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Conference Transcript

A TEACHER'S TROUBLE: RISK, RESPONSIBILITY AND REBELLION

What follows is an edited transcript of a session at the 1995 Annual Meeting of the Association of American Law Schools, held in New Orleans, Louisiana, January 7, 1995. The meeting was a joint plenary session of the AALS Section on Professional Responsibility and the Section on Clinical Legal Education. The meeting was planned and the role plays were written by Professors Margaret Martin Barry and Lisa Lerman of The Catholic University of America and Professor Homer La Rue of Howard University.¹

The purpose of the program was to foster interaction among teachers of professional responsibility and clinical teachers about issues that arise in both clinical and non-clinical teaching. As Professor Sandy Ogilvy of Catholic University said in introducing the session, the planners wanted "to bring together the perspective on the profession of the professional responsibility teachers, with the expertise in teaching methodology of the clinicians, with the thought that each group would be interested in what the other group had to say. Interesting ethical issues arise daily in clinical programs, and the planners wanted to encourage cross-fertilization between these two fields and increased collaboration within law schools between clinical teachers and teachers of professional responsibility." In developing the three role plays presented in this program, the planners selected issues that raise ethical or professional dilemmas for the law teachers as well as for their students.

The transcript of this discussion explores only some of the issues potentially raised by the role play scenarios. The editors of the Clinical Law Review invite readers to submit commentary reacting to the issues

¹ Lisa Lerman, then Chair of the Section on Professional Responsibility, represented that section on the planning committee. (At the time of the conference, Professor Lerman was visiting at American University, Washington College of Law.) Margaret Martin Barry and Gary Laser were appointed to represent the Section on Clinical Legal Education on the program planning committee by that Section's Chair, J.P. (Sandy) Ogilvy. Gary Laser planned the afternoon session of the joint program, and then Homer La Rue assisted Professors Lerman and Barry in planning the portion of the program which is presented here.

The editors wish to thank the program planners and particularly Professor Lerman, for their help in the publication process. Both the editors and the program planners also gratefully acknowledge the assistance of Robert Kelso of American University, Washington College of Law, in transcribing the tape recording of the program, and of Julie Silverstein, a Washington College of Law student, in readying the transcript for publication.

raised in this discussion, or raising other issues suggested by the role plays but not fully discussed by the participants. The Review will consider such submissions for possible publication in its next issue. Readers might also consider initiating further dialogue with colleagues through one of the relevant internet listservs (lawclinic, legeethics or lawprof); such dialogue also may be submitted for possible publication.

HOMER LA RUE (HOWARD UNIVERSITY SCHOOL OF LAW): Good morning. I am Homer La Rue. I will be one of the moderators for this morning's session, and my counterpart is Carol Liebman—better known as Are we Oprah?

CAROL LIEBMAN (COLUMBIA UNIVERSITY SCHOOL OF LAW): Donohue. We're Oprah and Donohue, but we haven't figured out which is which.

HOMER LA RUE: We're going to run through three scenarios. Carol is going to explain to you how we're going to do it.

CAROL LIEBMAN: What we want to do this morning is to explore a number of ethical issues. Some are issues most likely to confront clinical teachers in their work in the clinics. Others are equally likely to confront nonclinical teachers.

As Homer said, we are going to use three role plays. The first one raises the question of how we deal with a conflict between our obligations to our students and our obligations to our clients, in situations where the work of the clinic places the student at some physical risk.²

The second deals with our own responsibility as teachers when we become aware of misconduct on the part of a faculty colleague, and when we have to decide what action we are going to take to address that misconduct.³

Finally, in our last playlet we're going to raise the ethical issues we face as teachers in a clinic as we try to select cases for the clinic that provide both optimal educational opportunity for the students and broad service to the community. The particular focus of that scenario is going to be on the tension that arises when students feel that they know best what is good education, and when, in particular, our students are litigation-oriented while we as teachers want to do some work that has broader community impact.⁴

HOMER LA RUE: Now, we have some rules that we need to lay down. For the first ten minutes or so after each one of the scenarios,

² See pages 317-23 *infra*.

³ See pages 323-34 *infra*.

⁴ See pages 334-47 *infra*.

we're going to ask you to react to the student in role.

CAROL LIEBMAN: Clinicians have contended that one of the best ways to get students to deal with and understand ethical issues is to have them encounter them in role. So we're going to ask you to experiment with in-role learning yourselves, as you deal with these ethical issues in the same pedagogical context as a lot of us use with the students.

I. SCENE ONE: WHOSE RISKS? WHOSE OBLIGATIONS?

HOMER LA RUE: In this role play, Margaret Martin Barry will be the supervisor. You will be in the same role that she's in. This scenario raises the issue of the lawyer's responsibility in a situation where there is a risk of physical or medical danger to the lawyer. You are supervising a clinic. The clinic represents clients who are incarcerated in an urban correctional center. In your jurisdiction, there is a statute which permits the parole board to release persons on an early parole if they are terminally ill. You are going to meet with Conrad and Anna, two of your students. At least that was the plan. You are supposed to be discussing with Conrad and Anna their final meeting with the prisoner. The purpose of the meeting is to prepare the final papers seeking the prisoner's early release.

A. *The Scene*

STUDENT (PLAYED BY CONRAD JOHNSON, COLUMBIA UNIVERSITY SCHOOL OF LAW)⁵: Good morning, Professor Barry. Are you ready for our meeting today? You remember that you and me and Anna were going to meet to talk about our case. Anna is not going to be here, but I'll fill her in.

PROFESSOR MARGARET MARTIN BARRY (THE CATHOLIC UNIVERSITY OF AMERICA, COLUMBUS SCHOOL OF LAW): Yes, I am ready. And I recall our brief talk on the phone, although it was awfully cryptic. Is Anna okay?

CONRAD: Well, I think she's okay. That's part of what I want to talk to you about today. Yesterday, we called the correctional facility to talk to our client, Mr. Tuscon. We were informed that he's been confined to the quarantine unit in the medical ward, and that five days ago he was diagnosed as having tuberculosis. We haven't rescheduled.

PROFESSOR BARRY: And why didn't you make your appointment?

⁵ When this role play was performed, the name of the student whom Professor Johnson played was "Joe." For clarity, however, the editors have changed this name to "Conrad," and Professor Johnson's comments in this role will be identified as those of "Conrad."

CONRAD: Well, after we spoke to the folks at the correctional facility, Anna and I started talking about our last couple of meetings with Mr. Tuscon. We remember at the last one, which was about two weeks ago, he was coughing very badly—we didn't think much about it at the time—and we remembered that in that meeting we were in a very confined space. It was a small room, there were no windows, and the door was shut, and we just have been thinking about that. Anna has gone to the doctor today to get tested for TB. She's upset. She's scared, and frankly, she thinks she might be pregnant and that just adds to the concern.

PROFESSOR BARRY: I can understand her being upset. I imagine you are as well. What do you want to do?

CONRAD: I really don't know. That's part of what I want to talk about here today. I am scared for myself as well. Do we have to go back to the correctional facility? I realize that we haven't finished the petition and all. But I don't see how we can get back into that quarantine unit or really whether we should go there. I am just thinking we never should have done this. Maybe I really shouldn't have been in the clinic, dealing with these sick people and all.

PROFESSOR BARRY: Well, if you and Anna don't finish the petition, what do you think will happen to Mr. Tuscon? Can we stop representing him at this point?

CONRAD: Wait a minute. I am concerned about Mr. Tuscon. I care about him. I also care about Anna, and I also care about myself. I am really not sure that as students we ought to be forced to do something where we might get hurt. You know we really weren't told that this could happen to us.

PROFESSOR BARRY: No, wait a minute. You were informed about this. Come on.

CONRAD: We had some readings. They talked to us about communicable diseases. I read those. I understand what happens in criminal populations. They were informative. We also had that lecture from Dr. Metcalf, and he talked to us about what happens in relation to HIV-positive clients. But you know, we never really were told this could happen to us. I just really never thought this would happen.

PROFESSOR BARRY: Well, I know this is a difficult situation for you and for Anna. We need to discuss your obligations to your client as well as your understandable concerns about yourself.

B. Additional Players: In-Role Comments from the Audience

HOMER LA RUE: Okay, now you're in role. You're in the supervisor's role. What do you say to Conrad?

