

Fall 1996

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Recommended Citation

3 *Clinical L. Rev.* 1 (1996-1997)

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A YEAR IN PRACTICE: THE JOURNAL OF A REFLECTIVE CLINICIAN

STACY CAPLOW*

According to the old saw, “those who can’t do, teach.” For a year in 1992-1993, I set out to prove to myself that those who teach can too do. Thanks to an obscure provision in the regulations of the United States Attorney’s Office,¹ and with the cooperation and encouragement of both my Dean² and the United States Attorney for the East-

* Professor of Law and Director of Clinical Legal Education, Brooklyn Law School. I would like to thank Gene Cerruti, Maryellen Fullerton, Kathleen Sullivan, Barbara Underwood, Spencer Waller, Marilyn Walter, and Deborah Zwany for reading earlier drafts and for their helpful comments and encouragement. My colleague, Minna Kotkin, read more than one draft and offered her incomparable support at many stages. I am also very grateful to the participants in the New York Law School Clinical Theory Workshop and indebted to the editorial board members of the *Clinical Law Review* whose perceptive and supportive comments, exemplifying the best collegial traditions of the clinical legal education movement, pushed me to make extensive revisions and, I hope, improvements. The preparation of this article was supported by a Brooklyn Law School Summer Research Stipend.

¹ Section 3-2.334 of the U.S. Attorney’s Office Manual authorizes a sabbatical program as follows:

Subject to case-by-case approval by the Director, Executive Office for U.S. Attorneys, U.S. Attorneys are authorized to establish sabbatical programs with law schools. Assistant U.S. Attorneys may spend no more than one full year teaching at a law school and a professor from that law school may spend a similar period of time working in the Office of the U.S. Attorney. This program will give selected Assistants a break from their routine, an opportunity to recharge their batteries, and a chance to do some in-depth research in their areas of interest.

This regulation, actually intended as an employment benefit for senior AUSAs, offers a fantastic opportunity for law professors to spend a year in practice doing sophisticated and diverse litigation in a setting that is designed to delegate a lot of responsibility to the individual very quickly. Even within the limited period of a single year, it is possible to work on many types of cases, perform a great variety of lawyering tasks, appear before excellent judges in both trial and appellate courts, and litigate against very able adversaries. The job offers all of the stimulation of high-level litigation without the anxiety of having a career at stake.

² At the time that I requested permission for a leave of absence, the Dean of Brooklyn Law School was David G. Trager. He subsequently became a judge of the United States District Court for the Eastern District of New York. Judge Trager, who had been the United States Attorney for this district in the late 1970’s, was wholly supportive of my request and made its implementation easy. Other connections between the law school and the Eastern District are numerous and longstanding. Several judges are or have been on the law school’s Board of Directors. Some were former full-time faculty members, while others are currently adjuncts. Many of the judges and magistrate judges, as well as the U.S. Attorney’s Office, regularly have law student interns from Brooklyn Law School. Faculty members frequently serve on court advisory committees.

ern District of New York,³ I was able to spend a year as an Assistant United States Attorney (AUSA) in the Civil Division litigating a wide variety of cases ranging from the most mundane to the most sophisticated.⁴

This bus driver's holiday would benefit any academic looking for an occasion to acquire or deepen practical experience.⁵ Given my almost exclusive background in criminal law practice, this year exposed me to an entirely new universe of federal civil litigation. At its conclusion, I felt quite comfortable with a wide range of litigation tasks.

A year in practice offers unique opportunities to a clinical teacher, particularly one who has been teaching full-time for many years. A return to practice in order to learn how to be a better practitioner should enable any clinician to teach practice better, and with more sophistication. Although most clinicians teach students the skills and judgment connected to law practice, we do so in a very rarified environment with limited caseloads and an explicit goal of fostering contemplation. Too much time away from the more realistic arena

³ At the beginning of my year at the U.S. Attorney's Office, Andrew J. Maloney was the United States Attorney and Mary Jo White was his Executive Assistant. They were succeeded mid-year by Zachary Carter and Barbara Underwood, respectively. All of them, as well as members of their legal and support staff too numerous to mention individually, generously gave me their practical and moral support all year. I would particularly like to thank Robert Begleiter, then Chief of the Civil Division, and Assistant United States Attorneys Deborah Zwany, Christopher Lehmann and Varuni Nelson, all of whom were terrific role models. Robin Greenwald, with whom I switched lives for the year, was an unending source of help and comfort. We spent much time over the phone and at lunch, exchanging teaching and/or litigation information. She read my work; I attended her class. It was an honor to sit in her chair for a year.

⁴ The Civil Division is the lawyer for the government in both affirmative and defensive civil litigation. My "clients" were generally agencies such as the Food and Drug Administration (FDA), the Department of the Interior, the Department of Defense, the Internal Revenue Service (IRS), the Federal Bureau of Investigation (FBI), Housing and Urban Development (HUD), or the Drug Enforcement Administration (DEA). The types of cases on which I worked included food stamp fraud, a challenge to National Park Service administrative regulations, a False Claims Act suit against a government contractor, tort claims arising out of the acts of federal employees, a civil Racketeer Influenced and Corrupt Organization Act (RICO) action against the Long Island carting industry, an action seeking enforcement of IRS subpoenas, breach of contract, civil forfeiture of child pornography, and forfeitures brought under narcotics statutes. This synopsis illustrates the wide range of cases that are litigated in this office.

⁵ My practice background had been exclusively in criminal law, first as a defense attorney and then as a prosecutor in the state trial and appellate courts. I had conducted two *pro bono* civil rights jury trials in federal court. Others have urged or described similar experiences of academic-practitioner crossovers. See, e.g., Douglas H. Cook, *Practitioner's Notebook: How I Spent My Sabbatical, or What Happens When a Torts Professor Is a Juror in a Negligence Case*, 14 REV. LITIG. 219 (1994); Gary S. Gildin, *Testing Trial Advocacy: A Law Professor's Brief Life as a Public Defender*, 44 J. LEGAL EDUC. 199 (1994); Theodore Goldberg, *An Academic in Practice-or-How About a Sabbatical Doing Social Work?*, 224 J. SOC. WORK EDUC. 211 (1988); Edward D. Re, *Law Office Sabbaticals for Law Professors*, 45 J. LEGAL EDUC. 95 (1995).

of practice may dull our real-world edge as we come to more closely resemble our traditional academic colleagues. Practitioners unquestionably approach cases, clients, and legal problems differently from academics, even clinicians. A sabbatical-in-practice provides a reminder of those differences and an occasion to sharpen our focus, update our knowledge, and maintain our credibility.

This exchange also creates an opportunity to engage in the ultimate role-assumption exercise, a teaching method clinicians routinely use. Like my students, I worked in a law office, shouldered substantial litigation responsibilities, and learned new skills that were reinforced throughout the year. All of this legal work was supported by the kind of assistance and feedback that is basically concrete, designed to elucidate and solve a particular problem, perfect a certain piece of work, or advance the litigation. I received informal advice from all of the AUSAs and more structured supervision from several extremely helpful mentors. I also had access to my law school colleagues.

One key ingredient was missing, however. Unlike my students, I had no experienced educator dedicated to guiding my metamorphosis from neophyte to more seasoned practitioner. My supervisors largely, and undoubtedly correctly, saw their primary role to facilitate my litigation responsibilities, rather than to engage me in critical self-reflection. Every time I went to court, made a strategic decision, or prepared for or conducted a deposition or negotiation session, I wanted to debrief, to evaluate my performance and judgment, and to assess my progress. All my years of clinical teaching had conditioned me to introduce these layers of pre- and post-performance analysis into any lawyering endeavor. During and after the year, therefore, in order to engage in that interactive component of clinical teaching methodology, I had to maintain a continuous inner dialogue with myself about what I was planning to do, had done, and had learned. This required me to be simultaneously a practitioner (the doer), a student (the experiential learner), and a teacher (the facilitator of self-reflection). Outwardly normal, inwardly autodidactic, for most of the year I was a fifteen-year veteran clinical teacher, with twenty years of legal experience, who talked to, brainstormed with, critiqued, rebuked, and even occasionally praised her alter-ego, a novice civil litigator.

Overall, the year was wonderful for a lot of reasons. I worked on some fascinating and challenging cases and became reasonably competent at the work. The office was exceptionally congenial, and I met and liked a great many people. When asked about my experience upon return to school, I unhesitatingly replied, "Great!" or some other similarly enthusiastic adjective. The year certainly fulfilled my goals of learning about federal civil litigation and taking a break from

teaching.

Yet, it seemed that the legacy of my year in practice should be more than exhilaration.⁶ It also should stimulate ideas about teaching and supervision. It was, however, surprisingly difficult, both during the year and immediately thereafter, to organize my experiences into coherent thoughts. After a year's immersion in litigation, it has taken me more than two years to regain my balance in law school and to feel distanced enough to reflect on how the year affected me. I needed this time to evaluate how my experience as "teacher-as-student" helped me develop as "teacher-of-students."

This article describes some of the more notable events of my year and identifies some central lessons that emerged from my moonlighting to inform my day job of clinical teacher. These themes concern the process of self-directed learning in an environment of total immersion, the everlasting need for discourse with other knowledgeable people about the nature of our practical experiences, and the burden we place on our students in clinics when we give them lawyering responsibilities.

To chart my year, I gave myself the same assignment as my students: keep a reflective journal.⁷ Part I contains selected "Journal Entries" that encapsulate an occurrence or experience to which I then append a "Reflection."⁸ The "Journal Entries" have been extrapolated from my notes and reworked to provide more detail, yet they are deliberately more succinct than an ideal student journal entry should be. Although somewhat unauthentic, this format allows me to roam widely through my recollections of the year and to connect a range of seemingly unrelated topics.

⁶ I quickly appreciated one surprising and refreshing lesson about lawyering and litigation. Without client and business pressures, and without the concerns of status and personal success, the practice of law is extremely exciting and intellectually challenging. Perhaps that explains why our clinical students, who engage in "virtual lawyering" free from most of the stresses and risks of law practice, seem to enjoy their experiences without reservation.

⁷ I always try to convince my students that a journal beginning with a statement of goals followed by descriptive, contemporaneous record keeping, examining what they have learned, is an exceptional learning tool. This is especially true in an externship, the clinical model my year most closely resembled. See Stacy Caplow, *From Courtroom to Classroom: Creating an Academic Component for a Student Judicial Clerkship Clinic*, 75 NEB. L. REV. 4 (1996) (forthcoming). I thought I could be a good laboratory for my own assumption about the value of journal-keeping. Although burdensome, journals provide an incomparable and potentially unguarded chronicle of events and reactions, and they enhance the fieldwork immeasurably.

⁸ My first lesson was an appreciation of the onerousness of journal-keeping. I have to confess that I did not live up to the standards I set for my students. At the end of the year, my written journals were sporadic and sketchy. My excuses sounded very familiar. I was too busy, forgetful, or had nothing interesting to say about a particular day.

The "Reflections," collecting a wide range of *post hoc* thoughts, impressions, and reactions prompted by and responsive to the journal entries, were written expressly for this essay. Each "Reflection" usually occurs on several levels. First, I react to a specific event or situation and then elaborate by both examining my reaction and drawing some more generalized lessons either about practice or about clinical teaching. These one-step-removed responses constitute my effort to be both a reflective practitioner and a reflective learner. And since it was impossible to jettison the well-developed tendencies of my years as a clinical teacher, my "Reflections" also contain elements of the reflective supervisor. Taken together, the comparatively brief "Journal Entry" and the "Reflection" add up to the kind of introspective journal writing I exhort my students to attempt.

I chose the term "Reflection" advisedly for its association with the work of Donald Schön, a leading theorist of professional education,⁹ and for the longstanding endorsement by clinicians of "reflection" as a key component of experiential learning and the clinical law teaching methodology.¹⁰ Although my "Reflections" were not strictly

⁹ DONALD A. SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER* (1987). See also DONALD A. SCHÖN, *THE REFLECTIVE TURN* (1991); DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER* (1983); CHRIS ARGYRIS & DONALD A. SCHÖN, *THEORY IN PRACTICE* (1974). Schön is the Ford Professor of Urban Studies and Education at the Massachusetts Institute of Technology. Professor Schön applied his theory to clinical law teaching at the 1992 AALS Mini-Workshop on "Theory and Practice: Finding Bridges for the Classroom." See Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 CLIN. L. REV. 231 (1995). Schön's writings have provided many clinicians a theory for framing their teaching goals, methods and supervisory styles, and have helped them understand and communicate about the relationship between theory and practice. See, e.g., Robert J. Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223, 232 n.22 (1981). See also Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243, 250-60 (1992); Gary Laser, *Significant Curricular Developments: The MacCrate Report and Beyond*, 1 CLIN. L. REV. 425, 426 (1994); Michael Meltsner, James V. Rowan & Daniel J. Givelber, *The Bike Tour Leader's Dilemma: Talking About Supervision*, 13 VT. L. REV. 399, 418 (1989) (supervision in law practice); Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HAST. L.J. 725, 725-27 (1989).

¹⁰ See, e.g., George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 192-93 (1974) ("The aim . . . is to create a sense of professional self-examination which neither legal education nor the legal profession has adequately promoted in the past."); Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284, 285 (1981) ("In contrast [to traditional classroom legal education], clinical education is primarily concerned with the process of learning from actual experience, learning through taking action (or observing someone else taking action), and then analyzing the effects of the action."); Paul Bergman, Avrom Sherr & Roger Burridge, *Learning from Experience: Nonlegally-Specific Role Plays*, J. LEGAL EDUC. 535, 537 (1987). ("Only experience that is reflected upon seriously will yield its full measure of learning."). See also Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185, 194-96 (1989); Phyllis Goldfarb, *A Theory-Practice Spiral: The*

contemporaneous, I wrote them in light of the received wisdom that they would enhance the experience itself whenever they occurred.

Following this anecdotal section, I turn to two distinct learning theories for professionals to see what relevance they might have to my own year. First, I briefly review Schön's model of education for practice in order to consider what aspects of his model, which is geared toward the education of fledgling professionals, might pertain to my experience. Too direct an analogy between my year as a litigator and my students' clinical programs would fail to account for the gulf between my significant legal background (albeit in other areas of practice) and their relative inexperience. Schön's ideas, intended as a prescription for students and novices, were only marginally applicable to my situation. I found that my year of total immersion in federal civil litigation, with full responsibility for my own cases and shared accountability for the cases that I co-counselled, provided little self-conscious, formal supervision primarily aimed at my education. This structure seemed to fit more closely the second theory I will examine in Part II, Brook Baker's vision of "ecological learning."¹¹ This theory proposes that the workplace alone, without any involvement of an educator, may be the best setting for novices to learn the skills of lawyering, given the appropriate confluence of the key elements he identifies.

