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Susan Bennett

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ON LONG-HAUL LAWYERING

*Susan D. Bennett**

Introduction

I came to the practice of community development law from three perspectives: as a former general practice legal services lawyer (trained by some of the people present at this conference); as a law school professor; and, for the last fourteen years, as a clinical teacher of second and third year law students, primarily in the representation of indigent clients seeking to secure or maintain public benefits. With the help of these students, over the course of the past two years, I changed the focus of that clinical practice. We now represent fledgling nonprofits, small businesses, tenant co-ops in private housing, and tenants' associations in public and subsidized housing. When we are called upon to describe our practice, for brevity's sake, we label it as "transactional," in "community and economic development law."

My choice of a path that diverged so far from my training and from the substance and ethos of my practice experience, reflected a first grudging and then enthused adaptation to a different world: one in which no causes of action to secure economic rights remain.¹

* Professor of Law and Director of the Community and Economic Development Law Clinic, Washington College of Law of the American University. My thanks to Danny Greenberg, for showing me early that the practice of poverty law is the most honorable in the world; to John Eidleman, for sharing both his Legal Services statistics and the model of a Legal Services life; to the Washington College of Law, and Ann Shalleck, who, as Director of the Office of Clinical Programs, unquestioningly cleared the way for a new clinical project; to our clients, for being brave beyond belief; to Nancy Cook, for her principled thinking; to Pat Roth, for being present at the beginning; to Louise Howells, for modeling the best in thoughtfulness and collaborativeness; to Perry Wallace, Ken Anderson, and Nancy Abramowitz for their unflinching encouragement and assistance; and to Michael Diamond, for writing manuscripts that make me think long and hard about community, and who pushed me over the edge.

1. See Alan Houseman, *A Short Review of Past Poverty Law Advocacy*, 23 CLEARINGHOUSE REV. 1514, 1517-20 (Apr. 1990) (noting an accumulation of developments which have undercut the efficacy of litigation for economic rights, beginning with the Supreme Court's refusal in the 1970s to recognize constitutional protection for rights to subsistence, and continuing into the 1980s with Congress's narrowing of statutory eligibility for welfare and shifting discretion for welfare administration to the states). Some twenty years ago, long before the de-federalization of both the welfare and housing systems a current colleague of mine predicted that litigation strategies to coerce improvement in housing conditions would implode, succeeding in

I felt that I owed it to my students who are dedicated to legal services or public interest careers, to teach them about what business lawyers and community organizers do. What this has meant is that the clients, (new nonprofits that I will describe below), the students and I, all share similar learning curves and maturation processes. It is from the perspective of this very different background, and even from a very different present, that I can hold up Brooklyn Legal Services Corporation A ("Corporation A") and the Workplace Project and the New York Lawyers' for the Public Interest ("NYLPI") as models (albeit distant) for a very unique construct of lawyering.

How distant can be gauged from even the briefest description of the disparities in situation between their practices and my own. For instance, our clinic continues to be measured in "cases," and not in community projects - certainly not in neighborhood-based projects. The reason for this is simple. Like most law school clinics, we do not live in a neighborhood.² We meet our clients in the basement laundry rooms of their apartment buildings or in community centers, because our offices are too far away. New clients come to us through word of mouth and through contacts made by attending our community meetings. These meetings, and these clients, occur in and come from every ward in the city except the one in which our law school is located: the richest, whitest, most exclusionary quadrant of the District of Columbia. This alone contrasts us with the community-based practice described in Corporation A.

The placement of an office is only one of many statements of philosophy of what is important in teaching and practicing law. My comments on the video come from this and other elements that seemed to embody philosophies that contrast with my past experience, but which make tremendous sense to me now. I would like to discuss these elements, first, as a fledgling lawyer myself for fledgling non-profits (call me an "FLFNP"); and second, as a teacher for what I hope will be the FLFNPs of the future.

the short term, but failing in the long term to increase the stock of affordable, decent housing. See Michael Diamond, *Rehabilitation of Low-Income Housing through Co-operative Conversion by Tenants*, 25 AM. U. L. REV. 285, 289-93 (1976) (describing limited efficacy of civil enforcement of habitability codes and of rent strikes as tools to increase the supply of affordable housing).

2. An exception to this pattern - and there may be others - is the Community Economic Development Clinic of the University of Michigan Law School, which, as a result of conscious choice by its founders, is located in Detroit, about sixty miles away from the main campus of the law school in Ann Arbor. For further discussion of the uneasy fit between law school priorities and community development practice, see discussion *infra* Part I.B.

Three major points stand out for this FLFNP. First, the skill and art of the community development practitioner is that of "long-haul lawyering." Long-haul lawyering derives from many elements, but two are critical. One is presence in the community. As one of the community organizers in the segment about the Workplace Project said, earning trust means "going there earlier than everyone else; and being there in the morning." The legal services provider must be community-based and collaborative (or needs to be community-based in order to be collaborative). Presence, a moral and geographical presence, is an imperative.

Second, legal services representation in the community is unbounded, in both nature and duration. The "unboundedness" of the exercise is the second critical element of long-haul lawyering. The groups whom the community lawyer represents may well be "clients for life," and the lawyer is rarely able to predict which skills her clients' situations may call upon her to use, or to refrain from using. The "collaboration" that I just mentioned may require a fluid sharing of tasks, in ways that blur demarcations between what the lawyer thinks of as her and her client's expertise. In addition, the video reminds us that there will always be the necessity to resort to other, non-transactional legal services. Litigation - or the threat of it - is still a powerful tool. There must be legal "hooks."

Third, teaching the practice of community development law in a law school clinic is like nailing jello to a wall.