VOICE ONE⁶: Okay, Conrad. So far as we've talked, I see that we have really two issues that we have to explore. One is your legitimate concern about your health, and the second, although you don't seem to be as concerned about it, is your ethical obligation to the client now that we've accepted responsibility for representing him.

CONRAD: I am concerned about my ethical obligations. That's why I am here. But I am also concerned about my health and that's something that hasn't really come up between us. I'd like to see some concern on your part as well. I hoped that was something you shared.

VOICE ONE: No, of course we do share that concern which is why we have the readings included and had Dr. Metcalf come in and make the presentation. So, I am just curious—when you were going through the readings and listening to the presentation about health conditions within the prison, what were you thinking in terms of your own involvement and going into those conditions?

CONRAD: I was thinking this is good information to have generally. Frankly, it didn't tell me much I didn't already know about prison populations and diseases. But frankly, it never brought home to us, put us on notice, that this could happen to us, what we should do if we thought it was going to happen to us, what you would do if it did happen to us. So on some levels the readings were informative but just, well, in the background but not really helpful in this situation.

VOICE ONE: Okay, so I hear what you're saying. I think you're right in that regard. Perhaps we didn't lay it out as explicitly as we could have, but let's deal with your situation right now. What can we do to help reassure you that your own health conditions are being protected as best they can be?

CONRAD: I am worried about who's going to pick up the cost for the testing. What's going to happen if I have contracted this disease? What are you going to do to help me continue my education and to move this along? I also worry about other people. Maybe this is the first time this has happened in the clinic, but if it is it ought to be the last. And what are we going to do for other students?

HOMER LA RUE: Okay, Conrad is concerned. Who else wants to talk to Conrad about this problem?

MARLA HOLLANDSWORTH (UNIVERSITY OF BALTIMORE SCHOOL OF LAW): Conrad, for now let's not worry about the client. We'll get back to the client. What I want to do is introduce you to somebody who works with people who have tuberculosis, and who can answer every question you have and direct you to whoever you may need to go to for any kind of testing yourself. I'd also like to see if we could

⁶ Speakers whom we were not able to identify are referred to as "Voice One," "Voice Two," and so on.

get the medical records on your client to find out just what the client has and whether it can or cannot be spread. Right now you need as much information as possible, and I am going to make some calls to see that you get that information.

CONRAD: That'll be helpful.

MARLA HOLLANDSWORTH: Do you feel like that addresses your personal concerns, Conrad?

CONRAD: You mean if I don't have TB, sure. If I do, no. And it certainly doesn't address the prospective concerns for what else we might do here. I also am concerned about the client and I don't know what we're supposed to do in this circumstance. I have some obligations to this person.

MARLA HOLLANDSWORTH: Well, let's talk about that right now. Let's brainstorm a little bit about what options you see for continuing to represent the client or for ensuring that in fact your client's case doesn't get dropped. What do you see as the options at this point?

CONRAD: I mean, the options are somehow we find a way to communicate with him and go forward where we're not in continued danger.

MARLA HOLLANDSWORTH: Okay, say more about that.

CONRAD: I don't know. I mean, we would have to find ways to talk to him over the phone or communicate in written form somehow. Obviously there must be ways of getting his signature on things, I imagine.

MARLA HOLLANDSWORTH: Do you think there is perhaps a facility at the institution where you could communicate maybe through a glass window or through a microphone or something?

CONRAD: I'm sure there is. But I am also concerned about his feelings about this. He can't be feeling real great right now either. I have a taste of how he might feel, and I'd like for him not to be put off by all this.

MARLA HOLLANDSWORTH: So how might you communicate that to your client?

CONRAD: I could try to talk to him, but you would have to help me arrange some way of being in touch with him in the quarantine ward.

MARLA HOLLANDSWORTH: Now, when is the last time you spoke with your client?

CONRAD: Two weeks ago.

MARLA HOLLANDSWORTH: Do you think a phone call right now might be helpful just to let him know that you haven't forgotten him?

CONRAD: If I can get through, sure.

MARLA HOLLANDSWORTH: Okay.

C. Discussion of the First Scene

HOMER LA RUE: Okay, you've had an opportunity to talk to Conrad in role. Now you can step out.

How seriously should we take this as supervisors, as directors of clinics? Should we be concerned about these issues when students bring them, or should we simply look upon them as the students working through their biases because the clients they generally represent in our clinics are different from them? How should we be addressing these issues?

VOICE TWO: I think that there is clearly a lack of empathy between the student and the client. I am not suggesting that there has to be some love or some friendship, but there may be a lack of empathy that underlies this. Obviously if this was someone the student felt more concerned about personally, then we might not have the discussion going in this direction. So there is a question of empathy that underlies this whole problem. And oftentimes that's difficult. Students can sometimes give the impression of empathy at the beginning of a case, but when it gets to the part of the case where there's a real concern about their true feelings about these people, we often see these problems develop and they're very difficult to deal with at that point in the case.

RICHARD ROE (GEORGETOWN UNIVERSITY LAW CENTER): I agree with the last speaker. I think the way to approach this issue is to first attend to the student's concerns, his individual concerns that were very strong and very powerful, to encourage him to express those feelings and then help him to see that there was a way that they could be dealt with that helped to move him beyond those, and at that point he could actually begin to deal with the concerns of the client. So what was appropriately done was to deal with the student's concerns first, to get him to express those concerns. Then by working through those, he himself began very appropriately to explain how he could deal with the legal issues and the ethical issues. He could proceed once his own concerns were moved out of the way. So I thought it was appropriately done.

HOMER LA RUE: You're a professional responsibility teacher. The supervisor has come to you as a colleague, and wants your advice as someone who has delved into the issues of professional responsibility heavily. What do you say? Do we have a professional responsibility teacher who wants to talk to his or her colleague? [pause] You don't like talking to your colleagues.

MARY DALY (FORDHAM UNIVERSITY SCHOOL OF LAW): Well, you've brought me a really serious issue here. You've done the right thing talking to the student, but what I am concerned about quite

frankly is what happens to your client. We can't lose sight of that client. You have an obligation of competence. You have an obligation of diligence. The student may have to go back in there. You may have to put those fears aside and get that petition signed. You may have to have follow-up meetings. I think it's a tough call, but that's what lawyers do.

VOICE THREE: I was going to say there was an additional concern, though, right from the beginning and that is not only what happens to the client with respect to this legal matter but what happens to the client and the community in terms of the communicable disease. It seems to me the lawyers are not under an obligation, the way doctors and nurses are, to put themselves in this particular kind of risk. Rather it seems to me they should arrange for contact through glass or whatever, that is, they should take the kind of precautions that the people who are not in the medical profession would take. That's why he's under quarantine. So within those limitations, a lawyer/client relationship that is as normal as possible should continue. But I don't think that the client's problem is merely a legal problem. The lawyer has an obligation to turn the nonlegal aspects of the matter over to people who are qualified to deal with those kinds of problems. If the lawyer merely facilitated the client getting out and on to parole and into the community, I think that would be an antisocial piece of work that the lawyer should not do without further consultation with others.

MARY DALY: I have another thought, too. I'd like to see the professor take the lead. Maybe what I would say to Conrad is, "Look, we have to go back. The doctor says it's safe. We'll talk to the client through the glass, but I am going to go with you. I want you to understand that this is our problem together." I think it is important for the teacher to play that type of a role with a student. On an empathetic level, it helps the student because it shows your own sympathy and your understanding, and you want some day for the student to assume that role in teaching others as well. So, I'd like to see the clinical teacher get involved to a degree that perhaps the teacher otherwise would not.

CAROL LIEBMAN: Let me ask one question. It seems as if the consensus of the group here—of the people who have spoken—is that there is a real obligation on the part of the teacher to find a way for the student to continue representing this client. Putting aside for the moment that we're in the midst of representation rather than at the beginning, is this very different from the eighteen or twenty Wall Street lawyers who refused Judge Duffy's request that they represent one of the World Trade bombers? Why should our student have to go into a situation of physical risk when those Wall Street lawyers were

let off the hook merely because it might harm their firm's pocketbook or self-image?

HOMER LA RUE: And with that observation, we're going to move to the next scene. We promise you only one thing this morning. We will raise a lot of questions. The answers, however, we don't promise.

