

University of Denver

**Digital Commons @ DU**

---

Sturm College of Law: Faculty Scholarship

University of Denver Sturm College of Law

---

1981

## Student Practice in Colorado

Robert M. Hardaway

Follow this and additional works at: [https://digitalcommons.du.edu/law\\_facpub](https://digitalcommons.du.edu/law_facpub)



Part of the [Civil Procedure Commons](#), [Constitutional Law Commons](#), and the [Legal Education Commons](#)

---

---

## **Student Practice in Colorado**

### **Publication Statement**

Copyright is held by the author. User is responsible for all copyright compliance.

---

# Student Practice in Colorado

*by Robert M. Hardaway*



*Robert M. Hardaway, Denver, is an assistant professor of law, University of Denver College of Law.*

Both the University of Denver College of Law and the University of Colorado Law School have active student law clinics. Law students in these clinics receive academic credit for representing indigent clients under the supervision of a faculty member or staff attorney.<sup>1</sup>

Students in the two clinics are permitted to practice in the Colorado courts pursuant to one of the nation's most liberal student practice rules. C.R.S. 1973, § 12-5-116 provides:

Students of any law school which has been continuously in existence for at least ten years prior to April 23, 1909, and which maintains a legal-aid dispensary where poor persons receive legal advice and services shall, where representing said dispensary and its clients and then only, be authorized to appear in court as if licensed to practice law.<sup>2</sup>

Rule 226 of the Colorado Rules of Civil Procedure further provides that students in a clinic maintained by an accredited Colorado law school are authorized to appear in district, county and municipal courts of the state as if licensed to practice, "provided such representation shall be with the approval of the lawyers in charge of the said legal aid clinic and the judge of the court in which the student appears."

The Colorado rule differs from the ABA Model Rule on student practice and the student practice rules of many other states in that it does not specifically require in-court supervision by a licensed attorney or certification of a student by a law school dean.<sup>3</sup>

Despite the statutory and rule authority for student representation, however, there is sometimes disagreement on the part of judges, city and district attorneys, and private practitioners who may find themselves working with students on a case as to the legal status of the student practitioner. This is to be expected in light of the breadth of the student rules and the lack of specific guidelines contained in them.

Moreover, many of the problems in student practice go beyond the rules themselves. Important constitutional questions concerning the legal status of student practice, particularly in criminal cases, have been raised in other jurisdictions.<sup>4</sup> The manner in which these questions are resolved may have an important impact on student practice in Colorado and affect the procedures for student practice followed in the Colorado courts. Failure on the part of judges, city attorneys and supervising attorneys to follow those procedures may result in constitutional and other challenges to student representation similar to those made in other states.<sup>5</sup>

## RATIONALE OF THE STUDENT CLINIC

The law school clinic is the law school's answer to such critics of legal education as Chief Justice Burger, who has observed:

The shortcomings of today's law graduate lies not in any deficient knowledge of law but that he has little, if any training in dealing with facts or people—the stuff on which the cases are really made,<sup>6</sup>

and

Law students can deal with a corporate spin-off, or a vertical merger, but they don't know enough to save a client from a fast talking encyclopedia salesman.<sup>7</sup>

Indeed, there has been a call for practical training in the law schools ever since Jerome Frank in 1933 observed that "the trouble with much law school teaching is that, confining its attention to a study of upper court opinions, it is hopelessly oversimplified . . . (T)he law schools should get in intimate contact with what clients need and what courts and lawyers actually do."<sup>8</sup> The purpose of the modern law school clinic is to do just that.

## HISTORICAL PERSPECTIVES

The University of Denver College of Law student law clinic, established in 1904, was the nation's first.<sup>9</sup> Although it was another forty years before other states began to follow Colorado's lead, by 1978 forty-four states had adopted some sort of student practice rule.<sup>10</sup>

An important boost to student practice came in the right to counsel case of *Argersinger v. Hamlin*, in which Justice Brennan, joined by Justices Douglas and Stewart, stated: "I think it plain that law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas including cases reached by today's decision."<sup>11</sup>

By 1979, largely due to the adoption of

student practice rules by the majority of states and the increased support for clinical education by the Council on Legal Education for Professional Responsibility ("CLEPR"),<sup>12</sup> approximately 80 percent of the ABA-approved law schools offered some form of clinical education.<sup>13</sup>

With the rapid expansion of student law clinics around the country, it was inevitable that constitutional questions concerning the legal status of student lawyers would arise.