While neither of these learning theories perfectly pertain to my unique circumstances, I conclude that they each offer a partial description of what I experienced as a non-traditional novice litigator. In fact, my needs and expectations were fairly simple, namely to acquire new legal experiences and bolster others. Just like most of my clinical students, I sought the refreshment of a new experience. Unlike the majority of my traditional academic colleagues, and even many of my co-clinicians, I found my sabbatical replenishment in a limited stint in law practice.

I. JOURNAL ENTRIES: EXPERIENCES AND REFLECTIONS¹²

A. *Journal Entry: Statement of Goals*

There are several goals I hope to achieve in this year of practice.

Ethics of Feminism and Clinical Education, 75 MINN. L. REV. 1599, 1650 (1991). For a recapitulation of "prevailing assumptions on theory and reflection" in clinical legal education, see Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. ST. L. REV. 287, 333-37 (1994).

¹¹ Baker, *supra* note 10, at 333-37.

¹² In looking back at my choice of topics for the journal entries and the reflections that the events inspired, I recognized a pattern. Certain themes recurred throughout the year, while others surfaced at the beginning but dissipated as I acclimated to my new role and surroundings. After reviewing my roughly chronological entries, I realized that my earlier

First, I have a specific experiential goal: I want to learn about civil practice in federal court. Not only is my practice and teaching background exclusively in the criminal area, I have rarely appeared in federal court.¹³ If, upon my return to school I reorient my clinical teaching in the ways I am contemplating, I will need the concrete skills. I have conducted upwards of a dozen criminal jury trials, but I have never done any civil discovery, drafted pleadings, negotiated or drafted financial settlements, or argued an appeal in the federal circuit.

I also want to become a better clinical teacher and enhance my empathetic skills with respect to my own students. By experiencing learning in a highly self-conscious way I want to develop and polish some of my own practical skills in order to teach about these skills more effectively and to equip myself to think about my own learning process more insightfully after many years of teaching. In addition, this year should revitalize my credibility as a practitioner, which I think is a vital requirement for success as a clinician. If a clinical teacher's lawyering skills become stale or out of touch with everyday practices, it is difficult to sustain credibility with students.

Finally, I simply want a change of environment and priorities as well as a new set of issues to think about after fifteen years of teaching. Ten years before, I took a similar leave of absence from the law school to work as a Bureau Chief in the Brooklyn DA's office. That year gave me a wonderful legacy of new experiences, new friends, and new connections to criminal law. When I returned to teaching, I taught new courses and developed new research interests. I also conducted training programs for that office, a wonderful bridge between clinical teaching and practice. I hope that this new leave will offer similar rewards.

Reflection: Keeping an Eye on the Goal

At the outset of a clinical course, students usually are asked to set forth their goals and expectations for their clinical experience.¹⁴ Such

observations largely concerned my adaptation to the office and my new position. As the year unfolded and my confidence grew, my attention was captured by the dynamics of law practice and the skills I was acquiring. This maturation process, moving from self-concern into lawyer role, is similar to that of most clinic students, I suspect. I found myself analogizing these experiences to the progression of the many issues confronted in the typical student-supervisor relationship in a clinic. See, e.g., Peter T. Hoffman, *The Stages of the Clinical Supervisory Relationship*, 3 ANTIOCH L. REV. 301, 302-03 (1985).

¹³ In retrospect, my two *pro bono* federal civil rights jury trials more than fifteen years earlier were conducted in a fog of ineptitude.

¹⁴ Jane H. Aiken, David A. Koplow, Lisa G.Lerman, J.P. Ogilvy & Philip G. Schrag, *The Learning Contract in Legal Education*, 44 MD. L. REV. 1407 (1985).

a statement provides a convenient yardstick against which to measure accomplishments, as well as a message about the students' own learning agenda around which the teacher can build a relationship. I followed this pattern and tried to think in advance about what I hoped to accomplish (aside from the obvious battery recharging). This year would be a major commitment of my time and would require a lot of generosity and accommodation on the part of many people. I wanted to do as much as possible to assure its success.

In retrospect, however, I realize that even though goal setting creates a baseline from which to assess an experience, these predictions inevitably are superficial. Certainly my general goals were satisfied, but I never could have envisioned the dimensions and complications of all of my accomplishments and satisfactions, a situation even more probable for clinical students, many of whom take clinics without much forethought. Also, my statement of goals ironically mirrored the kinds of oversimplifications I have learned to expect from my clinic students. And like them, I found that the text of the actual lessons of the year only remotely descended from the expectations I had at the beginning. Furthermore, it took me a long time to extricate myself sufficiently from my absorption in my experiences to reflect on and appreciate their lessons. For more than a year after my return to teaching I even continued to work on some cases, reluctant to completely divorce myself from the matters in which I was so invested.

B. Journal Entry: First Court Experience

My first weeks in the office are full of adjustments. The Civil Division Chief, a law school classmate and friend of mine, introduces me to everyone, including several former students—who clearly have no idea how to address me.¹⁵ I am still a little mystified about how the office works, how cases are assigned, and how supervision occurs. My

¹⁵ This was just one of the most obvious instances when my academic status created relationship problems inside the office. Most of the AUSAs who had attended Brooklyn Law School were tongued-tied about calling me by my first name. The title "Professor," emblematic of law school hierarchy, is so entrenched, even at an "open door" school like Brooklyn, that long after graduation, former students are uncomfortable in a more egalitarian situation.

Another example of behavior formed by preexisting roles was told to me many months after my arrival in the office by a Brooklyn Law School graduate who had coincidentally also worked in the bureau I headed at the Brooklyn District Attorney's Office. She expressed a fantasy that the first time I would come to her for help, she would delightfully tell me: "Go look it up." This revenge fantasy is interesting for its insight into the long-lasting resentments of law students toward their professors. This particular pay-back also reveals the extent to which students prefer to be given an answer instead of encouraged (forced) to learn some independent problem-solving skills.

supervisors are looking out for my best interests and ask me what kinds of cases I would like to handle in order to meet my goals. I have three cases to work on, but am not really sure what I am supposed to do. Since each of the files contains only the Summons and Complaint, I guess I am supposed to file an Answer. I obtain a few samples that enable me to draft an Answer in one of the cases which my supervisor reviews with me.

At the end of my first week at the office, I am given the kind of minor matter typically assigned to the junior AUSA on the block. It involves obtaining an administrative search warrant for two DEA agents who suspect that a pharmacist is illegally selling prescription drugs. Although this is nominally a civil matter, the case has sufficiently familiar criminal law overtones to make me feel comfortable. I interview the agents to determine whether there is probable cause and then prepare the warrant and underlying affidavit. A supervisor quickly reviews the paperwork, which is fairly routine, basically copied from the papers prepared by the last AUSA assigned to handle this kind of warrant.

We all walk over to the chambers of a Magistrate Judge so that she can review the papers and, we hope, sign the warrant. The particular judge is someone I know slightly in connection with my administration of Brooklyn Law School's Judicial Internship Program. She has several of my students in her chambers each semester.

I hope that the two young agents do not notice how nervous I am when we enter chambers. When we arrive, I see three student interns from Brooklyn Law School sitting in the anteroom reading mail-order clothes catalogues. As soon as we walk in, they all start to laugh, which only increases my anxiety and self-consciousness. When we meet with the judge, she is all business—pleasant, yet direct. She signs the warrants, much to my relief. On my way out, I learn the joke. When the students had heard that I was making an appearance in chambers, they staged a scene in which I was supposed to notice that they were reading catalogues and loafing instead of assiduously researching and writing opinions for the judge. In my state of nervousness, their humor completely eluded me. Even if I had noticed what they were doing, I would not have cared since I was so preoccupied with my own upcoming performance.

Reflection: Fitting Old Lawyers into New Roles

My new situation involved some contradictions. I was the junior AUSA, yet I was at least ten years older than most of the other Assistants and had a well-established career. I was an outsider with temporary insider status and, despite everyone's friendliness, frequently felt

out of sync with the routines, norms, and even terminology with which everyone else seemed accustomed. I felt like a rank beginner, plunged into an uncertain situation. Most newcomers to a job, including clinical students, are expected to need a period of adjustment and are given some allowances for their inexperience. Yet, I was an experienced lawyer after all, so it was perfectly reasonable for my new associates to presume some degree of competence on my part. Unlike my students each September, who are expected to begin by taking baby steps, I was expected to take off running. If I intended to benefit from my one short year, I knew that my learning curve had to be vertical.

I found it extremely difficult to establish my role vis-à-vis my colleagues, the judges and their staff, and occasionally even my adversaries.¹⁶ Academics enjoy a respect, whether or not deserved, derived from their particular status. Because we want to preserve this specialness, such a reputation can also be a burden. Unlike newly hired employees who routinely receive some orientation and training, or my students who obtain large doses of support and encouragement, I felt that the normal generous margin for error allotted to newcomers was unavailable to me. A degree of knowledge and ability greater than I actually possessed was presumed of me and I worried constantly that I would say or do something so inept or stupid that my professional reputation would suffer. Although my colleagues were supportive and tolerant, I felt that if I really made a mistake or appeared less than perfect, I would risk my standing in the larger context of my "real" life to which I would be returning at the end of the year. Paradoxically, it seemed that my neediness helped others in the office feel more comfortable with me and dispelled any of their preconceived notions about my special status.

As a result, every time I had to seek help or ask a question, I fretted about revealing the depth of my ignorance and, even worse, my insecurity about what I was doing. Later in the year, this concern resurfaced when I was assigned to two different cases on which teams of lawyers worked. Teamwork required frequent meetings, casual conversations that often grew into long strategy sessions, and participation on a level at which my work would be carefully observed by relative strangers who, I feared, had exaggerated expectations of my abilities.

These anxieties echoed those voiced by my clinic students over

¹⁶ Several former students also were among my adversaries. I was asked at least three times, "Didn't you teach at Brooklyn Law School?" Some of these alums clearly assumed I would be a daunting adversary for no other reason than the inference drawn from the presumed authority of my academic background, an inference I certainly did not want to undermine by the quality of my work.

the years. If I was nervous and insecure in a new situation despite a clear degree of practical competence acquired from many years of lawyering, my students must experience these feelings to an exponentially higher degree — and for a longer period of time. For example, my students working as interns for judges often express their apprehension about submitting their written work to the judge for review. They want to make a good impression and are anxious about any appraisal of their work. They feel despondent and deflated when that first effort is returned with the judge's inevitable criticisms. My extern students, however, often confront their shortcomings for the first time in the hands of a busy stranger who has little training for or commitment to providing constructive feedback in a manner sensitive to their self-doubts.

I was spared a lot of ego-bruising in my first court appearance. My supervisor reviewed and certified my work without much scrutiny, perhaps because the matter was so simple she assumed I was capable of executing such a routine task, or maybe because she was too generous or too intimidated to be overly faultfinding. Indeed, the application itself and the accompanying documents were not particularly difficult to prepare; despite my worries, it was easy to do it correctly. My appearance before the judge was straightforward despite my anxiety, no doubt at least in part due to the self-confidence I have acquired after all these years of practicing law and standing up in front of a room full of students. No one accompanied me to court since the application was so perfunctory, or critiqued my performance, but this case was a perfect ice-breaker and, judging from the agents' (my clients) respectful attitude toward me, I had achieved their objectives. They never would have guessed this was my first case.

During the year, my greatest fears arose during my interactions with the judges and magistrate judges in the district, most of whom I knew in connection with my law school responsibilities. I appeared regularly at status conferences, and prepared and argued many motions as well as two appeals. At an early status conference, one Magistrate Judge inquired, in rather incredulous tones, "Why on earth are you doing *this*?" Occasionally, one of the judges would look perplexed and ask, "Aren't you at the law school?"

Usually these queries were more curious than challenging. Nevertheless, I felt pressure to be an outstanding advocate and to act with impeccable professional demeanor in order to survive with my reputation intact. Undoubtedly I exaggerate the amount of attention the judges were paying to my situation. Surely no one returned to chambers and dissected my oral presentation or commented to a law clerk about my citation form or my legal analysis in a memorandum of law.

Or, if they did, their reactions to my lawyering skills probably were not related to my professorial role. Even knowing this, I felt unprotected and exposed.

This vulnerability was familiar, even if the context was not. As teachers, we are sensitive to the judgments of our colleagues, and rarely, if ever, subject ourselves to peer evaluation after tenure. Inviting an associate to attend a class and to offer feedback about one's teaching can be extremely intimidating. As a group, clinicians may be less isolated than other law teachers since we frequently model teaching techniques and approaches at workshops and conferences. Clinicians often team teach, and, at Brooklyn, we have co-taught classes combining our respective clinic students. I have frequently risked the scrutiny of my co-clinicians, but even in that comparatively safe environment, have felt insecure about their reactions.

Even knowing this about ourselves, we ask our students to expose themselves through their lawyering performances to our scrutiny and criticism and, through the grading process, to our judgment of them. Now that I had changed my role from *critiquer* to *critiqued*, my respect for the hazards and difficulties inherent in student role-assumption soared. For the sake of their education, our students open themselves, their performances, their motivations, and their underlying values, to detailed examination and assessment, a process which can be both reinforcing and dispiriting. Even though, in other contexts, they are accustomed to being evaluated by their professors and often accept evaluation quite passively, clinical performance evaluation is more personal. My appreciation of the willingness of even the most difficult and contentious of students to submit to this often painful and frequently public scrutiny and judgment, without much argument or defensiveness, increased enormously.

Even clinical teachers can be role-bound, which vastly complicates the transformation from judging to being judged. As we age and become more like parent than friend to our students, and as they stop perceiving of us as radically different from their traditional teachers, it becomes increasingly difficult to escape role comfortably. By stepping out of role, I was able to regain or acquire new insights about my students. I also was able to show myself to the world in a new context and be responded to on different terms. This was a refreshing and instructive perspective, even if my fear of failure was occasionally nerve-wracking.

C. *Journal Entry: The Court of Appeals*

Early on, I run into an acquaintance from my criminal defense days who expresses surprise to hear that I am working for the U.S

Attorney's Office. Working for the federal government is going to require some adjustments, although far fewer than when I worked for the Brooklyn District Attorney's Office ten years earlier. At that time, some of my former colleagues from The Legal Aid Society's Criminal Defense Division refused to talk to me because they considered my cross-over traitorous, illustrating an ideological chasm between prosecution and defense work that some lawyers refuse to bridge. My formative legal experience, and that of the vast majority of my clinical colleagues, involved representing poor people against the government. My vocabulary and world view are inescapably shaped by this nascent legal experience which inculcated a service orientation and a general anti-government attitude. I usually describe my early training on the front lines of the Criminal Defense Division of Legal Aid as my "native tongue," because for the rest of my career I will speak with that accent. Moreover, most of my contemporaries who began clinical teaching in the late 1970's and early 1980's have backgrounds in poverty law, often bringing or defending cases against federal agencies which were represented by the U.S. Attorney's Office. Most clinical programs, and certainly those designed in the early years of the movement, were based on a legal services model.¹⁷ Even now, when many clinics have less traditional foci such as community economic development work or the representation of small business owners or not-for-profit corporations, the major themes in conversations among clinicians at conferences and in their scholarship continue to be the empowerment of clients and systemic critiques formed largely from an outsider's perspective.