I. The Unsettling Prospect of Long Haul Lawyering

A. A pleasant surprise, a source of unease: the entrance of the "Client for Life."

As Sam Sue, one of the critical actors in NYPLI's environmental advocacy in Red Hook, said during the conference discussion that relationships in an on-going community practice are intense. This comes as no surprise. Initially, it would never have occurred to me that representation of an association or non-profit corporation could approach the drama, immediacy or anxiety involved in the representation of a mother whose child has been snatched, or of a family on the verge of eviction. The purchase of an apartment building, or the development of a health center, can drag out forever, without the galvanizing ups and downs that may bond the lawyer and her individual client together through what may be an equally protracted representation. But there is no denying Sam's point. Client-lawyer relationships in a community development

practice are intense because they are born of no one single moment. They are the product of a mutual evolution over time: of the long-haul lawyer and the client for life.

The notion of "clients for life" is sobering. Actually, it is frightening. There was always that nice, satisfying snap to "closing a case." Now, as when I served as a Legal Services lawyer, the short-term case, not the long-term relationship, is the rule. Most cases completed by LSC grantee organizations consist of quick advice and referral.³ This is nothing new. Focus on brief services has been a feature of legal services practice for the past few years.⁴ Relationships in traditional legal services individual representation are more often defined by "the case" rather than by "the project vision."⁵ In legal services practice, as in the judicial arena, pressures to produce numbers and to make room for ever more cases have turned "closing the case" into the lawyer's unit of accomplishment.⁶

There are undeniable externals that pressure poor people's law offices into practicing law "by the case." Two years ago Congress withdrew from Legal Services grantees the funding,⁷ the stability,⁸

3. The Legal Services Corporation retrieves data for casework performed in field programs at the time of case closure, so any analysis of the composition of casework is always retrospective. Still, for calendar 1996, 38.5% of all cases closed were concluded after "Advice and Counsel," and an additional 20.8% were closed after "Brief Service." Of cases in which staff rendered more substantial services, 2.2% were closed based on settlements with litigation; 2.7% with settlements without litigation; 3.8% were closed as a result of decision by an agency; and 7.2% were closed after a decision by a court. LEGAL SERVICES CORPORATION, LEGAL SERVICES FACTS 1996, at 13 (1997) [hereinafter 1996 FACT BOOK].

4. Case reports for 1990 list 34.68% of all national cases closed after "Counsel and Advice," and 22.20% closed after "Brief Service." LEGAL SERVICES CORPORATION, LEGAL SERVICES CORPORATION FACTS 1990-1991, at 82 (1992).

5. Tellingly, the Legal Services Corporation's codes for types of work do not capture group work or transactional projects. 1996 FACT BOOK, at 14-15 (1997) (listing from the 1996 Grant Activity Reports the types of closed cases. Categories consist of Consumer, Education, Employment, Family, Juvenile Health, Housing, Income Maintenance, Individual Rights, and Miscellaneous, with sub-categories, and with the reasons for case closing noted next to each sub-category).

6. See, e.g., Alan Houseman, *Community Group Action: Legal Services, Poor People and Community Groups*, 19 CLEARINGHOUSE REV. 392, 399 (Summer 1985) (predicting pressures on legal services offices to provide "limited services to large numbers of clients," and the institution of case-reporting requirements that would "encourage high case counts").

7. Appropriations for the Legal Services Corporation decreased 30.5% from fiscal year 1995 to FY 1996, from \$400,000,000 to \$278,000,000. This represented the most significant withdrawal of support since 1982, when Congress cut appropriations for the Corporation by 25%. See 1996 FACT BOOK, at 1. Field offices lost 12.9% of their full-time office staff. See *id.* at 9. Field offices closed 14% fewer cases in 1996 than in 1995, and 21.2% fewer cases requiring extended service. See *id.* at 16.

and the professional discretion to elect forms of delivery of legal services - class actions,⁹ community organizing,¹⁰ legislative lobbying¹¹ - that might support more expansive or systemic representation.¹² This action merely continued a process of curtailment of capacity for broad-based lawyering that began the minute that Legal Services offices received their first federal funding,¹³ and demonstrated a recognition that systemic representation is political and threatening. Even without these incursions, field offices have faced pressures, as have other social services providers, to choose between meeting the emergency need and building for the long term.¹⁴

8. The Omnibus Consolidated Rescissions and Appropriations Act of 1996 (hereinafter 1996 Act) required the Legal Services Corporation to implement a system of competitive bidding for funding for all field programs after March 31, 1996, Pub. L. 104-34, § 503(a)(1), 110 Stat. 1321, 1352 (1996); and forbade the giving of any preference to previous recipients of Corporation funds, § 503(e), 110 Stat. 1321, 1353.

9. See Pub. L. 104-34, § 504(a)(7), 110 Stat. 1321, 1353 (1996) (denying support to recipients who participate in class action litigation).

10. The original Legal Services Corporation Act of 1974 prohibited the use of funds to train clients in political advocacy, 42 U.S.C. 2996f(b)(6); see *Legal Aid Society of Hawaii, et al., v. Legal Services Corp.*, 961 F. Supp. 1402, 1406 n.1 (D. Hawai'i 1997). The 1996 Act prohibits the use of funds for conducting training programs to support a particular public policy or political activity, although a field program may train legal staff to inform a client of her rights. Pub. L 104-34, § 504(a)(12)(A-B), 110 Stat. 1321, 1355 (1996).