II. SCENE TWO: THE DIRTY LAUNDRY: TO AIR OR TO ERR?

CAROL LIEBMAN: Okay, so now we're ready for Scene Two. This playlet raises questions about what a law teacher should do when faced with unethical conduct by a colleague. You're going to see a scenario where a student has come to you as a teacher—again imagine that you're sitting up there in Margaret's seat. What would you do? What would you be saying to the student? The student has come to raise some concerns. This is a student who is supervised by another clinical teacher. You're a clinician. You're an untenured clinician. As you watch this, think about what kind of advice you have for the student. What kind of questions would you ask her? What would you tell her about what you intend to do about the things she's going to dump in your lap? Again, at the end, think first about how you would respond in role and then we'll open it up to a broader discussion about our ethical obligations.

A. *The Scene*

STUDENT (PLAYED BY LISA LERMAN, THE CATHOLIC UNIVERSITY OF AMERICA, COLUMBUS SCHOOL OF LAW): Professor Barry?

PROFESSOR BARRY: Yeah, hi, Lisa. Come on in.

LISA: Do you have a moment to talk to me?

PROFESSOR BARRY: Sure.

LISA: I have a problem I need to talk to you about. Look, I am really a little uneasy about coming to talk to you about this situation. It has to do with Professor Olsen. You know, he's my clinical supervisor this semester, and I am also in his Professional Responsibility class. I don't want to put you in an awkward position. I know he's the director of the program. I also know you've only been here a couple of years. But I've just got to talk to somebody. I just thought maybe you would understand. It's a bit complicated.

PROFESSOR BARRY: That's fine, Lisa. I'll help if I can.

LISA: Okay. Professor Olsen believes that each of the students in the clinic should handle as many cases as we can, and I currently

⁷ Since Professor Lerman played a student named Lisa, in role she will be identified as "Lisa."

have six active cases. I have two landlord-tenant cases, three divorces, and one social security case. I've been working nonstop in the clinic. I actually have not been to class very much in the last couple of weeks, and I am really starting to panic. To tell you the truth, I am very confused about what I ought to be doing on the cases. I have hearings scheduled on two of them in the next two weeks . . . and I've never done a hearing before.

Well, this is really just awful. Last week, I missed a deadline to file the brief for an appeal in my social security case. I knew when the deadline was, but I had to get Professor Olsen's okay on my brief and I just couldn't get his attention. Then he wound up finally approving it three days after it was due. After he approved it, I submitted it right away, but the Appeals Council refused to accept it because we filed late.

PROFESSOR BARRY: Did he know about that deadline?

LISA: Yes, he knew about the deadline too. But he's handling three capital punishment cases, and he was simply too busy to talk to me. That's what he always says.

PROFESSOR BARRY: Did you try to get him to sit down and go through the papers?

LISA: Yes, I did, and this is the worst part, at least for me. Last week, I went to his office with him after a PR class to see if I could get him to look at my brief. He said he was much too busy to read a thirty-five page brief that day, and he started telling me about how panicked he was about his capital cases. We were sitting on his couch, and then he moved over toward me, and he put his arm around me, and he said, "I guess we've both been too busy to talk very much lately. How about coming to dinner with me tonight?" or something like that. I mean . . . he had his *arm* around me! I said I had work to do, and I got up. I said, "Please could you look at the brief," I left it on the table, and I left. Truthfully, I didn't even try to talk to him for a couple of days, and eventually he put the brief back in my mailbox.

PROFESSOR BARRY: Have you talked to the Dean's Office about this?

LISA: I did. Right after this happened, I was so upset that I went to see Dean Hammond. I had talked to him last year after my dad died, and he had been really nice to me. So I thought maybe he would be supportive and maybe he would do something, but he was useless. He explained that Professor Olsen is tenured, and it would be very difficult to take any action against him. He also told me that I should regard this as a "learning experience" and that professional women have to deal with people who behave this way. He suggested that instead of trying to get back at Professor Olsen, I should think about

how I would respond if somebody behaved to me this way again.

PROFESSOR BARRY: That did you a lot of good, didn't it?

LISA: Yeah I just can't stand it. I don't know what to do. I don't want to be anywhere near Professor Olsen, and I am really upset because I've got nine credits of graded classes with him this semester. I know I am committing malpractice and I don't want to abandon my clients, but I can't work like this.

B. Additional Players: In-Role Comments from the Audience

CAROL LIEBMAN: Who would like to continue this conversation?

VANESSA MERTON (PACE UNIVERSITY SCHOOL OF LAW): First of all, Lisa, I have to tell you this is not the first kind of situation that we've confronted like this. So don't feel like this is a completely strange and bizarre event that never has happened before.

LISA: You mean with him?

VANESSA MERTON: Well, without getting into specifics about Professor Olsen, I am just letting you know that lawyers find themselves in situations where other lawyers whom they work with—whom they have to trust and rely on—behave in ways that are really unacceptable. From what you have told me, based on what I know, it sounds to me like we are talking about behavior that is not acceptable. A couple of things, though, we really need to clarify (and out of role I would have done this up front). When you came you said you weren't sure whether or not this was something you wanted to talk with me about, and one of the things I need to know from you is how you want to work with me on this. Are you talking to me with an idea of getting some legal advice and possibly some legal assistance in terms of your own responsibilities in this situation? Are you looking to me for that kind of help? What is it you want from me? Do you know?

LISA: I guess I'd be happy for any advice. I feel like I'm in a very difficult situation.

VANESSA MERTON: Well, you are.

LISA: I mean, I can't work with this guy and I have these six cases.

VANESSA MERTON: Okay, it's a difficult situation for you, and for us as part of the same institution with responsibilities for your clients. Maybe we should try to figure out how you want me to work with you on this because it will make a difference. If you recall earlier on in one of our classes, we talked about the fact that lawyers, particularly lawyers like yourself—starting out, working with more senior people—may see things that seem to you to be wrong and that you have to think about how you are going to respond. Do you remember some of that discussion?

LISA: Yeah.

VANESSA MERTON: As you know, there are some rules that we have to take into account in deciding what to do and we don't have total discretion about our responsibility. But one question is whether or not the information you have given me is part of a confidential relationship, so we need to clarify whether or not you want me to work with you as a legal adviser or not. Do you understand why that's significant?

LISA: Yes, because then you would have obligations of confidentiality toward me, right?

VANESSA MERTON: That's right, and that changes the dynamics of the situation.

CAROL LIEBMAN: Vanessa has spent some time defining the role relationship between her and the student.

ROY SIMON (HOFSTRA UNIVERSITY SCHOOL OF LAW): Lisa, the reason that you were sent to me is because I am tenured and I am going to try to help you through this. The best advice that I can give you is that you have to deal with the cases you have as if you are the only lawyer on the case. You're now in a situation where you feel like you don't have a supervisor. That's the situation that anybody is in who goes to work for a solo practitioner who's on trial. That's the situation of anybody who goes to work as a solo. Now, I have watched you for several years, and I feel like you have a lot of ability. You can do this. You can handle these cases. Now, it's easier if you have a supervisor. One thing that I can do is I'm going to go to Professor Olsen and tell him that you need to work with a different staff attorney. Is there anybody else that you have worked with or that you have struck up conversations with at the clinic?

LISA: Well, Professor Barry I've talked to a couple of times.

ROY SIMON: All right, well, perhaps Professor Barry can just accompany you to this court. You have two hearings coming up, right? Well, they're not both going to be your first hearing ever. One's going to be your second hearing. So you have to concentrate on preparing for the first hearing. One thing that I can try to do is put you in touch with some lawyers who do that kind of hearing, and I think you should go down to court. Have you been down to court to watch any of those hearings?

LISA: Not yet.

ROY SIMON: All right. I would try to go down to court and just watch. How is it done in this court? Would you be able to do that?

LISA: I could do that. I really do feel like I need a supervisor. I don't feel competent to make all these decisions about what to do by myself. I just don't think that my clients are getting what they are,

entitled to. And frankly, I am paying \$18,000 per year to get some supervision, and I think that I am entitled to more than what I am getting.

ROY SIMON: You're entitled to more than what you are getting, but you may not get it. You may have to prepare by reading. You'll be able to handle these cases. As far as the social security case, that's water under the bridge at this point, I guess, unless you can find a way to get the Appeals Council to accept the brief. Anyway, you may not lose even if they don't read your brief. I don't know if they would read your brief even if you submitted it.

VOICE FOUR: Lisa, I've got a couple of questions for you. First of all, are you confident in your own mind that what you did was malpractice? You blew a deadline and the supervisor knew it. You're sure of that? Is that right?

LISA: I think it is.

