

PROSECUTORIAL EXTERNSHIP PROGRAMS: PAST, PRESENT AND FUTURE

*Hans P. Sinha**

INTRODUCTION

The history and development of clinical legal education has been thoroughly documented.¹ After the demise of the apprenticeship system to train young lawyers in the actual practice of law² and the ensuing domination of the case opinion

Hans P. Sinha, B.A., University of Pennsylvania 1983, J.D., Tulane School of Law 1988, LL.M in International and Comparative Law (with distinction), Tulane School of Law 2001, is a Clinical Professor and Director of the Prosecutorial Externship Program with the National Center for Justice and the Rule of Law and Director of the Public Service Internship Program at the University of Mississippi School of Law, Oxford, Mississippi. The author gratefully acknowledges the assistance of Kristy and Patrick Callahan, Alicia Kutch, and Angela Swilley in the two year process this survey has consumed. Special thanks goes to Angela Swilley who was instrumental in transforming the raw survey data into comprehensible charts.

¹ See, e.g., Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 *Clinical L. Rev.* 1, 5, 12, 32 (2000) (discussing the “three waves” of clinical legal education, to wit, “The Birth of the Modern Law School and the First Wave of Clinical Legal Education,” “The Maturing of the Modern Law School and the Second Wave of Clinical Legal Education,” and “The (Sometimes Uneasy) Present: Defining and Refining the Role of Clinical Studies in the Law School Curriculum.”).

² The history of legal education in America “began with the apprentice system. The prospective lawyer ‘read law’ in the office of a practicing lawyer.” Jerome Frank, *Why Not A Clinical Lawyer-School*, 81 *U. PA. L. REV.* 907, 909 (1933); see also LAWRENCE M. FRIEDMAN, *HISTORY OF AMERICAN LAW* 97 (2d ed. 1985) (noting that “[t]he road to the bar, for all lawyers, was through some form of clerkship or apprenticeship.”). Interestingly, the pros and cons of the early apprenticeship parallel

pedagogical method, brought about by the influence of Christopher Columbus Langdell,³ the value of clinical legal education may have been doubted by encased doctrinal academicians.⁴ However, beginning with the emergence in the early twentieth century of criticism aimed at the failure of law schools to teach the actual practice of law,⁵ the importance of clinical legal education as a whole began to be, if not generally applied, at least accepted.⁶ Today, virtually every law school

those of externships today in that “[h]ow much the apprentice learned depended greatly on his master.” *Id.* at 97-98.

³ Langdell, the first dean of Harvard Law School, brought the appellate case method to American legal education beginning in the 1870s. Frank M. Coffin, *The Law School and the Profession: A Need for Bridges*, 11 *NOVA. L. REV.* 1053, 1054 (1986). Whatever the benefits of this system may have had on the education of lawyers, it did lead to “a distancing of the law school from the profession.” *Id.* at 1055. According to the Langdellian theory of legal education, “the exclusive repositories of the wisdom which law students must acquire to make them lawyers” could be found in the opinions of judges. Frank, *supra* note 2, at 907 (emphasis removed).

⁴ See Barry et al., *supra* note 1, at 8 (discussing conditions leading to “[t]he dearth of clinical legal education programs in the first half of the twentieth century,” including that “law school teachers of this era disagreed about the value— and feasibility—of teaching lawyering skills other than legal analysis.”).

⁵ See generally, *id.*; see also, William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 *ILL. L. REV.* 591, 592 (1917) (arguing that “[t]he radical changes in the conditions and methods of legal practice and professional office-work have now made the adequate provision for clinical training and experience the most essential part of legal education.”). See also Frank, *supra* note 2, as well as a second article Frank published twenty years later, criticizing law schools for being “[h]ypnotized by Langdell’s ghost” and calling for each law school “to build its teaching around a legal clinic.” Jerome Frank, *Both Ends Against the Middle* 100 *U. PA. L. REV.* 20, 29 (1951). See also, John S. Bradway, *The Beginning of the Legal Clinic of the University of Southern California*, 2 *S. CAL. L. REV.* 252, 276 (1928) (discussing the development of the Legal Clinic at the University of Southern California and concluding that while much experimentation needs to be done, “the clinic has a place” in legal education).

⁶ Legal aid clinics began as early as 1913 at Harvard, Minnesota and Northwestern, followed by Yale, Cincinnati and Southern California in the 1920’s. Quintin Johnstone, *Law School Legal Aid Clinics*, 3 *J. LEGAL. EDUC.* 535, 541 (1951). Duke,

has some sort of clinical legal education offering for their students.⁷ Indeed, law schools today are mandated by Standard 302 of the Standards for Approval of Law Schools of the American Bar Association (ABA) to offer “substantial opportunities for . . . live-client or other real-life practice experiences.”⁸ Such “experiences may be accomplished through clinics or field placements.”⁹ Today, few if any academicians, whether disciples of Langdell or pure clinicians, take issue with the notion that clinical legal education is and must be a part of the education of American law students.¹⁰

Cornell, Ohio State, Maryland and Wisconsin established clinics in the 1930's. *Id.* By 1951, twenty-eight law schools had “some kind of legal aid clinic.” *Id.* at 535.

⁷ In 2002, 127 schools offered some sort of in-house live client clinical opportunities for their students, and 147 schools offered at least one externship clinical opportunity. A Survey of Law School Curricula: 1992-2002, 2004 A.B.A. SEC. LEGAL EDUC. ADMISSIONS 34-35.

⁸ AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 302(b)(1) (2005), available at <http://www.abanet.org/legaled/standards/chapter3.html> [hereinafter ABA STANDARD 302], reads in its entirety:

(b) A law school shall offer substantial opportunities for:

(1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence;

Id.

⁹ AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Interpretation 302-5 (2005), available at <http://www.abanet.org/legaled/standards/chapter3.html> [hereinafter ABA INTERPRETATION 302-5], reads in its entirety:

The offering of live-client or real-life experiences may be accomplished through clinics or field placements. A law school need not offer these experiences to every student nor must a law school accommodate every student requesting enrollment in any particular live-client clinic or other real-life practice experience.

Id.

¹⁰ Even the most ardent supporters of the case opinion method

One of the components of clinical legal education is field placement programs.¹¹ In 1982, a survey designed to ascertain the status of clinical field work as a whole indicated the existence of field placement programs at 75% of the 105 responding schools.¹² A subsequent survey specifically dedicated to field placement programs indicated that in the 1992-1993 school year, there existed ninety-eight field placement programs at fifty-eight law schools,¹³ while a 1995 survey also focusing on field placement programs, showed that 126 schools had such programs.¹⁴ Indeed, there was a 32.3% increase of

presumably do recognize, as indicated by the adoption of ABA STANDARD 302, *supra* note 8, that clinical legal education shall be a component of legal education. This does not, however, necessitate an agreement that this component of legal education is perceived as equal to what is taught through the case opinion method. The continuing lack of equality between clinical educators and Langdellian educators at law schools point to a lingering prejudice towards clinicians. See discussion *infra* pp. 1353-57 pertaining to status of clinicians in prosecution clinical programs.

¹¹ See ABA INTERPRETATION 302-5, *supra* note 9. Like a well-loved child, field placement programs are referred to by many names. See discussion *infra* pp. 1310-13. This article will use the term "field placement" and "externship programs" interchangeably.

¹² Marc Stickgold, Exploring the Invisible Curriculum: Clinical Field Work in American Law Schools, 19 N.M. L. REV. 287, 298 (1989) [hereinafter Stickgold Survey]. One hundred percent offered simulation courses while 76% offered in-house clinics. *Id.*

¹³ Robert F. Seibel & Linda H. Morton, Field Placement Programs: Practices, Problems and Possibilities, 2 CLINICAL L. REV. 413, 423 (1996) [hereinafter Seibel & Morton survey]. Seibel and Morton had sixty-eight schools respond. Fifty-eight indicated they had field placement programs, seventeen of which provided reports on more than one program. Hence the total of ninety-eight reported programs. *Id.* at 422-23. This equated to 85.29% of responding schools. *Id.* Seibel and Morton noted that this corresponded with the findings of the MacCrate Report that "130 out of 155 schools (83.9%) have externship programs." *Id.* at 422; see also Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, A.B.A. SEC. LEGAL EDUC. ADMISSIONS Bar 253 (1992 [hereinafter MacCrate Report]).

¹⁴ Marc Stickgold & Sue Schechter, Externship Survey Report, Clinical Legal Education Association Newsletter, September 1996, at 19 (on file with author)

placement/externship programs at American law schools between the 1986-87 academic year and the 1990-91 academic year.¹⁵ In 2002, 147 schools offered at least one field placement opportunity.¹⁶ These programs varied from judicial, corporate counsel, law firm, government agency, not-for-profit entity, prosecutor and public defender placements.¹⁷ Fourteen thousand eight-hundred fifty-seven students took externship courses in the 2001-2002 academic year.¹⁸ In some ways, field placement clinical legal education may indeed be the area of the current American legal education system which is the most diverse—as it should be. Where students can be placed is, within certain generally accepted parameters,¹⁹ limited only by

[hereinafter Stickgold & Schechter survey].

¹⁵ MacCrate Report, *supra* note 13.

¹⁶ A Survey of Law School Curricula, *supra* note 7, at 35. Note that this constituted approximately 79% of the then one-hundred and ninety ABA approved law schools. See American Bar Association, ABA Approved Law Schools, at <http://www.abanet.org/legaled/approvedlawschools/year.html> (last visited May 2, 2005) for listing of ABA approved law schools by year of approval. The one-hundred and forty-seven schools also constituted 96.7% of the one-hundred and fifty-two schools which responded to the Section of Legal Education and Admissions to the Bar survey.

¹⁷ A Survey of Law School Curricula, *supra* note 7, at 35. By comparison, out of the 152 law schools surveyed in 2002, 127 offered regular in-house, live clinical opportunities. *Id.* at 34.

¹⁸ Peter A. Joy, *Evolution of ABA Standards Relating to Externships: Steps in the Right Direction?*, 10 *CLINICAL L. REV.* 681, 693 n.53 (2004) (citing to e-mail from David Rosenlieb, ABA DATA Specialist, to Peter A. Joy (Dec. 19, 2003)). By comparison, 15,385 students participated in in-house clinical courses. *Id.*

¹⁹ What Barry, Dubin and Joy have called the “Social Justice Dimension of Clinical Legal Education,” has historically dictated that field placement programs only be established in pro bono, not for profit, or governmental agencies. Barry et al., *supra* note 1, at 12. Skills training is the second dimension to clinical legal education. While the social justice dimension of clinical legal education clearly is served by providing legal aid to the poor and sectors of society otherwise underrepresented and in need of legal services—in a criminal setting typically indigent criminal defense or prisoner’s rights, prosecution clinics, whether in-house or field placement programs, also meet the social justice dimension. See, e.g., Karen

placement availability and the combined imagination and determination of the students and their clinical faculty.²⁰

One component of field placement clinical programs consists of placing students with prosecutor offices. Generally, prosecutorial externship programs place students as externs with local, state or federal prosecutor offices. Prosecution externship programs are fairly simple programs to establish in that prosecutor offices exist in some form or another wherever a law school exists. This is true even for schools located in rural areas.²¹ Prosecutor offices are traditionally more than happy to accept students as externs, and equally importantly, they normally have sufficiently large and varied case loads to enable students to perform meaningful work and participate in a range of different types of cases. With the exception of students placed in public defender programs,²² few other field

Knight, *To Prosecute is Human*, 75 NEB. L. REV. 847, 865 (2002) (discussing same and noting that “[t]he conclusion that prosecution is not public service is flawed.”)

²⁰ Assumed in an organization being available as a field placement, are criteria ensuring such a placement being a quality placement. It is the development of guidelines and standards designed to ensure the students receive a quality education while at the placements, which separates the modern type of field placement programs from the “mere” apprenticeship system of yore. Indeed, Thomas Jefferson, despite having had an apparently beneficial apprenticeship (he appointed his former teacher, George Wythe, to be the nation's first law professor at the William and Mary College) “voiced strong criticism of the apprenticeship system of legal training,” opining that “placing a youth to study with an attorney was rather a prejudice than a help.” Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L.Q. 597, 604, 609 (1981) (citing to Letter to Thomas Turpin, February 1769, in 1 THE PAPERS OF THOMAS JEFFERSON 23-24 (J. Boyd, ed. 1950); see also, MacCrane Report, *supra* note 13, at 104 (citing to same).

²¹ While rural areas may lack a broad array of public service placements as can be found in large cities, even a rural school will typically find prosecutor offices, public defenders and judicial placements.

²² For two student views pertaining to their placements with public defender offices, see Joanne Carter, *Essay, Mixed Emotions: A Law Student's Perceptions While Working at a Public Defender's Office*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 329 (1998) and Greg Dantzman, *Essay, My Externship Experience at the*

placement options enable students to participate in the preparation and conduct of trials on such a consistent basis as do prosecution externship placements.²³ It is possibly because of these factors that the popularity of prosecution placements grew from just below 100 in 1992 to slightly less than 130 in 2002.²⁴ The majority of these prosecutor placements are part of a school's general field placement program. For example, out of the total ninety-eight reported field placement programs in the Seibel & Morton survey, only six were identified as specific prosecutor placements.²⁵

Although all the above mentioned surveys provide sufficient data to enable extrapolation of the general status of field placement programs dealing with criminal justice placements in recent legal education, they do not provide data specifically geared towards prosecution externship programs. That was the goal of the survey upon which this article is based. It is the first work of its kind to specifically seek information about prosecution externship programs. The article is based upon a six page, forty question long survey,²⁶ seventy-seven of which

Public Defender's Office in Ann Arbor, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 337 (1998). For a similar essay but from a prosecutor placement perspective, see Meryl Markowitz, Essay, My Experience at the Eaton County Prosecution Office, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 343 (1998).

²³ See generally Stephen T. Maher, The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education, 69 NEB. L. REV. 537, 545 (1990) (noting that students placed in settings such as prosecutors or public defenders "will have substantial opportunities to gain trial experience during their externship.").

²⁴ A Survey of Law School Curricula, *supra* note 7, at 35. Figure 9 of such survey, "Regularly Offered Externship Placement Opportunities," shows the number of positive respondents in relation to the particular types of placements in a bar graph format, but does not provide the exact number of schools. *Id.*

²⁵ Seibel & Morton, *supra* note 13, at 423, 453 "Appendix B: Externship Programs Surveyed." Based upon the titles of the programs listed in such table, six indicate externship programs dedicated exclusively to prosecution placements. *Id.*

²⁶ See Appendix A for a copy of survey.

were returned by schools from across the country.²⁷ Although the survey was designed to elicit information specifically about prosecution externship programs, the returned surveys quickly made it clear that the vast majority of schools included their prosecution externship program as part of a general placement program. The information provided, although pertinent to prosecution externship programs per se, thus also provides an overview of externship programs in general. This is how it should be. Externship programs wherein students are placed with prosecutor offices, although unique in certain aspects,²⁸ are also part of the general genre of field placement programs. The information drawn from this survey and presented in this article can thus be seen to fall squarely among the surveys discussed above, providing additional information about field placement programs in general and prosecution externship programs in particular.

