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## **Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy**

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# CLIENTS DON'T TAKE SABBATICALS: THE INDISPENSABLE IN-HOUSE CLINIC AND THE TEACHING OF EMPATHY

PHILIP M. GENTY\*

## INTRODUCTION

After almost 12 years in law teaching, I approached my first sabbatical with a single goal: to free myself from cases. At that time my clinic clients were primarily parents who were involved in family court proceedings in which they were trying to preserve their parental rights and get their children out of the foster care system. Such cases are emotionally draining for both the client and the lawyer. Thus, while I welcomed the chance to have a semester off from teaching and attending faculty and committee meetings, I felt that I *needed* a break from the demands of lawyering on behalf of clients.

It did not work out that way. Given that the clinic would not be taught during my semester off, my dean was less than thrilled about the idea of hiring a lawyer simply to handle my 25 or so open clinic cases. At first I was prepared to push the issue, but upon closer examination of my caseload, I realized the obvious – the handful of especially demanding cases involved clients to whom the clinic and I had the greatest personal obligation.

So I spent the next six months doing many things I wanted to do, as well as the one thing I had not wanted to do: appearing in family court. But a funny thing happened on the way to the end of the sabbatical. I came to remember why I had first been drawn to client representation and more specifically to clinical teaching. In so doing I also came, again, to understand the extent to which the in-house, actual client clinic<sup>1</sup> fills a unique and invaluable place in the law school

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\* Clinical Professor, Columbia Law School. Director, Prisoners and Families Clinic. I am grateful to Elizabeth Chen, my extraordinary research assistant for three years, for all of her work. Special thanks to Maria Arias, Stephen Ellmann, Mary Jo Eyster, Jonathan Hyman, Carol Liebman, Barbara Schatz, Robert Seibel, Jane Spinak, Judith Waksberg, Mary Zulack and the participants in the Clinical Theory Workshop at New York Law School in September 2000, for their helpful comments. I also want to acknowledge the support of Columbia's summer stipend program. This essay is dedicated to Madalyn, Maria and Michelle, three women who entered my life shortly after I began clinical teaching and who, in the many years that they have been my clients, have taught me the meaning of courage and perseverance in the face of seemingly impossible circumstances.

<sup>1</sup> By "in-house, actual client clinic," I mean a clinic in which the students provide direct representation of clients, and in which the faculty member has ultimate responsibility for the cases. This definition does not include simulation programs or externship models in

curriculum.

This realization arose particularly from the two cases that most required my attention during the sabbatical. In the first, a 20 year-old woman was attempting to gain custody of her younger siblings who were in foster care. In the second, a young mother was attempting to obtain specific performance of an adoption surrender in which she had been promised, but had failed to get, visits with her child after the adoption. What stands out is not the fact that both cases went to trial. Obviously that was an important consideration, but I lost both trials; arguably the clients would have fared at least as well with another attorney. The importance of my continued involvement lay elsewhere: In both cases the clients were struggling mightily to *be taken seriously* by the child welfare and family court systems.

As I prepared these clients for trial and spent long hours with them in family court, I was struck by the disparity between the clients' views of themselves, and the agencies' and judges' views of the clients. In the custody case, my client felt that her siblings were not being properly cared for by the foster mother and that the child welfare agency had acquiesced in this marginal level of care for reasons grounded in racism. My client felt that the agency saw the foster home as "good enough" for these African American children. The client believed that her siblings would have much greater opportunities in life if they were in her care. Conversely, the agency and the judge saw my client as immature, meddlesome and unrealistic in her goals for her siblings. In the adoption surrender case, my client felt that she could continue to play an important and constructive role in her daughter's life, even after her daughter had been adopted. My client's perceptions were based on her own experience as a child in foster care. As with the custody case, the agency and judge had a markedly different outlook. They saw my client as irresponsible and selfish, with no real regard for the child's needs. They felt that she was trying to sabotage the adoptive mother's relationship with the child.