Although this courthouse encounter is not tense or hostile, I am anxious about my new role as government lawyer. Just days before I arrived in the Civil Division, attorneys from that office had been involved in a hearing before the District Court in defense of the seizure of RU 486, the French abortifacient drug.¹⁸ Their opponents are people I knew either personally or by reputation as part of the broad New York City public interest legal community. During my tenure in the office, another suit challenged the continued detention of Haitian refugees in Cuba. A lengthy hearing is conducted by a coalition of local public interest lawyers, including clinic students from Yale Law

¹⁷ David Barnhizer, *The University Ideal and Clinical Legal Education*, 35 N.Y.L. SCH. L. REV. 87, 106 (1990); Panel Discussion, *Clinical Education: Reflections on the Past Fifteen Years and Aspirations for the Future*, 36 CATH. U. L. REV. 337, 344 (1987); Robert E. Oliphant, *Directing and Managing Legal Education in a Service Setting*, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 356 (1973); Donald K. Stern, *Delivery of Legal Services: Clinical Education and Group Legal Services*, in *id.* at 214.

¹⁸ *Benten v. Kessler*, 799 F. Supp. 281 (E.D.N.Y. 1992).

School, and is defended by a team of government lawyers that includes individuals from the Civil Division.¹⁹

I discover fairly quickly that in most cases being a civil lawyer for the U.S. Government does not often involve ideology or controversy. The majority of my cases are perfectly straightforward, allowing me to participate in the full range of civil litigation experiences from preparing pleadings, through written and oral discovery proceedings, to pre-trial motions, and even to trial and appeal.²⁰ Generally, the government is being sued on account of the conduct of a federal agency or one of its employees. I handle several Federal Tort Claims Act²¹ cases in which, for example, a veteran's hospital is being sued for a wrongful death, the Navy is being sued for negligence as a result of a car accident, or the FBI is being sued for false arrest. The government also handles affirmative litigation against individuals or other entities. During my year in the office, I bring a breach of contract claim on behalf of HUD and a food stamp fraud claim on behalf of the FDA. I also work on complex litigation such as a multi-million dollar False Claims Act²² suit against a defense subcontractor and a Civil RICO²³ suit seeking to reform the Long Island carting industry. Most of these defensive matters are representative of the conventional caseload of the office, while the affirmative litigation is often much more innovative.

Being known as a government lawyer is also quite confidence-building. Even though judges sometimes rebuke AUSA's, most of their judicial impatience is reserved for the Criminal Division lawyers

¹⁹ *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993). These two cases were simply the most dramatic examples of the positions the Office had to take in defense of unpopular government policies. There were many more mundane examples in such areas as Social Security and immigration. Unlike the prosecutors in the Criminal Division who generally are perceived as crusaders against serious crime and guardians of law and order, AUSAs in the Civil Division often have to defend the federal government's practices and regulations that are perceived less sympathetically. Moreover, even when the Civil Division does assume a "crusader's" role in affirmative litigation such as civil rights enforcement or novel Civil RICO litigation, the cases usually receive much less prominence than criminal prosecutions.

²⁰ Given the comparatively extended life of any civil case, I was not expecting that any of my cases would be tried during my brief year in the office, although it turned out that one of my car accident cases actually was tried one month after I left the office. It is, therefore, even possible to obtain trial experience in this compressed time period. Certainly, anyone working for a year in the Criminal Division would have ample opportunity to try cases in that period given the typical speed of criminal cases. Actually, I was not terribly disappointed that none of my cases went to trial that year because trial work was the one phase of litigation in which I had some experience, and because the intensity of trial preparation would have detracted from my ability to do new work.

²¹ 28 U.S.C. § 1346.

²² 31 U.S.C. §§ 3729-33 *et seq.*

²³ 18 U.S.C. § 1963.

who appear in court more regularly. With the exception of occasional pre-trial conferences, the Civil Division litigates its cases away from the scrutiny of the court. When I do go to court, I am never subjected to expressions of judicial impatience. I came to realize that the office's high standards for its work product have produced a good relationship with the court.

I realize how easily I have adapted to my new role when I argue my first appeal in the Second Circuit. The case is neither legally nor politically momentous. The appeal is from a decision granting summary judgment to the government that essentially affirmed a decision by the National Park Service to rescind sea plane landing privileges in a certain community on Fire Island, a national seashore. Another AUSA who recently left the office had handled the earlier motion. Needless to say, I am extremely nervous about arguing in the Second Circuit, but am delighted that one of my goals for the year would be realized so soon.

Coincidentally, the appellant's counsel was on the faculty at another area law school. Throughout the proceedings, he had been perfectly pleasant and unassuming during all of our dealings. At oral argument, as I sit nervously waiting for argument to begin, I hear a warm voice from the bench say: "Well, hello, Professor, how are you today?" I look up, about to respond to the familiar honorific, when I realize that the judge is not talking to me. At first, I am disconcerted by the court's familiarity with opposing counsel and momentarily long for the status and security that my temporarily relinquished title confers. By the time it is my turn, however, I am composed and I just forge ahead with oral argument beginning with my appearance — "For the Government."

Reflection: On Being a Government Lawyer

Although appropriately nervous about my first federal appellate argument, I felt in command of my presentation, particularly after the prior day's moot court, and did not need any special recognition from the bench to bolster my confidence. My self-assurance also stemmed from an unaccustomed source: my status as an AUSA. In general, representing the United States seemed to guarantee a baseline degree of respect from judges and lawyers for the AUSA as a professional, regardless of the outcome of the case. By now, I have watched many arguments before the Circuit Court in which AUSAs for both the Eastern and Southern Districts of New York have held forth with a self-confidence and self-possession that seemed to emanate at least in part from the prestige of their respective offices.

In this case, I had the respondent's advantage in the standard of

review.²⁴ I thought I had written a better brief and none of the judges appeared to have any strong sympathies for my opponent's oral argument. As counsel for the government representing the prevailing party below, I found myself presuming an advantage and a likely outcome in my favor from the court. My self-confidence resounded during the argument, even without any special recognition from the bench.

In general, my year as a government lawyer turned out to be ideologically uneventful since most of the cases in which the government defends an agency are apolitical and the AUSA acts in the same advisory capacity as any other lawyer representing a client.²⁵ It also helped that the office was willing to honor my request to decline to handle cases that would have made me personally uncomfortable and which I felt, given my short time in the office, would not generate the kind of interesting work to which I aspired. For example, I specifically asked to be exempted from assignments on Social Security and immigration matters. In retrospect, this may have been a mistake. My guest status freed me from the regular stream of small cases by which a new AUSA becomes adjusted to the job and the role of being the lawyer for the government. In any job, it is beginner cases of this sort that teach the ropes, the rules, and a way of relating to the work. By limiting the range of cases on which I worked, I curtailed my exposure to the decision-making processes of the office. Ultimately, at the end of the year, despite my insider's access, I remained an outsider to a surprising degree, probably because I did not come of age at the same pace as other assistants, absorbing the skills and values of the office as second nature. This disparity may not have even occurred to my colleagues, since they went out of their way to welcome, accommodate, and help me, but I was frequently reminded of an experiential gap.

This special treatment raised two issues that relate to clinical education. First, as I will discuss more fully in the later journal entry about my student intern, a quick passage through any office is insufficient to acquire true understanding of the norms and practices of the environment. By exempting myself from certain of the cases an

²⁴ To reverse, the Circuit Court would have to find that the agency's determinations had been arbitrary and capricious. Given the high hurdle faced by plaintiff, no one was surprised when the opinion below was affirmed. *Christianson v. Hauptman*, 991 F.2d 59 (2d Cir. 1993).

²⁵ The government *qua* client is not exactly the same as an individual or even an organizational client. Although I consulted and worked closely with the representatives of the agencies involved in the cases, relied on their assistance to gather information, and required their approval for settlements, one key difference was pointed out to me on my first day in the office by way of encouragement. I was reminded that my clients, the federal government agencies, could not fire me even if they disliked my advice or legal opinion, or questioned my competence.

AUSA normally would be assigned, I was learning the job differently from everyone else. If I felt that even a year working full-time was insufficient to transform me into a genuine insider, our externship students who work shorter semesters and fewer hours are even less likely to achieve a meaningful level of assimilation.

I defended this case assignment indulgence on the ground that I had such a short time in which to accomplish my goals. Yet, although everyone in the office clearly understood and accepted this rationale, my special treatment was a somewhat embarrassing double standard, conflicting with my general belief that case selection and assignment in a clinic is not a wholly democratic process if the educational goals of the program are to be met. While my supervisors generously accommodated me, I had rarely allowed my students, who also have only a limited amount of time in which to achieve their goals, to reject a case assignment on the basis of a personal reservation — at least not without a lot of discussion and debate. In any clinical program, a responsible teacher would wrestle with this quandary taking into account the educational (and perhaps political) objectives of both the student and the clinic, as well as the possible effects of the decision on the particular student, the client, the program, the overall balance of cases, and the morale of other students.

One category of personally troubling cases that I did not try to avoid was civil forfeiture lawsuits in which the government seeks forfeiture of instrumentalities of drug trafficking.²⁶ The Eastern District U.S. Attorney's Office had been using this statute aggressively to forfeit homes, cars, and businesses, more often than not owned or used by someone other than the criminal defendant.²⁷

Prior to joining the office, I had strongly negative views about the use of this remedy to forfeit the residences of the families of convicted drug dealers serving prison terms. I had assisted our Federal Litigation Clinic in their representation of a claimant who was trying to prevent the forfeiture of her family's home after her husband's drug conviction. I believed that even if family members were aware of the illegal activities taking place in their homes, the claimants — in most cases the wife and children of a drug dealer — were powerless to prevent the conduct giving rise to the forfeiture proceeding. Although their lifestyles may have been enriched by the fruits of their husband's

²⁶ 21 U.S.C. § 881 (a)(7).

²⁷ See, e.g., *United States v. Certain Real Property and Premises at Whalers Cove*, 954 F.2d 29 (2d Cir. 1992); *United States v. Property at 4492 Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989); *United States v. Leasehold Interest in 121 Nostrand Avenue*, 760 F. Supp. 1015 (E.D.N.Y. 1991); *United States v. Premises Known as 171-02 Liberty Avenue*, 710 F. Supp. 46 (E.D.N.Y. 1988).

crimes, the loss of their homes seems an overly harsh penalty. Once their husbands are incarcerated, their source of income disappears. Often these wives do not meet the requirements for the statutory innocent owner defense, so their claims are doomed.²⁸

Handling forfeiture cases gave me a chance to experience representation when my personal views diverged from those of my clients (the various government agencies responsible for seizing the property). As I reconciled my ambivalencies in the name of advocacy, I was given another opportunity to empathize with my students who represent clients about whom, or argue issues about which, they have personal qualms. Usually, my advocacy instincts overrode my reservations as I became involved in some of the interesting legal issues the cases presented. In one case, I successfully lobbied my Chief to release the seized property, but I was motivated at least in part by my legal conclusion that the government would not be able to satisfy its burden of proof at trial.

My experience with forfeiture cases reminded me that it was possible to transcend personal preference and be an effective advocate despite a principled disagreement with the particular law. This transcendence is facilitated by the reinforcing messages any lawyer in a certain office culture or community receives from co-workers and supervisors that a particular kind of case or approach to litigation is valued. This conflict, usually resulting in accommodation rather than continued resistance, is probably commonplace in any law practice, but it had been a long time since I had confronted this kind of dilemma. In the past, any alienation I may have experienced stemmed more from the client than specific legal arguments about the fairness or morality of the law. As a criminal defense lawyer I occasionally disliked my clients and despised what they had done, but I was fiercely devoted to the public defender's ethos.²⁹ Many lawyers work in situations in which they have little personal choice or control over specific

²⁸ 21 U.S.C. § 881 (a)(7) creates a defense to forfeiture if the owner lacked knowledge or did not consent to the illicit use of the property. The Second Circuit requires the claimant to establish either lack of knowledge or lack of consent. Consent is the failure to take all reasonable steps to prevent the illegal use of the property. *United States v. 141st St. Corp.* 911 F.2d 870, 877-78 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

²⁹ I was reminded of a decision of many women lawyers at The Legal Aid Society to decline to represent defendants charged with rape, a position of personal preference that was quite controversial in the early feminist era during which I worked at that office. Most supervisors, almost all of whom were men, and male staff attorneys believed that this was an indulgence in conflict with professional norms of guaranteed right to counsel and zealous representation. The justifications offered by the women lawyers probably were so unfamiliar and unsophisticated that they were not adequately persuasive to overcome this resentment. Even when a request is ideological, special treatment can be alienating to the people who receive none.

assignments. Certainly, lawyers regularly represent people, advance interests, and voice arguments in which they do not personally believe, often without much angst. Clinic students, with no economic concerns about caseload and no decisionmaking bureaucracy to dictate to them, are encouraged to recognize and consider the moral dilemmas inherent in conflicts. In the relatively safe harbor of a clinic, they have the luxury of both time and autonomy to explore the moral dimensions of attorney role.³⁰ Ironically, I realize that clinics are a safe harbor for clinicians, too. We rarely *have* to take a case; we enjoy considerable, if not total, autonomy over case selection for our programs, and we choose the areas in which we specialize and even the individual clients. As we urge our students to indulge in soul searching, we tend to forget or ignore the realities of practice far from the ivory tower of a law school clinic.³¹

D. Journal Entry: Oral Argument on a Summary Judgment Motion

One of the first cases I am assigned produces my first major substantive oral argument before a district court judge. I am representing the army on a claim filed by the widow of a soldier killed in action during the Gulf War. The decedent originally named his mother and brother as beneficiaries of his service life insurance policy. Although he had indicated an intention to change the designation to his wife, apparently he had not completed the necessary paperwork before dying in a helicopter crash. The army paid the benefits to the mother and brother. Because army regulations require a signed beneficiary form, the only question of law is whether the court can take into account other writings to establish the intent of the decedent. While the

³⁰ When clinic students attempt to reject certain cases on the basis of ostensible value conflicts or for reasons of personal preference I am always troubled, although I often understand the reasons they express for their discomfort. For example, should a student be permitted to opt out of a case in which a lesbian seeks to adopt her partner's child because the student morally opposes same-sex relationships? Should a student be permitted to opt out of a case when a client expresses offensive anti-semitic, racist, or sexist opinions? Should a student who finds the personal hygiene of an elderly client repulsive be allowed to refuse the case? These examples, as well as other more mundane and less charged controversies, have arisen in our clinics in recent years. For a persuasive article arguing that lawyers *should* have discretion in deciding which clients to represent and how to represent them, see William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

³¹ I am grateful to Jim Stark and Bob Dinerstein, both of whom raised the question whether the relatively privileged group of clinical law teachers is in the best position to teach our students about the realities of law practice, particularly since many of us have been teaching for many years and may not have even had to deal with these realities when we were practicing. This suggests that clinical teachers might have a responsibility to return regularly to the real world in order to retain an edge and credibility with our students. This will be an increasingly difficult and perhaps even undesirable option if clinicians are pressured to develop as traditional scholars rather than as lawyers.

legal standard is in issue, there appears to be agreement about the material facts, so both the plaintiff (the widow) and the government, joined by its co-defendant, the insurance company underwriter, cross-move for summary judgment.