²⁷ Seventy-seven surveys in total were returned. However, two schools sent in duplicates, and one school indicated it did not grant academic credit for their placement. Additionally, although there are clear parallels between "true" in-house prosecution clinics and prosecution externship programs, three schools' programs were clear in-house prosecution clinics. These three, as well as one of each duplicate and the no-credit school were excluded, leaving a base of seventy-one "used" surveys. See discussion infra pp. 1306-08 and note 39.

²⁸ Not only do prosecution externship programs provide students with great trial exposure, see Maher, *supra* note 23, but such placements also provide unique opportunities to explore ethical and professional issues to which students are not exposed to in other placements. See, e.g., Stacy Caplow, What if There is No Client?: Prosecutors as 'Counselors' of Crime Victims, 5 *CLINICAL L. REV.* 1, 10-11 (1998) (noting that "the quasi-judicial role of the prosecutor requiring fidelity to a host of institutional and societal goals and values precludes the partisanship and loyalty owed a client and mandates an allegiance to truth-seeking, impartiality, and objectivity.").

THE SURVEY

The impetus for this survey came about when the author moved from the Tulane Law School Criminal Defense Clinic²⁹ to develop and direct the Prosecutorial Externship Program at the University of Mississippi School of Law.³⁰ In setting up the program, the author sought as much information as possible from clinicians who already directed similar programs. The author was able to obtain much information, some general in the form of articles from the growing scholarship pertaining to externships,³¹ some specific in terms of syllabi and other information provided by clinicians. Still, the wish and perceived need for some sort of central source, which the author could have accessed when creating the parameters of the prosecution externship program, remained. As the author moved from creating the program into the actual running of the program, this perceived need changed from what to do, to what do other programs do, including what is the “best” way to do something, and why.³² With this in mind, the author decided to do what any neophyte should do—ask the sage. In this case, the advice would come from the profoundly wise and eclectic clinical community through a nationwide survey. This survey was conducted in 2002 and 2003. It is hoped that the results of this survey will fill a niche in the ever increasing body of scholarship by focusing upon the current practice of one component of clinical legal education—prosecution externship programs.³³

²⁹ The author served as a Clinical Instructor with the Tulane Law School Criminal Defense Clinic from 1997 through 2001, as well as Acting Director and Deputy Director of that program at different times during his tenure there.

³⁰ The author arrived at the University of Mississippi School of Law in July of 2001 and began to develop the Prosecution Externship Program. At such time, third-year students were placed as interns with prosecutor offices through the school's Public Service Internship Programs. The author “carved” out from this general program a specific program devoted exclusively to placing students as

DATA COLLECTION METHODOLOGY

externs with prosecutor offices and developing a holistic program including an accompanying class entitled, *The Prosecution Function*. Beginning in the fall of 2004, the author also assumed directorship of the school's Public Internship Program. The different nomenclature of the students placed with prosecutor offices (externs) and with other public service offices or attorneys (interns), is just that, a mere nomenclature which arose as the result of the author naming his original program as a Prosecutorial Externship program. See *supra* note 11, as well as *infra* p. 1312-13, discussing the interchangeability of the terms "externship" and "internship."

³¹ See generally J.P. Ogilvy & Karen Czapanskiy, *Online Annotated Bibliography of Clinical Legal Education*, at <http://faculty.cua.edu/ogilvy/Index1.htm> (last visited May 2, 2005) for an updated compilation of materials pertaining to clinical legal education, originally published in 7 *CLINICAL L. REV. Special Issue* (2001).

³² The mere fact that many programs do one thing the same way does, of course, not equate with such means being the "best" way to do something. However, substantial uniformity in evolution of parameters of programs does indicate a certain general acceptance of how to do something. Implicit in such general acceptance is the notion that if dedicated clinicians through independent experimentation, substantially agree on some conduct of operation of similar programs, such conduct can at least be viewed as having been scientifically developed, tested and confirmed. For a scholarly view of best practices, see J. P. Ogilvy, *Guidelines with Commentary for the Evaluation of Legal Externship Programs*, 38 *GONZAGA L. REV.* 155 (2002); see also *Clinical Legal Education Association, Best Practices for Using Externships*, at <http://professionalism.law.sc.edu/downloads/text1204.pdf> (last visited May 2, 2005).

³³ See J.P. Ogilvy, *Introduction to the Symposium on Development in Legal Externship Pedagogy*, 5 *CLINICAL L. REV.* 337, 343 (1999) (encouraging scholarship pertaining to externship pedagogy).

Recognizing that asking the right questions is vital in any situation,³⁴ the survey was designed to obtain as much pertinent information as possible about prosecution externship programs.³⁵ With the advent of the internet, the initial hope was to be able to be both comprehensive and target oriented. All law school web pages were researched, identifying any school which listed a prosecution externship program or clinic. Information was also obtained from the American Association of Law Schools Clinical Directory.³⁶ This resulted in a data base of eighty-one extern programs with director names and school addresses. In order to be comprehensive, schools listing any type of prosecution clinic or field placement program were included, regardless of what the individual school might title their program. A survey with a postage paid self-addressed return envelope was mailed to such schools in December of 2002. The surveys were specifically addressed to the person identified as being the person in charge of the externship/clinical program. Several messages were also posted on the LEXTERN listserv.³⁷ This resulted in a return of thirty-one completed surveys by early spring of 2003.

Preliminary results of the survey, using information compiled from the then returned thirty-one surveys, were presented at the Extern-2 Conference at Catholic University in Wash-

³⁴ See Robert MacCrate, Remarks at the American Bar Association's National Conference on Professional Skills and Legal Education, Albuquerque, New Mexico (Oct. 15-18, 1987), 19 N.M. L. REV. 1, 85 (1987) (noting that in response to her long time companion Alice B. Toklas' question "Madame, what is the answer," Gertrude Stein on her death bed replied—"Alice, what is the question?").

³⁵ See Appendix A for a copy of the survey questionnaire which was mailed out. Note that although the questionnaire was mailed at two different times and as such had different cover information, the questions remained the same.

³⁶ See University of Michigan Law School Clinical Programs, Gateway to Clinical Legal Education, at http://cgi2.www.law.umich.edu/_GCLE/Index.asp (last visited May 2, 2005).

³⁷ Lextern@lists.cua.edu. The LEXTERN list is hosted by the Catholic University of America and maintained by Professor Sandy Ogilvy of the Columbus School of Law.

ington, DC, in March of 2003.³⁸ In order to ensure completeness, a second set of surveys was mailed in July of 2003 to all ABA law school deans, asking them to pass along the material to their school's prosecution externship director, or if they did not have a specific prosecution externship program, the school's clinic director. The final tally was seventy-seven returned and completed surveys.

Out of the seventy-seven surveys, two were discarded as being duplicates.³⁹ One school indicated no credit was offered as part of their program.⁴⁰ This survey was excluded from the

³⁸ The author and Arlene Kanter, Professor at Syracuse University College of Law, co-hosted a presentation at Externship 2—Learning from Experience, March 7-8, 2003, Catholic University, Washington, D.C. wherein the preliminary results, as well as sample syllabi and forms collected through the survey, were distributed. See Prosecution Externship Survey Results and Prosecution Externship Survey Results—Sample Syllabi and Forms (on file with author).

³⁹ As each survey response was received, it was assigned a sequential number. See *infra* p. 1310. School twenty-one was a duplicate of school twenty-nine. One of these responses, number twenty-nine, indicated that survey return pertained to the school's in-house clinic. The responses contained in number twenty-one, pertained to their externship program as a whole, part of which included placement with prosecutors. That survey was included in the total results. Similarly, numbers four and seventy-one came from the same school, one from the faculty teaching in the fall, and one from the faculty teaching in the spring. In this case, number four, the first one to arrive was included in the calculations. Regardless if a school's survey return was not included in the calculations underlying the data used in the article, the responses are included in the complete survey responses available on-line, thus making the entire database upon which this article is based, available for peer review. This on-line compilation of all survey returns permits a reader to not only see every response from every responding school, but also in light of each school being assigned a number, track one particular school's answers to all questions. See PROSECUTORIAL EXTERNSHIP PROGRAMS: PAST, PRESENT AND FUTURE—SURVEY RESPONSE DATA [hereinafter SURVEY RESPONSE DATA], available at <http://www.ncjrl.org/publications archive>; see also *infra* p. 1310. In addition to the raw data provided in an on-line format, Appendix A to the article contains a copy of the actual survey [hereinafter SURVEY], and Appendix B contains an alphabetical list of all responding schools [hereinafter LIST].

⁴⁰ School thirty-five indicated "0" credit hours in response to question

calculations simply based upon it falling outside the “may grant credit” parameter of Standard 305.⁴¹ Finally, three survey returns were determined to be from programs which could only be termed as “true” in-house prosecution clinics, and were also excluded from the data calculations.⁴² Although many of the parameters and requirements of a prosecution clinic are similar to those of a prosecution externship program, the survey was intended to bring forth as much material and information pertaining to externship programs. Conversely, even though a school would term their program a “prosecution clinic,” if the students were placed in non-law school operated law offices and supervised by regular prosecutors as opposed to by law school faculty, the survey was included as an “externship” program.⁴³ The total number of survey returns used for comparison and percentage calculation purposes was thus reduced to seventy-one.⁴⁴ As noted above, although a

fourteen, i.e., “How many credit hours can a student earn for participating in the externship program.” See question fourteen, SURVEY RESPONSE DATA, *supra* note 39.

⁴¹ AMERICAN BAR ASSOCIATION STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 305(a) (2005), available at <http://www.abanet.org/legaled/standards/chapter3.html>, states that “[a] law school may grant credit toward the J.D. degree for courses or a program that permits or requires student participation in studies or activities away from or outside the law school or in a format that does not involve attendance at regularly scheduled class sessions.” (emphasis added).

⁴² Schools number forty-five, forty-six and sixty-three.

⁴³ This classification, although admittedly not perfect, is similar to the classification criteria of COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, INC., SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1978-1979 (1979) [hereinafter SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION]. Under their criteria, these programs would fall into category 3(c)—“Placements in a non-school operated law office which do not fall into category (b)” [(b)—“Placements in a non-school operated law office with complete on-the-job supervision by the school personnel in that office”] as far as “Structure,” and into category 4(c) as far as “Location,” i.e., neither in the law school nor in a non-law school place used exclusively by the program. *Id.* at 1-20-Table 1: General Description of Law School Clinic Programs.

⁴⁴ Every effort was taken to ensure correct calculations of the returned

school's responses were excluded from the total calculations upon which the article data is based, such a schools' individual responses are included in the complete compilation of responses available on-line for peer review.⁴⁵

QUESTIONS

The survey was divided into three general sets of questions. The first pertained to general school information. This section sought to obtain information about the setting of the school, how large the particular school was, how many types of clinical offerings were provided to the students, whether there were part-time students and which students were permitted to participate in the school's clinical offerings in general and in the prosecution externship program in particular.⁴⁶

The second set of questions pertained specifically to the school's prosecution externship program. These questions were designed to obtain specific information about the parameters of the prosecution externship program. As such, they explored the types of placements, the academic credit hours and corresponding on-site hours, the process of selecting students who could participate, how grades were assigned, academic requirements including pre- or co-requisites and means to ensure achievement of pedagogical goals, as well as selection, training and communication with the on-site supervisors. Information as to the status of the faculty directing the programs was also elicited.⁴⁷ Many, if not all, of these issues touch

information, including reviewing and re-calculating the data again and again. However, with 2,840 different responses to review, as well as answers which at times had to be subjectively classified and categorized, the author acknowledges the possibility of both error and differences in opinions. As such, this information is presented not as a definitive "what is," but rather as an opportunity to review trends and commonalities within one field of clinical legal education.

⁴⁵ See supra note 39.

⁴⁶ See questions one through ten, SURVEY, Appendix A.

⁴⁷ See questions eleven through thirty-two, SURVEY, Appendix A.

upon the requirements and suggestions included in the ABA standards pertaining to field placement programs.⁴⁸ The final set of questions sought to elicit the same information but in relation to each program's classroom component.⁴⁹

In order to encourage candid and complete responses, the respondents, although asked to provide their names and the names of their schools on the survey returns, were assured that no individual or institutional information would be used in the presentation of the data. This was, of course, the correct way of collecting and especially presenting the data, some of which asked for subjective information about the schools.⁵⁰

⁴⁸ AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 305(e) (2005), available at <http://www.abanet.org/legaled/standards/chapter3.html>, reads in its entirety:

(e) A field placement program shall include: (1) a clear statement of the goals and methods, and a demonstrated relationship between those goals and methods to the program in operation; (2) adequate instructional resources, including faculty teaching in and supervising the program who devote the requisite time and attention to satisfy the program goals and are sufficiently available to students; (3) a clearly articulated method of evaluating each student's academic performance involving both a faculty member and the field placement supervisor; (4) a method for selecting, training, evaluating, and communicating with field placement supervisors; (5) periodic on-site visits or their equivalent by a faculty member if the field placement program awards four or more academic credits (or equivalent) for fieldwork in any academic term or if on-site visits or their equivalent are otherwise necessary and appropriate; (6) a requirement that students have successfully completed one academic year of study prior to participation in the field placement program; (7) opportunities for student reflection on their field placement experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection. Where a student can earn four or more academic credits (or equivalent) in the program for fieldwork, the seminar, tutorial, or other means of guided reflection must be provided contemporaneously.

Id.

⁴⁹ See questions thirty-three through forty, SURVEY, Appendix A.

⁵⁰ See, e.g., question thirty, SURVEY, Appendix A (asking how the respondent would describe the acceptance of the program by the non-clinic faculty).

However, there is also a benefit of being able to track all answers provided by one individual school. For example, if one school indicated that they used an ABC grade option for their externship program,⁵¹ it may also be interesting to see what grade option that same school used for their classroom component.⁵² With this in mind, each completed survey was also assigned a number as it was received. A complete listing of all answers corresponding to such numbers is available on-line.⁵³ The analysis and breakdown of the raw data is, of course, presented throughout the article. When appropriate, the data is reduced to bar graphs interspersed in the text of the article.

In addition to the raw data available on-line, Appendix A to the article contains a copy of the original survey, enabling a reader to see the exact wording of the question asked, while Appendix B contains an alphabetical list of all responding schools.⁵⁴ It is hoped this will enable a reader to assure him or herself of the exhaustiveness of the data in terms of which schools participated in the survey, while also maintaining the confidentiality of the respondents.

⁵¹ See question nineteen, SURVEY, Appendix A.

⁵² See question thirty-eight, SURVEY, Appendix A.

⁵³ See PROSECUTORIAL EXTERNSHIP PROGRAMS: PAST, PRESENT AND FUTURE-SURVEY RESPONSE DATA, available at <http://www.ncjrl.org> [publications archive]. See also *supra* note 39.

⁵⁴ See SURVEY and LIST, *supra* note 39.

