal on behalf of any indigent client, provided the client gives a written consent to such appearance. The consent must be filed in the record of the case. The supervising attorney, who is fully responsible for the student's guidance in court proceedings whether present or not, must file his written approval of the student appearance. In civil matters and criminal matters in which the indigent does not have the right to assignment of counsel under any constitutional provision, statute, or rule of court, the personal presence of the supervising attorney is not required when the student appears in court. But in criminal matters in which the indigent has the right to assignment of counsel, the supervising attorney must be personally present "throughout the case and shall be fully responsible for the manner in which they [the proceedings] are conducted." Paragraph II, section B allows eligible students to appear on behalf of the state.

The states permitting student appearances in court have split on the question of whether a student should be permitted to appear in the absence of a supervising lawyer.[17] This split has been caused by the tendency

13. 372 U.S. 335 (1963).
14. G. Anderson, *supra* note 7, at 9-10.
15. Professor Gary Anderson, University of Missouri-Columbia School of Law, after extensive research, submitted a tentative draft of a Proposed Missouri Rule, based on the A.B.A. Model Rule Relative to Legal Assistance by Law Students, to the faculties and representative student bodies of the four Missouri law schools. On September 10, 1969, student representatives of the four law schools met with Anderson and made various suggestions and comments. In October, 1969, a Proposed Rule was completed and submitted to the Supreme Court of Missouri, accompanied by 41 pages of Explanation and Comment and a 77 page brief in support of the Rule.
16. *See* Appendix B for complete text of the Missouri Rule.
17. *See* Appendix A.

of interested groups to emphasize one of the purposes of such a program rather than the other. Educators are primarily interested in improving legal education through internship programs. This calls for close supervision during court appearances, since less educational benefit is derived from a student appearing in court with no one present to criticize his work. This is true even in simple cases where few persons would question the ability of an adequately trained law student to provide competent representation. On the other hand, those interested primarily in providing legal aid to the public emphasize that, if the presence of a lawyer is always required in court proceedings, internship programs (1) will not function well to extend legal services, (2) will be seriously restricted in terms of the number of students allowed to participate; and (3) will cause the supervising lawyers to waste a great deal of time. This apparent conflict is partially solved under the Missouri rule in that law schools may require very strict supervision in law school clinics, while other agencies providing legal aid may require less supervision.

1. Civil Matters

An eligible law student can represent any indigent person in any civil matter so long as the indigent is willing to file a written consent with the court. If the supervising lawyer files a written approval the student may appear without the supervisor's presence at the proceeding. Of course, the student cannot accept any fee from the indigent client, although the rule permits the agency employing the student to pay him.

2. Criminal, Juvenile, and Post-Conviction Relief Matters

Under the Missouri Rule the amount of required supervision in court depends upon a somewhat flexible criterion—whether the defendant has a right to counsel under the law. Such a general provision, insofar as it refers to federal and state constitutional requirements, provides little guidance for persons administering the rule. More rigid criteria, such as limiting solo courtroom activity by students to cases in which there are certain maximum penalties, could be substituted. However, in light of the developing constitutional requirement of the right to representation by counsel, it is submitted that the flexible criterion is more desirable. With rigid criteria, it might be necessary to amend the rule to conform to the changing requirements of due process.

The supervising lawyer's responsibilities, clearly defined in the rule, should permit the greatest possible flexibility while retaining a high measure of control. Under the rule, if a highly qualified student has worked on a felony case from its inception, and, in the judgment of the supervising lawyer, is capable of appearing in a jury trial of the case (in the presence of the lawyer), the supervising lawyer may allow such appearance. The rule also requires the indigent client to specially consent in writing to any representation by an intern. This is to provide a record of intelligent waiver of the possible constitutional right to representation only by a member of the bar.

3. Cases on Appeal[18]

Law students always have been allowed to assist appellate lawyers in preparing briefs. By their third year, most students have received some law school training in appellate advocacy. Since much of the preparation in appellate cases is done outside the courtroom and each party has considered his own and his opponent's points in advance, there would appear to be no need for the presence of the supervising attorney. However, from the educational point of view, it is preferable to have the supervising attorney present to criticize the intern and suggest needed improvements. Therefore, the rule provides that the supervising attorney must be present at this stage.