Over the course of the sabbatical, I therefore came to realize that in both cases the clients were looking to me to help them be understood and, more importantly, respected. In short, both cases were really about *empathy*; my representation of the clients over a period of years had enabled me, finally, to appreciate their feelings about the systems with which they had been involved and to discern the role they wanted me to play in attempting to make the agencies and tribunals comprehend and credit their perspectives and goals.

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which students are supervised by practicing attorneys in the host organization. For simplicity, the in-house, actual clinic model will be referred to as "in-house clinic."

The experience of working with these two clients – and the insights about them that I gained along the way – caused me to emerge from the sabbatical with a renewed appreciation for the importance and rewards of the in-house clinic. On a general level, working directly with clients and collaborating with students on their clients' cases keeps clinical teachers involved in the work that brought most of us to the practice of law in the first place. This is also the experience our students are seeking when they enroll in a clinic. On a more specific level, however, my experience with these two clients reminded me of the importance of teaching empathy to our students. For reasons that I will discuss in this essay, I believe that empathy skills can be taught only with actual clients and only in an in-house model in which we are working directly with the students and clients.

#### THE GOAL OF TEACHING EMPATHY IN CLINICAL COURSES

Empathy is among the most important lawyering skills that students can learn in a clinic. It has been described as “the cornerstone of not only professional interpersonal relations, but also any meaningful human relationship.”<sup>2</sup> Carrie Menkel-Meadow describes empathy as “learning how to ‘feel with’ others . . . . [L]awyers need to learn to experience ‘the other’ from the values that the other holds, not those of the lawyer . . . .” She calls this an “ethic of care.”<sup>3</sup> Empathy thus involves gaining the client's trust and confidence and attaining an understanding of the client's substantive goals and aspirations. By connecting the lawyer to her or his client in this way, empathy provides the means of access to all of the other skills that the lawyer must employ in representing the client.

Part of this notion of empathy involves the lawyer's acquiring an understanding of the client's “social world” in order to appreciate the relationships, emotional demands and pressures that define the client's day-to-day life.<sup>4</sup> However, there is another, equally important, aspect of empathy, which requires the lawyer to understand the client's experiences with and impressions of the *legal* world. For many clients, but especially for clients who live in poverty, we might describe it as an empathy of fear, *i.e.* an understanding of the client's deep fear and mistrust of the very legal system upon which the client

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<sup>2</sup> ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 117 (1990).

<sup>3</sup> Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report – Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 620 (1994).

<sup>4</sup> See William L.F. Felstiner & Austin Sarat, *Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1454-55 (1992) (describing empirical study of divorce cases).

must rely for a solution to her or his legal problem.<sup>5</sup> As one set of commentators has put it, “[i]n the world of law, unknown rules and people operating in forbidding surroundings and through alien processes can influence or decide matters of great moment to clients.”<sup>6</sup>

Peter Margulies has described this broad conception of empathy – which combines an appreciation of the client’s social and cultural world with an understanding of the client’s perceptions of the legal world – as “empathetic engagement.” According to Professor Margulies, “[e]mpathetic engagement posits that the micro version of empathy (involving interpersonal relationships) and the macro version (involving concern about conditions of political, social, and economic subordination in society) are complementary, not radically separate.”<sup>7</sup>

For indigent clients, this experience with the world of law is fraught with difficulty. There is a chronic lack of access to lawyers, and the dynamics of the court system make it impossible for clients to present their claims adequately and to protect their rights.<sup>8</sup> Furthermore, clients may be afraid even to attempt to use the legal system. Gerald López has described this phenomenon among low-income women of color:

Apparently, in order to use law . . . and lawyers, many low-income women of color must overcome fear, guilt, and a heightened sense of destruction. In their eyes, such a decision often amounts to noth-