11. Current prohibitions restrict recipients from using federal funds in any activity to influence the promulgation, passage or amendment of any regulation or statute at any level of government. See Pub. L. 104-34, § 504(a)(2-4), 110 Stat. 1321, 1353 (1996). Recipients may not engage in legislative or regulatory advocacy, or in casework, to raise any systemic challenge to welfare law. See *id.* at § 504(a)(16), 110 Stat. 1355. Recipients may use outside funds to comment in public rulemaking, or to respond to specific inquiries from legislative bodies or committees. See *id.* at § 504(e), 110 Stat. 1357.

12. When Congress also prohibited field offices from requesting attorneys' fees in civil rights and other cases arising under fee-shifting statutes, it eliminated an indirect but significant source of support for such labor-intensive projects. See Pub. L. 104-34, § 504(a)(13), 110 Stat. 1321, 1355 (1996) (prohibiting distribution of funds to any recipient that "claims . . . , or collects and retains, attorneys' fees pursuant to any Federal or State law . . ."). Legal Services attorneys brought \$10,912,330 in attorneys' fees to their programs in 1995; in 1996, (presumably in cases begun before the effective date of the 1996 legislation) they won \$5,277,270 in fees, a decrease of 51.6%. 1996 FACT BOOK at 5.

13. For a description of the almost instantaneous intervention of the state bar association to force restrictions upon the activities of the nascent California Rural Legal Assistance in the 1960s, see PHILIP B. HEYMANN AND LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 30-31 (1988). For a contemporaneous discussion of congressional restrictions imposed in the mid-1980s on community-based legal services activities, see Houseman, *supra* note 6, at 398-99.

14. Many commentators, over many years, have prescribed ways of addressing the intractable problem of the availability of too few poor people's lawyers to take too

Collectively, these externalities limit the energy and the vision necessary for entering into the relationship with the "client for life." But there is nothing particularly intensity-enhancing about the lost litigation tools: the protracted contact implied in systemic or class action litigation does not translate necessarily into such a relationship.¹⁵ Nor is there anything magical about group or transactional representation. A lawyer-client relationship that begins with a transactional task may carry intrinsically no greater degree of intensity than if the retainer called for assistance with an SSI claim. Something induces the practice based on "clients for life" that is more intangible than whether the focus is on the individual client or the group, or on environmental impact litigation or education in workplace rights. Something more than external pressure impels "Corporation A," or the Workplace Project, or the NYLPI, or some other poverty community development practitioners,¹⁶ to envision their representation in terms of "projects" rather than "cases."

That "something" may explain why Corporation A is almost unique among models of legal services poverty law practice.¹⁷ The pressure to produce closed case numbers, the unfamiliarity with and distrust of these areas of law as appropriate tools for representing poor people, and fear that community development will be

many cases, and to take them all yesterday. For only a few, see Barbara A. Glessner, *The Ethics of Emergency Lawyering*, 5 GEO. J. LEGAL ETHICS 317 (1991) (positing standards of practice for emergency legal services); Paul Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1103-04 (1990) (expressing the opinion that it is permissible for legal services offices to engage in "triage," the practice of choosing who gets the scarce resources of legal services provision, and how much); Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 359 (1978) (stating that while a program may limit the categories of clients' needs that it will address, it should not limit the services provided within those categories).

15. See, e.g., Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class-Action Cases*, 64 FORDHAM L. REV. 1435, 1435 (1996) (in which the author describes her experience as an attorney for the plaintiff classes of children in or at risk of being placed in foster care in Arkansas: before she heard a child in foster care speak of the anguish of being kept ignorant of the location of her siblings, she had been prepared to treat the issue of sibling visitation in foster care as a "give-away" issue in negotiation of a settlement).

16. See Ben Quinones, *Serving Clients in New Ways: Community Economic Development: CED on The Job*, 27 CLEARINGHOUSE REV. 773 (Nov. 1993) (describing the breadth of scope of some community development legal services projects).

17. Some twenty percent of some three hundred Legal Services Corporation field programs have devoted resources to community economic development representation, with at least four programs practicing exclusively in that field. See Mario Salgado, *Building a Community Economic Development Unit*, 28 CLEARINGHOUSE REV. 981, 982 (Jan. 1995).

perceived as community organizing may deter programs from assuming the risk of long-term transactional projects. But what really deters is Corporation A's approach to representation. It acts as "house counsel" to its clients. This designation implies a relationship that evolves as the organisms do, with the lawyers' activities conditioned on the clients' own capacities and perceptions of the long-term needs of the neighborhood, as much as on the exigencies of the moment.¹⁸

For the law office to commit itself to a practice based on a client's growth demands a flexibility and a willingness to dig deep. It is rare that one cataclysmic event will trigger the representation of a community organization. It will probably take the tenth, not the first, shut-off of the heat and hot water for the tenants to call the lawyer; or the tenth, not the first time that someone is turned away from the closest emergency room for the neighbors to demand a community health center. As a corollary, it may take the tenth, not the first or the third, client-lawyer meeting for the client group, with its own group identity formed over months of internal bickering and external buffeting, to feel comfortable enough to use the lawyer as lawyers are accustomed to be used: to call her before, not after meeting with the housing authority about the grant; to show her the contract with the laundromat rental company before, not after it is signed.

We come back to presence. Being able to stay put and to dedicate resources over time, is the greatest contribution that a program can make to the practice of long-haul lawyering. Long before Congress stripped Legal Services offices of most of the weapons in their arsenals for systemic strategies, consultants reminded them that their greatest strength lay in "being there": on the "collective institutional memory" of the neighborhood law office, a repository of impressions filtered through individual cases that build insight about neighborhood problems. It is these organic impressions that no one client, no one lawyer, and no one intake system can or does identify, and that offices should endeavor somehow to capture.¹⁹

The mechanisms of class action, and especially of legislative advocacy, have undeniable power to address the structural injustices

18. Brian Glick & Matthew J. Rossman, *Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: the East Brooklyn Experience*, 23 N.Y.U. REV. L. & SOC. CHANGE 105, 119-20 (1997) (describing the "house counsel" approach used by the Community Development Unit of Brooklyn Legal Services Corporation A).