2005]

CLINICAL SURVEY

1313

EXTERNSHIP OR CLINIC

Clinical legal education is traditionally divided into three categories: in-house clinics, field placement programs and simulation courses.⁵⁵ Simulation courses differ from both in-house clinics and externships in that simulation courses do not employ real cases.⁵⁶ In-house clinics can be distinguished from field placement programs by the virtue of law school faculty providing the supervision of the students and the cases, as opposed to field placement programs where attorneys outside of the law school provide this supervision. This distinction has been described using the terminology of “case supervised” programs to designate in-house clinics and “practice supervised” programs to designate field placement programs.⁵⁷ This

⁵⁵ Stickgold, *supra* note 12, at 298 (noting that these terms have been used both by the Council on Legal Education for Professional Responsibility (CLEPR) and the 1980 Report of the Association of American Law Schools—American Bar Association Committee on Guidelines for Clinical Legal Education, *Clinical Legal Education* (1980)); see also Knight, *supra* note 19, at 849 (listing in-house clinics, externship placement clinics, and simulation clinics as the three different types of clinical programs).

⁵⁶ Marjorie Anne McDiarmid, *What's Going On Down There in the Basement: In-House Clinics Expand Their Beachhead*, 35 N.Y. L. SCH. L. REV. 239, 241 n.11 (1990) (noting the three distinct teaching methodologies comprising clinical teaching: live-client clinics using law-faculty supervised work by students, simulation courses relying entirely upon simulation, “and externships where supervision is provided by attorneys not employed by the school.”). *Id.* Note, however, also the existence of what has been called “hybrid in-house/externship programs” wherein “a law school creates a partnership with a legal provider, such as a civil legal services office or public defender office, and the students enrolled in the clinic are supervised by both a full-time clinician and lawyers from the outside office.” Barry et al., *supra* note 1, at 28. Finally, schools can also offer “clinical labs” where a clinical lab component is added to a traditional substantive law school course. *Id.*

⁵⁷ Maher, *supra* note 23, at 538-39. Maher uses “practice supervised” to “describe a program where students are placed off-campus in community law offices to practice law under supervision as court certified interns, and supervision of case work is provided exclusively by lawyers at the law offices.” *Id.* The involvement of the law faculty under this definition is limited to placing and monitoring the students. If any supervision of the case work is done by law school faculty, Maher uses the term “case supervised.” *Id.*

distinction is adopted in this article and applied to the results of the survey. Thus, even if a program was self-described as a "prosecution clinic," if the answers showed that the students were placed in prosecutor offices and supervised by prosecutors, as opposed to by law school faculty, those results were counted as prosecution externship programs.⁵⁸ Conversely, the survey results which indicated "true" prosecution in-house clinics, i.e. where law school faculty provided the supervision of the students and their handling of the cases, were excluded from the analysis and calculation of the answers as a whole.⁵⁹ Again, however, the information provided by these schools, equally informative and pertinent to clinical legal education in general, is included in the survey data available on-line.⁶⁰

Within the field placement category, programs are alternatively called externship or internship programs.⁶¹ No discernable difference exists between these two designations.⁶²

⁵⁸ Question number twenty-two asked how the students were supervised at the prosecutor offices, and gave full-time faculty, adjunct faculty, regular prosecutor, and other as possible answers. The answers provided to this question were used to classify a program as an externship or an in-house clinic program. If the students were supervised by regular prosecutors, whether an adjunct professor or not, the program would be termed an externship; if full time faculty did the supervision, the program was termed an in-house clinical program. This distinction was admittedly not perfect, and at times programs could not be neatly squeezed into one classification or another. See, for example, school number seven wherein the elected prosecutor teaching as an adjunct with tenure status [sic], taught the classroom component and provided the supervision at the prosecutor office. See answers to questions twenty-two, twenty-three and thirty-one by school seven, SURVEY RESPONSE DATA, supra note 39; see also discussion supra p. 1307-08, and -note 43 noting similar classification by 1978-1979 survey by Council on Legal Education for Professional Responsibility.

⁵⁹ See discussion supra pp. 1306-08.

⁶⁰ See SURVEY RESPONSE DATA, supra note 39; see also p. 1310.

⁶¹ See Joy, supra note 18, at 681 n.1 (noting the terms "externship" and "field placement" are used interchangeably).

⁶² It has been stated that "[t]he naming of externship programs varies from the obscure to the scatological." Daniel Givelber et al., Learning Through Work:

Indeed, a recent attempt to provide formal definition in this area noted their interchangeability, defining an externship program as “[t]he program of study in which a law student earns academic credit for engaging in authentic lawyering tasks under the guidance and supervision of an experienced supervisor in an institution outside of the law school. *Also called an Internship.*”⁶³

GENERAL SCHOOL INFORMATION

Externship programs are presumably feasible in schools of all sizes and locations, as well as those offering traditional day programs and those offering evening or part-time programs. In fact, for law students enrolled in evening programs, externships may be the only feasible means of participating in a clinical program.⁶⁴ With this in mind, the first part of the survey sought to ascertain some general information about schools which do have prosecution externship programs.

An Empirical Study of Legal Internship, 45 J. LEGAL EDUC. 1, 5, n.14 (1995) (noting that such programs “are variously called field-placement clinics, farm-out clinics, practice-supervised programs, out-of-house clinics, and even outhouse clinics”). Interestingly, despite the authors then choosing to use the term externship “because it is the term most widely used in clinical literature,” as if to emphasize the academy’s schizophrenia with regard to this terminology, the authors still titled their article a study of legal internships. *Id.* at 1 (emphasis added). Despite the term externship being the most commonly used, an etymological argument can be made that internship is the most proper term. One dictionary defines intern as “a student or trainee who works, sometimes without pay, at a trade or occupation in order to gain work experience,” while defining extern as “a person working in but not living in an institution, such as a nonresident doctor or other worker in a hospital.” THE NEW OXFORD AMERICAN DICTIONARY 601, 886 (2001).

⁶³ Ogilvy, *supra* note 32, at 179 (emphasis added).

⁶⁴ Part-time students may have a limited opportunity to participate in prosecution externship programs as well. See question three, school six, SURVEY RESPONSE DATA, *supra* note 39 (noting that “there was only one night court opportunity”).

SCHOOL SIZE, PART-TIME PROGRAMS

Out of the seventy-one responding schools, twenty-one (30%) fell in the under 500 category, thirty-five (49%) in the 500-1,000 category, and thirteen (18%) in the 1,000 category.⁶⁵ Thirty-six (51%) of the responding schools had part-time programs, while thirty-four (48%) did not.⁶⁶ Out of the thirty-six schools which indicated they had a part time program, the vast majority—thirty-two, permitted their part-time students to participate in their prosecution externship programs.⁶⁷ Put another way, out of the thirty-six schools with part-time programs, 89% permitted their part-time students to participate in their prosecution externship programs.⁶⁸

1. How large is your law school?

⁶⁵ See question one, SURVEY RESPONSE DATA, supra note 39; see also Chart One. Two schools, numbers one and twenty-two, did not provide answers to this question. Note that the size categories are identical to the categories used by Seibel and Morton in their survey of externship programs as a whole. See Seibel & Morton, supra note 13, at 427.

⁶⁶ See question two, SURVEY RESPONSE DATA, supra note 39; see also Chart Two. One school did not provide an answer.

⁶⁷ See questions two and three, SURVEY RESPONSE DATA, supra note 39.

⁶⁸ Id.; see also Chart Three.

2. Does your school have a part-time program?

CLINICAL OFFERINGS AND STUDENT PARTICIPATION

The number of clinical programs, including prosecution externships, offered ranged from two to twenty.⁶⁹ This information was somewhat unclear in that it appears some schools included the number of externship placements as opposed to programs, i.e., counting each placement as one program.⁷⁰ The data, however, does support a trend of schools providing a large and varied selection of programs. Five to seven clinical offerings emerged as the most popular, with twenty-five schools (35%) falling in this category, followed by eighteen schools (25%) offering one through four programs. Fifteen (21%) offered between eight and twelve, while six indicated between thirteen and twenty.⁷¹ Seven schools did not provide an answer to this question.⁷² As a historical comparison, the MacCrate Report noted that in 1987, there was an average of 2.1 clinics per school.⁷³ With regard to externship programs,

⁶⁹ See question four, SURVEY RESPONSE DATA, supra note 39. Note that school twenty-six indicated two programs and forty externship placements. Although unclear if this meant two or three programs, it was counted in the "2" programs offered category, the assumption being that the number forty pertained to extern placements, not clinical programs.

⁷⁰ See, e.g., responses by schools number twenty and twenty-six to question four—"How many clinical programs (including externships) does your school offer?" School twenty responded—"Twenty (approximately)" while school twenty-two responded—"Two (forty externship sites, one tax clinic)." School twenty was counted as twenty programs, while school twenty-six was counted as two programs. Id.

⁷¹ See question 4, SURVEY RESPONSE DATA, supra note 39.

⁷² Id.; see also Chart Four.

⁷³ MacCrate Report, supra note 13, at 239. Calculations were based upon seventy reporting schools, i.e. an almost identical sample as the current survey which used seventy-one reporting schools. Id.

the report relied upon 1990 numbers, and noted that such programs were “holding steady at approximately an average of 3 per school.”⁷⁴

Insert 4. How many clinical programs (including externships) does your school offer?

If offering a large amount of clinical programs could be viewed as a trend, requiring students to participate in such programs was not. Question number five addressed this issue head on. Only three of all responding schools (4%) required participation in clinical programs for all students.⁷⁵ While law schools today are not mandated to provide clinical opportunities to all their students,⁷⁶ nor to accommodate every student

⁷⁴ Id. The MacCrate Report did not indicate the number of schools reporting, but noted that the figures were derived by “[c]omparing the American Bar Association Curriculum study data to those of the Task Force survey . . .” MacCrate Report, *supra* note 13, at 239. The curriculum study referenced was presumably Williams Powers, Office of the Consultant on Legal Education to the ABA, *A Study of Contemporary Law School Curriculum*, (1986) and *A Study of Contemporary Law School Curricula II* (1987). *Id.* at 242. The Task Force survey reference was presumably MacCrate Report, *Survey on Professional Skills Instruction* (April 1990). *Id.* at 397.

⁷⁵ See question five, SURVEY RESPONSE DATA, *supra* note 39; see also Chart Five. It needs to be noted here that the survey did not seek information about other forms of skills training such as simulation or moot court.

⁷⁶ See ABA INTERPRETATION 302-5, *supra* note 9. (“A law school need

who wishes to enroll in a particular professional skills course,⁷⁷ considering the continuous and historical emphasis on the need for improvement of professional skills on the part of American law students,⁷⁸ it is confounding that not more schools see fit to require their students to graduate with such skills. Possibly, if not hopefully, the minority of schools that do require participation in clinical training today will at some point in the future be viewed as having been trailblazers.⁷⁹ As

not offer these experiences to every student nor must a law school accommodate every student requesting enrollment in any particular live-client clinic or other real-life practice experience.”]

⁷⁷ See AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Interpretation 302-4 (2005), available at <http://www.abanet.org/legal/standards/chapter3.html>. (“A law school need not accommodate every student requesting enrollment in a particular professional skills course.”)]

⁷⁸ See, for example, Rowe, *supra* note 5, for early Twentieth century call (1917) for clinical training, and Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice*, 42 *FORDHAM L. REV.* 227 (1973) for a late Twentieth Century call for better skills training. Possibly most influential in the more recent calls for improved professional skills was the MacCrate Report and its emphasis upon ten “Fundamental Lawyering Skills” (to wit: Problem Solving, Legal Analysis and Reasoning, Legal Research, Factual Investigation, Communication, Counseling, Negotiation, Litigation and Alternative Dispute-Resolution Procedures, Organization and Management of Legal Work, and Recognizing and Resolving Ethical Dilemmas), as well as its four “Fundamental Values of the Profession,” (to wit: Provision of Competent Representation, Striving to Promote Justice, Fairness, and Morality, Striving to Improve the Profession, and Professional Self-Development). MacCrate Report, *supra* note 13, at 138-41.

⁷⁹ Other factors, particularly cost, could play a part in schools not mandating clinical participation. The MacCrate Report, for example, estimated that it would cost the academy an additional \$170.4 million to provide live client clinics to the 28,500 students who as of the 1987-88 academic year were not enrolled in clinical programs. MacCrate Report, *supra* note 13, at 254 n.36. As Dean John Kramer subsequently noted, the true numbers in this “infamous” footnote should have been \$225-250 million. The lower number was selected out of fear the higher number “would be used to beat us [clinicians] on the head in faculty meetings, ridicul-

of now, however, the law school academy as a whole has voted with their feet, and the path is not encouraging.

If unanimity exists across the academy in not requiring students to participate in clinical programs as a whole, a similar (but not as strong) unanimity exists as to who may participate in clinical programs. Fifty-three schools (75%) permitted second and third year students to participate in clinical programs. Nine schools (13%) limited participation to third year students,⁸⁰ while two schools (3%) permitted all students (first year through third year) to participate.⁸¹ Similarly, three

ing an almost twenty-five percent increase in the outlays for legal education nationwide." John R. Kramer, Extra-Curricular Programs, in THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM 74, 77-78 (Joan S. Howland et al. eds., 1993).

⁸⁰ See question six, SURVEY RESPONSE DATA, supra note 39.

⁸¹ Id.; see also Chart Six. Schools forty-one and forty-eight. No explanation as to the extent of participation by first year students was provided. Presumably first year students would not fulfill most jurisdictions' limited practice requirements.

2005]

CLINICAL SURVEY

1323

schools (4%), all larger schools (500-1,000 students range) and all with part-time programs, permitted second years, third years and fourth years to participate in their clinical programs.⁸²

Insert 6. Which students can participate in the clinical programs?

Interestingly, the numbers were a little more restrictive when the question specifically addressed which students could participate in the prosecution externship programs. While fifty-three (75%) of all the schools permitted second and third year students to participate in their clinical programs as a whole,⁸³ the number decreased to forty-two (59%) when the question asked which students could participate in their prosecution externship program.⁸⁴ Correspondingly, the number of

⁸² Id. Schools eleven, fifty-two, and sixty-nine. It is presumed that these schools referred to part-time students taking longer than the traditional three years to complete their law studies as "4L" students.

⁸³ See supra note 80.

⁸⁴ See questions six and seven, SURVEY RESPONSE DATA, supra note 39.

schools which required prosecution externs to be third year students, increased from nine (13%) to twenty (28%).⁸⁵

Insert 7. Which students may participate in prosecution extern program?

Twelve (17%) schools indicated they offered both a prosecution externship and a prosecution clinic, while fifty-six (79%) noted that they did not.⁸⁶ Fifty-eight schools (82%) indicated they offered a criminal defense externship or clinic as well as a prosecution externship, while ten (14%) did not.⁸⁷ Finally, the vast majority of schools primarily placed their students in

⁸⁵ Id.; see also Chart Seven. Interestingly, one school (forty-one) indicated first year through third year students could participate in their prosecution externship program. No explanation was provided as to the parameters of first year students participating in an externship placement. Presumably 1L students would not qualify as limited practice students in most jurisdictions.

