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Teaching Practical Wisdom

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Cantrell: Teaching Practical Wisdom
TEACHING PRACTICAL WISDOM

DEBORAH J. CANTRELL*

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I. INTRODUCTION

Mr. M is a longtime resident of a small town in Connecticut. He owned some commercial real estate for many years and decided to sell it to the town for redevelopment. He had sold commercial real estate before and wished to handle the price negotiations himself. However, he planned to retain a local attorney to prepare the necessary closing documents. Mr. M contacted Attorney K, also a longtime resident of the town and someone who has handled previous legal matters for Mr. M. Mr. M instructed Attorney K to limit his legal representation to the closing, and the two discussed an anticipated set fee. However, Attorney K became active in the price negotiations because the town's representative had difficulty working with Mr. M. After the closing, Attorney K presented Mr. M with a bill that was larger than the set fee and was, instead, a percentage of the net sales price. Attorney K retained that portion of the net sales price reflecting his increased fee. Mr. M was furious and filed an

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ethics grievance against Attorney K. The case was set for an administrative hearing on the merits.

A local law school legal clinic contacted Mr. M, and he agreed to be represented by law student interns at the ethics grievance hearing. As the student interns prepared the case, they discovered two legal arguments that supported Attorney K's contention that he was entitled to some legal fees beyond the initially discussed set fee. Attorney K had not raised either of the two arguments in his pretrial filings. The student interns prepared their own pretrial brief presenting only those arguments in support of Mr. M. Attorney K chose not to file a pretrial brief.

At the hearing, the administrative panel questioned Attorney K about certain facts that would have supported the two legal arguments Attorney K failed to raise. It was clear from Attorney K's responses that he did not really understand the purpose of the panel's questions, and he became somewhat argumentative and evasive. Instead of answering the panel's questions, Attorney K managed to change the discussion to another issue. The student interns were well aware that Mr. M could also provide the supporting facts in his own testimony, but they avoided those questions when examining him. The panel did not raise its earlier questions again. Ultimately, Mr. M prevailed in his ethics grievance and Attorney K was publicly reprimanded.

Throughout the course of the student interns' representation, the students and their supervising attorney discussed what ethical and moral responsibilities the students had to Mr. M, Attorney K, and the administrative panel. Those discussions included considering state rules of professional responsibility, concepts of role morality (what one must do in one's role as attorney), and general morality (what one must do as a member of society). Of particular interest to me is whether the students' experiences were a particularly effective way of learning practical wisdom.

By practical wisdom, I mean the ability to consider the circumstances of a particular situation with empathy and compassion for competing viewpoints, without untempered partisanship, and with concern for questions of ethics and morality.¹ In my definition, practical wisdom is not dispassionate deliberation nor is it an unquestioning allegiance to a client's wishes. What makes practical wisdom practical is that it is guidance about conduct related to real problems faced by people. What makes it wise is that it requires one to consider multiple viewpoints, ethics and morality, and to balance results. If practical wisdom is something law students should learn, which teaching method works best to

1. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 16 (1993). As Dean Kronman and others have richly detailed, the notion of practical wisdom has its roots in Aristotle's teachings and has been woven into the philosophical works of Kant, Arendt and Llewellyn, among others. *Id.* at ch. 2; Mark Neal Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247, 252-56 (1998); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 58-64 (1995).

instill it? While not unanimous, many agree, and some insist, that a clinical setting is the only one which truly imparts practical wisdom.²

Those who argue for a clinical setting recount teaching experiences where students participating in a clinic have encountered ethical issues as a subsidiary part of their representation of clients in a particular substantive legal area. In dealing with the ethical issues, the students were pressed to consider competing viewpoints, the relevant norms, and the various outcomes of their possible actions. The students, however, did not take the cases because they presented ethical issues, but because the cases were in the substantive legal area in which their clinic focused.³ Is it possible that a more powerful way of teaching practical wisdom is to have a clinical setting in which both the substance and subsidiary issues are legal ethics? I believe it is, and I draw on cases such as Mr. M and Attorney K and my experiences teaching the Lawyering Ethics Clinic at Yale Law School to support my position. I describe the Lawyering Ethics Clinic in detail later, after more thoroughly defining practical wisdom and then considering the role of experiential learning in imparting practical wisdom.

II. DEFINING PRACTICAL WISDOM

The term “practical wisdom” seems initially not to need much definition. The phrase suggests a kind of applied intelligence with an additional normative layer. Someone with practical wisdom should give advice that is specific to the situation, considering both the facts at issue and the relevant social or moral norms. The term does not explicitly require the advice-giver to place priority on any particular interest. In other words, the term does not assume the advice-giver should concentrate on the best individual outcome for the advisee or on some other outcome. I suggest, in addition to the requirements of intelligence and a consideration of norms, the definition of practical wisdom should include a requirement about whose interests should take priority. More specifically, practical wisdom should require a balanced interest so that the outcome attempts to benefit the common good.