4. Appearance for the State

Students may appear on behalf of the state. It is the responsibility of the Attorney General, or prosecuting attorney, to see that adequate supervision is provided and that the interests of the State are protected. Preliminary hearings and trials of minor cases often keep the prosecuting attorney and his assistants, if any, too busy to effectively perform their other duties under the law. With proper training, legal interns could easily handle certain court proceedings for the state, thus relieving its overloaded prosecution staffs.

Prosecuting attorney internship programs, involving civil criminal, juvenile and post-conviction matters, would greatly increase student exposure to, and familiarity with, the duties and professional responsibilities of the Missouri prosecuting attorney. Such programs might also function to stimulate a desire in participating students to pursue a career in public service. Many counties in Missouri are having difficulty finding lawyers who wish to serve as prosecuting attorneys. A law school graduate who has had sufficient training and experience in the office of a prosecuting attorney could fill one of these positions without the need of a period of "internship" in a law firm.

B. *Other Activities*

1. Preparation of Pleadings and Briefs

Paragraph V, section A. of The Missouri Rule concerns legal intern activities other than court activities. Law students are already allowed to do limited interviewing of clients, preparation of pleadings and briefs, legal research, and factual investigation for attorneys of the Missouri Bar. It should be noted that nothing in the proposed rule would prevent law students, not certified as legal interns, from working as law clerks for members of the bar. The proposed rule affects only students who become legal interns and who are thereafter permitted to assume legal responsibilities greater than present law permits.

Although the intern may prepare pleadings, motions, and briefs under general supervision outside the presence of the supervising attorney, the

18. *See* Appendix B, Paragraph V, section B.

attorney must sign any documents prior to filing. Also, the fact that an intern participated in the preparation of documents must be mentioned therein.

2. Assistance to Indigent Inmates

Paragraph V, section A (3), provides for legal internship assistance to indigent inmates of correctional institutions. No one is currently available in Missouri to assist state prisoners in preparing motions for post-conviction relief except "jailhouse lawyers," who are willing to prepare documents in exchange for various items or favors. The result is that a large number of post-conviction motions of poor quality are filed in circuit courts throughout the state. Students will help remedy this situation. Thus among the benefits of a student internship program providing legal assistance for prisoners would be improvement in the quality of post-conviction motions filed under Supreme Court Rule 27.26 and the probable reduction in the number of motions raising frivolous questions. It should be noted that, under the proposed rule, these same students could also give advice and aid to inmates in connection with their civil problems. Rarely does a member of the bar give free legal assistance on civil matters to an indigent inmate.

The success of such programs has been noted by Justice Douglas in *Johnson v. Avery:*

> The experience at Leavenworth has shown that there have been few attacks upon the (prison) administration; that prospective frivolous litigation has been screened out and that where the law school felt the prisoner had a good cause of action, relief was granted in a great percentage of cases . . . . We think that these programs have been beneficial not only to the inmates but to the students, the staff, and the courts.[19]

C. *Requirements and Limitations*

Paragraph III, section A of the Missouri Rule provides that legal interns must be duly enrolled in a law school in this state. Section B provides that the legal intern must have completed at least four semesters of law school. Section C provides that the intern must be certified by the dean of his law school as being "in good standing." Section E provides that the student must certify in writing that he has read and in familiar with the Canons of Professional Ethics. This certification, along with the dean's certification of the student, must be filed with the Clerk of the Supreme Court. Although the legal intern may neither ask for nor receive any compensation from any client, the agency or institution which employs the intern may compensate him.[20]

The provision for the dean's certification of a student to the Supreme Court takes account of the varying approaches of the law schools in this state to legal education, curriculum offerings and requirements. Exact standards of evaluation, beyond the general parameters for evaluating

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19. 393 U.S. 483, (1969).
20. *See* Appendix B, Paragraph III, section D.

"good standing" in law school, would be extremely difficult to formulate. The dean of the law school where the student is enrolled is in a position to evaluate both the intangible factors and the academic preparation necessary for successful performance by a student intern. While not stipulated in the rule, it is expected that the dean will consult with the faculty in forming his opinion as to the individual student's "standing." Since close cooperation and consultation between deans and faculties is common practice in law schools in Missouri, the dean will have little difficulty gaining most of the information necessary to evaluate prospective interns.