⁸⁶ See question eight, SURVEY RESPONSE DATA, supra note 39; see also Chart Eight.

⁸⁷ See question nine, SURVEY RESPONSE DATA, supra note 39; see also Chart Nine.

2005]

CLINICAL SURVEY

1325

urban areas (forty-eight schools or 68%), or in both an urban and rural setting (twenty-two schools or 31%).⁸⁸

Insert 8. Does your school offer both a prosecution externship and a prosecution clinic?

Insert 9. Does your school offer a criminal defense externship or clinic as well?

⁸⁸ See question ten, SURVEY RESPONSE DATA, supra note 39. Note that one school qualified the urban categorization with "small," (school nine), while one school qualified the both category with "mainly rural" (school fifteen).

EXTERNSHIP PROGRAMS

The information solicited through questions one to ten (discussed above) pertained to the schools and their clinical programs in general. The second set of questions (eleven through thirty-two) sought information specifically pertaining to prosecution externship programs. As noted above, the majority of schools incorporate their prosecution placements in their general externship program. Nevertheless, the information provided in this section enables one to draw conclusions as to trends and general parameters of prosecution programs across the country. In other words, the fact that the information may be applicable to other types of externship placements as well, does not diminish its applicability to prosecution externship programs. In that respect, the information is both pertinent and valuable.

SIZE

The size of the prosecution externship programs in terms of the number of students which could participate ranged from small to large. Twenty-five schools (35%) indicated zero to ten students while twenty-six schools (37%) indicated ten to twenty students.⁸⁹ Five schools (7%) each fell into the twenty to thirty and the thirty to forty categories, while seven schools (10%) fell in the forty plus category.⁹⁰ The question, unfortunately, did not specify semester or year. However, many schools added such specifications, permitting those schools to be placed with certainty in appropriate categories.⁹¹ The answers to this question should most accurately be read to reflect the number of students enrolled in each school's program for the length of such program, i.e. some are one semester program while others are full year programs. These numbers correspond proportionally to the data found by Seibel & Morton. That survey found that in 1992-1993, 39% of externship programs had zero to ten students, 33% had eleven to twenty students, 19% had twenty-one to forty students, and 10% had forty or more students.⁹²

⁸⁹ See question eleven, SURVEY RESPONSE DATA, *supra* note 39.

⁹⁰ *Id.*; see also Chart Eleven.

⁹¹ See question seven, SURVEY RESPONSE DATA, *supra* note 39, for school specifications as to semester or year. Out of the schools which did specify, seven indicated semester and seven indicated year. *Id.*

⁹² Seibel & Morton, *supra* note 13, at 424 (rounding up to the nearest percentage).

Insert 11. How many students participate in your prosecution externship program?

STUDENT SELECTION PROCESS

Regardless of the number of students enrolled in a program, how to select those students is always a delicate process. Other than setting certain academic pre-requisites,⁹³ the decision has to be made whether a student can simply enroll in a clinical program through regular registration as he or she would for any other law school class, or whether the student should be subject to a screening process. Implicit in a screening process is that the clinical faculty, or the placement attorneys, has a say, if not a veto, in who will be permitted to enroll in the clinical program. Although wholly un-democratic, the clinical faculty arguably has a duty to ensure that only students of sufficient interest, maturity and character are permitted to participate as student-attorneys in the high publicity and pressure inherent in any clinical setting, including prosecution externship placements. The concern with such an argument is that any decision as to personnel, which this in essence is, if based upon subjective criteria, has the danger of becoming clinical faculty selecting “those students whom the faculty member most wants to teach.”⁹⁴ The unfairness in such a process speaks for itself⁹⁵ and should not be permitted.⁹⁶

⁹³ See discussion pertaining to pre-requisites, *infra* p. 1326.

⁹⁴ David F. Chavkin, *Spinning Straw into Gold: Exploring the Legacy of Bellow and Moulton*, 10 *CLINICAL L. REV.* 245, 267 (2003). It may be fitting that it was in the area of prosecution that the Supreme Court warned that too much discretion without standards may lend itself to arbitrary actions, stating that

It was with this dilemma in mind that question eighteen asked how students were selected to participate in the externship programs. Since the question asked for a narrative answer, the answers are not clearly classifiable. However, three general categories can be extrapolated from the various answers: one group termed regular registration wherein any student can simply register and enroll for the externship, one wherein an application process and implicitly a subsequent approval by the clinical faculty was required, and one where the students applied directly to the placement. The split was fairly even among the programs which permitted students to register through regular registration (26 or 32%) and those programs which required a special application process (27 or

“[w]here, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.” *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (striking down City of Jacksonville vagrancy ordinance).

⁹⁵ One of the author's most vivid memories from clinical teaching involves a student who had not been selected for enrollment in the Tulane Law School Criminal Defense Clinic who confronted the author in a classroom one year later, and, sobbing, accused the author of having ruined her life through that decision. Although the somewhat overly dramatic and immature way the student handled adversity may have indeed proved that the decision was actually correct, in retrospect the author was still left with the painful conclusion that there really were no objective grounds with which to justify the decision not to select her for participation in the clinic. The decision was strictly a subjective one, albeit based upon grades, an essay and worst of all, a personal interview.

⁹⁶ One commentator noted:

A model that selects the most political and/or most talented clinic applicants cannot be tolerated in law schools, especially in an environment in which not every student who wants to take clinic can enroll. Since we should be able to motivate every student to provide competent representation, resources should then be focused on the students who most need clinical education and who would most benefit from exposure to our methodology. If we do not want to invest the time and resources that would be required to identify each such student, we must opt for a randomized selection process that gives every student an equal chance for selection.

Chavkin, *supra* note 94, at 267.

33%).⁹⁷ Six programs (7%) required a face to face interview with the clinical faculty, arguably the most subjective method upon which to base this decision. A slightly larger number (11 or 13%) transferred the selection process, including an interview (6 or 7%), to the field placement.⁹⁸ Considering the perception of unfairness which may accompany any negative decision based upon something as subjective as a personal interview, and the lack of uniformity in how this process is handled at different schools, it may be an area in need of development of guidelines and scholarly justifications for either side.

Insert 18. How are students selected to participate in the externship program?

⁹⁷ See question eighteen, SURVEY RESPONSE DATA, *supra* note 39. Note that the percentages here are calculated on eighty-two responses since several schools fell into more than one category. Schools three, five and twenty-eight, for example, all indicated special application and a director interview. Seven schools indicated a lottery was used for selecting students. These schools were included in the "regular registration" category since such a lottery process lacks the subjectivity inherent with special applications and/or interviews.

⁹⁸ *Id.*; see also Chart Eighteen.

2005]

CLINICAL SURVEY

1331

PRE- OR CO- REQUISITES

Related to both which students may participate in prosecution externship programs and how those students are selected, is the issue of what pre- or co-requisites various schools require for such participation. Question sixteen sought to elicit this information. If there was a discernable trend across the country in this respect, it was that twenty-five schools (21%) required students enrolling in their prosecution externship programs to either be enrolled in or previously have taken Evidence.⁹⁹ Interestingly, except for no requirement (thirty schools, 25%), there was no other discernable trend as far as pre- or co-requisites. Seventeen schools (14%) required criminal procedure, ten schools (8%) required trial practice/advocacy, while ten schools (8%) also required criminal law.¹⁰⁰ Only eight schools (7%) required professional responsibility.¹⁰¹

Insert 16. What prerequisites or co-requisites do you have for the externship?

⁹⁹ See question sixteen, SURVEY RESPONSE DATA, *supra* note 39; see also Chart Sixteen.

¹⁰⁰ *Id.* Note that respondents were free to provide more than one category. As such there were a total of 118 different responses in the nine categories graphed in Chart Sixteen. The percentages are based upon this number as opposed to the seventy-one responding schools.

¹⁰¹ *Id.*

If there was a surprise in this particular data, it would arguably be the relatively small number of schools which required their prosecutorial externs to take or have taken professional responsibility. This is surprising for two reasons. First, the literature pertaining to field placement programs in general, and prosecution externship programs in particular, is replete with scholarship emphasizing the importance of ethics and professionalism.¹⁰² Second, sixty-five (87%) of the schools responding to the survey indicated that they cover ethics and professionalism as part of their prosecution externship program in one form or another.¹⁰³ The vast majority of these responses indicated in narrative form that they did so through their classroom component.¹⁰⁴ Clearly, the clinical faculty across academia is in agreement as to the importance of exposing prosecutorial externs to ethics and professionalism concepts. However, the absence of professional responsibility as a

¹⁰² See, e.g., J.P. OGILVY ET AL., *LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS* (1998) (devoting one entire chapter to ethical issues); Kate E. Bloch, *Subjunctive Lawyering and Other Clinical Extern Paradigms*, 3 *CLINICAL L. REV.* 259 (1998) (discussing the role of the clinical teacher in facilitating resolution of ethical issue which may arise in externship placements, and significantly, choosing to employ prosecutorial settings for such scenarios); Lisa G. Lerman, *Professional and Ethical Issues in Legal Externships; Fostering Commitment to Public Service*, 67 *FORDHAM L. REV.* 2295 (1999) (discussing ethical scenarios typically encountered by externs, including prosecution externs); Robert J. Condlin, "Tastes Great, Less Filling": The Law School Clinic and Political Critique, 36 *J. LEGAL EDUC.* 45, 65-67 (1986) (extending discussion from ethics to how externship setting is beneficial to aiding in students a "moral understanding" as to professional issues); see also, Caplow, *supra* note 28, at 10 (noting the unique professional responsibilities which accompany a prosecutor's quasi-judicial role).

¹⁰³ See question seventeen, *SURVEY RESPONSE DATA*, *supra* note 39; see also Chart Seventeen.

¹⁰⁴ *Id.* (see narrative responses).

2005]

CLINICAL SURVEY

1333

pre- or co-requisite may also be evidence of an equal agreement that the general professional concepts covered in such courses are not sufficiently specific for students externing in a real life criminal setting.

Insert 17. Do you cover ethics and professionalism as part of your externship program? If so, how?

TYPES OF PROSECUTOR PLACEMENTS

A prosecutor externship program generally has five possible placements: United States Attorney, District Attorney, Attorney General, County Attorney, or City/Municipal Attorney. Question number twelve sought to ascertain what type of placements were the most popular across the country. It did so by asking what type of prosecutor offices students were placed in as prosecutorial externs.¹⁰⁵ If placed in several offices, as most programs did, the respondents were asked to provide an estimated percentage of placement locations.¹⁰⁶

The most popular prosecutor placement was district attorneys, closely followed by United States Attorneys. Fifty-four schools (26%) indicated they placed their prosecutorial externs with district attorney offices, while fifty-two schools (25%)

¹⁰⁵ See question twelve, SURVEY, Appendix A.

¹⁰⁶ Id.

indicated federal prosecutors.¹⁰⁷ The remaining prosecutorial placements were equally split among city prosecutors (thirty-six or 18%), county prosecutors (thirty-two or 16%) and attorney generals (thirty or 15%).¹⁰⁸ A follow-up question to the schools which placed their students with United States Attorneys offices, or Attorney General offices, both prosecutor offices where there are normally separate divisions handling criminal and civil matters, inquired as to which of these divisions the students worked in. Fifteen schools (21%) indicated their students only did criminal matters, while the majority (forty-three schools or 61%) had their students handle both criminal and civil matters.¹⁰⁹

Insert 12. What type of offices do you place students in? If several, please indicate average approximate percentage of placement

¹⁰⁷ See question twelve, SURVEY RESPONSE DATA, supra note 39.

¹⁰⁸ Id.; see also Chart Twelve. Note that the numbers in chart twelve exceeds seventy-one, i.e. most schools placed students in several types of prosecutor offices. The percentage values in parenthesis are thus based upon the total number of prosecutor office placements (204), which was derived at by simply totaling all instances when a school indicated they placed a student at a particular office. The respondent's estimations as to what approximate percentage of placement corresponded to each office can be seen in the tabulation of answers to question twelve. See supra note 107.

¹⁰⁹ See question thirteen, SURVEY RESPONSE DATA, supra note 39; see also Chart Thirteen.

Insert 13. If you place students in USA or AG, do the students work in both the criminal and civil divisions?

CREDIT HOURS AND ON-SITE HOURS

The type of prosecutorial office in which students are placed is peculiar to prosecution externship placements. Questions fourteen and fifteen, however, addressed an issue which cuts to the core of all field placement programs—how many credit hours are awarded for such placements, and how many on-site hours, i.e. the hours the student “works” at his or her placement, do such credit hours equal? This appears to be an area where the ABA Standards have had a unifying effect upon externship programs across the land.

In 1993, the ABA amended Interpretation 2 of Standard 306(c),¹¹⁰ adding language ensuring that “the level of scrutiny and the requirements for externship programs increased significantly as the academic credits awarded increased.”¹¹¹ Per the amended language of Interpretation 2 of Standard 306, field placement programs awarding six or more credit hours had additional criteria made applicable to them, including a classroom component, a written appraisal of the program every three years and required on-site visits by full-time facul-

¹¹⁰ Standard 306 was renumbered Standard 305 in February and August of 1996. See Joy, *supra* note 18, at 702.

¹¹¹ *Id.* at 698.

ty.¹¹² Although Interpretation 2 of Standard 306 became Interpretation 305-2 as Standard 306 was renumbered Standard 305 in 1996,¹¹³ the substance of the interpretation remained unchanged.¹¹⁴ This remained true three years later as much of what had appeared in Interpretation 2 of Standard 306 became part of the text of Standard 305 in 1999.¹¹⁵ As per the 1999 version of Standard 305, periodic on-site visits by a faculty member were preferred for all field placement programs, but required if more than six credit hours were awarded.¹¹⁶

¹¹² Id. at 698-99. Subsection (h) of the 1993 Version of AMERICAN BAR ASSOCIATION INTERPRETATION 2 OF ACCREDITATION STANDARD 306: Regarding Field Placement Programs, reproduced in Joy, *supra* note 18, at 718-19, reads in its entirety:

(h) In those field placement programs that award academic credit in excess of six credit hours per semester, the following additional criteria apply:(1) A classroom component is required. If the classroom component is not contemporaneous, the school has the burden of demonstrating that its alternative is a functionally and educationally equivalent classroom experience involving full-time faculty. The alternative may be a meaningful pre- or post-field placement experience involving full-time faculty. The classroom component may be satisfied by regular tutorials conducted by the full-time faculty.(2) A written appraisal of each program shall be conducted at least every three years by the law school to evaluate whether the program is meeting its stated educational objectives.(3) The school shall ensure that there is careful and persistent full-time faculty monitoring of the academic achievement of each student. This shall include an on-site visit in each field placement by full-time faculty in the course of the field placements. The school shall document this monitoring. February, 1993.

Id.

¹¹³ Joy, *supra* note 18, at 702.

¹¹⁴ Id.

¹¹⁵ Id. at 703.