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<sup>5</sup> Jane Spinak has discussed these aspects of empathy in the context of her representation of a foster mother seeking to adopt her foster children. Jane M. Spinak, *Reflections on a Case (Of Motherhood)*, 95 COLUM. L. REV. 1990 (1995). Although indigent clients probably feel this fear most acutely, this is an issue for other clients as well. For example, several years ago, two friends asked me to represent them in a landlord-tenant matter. The issues were simple and could have been handled by any marginally competent attorney. What was striking was the terror that these two college-educated women felt as they entered the courtroom. What they valued, even more than a favorable outcome in the proceeding, was emotional support and guidance to help them understand and deal with the experience. Although my experience is in litigation, and this essay is primarily focused on teaching in a litigation clinic, I believe that many of these issues also apply to transactional work.

<sup>6</sup> Felstiner & Sarat, *supra* note 4, at 1455.

<sup>7</sup> Peter Margulies, *Re-framing Empathy in Clinical Legal Education*, 5 CLIN. L. REV. 605, 615 (1999); see also Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1748-50 (1993) (describing the importance of appreciating both the legal and social worlds of the client). Stephen Ellmann has discussed the related concept of “approval,” which he distinguishes from empathy. Professor Ellmann defines “approval” as comprising loyalty, respect, warmth, advice and understanding. Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991, 994-1005 (1992). Loyalty, respect and understanding are aspects of what I am here describing as empathy.

<sup>8</sup> See Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); Homer C. La Rue, *Developing an Identity of Responsible Lawyering Through Experimental Learning*, 43 HASTINGS L.J. 1147 (1992).

ing less intimidating than taking on conventional power with relatively little likelihood of meaningful success . . . . And it seems inevitably to entail making your life entirely vulnerable to the law – with its powers to unravel the little you’ve got going for yourself and your family. In effect, turning to law and lawyers seems to signify a formal insurrection of sorts – an insurrection that, at least for these low-income women of color, foreshadows discomfiting experiences and negative consequences.<sup>9</sup>

Thus, empathetic lawyering requires the lawyer to look at the legal system through the client’s eyes. In addition, the lawyer must prepare the client for, and guide the client through, an encounter with that system. This is, of course, an exceedingly complicated role, for the lawyer is, at one time, both a part of the mistrusted legal system and the client’s only practical means of gaining access to and results from that system. The attorney is an officer of the court with an allegiance to a legal system that her or his clients experience as unjust. The empathy skills involved in preparing a client for and taking the client through the fearful experience of a legal proceeding are therefore among the most difficult to master.

This empathetic role involves skills similar to that of a leader of an expedition: The attorney must accompany the client into a strange region with its own language and cultural customs and must bring the client through the experience safely. One writer has suggested that this may involve the lawyer’s sharing of her or his position of power and privilege with the client to provide the client with access to the legal system.<sup>10</sup> The lawyer’s role has also been described as one of “translator”:

The lawyer as translator . . . does not act as mere intermediary between the client and the legal system. Instead, the lawyer acts as facilitator, one who enables dialogue across lines of social difference between the client, law, and legal decisionmaker. . . . Although the lawyer as translator may be a useful metaphor for all types of lawyering, it is an imperative for poverty law practice. As Lucie White has stated: “The gap between what poor people want to say and what the law wants to hear often seem enormous.” The job of poverty lawyers should be to fill that gap.<sup>11</sup>

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<sup>9</sup> Gerald P. López, *The Work We Know So Little About*, 42 STAN. L. REV. 1, 8 (1989).

<sup>10</sup> Jane Harris Aiken, *Striving to Teach “Justice, Fairness, and Morality,”* 4 CLIN. L. REV. 1, 20-21 (1997).

<sup>11</sup> Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 917 (1992) (quoting Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 545 (1987-88)); see also Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (describing the experience of representing a client in a

Through this form of translation, the lawyer puts empathy into action.

Thus, empathy is complex and multifaceted. For that reason the teaching of empathy skills is one of the most challenging goals of clinical legal education.