D. *Certification*

Paragraph IV, section A provides that, unless withdrawn sooner, the certification shall remain in effect until the expiration of eighteen months after filing, or until the announcement of the results of the first bar examination following graduation, whichever is earlier. Recent graduates not yet eligible for admission to the bar would continue to be considered within the realm of legal education and under the aegis of their particular law school. Thus, under this provision, recent graduates might continue internship training while awaiting the results of the bar examination. The provision may encourage law schools to set up summer internship programs involving recent graduates as well as students who have just completed two years of legal study.

E. *Withdrawal of Certification*

The same considerations leading to the designation of the dean as certifying authority apply with equal force in the decision to include him in the system of revocation of certification. Paragraph IV, section B provides that the dean may withdraw certification by mailing a notice to the Clerk of the Supreme Court. No cause need be stated in the notice to the Clerk. Paragraph IV, section C provides that the Supreme Court also may terminate an intern's certification without notice, hearing, or cause.

F. *Supervision*

Paragraph VI of the Missouri Rule provides that the supervising lawyer shall be a member of the bar in good standing and assumes professional responsibility for guiding the student in any work undertaken and for supervising the quality of the student's work. Obviously, this will require close supervision and review of the student's activities for the protection of the client. In addition, the lawyer must assist the student whenever necessary.

IV. Legal Precedent for Legal Internship

A. *Adoption of Internship by Court Rule*

Of the twenty-seven jurisdictions which have adopted some form of legal internship, eighteen have done so by court rule and seven have done so by statute.[21] Although two states have allowed internship without a rule or

21. *See* Appendix A.

statute,[22] it is preferable to base the internship practice on such authority, thus avoiding the possibility of a charge of unauthorized practice of law.

Section 484.010 (1), RSMo 1959 defines the practice of law[23] and section 484.020, RSMo 1959 makes the unlicensed practice of law a misdemeanor.[24] Thus, at first glance it appears that the legislature regulates the practice of law in Missouri. However, such is not the case. Article II of the Missouri Constitution provides for separation of powers between the legislature, the executive, and the judiciary. Pursuant to this constitutional mandate, Section 484.040, RSMo 1959 provides that the Missouri Supreme Court shall have the exclusive power to "admit and license persons to practice as attorneys and counselors in the courts of record of this state, or in any of them." The regulations of the practice of law being a judicial responsibility, the intern rule is a matter for the Supreme Court rather than for the legislature.

The Missouri Supreme Court has uniformly held that it has the inherent power to define the practice of law.[25] The court has recognized that the legislature may, in the exercise of its police power, aid the court by providing penalties for such unauthorized practice and may define the practice for the *limited purpose* of enforcing such penalties.[26] In *Hoffmeister v. Tod*,[27] the court stated that although at times it had recognized the statutory definition of the practice of law, "we may undoubtedly do so reserving the right, however, at all times to fix our own boundaries and declare our own restrictions in all matters other than a prosecution under the statute."[28] The court also pointed out that the legislature, by defining the practice of law, may in no way hinder, interfere with, or frustrate the court's inherent power to regulate and discipline the bar, to define the practice of law, and to prevent the practice of law by unauthorized persons.[29]

The Missouri statute is not unique in providing that no person other

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22 *Id.*

23. The "practice of the law" is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.

24. (1) No person shall engage in the practice of law . . . unless he shall have been duly licensed therefor. . . .

(2) Any person, association or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution.

25. Hoffmeister v. Tod, 349 S.W.2d 5 (Mo. En Banc 1961); Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855 (En Banc 1952); Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977 (En Banc 1937); *In re* Richards, 333 Mo. 907, 63 S.W.2d 672 (En Banc 1933).

26. Hoffmeister v. Tod, 349 S.W.2d 5 (Mo. En Banc 1961); Automobile Club v. Hoffmeister, 338 S.W.2d 348 (St. L. Mo. App. 1960); Liberty Mutual Ins. Co. v. Jones, 344 Mo. 932, 130 S.W.2d 945 (En Banc 1939); Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977 (En Banc 1937) (separate opinion).

27. 349 S.W.2d 5 (Mo. En Banc 1961).