19. See John Tull, *Implications of Emerging Substantive Issues for the Delivery System for Legal Services for the Poor*, 24 CLEARINGHOUSE REV. 17, 21 (May 1990).

that repeated single inequities expose over time. But none of the initiatives in Brooklyn or Long Island which the video depicts depended on any of the confiscated tools for their success. The recent blatant removal of the capacity for structural advocacy may in the long run do no greater harm than the removal of the neighborhood-based law office - whether that removal occurred through “friendly” diversion of focus into elite, one-issue specialty offices in the 1960s and 1970s, or through hostile elimination of staff in the 1980s and 1990s.²⁰

It is of course perseverance in the dedication of mental resources that makes the most difference. After a few short years of community development law practice, the FLFPN marvels as much at what the video does not, as at what it does, show. The Corporation A - Brownsville CDC collaboration works because so many people spent so much unseen time laying groundwork. There are the years of “going there earlier than everyone else.” There are the years of staying with the client group that starts with little more than a vision; that keeps its receipts in paper bags and throws away the stupid little forms it gets in the mail from the Internal Revenue Service because, hey, it makes no money so it doesn’t have to pay any taxes, right? These are the groups whose officers work three jobs; or spend whole days on line at the Department of Human Services so they don’t miss their workfare appointment, and so have no energy to send out notices of membership meetings, let alone hold them. And on and on. Yolanda Garcia’s 168 meetings seem little short of miraculous based on what I have learned over the past two years.

While we must ask, what sustains the long-haul lawyer?—we should wonder as well: what sustains the long-haul client? For anyone with survival as a day job, doing the night meetings and the weekend work of “civil society” is asking more than most of us

20. Alan Houseman has clarified the historical roots of what often has been oversimplified as an impact-service, specialty office-neighborhood office dichotomy in Legal Services. As he explains, early differences in approach arose more from whether the core of the representation was situated in the neighborhood office, or in community-based lay advocacy groups, no matter what their location; each mode employed a full range of strategies. *See* Houseman, *supra* note 6, at 395. From its inception in the 1970s, the Legal Services Corporation emphasized development of specialty units, with a focus on “professionalism” in traditional lawyering tasks, and de-emphasized organizing and other skills not directly tied to litigation. *See id.* at 397. For further description of early disagreements over approaches to effective poor people’s representation, *see* MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-1973, 22-39 (1993).

usually ask of ourselves.²¹ When my students and I get petulant because our clients don't take minutes and don't keep books, we have to stop and reflect on what effort not only of will, but of faith, it takes to assume responsibility for the well being of your community.

I have discussed with colleagues troubling issues of whether lawyers should only represent community group clients who are "lawyer-ready" - that is, who have moved from paper bags to third-hand filing cabinets. While we continually worry about lawyer competence, is it appropriate to set standards for client competence? "Capacity-building" is a buzz-word in the new world of abdication (also known as devolution), in which non-profits struggle to fill the gaps left by government in the provision of housing and social services. For community groups to take on the complicated and expensive job of building, financing and managing housing requires significant external supports and strong internal organization.²² Similarly, groups may need training in how to construct themselves as a group in order to articulate unified, representative positions to a lawyer. But the question of whether that training should be a predicate to representation, or should be the task of the newly retained community development attorney, can be answered only by the answer to another question: how deep is the lawyer willing to dig? How much a witness to, and participant in, the struggles of the group to constitute itself out of the welter of individual hardships and competing demands can the lawyer be?²³

One must add to the difficulty of the indeterminacy of long-haul lawyering one paradox: that being "present" requires the commu-

21. See Robert Halpern, *REBUILDING THE INNER CITY: A HISTORY OF NEIGHBORHOOD INITIATIVES TO ADDRESS POVERTY IN THE UNITED STATES* 12 (1995) (describing the history of community-based but top-down dictated urban improvement projects as expecting unreasonable sacrifices from ". . . those with the fewest capital, institutional, and human resources to draw on those resources to better their lives; . . .").

22. See, e.g., Alex Schwartz, et al., *Nonprofit Housing Organizations and Institutional Support: The Management Challenge*, 18 *J. URB. AFFAIRS* 389, 393 (1996) (describing financial and organizational resources that nonprofits draw on to enable them to engage in housing development).

23. In a classic Clearinghouse piece - and one of few in this Legal Services periodical that directly addresses group representation - Michael J. Fox set forth as his sixth of fifteen "rules" for community lawyers that the lawyer should insist on unified direction from the group, communicated through a formal process. He suggested this not as a way of screening out less well organized clients, but as a way of assisting the client group in developing structures that it will need if it is to succeed in its projects. See Michael J. Fox, *Some Rules for Community Lawyers*, 14 *CLEARINGHOUSE REV.* 1, 3 (May 1980).

nity lawyer to figure out when not to be. While the community lawyer may need to be prepared to hand out fliers, drive children to baby-sitters so the officers can attend a meeting, or produce several dozen deviled eggs on a few hours notice (the best guarantee of attendance at a meeting is food), she also needs to know when to hang back. Some of the most consistent advice given to community lawyers consists of warning them not to use their professionalism to dominate the group process.²⁴ But the issue becomes more complicated when the group implicitly or overtly requests assistance that may not look like domination, but may amount to subversion of the group's purpose. Richard Marsico has described how, with all good intentions and with the client's apparent approval, his clinic's focus on legal strategies for challenges under the Community Reinvestment Act may have diverted the client's energies from the community organizing necessary to address the political roots of disinvestment.²⁵ He also notes that the clinic's goal of making itself available for "non-lawyer" tasks may have had the unintended consequence of undermining the client's internal administrative organization.²⁶ Richard's brave (and perhaps unduly self-castigating) exposure of the difficulties that even the most sensitive community lawyer can face in deciding when and how to represent suggests that knowing when to act and when not to be seen, may be the most useful skill of the long-haul lawyer.