#### THE TEACHING OF EMPATHY IN A FIELDWORK SETTING

The teaching of these empathy skills needs to take place at all three stages of the clinical learning process: planning, doing and reflecting. At the planning stage, the teacher works alongside the students on development of strategy and, in the litigation context, to help the students prepare for an encounter with the tribunal.<sup>12</sup> Here, as at all stages of the representation, the students need an empathetic understanding of the client's goals and fears. As clients approach a legal proceeding, they have many hard, practical questions for the students: Who is the judge/hearing officer? What will s/he think about who I am? What will the opposing attorney say about me? Will the opposing attorney know about and bring up the subjects about which I am most sensitive? What is the likely outcome? At the planning stage the teacher will help the students gain insights about their clients.

The teaching of empathy continues at the "doing" stage when the instructor accompanies the students and the client to court. Here, the teacher performs at least two functions. First, as in the planning stage, the teacher acts as co-counsel with the students, sharing the responsibilities, risks and uncertainties of the court experience.<sup>13</sup> The teacher is subject to many of the same fears and uncertainties that the students and client are experiencing. The teacher must deal with the same client anxiety and mistrust, the same fluid environment, the

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welfare administrative hearing).

<sup>12</sup> See Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109 (1993-1994) (providing thoughtful, detailed description of the process of preparing students). See also Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 344-50 (1982) (discussing co-counsel relationship between teacher and student). A "co-counsel" relationship between the teacher and the student may take many forms. In my clinic I typically work fairly closely with the students on their cases. We collectively "brainstorm" about possible strategies and the pros and cons of various options, and I share my own uncertainties with them. My purpose is not to take "ownership" of the case away from the students, but rather to convey that we are all responsible to the client and that I do not necessarily know which approach is most likely to achieve the client's goals. With respect to client meetings, whether I participate will depend on a number of factors. If I already have a relationship with the client, or if we are preparing for a hearing, I am more likely to be present for the meeting; otherwise, the students will generally meet with the client alone. For hearings, the students and I usually divide responsibilities. For example, the students might conduct the direct examinations, and I might handle the cross-examinations.

<sup>13</sup> See La Rue, *supra* note 8, at 1153-55. See also description of co-counsel role, *supra* note 12.

same temperamental and unpredictable judge. The teacher is completely exposed, as the students look to the teacher for advice and assistance to make this situation comprehensible, less painful and ultimately successful for the client. Such direct involvement enhances the students' educational experience. It also enhances the teacher's credibility in the eyes of the students and the client.<sup>14</sup>

The second function performed by the teacher in the courtroom is that of guide for the students. The teacher helps the students make sense of what is transpiring.<sup>15</sup> Sitting in court with the client, the students will feel the client's anxieties as the client watches them negotiating with opposing counsel. They will know that the client is watching for alliances: Are the students too friendly with opposing counsel? Will the students advocate forcefully or will they compromise? In the courtroom, the students will feel the client's fear of the judge and uncertainty about whether the judge can be made to understand who the client is. The teacher needs to be present in order to help frame this learning experience for the students. In this way the teacher facilitates the student's empathetic understanding of the client's perspective.

Without the instructor's presence, the students may be overwhelmed by – or perhaps worse – oblivious to the complexities of the courtroom interactions. Students are typically from the same privileged background as the opposing attorneys and the judge.<sup>16</sup> Moreover, practicing attorneys and judges are frequently guest speakers at law school events and are presented as role models for the students. It would therefore be natural for the students, in the midst of a confusing and intimidating courtroom experience, to ally themselves with these professional role models rather than with the client.