The oral argument takes place several months after I had submitted my motion papers. This case had my exclusive attention when I prepared the motion, but by the time the motion was calendared, I am juggling a full caseload. So I hastily reread the motion papers and memos before heading off to court.

My calendar call is scheduled for 2 p.m. I walk over to court alone about 1:45, enter the empty courtroom, and realize immediately that I have no idea where to sit or stand. At criminal trials, prosecutors sit at the table closest to the jury, but where does the Government sit on a civil motion? Does it hinge on who is the plaintiff and who is the defendant? Is it dependent on who is the moving party? Does it matter at all? Bolting from the courtroom, I race over to other courtrooms on the same floor, but all of them are also empty. There is no one to ask.

Counting on outward aplomb to cover inward uncertainty, I develop a strategy to deal with my unanticipated ignorance. I wait in the audience until my adversary appears, follow him into the well after the judge takes the bench, and hang back until he commits himself to stand on one side.

Plaintiff's counsel argues first. The court's comments and questions seem to reflect my view of the motion. The judge is courteous, patient, and well prepared on the law, but I leave the courtroom dissatisfied with my overall presentation.³² My tally at oral argument is: one fatuous remark, one unnecessary repetition, and several instances of long-windedness. I also am confused about the facts of one of the cases the judge mentions because I forgot to reread the cases before the court appearance. Fortunately, she does not question me about this case.

On the walk back to the office, I engage in a debriefing of my performance similar to the many conversations I have had with students on similar walks over the years. "Not a disaster." "You made your points." "Why did you bring up the ambiguity in the decedent's

³² Approximately six months later, the judge granted the defendants' summary judgment motion. *Ortiz v. Prudential Life Insurance, Co. and U.S.A.*, CV 92-2866 (E.D.N.Y.). This case provides another example of cross-fertilization between my year in practice and my clinical teaching. I have developed a simulation problem based on the documents in this case for my judicial internship clinic students. Since the file was manageable and the legal issues relatively simple, I used it to create a simulation of an assignment from the judge. The students analyze the file in groups, research the case, simulate a series of discussions with the law clerk and judge, and finally outline a decision.

letter?" "Didn't you reread the cases before going to court?" This out-of-body experience of having a conversation with myself is disconcerting and probably not very productive since I am well aware that I rambled and misperceived a few of the judge's questions. I am critical of my performance, and even more dissatisfied with myself for ignoring some of the precepts that I frequently had communicated to my students: "Listen carefully to the questions so you know what is on the judge's mind." "Be responsive." "Understand the nature of the relief you are requesting so that your argument leads the judge to the conclusion or result you desire."

Reflection: Post-Performance Self-Critique

When I taught an in-house criminal defense clinic, I would take my students to court in the early weeks of the semester. I wanted them to reconnoiter the courtroom so that by the time of their first court appearance they would feel sufficiently comfortable with the physical environment that they could relax and concentrate on their oral presentation. We would rehearse the most basic aspects of their performance, including the all-important moment of putting their name on the record which usually was the first time they had to speak aloud in open court. I can remember students who were so nervous that when the court reporter asked for their appearance, they would lean over the table and whisper their names so quietly that the judge who could not hear them would demand, "Speak up," thoroughly unsettling them before anything substantive even happened.

In order to make the point and put my students at ease at my expense, I used to tell them a story about my early days as a lawyer when I was humiliated by a judge who yelled at me for the trivial mistake of standing on the wrong side of the table. "If you know where to stand, the rest is easy," I would tease, convincing them that a confident stride up to the right spot at counsel table would telegraph the self-assurance that is guaranteed by thorough preparation of even this relatively trivial detail. My shorthand symbol for self-confidence was knowing where to stand, yet I had forgotten to do my homework before going to court. Although I flunked my own test, my many years of experience in unanticipated situations, of bluffing my way through unfamiliar territory, had taught me enough improvisational skills and had given me sufficient innate poise to survive my ignorance. Yet, if I could not practice what I preach, what was fair to expect from my students?

Self-critique is a difficult skill to master, which is why the perspective of a third person is so important. My internal see-sawing reminded me how hard it is to judge ourselves accurately and objec-

tively, even after many years of experience and a broad base of comparison. Presumably, accrued experience should equip us to better judge a performance, but that very experience also may convince us that we know what we are doing and blind us to our own flaws and defects. Many returning-from-court conversations with my students often revealed sharply differing perceptions of what had happened. Students who were unsuccessful despite an excellent presentation could not see past disappointing results to assess their performance objectively. Students who achieved good results notwithstanding a poor performance could not accept constructive criticism because they were blinded by their victory. Reliable critique is also very difficult in a performance context when we are too busy doing and reacting to be optimally observant.

Having some objective feedback undoubtedly would have been welcome and reinforcing. Of course, my situation was different from that of an in-house clinical student who would always be accompanied to court and supervised by a clinical teacher proficient in the art of critique. Even interns working in an off-campus placement would most likely be closely supervised anytime they actually have an opportunity to argue a motion personally. Clinic students probably expect to make some mistakes despite extensive preparation, know they are backed up by supervisors, and consider every performance to be a learning experience. In contrast, my first instinct was to be hypercritical and unforgiving. Anything short of perfection was tantamount to failure.

This first oral argument made me realize that, even without a supervisor's observation and feedback, I actually could evaluate the general effectiveness of my performance, and I stopped being so exacting. Minor points could have been better, but none of these imperfections, including not knowing where to stand, seemed to have mattered very much. Indeed, the entire oral argument may have been superfluous following the more thorough discussion contained in the motion papers. I did realize, however, that despite my inexperience with federal civil motion practice, I simply *knew* my performance had been *fine*. This innate awareness, which translates into a capacity for developing problem-solving strategies, is the product of many years of practice, and sets me apart from my students even in unfamiliar settings.

E. Journal Entry: The First Deposition

One of my clearest goals for the year is to learn about discovery and to conduct depositions, so, when I am asked to step in for an extremely busy AUSA who is facing a discovery deadline, I am delighted. Ironically, given my ambivalence about civil forfeiture cases,

my first deposition — actually four depositions in a single sitting — are to be taken in a complicated civil forfeiture case in which the forfeitable house was owned by a corporation whose sole shareholders are the wife and minor children of a convicted drug dealer. Four witnesses are noticed for deposition: the claimant-wife, her father, the lawyer who had incorporated the entity, and her husband who had completed his sentence and was living in the house again.

My goals for the depositions are both narrow and open-ended. I want to establish facts that will reveal that the corporation is a sham, created to shield the property from creditors. The existence of the corporation makes this otherwise routine forfeiture case much more unusual and complex since the husband is not a shareholder. I also have in mind the more usual objectives of developing facts, locking in testimony, obtaining admissions, and laying the groundwork to attack the witnesses' credibility.

To prepare for the depositions, I read a few secondary sources.³³ I talk with the assigned Assistant, compile long lists of questions and organize the documents in the file. I am ready for all contingencies, or so I think.

As it turns out, instead of carrying out the depositions with dispassionate professionalism, I become so offended by the underlying facts of the case, particularly the plight of the claimant-wife who seems to have been manipulated by both her father and her husband, that I reveal my disgust and impatience openly during the depositions. I express incredulity, question with sarcasm, and, instead of using the depositions to discover as much as possible about their potential trial testimony, I allow my personal opinions and judgments about the witnesses to shape and close my thinking about the case, limit my questions, and distract my concentration. What might have been an intentional tactic in the hands of a more sophisticated litigator, for me is an unintentional loss of control. I sacrifice the discovery opportunities to my indignation.

Reflection: Prejudice Interferes with Effective Lawyering

The witnesses at this deposition were straight out of central casting. The husband could not account for an honest day's work in his life. The wife's professed obliviousness and complete passivity were deeply disturbing, especially because both her father and her husband

³³ E.g., ROGER S. HAYDOCK, DAVID F. HERR & JEFFREY W. STEMPEL, *FUNDAMENTALS OF PRETRIAL LITIGATION* (1994); PAUL M. LISNECK & MICHAEL J. KAUFMAN, *DEPOSITIONS: PROCEDURE, STRATEGY AND TECHNIQUE* (1990); Jeffrey R. Zuckerman & Martin L. Feinberg, *Depositions*, in *FEDERAL CIVIL PRACTICE* 345-415 (Georgine M. Vairo ed., 1989).

belittled her. Her home life was a stereotype: Her husband peeled bills from a wad of cash for the household expenses before he left each morning and then returned in the evening without telling her anything about his day. She took care of the house and the kids, asking no questions and accepting her lifestyle and his domination submissively. Her father had built the house for her, which was valued at about \$400,000 — free and clear. Without explaining anything to her, her father had his lawyer incorporate the house, installing his daughter and his grandchildren as sole shareholders, in order to safeguard the asset against creditors, and, as it turned out, his son-in-law. She signed whatever she was asked without any curiosity or hesitation. In an act of extraordinary hubris, the husband took out a mortgage on the house without her knowledge in order to raise money to further his schemes. He actually brought another woman to the closing who posed as and signed for his wife, thereby substantially — and fraudulently — encumbering his family's home. The wife actually may have learned of this for the first time at the deposition. If she did, she gamely concealed her reaction at learning about the duplicity that had subjected her house to both forfeiture and foreclosure. I learned about his deceit much later and marvelled in hindsight at her composure and outward loyalty.

Everyone testified according to role. As incredible as her claim of total ignorance of her husband's activities might have been, I found myself thinking during the deposition that the wife was very believable and might succeed in convincing a jury of her ignorance. Her attitude was alien, but her demeanor was sincere. It was difficult to believe that people and relationships like these continue to exist today. I was encountering a stereotype which was familiar from popular culture, but totally foreign to me in real life.

As a result, I became very angry at the wife's circumstances and at her personally for allowing herself to be so victimized, first by the men in her life, and now by the legal machinery that was trying to take away her home. During my examination, I openly expressed contempt for her husband and father, anger and disbelief at her claims of ignorance, and disrespect for their sleazy lawyer. My questioning became impatient and judgmental rather than open, inquisitive, and instrumental to fact-finding. In the end, because of my attitude, I learned less from this deposition than I might have.

Although the specific nature of the differences between me and these witnesses was unusual, I began to feel like many of my students when they first meet a client or a witness who comes from an unfamiliar background and has different values and priorities, or uses differ-

ent language to express ideas.³⁴ Here, of course, the witnesses were adversaries rather than clients, so I had no long-term interest in overcoming our differences in order to preserve or further the relationship. Yet, I realized how easy it is for differences to interfere with communication and diminish a lawyer's effectiveness in all kinds of situations.

Before one of my students' first depositions or other forms of witness questioning, I surely would have advised a neutral approach and counseled avoidance of any preconceived notions about what might happen. Nevertheless, once in role myself, I fell into some of the emotional and judgmental traps that have caught my students in a whole range of lawyering tasks, particularly interviewing and counseling. I engaged in an interaction with the witnesses that was more about me and my beliefs than about their testimony. Of course, I knew before the depositions that the injection of personal opinions into a proceeding that is intended to find facts and build a case is dysfunctional, but I discovered that even well-prepared, self-aware litigators can lose self-control in the intensity of an adversarial proceeding.

I conducted many more depositions during the rest of the year and largely managed to retain my self-control and an outward appearance of objectivity. I certainly was more self-conscious of my proclivity to be impatient and judgmental. Once a plaintiff I was deposing broke down and cried three times during his deposition. His behavior seemed so inappropriate under the circumstances that I believed that he was faking his emotions and felt scornful of his attempted manipulation. Rather than express these beliefs, however, I simply took a break until he regained his composure even though the delay interrupted the flow of the questioning and prolonged the deposition hours longer than necessary. On another occasion, I was deposing a lawyer seeking the return of some material depicting child pornography. He alleged that he was exempt from the federal law prohibiting such possession due to his status as a researcher/scholar of pornography. His arrogant attitude during the deposition was irritating and provocative. I tried to curb my impulse to be snide and nasty, sticking to the goals of my discovery plan. Was I successful? Probably not entirely, but at

³⁴ For a sampling of the literature addressing the conflicts that may occur in clinics or in poverty law practice arising from differences between lawyers or students and their clients see, e.g., Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons from Client Narrative*, 100 YALE L.J. 2107 (1991); Peter Margulies, *The Mother With Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695 (1994); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

least I had become more attentive to my propensity to inject my personal opinion into the deposition and was more successful at neutralizing my behavior.

During my year, I did have opportunities to review deposition outlines with a supervisor, and I know that support was available for the asking, yet most Assistants seemed to take for granted that they could plan and conduct a deposition without much oversight. Clinicians obviously do not assume that their students can prepare for performances on their own so we all work hard to get them ready in advance, requiring outlines, scripts, rehearsals, moots and other forms of pre-performance practice, and anticipating all conceivable contingencies. Yet, notwithstanding extensive preparation of this sort, we have all observed a student become so absorbed in the proceeding that he or she spontaneously lands in uncharted waters, much to our consternation. Then, it worsens as the judge begins to question or opposing counsel reacts unexpectedly. All of that preparation may have had a subliminal affect on the student, creating confidence to deal with surprises. But in the throes of the performance and the headiness of being in role as a lawyer, students often lose track and improvise.

I had assumed, apparently incorrectly, that I was beyond the kind of loss of composure that occurred in my first deposition. My chagrin is a reminder of how easily even a seasoned, self-disciplined lawyer can be derailed inadvertently. I had fallen quite easily into what was for me a very familiar cross-examination mode of questioning an adverse witness, losing track of the quite different goals of a deposition that can be achieved just as or even more effectively by a non-confrontational style. On the other hand, maybe students actually restrain themselves more than experienced lawyers do because they have not yet developed a sense of the limits of their lawyering ability so they err on the side of caution. Less self-assured students probably are too insecure and inhibited to exhibit anger, impatience, or disbelief. This deposition made me reconsider the wisdom of an approach to pre-performance preparation that focuses almost exclusively on content and procedures, to the exclusion of the less substantive, more intuitive areas of demeanor, attitude, and style.