VOICE FOUR: Well, now think about this for a second. You knew there was a deadline. Did the supervisor know of the deadline?

LISA: Yeah.

VOICE FOUR: You're positive of that?

LISA: Oh, absolutely positive.

VOICE FOUR: And you submitted the brief to the supervisor in time for the supervisor to review the brief and file it in a timely fashion?

LISA: Yes.

VOICE FOUR: Lisa, your first obligation is to your client. You've got two problems. One is an ethical problem that's covered by the Code of Professional Responsibility, and the second one may be something else. But the first obligation, let's take that. Why don't you bring me the file, and you write down in a memo exactly what happened. (Applause) Then I am going to take that case from you and take it over. I will file an appearance with my name on it and we'll go from there.

Secondly, I'd like you to bring me all the cases you have with the other professor, and I want to review those with you. I'd like to do that as soon as possible, and I'd like to go through those cases with you. Also, the professor's conduct may be covered by administrative rules of the university and maybe some other rules. I'd like you to think about proceeding on those matters. I'd like to sit down and talk with you in a different context about that aspect of this situation and maybe refer you to someone else who might be a little more helpful.

But first, let's take care of the clients. Let's make sure that the one client is informed of the mistake so we can withdraw from the case. We can file an application to show good cause with the court

why the deadline was missed, and we'll let the chips fall where they may. Does that help?

LISA: Thank you very much. That really takes a load off my mind. (Laughter)

C. *Discussion of the Second Scene*

CAROL LIEBMAN: Now you are released from role. We have at least three dilemmas here, three layers of problems to deal with. Let's get some comments on what should be done.

SUE BRYANT (CITY UNIVERSITY OF NEW YORK SCHOOL OF LAW AT QUEENS COLLEGE): I think all of us would agree that the dean's response to the sexual harassment information was inappropriate. One concern I have is about our response to the student—that we not do the same thing with her other concerns as was done with her sexual harassment concern. We might have done that in our rush to make her feel confident that she can take care of it, which was one approach that was used in supervision, and one I think that we do use. I would ask the student whether or not she experienced that as very similar to the dean's response of, in effect, "chin up, you're gonna be a lawyer, you have to deal with this."

LISA: I felt a lot more comfortable with the last response where another teacher was going to step in and actually help me out with some of the judgments I needed to make about what to do with the cases. I felt a little abandoned by being told that I was competent and could do it because I knew that wasn't true.

VOICE FIVE: What's troubling me is that I see the student as somewhat like a client and the supervisor as somewhat like an attorney. I don't see us modelling very good counselling, the kind of counselling that involves helping the student look at the options, helping the student pick an option, and showing some empathy towards the dilemmas the student finds herself in.

CAROL LIEBMAN: So what would you do?

VOICE FIVE: Well, first, we ought to show some empathy toward the student. [To the student:] I see at least three problems that you're talking about here. One, you feel stress over the caseload that you find yourself with, and you are missing classes. Secondly, you find that because of inadequate supervision you have missed a deadline for a client. Thirdly, you find inappropriate behavior on the part of your supervisor. Is that fair?

LISA: Yes.

VOICE FIVE: Which of those problems would you like to talk about first?

LISA: I'm sure that whatever classes I've missed I can get notes

from other students, so I am a lot less worried about that. As between the other two, the problems with my clients and this issue about how he was behaving toward me, I've been lying awake at night alternating being panicked and terrified about one or the other or both. I guess they're of equal concern.

PETER MARGULIES (ST. THOMAS UNIVERSITY SCHOOL OF LAW): One of the problems you've raised is a problem that clinicians don't tend to encounter a lot, which is a problem of a high volume case load. But on the other hand, that's a huge problem with poverty law and public defender practice, which is something that we are supposedly training you to get right into. Do you see that as a problem that we ought to address here? Is there something we can do about our caseload that may alleviate the kind of concern that you've encountered with inadequate supervision?

LISA: I do think I have too many cases. If there was a way to reassign some of them to some other students, that would help me out a lot too.

PETER MARGULIES: Do you think that in addition to reassigning some of your cases that we ought to think about whether we need to take fewer cases and do a more focused job of supervision in the cases we do take?

LISA: I don't know . . . that seems like the kind of a decision a teacher would make to me.

CAROL LIEBMAN: So, we're back to whether some of the approaches we use, in trying to help the student, end up putting more burden on the student. Notice the rather broad line that people keep stepping on: trying to be supportive of the student but also trying to keep it the student's problem rather than the problem of the teacher.

JANE AIKEN (UNIVERSITY OF SOUTH CAROLINA SCHOOL OF LAW): We've talked a lot about what the student needs, but I want to talk about what Margaret needs. Margaret, you're now in possession of a lot of information about your colleague concerning professional irresponsibility and concerning the possibility of engaging in sexual harassment. I presume you are an untenured junior professor in your clinic?

CAROL LIEBMAN: Clinical. Untenured clinical junior professor.

JANE AIKEN: And an African-American woman, and it's not a surprise that the student came to you. I want to know what we're going to be able to do with this information because your career now is somewhat in jeopardy if you move forward on this, I believe. At the same time you have information that could make a big difference in your clinic and in the treatment of students.

CAROL LIEBMAN: So in this role play you (the audience) are all

Margaret. What are you going to do with the information? What's your obligation?

VANESSA MERTON: One of the things I had wanted to say before is that (not to sound overly Carol Gilligan-ish) for me to know how to respond in this situation as Margaret, as a supervisor—and it is a situation I have confronted, and I would dispute that it's a rare occurrence, unfortunately—I need the context. I need to know a lot more about the prior history with this Olsen. We could talk just about technicalities, of course, and about the disputes there might be among disciplinary authorities as to whether one instance of missing a statute of limitations amounts to “neglect” constituting a code violation. But that's only the lowest level of analysis. What did I know about this clinic? I agree with Peter that the structure of the clinic is a walking invitation for malpractice, so had there been these kinds of supervisory problems before? I would need to know a lot more about whether I had talked with Olsen before about this problem, whether I had talked with other institutional authorities, whether it was an issue that had been identified around the school as a possible problem and so forth. I am afraid this is one of those cases where you really need to know a lot more to figure out what the appropriate response might be.

VOICE SIX: I am concerned about part of what I think Peter is saying: the institution created this problem. The institution has some obligations to solve the problem or to help the student solve the problem. The thing that I think we're reacting to in putting responsibility on the student is that we don't want to make the student feel like she was incompetent to solve the problem or to leave her feeling like she was helpless. So one thing I'd start by doing is putting that up front with the student and saying, “Look, there are ways in which this problem is the institution's responsibility to solve.”

And that was part of what the final supervisor was saying, though I think there were some other ethical problems with his approach. He can't just step into another lawyer's case. He cannot just take over a case where somebody else is on the line in terms of the court. So that's just a lawyer-to-lawyer kind of problem.

But I think Margaret's problem is also partly the institution's responsibility, and it doesn't do just to say the dean screwed up and didn't give the right answer. I think there is now an obligation on the part of the institutional players to go back to the dean and say that doesn't work.

In this scenario you're relieved of one of the problems, namely deciding you will tell the dean this information, because Lisa has already told the dean the information about the sexual harassment. So

she doesn't have that kind of confidentiality problem, but I do think that the institution has a responsibility to this student to relieve her of the caseload and to address the problem with Olsen.

BOB DINERSTEIN (AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW): I thought in our responses in role as supervisors we did one of two things, neither of which I thought was most helpful. We either turned it over to the student and said, "You can do it, godspeed," or we said, "We'll take it away from you and we'll handle it so you can feel better." I thought it was not by chance, Lisa, that you would have responded most positively to the last comment, which seemed to say, "You're gonna take care of it, Dad, and I can go back and sleep well."

The impulse to do that is very strong and powerful, and there are some very good things behind it. But we have to separate out here, in addition to thinking about the institutional responsibility and the role of the supervisor, the fact that there's both the need to respond to the student and a learning opportunity for the student. One of the things the student can learn from this is how to work through dealing with a problem like this, which will come up in some different ways. Actually, my response to it was not that this is something you will face mostly in solo practice. This is something you will face in a large law firm where a partner blows a deadline or is about to, you know it's going to happen, and you don't feel powerful enough to say, "I don't care what your problem is, we have to file this tomorrow." As we know, in that kind of situation you've got your own professional responsibilities. I think it would help you, as the student, to feel more in control of your situation both professionally and personally, if you have the experience of working with the supervisor to see that there really are some choices. And perhaps it will help for the supervisor to admit that there aren't easy choices, because to some degree a dynamic exists in which I am the supervisor, I know what to do here, but I am going to play the usual hide-the-ball game and let you figure it out and then tell you, "Well, maybe you figured it out right, maybe you didn't." There are a lot of competing considerations that we should own up to, but we also should help you see that you have the capacity, not to file the motions by yourself and argue them, but to think through at least in a beginning way what the choices are and then what in turn we have to do about it.