## THE RIGHT TO COUNSEL

The Sixth Amendment of the U.S. Constitution states, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The U.S. Supreme Court has held that the right to counsel is jurisdictional.<sup>14</sup> In *Powell v. Alabama*,<sup>15</sup> it was held that a failure of a state court to provide effective assistance of counsel for an indigent in a capital case was a denial of due process. The Court in *Betts v. Brady*<sup>16</sup> declined to extend the Sixth Amendment right to counsel to the states in non-capital cases. However, *Betts* was reversed in *Gideon v. Wainwright*,<sup>17</sup> which extended this right to counsel to the states via the Fourteenth Amendment. Finally, in *Argersinger v. Hamlin*,<sup>18</sup> the Court extended the right to counsel to misdemeanor cases in which incarceration was imposed.

The adoption of a yardstick based on incarceration actually "imposed,"<sup>19</sup> rather than "authorized," created a new problem. In applying the *Argersinger* yardstick,

(T)he trial judge and the prosecutor (must) engage in a predictive evaluation of each case to determine whether there is a significant likelihood that, if the defendant is convicted, the trial judge will sentence him to a jail term.<sup>20</sup>

The *Argersinger* "predictive analysis" raises a classic chicken and egg problem for the student attorney. There is usually no practical way for a student attorney to know in advance if a jail sentence will ultimately

be imposed on the client in an average misdemeanor case and therefore to know if the client is entitled to Sixth Amendment counsel. Thus, if the student is deemed to have provided Sixth Amendment counsel, the judge is free to impose a jail sentence. If, on the other hand, the student's appointment is deemed not to be in satisfaction of the Sixth Amendment, no jail sentence can be imposed. The question of whether student representation meets Sixth Amendment requirements is therefore critical.<sup>21</sup> The resolution of this issue, however, is only possible if a judge makes a determination of the legal status of the student's representation as a matter of record.

#### CHALLENGES TO STUDENT REPRESENTATION

In the recent California case of *People v. Perez*,<sup>22</sup> the defendant represented by a

supervised law student was convicted of a felony. Perez appealed on the grounds that he had not been represented by counsel in accordance with Sixth Amendment requirements. The California Court of Appeals noted that while the student was supervised by a licensed attorney, the attorney did not directly participate in the trial and, therefore, the supervisor's interest was not of a "continuing and substantial nature."<sup>23</sup> Although Perez had signed a form waiving his right to Sixth Amendment counsel,<sup>24</sup> the court rejected the waiver on the grounds the record itself did not show that Perez "intelligently and understandingly" waived this right.<sup>25</sup>

The Court of Appeals also held that student representation in a felony case did not meet the Sixth Amendment requirements of "adequate" counsel because the student lacked experience and training, and his "moral standards . . . (were) largely un-



"A very specialized trust service we provide to our corporate customers includes acting as transfer agent for stock issues, bond indentures and other funding arrangements. Our stock transfer department is fully equipped to handle the needs of both large and small corporate clients in servicing their stockholders."

Stan Raney,  
Corporate Trust Officer

You can put your trust in us.

**Central  
Bank**  
of Denver

**The Better Bankers.<sup>SM</sup>**

1515 Arapahoe Street / P.O. Box 5548 T.A.  
Denver, Colorado 80292 / (303) 893-3456

The Better Bankers is a registered service mark  
of Central Bank of Denver.

Member FDIC

known'' due to lack of a certification procedure. Moreover, the court found the student to be engaged in the unauthorized practice of law since the rule under which the student was practicing had never been approved by the California Supreme Court.

The California Supreme Court reversed,<sup>26</sup> holding that (1) the student's representation under the in-court supervision of a licensed attorney constituted Sixth Amendment representation; (2) the written waiver was therefore not necessary to meet Sixth Amendment standards, but needed only to meet the waiver requirements of the student practice rule; (3) absent allegations that the student's representation was incompetent, Sixth Amendment effective assistance standards were met; and (4) the issue of unauthorized practice was inapplicable absent any indication of moral irresponsibility or actual prejudice to the defendant. Despite the happy ending for the cause of student representation in California, the serious challenges raised in *Perez* should be looked at in the context of the practice of law by students in Colorado.