Philosophy-based definitions of practical wisdom have noted that balance is integral. As Anthony Kronman has argued, practical wisdom is “a certain calmness in . . . [the lawyer’s] deliberations, together with a balanced sympathy toward the various concerns of which his situation (or the situation of his

2. See Luban & Millemann, *supra* note 1, at 40 (“[T]he best way to teach legal ethics—the only way to teach legal ethics that incorporates the all-important element of moral judgment—is clinically.”); James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentices System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83 (1991) (analyzing various models of teaching ethics and proposing more emphasis on utilizing internships and externships).

3. See, e.g., Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37 (1995) (recounting student experiences in landlord-tenant and family law clinics).

client) requires that he take account. These are qualities as much of feeling as of thought.”⁴ This philosophy-based definition of practical wisdom understands practical wisdom as a virtue and a skill. In other words, practical wisdom requires a lawyer to consider the particular facts presented by a problem in light of more general values and to do so by taking the perspective of the lawyer’s client as well as any other person involved in the problem.⁵ The lawyer does not tailor advice so that the client’s interests are served over other interests. The lawyer’s advice considers the client’s interest, the other interests involved, and the relevant norms. The “balanced sympathy” to which Kronman refers requires the lawyer to advise in a way that should best benefit all those involved.

Psychologists studying intelligence and wisdom have similarly considered the importance of norms and balance. In particular, psychologist Robert Sternberg has articulated a balance theory of wisdom.⁶ Sternberg argues that wisdom is a particular kind of practical intelligence. In his research, Sternberg looked at practitioners in various fields and gave them a series of problems to solve to determine a measurement for practical intelligence.⁷ Sternberg found that practical intelligence includes an ability to solve problems practically, verbal skills, “intellectual balance and integration, goal orientation and attainment, contextual intelligence, and fluid thought.”⁸ Sternberg further found a subset of skills he labeled and classified as wisdom, including “reasoning ability, sagacity, learning from ideas and environment, judgment, expeditious use of information, and perspicacity.”⁹

Based on his research, Sternberg proposes that wisdom differs from general practical intelligence in that wisdom is a balancing of interests with the goal of achieving a common good. Practical intelligence does not require a balancing of interests and can include an astute decision to be self-interested.¹⁰ Furthermore, Sternberg’s research demonstrates that wisdom is normative and presumes a set of values.¹¹ People demonstrate wisdom when they consider intrapersonal, interpersonal, and extrapersonal interests and balance those interests in deciding how to adapt, shape, or select a particular environment in a way designed to achieve “a common good for all relevant stakeholders.”¹²

4. KRONMAN, *supra* note 1, at 16.

5. See Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113, 142–44 (1995).

6. Robert J. Sternberg, *Intelligence and Wisdom*, in HANDBOOK OF INTELLIGENCE 631–49 (Robert J. Sternberg ed., 2000).

7. Robert J. Sternberg, *A Balance Theory of Wisdom*, 2 REV. OF GEN. PSYCHOL. 347, 351–52 (1998).

8. Sternberg, *supra* note 6, at 632.

9. *Id.*

10. “Practical intelligence may or may not involve a balancing of interests, but wisdom must.” Sternberg, *supra* note 7, at 355.

11. Sternberg, *supra* note 6, at 640.

12. *Id.* at 638.

Consistent with the philosophy-based and psychology-based definitions of wisdom, in this article I mean practical wisdom to include norms and a balancing of interests. I differentiate between skills such as doing a good job advising a client about the best way to win a case; expert knowledge about a substantive area of law or the procedures at issue in a particular matter; and actions designed to achieve an outcome that strives for a common good for all involved by presenting a client with a full picture of the problem at hand, combined with advice and encouragement. The first two skills display practical intelligence while the third displays practical wisdom. Without norms and balance, practical wisdom is really nothing more than practical advocacy.¹³

III. THE ROLE OF EXPERIENTIAL LEARNING

When considering how to teach practical wisdom, there are two basic methods available to most law teachers: lecture and experiential learning. Research strongly supports the proposition that practical wisdom is best learned experientially. In Sternberg's work on the balance theory of wisdom, he considers how people gain wisdom. His research demonstrates that the kind of knowledge central to wisdom, what he labels "tacit knowledge," is action-oriented and procedural. Tacit knowledge is the "knowing how" rather than only the knowledge of the fact.¹⁴ It is knowledge learned from actual experience. Further, tacit knowledge has practical use. People rely on tacit knowledge to understand how to reach goals.¹⁵ Sternberg's model posits that experience as a necessary component to learning wisdom.¹⁶

Adult learning theory similarly contends that experience is critical. The theory proposes that adults come to learning settings with a sense of themselves as self-directed and motivated to learn those skills related to performing the tasks or roles they plan to undertake.¹⁷ Adults learn better when they can actively participate in and reflect on the skills they are seeking to gain.¹⁸

13. Clearly my definition of practical wisdom will not sit well with those who believe a lawyer's responsibility is to give priority to a client's interests regardless of maximizing the common good. I acknowledge the substantial debate on the issue but set it aside for purposes of this paper. Compare DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) (advocating lawyer as moral activist), with WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998) (advocating a contextual role for the lawyer), and MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* (1990) (advocating a loyalist role for the lawyer). See also Amy Gutmann, *Can Virtue Be Taught to Lawyers?*, 45 STAN. L. REV. 1759 (1993) (discussing the three conceptions of a lawyer's role and advocating for the addition of lawyer deliberation with client).