¹¹⁶ AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 305(f)(3) (1999). Subsection (f)(3), reproduced in Joy, *supra* note 18, at 703, reads in its entirety:

(3) Periodic on-site visits by a faculty member are preferred. If the field placement program awards academic credit of more than six credit hours per academic term, an on-site visit by a faculty member is required each academic term the program is offered.

Similarly, while a classroom or tutorial component was preferred for all field placement programs, if six or more credit hours were offered, the classroom or tutorial component was required.¹¹⁷ Six credit hours remained the threshold level as the pertinent language moved from 305(f) into 305(e) in August of 2004,¹¹⁸ until 2005 when the language of subsections (e)(5) and (e)(7) were amended to lower this threshold to four credit hours. As of February 2005, the Standards require “pe-

¹¹⁷ AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 305(f)(4) (1999). Subsection (f)(4), reproduced in Joy, *supra* note 18, at 703, reads in its entirety:

(4) A contemporaneous classroom component or tutorial component taught by a faculty member is preferred. If the field placement program awards academic credit of more than six credits per semester, the classroom or tutorial component taught by a faculty member is required; if the classroom or tutorial component is not contemporaneous, the law school shall demonstrate the educational adequacy of its alternative (which could be a pre- or post-field placement classroom component or tutorial.

Id.

¹¹⁸ The new language of sub-sections (5) and (7) in 305(e) of AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 305 (2004), available at <http://www.abanet.org/legaled/standards/2004-2005masterandstandardsbook.pdf>, became effective in August of 2004, reading:

(e) A field placement program shall include:

(5) on-site visits by a faculty member each academic term the program is offered if the field placement program awards more than six academic credits (or equivalent) for fieldwork in any academic term

...

(7) opportunities for student reflection on their fieldwork experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection. Where a student can earn more than six academic credits (or equivalent) in the program for fieldwork, the seminar, tutorial, or other means of guided reflection must be provided contemporaneously.

see also email from Peter A. Joy, Professor of Law and Director of the Criminal Justice Clinic, Washington University School of Law, to Hans P. Sinha (March 25, 2005) (explaining evolution of ABA Standards 305(f) and 305(e)(5) and (7) from 2002-2003 through 2005) (on file with author).

riodic on-site visits”¹¹⁹ and contemporaneous “opportunities for student reflection”¹²⁰ if more than four credit hours is offered for the field placement.¹²¹

Although the ABA's attempts to mandate standards in this area have been criticized as a “micro-management approach to externships,”¹²² the attention focused on the amount

¹¹⁹ AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 305(e)(5) (2005), available at <http://www.abanet.org/legaled/standards/Chapter3.html> [hereinafter ABA STANDARD 305], reads in its entirety:

(e) A field placement program shall include:

(5) periodic on-site visits or their equivalent by a faculty member if the field placement program awards four or more academic credits (or equivalent) for fieldwork in any academic term or if on-site visits or their equivalent are otherwise necessary and appropriate.

Id.

¹²⁰ AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 305(e)(7) (2005), available at <http://www.abanet.org/legaled/standards/Chapter3.html>, reads in its entirety:

(e) A field placement program shall include:

(7) opportunities for student reflection on their field placement experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection. Where a student can earn four or more academic credits (or equivalent) in the program for fieldwork, the seminar, tutorial, or other means of guided reflection must be provided contemporaneously.

Id.

¹²¹ The current version of Standard 305(e) was adopted by the Council of the Section on Legal Education and Admission to the Bar in August of 2004. The ABA House of Delegates concurred in February, 2005. See Memorandum from John A. Seibert, Consultant on Legal Education, to Deans of ABA-Approved Law Schools et al. (February 17, 2005) (on file with author).

¹²² Seibel & Morton, *supra* note 13, at 416, questioning whether “greater specificity in the regulation of the content and methodology of field placement programs—the heart of the 1993 revisions of Standard 306(c)’s Interpretation 2—[is] helpful to individual program goals?” See Joy, *supra* note 18, at 717, Appendix A, for “1993 Version of ABA Interpretation 2 of Accreditation Standard 306: Regarding Field Placement Programs.” Seibel and Morton acknowledged that “[t]he ABA can and should play an important role in encouraging and re-

of credit hours by the Standards does seem to have had an effect as to how many credit hours field placement programs, including prosecution externship programs, offer their students. Since six credit hours became the threshold wherein programs awarding more would incur special attention, field placement programs as a whole have limited their programs to six or below. In fact, the Seibel and Morton survey found that in 1992-1993, "the overwhelming majority of programs—eighty-two out of ninety-eight—... [had] ... a maximum credit allocation of six units or less."¹²³ Seibel & Morton noted that only five programs had "minimum credits of seven or higher."¹²⁴ The Stickgold & Schechter survey, conducted in the fall of 1995, had a similar yet also surprising result in this regard. While that survey found that "44 schools allowed a total of 6 or fewer total credits," it also found that thirty-seven schools allowed between seven and twelve credits, and twenty-four schools allowed over twelve credits.¹²⁵ The high number of schools which permitted an excess of six credit hours as per the Stickgold & Schechter survey is surprising in two ways. First, the six credit threshold language of section (h) of Interpretation 2 of Standard 306 (1993) had been in effect for two years when the survey was conducted.¹²⁶ Second, if anything, one would have expected a decrease of programs offering more than six credit hours between the 1992 Seibel & Morton survey and the 1995 Stickgold & Schechter survey.

quiring law schools to include in the curriculum valuable experiential educational opportunities, like clinics and field placement programs." Seibel & Morton, *supra* note 13, at 417. However, they maintained that the way to do so is "not to impose detailed requirements governing the elements of field placement programs," but instead to ensure that such programs, "like all others in the curriculum, have adequate supervision by faculty members who are given the time and resources to structure their programs in ways that fit with the constraints and opportunities in their particular schools and geographical locations." *Id.*

¹²³ Seibel & Morton, *supra* note 13, at 426.

¹²⁴ *Id.*

¹²⁵ Stickgold & Schechter, *supra* note 14, at 20.

¹²⁶ See *supra* notes 112 and 113.

Regardless of the reasons for the finding in 1995, by 2002-2003, the effect of the six credit hour language had set in.¹²⁷ Only nine programs (13%) awarded more than six credit hours as part of their prosecution externship programs. Twenty-seven (38%) awarded between one and three credit hours, while thirty-five programs (49%), awarded between four and six credit hours.¹²⁸

Insert 14. How many credit hours can a student earn for participating in the externship program?

The second component of the credit hour section of the survey inquired as to how many on-site hours a student had to work in order to earn one academic credit.¹²⁹ This too is an

¹²⁷ Regardless of whether this was the intended effect of the Standard or not, Carl Monk, Executive Director of the American Association of Law Schools, has noted that "[t]he key to a healthy accreditation process is balancing the need to enforce minimum standards of excellence with the need to avoid adoption of standards that inhibit creativity and innovation in legal education." William Wesley Patton, *Creating an Externship Consortium: The Glace Experience*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 233, 240 (2001) (citing to Carl Monk, *The AALS Role as an Accrediting Body*, THE NEWSLETTER: A Quarterly Publication of the Association of American Law Schools, Number 92-3, April 1993, at 4). Put another way, "...let a thousand flowers bloom . . . [but] . . . also see to it that the flowers are well tended." Robert J. Condlin, *Learning from Colleagues: A Case Study in the Relationship Between 'Academic' and 'Ecological' Clinical Legal Education*, 3 CLINICAL L. REV. 337, 438 (1997).

¹²⁸ See question fourteen, SURVEY RESPONSE DATA, *supra* note 39; see also Chart Fourteen.

¹²⁹ See question fifteen, SURVEY, Appendix A.

area which is regulated by the Standards, but not with the same specificity as the number of credit hours awarded through participation in field placement programs. Instead, section (b) of Standard 305 merely mandates that “[c]redit granted shall be commensurate with the time and effort required and the anticipated quality of the educational experience of the student.”¹³⁰ Although neither the Standards nor the Interpretations provide more guidance as to how schools should ensure such “commensurate” level is maintained, it has been noted that “[c]redit for fieldwork frequently is awarded at the rate of one credit-hour for each fifty or sixty hours of time devoted to assigned tasks at the placement during the semester.”¹³¹ The Seibel and Morton survey found that almost eighty-eight percent of schools allocated between three and five fieldwork hours per week for each academic hour.¹³² These figures translate to “fifty-two to eighty hours of fieldwork per semester per credit.”¹³³ The Stickgold & Schechter survey numbers of between forty-five and sixty-five hours per semester credit, although a slightly lower range, still support the Seibel & Morton data.¹³⁴ The numbers had not changed by 2002-2003. Although calculating the numbers based upon the survey responses was, as Stickgold & Schechter noted “confusing,”¹³⁵ fifty-six on-site hours for one academic credit hour accumulated the most number of schools (eighteen).¹³⁶ The next two largest categories were fifty on-site hours with eleven

¹³⁰ See ABA STANDARD 305, *supra* note 119, at Standard 305(b).

¹³¹ Ogilvy, *supra* note 32, at 166.

¹³² Seibel & Morton, *supra* note 13, at 428.

¹³³ Ogilvy, *supra* note 32, at 166.

¹³⁴ Stickgold & Schechter, *supra* note 14, at 20.

¹³⁵ *Id.* The responses to question fifteen were not always clear. Some responses clearly gave the number of on-site hours to one credit hour. Using an average fourteen week semester and referencing a particular school's answer to question fourteen when helpful would all be used to ascertain the school's average on-site hour per academic credit ratio.

¹³⁶ See question fifteen, SURVEY RESPONSE DATA, *supra* note 39; see also Chart Fifteen.

schools and sixty and forty on-site hours with five schools each.¹³⁷

Insert 15. How many “on-site” hours translate to such credit hours?

Regardless of how many credit hours a program awarded students for participation in the prosecutorial externship program, and regardless of how many on-site hours a particular school required for such credit hours, schools as a whole did not permit the inclusion of travel time in the calculation of these on-site hours. Sixty-eight schools (96%) answered in the negative when asked if they permitted the inclusion of travel time in the required on-site hours.¹³⁸ The same number of

¹³⁷ Id. These numbers are also supported by a 1987 survey of clinical programs as a whole, which found that “the average clinic student must work 3.88 hours per week for each clinic credit hour.” McDiarmaid, *supra* note 56, at 250. Using a fourteen week semester, this would work out to 54.33 on-site hours for one credit hour; see also Knight, *supra* note 19, at 851 (noting that the University of Nebraska in-house, faculty supervised prosecution clinic awards six credits per semester for twenty hours of work per week.) This equates to forty-six on-site hours per credit hour.

¹³⁸ See question twenty-eight, SURVEY RESPONSE DATA, *supra* note 39. Note that the question was designed to refer to travel between the school or home and the prosecutor's office, as opposed to between the prosecutor's office and court. It is possible that the three schools which fell in the distinct minority (4%) of

schools answered in the negative when asked if they reimbursed students out of pocket expenses such as parking.¹³⁹

GRADES

Regardless of the number of credit hours an extern can earn, the majority of prosecutorial externs are graded on a pass/fail basis. Fifty-five schools (77%) indicated they employed a pass/fail grading system.¹⁴⁰ Ten schools (14%) used a regular ABC grading scheme, while six schools (8%) used what can be termed non-traditional means of grading.¹⁴¹ One of these non-traditional methods permitted the students to choose between receiving an ABC or a pass/fail grade,¹⁴² while another assigned the externs an ABC letter grade for one credit hour and a pass/fail grade for the remaining credit hours.¹⁴³ That school assigned between three and four credit hours for participation in their prosecution externship program.¹⁴⁴

permitting the inclusion of travel time in the credit hour calculation, were referring to the latter travel time when answering the question. (One such school, number sixty-seven, interestingly indicated "partial credit.") If so, it will correlate with the author's experience that travel time between the prosecutor's office and court is not necessarily devoid of an educational benefit. In a rural area such as Mississippi where the courts still "ride the circuit," prosecutorial externs who ride along with a prosecutor, and especially judicial interns who ride with the judge, often comment upon how much they learn from discussing issues with their on-site supervisor during those drives.

¹³⁹

See question twenty-nine, SURVEY RESPONSE DATA, *supra* note 39. Since the Standards do not prohibit the "reimbursement of reasonable out-of-pocket expenses related to the field placement," AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Interpretation 305-3 (2005), available at <http://www.abanet.org/legaled/standards/chapter3.html> [hereinafter ABA Interpretation 305-3], the response by school ten—"No, I wish I could—these expenses build up," likely reflects the thinking of most field placement faculty.

¹⁴⁰

See question nineteen, SURVEY RESPONSE DATA, *supra* note 39. The literature support these numbers. "The fieldwork portion of the course is commonly graded on a pass/fail basis, which is assessed by evaluating whether the extern

Out of the fifty-two schools (72%) which also had a classroom component to their externship program, twenty-three (32%) indicated they used a pass/fail grade option for the class, while fifteen (21%) used a graded option.¹⁴⁵ Four fell in an "other" category.¹⁴⁶ Interestingly, school number thirty permitted its externship students to select between a pass/fail and a graded option for both their placement credits and for their classroom component credits.¹⁴⁷

completed the required number of hours of fieldwork and whether the work was satisfactorily completed." Ogilvy, *supra* note 32, at 173.

¹⁴¹ See question nineteen, SURVEY RESPONSE DATA, *supra* note 39; see also Chart Nineteen.

¹⁴² *Id.* School 30. See also Stacy L. Brustin & David F. Chavkin, Testing the Grades: Evaluating Grading Models in Clinical Legal Education, 3 CLINICAL L. REV. 299 (1997) for a discussion of the pros and cons of pass/fail and number grades in a clinical, albeit not strictly field placement, setting. After a one semester experiment in 1995 wherein students were permitted to select between pass/fail and a fully graded option, 84% of students elected grades, while only 16% elected the pass/fail option. *Id.* at 310.

¹⁴³ See question nineteen, SURVEY RESPONSE DATA, *supra* note 39. School thirty-one. Interestingly, California Western School of Law as early as 1987, employed a similar non-traditional grading option in their internship program wherein the students received "a numerical grade for one unit of the course and a pass/fail grade for the remainder of their units." Janet Motley, Self-Directed Learning and the Out-of-House Placement, 19 N.M. L. REV. 211, 213 (1989). The graded unit was based upon the students' written assignments, journals and quality of discussions in private meetings. *Id.* By having the graded unit, the students took these assignments more seriously. *Id.*

¹⁴⁴ See question fourteen, SURVEY RESPONSE DATA, *supra* note 39. School thirty-one.

¹⁴⁵ See question thirty-eight, SURVEY RESPONSE DATA, *supra* note 39, as well as discussion on classroom component *infra* pp. 1357-60. Unfortunately, although fifty-two respondents indicated in their answers to question thirty-three that they did have a classroom component, only forty-two schools provided answers to question thirty-eight pertaining to their classroom grading option. *Id.*

¹⁴⁶ *Id.*; see also Chart Thirty-eight.

¹⁴⁷ See questions nineteen and thirty-eight, SURVEY RESPONSE DATA, *supra* note 39.