### **Sixth Amendment**

In light of the fact that there is no Colorado case on the question of whether student representation can meet Sixth Amendment requirements, it is recommended that a judge be asked at the time of appointment of student counsel to make a statement on the record as to whether the client is entitled to Sixth Amendment counsel and whether the student is being appointed as Sixth Amendment Counsel. This will enable the student to advise the client of his or her exposure to incarceration. It will also avoid the problem at sentencing as to whether the judge is free to impose a jail sentence. City and county attorneys will then know where they stand in any plea bargaining with a student defender.

### **Waiver**

It is recommended that neither the court nor the student defender rely solely on waiver of Sixth Amendment rights as the

basis for student representation. As the U.S. Supreme Court cautioned in *Escobedo v. Illinois*, ". . . no system of criminal justice can, or should survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness."<sup>27</sup> One critic of student representation waivers has noted that such waivers "refrain from indicating that the indigent has a different choice available, and the harried, troubled defendant cannot be compelled to read between the lines."<sup>28</sup>

Nevertheless, until student representation is firmly established as meeting Sixth Amendment counsel requirements in Colorado, a waiver should be required in every case in which a student is appointed as Sixth Amendment counsel. Furthermore, recognizing that courts indulge every reasonable presumption against waiver of fundamental rights,<sup>29</sup> the waiver should itself meet Sixth Amendment requirements by including an acknowledgement of the nature of student representation, detailing its advantages and disadvantages,<sup>30</sup> and a statement that the indigent client has a free choice to demand licensed counsel. The waiver must be made intelligently<sup>31</sup> and should appear on the record as part of an oral inquiry by the judge,<sup>32</sup> as well as in the form of a written waiver on file.

### **Unauthorized Practice**

The problem of unauthorized practice of students encountered in *Perez* should not arise in Colorado as long as students comply with C.R.C.P. Rule 226. Problems may arise, however, where a student appointed by a judge in one court attempts to dispose of a related case in another court where an appointment has not been made. A student wishing to bring an appeal to a level above the district court should get special authorization from the Colorado Supreme Court in light of the language of C.R.C.P. Rule 226 limiting student practice to municipal, county and district courts. Student representation of defendants charged with felonies in district court, while permitted under the

rule, is not recommended except in exceptional cases and then only if there is strict in-court supervision by a licensed attorney.

### *Student Certification*

In this author's opinion, a certification process for student defenders should be established in Colorado. Under such a procedure, a form of "limited license" would be issued after due application by the student, upon certification by the dean of the good moral character of the student, and proof of a grade-point average showing competence in courses in areas in which the student will practice, such as criminal law and procedure and trial practice. Such a certification process might prevent *Perez*-type challenges in Colorado of student representation based on the "unknown" moral standards of the student.

### CONCLUSION

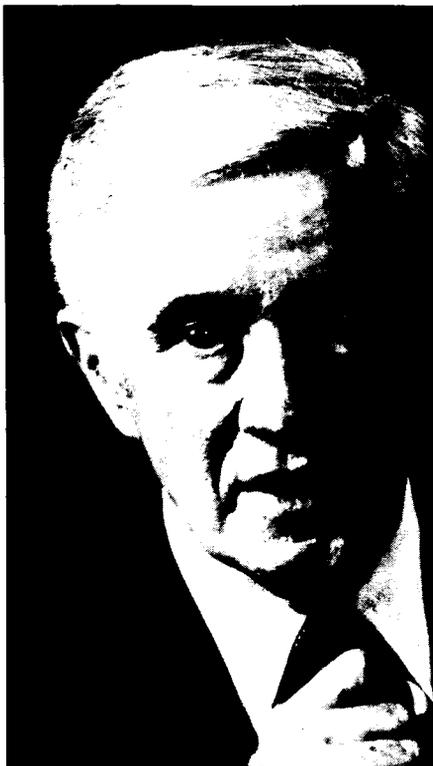
Student representation has a long and established tradition in Colorado. Continued sup-

port of the Colorado student law clinics by judges, city and district attorneys, and practitioners will go far in meeting the hope expressed by three U.S. Supreme Court Justices that law students can be expected to contribute to the representation of the poor.<sup>33</sup> At a time of budget cuts in legal aid funding, that contribution can be even more significant than in the past.

Until a final determination is made as to the Sixth Amendment status of student representation, the recommendations in this article may help to prevent a *Perez*-type challenge to student representation in Colorado.