LISA: Do you think I should be expected to continue to work with Professor Olsen?

BOB DINERSTEIN: I think one of the things we have to talk about is why that is an option. I don't want to say to you, "Okay, I am going to take you out of Olsen's supervision, forget it, we'll just take care of

it." It may be that's what we'll talk about. It is very hard to see how you can continue to work with him, but there is a separate issue of whether I say to you, "Don't worry about it, it's not your problem anymore, I'm taking you away from his supervision." I think we have to put the options out on the table. For all I know, you actually want to continue to work with him. We didn't really even get to the point of saying what your overall goals are. You certainly are capable of telling us what it is you think we need to do with respect to the client, before your supervisor says, for example, "I am going to take over and file a pleading whether I have an appearance in the case or not." I think all that has to be worked through, and while it seems to me quite plausible that you might not work with Olsen anymore, we shouldn't impose that without first discussing it.

CAROL LIEBMAN: One of the great gifts of clinicians, of course, is turning any disaster into an educational opportunity. Let's assume for the time remaining in this discussion that you've done that. You've had the most empathetic, most insightful, most responsibility-sharing, most giving-control-to-the-student-but-giving-support kind of discussion, and you have arrived at conclusions that now leave you on the spot. The student has said, "I will work on my cases, but I need you to take some action here," and you're comfortable with that outcome. What are you going to do? What are your obligations? Let's shift this focus away from the stuff that's easy, such as turning the disaster into an educational opportunity, and let's focus on what obligation we have, as teachers and as lawyers, to deal with these pretty serious allegations. Let's assume also that it's the worst case. We've done the questioning that Vanessa has suggested and it's just as bad as the way we filled in the blanks when we first heard this story. What are you going to do? What do you have to do?

TERESA COLLETT (SOUTH TEXAS COLLEGE OF LAW): Actually, that was one of the points I wanted to raise. It is not inconceivable nor is it beyond people's experience in this room, that a student would come with such a serious story to a professor. The professor could respond by saying, "You know, Lisa, I am really troubled not only by the experience that you've had with this other professor but by the dean's response. We need to talk about how we go about changing that, and making that change is probably going to require that you tell this story to other people. I think that's really important, but I need to know from you whether you're willing to do that. Are you willing to tell other professors about your experience with this professor so that something effective can be done?"

LISA LERMAN: If I could arrange to transfer to other courses so that I would not be getting grades from Professor Olsen, especially

now that I know he's done this to other people, I don't think I have anything to fear.

TERESA COLLETT: I hope that that is true. Institutionally, I have a large amount of evidence to support that conclusion, but I can't give you any guarantees to that effect. [Out of role:] Now, it makes a difference to the issue of who gets to control the decision concerning whether or not the student is going to speak to others if I—the second professor—am acting as Lisa's lawyer or her law professor/mentor. I have been put in a position where instead of Lisa's reaction, I had a student refuse to say anything, and I wish I had had the wisdom to distinguish whether I was the lawyer or the professor. But what are our institutional responsibilities when the student says, "Absolutely not, get me out of the class, that's all I want and I don't want to be embroiled in any further controversy"? I don't have the answer. I would like to hear from other people.

CAROL LIEBMAN: So, you've really got two possibly conflicting sets of ethical obligations. I think you all probably know that we have a code of professional responsibility as teachers that the AALS puts out. It's about as helpful in these dilemmas as the regular code and rules.

TED SCHNEYER (UNIVERSITY OF ARIZONA COLLEGE OF LAW): I do think it's interesting in both of these scenarios that because it is a training situation, the focus is on how to counsel the student and what can be learned by that student from this experience for the future. It is almost as if the immediate events don't really matter that much. Whereas if events like this were happening within a law firm, or if events like the first scenario were happening within a legal aid office, I think there would be serious attention to the events for their own sake. I think the tension between the duties of teacher and lawyer has a lot to do with this.

I don't agree that the supervisor in this situation ought to think of herself essentially as owing duties of confidentiality to the student as if they were in a lawyer-client relationship. There may be a felt obligation of confidentiality just because of the general expectation that this wouldn't go any further, but I don't think you're talking about a lawyer-client situation.

I do think, apropos the first scenario, that that tension between whether you are a teacher and therefore have special obligations to protect the student and keep the student out of harm's way, or whether you are a supervising lawyer who is helping this person represent someone in jail where there's tuberculosis, will have an enormous impact on how you view the problem. I have always found it hard to understand how clinicians are able to reconcile the tensions between

their roles as teachers and as supervising lawyers.

VOICE FOUR: Lisa, I'm back again. Let me tell you why I advised you to focus on the clients first, and right away. Where I am from, you get a little certified letter in the mail from the bar association ethics committee, if you're a lawyer and you continue in a situation where you have either mis-represented or neglected a duty to a client. What you've told me could be a violation of that, and the reason I'm here is I'm not just your instructor, I am a lawyer. I am licensed to practice in this jurisdiction, and I am subject to that rule of professional responsibility. So the first thing we want to do is we want to take care of that client. Do you understand that, Lisa? Does that make sense to you?

LISA: It does.

VOICE FOUR: I am a little distraught over the discussion here about what's going on in the law school, because if you ever get one of those letters from a bar association ethics committee—and I have, I am a public defender or used to be—they terrify you because you have to respond. They aren't interested in some academic debate about whether or not you felt this way or didn't feel this way or who meant to do this or who didn't mean to do that. They want to know one thing. They want to know what happened. I suppose the reason I jumped in so fast is because it's a kneejerk reaction on my part, and I think it ought to be a kneejerk reaction on the part of any lawyer who is licensed to practice.

CAROL LIEBMAN: Let me just test that. How many of you have ever been aware of either a colleague, opposing counsel or a fellow faculty member doing something you were pretty sure was unethical? How many? [show of hands] Okay, how many of you have ever made a formal report about it? [show of hands] That's a much higher number than I expected. Look around and note the people who said yes, they had done something about it. I think you might want to have conversations with them as you continue the dialogue about this after today.

III. SCENE III: EXPANDING THE LAWYER'S ROLE: MORAL OBLIGATION OR QUAGMIRE?

HOMER LA RUE: Our final role play deals with something a little more subtle. It has to do with the reasons why some of us have come into teaching, particularly clinical teaching. This last scenario deals with the question of what our obligations might be if we feel that the clinic ought to be going in a direction different from that of simply teaching litigation skills, and that feeling runs right up against the desires and the expectations of many of our students who come into

the clinic and want those litigation skills. When you start talking to them about other roles that lawyers play—the lawyer as organizer, the lawyer as teacher, the lawyer as economic developer or assistant in economic development—many times you see the students' eyes roll back or glaze over. We are going to explore that in this one.

In this scenario, you're meeting in your office with Odeana, a third year student. She's come in for her regularly scheduled weekly meeting. You're prepared to discuss her work in organizing the tenants to purchase one of the large apartment buildings in a poor neighborhood in the city. The organizing grew out of the student's work in a previous semester defending one of the tenants in that same apartment building against an eviction.

A. *The Scene*

STUDENT (PLAYED BY ODEANA R. NEAL, UNIVERSITY OF BALTIMORE SCHOOL OF LAW)⁸: Professor Barry, are you ready for our meeting?

PROFESSOR BARRY: Yeah, hi, Odeana. Come on in. Are you prepared to talk about the co-op plan?

ODEANA: Yeah, I'm ready. I did all the stuff you told me to do, but I wanted to talk to you about something before that. I am really nervous about it because I have been talking to Marla about it, and she says I should talk to you instead of complaining to her all the time, and so I wanted to talk to you about it.

PROFESSOR BARRY: Okay, sure.