F. Journal Entry: The Court of Appeals [Redux]

My next case in the Second Circuit is much more significant and complex than the sea plane matter. In connection with a civil forfeiture action, the government seized property, including boats, trucks, and bank accounts belonging to individuals and corporations under investigation for tax evasion. The district court had denied a motion

brought by certain of the claimants to vacate the seizure and dismiss the action. When an expedited interlocutory appeal is filed in the Second Circuit, the AUSA handling the case is involved in a lengthy trial. I once again have a chance to argue before that court.

In a recent decision, the Circuit had permitted an interlocutory appeal from a district court order refusing to vacate an *ex parte* seizure warrant in a civil forfeiture matter involving an ongoing business in certain very limited circumstances.³⁵ In my case, the claimant-appellant is relying on this authority. It is important to the office to limit the scope of that adverse precedent.

Both the Chief and one of the Deputy Chiefs of the Civil Division attend the oral argument. They had both read and edited drafts of my brief and had mooted me for about an hour the day before. Although it is customary for a supervisor to sit at counsel table during the argument, neither is able to do so because they arrive too late to take a seat in the well unobtrusively. In the middle of my questioning, first one, then the other comes up from the audience to whisper comments about points they are worried I may omit. This interruption is distracting and disconcerting. It also might have been disastrous except that my argument is almost over and I manage to incorporate their suggestions without too much difficulty. Luckily, the three presiding judges are relatively informal and seem unperturbed by all of this activity.

Reflection: Self-Restraint During In-Court Supervision

This incident was so reminiscent of my own behavior with students in court that it was hard for me to be angry or upset with my supervisors. Self-restraint is one of the hardest lessons for any clinical supervisor to learn, so I could empathize with their impulse to intervene. I also understood that their core concern is the outcome of a case rather than the education of the AUSA handling the case, so they see no need to exercise the forbearance that clinicians are forced to develop to delegate as much of the actual lawyering responsibilities as possible to students. While the received wisdom among live-client clinicians tends to favor non-directive supervision, this is one area in which our instructional philosophy may romanticize our reality.³⁶

³⁵ United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896 (2d Cir. 1992).

³⁶ A review of some of most familiar literature about supervision demonstrates that this dichotomy oversimplifies the rich and mutual process of giving and receiving supervision in a clinical setting. See, e.g., David R. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67 (1979); Robert J. Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223 (1981); Peter T. Hoffman, *Clinical Course Design and the Supervisory Process*, 1983 ARIZ. ST. L. REV. 277; Peter T. Hoffman, *The Stages of the Clinical Supervisory Rela-*

Based on my own experience, even sitting to one side or in the audience may not put sufficient distance or impose adequate inhibitions on the supervisor bent on intervening. Often judges bypass the student "attorney" and invite participation by the instructor who, of course, has little choice but to cooperate.

My memories of this struggle over delegation and control are almost prehistoric, dating back to my own days as a third-year law student in the Criminal Defense Clinic at New York University Law School. I can still feel the pressure of my supervisor's finger in my back and hear her whispered advice while I was in the middle of conducting my first preliminary hearing. The distraction was no less twenty-five years later, except that all those years of life experience thankfully *had* taught me enough about the art of lawyering to allow me to stay focused and to cope with the unexpected interruption.

Even if the recipient can deal with intervention during the performance itself, however, other issues tend to emerge in its aftermath. Inevitably, this kind of interruption raises self-doubts about *why* it was necessary for the supervisor to break into the argument. What was so deficient that it necessitated such disruption and, as I felt in my case, disrespect? As a law student, I had not been courageous enough to voice my feelings about this compromising behavior. As an AUSA, I was just as uncomfortable and non-confrontational, for a similar reason: I did not *really* want to know. I hesitated to question these interventions too deeply for fear that I would discover that my supervisors lacked confidence in me or perceived incompetence on my part. I did not want to undermine our working relationship or threaten our friendships. One key difference between then and now was my ability to see the humor and irony in what had happened, and to maintain my poise before the court.³⁷ In addition, I now had enough tools to evaluate my performance independently, without assuming that I was deficient simply because my supervisors were unable to rein in their impulses.

tionship, 3 ANTIOCH L. REV. 301 (1985); Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn From Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981); Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HAST. L.J. 725 (1989); Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CH. 109 (1993-94); James A. Stark, Jon Bauer & James Papillo, *Directiveness in Clinical Supervision*, 3 B.U. PUB. INT. L.J. 35 (1993).

³⁷ It also helped that I had the impression from the Court's tough questioning of opposing counsel that the judges were on my side so that oral argument would have little effect on the outcome of the case. The court unanimously affirmed the judgment below and limited the availability of interlocutory appeal. *United States of America v. Victoria* 21, 3 F.3d 571 (2d Cir. 1993). Just as important, my (tor)mentors apologized and we laughed together in the hallway outside the court.

In retrospect, I realize that I never did discover why my supervisors intervened so aggressively.³⁸ Once the argument was over and we had retreated into the hallway full of the usual post-performance relief and giddiness, it just did not seem timely to complain, criticize, or even analyze what had happened. Later, any questioning felt confrontational. For our respective reasons, we all seemed to need to put the incident behind us.

The structure of a typical clinical program would have dictated a very different post-mortem. Even if a discussion immediately afterwards would have been awkward, the incident undoubtedly would have been a topic in later supervisory sessions. A student in my situation would have a chance to question the reasons for the intervention and the supervisors would have a more natural opportunity to explain, justify, or even apologize for their behavior. The student would have a forum in which to air the inevitable self-doubts and feelings of grievance that such an intervention creates, and to bring the incident to some closure. Also, the supervisor would be able to examine his or her own conduct in order to both remediate with the particular student and to be more self-conscious about any propensity for this kind of supervisory behavior generally. All of these opportunities require either initiatives by the supervisor or an established procedure in which to raise the issues. Without clear expectations, students left to their own devices probably prefer to avoid these discussions, just as I did both a generation ago at NYU and more recently.

Many clinicians try to suppress their instincts to dictate or interfere or override when students are conducting a case differently than we might as long as the client's interests are not in jeopardy. Our explicit objective is to teach our students to learn from their experiences and we recognize that blunders often produce the richest lessons. The battle for self-control in supervision seems a perennial part of a clinician's struggle to achieve equilibrium between appropriate delegation of lawyering responsibility to the students and professional responsibility to the client and the court.

It was important to be reminded of how sensitive our students can be to any interruption in their well-rehearsed performances, particularly in court appearances. Their confidence is so precarious that a

³⁸ One simple explanation is physical: If one of them had been sitting next to me, as was their normal practice, they would have passed inconspicuous notes instead of walking up. By the time one of the people involved had read an earlier draft of this article, she could not even reconstruct her reasons for jumping in. This anecdote occasioned yet another insight about how we underestimate our impact on our students and how we perceive events differently from them. For me, this incident (and even my own student experience of long ago) was sufficiently vivid and embarrassing to inspire much soul-searching. For my supervisor, it was a minor and forgettable footnote.

supervisor's intervention can be more than disruptive, it can be disabling in some cases. Indeed, the mere fact that this incident stands out as one of the more memorable moments of my year is a sobering illustration of the impact clinic experiences can have and how long students may feel the reverberations of those experiences.

G. *Journal Entry: My Student Intern*

In the spring semester, I ask for an intern and am assigned a law student from an area law school (not Brooklyn) whom I will call Nancy. Nancy is quiet, pleasant, and respectful, but only shows up one or two days a week. I put her to work researching and quickly forget about her unless she comes into my office with a question or for guidance. When she needs help, I sit with her, go over her work to date, and then set some goals, pointing her in the direction of the library. Her analysis on one case helps frame the questions in an impending deposition. When the time for the deposition arrives, however, Nancy is unable to attend to see her work put to use. The first draft of her second assignment, a point of a memorandum of law in support of a motion for summary judgment, is barely adequate even though we talked about it at length before she began to write. I mark up her draft and discuss some changes, but before she can really work to improve it, she is finished with her semester, leaving me with a pile of xeroxed cases and a slightly better, but still incomplete, second attempt.

Reflection: On Being an Extern Supervisor

Despite having sent hundreds of students into the world to be supervised by attorneys and judges, and having witnessed the growing acceptance of extern clinics by clinical teachers,³⁹ I remain unconvinced that these programs provide as good an academic experience as real-client clinics. The well-rehearsed criticisms of externships center on the inability of busy lawyers to provide appropriate assignments and offer the kind of thoughtful time-intensive feedback built

³⁹ See, e.g., Stephen T. Maher, *The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education*, 69 NEB. L. REV. 537 (1990); Linda Morton, *Creating a Classroom Component for Field Placement Programs: Enhancing Clinical Goals with Feminist Pedagogy*, 45 ME. L. REV. 19 (1992); Janet Motley, *Self-Directed Learning and the Out-of-House Placement*, 19 N.M. L. REV. 211 (1989); Henry Rose, *Legal Externships: Can They Be Valuable Clinical Experiences for Law Students?*, 12 NOVA L. REV. 95 (1987); Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 CLIN. L. REV. 413 (1996); Linda Smith, *The Judicial Clinic: Theory and Method in a Live Laboratory of Law*, 1993 UTAH L. REV. 429; Marc Stickgold, *Clinical Fieldwork*, 19 N.M. L. REV. 287 (1989).

into the structure of most live-client clinics.⁴⁰ Even in the best externships, intensive participation by a full-time faculty member rarely equalizes all of the uncontrollable variations in the fieldwork component.

Every one of those failings occurred during my supervision of Nancy. Even though she was conscientious, Nancy was not very helpful due to her schedule and her inexperience. Moreover, I was not sure that I really was committed to the responsibility of supervising an intern since my year was intended to be a break from my normal responsibilities of dealing with students. Also, given my own relative inexperience and limited caseload, I may not have been that skilled at developing appropriate assignments.

To be fair, most of the AUSAs in the Civil Division were very sensitive to the aspirations of their interns. The office had an organized internship program for the many law students who interned there every semester and in the summer. When lawyers were assigned new students, they made a concerted effort to design manageable and varied assignments that would expose the students to different issues and even allow them to argue motions in court. It was easy to see that the interns enjoyed working in the office for the same reasons as the Assistants: The cases were interesting, federal civil practice was conducted on a high level of professionalism, and the environment of the office was collegial and supportive. Some interns stayed for additional semesters and some of the AUSAs had previously been interns. In the universe of placement possibilities, this office would be considered exemplary.

Nonetheless, my experience as an extern supervisor confirmed the obvious: In any externship, the student runs the risk of being assigned to a supervisor (in this case, me) who is not primarily concerned with the student's education or who perceives the student's greatest value as a researcher rather than an involved participant. From my experience with Nancy, I learned that, although I welcomed some assistance with research, I could not always rely on her work product and did not really want to spend my time tutoring with her. Of course, I may not have been a typical supervisor since I was escaping rather than embracing the pedagogical role during my year away. Perhaps I was wrong to have taken on the responsibility of a student intern.

Despite my possibly unique situation, this experience highlights the vagaries of externships that rely on the good will, interest, and teaching skills of field supervisors. Differences of temperament,

⁴⁰ See *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 511 (1992).

workload, and values among supervisors portend erratic experiences. As we all know, it is easier to do a task ourselves than to wait for the student to complete something which, even if they do get it right, takes them much more time and effort. This inefficiency is the paradoxical heart of the in-house law school clinical programs that are dedicated to teaching students to develop their own problem-solving techniques and to foster their independent decisionmaking skills, however long this process may take and even if mistakes are made along the way. Ample time and patience, lack of distraction, and teaching expertise characterize the typical in-house clinical supervisory relationship; these are in sharp contrast to the more hurried and erratic supervision provided by a practitioner.

While it may be possible to improve extern supervision by providing more training to supervisors and increasing faculty involvement,⁴¹ it is very difficult to balance both the often-conflicting roles of educator and litigator, and few law schools have demonstrated the willingness to engage in in-depth supervisor training and monitoring. Busy litigators seldom have the resources and devotion to dedicate this kind of effort to a student intern, particularly during the school year when students work only one or two days a week for a few months and then are replaced by the next semester's interns. The situation is unquestionably better in summer intern programs when students work full-time and participate in organized activities as a group. The student intern I shared with another AUSA in the summer was able to work intensively on a particular case, observe a status conference with the Magistrate Judge, attend a lengthy deposition, and conduct research for a letter-brief concerning discovery disputes. This contrast at least suggests that a total immersion experience is preferable to a more hit-or-miss part-time program because the students become more assimilated into the office, have more continuity with particular cases, have more opportunities to observe events repeatedly, and have a more defined role in the office.⁴²

Instead of using my time to raise the standard of intern supervi-

⁴¹ See, e.g., Liz Ryan Cole, *Training the Mentor: Improving the Ability of Legal Experts to Teach Students and New Lawyers*, 19 N.M. L. REV. 163 (1989); Motley, *supra* note 38.

⁴² Recent defenders of learning through doing have argued that when students are exposed and entrenched in the work place, even without the benefit of an educator-facilitated interpretation, their overall education and general critical capacities become more effective. See, e.g., Baker, *supra* note 10, at 317 ("The central impact of this discussion of contextualism for a theory of ecological learning is that the law student will learn about lawyering primarily by immersion in the community of legal practitioners participating in the flow of their meaningful and functional events which the student will gradually integrate into more and more coherent and comprehensive happenings."). See also Daniel J. Givelber, Brook K. Baker, John McDevitt & Robyn Miliano, *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. LEGAL EDUC. 1, 9-15 (1995).

sion, I found myself sinking to the level of expediency associated with the least effective practitioner. If even I was unable to commit to high-quality field supervision, I despair that this model of clinic will ever offer the caliber of training and experience of a true reflective practicum. It would have been interesting to learn what Nancy thought she derived from her experience and what she was sharing with her classmates and teachers during her clinical seminars. Given the congenial atmosphere in the office, the interesting nature of the problems she researched, and her opportunities to investigate the courthouse, she may well have been quite satisfied with her internship.⁴³ I used to speculate about her journal entries and the experiences she may have described during her classroom component. Regardless of what her conclusion may have been, I am skeptical that she actually learned very much, given her very limited opportunities to participate in or even observe actual proceedings, to connect her research to either a proceeding or an outcome, or to build many skills.

Ironically, perhaps my most significant lesson about externships emanated from my own experience as a quasi-intern, rather than my performance as a supervisor. During my first week in the office, my immediate supervisor discussed with me the kinds of matters and types of proceedings on which I would like to work. I was the recipient of thoughtful, planned supervision in the form of case assignment since she and my other supervisors hand picked my cases and looked for interesting and diverse issues that would provide the kinds of lawyering opportunities I wanted. They selected cases that were within my perceived abilities and assigned me to work collaboratively on cases that would have been too complex for me to handle alone. If Nancy had been the beneficiary of such well considered supervision, the source of her satisfaction would have been based on a sound plan of instruction rather than happenstance.