Homer La Rue has described the pressures that students face when they enter this courtroom setting:

The student-lawyer coming into this milieu is understandably confused, perhaps also a little daunted by the maze of people and procedure. She is faced with the difficult question of what it means to be a lawyer . . . . The student's strong inclination is to look to the

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<sup>14</sup> One aspect of this relates to role-modeling, about which Minna Kotkin has written. See Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Legal Education*, 19 N.M. L. REV. 185 (1989). In an in-house clinic the students are able to watch the way in which we clinical teachers approach cases, relate to clients and interact with other attorneys and judges. This experience is invaluable for the students, and, as I suggest below, for us.

<sup>15</sup> See Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLIN. L. REV. 37, 60 (1995) (terming the clinical instructor a "guide by the side").

<sup>16</sup> This is, of course, a generalization, but even those students who come from backgrounds similar to those of their clients may be "socialized" by their law school experiences to identify with the institutional actors.



role – the mores, attitudes, and behavior of the profession – for guidance regarding how to be and how to act. Deeper questions about the student's reactions to this scene and her connection with it are tucked away into the background.<sup>17</sup>

The teacher can help the students understand these complex power dynamics and resist a shifting of alliances away from the client. Again, the students need to continue to employ empathy, *i.e.* seeing the courtroom experience through the client's eyes. The teacher, working alongside the students and the client, will help ensure that this occurs.

After the courtroom experience, the teacher must work collaboratively with the students at the reflecting or de-briefing stage. For many students, the courtroom experience will have been what Fran Quigley calls a “disorienting moment,” *i.e.* “when the learner confronts an experience that is disorienting or even disturbing because the experience cannot be easily explained by reference to the learner's prior understanding – referred to in learning theory as ‘meaning schemes’ – of how the world works.”<sup>18</sup> Professor Quigley sees such “disorienting moments” as an opportunity for a transformative experience for the adult learner:

If an experience is unsettling or puzzling or somewhat incongruous with our present meaning structure, it captures our attention. If the gap is too great between how we understand the world and ourselves in it and the experience, we may choose to ignore it or reject it. If however we choose to grapple with it, learning results. Some of this learning affects us more than others. Powerful learning experiences may even transform how we think and act.<sup>19</sup>

Because the teacher and students will have shared this experience, the teacher will be in an ideal position to facilitate the students' learning by engaging the students in collaborative reflection about the client's encounter with the legal system.<sup>20</sup>

Professor La Rue discusses an experience he shared with one of his students, a white male, who was representing an African American client before a white judge in Rent Court. The judge, in siding completely with the white male landlords and rejecting the client's request for relief, had reduced the client to tears of frustration. After the

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<sup>17</sup> La Rue, *supra* note 8, at 1150.

<sup>18</sup> Quigley, *supra* note 15, at 51.

<sup>19</sup> *Id.*

<sup>20</sup> See Shalleck, *supra* note 12, at 164-67 (describing the process of de-briefing the students after a joint court appearance); see also Frank S. Bloch, *Framing the Clinical Experience: Lessons on Turning Points and the Dynamics of Lawyering*, 64 TENN. L. REV. 989, 1008 (1997) (noting that learning lessons are most powerful when they are presented simultaneously to the student and teacher through shared experiences on cases).

court appearance, the student reflected upon the experience with Professor La Rue:

[T]he student . . . remarked that the judge never really saw who his client was. The judge only saw a poor person of color and assumed that she was trying to get more than that to which she was entitled. He was genuinely outraged at the judge's inability or unwillingness to see past her racial and class biases. The student noticed how his own desire to "win" pushed him to identify with his client in a way that permitted him to experience, if only for a moment, the powerlessness of a person who lives her life in a state of subordination.<sup>21</sup>

Professor La Rue was able to use this shared courtroom experience to help the student develop a deeper level of empathy with the client.