14. Sternberg, *supra* note 6, at 635.

15. *Id.*

16. *Id.* at 636.

17. See Quigley, *supra* note 3, at 46-49.

18. *Id.*

Practical wisdom is a skill which a student can cultivate and acquire.¹⁹ Practical wisdom is multifaceted and includes the abilities, among others, to analyze a situation from multiple viewpoints, establish rapport with a client, determine competing possible courses of conduct, articulate any ethical or moral concerns raised by the situation, assess the benefits of various outcomes, and proceed with some action. Each of those facets can be isolated and practiced using typical methods employed by adult learning theory.

For example, when a student represents a client applying for government benefits and discovers the client has undisclosed income that would disqualify her from benefits she truly needs, the student will feel the tug of empathy of one human to another along with the competing tug of other professional and societal rules about lying and fraud. She must assess the benefits to her client of both disclosing and concealing the unreported income. She must also assess the risks of her client's conduct on other family members of the client, and so on. The student must reach some concrete decision on actual behavior she will follow that will reflect moral issues, including how she perceives herself as a lawyer and as a person and whether those identities are in conflict with each other.

Experiential learning requires a student to immerse herself in her practice and at every juncture take her book learning and turn it into conduct. She decides on her conduct through trial and error and imitation of those more experienced than her, learns the consequences of her conduct, and reflects on those consequences.²⁰ The student's immersion in her practice ensures that she will be exposed to problems and challenges in the broader context of the social world, including her clients, classmates, instructors, judges, social service workers and the like, leading her to both a potentially more complicated and more nuanced learning experience.²¹ As James Greeno notes, "[k]nowledge . . . is not an invariant property of an individual, something that he or she has in

19. "[T]he Aristotelian view is that virtue is learned by the doing of virtuous . . . acts." Moliterno, *supra* note 2, at 96. Not all agree that practical wisdom is a skill. See Luban & Millemann, *supra* note 1, at 40 (noting position that practical wisdom is innate, not learned).

20. See Luban & Millemann, *supra* note 1, at 58–63.

21. Developmental psychology supports the position that immersion in practice is an effective way to increase practical wisdom. Most prominently, psychologist Lawrence Kohlberg argued in his theory of moral development that children could develop their moral judgment through active participation in settings in which higher levels of moral reasoning were demonstrated and in which children were encouraged to engage and discuss the moral dilemmas. See Elliott M. Abramson, *Puncturing the Myth of the Moral Intractability of Law Students: The Suggestiveness of the Work of Psychologist Lawrence Kohlberg for Ethical Training in Legal Education*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 223, 228 (1993); see also Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 527 (1995) (reporting increases in student scores on a Kohlberg-based moral development test after students completed intensive, immersive ethics course).

any situation. Instead, know[ledge] is a property that is relative to situations, an ability to interact with things and other people in various ways.”²²

In contrast to experiential learning, lecture-style learning does not require the same kind of active participation. Students are presented with information, either as established knowledge or developed through hypotheticals. They may actively participate in discussing the issues or the hypotheticals, and they may posit some behavior they might take as a result, but they do not actually have to do anything. Thus, while students will certainly learn from a lecture, it is a less effective form of teaching the kinds of knowledge that stem from actual experience. Given the psychological research on learning wisdom, it is clear that actual experience is a critical element of wisdom. Thus, experiential learning should be tapped as a means of teaching practical wisdom. For law students, experiential learning most often happens in a clinical setting.²³

I move now from a general discussion about experiential learning to the question of whether differences between experiential learning settings can affect how a student learns practical wisdom. If a student in a landlord-tenant clinic gains more practical wisdom than her counterpart in an ethics lecture class, will a student in a clinic in which ethics is the substantive legal area gain more practical wisdom than her counterpart in the landlord-tenant clinic? First, a description of an ethics clinic follows.

IV. THE LAWYERING ETHICS CLINIC

In the Lawyering Ethics Clinic,²⁴ students represent people who have filed an administrative grievance against an attorney alleging the attorney acted unethically. Connecticut has adopted the Model Rules of Professional Conduct, and therefore, ethical violations are generally described in terms of which rule has been broken. Connecticut is one of only a few states in which an individual may shoulder the burden of filing, investigating, and proving a claim of unethical conduct. In most states, an individual need only file a grievance and then some form of administrative entity goes forward with the investigation and prosecution of the complaint. In Connecticut, the complainant remains involved throughout the process. Connecticut’s administrative entity, the Statewide Grievance Committee, screens complaints for basic merit, then

22. Brook K. Baker, *Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice*, 6 CLINICAL L. REV. 1, 28 (1999) (quoting James G. Greeno et al., *Transfer of Situated Learning*, in TRANSFER ON TRIAL: INTELLIGENCE, COGNITION, AND INSTRUCTION 99–100 (Douglas K. Dettermant & Robert J. Sternberg eds., 1993)).