28. *Id.* at 11.

29. *Id.*

than a licensed attorney may practice law. In fact, all courts adopting programs allowing a limited student practice or supervised student internship have done so under similar statutes.[30] Tennessee, whose student internship program was rated best in the nation by the Law School Dean's Conference in 1965,[31] authorized, by court rule, programs allowing student interns to practice under the supervision of licensed attorneys without regard to Tennessee Code section 29-302, which defines the practice of law in approximately the same language as the Missouri practice statute.[32] This is possible because, as stated in the *Hoffmeister* case, the inherent power to determine who shall practice before the courts of the state is in the Supreme Court; the statute acts only as an aid to the court, not as an infringement of its inherent power.[33]

B. *Competence of Legal Intern to Provide "Assistance of Counsel"*

The United States Constitution provides that "in all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[34] Thirty years ago, in *Johnson v. Zerbst*,[35] the Supreme Court held that the sixth amendment imposed a duty on the federal government to provide legal representation for defendants appearing without counsel because of indigency. This principle was applied to the states in *Gideon v. Wainwright*.[36]

The issue of whether a student internship program can provide sixth amendment "assistance of counsel" has never been settled by the courts. In *Gideon*, the court had no occasion to measure the *quality* of the defense, it simply ruled that the defendant must have some counsel. The briefs in *Gideon* assumed that an internship program could meet the constitutional requirements of "assistance of counsel."[37] Practically speaking, each state

30. *See, e.g.*, FLA. STAT. §§ 454.1, 454.021, 454.23 (1965); ILL. REV. STAT. ch. 13, § 1 (1967); IND. ANN. STAT. §§ 10-3110, 10-3111 (1954); MASS. GEN. LAWS ch. 221, §§ 41, 46A, 46C (1932); MICH. COMP. LAWS § 600.916 (1948); MINN. STAT. §§ 481.02, 481.02(8) (1965); OKLA. STAT. tit. 5, § 12 (1966); PA. STAT. tit. 14, § 1610 (1936); TENN. CODE ANN. §§ 29-302, 29-303 (1955); WYO. STAT. ANN. § 33-61 (1957).

31. 12 J. AM. L. STUD. ASS'N. 19 (Feb. 1967).

32. § 484.010, RSMo 1969.

33. Hoffmeister v. Tod, 349 S.W.2d 5 (Mo. En Banc 1961). In addition, an analogy can be drawn to the practice employed by medical schools. Third and fourth year students spend a significant portion of their time in hospital clinics under the supervision of a licensed physician, yet this practice has never been challenged as the unauthorized practice of medicine, even though the Missouri statute provides that only licensed physicians may practice medicine. § 334.010, RSMo 1969 provides as follows:

> It shall be unlawful for any person not now a registered physician within the meaning of the law to practice medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or engage in the practice of midwifery in this state, except as herein provided.

34. U.S. CONST. amend. VI.

35. 304 U.S. 458 (1938).

36. 372 U.S. 335 (1963).

37. Brief for Petitioners, Brief for A.C.L.U. as Amicus Curiae, Brief for State Attorneys General as Amicus Curiae at 35, Gideon v. Wainwright, 372 U.S. 335 (1963).

court authorizing student internship in criminal cases has, by the act of approving the internship concept, expressed the belief that supervised interns can meet sixth amendment requirements.

In Missouri, it appears that a law student in a criminal case under the supervision of a licensed attorney would satisfy the constitutional guarantee. In *Higgins v. Harper*,[38] the Missouri Supreme Court held that a criminal judgment could not be avoided on grounds of incompetent counsel, where defendant's "chief" counsel was a layman. In that case the layman counsel was assisted by a licensed attorney, although the layman "took the laboring oar."[39] The court stated as follows:

> The petitioner . . . contends that his conviction was violative of his constitutional rights because of the incompetence of his counsel Roden [the layman who posed as an attorney]. This of course, ignores the fact already discussed that he had another duly licensed lawyer . . . who participated in his defense throughout.[40]

The *Higgins* case is therefore precedent for the proposition that an accused is afforded adequate counsel if a duly licensed attorney is counsel of record, and the defense rendered is *in fact* adequate.