### NOTES

1. Full-time staff attorneys supervise students at the University of Colorado. At the University of Denver College of Law, regular tenure-track faculty rotate into the clinic on a quarterly basis.
2. See, *Pilapil v. Immigration and Nat. Ser-*



"The fact that our clients have entrusted us to profitably manage nearly 100 million dollars in assets says a lot about the confidence they have in us—in our knowledge, our judgment, our money management skills and our investment savvy."

Theodore E. Dretos, Jr.,  
Vice President and Senior Investment Officer

You can put your trust in us.

**Central  
Bank**  
of Denver

**The Better Bankers.<sup>SM</sup>**  
1515 Arapahoe Street • P.O. Box 5548 T.A.  
Denver, Colorado 80292 / (303) 893-3456

The Better Bankers is a registered service mark of Central Bank of Denver.  
Member FDIC

vice, 424 F.2d 6 (10th Cir. 1970), where the court held that a University of Denver law student practicing under this rule was qualified to act as counsel for a non-immigrant alien student in a federal deportation hearing.

3. ABA Model Rule III(c) provides that a student be "certified by the dean of his law school as being of good character and competent legal ability." Section II(a) provides that where an eligible law student appears in "any criminal matter in which the defendant has the right to assignment of counsel under any constitutional statute or rule . . . the supervising lawyer must be personally present throughout the proceedings."

4. For a comprehensive treatment of the legal status of student representation, see, Hardaway, "Student Representation of Indigent Criminal Defendants and the Sixth Amendment: On a Collision Course?" 29, *Cleveland State Law Review* (Summer-Fall, 1981), a symposium on clinical education.

5. See e.g., *State v. Daniels*, 346 So. 2d 672 (La. 1977); *People v. Masonis*, 58 Mich. App. 615, 228 N.W.2d 489 (1975); *State v. Cook*, 84 Wash. 2d 342, 525 P.2d 761 (1974); *People v. Perez*, 155 Cal. Repr. 176, 24 Cal. 3d 133, 594 P.2d 1 (1979).

6. Burger, "The Future of Legal Education," ABA, *Selected Readings in Clinical Legal Education* (1973), p. 53.

7. Burger, "Quotations," 15 *Student Law J.* No. 5 (1970), p. 5.

8. Frank, "Why Not a Clinical Law School?," 81 *Penn. L. Rev.* (1933), p. 907.

9. University of Denver College of Law, *Advocacy Skills Program Bulletin* (1980), p. 3.

10. Klein et al., *Bar Admission Rules and Student Practice Rules* (Ballinger Pub. Co.: 1978), pp. 960-969.

11. 407 U.S. 25 (1972) at 41.

12. See, Grossman, "Clinical Legal Education: History and Diagnosis," 26 *Journ. of Leg. Ed.* (1974), pp. 162, 173.

13. CLEPR, *Survey and Directory of Clinical Legal Education (1978-1979)* (1979), p. v.

14. *Johnson v. Zerbst*, 304 U.S. 458 (1938) at 468:

A Court's jurisdiction at the beginning of trial may be lost "in the course of proceedings" due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel.

15. 287 U.S. 45 (1932).

16. 316 U.S. 455 (1942).

17. 372 U.S. 335 (1963).

18. 407 U.S. 25 (1972).

19. Any question as to whether actual rather than potential incarceration was to be the standard was resolved in *Scott v. Illinois*, 440 U.S. 367 (1979). In *Scott* the defendant was charged and convicted of shoplifting, which carried a one-year maximum jail penalty. The court held that the defendant had no right to appointed counsel since the defendant was not sentenced to a jail term. But, see, *Baldasari v. Illinois*, 48 LW 4481 (1980), in which the court overturned a conviction resulting in a jail sentence for theft based on a prior theft conviction where counsel was not provided. Justice Powell dissented, complaining that such a holding created a "hybrid" type of conviction "valid for the purposes of their own penalties as long as the defendant receives no prison term," but "invalid for the purpose of enhancing punishment upon a subsequent misdemeanor conviction." But, see also, *Lewis v. U.S.*, \_\_\_ U.S. \_\_\_, 63 L.Ed 198 (1980), in which the court upheld a firearm violation of 18 U.S.C.S. § 1202(a)(1) despite the fact that the underlying state conviction was subject to collateral attack on Sixth Amendment grounds.

20. *Supra*, note 18 at 42.