H. *Journal Entry: Accusations of Misrepresentation*

In the middle of the year, I become part of a team of lawyers working on the largest Civil RICO action⁴⁴ ever brought by the Department of Justice. More than 100 individual and corporate defendants are being sued on the theory that they were conducting the affairs of the garbage hauling and carting industry on Long Island through a pattern of racketeering.⁴⁵ After a delay of more than two

⁴³ The findings of Givelber, *et al.*, *supra* note 42, indicate that work in government offices ranked in the middle range in overall educational rating, *id.* at 29, table 5, and near the top in adequacy of supervision, *id.* at 30, table 7.

⁴⁴ 18 U.S.C. § 1963.

⁴⁵ For the factual background of the case, *see* United States of America v. P.S.I.A., *et*

years while the motion was pending, the district court judge granted the government's summary judgment motion against the lead defendant, alleged to be a major player in the Luchese organized crime family. The court has ordered several equitable remedies, including divestiture, injunction, and disgorgement of profits.⁴⁶ This defendant is now appealing the court's grant of summary judgment and the specific equitable relief ordered.

The lion's share of the legal issues on appeal have been thoroughly addressed in the district court. I am asked to write the section of the brief responding to the appellant's challenge to the remedial relief, a point which no one has previously briefed. While the appeal is pending, the rest of the case is proceeding on so many fronts that four AUSAs are thoroughly occupied by a range of motions and discovery proceedings. Some defendants are either taking or defending depositions. One defendant, who had been ordered to testify by the Magistrate Judge despite his assertion of a Fifth Amendment privilege at his deposition, is now appealing that ruling to the district court.⁴⁷ Other defendants seem to be making settlement noises. Meanwhile, we are conducting discovery in order to determine how to enforce the disgorgement order against the main defendant.

In the midst of this furious activity, I become the contact person for the lawyer handling the appeal on behalf of the main defendant. On the eve of filing our brief, this defendant is indicted on racketeering charges by the office's Criminal Division. We want to mention the recent indictment in our brief but, given the timing, the indictment is not part of the original record on appeal. We decide to insert a succinct footnote about the indictment in the brief and to file a request to expand the record simultaneously with the brief.⁴⁸ Standard Second Circuit motion practice requires us to indicate, on the cover sheet of the motion, our opponent's position on the request to expand the record. I call the appellant's lawyer.

Counsel does not oppose the request to expand the record, although he is obviously not pleased about any allusion to the indictment, however concise, since it calls attention to his client's criminal charges. During the phone call he cryptically asks, "I hope I won't find any surprises in the brief?" I do not understand his question since the very point of our conversation and his consent to our request

al., 793 F. Supp. 1114 (E.D.N.Y. 1992).

⁴⁶ *United States v. P.S.I.A., et al.*, 811 F. Supp. 808, 818 (E.D.N.Y. 1992), *aff'd*, 995 F.2d 375 (2d Cir. 1993).

⁴⁷ Fed. R. Civ. P. 72 (a).

⁴⁸ The more cumbersome alternative would have been to await the granting of permission to expand the record and then file an amended brief containing the footnote.

implies that he is aware that the brief eventually will contain the reference, so the feared “surprise” presumably refers to something else. Therefore, I reply, “No”.

When he receives the brief, he is furious. Apparently he inferred from my “no” that our brief would not mention the criminal charges. In his answer to the motion, he accuses me of lying. I am very upset by the accusation, and agonize over the details of this fleeting conversation in an effort to fathom the misunderstanding and his anger. My reaction begins with shock, then transforms into self-doubt and worry, and eventually dissipates as my supervisors listen to my story and reassure me that I do not appear to have misrepresented anything. My adversary’s query is either deliberately disingenuous, obscure, or indirect. He probably is overreacting due to his own vulnerable position in the litigation.

The court perfunctorily grants our motion without commenting on his allegations. This ruling eliminates the sting of the accusation. Until the court rules, however, I feel vulnerable and defensive.

Reflection: Lessons About Professional Responsibility

From its earliest years, clinical education has been valued as a laboratory for learning about professional responsibility.⁴⁹ Students confront or observe situations in which they must make difficult moral and ethical decisions in a comparatively controlled and safe environment where they enjoy the collective advice and support of their teachers and peers. Moreover, many of the forces that contribute to questionable choices by lawyers — misguided loyalty to clients, fear of economic consequences, time pressures — are absent, or at least diminished, in the clinical setting. Clinical education is dedicated to the development of the instinct and intuition that play such a large role in making judgments about a lawyer’s conduct in a real world in which professional rules and norms are vague. I would have thought that after so many years, my personal “art of *ethical* practice” would have been sufficiently well developed and reliable that I would trust my instincts and be able to judge my own conduct.

Years ago, as a new lawyer working for the Criminal Defense Division of the Legal Aid Society, an Assistant District Attorney in Manhattan told me that he would do something (probably give my client the plea offer I was seeking) simply because I was representing

⁴⁹ See Barnhizer, *supra* note 36, at 71-79; Charles H. Miller, *Living Professional Responsibility — Clinical Approach*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 17, at 99; William Pincus, *Legal Education in a Service Setting*, *id.* at 27. More recent articles include Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLIN. L. REV. 505 (1995).

a fact to be true and he trusted me. At this very early point in my career, I realized that personal credibility and a reputation for integrity were vital for success as a lawyer. Now, when my adversary impugned my honesty, I felt compromised, even when, by all accounts but his, I had not done anything wrong.

Under the shadow of this accusation, I could not stop worrying that perhaps somehow I *had* put the expediency of the case ahead of my personal integrity. Had my role as litigator confused my instincts, particularly in this case which was a contentious civil lawsuit involving many pugnacious lawyers and shady defendants? The other AUSAs, who seemed to have no trouble being simultaneously forthright and effective on this case, did not consider my remarks to have been misleading. Yet, my emotional response was interfering with my capacity to evaluate the allegation objectively, so that, completely irrationally, the mere accusation made me feel guilty.

After this experience, when I look back on the many, many times I have spoken so authoritatively and judgmentally about the decisions and actions of other lawyers and students, I am appalled at my certitude. While I had managed to be a lawyer for a long time without any blots on my record, most of that time had been spent in the protected corridors of the academy rather than the hurly-burly of law practice. In the context of my prior clinical teaching, I was so familiar with the ethical territory of criminal practice that making and justifying ethical judgment calls was not difficult. Moreover, as a clinician, I was usually one step removed from most front-line interactions with adversaries since the students were supposed to be carrying out all of the lawyering responsibilities. This distance frequently provided a cushion of time to mull over the ethical implications of any situation and to try to resolve them collectively with the students. Given this structure, I usually acted in the background as counsellor to the students without directly dealing with the client, opposing counsel, or court. To the extent that I was ever accused personally by an adversary of any ethical improprieties as a result of my supervisory role, these allegations were usually tactical, intended to intimidate the students. Once I became directly involved, their intensity usually dissipated.

I drew two lessons from this minor incident which, if anything, illustrated how perilous litigation can be and how difficult it is to apply vague ethical norms in fast-paced situations. As a lawyer and as a person, I was unprepared for how deeply sensitive to any suggestion of misconduct I was and how even the flimsiest allegation of wrongdoing made me feel insecure. It had indeed been a long time since I had felt so unprotected by my academic role. As a clinician, I was also reminded that even experienced practitioners can make, appear to

make, or be accused of making misrepresentations, particularly in an intensely adversarial situation. Obviously the many correct ethical decisions that are made spontaneously and intuitively reflect a knowledge that can be learned through repeated practice, discussion, and reflection. Within law practice, however, the nuances of situational ethics pose the challenge of unanticipated problems which even the most seasoned lawyers have difficulty foreseeing and handling.

I. Journal Entry: The "Big Case" Negotiation

Soon after my arrival in the office, I start to work on a long-pending False Claims Act lawsuit.⁵⁰ The government alleges that the defendant-company and its executives defrauded the military by submitting false invoices in connection with certain contracts. The government is suing to recoup those losses as well as to impose punitive damages. The documents in the case fill a room of file cabinets. The pile of paper comprising the various motions in the case is about two feet high.

Over the years of this case, relations between our office and opposing counsel have been strained by distrust and a sense that the lawyers in this firm are "Rambo" litigators. For example, when we were in the midst of taking a very lengthy deposition of the key witness, counsel for the defendant filed a preemptive motion for partial summary judgment. This tactic provoked days of discussion about our response. Ultimately, we filed a cross-motion for complete summary judgment. The two motions and their attachments were voluminous. I felt like I was making an important contribution to the case by writing a key portion of our memorandum of law and assisting in the preparation of the appended exhibits, affidavits, declarations, and other documents.

The judge to whom the case was assigned had senior status and only sat in the district during certain months. He set a tight schedule within which to file the papers and hear oral argument. We expected a long delay before he ruled. Amazingly, we received the order denying both motions within a few months. The decision contained language which, in our optimistic, between-the-lines interpretation, seemed to indicate that the judge had bought our theory of the fraud.

This aggressive motion practice had an explosive effect on the case. Our adversary began to make settlement overtures. After months of discovery and motion practice, and several years of high-pressure, often acrimonious litigation, the defendant finally comes to the bargaining table. We speculate about other reasons that might

⁵⁰ 31 U.S.C. §§ 3729-33 *et seq.*

have prompted their newly conciliatory attitude, such as the possible sale of the parent company, some change in management policy, or the increasing costs of the litigation. Whatever their motivations, we all arrive at the bargaining table for several long negotiation sessions.

These sessions are very instructive on several levels. First, and of utmost importance to all of us, we learn about our adversary's positions regarding the contours of any potential settlement. For me, the discussions provide a very illuminating window into the art of high-stakes negotiation. Since one of my colleagues is the lead negotiator for our team, I am able to observe both the substantive and skills dimensions of the process.

It is clear to us that the defendants have made the decision to settle the case, so our negotiation posture assumes this eventual outcome. Despite the years of antagonism, everyone is cordial and respectful, even slightly formal, during these discussions. We sit around a big conference table as each side makes its presentation, offering a theory to justify its claim that a particular amount was appropriate. It is apparent, however, that these theories and characterizations were superfluous to the settlement itself and only useful to frame the discussion and provide justifications for disparate dollar amounts. We probably could as easily have put our offers on the table, and simply decided to split the difference, and then focused on the terms and conditions of payment, which were bound to be almost as important as the amount itself.

After several rounds of negotiation, we settle for \$17,500,000.⁵¹ Exultation is an understatement. We are convinced that the defendant corporation had profited enormously and illegally from the misconduct of its employees. Now, the company will repay millions of fraudulently obtained dollars. This is one of the biggest civil settlements in the history of the office.

Reflection: The Value of Collaboration

This was my favorite case and one of the headiest experiences of my time in the office. My association with the team of three AUSA's who were handling this matter and my observation of the work product of a high-powered law firm taught me an enormous amount about complex commercial litigation. We negotiated a huge settlement with a group of tough lawyers who were representing a major corporation. Before this satisfying outcome, however, we had spent hours working

⁵¹ By the time the specifics of the settlement agreement had been hammered out and the documents signed, I had left the office. Before my departure, the general terms and amounts had been determined, so I was deeply involved in the heart of the negotiation process.

on the motions, preparing for court appearances, and brainstorming about the case. Ultimately, my greatest sense of accomplishment derived from the team effort that went into the case. The level of discourse about legal and strategic issues was both intense and intelligent. In addition, and extremely gratifying to me, my co-counsel fully accepted me and appeared to value the contribution I was making to the group effort.

On an almost daily basis, we met in each others' offices to report, strategize, react, joke, and plan. At first, I was not sure what I had to offer the team since they all seemed to understand how to organize file cabinets of documents, create privilege lists, prepare a witness for a month-long deposition, and to compile the exhibits for motions. Soon, however, I was given particular tasks (*e.g.*, taking depositions of several minor witnesses, determining the legal status of a defendant who had been found incompetent to stand trial in a related criminal case, drafting part of a legal memorandum in support of summary judgment, and appearing alone at a status conference). I mastered the organization of the documents and the majority of the complex and technical background facts of the case. Although I never achieved the level of expertise of one team member who had the uncanny ability to lay her hands on *any* document without apparent effort, I developed a working knowledge of the case and began to feel that I was an equal member of the group.

Although the case had been going on for some time, it was a good point to join the team because the demanding discovery phase was about to begin, so the team could use additional help. All of the tasks were divided, with one lawyer overseeing all aspects of the case. At any given time, therefore, certain individuals were busier than others. The decisions about which of us would have particular responsibilities were made easily and equitably. My impression is that personal grievances would not have been tolerated either by my colleagues or our supervisors, but everyone approached the collaboration so cooperatively that the notion that there might be problems never even occurred to any of us.

Several clinicians have commended student collaboration as an important aspect of clinical methodology.⁵² In a clinic, students may be grouped into teams or assigned to work together on particular cases in order to make the representation more efficient. Collabora-

⁵² See, *e.g.*, Susan J. Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 VT. L. REV. 459 (1993); David F. Chavkin, *Matchmaker, Matchmaker: Student Collaboration in Clinical Programs*, 1 CLIN. L. REV. 199 (1994)(detailing some of the advantages and disadvantages of collaboration for both students and supervisors).

tion also has pedagogical values, teaching the students about division of labor, respecting and working with the ideas of others, and learning about the thinking and working styles of others. Collaboration can also teach the individual student about his or her interpersonal strengths and weaknesses. In order to enhance this component of the learning experience, the clinical teacher occasionally has to divert the focus of supervision to the dynamics of the collaboration.

Obviously, my collaboration was dissimilar from the typical student team effort, since we were working together solely to meet the demands of the case with no other agenda. Moreover, we were all experienced lawyers and predisposed to work amicably. While student teams can experience emotional upheavals or personality conflicts which can cause practical difficulties and divert the supervisor's attention from case and client needs, our collaboration was devoid of those problems. We were presumably more mature than most students. We were not being graded on our work, we were not hierarchical, and we were sufficiently compatible to allow the collaboration to strengthen rather than detract from the energy spent on the case. All of us were deeply invested in the case and our cooperation provided additional motivation to work productively. We frequently put aside other demands to bounce around ideas, read each other's work, and discuss recent developments. Around the office, other Assistants seemed to envy our camaraderie and jokingly referred to us as "The Target Rock Team," after the name of the case.