ODEANA: Well, I am kind of feeling like when I started the clinic last semester I expected that I would be representing clients in court. I got to do that last semester with Ms. Johansen. She had a leaky apartment, and we managed to get the leaking problem fixed. She didn't have any heat, and we got the heating problem fixed. She really didn't have enough money to pay her rent and because of her problems we got her a rent abatement. And what she really wanted was to not get evicted for not paying her rent, we got her that, and I felt really good about doing that. After it was done, I felt like I had done what my job was in the clinic as a lawyer, but now I am all involved in this co-op thing and I don't know if I like that.

PROFESSOR BARRY: Well, do you see any purpose, Odeana, in the co-op project?

ODEANA: Well, I understand that we're trying to help Ms. Johansen. I understand we're trying to help the other tenants. We talked in the seminar about how if you own a building that you feel connected

⁸ Since Professor Neal played a student named "Odeana," in role she will be identified as "Odeana."

to your home and all that stuff, but I just don't see why that is my job as a lawyer. I mean I could have done another landlord-tenant case. There may be another person who's on the verge of getting evicted, and I could have gone into court and helped that person. Instead I am focusing on helping these people buy this building.

PROFESSOR BARRY: Do you see any connection between the two?

ODEANA: Well, yeah. I know that Ms. Johansen's rent is going to go up again and her landlord is maybe going to try to evict her again. I know that some problems may happen again, and they may not get fixed. But I didn't come to law school to be figuring out what may happen in the future to these people. I want to learn how to be a lawyer.

PROFESSOR BARRY: Well, Odeana, do you think that a lawyer's job can be carved up that neatly?

ODEANA: Well, I know that lawyers do a lot of stuff out of court and I know that most lawyers don't go to court, but I think that in the clinic we ought to be learning litigation skills. That's what I think.

PROFESSOR BARRY: Why do you think that's the thing you need most? Most lawyers don't even litigate.

ODEANA: But that's why we took the clinic—to learn how to litigate.

PROFESSOR BARRY: Did litigation solve Ms. Johansen's problems?

ODEANA: She didn't get evicted, which she wanted. Her leak got fixed and she wanted that. She got heat, and she wanted that. But I know what you mean. In the long term, her rent is going to go up again, her problems may recur, and she's going to be in the same situation. But this is how I feel. Do you know what I spent all afternoon doing yesterday?

PROFESSOR BARRY: What? Tell me.

ODEANA: I spent all afternoon on the phone trying to arrange childcare for a tenant to come to this meeting tomorrow. I kept thinking, "I cannot believe that I am doing this."

PROFESSOR BARRY: Well, Odeana, why were you doing it?

ODEANA: Because if I didn't do it then the people in the building who need childcare wouldn't come to the meeting.

PROFESSOR BARRY: Do you believe their participation is important in forming the co-op?

ODEANA: I think that if the people who have children don't come, then you won't be able to build a consensus among the tenants, and we need a consensus to be able to make the co-op.

PROFESSOR BARRY: So why wasn't it a good use of your time to

make sure that they would be there?

ODEANA: Because I did not come to law school and did not take the clinic to be a social worker or a social secretary.

PROFESSOR BARRY: Could anyone else have arranged the child care? Maybe it should have been Jerry's role as president of the co-op.

ODEANA: Well, if I had left it to Jerry, we both know that he wouldn't have done it. If somebody else had been assigned the task, they would have started it, but they really wouldn't have stuck to it. Then there wouldn't have been any childcare, and then people wouldn't have been at the meeting. It would have just been a mess.

PROFESSOR BARRY: Maybe you have a role to play then in making sure that Jerry and other members of the co-op understand the importance of planning these kinds of details.

ODEANA: But why is it my job to teach tenants how to arrange for childcare? Why is that my job? I mean last semester I had a trial. I was in court. I knew what I was supposed to do, and I was feeling like a lawyer. This semester I feel like I am all wrapped up in this co-op thing and we're plodding towards something, but I don't know what it is. I just don't feel like a lawyer, and frankly I just don't feel very professional doing this.

B. Additional Players: In-Role Comments from the Audience

HOMER LA RUE: All right, is there a reaction to Odeana in role? What are you going to say to her?

VOICE SEVEN: Have you thought about the longer term when you graduate from law school, what you want to do?

ODEANA: I want to be a lawyer.

VOICE SEVEN: Okay, that's good since you'll have a law degree. What kind of a lawyer do you want to be?

ODEANA: I don't really know. I am taking Tax now. I am trying to get into it because I hear those lawyers make a lot of money, but I don't know. I give some thought sometimes to maybe being a clinical law teacher. I'm not real sure.

VOICE SEVEN: I would like to suggest some things you might think about. What you're feeling is very predictable, and I felt it too, both when I was in a law firm in a traditional practice where I was focused on litigation and then also when I was a public interest attorney and a community organizer. I often sat and felt, "Why am I doing this? Can't someone else be doing this?" But at the same time you know that because you did it, it got done.

The question is not how you want to work but what kind of work you want to do. I have to tell you that if you are going to do public

interest law in the community, you will end up sometimes arranging for childcare for your clients. It may be that professionally that's not what you're going to choose to do. If you're going to focus on just being a courtroom litigator and being the hired gun that is needed by many clients, then that may be where you feel most comfortable and effective. It doesn't mean you're more professional than the person who's doing the community work. Frankly, to be a public interest lawyer in the community you have to do what you're doing this semester. That's part of your job. You may get paralegals to help you. You may build more relationships with community people who can handle that and back you up, but that's part of your job. That's part of what we feel you need to experience and to learn in the clinic, so you can make a decision about where your skills are best going to be used.

ODEANA: But I feel like every hour that I am spending on daycare is an hour that I could be learning how to be a lawyer, which I am not doing. The other thing is that I'm kind of feeling that if the tenants can't arrange for their own daycare then maybe I'm not doing something right. If I'm caring about this more than the tenants are caring about it, then maybe I'm not really being a lawyer anymore.

VOICE SEVEN: No, you're asking the first question that an organizer needs to ask, and that means you're asking the right questions. If you're caring more about it than the tenants then somehow we need to figure out how to get the tenants to care about it as much as you or to express their caring in the way you want them to, because you know that's what they need to be effective. They do care about it. Otherwise, they wouldn't be coming to a meeting at night when they have to get their kids' diapers changed and food made and get ready for school and get up in the morning and they've worked all day. So, there's no question they care about it. We need to figure out some other strategies for how they can take some of that work from you, since that is important for their own development as organizers in their own building and important for you to do your work. Let me also ask you this, because I don't know what you did before our clinic: have you had much experience talking to civil attorneys who do land-use in our city?

ODEANA: No, I really haven't. I mean really the clinic is my only exposure to lawyering.

VOICE SEVEN: Okay, part of what we might also need to do is to have you learn a little bit about what those attorneys do, because what you feel is not the work of an attorney in fact is very much present in their work. When a land-use attorney needs to get his client whatever the client needs to get from the city, say a permit, he's going to spend a lot of time schmoozing and greasing the wheels and going through

the bureaucracy, calling people, and making sure they are at the meetings they are supposed to be at. It feels a lot more professional to the attorney because he's dealing with a bureaucrat instead of a poor tenant, and because we think that's appropriate for an attorney to do. But that's simply the prejudice against poor people and against working with poor people. Again, it's choices you have to make about where you want to spend your life work.

HOMER LA RUE: Thank you. Other reactions?

GARY PALM (UNIVERSITY OF CHICAGO LAW SCHOOL): Well, first, I think that this is very much traditional lawyering—and I wanted your reactions to this—because you've been counselling the client about wealth generation and arriving at a transaction that you're going to implement through legal procedures. So much of your work is traditional lawyering, just not litigation. I notice that you're nodding, so we're in agreement. I think that the major change that we've been making in public interest and pro bono work is moving towards wealth generation as a goal of our clients rather than concentrating just on the presenting litigation problem that comes in the door. So that just as with the firms where you represent clients instead of matters, we are helping our clients analyze what the available wealth generation alternatives are, and developing long term goals with the clients to improve their economic circumstances, which you have already done with the co-op.

ODEANA: But you know sometimes I feel like we're doing this social engineering, and I don't know if it's right for lawyers to be doing that. Did you ever see that movie *Anatomy of a Murder*?

GARY PALM: Yeah.

ODEANA: Okay, you know when Jimmy Stewart tells the client all the options and everything so that he'll get his story straight? I feel like we're putting ideas in our clients' heads. Maybe we shouldn't do that.