As stated in the *Higgins* case, the constitutional guarantee of "assistance of counsel" means a duly licensed lawyer, not a layman or attorney in fact. However, the court clearly stated that the fact that one of two counsel representing the accused is not a licensed lawyer does not mean that an accused has been denied a fair trial because of incompetence of counsel.[41] Under the proposed rule, a member of the bar will be the counsel of record and must be present to supervise the student intern at all stages at which the accused has a constitutional right to the assistance of counsel. The supervising lawyer will be responsible for general supervision of the trial as well as for the selection of students who are competent to try cases. The accused will be advised of the fact that a student intern will assist in representing him, and he will be so represented only if he signs a written consent to such student representation.[42]

Thus, it can be seen that if a student intern provides representation which is *in fact* adequate, and a supervising attorney is the counsel of record and personally responsible for the work of the student,[43] the constitutional guarantee of "assistance of counsel" is fully satisfied.

Courts in general have recognized that, in the final analysis, the ques-

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38. 354 Mo. 888, 191 S.W.2d 668 (En Banc 1946).
39. *Id.* at 890, 191 S.W.2d at 670.
40. *Id.* at 892, 191 S.W.2d at 671.
41. *Id.* at 891, 191 S.W.2d at 670.
42. Although the constitution guarantees the accused the right to "assistance of counsel," it may be waived, Adams v. United States, 317 U.S. 269 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938), if the waiver is intelligently and understandingly made, Moore v. Michigan, 355 U.S. 155 (1957); Von Moltke v. Gillies, 332 U.S. 708 (1948). If the accused may waive the right to counsel entirely, then there is certainly no harm in permitting him to consent either to representation by an approved intern at non-critical stages of the criminal proceedings or to intern activity at other stages provided that the supervising attorney is present.
43. *See* Appendix B, Paragraphs II, section A2, and Paragraph VI, section B.

tion is not *who* represented the accused, but rather, whether the representation was *in fact* adequate. Adequate representation depends neither on the fact that a distinguished lawyer with broad legal experience provides it,[44] nor on the fact that the attorney is inexperienced.[45] Two tests have been advanced by the courts in determining the adequacy of counsel. Some courts state that the ultimate test is whether the defendant was deprived of a fair trial.[46] Others state that counsel is inadequate if it reduces the trial to "a farce and mockery of justice, shocking to the conscience of the court."[47] The Western District Court of Missouri summarized these tests as follows:

> Courts have employed a variety of formulae—"a mockery of justive," "the . . . absence of judicial character in the proceedings as a whole," "a travesty" "a sham," or "a farce"—to characterize the degree of degeneration of the proceedings necessary before a finding of ineffective representation should be made . . . . Whatever the applicable characterization, a court is compelled to test, at least in some minimal way, the effectiveness of counsel's efforts.[48]
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> . . . .
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> [T]he issue . . . is not counsel's reputation or his ability, but his stewardship of the challenged trial . . . both counsel and the courts must recognize that the main issue is whether the accused's rights have been adequately protected. . . .[49]

John D. Schneider of Boston College Law School has stated in reference to the question of the adequacy of student representation:

> The issue has never been settled by the courts and, as a matter of fact, the briefs in *Gideon* assumed that a law student program could meet the constitutional requirements. . . . While membership in the

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44. Cardarella v. United States, 375 F.2d 222, 230 (8th Cir. 1967).

45. In Achtien v. Dowd, 117 F.2d 989, 992-93 (6th Cir. 1941) the court made the following observations:

> There is a rather well-defined recollection on the part of this court, backed by our observations, that all lawyers must have their first case, that in said first case diligence and anxious effort are often quite the equivalent of experience. It is also observable that counsel with much experience often have co-pending matters of importance which necessitate the division of time and attention, whereas the young counsel is unvexed and unperplexed by other matters and questions and not bothered by more profitable and insistent clients. He may, therefore, give to the client full, valuable and vigorous service which will compare favorably with that which his more experienced and better established brethren of the Bar render.

Justice Tom Clark of the United States Supreme Court stated in reference to the intern program in Massachusetts:

> Of course they're not experienced, but they make up in zeal, research, and determination for what they lack in experience. THE NATIONAL OBSERVER, May 6, 1968 at 1-2.