Unquestionably, a case of this magnitude required a team effort, but our affinity made the work more enjoyable and sustainable. This collaboration provided me with an opportunity for detailed feedback and validation, as well as to engage in cooperative problem-solving, in contrast to the many other cases on which I worked in isolation. Furthermore, this case, more than any other on which I worked, helped me meet my goal of acquiring substantial federal civil litigation expertise as I both participated in, and observed in depth from the inside, the workings of a complex lawsuit in the hands of excellent lawyers on both sides.

J. Journal Entry: Running Conversation

The U.S. Attorney's Office has a system of mentoring that requires all written work to be read by a supervisor and revised, if necessary, prior to submission. All settlements have to be approved by the Civil Division's Chief. Although this system makes a certain amount of oversight inevitable, it is nevertheless difficult to find a way to brainstorm about a case. Supervisors and other Assistants are always cordial and willing to talk if approached, and on many occasions

I benefit from close personal attention that consumes many hours of the time of many AUSAs. Yet everyone is so busy that I hesitate to impose even though my original reticence about revealing my ignorance has dispelled over time. In this context, my temporary insider status interferes most unproductively. Perhaps if I were a young, new attorney I would sit around for hours into the evening engaging in pick-up conversations about my cases, developing friendships in the process. Instead, I want to get home to my family. My age and my peculiar hybrid status really set me apart.

I am lucky, though, because I have my own personal clinical trainer, Kathleen Sullivan, an accomplished clinician and my colleague at Brooklyn Law School for eight years, who now teaches at Yale Law School. Over the year, Kathy is my sounding board — part friend, part colleague, part mentor — filling the gap created by the differences between me and the other Assistants in the office.

Every morning at 6:30 we meet to run (slowly) for about forty-five minutes. During that time, I am able to impose on Kathy's highly evolved listening skills, raising my questions and concerns for the day while we burn fat. Without disclosing any confidential aspects of my cases, I am able to discuss my understanding of the law (pant, pant. . . just what is this materiality standard in summary judgment motions? how does the immunity defense work in civil rights litigation? how do the statutes prohibiting age discrimination interact with those prohibiting sex discrimination?), strategic decisions (huff, puff. . . when should I make the motion? in what order should I notice the depositions?), and silly practice pointers I was too embarrassed to ask anyone else (wheeze. . . how do you mark exhibits for a deposition? can you really just pick up the phone and call a Magistrate Judge in the middle of the deposition to obtain a ruling?).⁵³ I also can brag unself-consciously, confess my shortcoming safely, and receive advice gracefully.

Reflection: The Need for Someone to Talk To

Several extremely talented AUSAs were my formal or *de facto* supervisors and reviewed all of my written work. Occasionally, I would show someone a deposition outline. In addition, working with teams of lawyers on several cases diversified my sources of feedback and, because my co-counsel were so knowledgeable about the particulars of the case, their reactions were especially meaningful. I absorbed a lot from them mostly through osmosis and alert observational skills

⁵³ When Kathy read a draft of this essay, she disputed my parody of our running, believing that all that strenuous effort deserved more serious recognition.

rather than any intentional teaching on their part. In this respect, I was *their* intern and my learning patterns were similar to my extern students, only much more efficient. They were generally supportive of my efforts. Despite this encouragement, I was never convinced that the explanation for their positive reactions to my work stemmed from their respect for its quality, even if, objectively, it indeed may have been good enough to require little criticism. Instead, I think that the office norms were to respect colleagues' work and to assume that very little needs fixing.

Despite this wealth of experienced role models, I hungered for the more detailed, leisurely conversations found in a clinic. No doubt, I am romanticizing clinical supervision since few of us ever have as much time to devote to students as they might crave. Indeed, while I could easily recollect my frequent impatience and exasperation at lengthy student conferences, I began to appreciate how much the students wanted to prolong these discussions. I needed a colleague who had the time, the inclination, the patience and the skill to let me ask questions and raise issues, ranging from complicated to silly, without any other agenda. In short, what I needed was a friend, who also could impart something useful about federal civil litigation.

My connection to Kathy, of course, was neither as teacher nor mentor. Nor were we two novice students finding solace in our mutual insecurity and ignorance. Kathy herself prefers to call our relationship one of "true clinical peers," two partners who could discuss any subject with mutual respect. Kathy was someone to whom I could speak honestly about my ideas, concerns, and insecurities who happened to have well-defined supervision skills and the time (a comparatively luxurious 45 minutes a day) to listen to and counsel me. We could communicate free from judgment. Her observations, suggestions, and comments empowered me to return to the office and engage in more textured and meaningful conversations with my supervisors. Our discussions reflected the "high interpersonal intensity"⁵⁴ attained when people engage in mutually beneficial and supportive exchanges that are the hallmarks of the most successful incarnation of a reflective practicum.

Unlike the typical supervisor-student dialogue, our running conversation was not completely one-sided since we discussed Kathy's cases and concerns also.⁵⁵ Undoubtedly Kathy was more tolerant and

⁵⁴ SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER, *supra* note 9, at 171.

⁵⁵ Both Kathy and I were scrupulously attentive about any potential conflicts of interest that might arise from the disclosure of the facts and circumstances of our cases. Since the textual description makes us sound one-dimensional, I should note that many of those miles covered less serious topics like children, gossip, clothes, friends, etc.

generous to me as her friend and peer than she might have been to one of her students,⁵⁶ and certainly engaged freely in uninhibited self-disclosure. She was very direct and unsparing with her advice, her attention, and her support. Perhaps she was too short of breath to be long-winded, or she had to be efficient since our runs only lasted for forty-five minutes. Her focused and incisive comments were more helpful to me than the discursive, carefully and tactfully framed feedback we generally give to students.

No doubt my needs were different from the clinic students with whom I have to start a new relationship at the beginning of each semester. Kathy and I had the luxury of an established relationship of trust, obviating the need for the usual preliminaries in the communication between supervisor and student. We had an effortless "state of communication grace."⁵⁷ As a more experienced and, by the middle of my year, more self-assured practitioner, I welcomed the straightforward approach.⁵⁸ My needs and abilities were not the same as the novice lawyer or clinical student. I did not require the space for initiative and reflection that explicitly non-directive supervision imposes in order to teach novices how to ask the right questions or solve problems. With some minor, but focused direction, I could think through most problems independently.

Most clinicians probably practice a more indirect form of advice-giving with their students in order to teach them to think for themselves and to be open to constructive criticism. Our students certainly need a more open-ended approach that allows them to reason and draw conclusions independently without "giving them the answer." It is possible, however, that at some point during a clinic, some of our students are ready for a more egalitarian approach that is predicated on a respect for the validity of their independent judgment. This more mature professional sense may develop in our students sooner than we recognize credit. Certainly, in my advanced professional state, my personal needs coupled with my learning abilities

Our running discourse proved to me that even at our relatively advanced level of professional experience, self-confidence, and accomplishment, it is still better to have a companion, partner, collaborator or other responsive associate who can be, at appropriate times, either encouraging, skeptical, helpful, or challenging. Even though we

⁵⁶ For Kathy's own version of the dynamics of her relationships with her clinical students, see generally Kathleen A. Sullivan, *Self-Disclosure, Separation and Students: Intimacy in the Clinical Relationship*, 27 IND. L. REV. 115 (1993).

⁵⁷ SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER, *supra* note 9, at 100.

⁵⁸ Anyone who knows Kathy will be able to appreciate that, for her, "straightforward" does not mean abrupt, brusque, or brutal. While Kathy does not pull punches, her fists are always cushioned with concern and kindness.

were not needy novices, these reinforcing conversations reaffirmed for me the value of peer connections, the supportiveness of some type of collaboration, and, when experience is unequal, a mentoring relationship. These features are often, but not universally, built into any good clinical experience, and should be imported into the work place.

II. LESSONS FROM A YEAR IN PRACTICE⁵⁹

My journals and *ex post facto* reflections expose the mixture of perceptions and emotions that surfaced during my year in the U.S. Attorney's Office. Litigator. . . student. . . clinician. Neophyte. . . old hand. Apprehensive. . . confident. Impostor. . . achiever. Unassimilated. . . insider. Transient. . . colleague. This confusion endured for several years, well into the writing process. Was I comparing myself to a clinic student, and if so, what kind of clinic? Was any comparison to a student legitimate, given the considerably advanced stage of my career? Was there any real correspondence between the supervision of a veteran lawyer and that of a student? Would I treat my students differently or ask more of supervisors as a result of my experiences as a quasi-intern? Were my insights about the events that happened to me transferable to my students? Did I even want to burden my gratifying experience with the weight of too much systematic reassessment, particularly publicly?⁶⁰

⁵⁹ With acknowledgment to Liz Ryan Cole, *Lessons From a Semester in Practice*, 1 CLIN. LAW REV. 173 (1994).

⁶⁰ Several other obstacles interfered with starting to write. First, I continued to be formally associated with the office for almost a full year after my return to the law school. Another more personal concern contributed to my procrastination, or more precisely, my avoidance. Writing critically, and for publication, about my experiences inevitably would run the risk of offending or alienating the people with whom I had worked so effectively and companionably. I was the first academic who had made an exchange with this office and I was anxious that the experiment work. My vacillation in this regard was different from that of student interns who tend to identify so closely with the host office and supervisors that they lose their objectivity. For them, any criticism feels like disloyalty. I knew I was not disloyal, but was concerned my former colleagues might react differently. My welcome into the community was so warm, and my gratitude to all my co-workers so sincere, that I feared threatening the legacy of good will and friendship. I also worried that my descriptions of events might deviate from the reality as perceived by my colleagues. Writing about my experiences, rather than, for example, a straightforward legal topic inspired by a case on which I had worked, might suggest that I had been working in the office not as a colleague but as a covert anthropologist, studying the unwitting natives. I wanted to be descriptive and candid, yet any commentary, let alone criticism, might be hurtful and alienating. For example, one of the Assistants who read an earlier draft of this essay was disturbed by my characterization of how certain decisions were made in the office. This understandably protective reaction also highlighted for me that my perceptions were still those of an outsider — and even worse, an academic who overanalyzes everything! First, I simply did not have the depth of experience to accurately understand the inner workings of the office. Even though I think did a good job, I had not *become* an AUSA. Second, I was not so wholly assimilated into the office that I saw my role to shield it from any negative

While I was at the U.S. Attorney's Office, my greatest stimulation came from the work itself. As I hope the previous section made apparent, I savored the process of digging into issues, developing skills, and the feeling of doing important work well. It was tempting to relax into this "learning by doing" mode and simply be a litigator, an enticement to which I succumbed more often than not. My absorption in work allowed me to shed the baggage of contemplation and explanation that is the clinician's *de rigueur* accessory to lawyering action. I was able to discard the stress associated with delegation, supervision, and tactful evaluation. This relief probably explains why I was such an indifferent supervisor to my law student intern.

Like my students, I relished the action — unknitting legal issues, strategizing, appearing in court, negotiating with an adversary — and was content simply to become a better practitioner. In addition to improving my own skills, I am now better equipped to teach about those skills. I had accomplished my goals related to teaching. In addition, this hiatus achieved the other traditional objectives of a sabbatical — a break from normal routines, the challenge of a fresh endeavor, and the deepening of existing competencies. Nevertheless, I was haunted by that all too familiar refrain: "Reflect on your experience." As a clinician, I felt duty-bound to explore one more layer and relate my own activities to some broader theories about learning from experience. As a teacher of practice, I felt obligated to probe my experience as student/practitioner.

In order to impose some coherence on this chaos and to rouse myself to finally organize my thoughts and overcome my trepidation about writing, I turned to some literature about learning from experience. I first read (and, in some cases, reread) the work of Donald Schön,⁶¹ whose theory of education for practice I thought might offer a framework for evaluating my own year in the indeterminate, unpredictable "swamp zone" of litigation.⁶² The crux of Schön's theory is

exposure.

This project was additionally delayed for another reason. My employment agreement required that I submit any writing based on or derived from my time in the office to the Executive Office of the United States Attorney for review, the purpose of which was to avoid revealing any confidential or privileged information, or jeopardizing the cases. A member of that office read the penultimate draft of this article and raised a few minor concerns, all of which have been addressed. Any changes that appear in the published version relate to organization and analysis, and do not alter the contents with respect to the areas of concern to the Executive Office. To give my former colleagues their due, none of the people in the office who read this piece, including anyone at the Executive Office, tried to influence its contents, except to correct inaccuracies and to safeguard the litigation.

⁶¹ See generally the books collected *supra* note 9, and particularly, EDUCATING THE REFLECTIVE PRACTITIONER.

⁶² Schön refers colorfully to "the swampy zones of practice" that exist outside of professional knowledge and rationality. *Id.* at 3.

that professionals eventually acquire an intangible “artistry,” by which he means the “kinds of competence practitioners sometimes display in unique, uncertain and conflicted situations of practice.”⁶³ This often unacknowledged dimension of intuitive awareness normally is revealed in countless unexceptional exercises of judgment and performance. He labels this observable process of demonstrating competence “knowing-in-action.”⁶⁴

For professionals who share a particular language and norms, use certain tools of the trade, and operate within designated structures, “knowing-in-action” is more appropriately “knowing-in-practice,” a process structured by the particular institutional settings and systems.⁶⁵ Success in practice often derives from non-theoretical sources such as intuition, talent, and a developed ability to apply and adapt, even unwittingly, past lessons learned to present problems. Schön helps us to understand why we are struck by the brilliant trial lawyer or consummate negotiator and why some lawyers seem able to handle difficult or unexpected situations effortlessly.

Schön’s “knowing-in-practice” does not function only in familiar situations for which a set of routinized responses have developed. In a real world of unpredictable problems and reactions, the practitioner is compelled to pause and consciously connect the unanticipated event or unexpected reaction to the knowledge already possessed. Schön labels this associative process “reflection-in-action,” the aim of which is to facilitate experimentation with new activities and to develop new or more complex problem-framing capacities and problem-solving strategies⁶⁶

Schön does not believe that “reflection-in-action” can occur in a vacuum, particularly in the context of professional education. In *Educating the Reflective Practitioner*, Schön proposes a teaching model he calls a “practicum” that combines “learning by doing. . . , interact[ing] with coaches and fellow students, and a more diffuse process of ‘background learning.’”⁶⁷ The coach — read: clinical teacher — works with the student, using the student’s tasks and performances as the material of discussion and reflection, and in an exercise of “reciprocal reflection-in-action,” continually examines the validity and worth of the coach’s own assumptions and strategies of practice.⁶⁸ Since this practicum model so closely describes what we know as a law school clinical

⁶³ *Id.* at 22.

⁶⁴ *Id.* at 25.

⁶⁵ *Id.* at 33.

⁶⁶ *Id.* at 29.

⁶⁷ *Id.* at 38.