#### CAN EMPATHY BE TAUGHT IN CONTEXTS OTHER THAN AN IN-HOUSE FIELDWORK SETTING?

These, then, are the skills that we want to teach our students. In order to develop empathy, our students must gain some firsthand exposure to the client's experience of the legal world. While we may not express the goal explicitly, we want our students to experience the hostility that is directed at clients, and often at the clients' advocates as well, in the tribunals of poverty: the family courts that take away their children, the welfare hearings that take away their means of subsistence, the landlord-tenant courts that take away their homes and the criminal courts that take away their freedom.<sup>22</sup>

Students may also get a "window" into their clients' lives by means other than going to court. Professor Quigley describes the profound effect upon one of his students of interviewing a client in a battered women's shelter:

[T]he student unexpectedly stopped the interview and, visibly shaken, approached the supervisor to request permission to end his involvement in the case. When asked why he was unable to respond to the client, a single mother and rape victim struggling with both the criminal justice and welfare systems, the student said, "Her life is so messed up, I don't know how to respond. She has so many

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<sup>21</sup> La Rue, *supra* note 8, at 1154-55.

<sup>22</sup> Clinical teachers have written about the impact that going to court has had upon students' perceptions of their clients. See Shalleck, *supra* note 12, at 171-72 (describing how students' observations of another family offense court case made it possible for them to understand how the structure of the court system affected their client and helped them to explain the court system to their client); Barbara Bezdek, *Reconstructing a Pedagogy of Responsibility*, 43 HASTINGS L.J. 1159, 1170-72 (1992) (discussing the ways in which students' experiences assisting low income tenants in Rent Court created a heightened awareness of injustice and caused the students to begin to understand the difficulty of their clients' lives).

problems I don't see a way out of her situation."<sup>23</sup>

Jane Harris Aiken has suggested that students may have similar types of revelatory experiences when they interview their clients in the clients' homes, wait in welfare agency lines with them or accompany them to meetings with caseworkers, doctors or court personnel: "[V]enturing into the client's world should increase the likelihood of developing a critical understanding of power and privilege."<sup>24</sup>

These aspects of client representation cannot be simulated; they must be experienced. Simulations are too neat. Real-life advocacy is confusing, intimidating, unpredictable and messy, and our students need to know this. Moreover, students need to experience the complexities of dealing with an actual client. If there is a baseline concept underlying clinical education, it is the importance of a client context for learning and understanding the law.

Of course, simulations play a critical role in clinical education. To some extent all clinical models use simulations to teach a core set of lawyering skills. The simulations are carefully crafted and often videotaped, and the students are rigorously critiqued. Case planning, negotiation and settlement, drafting and research and trial techniques – all of these may be taught through a combination of simulation exercises and fieldwork experiences. Simulations are an attractive way of teaching many of these skills because of the degree of pedagogical control that the teacher is able to exert over the student's experience and learning. Simulations are also an important way to prepare and critique students before they start to work with actual clients. The use of simulations minimizes the extent to which clients are "guinea pigs" for the students' learning.

Even the most carefully crafted simulation, however, inevitably involves a degree of artificiality that prevents the students from taking the experience as seriously, and learning as deeply, as they would if an actual client were involved. Simulations are inherently limited by the fact that the "client" is a creation or extension of the teacher. Ann Shalleck has written about the problems inherent in using such "constructed" clients in law teaching:

[T]he constructed clients . . . force out the real clients. Students do not see the worlds that the clients come from, the institutions that shape the clients' lives, and the choices, or the conflicts, confusion, and uncertainty that some bring with them to the lawyer's office. Students have no sense of how hard it often is to identify what a client wants, nor do they develop any insight into how they themselves can participate in shaping clients' understanding of the cli-

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<sup>23</sup> Quigley, *supra* note 15, at 53-54.

<sup>24</sup> Aiken, *supra* note 10, at 46.

ent's goals. Students do not learn how to attend to the ways power operates within their client relationships, nor are they taught the role it can play in the definition of client interests.<sup>25</sup>

In short, a simulation does not allow students to feel the coercive power of the legal system and to understand their client's fear of, and responses to, that power. In order to learn the skills of empathy, our students need to be able to work with *actual* clients. But we teachers need to be there with them.