2005]

CLINICAL SURVEY

1345

Insert 19. What grade option do you use for the externship program?

Insert 38. What grade option do you use for these classes?

For a historical comparison, one can note that 77% of programs grading the placement component on a pass/fail basis is similar to the findings by Seibel & Morton that in the 1992-1993 academic year only thirty-two out of ninety-eight externship programs awarded letter grades.¹⁴⁸ In other words, Seibel & Morton found that out of their survey base of ninety-eight programs, sixty-six or 67% used the pass/fail option, a

¹⁴⁸ Seibel & Morton, *supra* note 13, at 434. It is presumed that by saying "award grades," the authors of the survey meant ABC grades as opposed to pass/fail grades. Presumably, some reflection must be made upon a student's transcript indicating he or she has successfully earned the academic credit in question.

percentage remarkably similar to 77% of this survey. Going a quarter of a century back in time, one finds that the practice was to grade the clinical component pass/fail while the classroom component was universally graded with a letter or number grade. Extrapolating information from two different tables in the Council on Legal Education for Professional Responsibility's 1978-1979 survey, one finds that eighteen of the clinical programs offered by schools were prosecution externship programs.¹⁴⁹ Out of these eighteen programs, six (33%) used a letter/number grading system for their clinical part, while twelve (66%) used pass/fail or credit/no credit grading system.¹⁵⁰ Seventeen (94%) used a letter/number grade for their class component, while only one used a pass/fail system.¹⁵¹

¹⁴⁹ SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION, *supra* note 43.

The eighteen prosecution dedicated programs were derived by selecting only those programs which fell into the non-school operated, not at school programs, i.e., Category 3(c) [but not (b)], and Location 4(c) for location. See *supra* note 43, Table 1—"General Description of Law School Clinic Programs," at 1-20. The eighteen schools were American, Arizona State, Florida State, Fordham, Hawaii, Hofstra, Mercer, William Mitchell, New Mexico, North Dakota, University of the Pacific, Seton Hall, Southern Methodist, Stetson, Suffolk (juvenile prosecution program), Texas, Texas Tech and William & Mary. *Id.*

¹⁵⁰ *Id.* at 69-78, Tbl. 4: Clinical Grading. The eighteen programs extrapolated from Table One were then cross-checked with the information pertaining to them in Table 4 in order to ascertain what type of grading practice they employed.

¹⁵¹ *Id.*

2005]

CLINICAL SURVEY

1347

LIMITED PRACTICE BY STUDENTS

The survey showed, to no surprise, that the majority of students participating as prosecutorial externs at law schools across the nation were sworn in as limited practice students.¹⁵² Question twenty probed this area. A resounding majority, fifty-one respondents (72%), indicated in the affirmative. Eleven (15%) said no, while nine (13%) fell in the other/varies category.¹⁵³

Insert 20. Are students sworn in under a limited practice rule?
Externship Requirements

JOURNALS, TIME-LOGS, AND READING AND WRITING REQUIREMENTS

The vast majority of law students at some point in their

¹⁵² See, e.g., David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507 (1998) (listing student practice rules).

¹⁵³ See question twenty, SURVEY RESPONSE DATA, *supra* note 39; see also Chart Twenty. Out of the nine "other/varies" category schools, all but one indicated there was a possibility for the students to be sworn in. If one adds these eight programs to the other affirmative answers, the percentage of programs where the students can be sworn in increases to 83%. One of these nine answers was "un-sure."

law school career work in a legal related job.¹⁵⁴ Presumably, these students at the very least gain some legal experience from their clerkship positions, in addition to a salary.¹⁵⁵ When students are placed in prosecutor offices or any field placement position, at the very minimum there must be a moral justification for those students paying tuition to the law school for the privilege of “working” for free at a place where they possibly could otherwise work for pay.¹⁵⁶ In addition to the

¹⁵⁴ Albeit somewhat dated at this point, a study conducted in 1984 found that ninety percent of graduates of the classes of 1973, 1976, and 1979 through 1982 from the University of Utah College of Law had held a legal clerkship employment during their law school career. Donald N. Zillman & Vickie R. Gregory, Law Student Employment and Legal Education, 36 J. LEGAL EDUC. 390, 390-91 (1986) [hereinafter Zillman & Gregory Survey]. An overwhelming majority of students in the Zillman & Gregory survey (86%) chose “general desire to gain practical experience” as the most important reason for doing a clerkship. *Id.* at 392. There is no reason to believe today’s students clerk at any lesser rate, nor that their motives differ.

¹⁵⁵ More than ninety percent of the students in the Zillman & Gregory survey “viewed their clerkship experience as worthwhile.” *Id.* at 395.

¹⁵⁶ Assigning students to field placements, and accepting their tuition dollars for such a privilege, without providing an educational component to such experience, is no different than a law school accepting students’ tuition and not adequately preparing them for their roles as attorneys. See Robert MacCrate, Preparing Lawyers to Participate Effectively in the Legal Profession, 44 J. LEGAL EDUC. 89, 92 (1994) (noting that it is “difficult to understand how a law school . . . can derive 86 percent of its income from student tuition, send its graduates as a result out into practice with huge personal debt, and not be willing to assign equal priority in the law school, along with developing the law, to preparing its students to participate effectively in the legal profession.”); see also Russell Engler, The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow, 8 CLINICAL L. REV. 109, 118 (2001). There is no difference to this concept when applied to externship placements. “To justify tuition charges and the award of course credit for an externship placement experience, the law school is obligated to provide value added to the student’s experience at the placement. The value commonly is supplied by providing structured preparation for the placement experience and structured reflection on the placement experience through discussion, writing, reading, and guided observation.” Ogilvy, *supra*, note 32, at 163; see also Joy,

moral justification, there is also an obligation on the part of the law school to ensure that a field placement, whether it be in a prosecutor office, or otherwise, be educationally worthwhile and beneficial to the student.¹⁵⁷ Absent the school adding some educational benefit to the field placement, the field placement would in essence be no different than the apprenticeship system of old, and the student would be better off seeking a paid position.

This obligation has not gone unnoticed by the ABA. The seven sub-sections of Standard 305(e) in essence seek to ensure that field placements achieve and maintain high qualitative educational levels.¹⁵⁸ While the language of the Standard is not exclusively limited to faculty/student interaction, a good and productive faculty/student interaction does aid in obtaining a high educational experience for an extern. Means with which to facilitate this include "structured or unstructured academic journals, critical incidence reports or logs, reflective papers, progress reports, time records, portfolios, individual conferences, group conferences, telephone conferences, e-mail exchanges, and site visits."¹⁵⁹ With this in mind, question twenty of the survey sought to probe the prevalence of four of the most basic requirements of externship placements: time logs, journals and reading and writing requirements.

From an experiential point of view of seeking to have the students not only observe and do, but also to learn lessons from their experiences, keeping a journal falls within the reflective part of "The Experiential Learning Cycle."¹⁶⁰ Possi-

supra note 18, at 711.

¹⁵⁷ See Norman Fell, *Development of a Criminal Law Clinic: A Blended Approach*, 44 CLEV. ST. L. REV. 275 (1996) for an excellent overview of a model prosecution externship program (albeit one termed a "clinic,"), and noting that "[i]t is ultimately the law school's responsibility to assure that the experience has educational focus in the development of professional skills." *Id.* at 288.

¹⁵⁸ See supra note 48.

¹⁵⁹ Ogilvy, supra note 32, at 172.

¹⁶⁰ OGILVY ET AL., supra note 102, at 4. The components of the

bly reflecting consensus of the benefit of journaling, much has been written about this requirement of externship placements as a whole.¹⁶¹ As such, it came as no surprise that the majority of schools have incorporated a journaling requirement in their prosecution externship programs.¹⁶² Indeed, out of the seventy-one programs, forty-eight schools (67%) required their students to maintain a journal, while eighteen (25%) did not.¹⁶³ The vast majority of the schools which did require their students to maintain a journal, did not require such journals to be shared with their on-site supervisors. Thirty-six (or 51% out of the total seventy-one schools) fell in this “not share” category, while nine schools (13%) did have the students share their journals with their on-site supervisors.¹⁶⁴

A similar breakdown could be seen with regard to time logs. Although not specifically mentioned in Standard 305(e), if nothing else, section (b) of Standard 305 mandating that “[c]redit granted shall be commensurate with the time and effort required and the anticipated quality of the educational experience of the student,”¹⁶⁵ implies at a minimum that an ac-

experiential learning cycle are “planning, doing, reflecting and integrating.” *Id.*

¹⁶¹ See, e.g., Barbara A. Blanco & Sande L. Buhai, Externship Field Supervision: Effective Techniques for Training Supervisors and Students, 10 *CLINICAL L. REV.* 611, 644-45 (2004); Harriet N. Katz, Personal Journals in Law School Externship Programs: Improving Pedagogy, 1 *T.M. COOLEY J. PRAC. & CLINICAL L.* 7 (1997); J.P. Ogilvy, The Use of Journals in Legal Education: A Tool for Reflection, 3 *CLINICAL L. REV.* 55 (1996).

¹⁶² Neither the Seibel & Morton nor the Stickgold & Schechter surveys explored this issue in depth. The Stickgold & Schechter survey did note that “18 schools require some form of diary/journal/logs/timesheets.” Stickgold & Schechter, *supra* note 14, at 21.

¹⁶³ See question twenty-one, *SURVEY RESPONSE DATA*, *supra* note 39. Five (7%) were classified as “other” based on their answers.

¹⁶⁴ *Id.*; see also Chart Twenty-one. The percentage in each category (time logs, journals, readings, and writing) is calculated with seventy-one equaling one-hundred percent. Note that three schools indicated they had a journal requirement, but did not specify whether the journals were shared or not. *Id.*

¹⁶⁵ *Supra* note 130.

2005]

CLINICAL SURVEY

1351

counting of the student's time has to be maintained. Possibly with this in mind, fifty-three (74%) of the seventy-one schools listed time logs as a requirement for their extern placement.¹⁶⁶ Thirteen schools (18%) did not.¹⁶⁷ The majority of the schools which did require time logs, twenty-seven out of the fifty-three (or 38% of the total seventy-one schools), had such logs verified by the on-site supervisors, while eighteen (or 25% of the total seventy-one schools) did not.¹⁶⁸

Insert 21. What requirements do you have for the extern placement?

Question twenty-one also sought to inquire as to reading and writing requirements the schools may impose as part of their prosecutorial externship programs. Thirty-seven schools (52%) indicated they had a reading requirement as part of their prosecutorial externship program, while forty schools (56%) indicated they had a writing requirement.¹⁶⁹ This question was designed to elicit requirements specifically pertaining to the extern placement. However, the responses must be read with the realization that some of the respondents may have

¹⁶⁶ Supra note 163.
¹⁶⁷ Id.
¹⁶⁸ Id.
¹⁶⁹ Id.; see also Chart Twenty-one.

considered their classroom component as they answered this question. Regardless, there seems to be a clear trend of requiring a reading and writing component of prosecutorial externs across the country.

ON-SITE SUPERVISORS

A successful prosecution externship program, or any externship program for that matter, depends upon three distinct groups of people: the students, the clinical faculty and the on-site supervisors.¹⁷⁰ The first group—the students, is selected by various means, as discussed above. This group is then trained and educated through the combined efforts of the second and third group, i.e., the clinical faculty and the on-site supervisors. Ideally, they will emerge from law school with a solid foundation upon and from which a good, professional and ethical neophyte lawyer can develop. The clinical faculty, presumably selected for their unique combination of practical experience and teaching capability, make up the second group of this triumvirate. As with any professional group, the clinical faculty is engaged in a continuous process of improving and learning from scholarship, each other at conferences, and trial and error, in how to be the best teachers possible. The selection, training and monitoring of the third group—the on-site supervisors, may be the most difficult aspect in this regard.¹⁷¹ Absent ways instituted by the second group, i.e. the clinical faculty, no means to improve the educational aspects and abilities of this final and crucial group would exist, possibly leading to one of the worst fears of clinical faculty—that their students emulate bad practices as opposed to being able to recognize both the good and the not so good and learn from both.¹⁷²

¹⁷⁰ Alexis Anderson et al., Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom, 10 CLINICAL L. REV. 473, 476 (2004); see also, Ogilvy, *supra* note 32, at 161 (observing that “[t]here are three pillars to a successful externship experience. First, the student must be

As with credit hours and student requirements, certain aspects of the role of on-site supervisors are guided by the ABA accreditation standards. Standard 305(e)(4) mandates in no uncertain terms that “[a] field placement program *shall* include . . . a method for selecting, training, evaluating, and communicating with field placement supervisors.”¹⁷³ This language seems to have had a similar unifying effect on the practice across the country pertaining to the training of and visiting with on-site supervisors, as has Standard 305(e)(7) in relation to “opportunities for student reflection” on the field placement experience through a “seminar, tutorial, or other means of guided reflection.”¹⁷⁴

With this in mind, five questions of the survey sought to probe the inter-relation between the programs and the placements. Question twenty-two sought to ascertain how students were supervised while at the prosecutor offices,¹⁷⁵ while ques-

prepared and motivated to benefit from the experience. Second, the law school must provide support and educational value to the student and support to the fieldwork supervisor. Third, the fieldwork placement must be willing and able to provide the student with the appropriate range and depth of lawyering tasks and with high quality guidance, critique, and feedback through a supervisor motivated and capable of providing these.”).

¹⁷¹ Blanco & Buhai, *supra* note 161, at 611-12. “Monitoring effective and motivated supervision of off-campus law externs in a structured field placement program has traditionally been the chimera of law school curriculum.” *Id.* (discussing general pedagogical theories of supervision, common barriers to effective supervision, and the Greater Los Angeles Consortium On Externships (GLACE) working solution).

¹⁷² See Condlin, *supra* note 127, at 345 (warning that “[s]tudents do not invariably learn effective practice skills working in outside law offices; sometimes they just ‘practice their mistakes,’ and those of their offices”).

¹⁷³ STANDARD 305(e)(4), *supra* note 48 (emphasis added).

¹⁷⁴ STANDARD 305(e)(7), *supra* note 48. Whether the ABA Standard came first, followed by the standardized practice in clinical programs, or whether the practice developed into a community norm, to be followed by the Standard, is an interesting chicken or the egg question.

¹⁷⁵ See question twenty-two, SURVEY, Appendix A.

tion twenty-three asked how the on-site supervisors were selected.¹⁷⁶ Question twenty-four dealt with training programs for these on-site supervisors,¹⁷⁷ while twenty-five inquired into formalized on-site visits.¹⁷⁸ The final question in this subcategory sought to ascertain if formalized evaluations of the placements existed, and if so, how such information was used.¹⁷⁹

Question twenty-two, asking how students were supervised at the prosecutor offices, did not provide any surprises. The vast majority of programs, forty-six schools or 65%, had their students supervised by regular prosecutors.¹⁸⁰ The remaining schools used a combination (seventeen or 24%) or a prosecutor who was also an adjunct (six schools or 8%).¹⁸¹

¹⁷⁶ See question twenty-three, SURVEY, Appendix A.