21. For an excellent elaboration of other problems resulting from the *Argersinger* standard, see, *Krantz et al., Right to Counsel in Criminal Cases* (Ballinger Pub. Co.: 1976), pp. 69-117. Examples are as follows: (1) What are the prosecutor's responsibilities to object to failure to appoint counsel, where such a failure precludes a jail sentence? (2) Can a court refuse to appoint counsel where the legislature had mandated a minimum sentence? (3) How can a judge view evidence prejudicial to the defendant prior to trial with a view towards predicting a jail sentence without jeopardizing at least the appearance of impartiality at trial?

22. 147 Cal. Repr. 34 (1978).

23. *Id.* at 36-37.

24. The defendant's written waiver stated:

I, Carlos Perez consent to allow (the student) to represent me under the direct supervision of (the supervisor), my court-appointed counsel, who will assume personal, professional responsibility in the matter entitled (*People v. Perez*). This consent extends to all matters in and outside the court, these matters being those set out by the California State Bar as proper for such certified Law Students to engage in a repre-

# We'd like to brief you on a new concept in financial management.

With new developments in the legal profession and with your own practice, it's tough to keep an eye on the bottom line. So when it comes to keeping up with changes in legislation, taxation, insurance, investments, and other factors that can affect your financial future, we can help.

We're Fidelity Bank of Denver and Jefferson Bank and Trust, and we back up our new approach to financial management with a range of equally new banking services and investment opportunities.

## **The right combination of service, yield, and liquidity.**

For example, we can help you find better ways to control receipts and disbursements. We can show you ways to minimize your tax and insurance burdens and help you sort through today's maze of investments. And we can provide you with new types of investment opportunities, like the Security Repurchase Agreement and the High-Yield Liquidity Fund. Both offer high return plus the liquidity you need.

## **From the bank that responds to your financial needs as a professional.**

In addition to our special financial services for professionals and our new investment opportunities, we also offer a complete line of banking services including credit lines, equipment leasing programs, fixed and variable-rate certificates of deposit, and banking by mail or phone.

If you prefer banking in downtown call Fidelity Bank of Denver at **629-5229**, or if you prefer the convenience of suburban banking call Jefferson Bank and Trust at **232-8612**



West Colfax & Wadsworth  
Lakewood, Colorado 80215  
(303) 233-6561  
Buildings 41 and 67  
Denver Federal Center  
Lakewood, Colorado 80225



One Denver Place  
999 18th Street  
Denver, CO 80202  
303/629-5229

sentative capacity pertaining to the practice of law.

People v. Perez, 155 Cal. Rptr. 176, 183, n. 12. n. 12.

25. *Supra*, note 22.

26. *Supra*, note 24.

27. 378 U.S. 478, 490 (1964).

28. Monaghan, "Gideon's Army: Student Soldiers," 45 *B.U.L. Rev.* (1965), pp. 445, 462. In some cases where the client is charged with an offense for which a jail term is likely, the student's best advice might be to refuse to waive counsel in favor of student representation. The client will then be entitled to licensed counsel or, if no counsel is appointed, be ineligible for in-

carceration.

29. *See*, Brewer v. Williams, 430 U.S. 38' (1977).

30. In Faretta v. California, 422 U.S. 806 835 (1975), the Supreme Court stated that a defendant, before waiving counsel and conducting his own defense should "be made aware of the dangers and disadvantages of self-representation." It is submitted that the same standard should be required for waivers in favor of student representation.

31. *Supra*, note 14.

32. *Id.* at 465; *see also*, Charnley v. Cochran 369 U.S. 506, 515 (1962).

33. *See*, text at note 11, *supra*.

---

**Douglas County Courthouse: Before  
the Torching on March 11, 1978**  
(see Cover information)





# Attention Attorneys!



**THE COLORADO LAWYER is now accepting lawyer's announcements!**

The Ethics Committee of the Colorado Bar Association has approved the use of such announcements in THE COLORADO LAWYER. CBA members can purchase a 1/3-page display ad for \$50 per insertion.

If you would like to announce a change of address, an addition to your firm, or a change of association, you can reach approximately 7,000 attorneys statewide by purchasing a display ad in THE COLORADO LAWYER in space set aside especially for this purpose.

Send your \$50 check, made payable to the Colorado Bar Association, with your announcement copy to our Editorial Offices by the 10th of the month prior to publication. For further information, call (303) 623-8117.