GARY PALM: Well, I think we should give them the option to obtain an asset if it's a do-able thing, and we should throw that into their thinking if it's not there. But when I talk to my clients about their plans for improving their economic circumstances I find that they have very concrete plans, many of which need legal intervention, many of which need litigation.

ODEANA: I don't know. Professor Barry, whose idea was it to do this co-op thing, anyway? Was it the tenants' idea? Was it our idea?

PROFESSOR BARRY: Well, you remember, Odeana, that we spoke with Ms. Johansen after the trial, and we talked with her about what her goals were and what she would like to accomplish. One of the things she said was "I just want to get away from this landlord," and

our discussion flowed from there. She did say very strongly that she wanted to own her own apartment if that was at all possible. She didn't conceive of it initially as within her reach, but certainly when we started talking about it, she was very excited, you'll remember.

ODEANA: I feel better about it now.

GARY PALM: The second problem I have, which I agree with you on, is the problem of the limits of our expertise. I think our expertise primarily is to apply and interpret law and do that through transactions, litigation, advice, and so forth. One of the things lawyers can do, though, is to really look for the long term goals of the client. Take the daycare problem. What is the long term goal there for the client that you could see?

ODEANA: The long term goal is still for them to have the building. I mean they're not going to have the building if they won't have meetings where a lot of people can be there.

GARY PALM: So it's an organizational problem.

ODEANA: A lot of the people won't be there unless they can leave their kids somewhere, or if they bring the kids it's just going to be a mess. We've tried that.

GARY: Or what about seeing it as an ongoing need for daycare?

ODEANA: Well, yeah, but I mean, so what? So next the clinic is going to say we need to build daycare next door?

GARY PALM: To apply for benefits so that clients can purchase daycare.

ODEANA: They may not know about that.

GARY PALM: My third point is the limits of expertise. What experts would you reach out to, if you had them to help you, to take over and implement this so the client will be independent of you?

ODEANA: Professor Barry knows I don't know that.

GARY PALM: What kind of people would you think?

MARGARET MARTIN BARRY: [Out of role:] It seems to me that it's very easy to start breaking down the lawyer's role and to say, "I don't do that, that's not in my ambit. You know we have to go find daycare organizers to do this." You can continue to break it down or you can say that if there is a job that is consistent with the goal, you will work on it. That's why I asked Odeana, "Have you worked with people in the co-op to get them to handle this better?"

ANN SHALLECK (AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW): A lot of my colleagues have been trying to convince you that this work is part of a lawyer's role, part of what you're going to have to do when you go out into practice. What do you think?

ODEANA: Well, I'll tell you the truth. I don't think I am going to be making anybody's daycare arrangements anymore. I am pretty

sure that I'm just not going to do that.

ANN SHALLECK: So you're starting to work out some sense of your own vision of what it is to be a lawyer—what are the limits of that, what's included and what's not included. What are some of the other things you feel like you're trying to sort out in terms of what you see yourself doing as a lawyer?

ODEANA: I guess that I'm trying to figure that out. When I started law school, and we did this little orientation phase called "Becoming a Lawyer," I was under the impression that the lawyer was supposed to do what the client said to do. But now in the clinic we come up with all of these other exciting things. I mean they are exciting to do, but I sometimes feel like it's the lawyers that are leading instead of the clients, and I feel nervous about that. I just feel kind of uncomfortable with that.

ANN SHALLECK: Well, in terms of what you said, you came to law school thinking lawyers were supposed to do what clients wanted them to do. It seems like you have pretty good reason to be nervous, then, if you think there are a bunch of lawyers telling clients what they should be doing. That sounds like an important insight you have. Do you feel able to try to talk about that with the other students that you're working with, or with your supervisors who you feel are giving you messages about lawyers that you are uncomfortable about?

ODEANA: Well, I am always complaining to Marla. So I'll probably talk to her some more about it.

ANN SHALLECK: Is she listening to your complaints about that?

ODEANA: Yeah, and then she tells me to shut up after awhile, but she listens for a good five or six minutes before she gets there.

ANN SHALLECK: Do you feel like that dialogue has gotten you any place in terms of your own feelings about what you want to be doing about this co-op work?

ODEANA: Well, one thing is that it did make me brave enough to talk to Professor Barry about it, because I hadn't been talking to Professor Barry and I'd just really been talking to Marla, and she was useless in helping me with this. But she did help me get enough nerve to talk to Professor Barry about it, so I feel good that I had some conversation with her.

ANN SHALLECK: Yeah, it seems like this dialogue that you're initiating with your supervisor is one of the most important parts of being a lawyer. You're figuring out what it is you want to be doing as a lawyer. What the contours of a lawyer's role are. Which parts of the role you feel comfortable with. Which you don't. Which are required externally and which aren't. That's really at the heart of being a lawyer. I think it's helpful to look at these questions you're having about

exactly what you should be doing in the context of the enormous numbers of choices you have about what to do with your time and what to do with your energy and your creativity.

ODEANA: Professor Shalleck, though, do lawyers talk about this in the real world? I mean do they talk about this? Or is this just like one of those clinical learning experiences that we have?

HOMER LA RUE: They talk. They do talk about it. What we need to think about as we continue with this scene is how much of an advocate any of us should be to our students about this expansion, when clearly the students' expectation is, as Odeana has expressed quite well, "I want to be a litigator, I want to do what a lawyer does."

SALLY FRANK (DRAKE UNIVERSITY LAW SCHOOL): I think there are two different issues that you're raising here. One is what you said about whose role it should be to decide things, and whether we've been the ones pushing for this co-op plan. The other one is which tasks are the lawyer's tasks and which tasks aren't. Am I hearing you right?

ODEANA: I think that's probably true. They probably are two different things.

SALLY FRANK: Okay, let's try to separate them out for a minute. You brought up *Anatomy of a Murder*, and I agree with you that there are really serious ethical problems if the lawyer is suggesting testimony to a client. That's what Jimmy Stewart was really doing in that movie, right?

ODEANA: Yeah.

SALLY FRANK: But in this case, you know that you said that lawyers should just be doing what the client wants. But do you think the clients always know what the options are?

ODEANA: No.

SALLY FRANK: And I think you know that when we decided to act on this co-op buying idea it was because, as Professor Barry said, your client kind of said she wanted to buy it. She just didn't realize that was possible. What I see as the lawyer's role is not only that when the client comes in and says, "I don't want to be evicted," then you deal with just that one thing, but that you also look at the broader problem.

ODEANA: Can I ask you a question, though? Suppose all she said was, "I don't want to get evicted"? Should I have said, "Oh, well, if you buy your building you won't be evicted"?

SALLY FRANK: Well, I think you first deal with the eviction, and that's what we did last semester. Then we would talk with her about whether that's all she wanted or whether there were other interests and other concerns she had. If she said no, there were no other inter-

ests and no other concerns, we might go on to the next case. But here we saw that there was a real problem for the whole building with this landlord. We knew that there were ways that these tenants, even though they were poor working-class people, could buy it, which they probably never even imagined. Now, when we proposed it to them, if, after we talked to them, they had said, "No, we don't want to do it, we're not interested," I would have said, "Yeah, Odeana, you're right. Let's not work on that. We're just imposing our views." But they got excited, and if they're excited then our job is problem solving.

The other aspect I just want to address for a minute is that I know the frustration of "What's a lawyer doing arranging childcare?" But last semester, when you did that trial, didn't you need to make sure that your client got to court?

ODEANA: Yeah, but I didn't go pick her up.

SALLY FRANK: You didn't?

ODEANA: No.

SALLY FRANK: What if she had said there was no other way for her to get to court?

ODEANA: I don't know.

SALLY FRANK: One of the things even the litigator does is to make sure all the details work, and one of the details might be finding transportation to court. Another might be, "While the client is testifying, is the two-year-old going to be in the courtroom?" So that even trial litigators could end up spinning their wheels working on this stuff. Sometimes we're sitting there saying, "God, why am I doing this, I went to three years of law school to arrange childcare," but if my client is not going to be able to testify, I might have to do it. I really understand your frustration, but even the pure litigator sometimes has to do these other strange kinds of jobs, or run the photocopy machine or things like that.

C. Discussion of the Third Scene

HOMER LA RUE: Okay, with Kim we're going to transition. Everyone who's queued now, you're released from your role. We start with Kim and her statement, and you may do it in role or as a comment.