46. Schaber v. Maxwell, 348 F.2d 664, 668 (6th Cir. 1965); United States v. Dillela, 354 F.2d 584, 587 (7th Cir. 1965); Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir. 1958).

47. Mosley v. Smith, 404 F.2d 346, 347 (5th Cir. 1968); Tafoya v. United States, 386 F.2d 537, 540 (10th Cir. 1967); Cardarella v. United States, 375 F.2d 222, 230 (8th Cir. 1967).

48. Goodwin v. Swenson, 287 F. Supp. 166, 182 (W.D. Mo. 1968).

49. *Id.*

> Bar is evidence of competency, non-membership proves nothing. It does not settle the matter to read the sixth amendment as requiring Bar membership because the federal constitution does not prescribe standards for admission and the states could admit law students or even persons without training in the law. The constitutional test . . . looks to the substance of the representation.[50]

After considering the sixth amendment problems the Committee on Protection of Individual Rights of the Indiana State Bar Association made the following report to that association.

> Your committee has carefully inquired into the question of whether or not representation provided by law students will be adequate. The committee has reached the conclusion that the law student by the time he reaches the third year of study has had the necessary law courses. Under the legal internship programs, as contemplated in this state and is now conducted in more than fifteen states, it would appear that the competency of the individual law student is guaranteed . . . .[51]

Thus, on the face of the matter, a carefully trained student intern, under the supervision of an experienced member of the Bar, could meet the constitutional test. This should not be taken to deny that, in each particular suit, the representation must be judged on its merits. If a student provides representation that makes a mockery of justice, he should stand in no better position than a practicing attorney.[52] It seems, however, that there is no better way to upgrade the adequacy of representation in general than to give law students supervised on-the-job training prior to their entry into practice.

V. Conclusion

Student Internship was long overdue in this state. It has been praised in the states which have adopted it and no state which has it is considering abandoning it.[53] Adoption of the rule has provided a service to the state, a service to the poor, and potential educational benefits to law students.

J. Douglas Cassity

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50. Taken from an unpublished article submitted to Judge Alvin B. Rubin during the drafting of the ABA Proposed Model Rule Relative to Legal Assistance by Law Students.

51. Report of Committee on Protection of Individual Rights of the Indiana State Bar Association 2 (April 17, 1969).

52. In criminal cases, the questions will be no different than if the counsel were an attorney; (1) was the defendant deprived of a fair trial or (2) was the defense provided so inadequate as to be a mockery of justice. The presence of the supervising attorney at all stages where the accused has the right to "assistance of counsel" should prevent any claims that the student appearance renders the defense incompetent per se, Higgins v. Harper, 354 Mo. 888, 191 S.W.2d 668 (En Banc 1946).

53. J. Wright, *Progress Toward Legal Internship*, J. Am. Jud. Soc'y 184 (1969).

APPENDIX A

COMPARISON OF STATES ALLOWING STUDENT PRACTICE

State	*How Established*	*Type of Practice*	*In Court Supervision*	*Student Qualifications*
Cal.	Rule	Civil or Criminal	Sometimes	Three semesters
Colo.	Statute	Civil or Criminal	No	None
Conn.	De Facto & Rule	Civil	No	None
Fla.	Rule	Criminal	Yes	Senior
Ga.	Statute	Civil or Criminal	At trials	Senior
Ill.	Rule	Civil or Criminal	Sometimes	Senior
Ind.	Rule	Civil or Criminal	Sometimes	⅔ of requirements for degree
Iowa	Rule	Civil or Criminal	Sometimes	Senior
Kan.	Rule	Civil or Criminal	Sometimes	At least four semesters
Me.	Rule	Civil or Criminal	Sometimes	At least four semesters
Mass.	Rule	Civil or Criminal	No	Senior
Mich.	Rule	Civil or Criminal	Sometimes	28 semester hours
Minn.	Rule	Civil or Criminal	Yes	Senior
Mont.	Rule and Statute	Civil or Criminal	No	Ordinarily none; seniors in post-conviction
Neb.	Rule and Statute	Civil	Sometimes	Four semesters of studies
N. J.	Rule	Civil	No	Senior
N. M.	Statute	Civil or Criminal	No	None
N. Y.	Statute	Civil or Criminal	Sometimes	Senior
Ohio	Rule	Civil or Criminal	Sometimes	⅔ of requirements for degree
Okla.	Rule	Civil or Criminal	Sometimes	Within 30 hours of law degree
Pa.	Rule	Criminal	No	Enrolled in graduate program & member of court of last resort of another state
S. C.	Statute	Civil or Criminal	No	None
S. D.	Rule	Civil or Criminal	Sometimes	Four semesters
Tenn.	Rule	Civil or Criminal	Sometimes	Senior
Texas	De Facto	Civil or Criminal	Yes	Senior
Wyo.	Rule	Civil or Criminal	Yes	Senior
Wash., D.C.	Rule	Civil, Criminal	Yes	Senior