¹⁷⁷ See question twenty-four, SURVEY, Appendix A.

¹⁷⁸ See question twenty-five, SURVEY, Appendix A.

¹⁷⁹ See question twenty-six, SURVEY, Appendix A.

¹⁸⁰ See question twenty-two, SURVEY RESPONSE DATA, *supra* note 39.

¹⁸¹ *Id.*; see also Chart Twenty-two. Note that although schools seventeen and thirty-one indicated full-time faculty only, they were nevertheless determined to be externship programs as opposed to in-house clinics. School seventeen, for example, also noted that the prosecutor offices selected the supervisors, something which indicated that the full-time faculty response to question twenty-two was more meant to indicate supervision of the program as a whole, as opposed to specific on-site supervision of the externs. School thirty-one provided similarly conflicting information, indicating that the students were supervised by full-time faculty at the prosecutor office in response to question twenty-two, but also that such supervisors were selected by "personal contact and interest" in response to question twenty-three. Further in support of classifying school thirty-one as an externship program as opposed to an in-house clinic despite the response to question twenty-two, was the fact that the school provided two completed responses to the survey (one received in March of 2003, one in August of 2003). The answers provided in the March survey were used. However, the response to question twenty-two in the August survey indicated that regular prosecutors supervised the students at the prosecutor's office. See question twenty-two, SURVEY RESPONSE DATA, *supra* note 39, for responses from March 2003 returned survey by school thirty-one. (August 2003 returned survey from school thirty-one on file with author.) *Id.*

2005]

CLINICAL SURVEY

1355

Insert 22. How are students supervised at the prosecutors office?

Anticipating many varied responses to question twenty-three, i.e., how the supervisors within the prosecutor offices were selected, the respondents were not given categories to check off, but rather were asked to provide a sentence or two explaining their selection process. The answers ranged from seemingly rather random¹⁸² to meticulous.¹⁸³ Two discernable threads, however, emerged from the responses. The first was that personal knowledge and or past experiences played a crucial part in the school's selection of their on-site supervisors.¹⁸⁴ The second discernable thread was that a senior prosecutor made assignments within the prosecutor offices with regard to students working with suitable assistants.¹⁸⁵

¹⁸² See question twenty-three, SURVEY RESPONSE DATA, supra note 39. "Whoever is assigned," (school twenty-three) and "They ask for students. Students ask for work in that office" (school twenty-five). Id.

¹⁸³ Id. "Supervisors are nominated by offices. Must have two years post-Bar experience. When students wish to extern at a placement, Externship Committee reviews and approves or denies supervisor." (School twenty-one). Id.

¹⁸⁴ Eight responses indicated such. See question twenty-three, SURVEY RESPONSE DATA, supra note 39.

¹⁸⁵ Thirty-two responses indicated such. Id.; see also Chart Twenty-three. Note that these answers were culled from narrative responses by the respondents, and thus subject to a certain amount of subjective discretion in

Insert 23. How do you select supervisors within the prosecutor offices?

Once an on-site supervisor is selected, regardless of process, the literature and the standards both emphasize the importance of continuous supervision and training of such prosecutors by the school.¹⁸⁶ With that in mind, the responses to question twenty-four, seeking information about training programs for the on-site supervisors, and question twenty-five, seeking information about formalized on-site visits, were surprising. Only twenty-five (35%) schools indicated they had “any training program for the on-site supervisors.”¹⁸⁷

classification. As such, a large group (31 or 44%) of responses defined easy categorization. *Id.* There is, of course, a distinction between the on-site supervisor selected by the law school faculty to be in charge of ensuring the externs receive a valuable experience at a certain placement, and this on-site supervisor in turn selecting lawyers for the students to work with. Unfortunately, the wording of the question did not permit a better differentiation of the various answers. *Id.*

¹⁸⁶ See *supra* note 173. Standard 305(e)(4) mandates for “a method for selecting, training, evaluating and communicating with field placement supervisors. *Id.*; see also Blanco & Buhai, *supra* note 161.

¹⁸⁷ See question twenty-four, SURVEY RESPONSE DATA, *supra* note 39; see also Chart Twenty-four.

Insert 24. Do you have any training program for the on-site supervisors. If so, please describe such program.

This low number is particularly surprising considering the fact that any responses indicating manuals or handbooks were counted as positive responses. Conversely, the number may be skewed in that the *respondents* may have interpreted the question narrowly, i.e., limiting their responses to training programs only. In other words, the surprisingly low positive response may be more a reflection of a poorly worded question, than an accurate representation of the practice across the academy. This is particularly so considering Standard 305(e)(1) which seemingly requires that schools at a minimum provide some sort of manual describing their programs and outlining their expectations.¹⁸⁸ In fact, reading the answers to question twenty-four together with the responses to question thirty-two,¹⁸⁹ which indeed inquired if the schools used manuals or other guidelines outlining the responsibilities of the students and the supervisors, the positive number jumps to the expected range. A total of fifty schools (70%) indicated they

¹⁸⁸ See supra note 48. See, e.g., University of Mississippi School of Law, Prosecutorial Externship Program—Informational Manual, available at http://www.olemiss.edu/depts/law_school/ruleoflaw/prosecutorial_extrnship/PEPmanual.pdf (last visited March 7, 2005.); see also Greater Los Angeles Consortium On Externships (G.L.A.C.E.) (Loyola Law School, USC Law School, Pepperdine Law School, Southwestern Law School, UCLA Law School, and Whittier Law School)—Field Placement Supervisor Manual, available at <http://www.lls.edu/glance/manual.pdf> (last visited March 7, 2005); see also Ogilvy, supra note 32, at 168 (discussing the use of written materials such as manuals in lieu of formal training sessions for on-site supervisors).

¹⁸⁹ See question thirty-two, SURVEY, Appendix A.

used manuals or other guidelines outlining the program and/or the responsibility of the students and the supervisors.¹⁹⁰ Interestingly, out of the fifty schools which indicated they did have such manuals, eight were drafted by a combination of the law faculty and the on-site supervisors, a positive and hopeful trend of beneficial cooperation between two of the three partners of field placements.¹⁹¹

Insert 32. Does your program use any manuals or other guidelines . . . were they drafted by:

If question twenty-four may have been unclear, question twenty-five was not. Question twenty-five asked if there were formalized on-site visits by faculty members, and if so, to describe how often and the primary purpose of such visits.¹⁹² Standard 305(e)(5) currently calls for “periodic on-site visits or their equivalent by a faculty member if the field placement program awards four or more academic credits (or equivalent) for fieldwork in any academic term or if on-site visits or their equivalent are otherwise necessary and appropriate.”¹⁹³ How effective on-site visits are has been questioned.¹⁹⁴ Despite the

¹⁹⁰ See question thirty-two, SURVEY RESPONSE DATA, supra note 39; see also Chart Thirty-two.

¹⁹¹ Id.

¹⁹² See question twenty-five, SURVEY, Appendix A.

¹⁹³ Standard 305(e)(5), supra note 48.

¹⁹⁴ See Seibel & Morton, supra note 13, at 444 (questioning the pedagogical value of site visits); see also Ogilvy, supra note 32, at 168-169 (questioning

skepticism of the pedagogical value or worth of on-site visits, the majority of prosecution externship programs indicated they indeed did conduct on-site visits. Forty-two or 59% indicated in the positive, as opposed to twenty-five (35%) which said they did not conduct on-site visits.¹⁹⁵ However, even within the negative category, many respondents indicated some sort of physical contact, just not formalized such as once per semester or year.¹⁹⁶ The implication of Standard 305(e)(5) aside, the lack of a formalized visitation schedule with each placement, does not necessarily equate to a lower quality program. If indeed a placement has been carefully selected, the on-site supervisors adequately trained, and most importantly, students over time received proper mentoring experiences, a visit by a professor may not and should not be the determining factor in whether such a program is up to par or not.

Insert 25. Do you have any formalized on-site visits by faculty members? If so, please . . . such visits.

effectiveness of on-site visits in general, but acknowledging that in some instances, such as when externs are practicing under a jurisdiction's student practice rule, or possibly when placed with inexperienced sole practitioner as opposed to a state attorney's office, "heightened monitoring, including on-site visits, may be called for").
Id.

¹⁹⁵ See question twenty-five, SURVEY RESPONSE DATA, *supra* note 39; see also Chart Twenty-five.

¹⁹⁶ Id. See, for example, responses by school one—"Nothing formalized. Periodic informal observation by faculty," and school fifty-eight—"No—some visits but generally not formal and not systematic." Id.

The final question pertaining to the regulation of on-site supervisors, inquired if the schools had formalized means of evaluating the placement office and/or on-site supervisors.¹⁹⁷ Not surprisingly, in light of Standard 305(e)(4) clearly mandating such,¹⁹⁸ the majority of programs answered in the affirmative. Forty-nine schools (69%) said yes, while only twenty schools (28%) indicated no.¹⁹⁹

Insert 26. Do you have any formalized evaluation of the placement office . . . information.

¹⁹⁷ See question twenty-six, SURVEY, Appendix A.

¹⁹⁸ Standard 305(e)(4), *supra* note 48.

¹⁹⁹ See question twenty-six, SURVEY RESPONSE DATA, *supra* note 39; see also Chart Twenty-six. Interestingly, four schools implied in their answers that they were establishing such an evaluation procedure. See schools five, six, nine and thirty-six.

CLINICAL EXTERNSHIP FACULTY STATUS

The status of clinical faculty has been subject to much debate. To what extent is and should clinical faculty be provided the same tenure track protection as non-clinical faculty,²⁰⁰ and if so, should *externship* clinical faculty have the same protection and status as clinical faculty?²⁰¹ Unfortunately, the answers to these questions still differ widely among schools. Regardless of the status of clinical faculty at various schools, however, all such schools presumably concur with “the goal of Standard 405(c), i.e. to ensure that law schools can attract and retain quality full-time clinical faculty and thereby strengthen the clinical component of the law school curriculum.”²⁰²

²⁰⁰ AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 405(c) (2005), available at <http://www.abanet.org/legaled/standards/chapter4.html>, addresses this issue, stating that:

A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.

Id.

²⁰¹ As recently as 1995, it was noted that even as clinical teachers have moved into relative parity with doctrinal faculty, externship teachers have remained “the orphan children of the clinical movement.” Givelbar et al., *supra* note 62, at 5 (citing Janet Motley, *Self-Directed Learning and the Out-of-House Placement*, 19 N.M. L. REV. 211, 211 (1989)).

²⁰² Proposed Revision of Chapter 4 of the Standards, SYLLABUS, American Bar Association Section of Legal Education and Admissions to the Bar, Vol. 36, No. 2 (Feb. 2005), at 12.

With this in mind, question thirty-one was designed to ascertain the status of the clinical faculty who direct prosecution externship programs. The respondents were provided a range of possible answers: tenure track, non-tenure track, adjunct, long-term contract, short-term contract, hard money, soft money and grant money.²⁰³ Many schools provided more than one answer. Thus, the percentages in chart thirty-one are based upon 109 responses as opposed to seventy-one. Still, the numbers are telling. Thirty-nine schools (36%) responded that their prosecution externship clinical faculty were tenure track. Thirteen (12%) indicated non-tenure track and seventeen (16%) indicated adjunct.²⁰⁴ Sixteen (15%) indicated the non-tenure track (presumably) were on long-term contracts, while seven (6%) indicated short-term contracts.²⁰⁵ Gratefully, only two (2%) noted that their prosecution externship faculty were funded by grant money, the category which provides the least amount of “form of security of position reasonably similar to tenure.”²⁰⁶

Insert 31. Are the faculty members who direct the prosecution externship program:

If viewed in a long term historical context, having 36% of clinical faculty teaching in an externship program as tenure

²⁰³ See question thirty-one, SURVEY, Appendix A.

²⁰⁴ See question thirty-one, SURVEY RESPONSE DATA, *supra* note 39.

²⁰⁵ *Id.*

²⁰⁶ ABA Standard 405(c), *supra* note 200; see also Chart Thirty-one.

track faculty can be seen as an improvement. However, in a short term comparison, this is only a 4% increase from 1989-1990. In that year, 32% of all one thousand six-hundred thirteen externship teachers were "Full-Time Permanent," while 52% were "Part-Time/Part-Time Permanent," and 16% were "Full-Time Not Permanent."²⁰⁷ Whether this slight increase should be viewed as a cause for hope can be debated. However, if one views the current results as a snap-shot in time of the status of externship clinical faculty, then the fact that only one third of schools have seen fit to grant their clinical faculty (albeit clinical *externship* faculty) tenure track status is nothing short of appalling. Absent a consensus among the legal community as a whole that professional skills training obtained through clinical programs and field placement programs in particular is inferior to other mandated aspects of legal education, there is simply no valid reason why 64% of clinicians directing such programs should teach under less than equal status of other faculty.²⁰⁸

Arguably related to the status of clinical prosecution externship faculty, is the perception by the non-clinical faculty

²⁰⁷ MacCrate Report, *supra* note 13, at 247. By comparison, the MacCrate Report found that out of all 933 clinical (non-externship) teachers, 65% were "Full-Time Permanent," 13% were "Part-Time/Part-Time Not Permanent" and 21% were "Full-Time Not Permanent." *Id.* The comparison between tenure track and "Full-Time Permanent," may not be exact. Presumably some of the "Full-Time Permanent" faculty in 1989-1990 may not have been tenure track, which indeed then indicates a greater improvement of the status of externship clinical faculty today.

²⁰⁸ The author recognizes that there are indeed clinicians who do not want to teach on a tenure track basis. An individual declining equal status within an institution is, however, strikingly different from an institution imposing un-equal status upon an individual within such institution. This is particularly so within academic institutions which are governed to a large extent by their faculty members. See Chavkin, *supra* note 94, at 274 for emphatic discussion of the negative aspects associated with short-term status instructors, including lack of governance participation, alienation from life at their institutions and twelve month employment denying opportunity for scholarship.

of the schools' prosecution externship programs. Question thirty probed precisely this, asking how the prosecution externship faculty would describe the acceptance of the program by the non-clinical faculty.²⁰⁹ Considering that this question asked for one person's perception of what another group's acceptance is of that person's work, and thus admittedly very prone to subjectivity, it was comforting to find that only one respondent described the non-clinical faculty's acceptance of that school's prosecution externship program as low.²¹⁰ Indeed, thirty-four respondents (48%) characterized the acceptance as high and thirty-two (45%) characterized the acceptance as medium (with one noting "High-Medium").²¹¹

Insert 30. How would you describe the acceptance of the program by the non-clinic faculty?

A 94% high to medium acceptance rate cannot be described as anything but superb. However, considering this, one is left with the possible and troubling conclusion that it is not a perceived lack of quality of this component of clinical education which prevents a greater number of schools to offer tenure track to the professors teaching externship programs. Clearly, the academy as a whole recognizes the need for clinical

²⁰⁹ See question thirty, SURVEY, Appendix A.

