The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 14 | Number 3 Article 4

12-1-2012

The Client Who Lost Despite Winning and the Client Who Won Despite Losing: Reflections on Starting a New Immigration Clinic.

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ESSAY

THE CLIENT WHO LOST DESPITE WINNING AND THE CLIENT WHO WON DESPITE LOSING: REFLECTIONS ON STARTING A NEW IMMIGRATION CLINIC

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I. INTRODUCTION

In the summer of 2010, Washington and Lee University School of Law asked me to start a program for the upcoming school year in which students would provide direct representation to clients in immigration matters. As I went about the task of finding cases for the program, I began to realize that the cases I selected and the way I selected cases would affect the kind of clinical experience the students would receive. Specifically, a focus on asylum cases would require students to develop their litigation and advocacy skills in a controlled setting with a clear goal, static facts,

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and a well-established body of case law. Conversely, a clinical experience that more closely mirrored what students would confront after graduation would not guarantee the exercise of any particular skill, but would require the flexibility, creativity, and uncertainty of a real immigration practice.

As I pondered the implications of what types of cases I selected, my thinking was influenced by two cases I had worked on, which I call, "the client who won despite losing" and "the client who lost despite winning." These cases forced me to think about the nature of the interaction between the student-practitioners and their future clients under competing models, a question that will likely confront any clinician trying to start an immigration program. This Essay is intended as a way to share my thought process with future clinicians in an effort to help them through some of the issues they may be confronted with when starting an immigration law clinic.

The cases of the "client who won despite losing" and the "client who lost despite winning" taught me that advocacy is only one component of good lawyering, which is actually a complex interaction between the lawyer, his client, the facts, and the law. The asylum-based clinical model, with its narrow focus on advocacy skills through cases that are prepped for litigation, has undeniable benefits in training future advocates. Such an approach, however, denies the student the richer experience of a case that includes all of the complex, human dynamics found in actual legal practice. The art of lawyering requires the integration of these legal skills into the larger problem solving process that is at the heart of the attorney–client interaction.

Indeed, I developed these thoughts on the process of becoming a lawyer only by going through such a process myself in the cases discussed below. The way in which I reached this viewpoint is therefore instructive both as an explanation of the viewpoint itself and as a model for how such an approach operates. For this reason, I chose a clinical model in which students would experience this same process; a multi-faceted engagement with clients that is not designed to transmit any predictable lessons other than the notion that lawyering is inherently unpredictable, requires openness to surprises, and the flexibility to respond appropriately.

In Parts II and III, I recount the stories of the "client who won despite losing" and the "client who lost despite winning." In Part IV, I discuss the lessons I learned from these two cases and how those lessons influenced the choices I made for the Washington and Lee clinical program. In Part V, I will detail the choice I was confronted with in constructing the immigration program, and how my experiences influenced that choice. While some clinics focus exclusively or predominantly on asylum

cases, other clinics are more open to handling a range of cases that provide a mix of challenges and varying degrees of complexity. Part VI describes how I believe this choice has benefited the education of the students in the program through three examples from our first semester in operation. I conclude this Essay in Part VII with my view on the kinds of cases that are most constructive in achieving the goals of clinical legal education.

II. The Client Who Won Despite Losing

For most of my time at Texas Rio Grande Legal Aid[1] in San Antonio, I handled a variety of immigration cases, as well as evictions, expungements, Section 8 hearings,[2] and debt-collection defense. It was rare to get an old-fashioned personal injury case, so when one came in the door, it was decided that it would be a good opportunity for me to get some jury-trial experience.

The case had taken some odd turns. There had been a minor car accident on a city street. There were no major injuries, but my client's car was inoperable and had suffered a few thousand dollars' worth of damages, which was greater than its resale value and severe enough to make it inoperable. My client claimed to have suffered back injuries, for which she received chiropractic treatment from her father. Her father was well regarded in the field, having been the former president of a national association of chiropractors. She was also a trained chiropractor but had a hard time setting up a successful practice and was taking cases from her father. The other driver had not sustained significant damage to herself or her vehicle.

While both drivers had car insurance, my client's company won arbitration between the two, making the other driver's insurance liable for paying the damage as between the two companies. However, the other driver's insurance company, GEICO, refused to pay my client's damages. Under Texas law, she was required to sue the other driver to obtain payment, which she did in small claims court. In the first trial, my client, representing herself, presented her story. She testified that she was driving behind the other driver on a road with one wide lane—wide enough to easily accompany two cars—going in each direction. As the defendant

1. *Who We Are*, Texas RioGrande Legal Aid, http://www.trla.org/about/who-we-are (last visited Dec. 7, 2011). I worked at Texas RioGrande Legal Aid (TRLA) from June 2006 to May 2010. TRLA provides free legal representation to residents of Southwest Texas who cannot afford private attorneys. *Id.*

2. Section 8 hearings refer to informal hearings used to determine whether a recipient of federal rental assistance vouchers should be terminated from the program due to alleged violations of program rules by the tenant-recipient. 24 C.F.R. § 982.552(a)(3) (2011).

pulled over to the right-hand side of the road, apparently to turn right, into a store parking lot, my client continued forward. The defendant then, without warning, made a left-hand turn from the right side of the lane, striking the front passenger side of my client's passing car with the front driver's side of her car. A police officer came out to the scene and cited the other driver for unsafe driving and making an illegal left turn.