⁶⁸ *Id.* at 101.

program, Schön's work has become an important source of validation for clinical law teaching methodology generally, and the use of structured reflection, either in anticipation of, or after the fact of, action, with a goal of creating models of practice.⁶⁹

The other theory of learning-through-work I examined relocates the optimal locus of learning from the classroom or tutorial to the workplace itself, and reduces and decentralizes (to the point of virtual elimination) the role of the teacher in favor of more self-directed learning.⁷⁰ In a lengthy article that is the first of a trilogy,⁷¹ Brook Baker advances his theory of "ecological learning," a construct that can be condensed into the fairly straightforward proposition that practice-based experience may be the superior environment for law students to learn skills even without the assistance of a teacher, provided that certain elements are present.⁷² Such settings are exemplified by most extern clinical programs or, even more controversially, by outside employment in a law office (with or without academic credit). Baker essentially devalues educator-centered experiential learning, represented foremost by in-house clinics, and to a lesser extent by simulation courses, both of which are methodologies commended, and even preferred, by *The MacCrate Report*.⁷³ Instead, Baker advocates law practice-based student employment in outside agencies or offices without any on-campus academic component.⁷⁴ For him, education is just as likely to occur during action as before or after it, without any contribution of a Schön educator/coach. Explicit and intentional posi-

⁶⁹ Professor Schön directly applied his theory to clinical law teaching at the 1992 AALS Mini-Workshop on Theory and Practice: Finding Bridges for the Classroom. See Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 CLIN. L. REV. 231 (1995). For examples of writings of clinicians referring to Schön's theories, see articles collected *supra* note 9.

⁷⁰ Proponents of externships historically have emphasized the development of students' capacity to assume greater responsibility for their own education, but none have eliminated the role of the law school teacher to the degree that Baker does. See, e.g., Motley and other articles collected *supra* note 39.

⁷¹ Baker, *supra* note 10.

⁷² A summary of Baker's full theory of "ecological learning" can be found in Givelber, *et al.*, *supra* note 42, at 9-15. In that article, the authors, who include Baker himself, refer to the second and third parts of the Baker trilogy, *Self-Directed Learning Post-Modernized: The Role of Autonomy, Self, and Self-Realization in Law Student Work Experience* (1994), and *Connection and Expertise in the Workplace: Finalizing a Theory of Ecological Learning* (1994), both of which are in manuscript form on file with the authors.

⁷³ AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992).

⁷⁴ Baker, *supra* note 10, at 292, 354. At Northeastern University, the law school where Baker teaches, the co-op model provides this kind of practice-based experience. See Givelber *et al.*, *supra* note 42, at 19 n.97.

tive modeling by practitioners, a learning method acknowledged by several clinicians as potentially effective for some students,⁷⁵ as well as merely average or even negative performances observed by the students on their own, formal and informal conversations with lawyers in the workplace, and intuitive judgments in response to performance are all means to the end of learning the art of law practice.

Baker asserts that people learn best when situated in a real setting or context, while functioning as a lawyer, working on a variety of tasks connected with real legal problems, in the genuine milieu of the lawyer.⁷⁶ The next component of his theory focuses on the nature of the experience itself. He contends that experience is most educational when it is repeated, varied, ability-appropriate, and valued by others in the workplace.⁷⁷ His other elements, developed in his later, as yet unpublished works, require that the work "has to be performed within a web of professional relationships which provide support, guidance, and feedback to the novice."⁷⁸

Baker relegates reflection and theory-building about lawyering to a more marginal position than Schön, one that is not dependent on an educator or coach.⁷⁹ Baker demurs that his theory merely readjusts current notions of reflection-on-action, exemplified by Schön's practicum, to include the time and place of the experience itself and not only during a pre- or post-experience, educator-facilitated stage. Yet, his message undeniably contravenes the historically dominant clinical pedagogy which strongly favors the involvement of professional educators in the experience-reflection-theory-new experience continuum.

While this summary admittedly oversimplifies both Schön's and Baker's ideas, the main difference between their visions seems to boil down to whether effective practical learning for the novice requires the guiding hand of a professional educator. In his exegesis against "the hegemony of educator-centeredness,"⁸⁰ Baker takes on the clinical teaching orthodoxy that owes much to Schön's vision of a productive, mutual interchange between student and teacher. He repudiates the primacy of the in-house clinic with its heavy reliance on full-

⁷⁵ See, e.g., Hoffman, *Clinical Course Design*, *supra* note 36, at 298-300; Kotkin, *supra* note 10, at 199-202.

⁷⁶ Givelber *et al.*, *supra* note 42, at 9-10; Baker, *supra* note 10, at 310-16, 317 ("The central impact of this discussion of contextualism for a theory of ecological learning is that the law student will learn about lawyering primarily by immersion in the community of legal practitioners participating in the flow of their meaningful and functional events which the student will gradually integrate into more and more coherent and comprehensive happenings.").

⁷⁷ Baker, *supra* note 10, at 324-32; Givelber *et al.*, *supra* note 42, at 10-11.

⁷⁸ Givelber *et al.*, *supra* note 42, at nn.2, 11-12.

⁷⁹ Baker, *supra* note 10, at 353-55.

⁸⁰ *Id.* at 354.

time clinical faculty.

At the conclusion of my ephemeral return to the learner role, I tried to determine what relevance these theories had to my own year in practice as a part-expert/part-novice, and what, if any, light my admittedly *sui generis* experiences might shed on the application of these theories to typical clinical students. After struggling with these questions, I concluded that the competing theories of Schön and Baker both contain ingredients useful to an understanding of my experience, but neither theory fits perfectly.

In Schön's world, I am neither novice nor coach, yet have many of the needs of the former and the knowledge of the latter. Although I had little background in the specific types of litigation I undertook, my lifetime of experience qualified me to claim title to a certain amount of what Schön calls professional artistry.⁸¹ As related in some of the anecdotes in the journals, I was able to competently diagnose problems and construct workable solutions. Moreover, I was fairly adept at examining my work for areas to improve and applying this self-awareness to future tasks. I could compensate for whatever expertise in the particulars that I lacked by referring to the categories, norms, constraints, and structures familiar to me from years of practice. To the extent that I needed to adapt in the office community, that process was ameliorated by the support of my co-workers, and by our usually shared belief (despite my frequent, and generally unfounded, insecurities) that I was capable of doing the work.

My professional accomplishments were numerous, judging by the vast amounts of new knowledge and skills I had acquired, and the accumulation of work product that I carted back to the law school. Unquestionably my year's immersion in practice gave me a fundamental understanding of federal civil litigation. Of the two theories, therefore, my assimilation into a work environment in which I was independently responsible for my own learning process more closely resembles Baker's characterization of learning-through-work. My experience tended to prove Baker's description of the process of learning, changing, and acculturating in a legal setting as essentially "an internal one of confronting and revising immature . . . and ineffectual understandings."⁸² On the other hand, the breadth, depth, and intensity of my education owes much to my own relatively advanced state of professional development. I am unconvinced that I would have learned as much in the same situation as a law student, the learners

⁸¹ "[A]n exercise of intelligence, a kind of knowing. . . that includes an art of problem framing, an art of implementation, and an art of improvisation. . . ." SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER, *supra* note 9, at 13.

⁸² Baker, *supra* note 10, at 355.

whom Baker has in mind. Indeed, most beginners, particularly law students, simply would not have been given as much autonomy or responsibility as I was, even if they had worked full-time.⁸³ Finally, after several years of disuse, I admit to having forgotten a great deal of the detailed knowledge I had acquired about, for example, the Federal Rules of Civil Procedure. While my judgment and general confidence in civil litigation processes are intact, I realize that one year was not enough to develop the expertise I witnessed in my colleagues and that lack of practice has dulled my skills. Given that the typical student internship is so much more limited than my own year in practice, I suspect that most of the concrete knowledge the intern acquires is quickly forgotten without repetition and reinforcement, attributes that are usually built into the in-house clinic teaching methodology.

Moreover, I could not have had so rich and satisfying an experience without the considerable resources available to me, the majority of which would be unavailable to the usual clinic student or new employee. Not only did I have years of experience — tacit knowledge — that reinforced my personal learning process and made my very steep learning curve easier to master, but I also had more than the usual amount of access to help from supervisors, colleagues, and friends. While much of my experience resembles Baker's "ecological learning," I take issue with his downplay of the role of the trained educator. As the recurrent themes in my journals and reflections disclose, even someone as conditioned to the tradition of reflection as I still longed for and was most affirmed when engaging in lively and concrete dialogue about substantive law, judgment, strategy, and skills. I generally had to expressly seek opportunities to reflect beyond the needs of a certain case, given that the nature of the conventional supervision at the office was very instrumental, dedicated to improving the litigation and only incidentally the litigator. By taking the initiative with my colleagues in the office, particularly my team mates, and also my "clinical peer," Kathy Sullivan, I was able to maximize opportunities to internalize what I was so busy seeing and doing. A newcomer to an office or an intern would not have the same rich mentoring resources, and would surely be much more inhibited about asking for assistance. My own extern students are always more confused and anxious about how and when to seek supervision than my in-house students whose regularly scheduled conferences leave no room for doubt that they are expected to share all aspects of their experiences. Students and all beginners worry about exposing their inadequacies to their supervisors by asking "stupid" questions or seeking clarification. My own

⁸³ Full-time, semester-long credit bearing programs are still relatively rare. See, e.g., Givelber *et al.*, *supra* note 42 (Northeastern); Cole, *supra* note 58 (Vermont Law School).

year, therefore, confirmed my long-held belief that the dedicated full-time clinical educator in a safe environment of the law school is central to the best clinical education, whether in-house or extern, for all of the off-stated reasons.⁸⁴

Years ago, when I began to practice, most beginners soaked up lawyering lessons through a hit-or-miss process of on-the-job training. For better, or worse, it worked. We inevitably became better lawyers even without the assistance of mentors or personal coaches. During my year in practice, I successfully repeated this absorption technique. This kind of situational evolution is exactly the process to which Baker has given the label "ecological learning." No one could dispute the self-evident assertion that "novices do learn in context by engaging in meaningful and appropriate work under the routine guidance of expert practitioners and collaborative peers."⁸⁵ This sounds a lot like the apprenticeship route to a license to practice law which flourished well before the era of modern law schools. But this historical option should not be romanticized. As law graduate "apprentices," many of us learned bad habits, never stopped to think while cutting and pasting others' work, and, as we carried the briefcases of others, may never have been given much independence. We may have learned to copy and adapt the preexisting form, but could we create it from scratch? This version of education assigns the decisions about content, values, and skills to randomly selected strangers, a delegation that should give pause to anyone seriously concerned about legal education. The fortuity that people willing to learn will learn under the right circumstances cannot validate that portion of Baker's theory that dispenses with the self-consciously reflective component provided by a clinical teacher.

I discovered in my year in practice that even an aging clinician, who is undoubtedly capable of learning new skills through self-generated critical observation, craves as much supervision, engagement, guidance, and specific information as any neophyte or clinical student when she is put in a new situation. This observation corroborates the generally shared belief that the presence of a mentor dedicated to students' needs enhances the learning process. Everyone — even a clinical teacher with an efficient learning style — can learn more proficiently, more lastingly, and more dynamically with someone who is truly invested in guiding them. Because Schön's practicum dialogues are meant to be applicable to basic learners rather than individuals with greater, even if tangential expertise, the details of his model

⁸⁴ See generally *Report of the Committee on the Future of the In-House Clinic*, *supra* note 40.

⁸⁵ Givelber *et al.*, *supra* note 42, at 43.

do not readily adapt to describe my experience. His general idea, however, that conversations in which pertinent and in-depth questions are raised and discussed enrich the problem solving process is indisputable.

In Part I of this article, I explored the many parallels between my experiences as a rookie federal civil litigator and those of clinical students (both those in externships and in-house clinics). As I have described, I often found myself in situations similar to that of a clinical law student who is performing an unfamiliar lawyering task and is on the receiving end of supervision. Perhaps the most unusual benefit of my year was the role-reversal opportunity that served the dual function of allowing me to assume an alternative professional persona and to discover something about the student's perspective on experiential learning.

I have no revolutionary proposals for teaching or treating clinical students differently as a result of this opportunity to empathize with them. My legacy is rather a renewed appreciation for the vulnerability and limitations of the beginner. We ask a lot of our students in the skills, ethical, moral, and personal dimensions, and then grade them for their efforts. Operating under pressures of our own, we may forget how difficult the adjustment can be for many of them. In addition, we tend to overlook the powerful influence of clinicians on student behavior, given our often uniquely close and usually quite intense relationship to the students. The opportunities I had during the year to step into my students' shoes, even if the fit was imperfect, succeeded in heightening my awareness of their sensitivities and struggles, and should cause me to pause and at least reconsider my attitudes and approaches to them.

There is no single right way to reflect on experience. It can be a process that occurs contemporaneously with the events described or that extends over time, separating the actual experience from present perceptions. Either approach has benefits that the other lacks. Simultaneity promises greater accuracy and more details, but it also does not allow for much perspective, basis for comparison, or introspection. Some disjunction between the experience and its contemplation assures a more informed, seasoned, and probably more objective examination and fewer premature or shallow conclusions.

On balance, I am glad I waited to sift through my experiences. After my return to the law school, my "academic" perspective resurfaced, replacing my more hectic "litigator" lifestyle, giving me the time and the incentive to ponder more thoughtfully. Even while writing this essay, I unpacked ideas, reactions, and connections that I had never identified or articulated during my year away, and I returned to

issues that I had last encountered many years ago as a student or young lawyer.⁸⁶

When my students review their journals at the end of a semester or a year, they see the full range of their experiences and usually can take measure of their changes and progress. They see which preexisting assumptions have been challenged and which have been affirmed. Most importantly, this stock-taking allows them to put closure on the clinical experience while facing the challenge of moving into the next stage of their careers. This article is my version of that transition.

Academics are fortunate that our flexible lifestyles allow us to take advantage of opportunities to become involved in all sorts of projects apart from our daily responsibilities. In different phases of our careers we devote our non-classroom time to a wide variety of activities including scholarship, public service, *pro bono* or private law practice, bar activities, continuing legal education, consulting, or visitorships. As my own experience amply attests, more law teachers, particularly clinicians, should add a sabbatical-in-practice to that list.

⁸⁶ Often returning to familiar territory induces new levels of appreciation for past experience — a phenomenon familiar to anyone who, as an adult, has reread a book originally read in high school. A recent book describing the author's thoughts and reactions to the literature and ideas contained in the "great books" when he reenrolled in two of Columbia University's freshman core courses thirty years later offers an vivid example of the stimulation of revisiting youthful experiences with the advantages of the intervening lessons of adulthood. DAVID DENBY, *MY ADVENTURES IN HOMER, ROSSEAU, WOOLF, AND OTHER INDESTRUCTIBLE WRITERS OF THE WESTERN WORLD* (1996); Joyce Carol Oates, *Back to School*, N.Y. TIMES, Sept. 1, 1996, sec. 7, at 10.