²¹⁰ See question thirty, SURVEY RESPONSE DATA, *supra* note 39.

²¹¹ *Id.*; see also Chart Thirty.

education²¹² and recognizes that it provides a quality education.²¹³ One can only speculate as to why so many schools insist on maintaining the separate but equal concept, a concept which is as inherently wrong in legal education today when used to keep clinical faculty from being fully integrated with law school faculties as it was in the days of yore.

CLASSROOM COMPONENT

The final set of questions pertained to the classroom component (if any) of the various programs. Although a class is not mandated by the Standards,²¹⁴ the majority of programs included a classroom component.²¹⁵ Fifty-two schools (72%) offered a seminar or other class in conjunction with their prosecution externship program, while eighteen (25%) did not.²¹⁶ These numbers reflect an increase from the 1992-93 Seibel & Morton study which found that 69% of their ninety-eight programs offered a classroom component.²¹⁷ Out of the fifty-two schools which offered a classroom component, forty-seven (66%) made this class a co-requisite of the externship program.²¹⁸ Two (3%) made the class a pre-requisite.²¹⁹

²¹² See Standard 302(B)(1), *supra* note 8.

²¹³ Hence the high to medium acceptance of prosecution externship programs. See *supra* note 211.

²¹⁴ See Standard 305, *supra* note 120, at Standard 305(e)(7) mandating "opportunities for student reflection on their field placement experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection," thus leaving the means to achieve such reflection open.

²¹⁵ Although the survey results showed a great proclivity towards satisfying Standard 305(e)(7) through a classroom component, not all agree. See Erica M. Eisinger, *The Externship Class Requirement: An Idea Whose Time Has Passed*, 10 *CLINICAL L. REV.* 659 (2004), arguing that "the value of the externship class rises in direct proportion to the commonality of the students' placements" and that as such "[t]he externship class should not be imposed, *de facto* or *de jure*, on all externship programs." *Id.* at 660. While it may be true that the educational value of a class for students placed in field placements as varied as, for example, a prosecutor's office and an in-house counsel of a charitable hospital, may be difficult

Insert 33. Do you offer a seminar or other class in conjunction with the externship program?

Insert 35. Are such classes co-or prerequisites to the externship program?

Sixteen schools (23%) graded their classroom component

to assess, having a classroom component to a specialized prosecution field placement program, does not suffer from the same concerns. As Eisinger noted, the "commonality" of the placement, would then enhance the benefit of the class. *Id.*

²¹⁶ See question thirty-three, SURVEY RESPONSE DATA, *supra* note 39; see also Chart Thirty-three. Question thirty-four asked what the titles of such classes were. A list of responses can be found in question thirty-four. *Id.*

²¹⁷ Seibel & Morton, *supra* note 13, at 429.

²¹⁸ See question thirty-five, SURVEY RESPONSE DATA, *supra* note 39.

²¹⁹ *Id.*; see also Chart Thirty-five. Question thirty-six asked the respondents to indicate the subject matters covered in the class. Twenty (28%) offered a combination of procedure, substantive law, and ethics/professionalism, i.e. these twenty programs covered some proportion of all these subjects. See question thirty-six, SURVEY RESPONSE DATA, *supra* note 39.

2005]

CLINICAL SURVEY

1367

separately from their prosecution externship program, while thirty-two (45%) did not.²²⁰ Although seventeen (24%) of the respondents noted that no separate credit hours were offered for the class apart from the credit hours offered for the prosecution externship placement, those which did offer separate credit hours for the class as a whole ranged between one and four credit hours.²²¹

Insert 39. How many credit hours are these classes?

The final question of the survey sought to ascertain the faculty status of those who taught the classroom component in the same way questions thirty and thirty-one addressed this in terms of those who directed the prosecution externship program.²²² While thirty-nine of the faculty members who directed the prosecution externship programs were tenure track,²²³ only twenty-three of those who taught the classroom

²²⁰ See question thirty-seven, SURVEY RESPONSE DATA, supra note 39. Twenty-three schools (32%) did not provide an answer.

²²¹ See question thirty-nine, SURVEY RESPONSE DATA, supra note 39; see also Chart Thirty-nine. Note that a substantial number (29 or 41%) did not provide an answer to this question. The percentage calculations in this question were based upon seventy instead of seventy-one responses in light of school five providing an answer of fifteen credit hours, which was so different from all other responses, indicating a possible misunderstanding of the question.

²²² See question forty, SURVEY, Appendix A.

²²³ See supra note 204.

component were.²²⁴ This difference seems to be at least partly due to the increased number of adjuncts who taught the class, twenty as opposed to seventeen who directed the prosecution externship program.²²⁵

²²⁴ See question forty, SURVEY RESPONSE DATA, *supra* note 39; see also Chart Forty. Note that many schools provided more than one response to question forty, for a total of ninety-nine responses (thus making the number and the percentages virtually the same).

²²⁵ *Id.*

CONCLUSION

There can be no doubt that clinical education has advanced from its initial "beachhead"²²⁶ and is now firmly entrenched in legal education. Nor can there be any doubt that field placement programs are firmly entrenched as a part of clinical legal education. The debate is no longer about whether this is a good or bad thing or whether clinical programs as a whole should be part of legal education, but rather it is about ensuring that students participating in these clinical programs receive a quality education which is both beneficial to them individually and to the legal profession as a whole. In this respect, prosecution externship placements fill a special role of clinical legal education. Prosecutor placements provide an opportunity for students to learn trial level skills, as well as the unique ethical and professional responsibilities which come with the prosecutor's dual role as both an advocate and a minister of justice. Possibly due to any one or all of these reasons, prosecution field placement programs are ubiquitous across the legal landscape today. There is no doubt that as more schools seek to provide the benefits of skills training to more of their students, they will do so by expanding field placement programs. The cost of in-house clinics, if nothing else, will dictate this route. As this occurs, it is hoped that this article, by exploring and presenting the state of prosecution externship programs today and by comparing it when possible with the past, will provide guidance for how the field should develop in the future. Certainly, the many instances of where standards, literature and practice all converge can be viewed as paths built upon the past, embraced by the present, and leading us into the future.

FILE:C:\WP51\SINHA.DTP
10:23AM

Jan 01/10/06 Tue

1370

MISSISSIPPI LAW JOURNAL

[Vol. 74

APPENDIX A

PROSECUTION EXTERNSHIP SURVEY

INFORMATION COLLECTED TO BE PRESENTED AT "EXTERNSHIP 2 - LEARNING FROM EXPERIENCE"
CONFERENCE, MARCH 7-8, 2003

PLEASE COMPLETE AND RETURN THE SURVEY IN THE ENCLOSED SELF-ADDRESSED,
STAMPED ENVELOPE AT YOUR EARLIEST CONVENIENCE.

PLEASE INCLUDE COPIES OF SYLLABI AND OTHER PERTINENT MATERIAL.

Thank you.

Hans P. Sinha
Clinical Professor and Director
Prosecutorial Externship Program
The National Center for Justice and the Rule of Law
The University of Mississippi School of Law
P.O. Box 1848
University, MS 38677-1848
(662) 915-6884
hsinha@olemiss.edu

2005]

CLINICAL SURVEY

1371

Dear Prosecution Externship Survey Participant:

The impetus for this survey came about when I moved from the Tulane Criminal Clinic to direct the Prosecutorial Externship Program at the University of Mississippi. I was able to get some information from various professors who directed similar programs. Still, I wished that there had been some central source I could have gone to in order to see how other programs were run. With this in mind, the information obtained through this survey will be compiled and presented at the "Externship 2--Learning From Practice" conference at the Catholic University of America, March 7-8, 2003.

I envision a compilation of various syllabi and related documents as being of utmost importance and interest. Thus, please include copies of your syllabus and other pertinent documents with the completed survey in the self-addressed, stamped envelope provided. You can also email any documents to me at hsinha@olemiss.edu. A compilation of such syllabi will be available at the conference. A list of reading requirements and other class requirements will also be compiled from the submitted syllabi for distribution at the conference. Appropriate credit will always be given. If you are not attending the conference, but would like a representative sample of submitted syllabi mailed to you, please email your mailing address to me.

While the survey asks for your name and your school, no individual or institutional identifying information will be used in the presentation of the survey data. The survey should not take more than ten minutes to complete.

Finally, if you prefer to take the survey on-line (I did both and recommend the on-line version), please go to www.ncjrl.org, click on the "A Prosecutorial Externship Program" link, and then on the "Prosecution Externship Survey" link. If you choose to complete the on-line survey, please email your syllabi and other documents to me separately, or mail hard copies to me using the enclosed envelope.

I thank you beforehand for your help, and hope that this endeavor will prove fruitful, and that we will all be able to learn and benefit from each others' programs.

Sincerely,

Hans P. Sinha

Prosecution Externship Survey

Name: _____ School: _____
Email: _____ Phone: _____
Address: _____

(No individual or institutional information will be used in the presentation of the data.)

General School Information

1. How large is your law school?
 under 500 500-1000 1000+
2. Does your school have a part-time program?
 Yes No
3. If yes, can part-time students participate in the prosecution externship program?
 Yes No N/A
4. How many clinical programs (including externships) does your school offer?

5. Is participation in a clinical program required for all students?
 Yes No
6. Which students can participate in the clinical programs?
 1L 2L 3L
7. Which students can participate in the prosecution externship program?
 1L 2L 3L
8. Does your school offer both a prosecution externship program and a prosecution clinic?
 Yes No
9. Does your school offer a criminal defense externship and/or clinic as well?
 Yes No
10. Do you place students primarily in an urban or a rural setting?
 Urban Rural Both

Externship Program

11. How many students participate in your prosecution externship program?
 0-10 10-20 20-30 30-40 40+
12. What type of prosecutor offices do you place students in? If several, please indicate average approximate percentage of placements.
____ US Attorney ____ DA ____ AG
____ County ____ City
13. If you place students with US Attorney and/or Attorney General offices, do the students work

2005]

CLINICAL SURVEY

1373

in both the criminal and the civil division?

Criminal only _____ Civil only _____ Both _____

14. How many credit hours can a student earn for participation in the externship program? If there is a range, please give the range.

_____/semester

15. How many "on-site" hours translate to such credit hours?

_____/semester

16. What pre-requisites or co-requisites do you have for the externship?

17. Do you cover ethics and professionalism as part of the externship program? If so, how?

18. How are students selected to participate in the externship program?

19. What grade option do you use for the externship program? ABC _____ Pass/Fail

Other _____

20. Are the students sworn in under a limited practice rule?

_____ Yes _____ No

21. What requirements do you have for the extern placement? Please note any significant feature of such requirements.

Time logs _____

Do you require on-site supervisors to verify? _____

Journals _____

Are these shared with on-site supervisors? _____

Reading requirement _____

Writing requirement _____

Other _____

22. How are the students supervised at the prosecutor offices?

Full-time faculty member _____

Prosecutor who is adjunct faculty _____

Regular prosecutor _____

Other. Please describe: _____

23. How do you select the supervisors within the prosecutor offices?

24. Do you have any training program for the on-site supervisors? If so, please describe such program and include any forms or other material used for this purpose with the returned survey.

1374

MISSISSIPPI LAW JOURNAL

[Vol. 74

25. Do you have formalized on-site visits by faculty members? If so, please describe how often and the primary purpose of such visits.

26. Do you have a formalized evaluation of the placement office and/or supervisors? If so, please describe how you use such information, and include any forms used for this purpose with the returned survey.

27. If you do not have a concurrent class component with the externship placement, do you use computer list serves, Blackboard, TWEN or other similar methods to meet electronically with your students during the semester? If so, please describe briefly.

28. Do you permit the inclusion of travel time in the required on-site hours?
 Yes No

29. Do you reimburse out-of-pocket student expenses such as parking?
 Yes No

30. How would you describe the acceptance of the program by the non-clinic faculty?
 High Medium Low

31. Are the faculty members who direct the prosecution externship program:
 Tenure track Non-tenure track Adjunct
 Long-term contract Short-term contract
 Hard money Soft money Grant money

32. Does your program use any manuals or other guidelines outlining the program and/or the responsibilities of the students and the supervisors? (Please provide copies.) If so, were they drafted by:

Law faculty On-site supervisors
 Combination Other

If other, please describe

Class Components

33. Do you offer a seminar or other class in conjunction with the externship program?
 Yes No ****If no, it is unnecessary to complete the remainder of this form; however, please refer to No. 41 at the end of this survey, and remember to mail in copies of requested documentation.***

34. If yes, what are the titles of those classes?

35. Are such classes co- or prerequisites to the externship placement?

2005]

CLINICAL SURVEY

1375

- Prerequisite Co-requisite Neither
36. Please indicate by percentage the subject matters covered in the class. Please provide copies of syllabus.
 Procedure Substantive Ethics/Professionalism Other
37. Are these classes graded independently of the externship placement?
 Yes No
38. What grade option do you use for these classes?
 ABC Pass/Fail Other
39. How many credit hours are these classes?
_____ /semester
40. Are the faculty members who teach these classes:
 Tenure track Non-tenure track Adjunct
 Long-term contract Short-term contract
 Hard money Soft money Grant money
- 41. Please remember to include in the return envelope copies of any syllabi or other descriptive material pertaining to classes, on-site supervisor training forms, on-site supervisor evaluation forms, manuals, and descriptions of your prosecution externship program. This material will be compiled and made available at the Externship Conference in March, 2003, with the hope that we can all learn from each others= programs.**

APPENDIX B

Schools Participating in Prosecutorial Externship Survey

Albany Law School
American University Washington College of Law
Ave Maria School of Law
Baylor University
Brandeis School of Law, University of Louisville
Brooklyn Law School
Campbell University School of Law
Capital University Law School
Catholic University
Chapman University School of Law
Cleveland - Marshall
Emory University
Fordham
Georgia State
Louisiana State University
Loyola - Los Angeles
Mercer
Michigan State University - Detroit School of Law
Mississippi College School of Law
New York Law School
New York University
Northern Illinois University School of Law
Ohio Northern University
Pepperdine
Regent University School of Law
Roger Williams University School of Law
Salmon P. Chase, Northern Kentucky University
Seattle University
St. John's University
St. Louis University School of Law
Stanford
Stetson College of Law
Syracuse University College of Law
Texas Tech
The John Marshall Law School
Thomas Jefferson School of Law

2005]

CLINICAL SURVEY

1377

Thomas M Cooley
Touro College Law Center
University of Akron
University of Arizona
University of Baltimore
University of California, Davis School of Law
University of California Hastings College of the Law
University of Colorado
University of Connecticut
University of Georgia
University of Hawaii
University of Illinois at Champaign
University of Iowa
University of Memphis
University of Mississippi
University of Missouri
University of Montana
University of Oregon
University of Pennsylvania
University of Pittsburgh
University of Richmond
University of San Diego
University of Southern California
University of Tennessee
University of Texas
University of Toledo College of Law
University of Tulsa
University of Utah
University of Virginia
University of Wisconsin
University of Wyoming
Vermont School of Law
Washington & Lee
Washington University
Wayne State
Western New England School of Law
Yale