APPENDIX B

MISSOURI RULE RELATIVE TO LEGAL ASSISTANCE BY LAW STUDENTS

I. *Purpose*

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

II. *Activities*

A. An eligible law student may appear in any court or before any administrative tribunal in this State on behalf of any indigent person if the person on whose behalf he is appearing has indicated in writing his

consent thereto and the supervising lawyer has also indicated in writing approval thereof, in the following matters:

1. Any matter in which the indigent person does not have the right to the assignment of counsel under any constitutional provision, statute, or rule of this court. In such cases the supervising lawyer is not required to be personally present in court if the person on whose behalf an appearance is being made consents to his absence in writing or in open court.
2. Any matter in which the indigent person has the right to the assignment of counsel under any constitutional provision, statute, or rule of this court. In such cases the supervising lawyer must be personally present throughout the proceedings and shall be fully responsible for the manner in which they are conducted.

B. An eligible law student may also appear in any matter on behalf of the State with the written approval of the supervising lawyer.

C. In each case the written consent and approval referred to above shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.

III. *Requirements and Limitations*

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

A. Be duly enrolled in this State in a law school approved by the American Bar Association.

B. Have completed legal studies amounting to at least four (4) semesters, or the equivalent if the school is on some basis other than a semester basis.

C. Be certified by the dean of his law school as being in good standing.

D. Neither ask for nor receive any compensation or remuneration of any kind for his services from the person on whose behalf he renders services, but this shall not prevent a lawyer, legal aid bureau, law school, public defender agency, or the State from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.

E. Certify in writing that he has read and is familiar with the Canons of Ethics in Rule 4 of this Court, and that he will abide by them. Said certification is to be filed with the Clerk of this Court together with the certification by the law school dean.

IV. *Certification*

The certification of a student by the law school dean:

A. Shall be filed with the Clerk of this Court and, unless it is sooner withdrawn, it shall remain in effect until the expiration of eighteen (18) months after it is filed, or until the announcement of the results of the first bar examination following the student's graduation, whichever is earlier. For any student who passes that examination, the certification shall continue in effect until the date he is admitted to the bar.

B. May be withdrawn by the dean at any time by mailing a notice to that effect to the Clerk of this Court. It is not necessary that the notice state the cause of withdrawal.

C. May be terminated by this Court at any time without notice or hearing and without any showing or cause.

V. *Other Activities*

A. In addition, an eligible law student may engage in other activities, under the general supervision of a member of the bar of this Court, but outside the personal presence of that lawyer, including:

1. Preparation of pleadings and other documents to be filed in any matter in which the student is eligible to appear, but such pleadings or documents must be signed by the supervising lawyer.
2. Preparation of briefs, abstracts and other documents to be filed in appellate courts of this State, but such documents must be approved by the supervising lawyer.

3. Assistance to indigent inmates of correctional institutions or other persons who request such assistance in preparing applications for and supporting documents for post-conviction relief. If there is an attorney of record in the matter, all such assistance must be supervised by the attorney of record, and all documents submitted to the Court on behalf of such a client must be signed by the attorney of record.
4. Each document or pleading must contain the name of the eligible law student who has participated in drafting it. If he participated in drafting only a portion of it, that fact may be mentioned.

B. An eligible law student may participate in oral argument in appellate courts, but only in the presence of the supervising lawyer.

VI. *Supervision*

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

A. Be a member of the bar of Missouri in good standing.
B. Assume professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work.
C. Assist the student in his preparation to the extent the supervising lawyer considers necessary.