23. See Moliterno, *supra* note 2, at 94–96; see also Lisa G. Lerman, *Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue About Goals*, 39 WM. & MARY L. REV. 457, 459 (1998) (“For over twenty years, experts have discussed the pedagogical challenges of this [legal ethics] field and recommended experientially-oriented teaching of ethics.”).

24. The clinic was the creative and thoughtful vision of my co-teacher, Denny Curtis. Our colleague and friend, Mary Clark, helped Denny in the early implementation of the clinic. I am the lucky benefactor of their work.

reviews and resolves complaints through an administrative hearing.²⁵ Any interested person may file a complaint against an attorney; there need not be an attorney-client relationship.²⁶ A complainant may grieve an attorney in any substantive area, including criminal defense.²⁷

Once a complaint is filed and screened for basic merit, the grieved attorney is required to respond in writing to a "Local Panel," consisting of two members of the bar and one lay member.²⁸ The complainant may then reply in writing to the attorney's response. The Local Panel investigates the complaint, considers the written record, and determines whether there is probable cause that the attorney violated a rule of professional conduct.²⁹ If the Local Panel finds probable cause, the matter is set for hearing in front of a "Reviewing Committee," a different three-member panel of two attorneys and a lay member.³⁰ The hearing runs as do most administrative hearings—slightly less formal than a court hearing with somewhat relaxed rules of evidence. The complainant bears the burden of proving by clear and convincing evidence that the grieved attorney violated a rule of professional conduct.³¹

The Lawyering Ethics Clinic receives copies of all probable cause letters issued by the Local Panels. Clinic students review the letters and decide which cases to solicit for clinic representation. The grievance process is generally speedy enough that the same student can handle the matter from solicitation through the hearing. Clinic students have been willing to handle cases involving all types of ethical rule violations stemming from all matters of underlying substantive law. Students have looked at rule violations such as competency, diligence, lack of communication, fraud, harm to third parties, and safekeeping of property. Underlying substantive law areas have included child custody, divorce, immigration, special education, zoning, real estate transactions, secured transactions, probate, and criminal defense.

V. THE HYPOTHESES

There are several hypotheses for why students learn more practical wisdom in a clinic setting where ethics is the substantive focus.

A. Hypothesis 1: An Ethics Clinic More Fully Immerses a Student in Normative Issues Related to Practical Wisdom

As I argued in my definition of practical wisdom, one key factor that differentiates wisdom from intelligence is that wisdom is normative. In other

25. CONN. PRAC. BOOK §§ 2-32 to -33, -35 (2003).

26. *Id.* § 2-32.

27. *Id.*

28. *Id.* §§ 2-32, -29.

29. *Id.* § 2-32(i).

30. *Id.* §§ 2-35, -33.

31. *Statewide Grievance Comm. v. Presnick*, 575 A.2d 210, 215 (Conn. 1990).

words, wisdom includes a moral or ethical component. It requires a person to assess the “rightness” or “wrongness” of particular conduct. Thus, the experiences a student needs to build practical wisdom should be normatively rich. These experiences should require students to consider the morality or ethicality of the conduct at issue. Students in an ethics clinic are likely to be more regularly immersed in normative issues than are their nonethics-clinic counterparts. Ethics clinic students’ case facts concern the normative rules of the legal profession; their legal research is about ethics; their legal analysis is about ethics; their behavior and opposing counsel’s (the grievous attorney) behavior is about ethics. The normative rules related to being a lawyer are not something that might come up during the course of representation—they *are* the representation. A student in an ethics clinic is completely immersed in normative issues.

In contrast, in a nonethics clinic, a student is primarily immersed in the substantive law of the clinic and the particular legal skills required by the clinic. A student in a landlord-tenant clinic focuses on the particular dispute, for example an eviction, and is immersed in learning the jurisdiction’s eviction procedures, the tenant’s possible legal defenses, and the possibilities of a settlement. Depending on the particular case, the student may never explicitly consider normative issues during the entire course of representation. The student is likely to consider and reflect upon her experience as one that increased her knowledge about landlord-tenant law and increased her skills in such areas as civil procedure and negotiations. The student’s experience will be rich and help increase her expert knowledge, but it may not give her a normative experience. She may be able to conclude her work without increasing her experience of normative rules.³²

B. Hypothesis 2: An Ethics Clinic Focuses a Student on the Ethics of Her Own Behavior, Making Her Experience More Personal and Thereby Encouraging Her Own Normative Development

When a student is so surrounded by normative rules of lawyer behavior as she is in an ethics clinic, she cannot help but be immediately aware of the ethics of her own behavior as a lawyer. Since she is immediately aware of her own conduct, she is encouraged to consider its propriety. For example, when the student initially investigates the facts of her case, she is aware that she is looking at behavior by someone in her own field. At a minimum, the student thinks, “I will never be an attorney who does something like that.” The case prompts the student to reflect on and predict her own behavior. In doing so, the student must conscientiously determine how she should behave and in what

32. I expect every landlord-tenant clinician will protest and point to several cases in which the student’s experience included substantial normative considerations. I want to make clear that my argument is not that nonethics clinics never or seldom provide normative experiences, but that ethics clinics are more likely to consistently provide richer normative experiences.

specific ethical conduct she should engage. In a nonethics clinic, the student is initially focused on facts or law that are unlikely to be directly related to ethics, and she is more concerned about her behavior in terms of efficacy or skillfulness (i.e., "Did I do a good job with my first client interview?"). It is only if a specific ethical dilemma comes up that the student turns directed attention to ethics.