Like simulations, externships are an inadequate substitute for an in-house clinic with respect to teaching empathy. If the essence of lawyering is the shared experience of the attorney and the client, the essence of clinical teaching is the shared experience of the teacher and the student in interactions with and advocacy on behalf of the client.<sup>26</sup> In an externship this quality is absent, because the clinic instructor is not working directly with the students and their clients. An in-house clinic, in contrast, involves a complex interrelationship among the teacher, the student and the client, played out against the backdrop of the legal forum in which the client's case will be adjudicated.<sup>27</sup>

The literature on adult learning, or "andragogy," stresses that the most effective adult learning occurs in such a setting, where the teacher and student are working collaboratively.<sup>28</sup> In the context of clinical legal education, this means that the teacher and student are working as co-counsel. While the division of responsibility has to be worked out on a case-by-case and student-by-student basis, teachers and students will work together throughout the representation of the client.<sup>29</sup>

Thus, it is not enough that the student be responsible to an actual client; the ideal learning environment requires that the teacher share this responsibility. The student's learning will be enhanced if she or he knows that the teacher has a direct, professional stake in the out-

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<sup>25</sup> Shalleck, *supra* note 7, at 1739 (describing limitations of the "cardboard," "constructed clients" used in doctrinal classroom hypotheticals and professional responsibility classes). *See also* Bloch, *supra* note 12, at 347-48 ("Actual client representation is real and, therefore, andragogically effective. Simulations, on the other hand, are recognized as imaginary and thus are less effective as learning experiences . . ."); Quigley, *supra*, note 15 at 69-70 (arguing that simulations unconnected to work with actual clients are not effective tools for teaching about social justice).

<sup>26</sup> *See* Catherine Gage O'Grady, *Preparing Students for the Profession: Clinical Education, Collaborative Pedagogy, and the Realities of Practice for the New Lawyer*, 4 CLIN. L. REV. 485, 516 (1998) (terming supervision of a student's work with clients "perhaps the primary teaching methodology for the clinical teacher").

<sup>27</sup> *See* Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 HOW. L.J. 31, 45 (1993) (discussing the dynamics of the "triangular relationship" among the student, teacher and client).

<sup>28</sup> *See, e.g.*, Bloch, *supra* note 12.

<sup>29</sup> *See* description of co-counsel role, *supra* note 12.

come of the case, or to put this more bluntly, that the teacher's own reputation and license are on the line.<sup>30</sup> In addition, students will see that even their instructor, an experienced attorney, does not have all of the answers and must deal with the unexpected.<sup>31</sup> It is this complete collaboration that makes the in-house clinic a unique educational experience for the law student. In contrast, externships involve a disconnect between the planning/reflection stages and the doing stage of the teaching, and this creates a break in the chain of learning. As a result, externships, like simulations, are not well-suited for the teaching of empathy.

### CONCLUSION

Although this essay focuses on a single dimension of in-house clinical instruction – the teaching of empathy – there are, of course, many more things that could be said about the unique educational value of the in-house clinic model.<sup>32</sup> The in-house clinic remains, in short, an essential component of legal education. I am concerned, however, that experienced clinical teachers are, increasingly, moving away from in-house models. I therefore want to offer some concluding observations about the risk that the future of such clinics may be jeopardized by the very success that clinical educators have had in enhancing our status within the legal academy.

Although the first clinical teachers were drawn from public interest law practice and were typically hired at low salaries, with limited job security and no professorial titles or rights,<sup>33</sup> clinical teachers have worked for and secured significant improvements in status. Today, while important disparities remain, more of these teachers are tenured or on tenure track, and many now have at least rough salary parity with their non-clinical colleagues. A by-product of this enhanced status is that clinical teachers are increasingly being allowed or even asked to teach doctrinal courses in addition to, or sometimes instead of, clinical courses.