As I noted, the video does not show us the early stages of Corporation A's relationships with its community clients. We do not know the genesis of many of these relationships - or what the basis was of any choices that had to be made at intake.²⁷ But I am confident that it is through "presence" throughout the stages of the

24. See *id.* at 5. "Rule 10: [a]void dominance of the group at all costs." See also Steve Bachmann, *Lawyers, Law and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 6-7 (1985) (noting the limited uses to which the Association of Community Organizations for Reform Now - ACORN - puts its attorneys, in order to avoid the risk of attorney domination of the group).

25. See Richard Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?*, 1 CLINICAL L. REV. 639, 651-52 (1995).

26. See *id.* at 652-54 (describing how the clinic's philosophy of cross-disciplinary collaboration with the client in legal and non-legal work culminated in the author's filling in for secretarial staff when the client organization lost funding).

27. See generally, Tremblay, *supra* note 14 (discussing triage issues in legal services intake). The question of the community development analogy to legal services "triage" demands a whole separate article. In setting criteria for taking new cases, should community lawyers take into account whether the representation will further any kind of coherent community vision? Can or should the articulation or furtherance of a coherent community vision be the lawyer's business, or - much as with the

journey that the community lawyer finds what Sam Sue spoke of as intensity. Choosing to be present at the creation of a neighborhood group can be as much an act of faith and commitment to uncertainty as taking on the most ferocious custody litigation. You know some of what it will entail. You can hope - but you really have no idea of exactly when or how or whether it will end.²⁸

B. Teaching the skills of "long-haul lawyering:" Standard issue: one shovel. Next week on the syllabus: Who Calls the Fire Inspector?

Last summer the *New York Times Sunday Magazine* ran an article on John Rosenberg, director of a legal services office in eastern Kentucky.²⁹ He started his practice twenty-five years ago by helping the thirty families of David, Kentucky buy their town - not their apartment building, their town - from its absentee owner. Later, he assigned a new lawyer to assist full time with the legal work for the town. The redevelopment project which the residents initiated involved the installation of new water and sewer systems. The clients suspected that the contractor had not laid the water main deep enough. The lawyer's first task as the lawyer for David was his first task as a lawyer, period. He took a shovel, and a tape measure, and dug a hole.³⁰

You will look far, and in vain, for better teaching aids in this business than a shovel and a tape measure. I know now that teaching and modeling community representation, as it is practiced in the Workplace Project or by Corporation A or by the NYLPI, is a daunting task, whether one has a laughable one or a more forgiving two semesters within which to do it. As our colleague Peter Pitegoff has noted, the brevity of the law school clinical experience is at odds with all the longevities required for community practice: longevity of technical experience, longevity of judgment, longevity of each project, longevity of the vision of which each endless pro-

"unready" client - should the lawyer take group clients as she finds them? What is the "project" equivalent of the "good case"? *Id.*

28. For an exacting self-examination of what lawyers bring, and ask, of themselves from the beginning of the enterprise of client representation, see Jane M. Spinak, *Reflections on a Case (of Motherhood)*, 95 COLUM. L. REV. 1990 (1995).

29. See Michael Winerip, *What's A Nice Jewish Lawyer Like John Rosenberg Doing in Appalachia?* N.Y. TIMES, June 29, 1997, § 6 (Magazine), at 24-25.

30. See *id.*

ject is just one part.³¹ Add boundedness to brevity, and you begin to appreciate the challenge of teaching community lawyering in law school. Duncan Kennedy alerted us years ago to noticing how law school recapitulates and reinforces professional hierarchy.³² Similarly, law school curricula - the focus on discrete doctrine organized into two to four credit packets - encourage the compartmentalization that makes adapting to the view of lawyering-by-the-case easy. Whether law schools create this time sense, and this need for definition and finality, or simply respond to the constructs of the profession, makes no difference - the result is the same.

In a reference that may have no meaning beyond my generation or geography, doing community lawyering after going to law school is a lot like parallel skiing after being taught how to snow-plow: you have to unlearn most of what used to get you downhill.³³ Curricula and materials further the mind-set that make teaching this concept of law practice so difficult. Litigation itself is peculiarly linear, as are case theories defined by "causes of action"³⁴ - and I never fully appreciated how welded law schools are to linear models, until I tried to teach something about non-linear lawyering. The standard track of clinical legal education moves students from client interviewing through formulation of a cause of action, through ensuing fact investigation and legal research, and through

31. Peter Pitegoff runs the Community Economic Development Clinic at SUNY Buffalo. See Peter Pitegoff, *Law School Initiatives in Housing and Community Development*, 4 B.U. PUB. INT. L.J. 275, 284-85 (1995).

32. Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 38-58 (David Kairys ed., 2d ed. 1990).

33. To elaborate: where and when I grew up, on the ice fields of New England, my generation learned how to ski via the maneuver known as the snowplow. Snowplowing was premised upon one view of how to approach a hill: traversing sideways, always going against the grain. Once you, the beginner, had trained your muscles into a frozen posture of bent knees and legs splayed into a "V", and your reflexes into guiding you away from the bottom of the hill, you were ready to graduate into real skiing. You were supposed to modify your weighting and edging, to slide both skis into parallel motion, and to attack the fall line head on. It was a world view conditioned by equipment (heavy wooden skies; lace-up leather boots with too much give in the ankles to promote confidence that skis would inevitably follow feet) and geography (northeastern skiing, with narrow runs and sudden patches of glare ice), that encouraged a cautious but ultimately maladaptive style.