Again, I am not arguing that a nonethics clinic fails to expose its students to ethics. There are myriad examples of nonethics clinic cases in which students must consider ethical issues. However, ethics is subsidiary to the substantive legal area or legal skills training of the nonethics clinic. For example, when a first-time clinic student is reminded to promptly return a client's call, she is not told that Rule 1.4 of the Model Rules of Professional Conduct requires her to so do. The student may think the admonition sounds singularly in common courtesy. In an ethics clinic, a student learns immediately that promptly calling a client sounds not only in common courtesy but in the rules of professional conduct as well. The link between conduct and norms is at all times explicit in an ethics clinic.

Furthermore, an ethics clinic reminds students that ethics is an everyday practice and not just a system for crises or hard cases. Practical wisdom is called for in ordinary lawyering tasks as much as it is in more extraordinary assignments. In fact, most ethics grievances in Connecticut concern attorney diligence and communication.³³ Students work with clients who have not been

33. Statistics from Connecticut's State Bar provide the following breakdown of grievances filed in a two-year period:

Nature of Complaint	Number of Complaints
Conflict of Interest	112
Excessive Fee	173
Failure to Return Records	75
Fraud	44
Harassment	91
Improper Communication	77
Improper Withdrawal	29
Mishandling Escrow	106
Lack of Communication	447
Mismanagement Funds/Property	96
Misrepresentation	152
Neglect	821
Other	224

Conn. Grievance Statistical Report for 07/01/2000–06/30/2002.

able to reach their attorneys, or whose attorneys do not tell them that court hearings have been continued, or whose attorneys tell clients only that their cases are proceeding without providing any details. Those prosaic settings remind students that ethics are equally important in mundane cases.

C. Hypothesis 3: An Ethics Clinic Triggers More "Disorienting Moments," Leading to Heightened Opportunities to Experience Empathy for Multiple Parties and Consider Balanced Outcomes

An ethics clinic creates more opportunities for what Fran Quigley has labeled a "disorienting moment."³⁴ The disorienting moment is one in which a person encounters a situation which does not easily fit into her existing frames of reference about the world or how it works.³⁵ Learning theory propounds that disorienting moments are heightened opportunities for adult learning because the moment requires the learner to reflect critically on inaccuracies in her world view. An ethics clinic regularly provides a student with disorienting moments. An obvious example is that an ethics clinic student regularly finds herself in a position in which she may be empathetic with both her client and opposing counsel. As an advocate, the student empathizes with her client, but as a soon-to-be lawyer, the student may also empathize with the grieved attorney.

Consider a clinic student who is busy with her class work and her clinic caseload, stretched for time, and facing multiple demands. She easily understands how an attorney with a caseload three or four times as great as hers may have trouble keeping up with client phone calls, particularly if the client seeks a large amount of communication. However, as an advocate, the student must consider her client's point of view. Those conflicting sentiments lead to a disorienting moment—how is a zealous advocate to deal with sympathy for the opposition?—and presents the student with a heightened opportunity to learn. In this case, the student is presented with opportunity to learn practical wisdom. The student must take the empathy she feels for her client and opposing counsel, step back, consider her responsibilities to both with some detachment, and then, with "calm deliberation," determine her conduct.

Having laid out my hypotheses, I test them using examples from the Lawyering Ethics Clinic. I then consider whether an ethics clinic has the potential for negative consequences as well.

34. Quigley, *supra* note 3, at 51.

35. *Id.*

VI. THE EXAMPLES

A. Mr. M and Attorney K

Returning now to Mr. M and Attorney K, consider the first hypothesis that an ethics clinic fully immerses a student in normative issues related to practical wisdom. In handling the case, the student interns had to consider initially the thorny ethical issue of competing responsibilities of loyalty to a client, respect for the rights of third parties, and the duty of candor towards a tribunal. The students had to consider how to respond to the incompetence of opposing counsel and what normative rule they were supporting by their chosen response. If the students chose not to correct opposing counsel's failure to provide the facts requested by the administrative panel, then the students would give priority to the normative rule calling for absolute loyalty to a client. If the students chose to provide the factual information to the panel, they would give priority to the normative rule calling for accurate and just results. Throughout the course of the representation, the students repeatedly and regularly discussed those ethical issues.

Furthermore, the case implicated the students' own conduct as attorneys. Their choices about appropriate norms directly required some corresponding action on their part. The students could not remain detached from the dilemma. If they chose not to present the facts, could they, in fact, be charged with an ethical violation? Similarly, if they wished to disclose the facts, but Mr. M did not, could the students be sanctioned? For the students, the experience was deeply personal and created a heightened opportunity to learn practical wisdom. In fact, I would argue it was less important how the students answered the questions and more important that they had the personal experience.