KIMBERLY O'LEARY (UNIVERSITY OF DAYTON SCHOOL OF LAW): Okay, Odeana, I think it's really important that you speak with your clients about your feelings about what your clients should be doing and what you should be doing. You've already arranged the childcare, but one of the things you might think about is whether you should have taken the same amount of time—because I think you're right, it would have taken some time—to discuss with your clients

how they could have done that and worked with them and had them help you do that. Do you think that might help?

ODEANA: Oh, I think that I am sure of what we should be doing. I am pretty sure I should not be doing daycare. But you're right that I probably just took it on and when I started realizing that, I didn't feel comfortable with it. I should have talked to my clients about that.

KIMBERLY O'LEARY: I think at least you owed it to your clients to explain that you feel that strongly about it.

MARLA HOLLANDSWORTH: No one has addressed this, and I would be interested in whether anyone, including principally Odeana, wants to address it. The question is whether some of the student's discomfort and concern about what professionalism is in this situation has to do with her being an African-American woman in law school who finds herself arranging care for other people's kids. We haven't talked about that yet in what's going on in this situation. I just wanted to raise that as something people might want to look at.

ODEANA: You see, that's why Marla is my buddy. I do feel very uncomfortable with that. That is at least part of my discomfort, that I feel like I am taking care of somebody's children, and why am I paying money for it? At least if I am going to be taking care of someone else's children I should be getting paid for that and not paying for the opportunity to take care of their children.

VOICE EIGHT: At some point I would want to have discussed the ways in which lawyers put things in other people's minds and the extent to which that's part of the job. When I go for estate planning, I am generally very happy with at least some of the ideas that are raised with me about dealing with assets. It seems to me that's an absolutely standard part of the lawyer's role. I think I would have gone from the James Stewart example to at least a discussion of what part of the lawyer's role it is to tell somebody, "If you own the apartment, you can't be evicted," because there might be really interesting discussions that would flow from that.

VOICE NINE: One of the issues that I've been trying to wrestle with deals with the sort of situation you're in, in which the role of the law student gets expanded beyond that which the law student signed up for. I think I also heard that in Conrad's remark that "I didn't sign up to be exposed to tuberculosis."

What we can expect from students changes depending upon the context. Suppose I'm working with you in a community organization, for instance a Habitat for Humanity group at the law school, and we're all in this together, we're doing this as our own community service. Then we're doing something which features a different type of relationship with the clients than when you now are my student and

what I am doing I'm doing as your supervisor. As your supervisor, I have to be very careful about what I ask you to do. I think I have a fiduciary obligation to you as a student to understand what risks I am exposing you to, and to be sure that I am not abusing my position of power as a supervisor by getting you to sign on to my own social agenda. I think there's a fine line between whether I am thinking "Well, yeah, I want to see these people own this co-op" as a matter of my own social values, or in terms that fit with my responsibility to you as a student. I understand that you are a student and that the relationship between you and me is one in which I have power over you in terms of the grade, and so I am worried about whether I am using that to get you to do what is my own social agenda, rather than helping you in this educational experience that we all understand is one in which ultimately I have teaching responsibility. Maybe, as your supervisor, I end up always being left on the hook to do those things that I don't think I should put my student at risk to do.

ODEANA R. NEAL: Actually, let me just say something quickly to that, because I was thinking as you were speaking—this is Odeana the teacher now—that although clinicians often talk about students setting their own learning agendas, what often happens in the clinical setting is that I convince the students that what I want to do fits their agenda. So I am really not letting them set the agenda. I don't think that as a student I felt like I could say, "Professor Barry, I don't want to work on this anymore," because if I said that I knew that either she was going to tell me how I was going to get all this wonderful experience or I was going to get a bad grade.

VOICE NINE: I send students into situations sort of like community-organizing situations, and sometimes the client asks them to do things that go beyond what they originally signed up to do. It is my job to protect them. Plus, as a professor of professional responsibility who teaches malpractice, I keep thinking about what am I exposing us to as an institution, and that is something that you always have to think about.

STEVE ELLMANN (NEW YORK LAW SCHOOL): I thought all three of these situations were completely mind-boggling, and I didn't try to perform these roles. But having had the benefit of listening to people do that, a couple of things struck me about the way that we did speak in role. One of them was that most of the supervisory comments were not empathetic. That is, in the classic Binder and Price terms, they just weren't communicating nonjudgmental empathetic regard.

I don't actually say that as a criticism, but more as an observation that fits with what Odeana in particular was just saying. It seems to me that we have strong advocacy agendas in our teaching and that

those don't fit very happily with speaking to our students in an empathetic way. Now I have to admit that part of the reason there were relatively few empathetic comments may have been that people felt that there was other business to do in the few moments with the microphone. But still I tend to think that it wasn't just the scene but also the way we might have played it in reality. So, I am struck by the tension between being the nice empathetic people we want to be and selling the messages that I think we often feel we really should sell.

The other thing that struck me is that I've been wondering which of these students we were most empathetic towards, not in terms of what we said but in terms of what we felt. I don't know, but I have the impression that the student for whom the room felt the least empathy was the one who was scared of dying of tuberculosis. I must say, if I'm right in that perception, I think it reflects a genuine failure of empathy on our part.

MARTIN GUGGENHEIM (NEW YORK UNIVERSITY SCHOOL OF LAW): I was curious throughout the role play what you folks had spoken about before Odeana took the course. It struck me in listening to it that it reaffirmed my view that it's very important to have interviews before students take our courses, because I think an important subject to discuss is what the work the student will be expected to perform will include. Odeana claimed during the role play that "I expected to be taught certain things," and part of my problem in working through this complicated situation is that even if we could persuade you that this work has worth and is the work that some lawyers do when they are in the profession, you still could be responding quite legitimately, saying, "I wouldn't have taken this course had I known that. I wanted to learn X, Y and Z. You're persuading me that ABC is also important." So I think truth in advertising is very important, and in role I was inclined to respond to you by saying, "I'm sorry you were misled. I understand that you took this course for a different purpose, and I am going to make sure to give you a fieldwork assignment that's consistent with your own expectations. You no longer have to do this."

ODEANA: Wow, will tuition get refunded and will I get an administrative pass, too?

PAULA JOHNSON (SYRACUSE UNIVERSITY COLLEGE OF LAW): Not in my clinic . . . we will continue to discuss it! I just want to say something about women of color and how the issues have arisen in some of the role plays. We have seen how complicated those issues can be through these discussions, particularly with respect to the current one—childcare and related responsibilities. This can be much more complicated than simply asking the female student attorney to arrange childcare, because if I am an African-American woman and I

arrange childcare for my client, the race of the client may have some relevance to what this task means. For instance, if the client is an African-American woman, that might be some basis to discuss her regard for me as a professional even as we work together and divide the various tasks. If the client is white, on the other hand, it may have some other implications about how she views me, not just as a professional but also as an African-American woman professional.

Those issues are parallel to some of the situations with colleagues as well. In the previous role play, for instance, the student came to an African-American woman with a complaint about sexual harassment. Again, that can place people in a very compromising position as professionals. As I have experienced myself in several situations, you must constantly decide how to proceed with that information. In that example, there wasn't enough discussion about the institutional response and about the collegial support that could have been rendered to that faculty member for her decision to support the student. Just as the student felt that someone was there to listen to her, you can also see how critical it is that those of us whose numbers are smaller and who often feel unsupported in various ways also be able to identify people in our institutions with whom we can talk, particularly about such difficult subjects as sexual harassment.

KIMBERLY O'LEARY: Addressing the issue of whether we let students set their own learning concerns: when you did the eviction case, I would not have found it acceptable in my clinic for you to say "I don't like to do direct examination" or "I don't like to do cross-examination so I am not going to choose to do that." It seems to me that as general practice clinicians, we need to redefine what we consider fundamental lawyering skills. I think the students are picking up from us what we think fundamental lawyering skills are, and that we should be up front and explicit about it.

MICHELLE JACOBS (UNIVERSITY OF FLORIDA, COLLEGE OF LAW): I just wanted to tie together the first and third scenarios by saying that we need to examine what we mean when we talk about "lawyering." I think Odeana's reaction to the housing situation points to this issue, as did one of the comments about the TB patient, a comment suggesting that it's not really lawyering to have to go and have intimate contact with the person. I think when you're training students to deal with populations of oppressed people or "financially handicapped" people (for want of a better term), you need to rethink what lawyering means. Lawyering in this context doesn't always mean just handling the "legal part of it." It could be much more expansive than that.

HOMER LA RUE: Thank you. Thank you very much.