34. For a re-conceptualization of traditional case theory analysis to ground it more thoroughly in client narrative, see Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994). The author's criticism of the "traditional model" - that it reduces the complexity of clients' experiences to mere supports for the winning doctrinal legal theory - arises implicitly from that model's embeddedness in the context of preparation for trial. See *id.* at 492-502 (describing approaches to case theory taken by leading casebooks and texts, all premised on stages of trial preparation).

the performance events of opening statement, witness examination, and closing argument. The model draws its linearity not so much even from the framework imposed by litigation, but from assumptions that all representation starts with a pre-formed event, such as the decision to write a lease or to open a particular business. This model does not work - either in its linearity or in the narrowness with which it defines "skills."³⁵ That the lawyer might serve a useful purpose in assisting the client in reaching that decision, and might need a different perspective on counseling or fact-gathering skills in order to do so, is not considered. The widely-used teaching materials that I know which illustrate the skills critical to any kind of lawyering use this model³⁶ - even when they purport to draw their examples from transactional practice,³⁷ and even when they

35. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: the Structure of Problem Solving*, 31 UCLA L. REV. 754, 762 (1984) (commenting on the overwhelming linearity and litigation focus of the literature dealing with negotiation); see also *id.* at 758 n.6 (that negotiations occurring in transactional contexts may differ so greatly from the interactions depicted in the standard literature that any attempt to apply principles from the adversarial model may be "dysfunctional").

36. See *infra* note 37; see also DAVID BINDER, PAUL BERGMAN, AND SUSAN PRICE'S *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991). Most of the text addresses client interviewing and counseling, and the processes of fact gathering and theory generation, in the context of problems conceptualized as litigation events. See *id.* See also ROBERT BASTRESS & JOSEPH HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATING* (1990) (which illustrates its discussion on these skills with a few transactional examples). But Bastress and Harbaugh pose very specific problems derived from and constrained by facts already in evidence: a reconfiguration of a former business; the setting up of a joint venture with one particular potential partner; and the exploration of problems with an investment. See *id.* at 62, 92-93, & 184-86.

37. Binder, Bergman, and Price explicitly recognize the litigation slant of most writing on legal problem-solving, and therefore apply the first example of lawyer-client interaction in their book to an individual client's non-litigation, transactional needs. Binder, *supra* note 36, at 5-6. However, inclusion of this as the first of three examples of "nonlegal concerns" implies strongly that the lawyer should evaluate such factors as a predicate to the consideration of whether to embark upon litigation. The sections of the book specifically devoted to interviewing in transactional work - on "Gathering Information for Proposed Deals," and the ensuing technical advice on "Techniques for Gathering Information About Proposed Deals," - are helpful in that they conclude with a caveat about the inherent differences between fact-gathering in litigation and in transactional situations, with the investigation about the "deal" requiring a more "wide-ranging" inquiry. See *id.* at 197-223. A subsequent section of the text, "The Counseling Model and Proposed Deals," follows up with suggestions on how to approach drafts of documents which sum up the agreements reached in the "deals." See *id.* at 376-406. However, the approach throughout does focus on the event of the "deal," as the culmination of a linear sequence. While the process of "deal-making" will certainly figure among the activities of community lawyering, it will arise as the result of other, less linear or predictable processes that produce the circumstances that generate the deal.

address the development of skills as fundamental as problem-solving to the teaching of broadly conceived transactional law.³⁸ One must search back twenty years to find a text and materials - out of print - which focus on planning as a lawyer's skill in transactional law.³⁹

In community development practice, students gain no comfort from the neat case theory model. But as community lawyering practiced as "business law in the public interest"⁴⁰ challenges static conceptions of lawyers' roles, it demands reconsideration of lawyers' skills; and there is no dearth of reflection about the skills we need to inculcate in the fledgling transactional community lawyer. Several of the few clinical law school faculty who teach in transactional, housing or economic development clinics, have articulated their view of what these clinics can or should teach. Although they want students to gain proficiency in the substantive matter of the work - the tax, corporations, housing, and finance law - they give the highest value to the approaches and to the political lessons which immersion in community-based issues teach. Primary among these approaches is that of collaboration: with community groups, with non-lawyers in interdisciplinary partnerships, and,

38. See GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978). In their introduction to their magisterial text, Gary Bellow and Bea Moulton acknowledge that the book gives "only scanty treatment" to what they label as "non-litigation planning and collaborative bargaining." *Id.* at xxv. Indeed, their commentary in the chapter on case planning immediately adopts the frame of reference of trial literature, with their section on developing theory of the case advocating consideration of broader context, but premised on "parties to a particular dispute . . ." *Id.* at 317 & 324. See also THE ABA REPORT: LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM, OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (the "MACCRATE REPORT") (1992). While THE MACCRATE REPORT is not a law school text, it does set out "Problem-Solving" as one of the critical lawyering skills, but has been criticized as failing to prescribe the consideration in problem-solving of perspectives broader than those which serve the client's immediate interests in litigation. See *id.* at 141-148; see also Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 CLINICAL L. REV. 65, 74 (1997).