Finally, the students' experience created a disorienting moment. At the outset of the representation, the students were confident that the case was straightforward: Mr. M and Attorney K had a clear and simple contract for a fixed fee, and Attorney K breached that contract when he retained more than the fixed fee amount. As the students prepared the case, they discovered that Attorney K had done a substantial amount of work negotiating the sales price. They also discovered that Mr. M could be extremely difficult to work with and often unclear about the facts. They further discovered arguments reasonably supporting Attorney K. Instead of facing the straightforward case they had anticipated with a client clearly in the right, the students found themselves in a more complicated situation. They sympathized with Attorney K but felt obligated to Mr. M. The situation forced the students to reconsider their set notions of their obligations as attorneys and focus in a more thoughtful way on their moral and ethical choices. The case of Mr. M and Attorney K supports the three hypotheses that an ethics clinic provides more regular and sustained opportunities to learn practical wisdom.

B. Michelle S.

Michelle S. was a single mother whom the Clinic represented in a grievance against an attorney who had worked with Michelle to try to regain custody of her child from her ex-husband. She complained that the attorney did not return her phone calls, did not keep her apprised of the status of the case, and most seriously, appeared in court without her and erroneously represented to the court that Michelle agreed that her sister-in-law could have temporary custody of Michelle's child. The attorney had not filed a response to Michelle's grievance—often a signal that the attorney was, in fact, having trouble managing his caseload.

The student assigned to Michelle's case began his work by trying to set up an interview with Michelle. The student left several voicemail messages and e-mail messages for Michelle without getting any response. The student talked in Clinic about his frustration with Michelle for not returning his calls or e-mails and wondered whether the Clinic should go forward with its representation. However, soon thereafter the student and Michelle talked, and the student gathered the information he needed to write Michelle's hearing brief. The student was convinced that Michelle had been treated unethically by her previous attorney and was certain that the attorney's misrepresentation to the court had cost Michelle her chance to regain custody of her child. The student's full reserve of sympathy was given to Michelle, and he was outraged at the attorney.

As the hearing approached, the student once again had trouble reaching Michelle. It was only a day or two before the hearing that he finally spoke with her, went over her testimony, and made final arrangements to meet at the courthouse in advance of the hearing for another practice of her testimony. On the day of the hearing, the student and his supervising attorney arrived at court well in advance of the meeting time. When Michelle was almost half an hour late, the student started calling the various phone numbers he had for her to try to locate her. About fifteen minutes prior to the hearing, Michelle still had not appeared, and the student and supervisor were approached by a gentleman inquiring whether they were from the Lawyering Ethics Clinic. He identified himself as the grieved attorney and asked whether Michelle would be at the hearing. The student told him yes, and the attorney said he was not surprised that she was not at court yet because she frequently missed court dates when he represented her.

Without waiting for any response from the student, the attorney continued, stating that he was distressed by the grievance and did not understand Michelle's position that he was the reason she did not have custody of her child. He recounted that the state's child welfare department had taken the position early on that Michelle should not have custody of her child so long as she was living at her father's house, and the judge had concurred early in the proceedings. He detailed his efforts to help Michelle move from her father's

house, that she had not been able to do so, and that her inability to move was the primary reason she did not gain custody of her child.

The attorney's demeanor was genuine and sincere. He expressed no malice or hostility towards Michelle, but merely confusion as to what had gone wrong. He also admitted that he had failed to respond to Michelle's grievance because he was overwhelmed by his caseload and did not read the grievance procedures to understand that his response was mandatory. He noted that he had since closed his law practice and was working outside the law.

Michelle never appeared at the grievance hearing. The hearing panel went forward with the grievance as it is permitted to do under its procedural rules. The panel accepted the Clinic's hearing brief as Michelle's case-in-chief and accepted testimony from the attorney in which he described his situation just as he had to the student earlier in the hallway.

After the hearing, the student was upset by the events and had many questions. Was Michelle all right? How could she have failed to come to the hearing, knowing it was her only chance to have her side heard? Why had she filed the grievance given what the student had learned from the attorney? The student was convinced the attorney had been forthright and that Michelle had not regained custody for reasons other than the attorney's conduct. Nonetheless, the student worried that he had failed Michelle when he had not pressed the hearing panel harder to continue the hearing. In fact, the student wondered whether he had violated a rule of professional conduct by not doing so. Of course, following standard clinical pedagogy, the student and his supervisor reflected on the questions after the hearing and recounted the experience at the next Clinic meeting where the group further discussed what could and should have happened.

For my purposes here, it is less important how the student and his peers ultimately assessed his behavior and more important to consider the student's experience in light of my hypotheses about the power of an ethics clinic to teach practical wisdom. In Michelle's case, the student was immersed in normative issues. He knew that his legal task was to determine whether Michelle's prior attorney had behaved unethically. He conducted his investigation, interviews, and legal research entirely through an ethics lens. In contrast, had the case come about through the work of a family law clinic, it is likely that the primary legal issue would have been regaining custody of Michelle's child. The student would have focused on family law, and issues of ethics would have been relevant only to the extent that they supported the family law arguments.