This is all a wonderful development and worth rejoicing. But these gains have not been without costs. Clinical teachers now have

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<sup>30</sup> See O'Grady, *supra* note 26, at 515.

<sup>31</sup> See Shalleck, *supra* note 12, at 149 (“[U]npredictable events often offer the most powerful insights into being a lawyer . . .”).

<sup>32</sup> Another important dimension is explored by Deborah Maranville in her article, *Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Clinical Experiences*, in this issue of the *Clinical Law Review*. For discussion of other facets, see, e.g., *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508 (1992).

<sup>33</sup> See PHILIP G. SCHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL LEGAL EDUCATION 7-8 (1998).

more freedom to choose what they want to teach, but this often comes with a new pressure to produce scholarship. In-house clinics are extremely labor intensive; teachers must spend hours with students preparing for and appearing in court proceedings, mediation sessions or transactional events. When the students are not around, client emergencies arise, and the teachers must attend to these. In the courtroom, the clinical teacher is at the mercy of an often impatient judge who may see the teacher's educational objectives as an unnecessary burden on an overcrowded court docket. Simulation courses and externships thus become increasingly attractive options for the harried clinical teacher.

As clinical teachers enjoy enhanced status, and as we grow older, the temptation to move away from direct representation of clients therefore increases. Most of us started our careers in programs that provide direct services, and we may be bored or "burned-out" or simply eager to move into novel "cutting-edge" areas of teaching, rather than continuing to teach in the labor-intensive, traditional, in-house client representation clinic model.<sup>34</sup>

But we must always be conscious of the choices we are making and the consequences of those choices. Whatever the advantages of moving in new directions, I believe that something precious is being lost. What has always set us apart from our non-clinical colleagues is that we are able to take our students outside the classroom and show them the legal system as clients experience it. If clinical teachers are

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<sup>34</sup> Law school deans have their own reasons for disfavoring in-house clinics. Students are now provided with "experiential learning" throughout the curriculum, using models that are less costly than in-house clinics. Required first-year skills programs use simulations to introduce students to a wide range of lawyering skills, including writing, research, interviewing and counseling. See RALPH L. BRILL, SUSAN L. BRODY, CHRISTINA L. KUNZ, RICHARD K. NEUMANN, JR. & MARILYN R. WALTER, SOURCEBOOK ON LEGAL WRITING PROGRAMS 34-36 (1997) (noting increasing inclusion of instruction in interviewing, counseling and negotiation in first-year legal writing courses). New upper-level simulation courses in interviewing and counseling, negotiation, drafting and professional responsibility, as well as externship and *pro bono* offerings have been added. In addition, "experiential" teaching techniques have been introduced into traditional doctrinal courses, e.g. drafting exercises in Contracts and case simulations in Civil Procedure. Larry Grosberg, Elizabeth Schneider and Jeff Stempel were some of the pioneers of this movement in Civil Procedure through the use of the Buffalo Creek litigation materials. The extent to which these techniques have become part of mainstream education is apparent from the inclusion of Buffalo Creek pleadings in the newest edition of a leading Foundation Press Civil Procedure text. GEOFFREY C. HAZARD, JR., COLIN C. TAIT & WILLIAM A. FLETCHER, PLEADING AND PROCEDURE, STATE AND FEDERAL, CASES AND MATERIALS 595-607, 655-62 (8<sup>th</sup> ed. 1999). In addition, that same company has published the litigation materials from *A Civil Action* for use in Civil Procedure courses. LEWIS A. GROSSMAN & ROBERT G. VAUGHN, A DOCUMENTARY COMPANION TO *A CIVIL ACTION* (1999). Given this range of "experiential learning" opportunities, deans may question the value of the more expensive, traditional in-house clinics.

to remain true to our calling, we must not entirely abandon our direct involvement in client representation. For the sake of our students' education, as well as our own, we must continue to accompany our students and their clients, and share their fear and uncertainty, on their journey through the legal system.