39. See LOUIS M. BROWN & EDWARD A. DAUER, *PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS* (1978). This is the only book I have found that deals with transactional lawyering as an approach, rather than as a collection of discrete skills such as contract drafting. The only example I know of a community development textbook is CHARLES E. DAYE ET AL., *HOUSING AND COMMUNITY DEVELOPMENT: CASES AND MATERIALS* (2d ed. 1989). As a comprehensive overview of policy, and litigative and transactional strategies, for preserving affordable housing, the casebook would work admirably even now as a classroom text. It does not address in any detail, and does not purport to, the skills which will enable the lawyer to approach her relationships with community-based group clients.

40. The phrase is Peter Pitegoff's. See Pitegoff, *supra* note 31, at 283.

most important, with the client groups themselves.⁴¹ As Susan Jones has emphasized, representation of clients in development issues exposes students to poor people as affirmative actors, with influence in the community and expertises that must be consulted.⁴²

There is no owner's manual for this kind of law practice - (perhaps because) there is no owner. We must then ask what course materials *do* we use, and how do we plan a year's worth of classes? We assign the linear texts, and glean from them what we can concerning techniques in interviewing and fact-gathering that we can extrapolate to the situation of groups who begin with no agenda save an idea. We draw from social work and sociology texts on group dynamics.⁴³ We may not have a class on cross-examination, but may split an instructional "hour" between necessary explanations of the impact of unrelated business income on a 501(c)(3) corporation, and discussion of the question, raised by one student's experience, of who calls the fire inspector: the lawyer (read, law student clinic intern) or the tenants' council. If the student calls the fire inspector, (especially in D.C.), gets someone to come out, and issue a violation for the illegally padlocked basement exit door, then the student has gained some mastery over bureaucracy, and feels pretty good. The student has also unnecessarily lawyerized an organizing moment, and stolen an opportunity for the tenant's group to enhance its credibility with management and its own membership. At the end of the day, we can say that we have explored two critical elements of community lawyering: how to keep your client solvent, productive, and still tax-free, and how to reflect on the desirability of keeping your nose out of your client's domain - an example of the cardinal principle I mentioned earlier of "don't butt in."

"Who calls the fire inspector" is a critical part of any curriculum on community lawyering, one of the many not addressed by the books. Another major part, also uncovered, consists of how to educate the client for self-help. The example of the Workplace Pro-

41. See *id.* at 285; Jeffrey S. Lehman and Rochelle E. Lento, *Law School Support for Community-Based Economic Development in Low-Income Urban Neighborhoods*, 42 WASH. U.J. URB. CONTEMP. L. 65, 73-4 (1992).

42. See Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 207, 219 (1997).

43. Examples of the non-legal literature we have used include Andrew J. DuBrin, *Group Dynamics and Teamwork*, in FUNDAMENTALS OF ORGANIZATIONAL BEHAVIOR: AN APPLIED APPROACH 153-171 (1997); and Ronald Toseland & Robert F. Rivas, *A Model for Effective Problem Solving*, in WORKING WITH TASK GROUPS 129-140 (1987).

ject illustrates the critical role of client education as a key lawyering goal: that organizing, and the use of client education as an organizing tool, is part of the lawyer's toolbox.⁴⁴ Thus it must be part of the law teacher's toolbox too: we need to borrow a page from the teacher training programs in which we certainly never took part, and instruct our students in how to design and present workshops for clients. While this skill resembles the oral advocacy skills we teach in clinics, particularly when we emphasize the importance of heeding the interests and capabilities of the audience, the goals differ. Oral advocacy seeks to persuade; client education seeks to empower.

If the quintessential community lawyering skills are endurance, presence, and the discretion to know when not to butt in, the question remains: how do we teach "presence?" Even more to the point, how do we teach "presence with persistence?" Perhaps the most important aspect is orientation. The "how to" tracts, however "client-centered" they in good conscience may be, depend on a structure in which forces external to the client control the rhythms of representation. Not that externals assume lesser power to constrict in the transactional world, where the calendars of developers, grantors, and lenders substitute for those of courts, agencies and the other side. But changing the usual lawyer's orientation from one that prompts reaction to problems, to one that induces action in furtherance of a community's assessment of its strengths, may be an important mission of the community lawyering curriculum. Working with our clients from a pro-active "asset-based," rather than a reactive "deficiency-based"⁴⁵ stance to attack problems is one way to show why long haul lawyers need mental, physical and political stamina.

II. At the End of the Day - the Remaining Necessity of Legal "Muscle"

As Paul Acinapura described in the video, Brownsville Community Development Corporation achieved its dream of building a

44. Jennifer Gordon had the opportunity to describe more fully the role of client education as a mode of legal services delivery in her article on the Workplace Project. See Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 433-37 (1995).

45. For a definitive statement of the "assets-based" community development philosophy, see JOHN KRETZMANN & JOHN MCKNIGHT, BUILDING COMMUNITIES FROM THE INSIDE OUT: A PATH TOWARD FINDING AND MOBILIZING A COMMUNITY'S ASSETS 8-9 (1993).

full-service community health center because of one lawyer's close and creative reading of one word: "hospital." Paul's interpretation of that key term in the context of New York State's Public Health Law - plus countless rounds of negotiation, meetings, and studies - triggered the bond issue that made the project possible.⁴⁶ Yet sometimes the close reading and the meetings and the submissions are not enough: sometimes you need muscle (or what all of us, lawyers or not, conventionally think of as muscle). Corporation A plays with back-up: the presence of a second legal services organization ready to take on the protracted litigation that may be necessary when the tools of negotiation and the strategies of moral and political persuasion fail.⁴⁷ Most of the examples we have seen work because there are legal hooks. Things are not so different from conventional practice in that respect. Even the Legal Services lawyers who do advocate community development solutions to problems of poverty have linked those solutions to opportunities extracted through litigation.⁴⁸

Professor Southworth has written about the practice of transactional law as "building and maintaining relationships."⁴⁹ Yet, our clients historically live in a world in which they are shut out of relationships. They and their Legal Services lawyers have struggled to develop norms of due process to guarantee access to impartial arbiters, all as a way of compensating for our clients' exclusion from

46. See Glick & Rossman, *supra* note 18, at 128-30 (describing the long process of persuading New York State's Department of Health to authorize the state Medical Care Facilities Finance Agency to issue bonds to finance the renovation of a facility).