Furthermore, the student was immediately aware of his own conduct. When the student had trouble reaching Michelle at the beginning of the case and questioned whether the Clinic should have taken the case, the student had to consider whether he had been diligent in trying to reach Michelle and whether he was too quick to conclude that Michelle was uninterested in the case because she was difficult to reach. The student explicitly assessed his own conduct in terms of ethical behavior. The student's focus on the ethics of his

own behavior continued throughout the case, culminating in his concern that he had failed Michelle when he did not press the hearing panel to continue the hearing given Michelle's absence.

Certainly, if Michelle's case was in a family law clinic, the student and his supervisor would have discussed the fact the student was having trouble reaching Michelle. They likely would have considered the student's ethical responsibilities to be diligent as well as tried to empathize with any difficulties on Michelle's side. Nonetheless, that discussion would have happened in the course of discussions about other things, such as what legal arguments were available to support Michelle's claim for custody and what position the state's child welfare department would take. In other words, the family law clinic student would have focused on areas other than ethics, while the ethics clinic student immediately focused on ethics, and in particular, the ethics of his own behavior. That immediate focus provides an ethics clinic student with more opportunities to develop practical wisdom than the family law clinic student.

Finally, the student in Michelle's case had many disorienting moments caused by discord between his role as advocate, his sympathy for his client, and his sympathy for the grieved attorney. Most strikingly, the student went to the hearing fully persuaded that the attorney had done nothing to help Michelle and then learned the attorney had tried to work with Michelle to regain custody. The student believed the attorney, sympathized with him, and was upset with Michelle for not fully disclosing the underlying facts.

Nonetheless, the student knew he owed a duty of loyalty to Michelle. The student had to determine what his ethical conduct should be, considering his charge of zealous representation, his duty of candor to the tribunal, and his own emotional feelings towards his client and opposing counsel. He had to consider competing points of view, both with empathy and detachment, and he had to consider alternative outcomes and balance their consequences. Again, the point here is not how the student balanced those issues, but that those issues were central to his experience. The process of working on Michelle's case gave the student an opportunity to develop his practical wisdom.

C. Robert S.

Robert S. was the administrator of an estate in which the decedent's will was being contested by one of the decedent's daughters. Robert was represented by counsel in his role as administrator of the estate. Robert filed a grievance against the daughter's attorney after the attorney sent Robert a series of highly inflammatory and derogatory e-mails, even though the attorney knew Robert was represented. The Clinic was aware at the time it took the case that Robert had responded to some of the e-mails in a less than temperate tone.

The student handling Robert's case determined early on that case law clearly supported Robert's claim that counsel had violated the Rules of Professional Conduct by contacting him directly rather than through counsel. Nonetheless, as the student further investigated the full range of e-mail

communications, it became even more clear that Robert had not hesitated to return counsel's e-mail using the same derogatory and inflammatory tone. It also became clear to the student that Robert was headstrong and willing to act contrary to the advice of his probate counsel. In turn, Robert's probate counsel seemed unable to persuade Robert that his conduct was harmful to both the probate action and his grievance.

From the outset, the student was faced with bad or ineffective behavior by almost everyone in the case: his client, the grieved attorney, and his client's probate counsel. Yet the student also knew that he had accepted the role of advocate for his client and therefore had to immediately consider his own conduct. Was he required to defend Robert's bad behavior? What if he could not persuade Robert to stop his inflammatory behavior in the grievance proceeding and in probate? What risk did the student run of having the grievance committee consider him unfavorably because he had an unsympathetic client? Was it appropriate for the student to consider his own reputation?

The student's ethical concerns and dilemmas surfaced as soon as he began work on the case. They were the substance of his representation, and he could not mute or avoid them by focusing on some other substantive area of law. The Clinic was not handling the probate matter. Further, Robert's behavior immediately required the student to consider his own behavior and decide whether he should be an unquestioning advocate, a critic of his client, or find some other tack, constantly considering multiple perspectives, multiple outcomes, and attempting to find a balance.

Finally, Robert's case created several disorienting moments for the student. The first was when the student took the case and realized that he did not like his client and would find it hard to sympathize with Robert even though Robert's ethics complaint was strong. Another was when the student recognized that his unsympathetic client might cause some harm to the student's own professional reputation. In fact, after the hearing in Robert's case, the chair of the Reviewing Committee took the highly unusual step of excusing others in the hearing room except members of the Clinic and then severely chastising the Clinic for accepting Robert's case. Setting aside whether the chair's actions were appropriate, the student's fear of "guilt by association" was certainly brought to a climax.