47. See *id.* at 149-51 (describing how the litigation director and housing units of Corporation A represented tenants in a rent strike and state court suit against the Department of Housing and Urban Development and the building's owner for appointment of a receiver and other relief. After the appointment of a receiver resulted in some immediate improvement in the condition of the building, Corporation A's Community Development Unit then assisted the tenants in negotiating purchase of the building). See *id.* at 151-55.

48. See John Little & The Staff of the National Economic Development and Law Center, *Practicing Community Corporate Law*, 23 CLEARINGHOUSE REV. 889, 889 (Nov. 1989); Debbie Chang & Brad Castel, *Creating Opportunities through Litigation: Community Economic Development Remedies*, 26 CLEARINGHOUSE REV. 1057, 1058, 1058 n.1 (Jan. 1993) (both emphasizing that community economic development and litigation strategies are not mutually exclusive, but, rather, that litigation compels the dedication of resources that community development expertise can help direct into lasting improvements).

49. Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 WIS. L. REV. 1121, 1126 (concluding that transactional counseling focuses on preventive measures, which include the nurturing of relationships, and that such a practice might produce more collaborative relationships with clients than might litigation-based practices).

the kind of marketplace based, old boy, old girl networks that grease the wheels for everyone else. It doesn't get any better just because you call yourself a "CDC."⁵⁰

I am constantly sobered by the realization that my clients have no legal hooks. Two weeks ago, the president of one of our client groups - a public housing tenants' association - called. She was deeply afraid. The head of the District of Columbia Housing Authority, a court-appointed receiver accountable to virtually no one, had shoved an agreement into her face and demanded that she sign it in a week. The agreement called for the tenant's association to join with the heads of one major corporation, one foundation and unnamed "community representatives" (none of whom would be from her community and none of whom her group would get to pick) in order to form a community development corporation, to which the Housing Authority would transmit the power to dispose of her public housing property. The expressed goal for the project seemed to be for "reduced density" mixed income home ownership - all for a complex with 97% occupancy and income at 15% of median. We know that Congress repealed the "one for one replacement" rule, which had required public housing authorities to provide alternative housing space for any unit they sought to demolish,⁵¹ and that our clients' right to be relocated and dispersed does not include the right to return.⁵² There is no hook.

What there is, is the kind of organization that workers in the Workplace Project used. They stood firm together, to insist that no one would work for less than their autonomously set going rate.

50. Nor might clients necessarily perceive it as any better. In their critique of alternate dispute resolution, Delgado, et al. noted that, for some claimants, the formality of adversarial adjudication increases their sense of systemic fairness, and decreases the danger that a more intimate, unstructured setting might allow extraneous prejudices to control. See Richard Delgado, et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1388 (1985). Many have cautioned against the suitability of non-adversarial means of structuring relationships between parties of unequal power. See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1592 (1991) (noting possible inability of mediator to judge power disparities between parties); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 544-45 (1986) (questioning whether informal, non-adjudicatory mechanisms for resolving disputes will guarantee greater fairness).

51. See Pub. L. No. 102-550, § 1002(a), 109 Stat. 235 (1995) (deleting 42 U.S.C. § 1437p(a)(3), which had required public housing authorities seeking permission to demolish units to show "provision of an additional decent, safe, sanitary and affordable dwelling unit for each public housing dwelling unit to be demolished or disposed").

52. See 42 U.S.C. § 1437p(b)(2) (1997) (requiring public housing authorities to assist all tenants displaced by demolition or disposition projects in being relocated).

Our clients have less bargaining power than that. They do have the ability to withhold their willingness to be displayed as a community partner, a relationship that HUD has required applicants for particular grants to demonstrate.⁵³ To do this - to take the risk of not being a team player - will take tremendous courage. No lawyer can provide that. But then, given what our clients show us every day, no lawyer needs to.

Some of the rewards of this practice have been predictable: the joy of watching students relate to poor clients who are resourceful and knowledgeable leaders; the exposure to new substantive areas of law, scorned in law school and now painfully, obviously essential; the immersion in cutting-edge issues of public policy in neighborhood development, welfare, housing and job creation. It has been perhaps the degree of the intensity of the interchanges, and of the urgency of the need to re-examine daily every given of how I counsel and teach, that has amazed me. For a FLFP, this is a scary practice of law. It is also completely exhilarating.

53. See 42 U.S.C. § 1437l(q) (1996). The "HOPE VI Revitalization Program" is the federal program through which the District's Housing Authority has funded and hopes to fund major renovations to its public housing stock. See Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriation Act of 1998, Pub. L. No. 105-65. In its Super Notice of Funding Availability (SuperNOFA) for Housing and Community Development Programs, the guideline that governed the competition for the most recent round of funding, the Department of Housing and Urban Development awards 10 out of 100 points to the public housing authority for demonstrating "full and meaningful involvement in the planning and implementation of the revitalization effort." 61 Fed. Reg. 15,489, 15,582 (1998). While the NOFA sets a minimal baseline for participation as the scheduling of one public hearing, the NOFA also requires demonstrating that the residents and community members "[s]upport the activities proposed in the submitted application." *Id.*