D. Summary

The cases of Mr. M, Michelle, and Robert support my hypothesis that an ethics clinic is a powerful and effective way to teach students practical wisdom. Nonetheless, I suspect that many clinicians will look at the cases and remark that they have had cases just like these, that they worked with their students on the same ethical issues, and that their students garnered the same practical wisdom as did the ethics clinic students. I am sure that is true. My argument is not that ethics cannot be learned in other clinical settings, but that an ethics

clinic provides a more potent and consistent format for teaching practical wisdom. Mr. M, Michelle, and Robert are an ethics clinic's everyday clients. There is no chance in an ethics clinic for a student to be distracted from the normative issues. In contrast, in a nonethics clinic, a student may not be called to consider normative issues. For example, when a student's client has been erroneously denied food stamps, the student may be able to rectify the problem simply with a letter and phone calls to the client's benefits worker. Thus, while ethics questions certainly are present in other substantive representations, there is no certainty that a case will raise those ethics questions. An ethics clinic presents a sustained and focused forum for teaching practical wisdom.

VII. THE RISKS

One of the strengths of the ethics clinic, its immersion in the rules of professional conduct, also creates one of its risks: that students will see the rules as demoralized and malleable to fit a client's desired outcome. Luban and Millemann have persuasively argued that the transition from the Canons of Professional Ethics ("Canons") to the Code of Professional Responsibility ("Code") to our current Model Rules of Professional Conduct ("Model Rules") demoralized the rules of legal ethics.³⁶ Both the Canons and the Code contained language of morality, and set out the "thou shalls" and "shall nots" for lawyers.³⁷ The Code also contained moral aspirations for lawyers in its Ethical Considerations.³⁸ In contrast, the Model Rules contain no aspirations and often speak in permissive rather than mandatory terms. Thus, under the Model Rules, an attorney *may* do something but is often not punished for failing to do so. There is no stated aspiration to coerce specific conduct. As Luban and Millemann argue, that move away from moral aspiration effectively demoralized the Model Rules.

Luban and Millemann use the example of representing unpopular or poor clients and argue that the Code's aspirational rule to accept such cases reminded an attorney that "professional honor takes guts."³⁹ In contrast, the Model Rules contain no such aspiration and, therefore, offer neither support for, nor the risk of, shame to an attorney when deciding whether to take such cases.⁴⁰ The Model Rules confirm it is "legal" for an attorney to represent the poor or unpopular, but the Rules say nothing about whether it is a moral obligation as well.

That demoralization of the Model Rules may influence students in an ethics clinic. Clinic students must develop their cases within the context of the Model Rules. They research and prepare their legal arguments just as they

36. Luban & Millemann, *supra* note 1, at 42–53.

37. *Id.* at 43–45.

38. *Id.* at 44.

39. *Id.* at 50.

40. *Id.*

would for any case based on a statute. There is case law to be found, rules of statutory construction to be considered, and other related regulations to review. The student's work may become less about ethics than about how to lawyer a case in a regulated field. Because the Model Rules speak strictly about legal duties, the ethics case may be no different than a case about SEC regulations, licensing, or other areas of statutory compliance. The risk for the student is that the primary question she is asked to answer is "Did I (or the other attorney) comply?" rather than "What viewpoints and norms are relevant and how do I achieve an appropriate balance?" If compliance is the question to be answered, then the student is not likely to develop her practical wisdom, but instead to develop her skills interpreting case law and statutory language.

The antidote to the above risk is the requirement in clinical pedagogy that a student critically reflect on her experiences and be guided in that reflection. So long as an ethics clinic student is asked to reflect on her experience in the context of her role as lawyer and person, the student should be able to consider her case, the conduct of others, and herself in moral terms rather than only in legalistic terms. Her critical reflection should ensure that her immersion in ethics is more than immersion solely in a regulatory scheme.

Another potential risk is that the student may focus too intently on personal conduct. The student will be too inward-looking and will not sufficiently listen to her client. In so doing, the student will not learn the importance of client narrative. More experienced practitioners have learned how easy it is for lawyers not to listen truly to a client's stories or to recount those stories in a legalistic way.⁴¹ More importantly, I would argue that truly hearing a client is an integral part of practical wisdom. It is the part of practical wisdom that builds empathy between attorney and client and ensures that the attorney consider solutions from more than just her perspective. Therefore, if a student is focused too inwardly on personal questions of moral development, she may, in fact, neglect to learn one of the critical facets of practical wisdom.

Again, the counter to that risk is guided critical reflection. Through whatever methods the clinical supervisor prefers, the student can be encouraged to consider her client's perspective and gather her client's story. The student can be asked to reflect on what place her client's narrative has in the student's decisionmaking process and, more explicitly, what role the narrative plays in the student's assessment of moral and ethical conduct in the case. The risk of self-centeredness can be handled by good clinical pedagogy.

VIII. CONCLUSION

Practical wisdom is the consideration of multiple views with both empathy and dispassion, along with an assessment of the relevant norms and the

41. See Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321, 322 (1998).

possible outcomes, and selecting a course of conduct that balances these elements in a way most likely to lead to common good. Practical wisdom is a skill one best acquires through experience. Further, the best experience from which to garner practical wisdom is one in which the student is immersed in questions related to her role as a lawyer and her broader responsibilities as a person. Those kinds of opportunities are regularly offered in an ethics clinic. Couple those opportunities with guided critical reflection and students in an ethics clinic have a rich environment for learning practical wisdom.