The GEICO attorneys argued that this was a case of "road rage."[3] They argued that my client was cut off by the other driver on the previous street invoking this so-called road rage. As my client was driving to her first errand of the day, the defendant had turned left from the turn lane directly in front of my client driving in the opposite direction. My client was forced to slam on the brakes, at which time she decided to turn on the same side street as the defendant rather than to continue forward as originally planned. She explained that since she was forced to brake anyway, she changed her plans to pursue her second errand down that street instead of continuing on to her first errand. This dissatisfying answer, which she gave on tape to the insurance representative shortly after the crash, would come back to haunt her later. The defendant argued that my client changed course in order to pursue her in a fit of road rage. Furthermore, she alleged that my client then followed closely behind her, making angry gestures that the defendant could see in the rear-view mirror. As the defendant tried to turn left, my client angrily tried to pass her, which caused the collision. The defendant testified that my client acted crazily and continued to yell and make angry gestures after the crash occurred.

The defendant won in small claims court, and my client appealed to the county court at law.[4] She came to our office for help with the second trial. Reading through the case file, the road rage argument seemed a bit far-fetched. It seemed unlikely that someone would get so enraged by being cut off that she would proceed to instigate an accident, putting her car and herself in jeopardy. The location of the accident, the arbitration decision, and the police report all seemed to support my client's version of the accident.

Upon meeting my client, I began to understand at least why GEICO felt the road rage argument might work. She came across as angry, em-

3. "Road rage" generally refers to angry, aggressive behavior by a driver on the road, but it has also been recognized as a symptom of intermittent explosive disorder, a psychiatric condition. Phyllis Coleman & Robert M. Jarvis, *State and Local Government Law Road Rage*, GPSOLO, Mar. 2002, at 40, 41–42, *available at* http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/leslie.html.

4. In Texas, small claims suits in excess of $250 can be appealed for final judgment to the county court at law, which hears the case de novo. TEX. GOV'T CODE ANN. § 28.053(b) (West Supp. 2011).

bittered, and even a little crazy. In contrast, the defendant, who I would later meet in a deposition, was a young, attractive woman who appeared calm and reasonable. My client was upset that she was not able to find a job or run a successful chiropractic practice. She was embarrassed that she received food stamps and unemployment insurance, and mad that the GEICO attorneys had managed to point this out at trial. She felt that the chiropractic profession was misunderstood and dismissed as quackery even though, from her perspective, it had proven health benefits for a range of ills.[5] She was upset that her choice of going to her father for treatment, which seemed the most natural decision in the world, was characterized as an attempt to inflate or create medical damages. She was upset that she did not have a working car, and that a large insurance company refused to pay the modest amount to fix it despite losing arbitration. She was upset that she was characterized as angry and unstable and that, according to her, the defendant lied about her on the stand. She was upset by the way the GEICO attorneys and the justice of the peace treated her—and felt that the system itself had conspired against her.

The first meeting—about two hours of her grievances with me barely getting in a word edgewise—was the first of many. She wanted to meet frequently to continually explain her version of events, why she turned when she did, why chiropractics is misunderstood, and why she had difficulty finding a job. It was challenging to avoid these meetings without her getting upset and questioning my commitment. As a new attorney, who had never advocated in a jury trial, her questioning of my capability against the much more experienced GEICO attorneys was hard to rebut. And so it went on. I was able to get the police officer to agree to testify and to get the medical and auto repair reports for use as evidence. We made it through discovery, depositions, and motions for summary judgment; but little changed in her attitude or comportment, and in fact, they got worse. The more she was forced to do—answer discovery, sit for a deposition, wait for the process to play out—the more embittered she became at the failure of the justice system to fix her car, recoup the cost of her medical care, and achieve fair resolution to her case. Even the receptionist and my secretary got sick of her angry and sullen visits to the office, and they would frequently ask me when the case would finally be over.

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5. Chiropractic therapy is a form of alternative medicine to treat patients—especially through spinal manipulation—under the theory that mechanical problems of the spine cause a number of general health problems through the nervous system. SIMON SINGH & EDZARD ERNST, TRICK OR TREATMENT: THE UNDENIABLE FACTS ABOUT ALTERNATIVE MEDICINE 147–48 (W.W. Norton & Co. 2008). Its' efficacy has been controversial because of a lack of evidence for any sort of "innate intelligence" or for "subluxations" despite its apparent acceptance by the mainstream medical establishment. *Id.*

I spoke to her father, a distinguished man who loved his daughter but was reluctant to put his reputation on the line for her and dubious of the wisdom in pursuing the suit. He felt her injuries were minor and he was not charging her for the chiropractic services anyway. He further stated that his son had offered to fix her car for free. He did not see what there was to be gained by this lawsuit and did not understand why his daughter was putting her life on hold to await the outcome of the suit. It was his opinion that she needed to get a job and get on with her life. His position seemed reasonable to me.

As we went to court-ordered mediation, I saw the writing on the wall. Though I had explained to my client that the role of the mediator was different than a judge—that he was there to work out a deal, not to adjudicate the merits of the case—she insisted on giving him long explanations on the merits of her case and the unfairness of her treatment. After giving her lowball offers, the GEICO attorneys sent a message to her through the mediator: they felt they could win the case because they felt she would make a bad witness on the stand. In addition to almost certainly being true, this, combined with the insulting offers, only made her more upset.

I began to feel that this case had taken on an importance to her well out of proportion to the modest sum of money she was asking for. Moreover, it was quite possible that she could be awarded even less than the little she was demanding even if she won the case. The jury might have had a hard time compensating her for injuries that did not appear to be serious or permanent, and for which she had received no medical attention other than chiropractic treatment from her own father. They might also balk at paying for car repairs when the amount was in excess of the bluebook value of the car itself. I could see a scenario in which we won the case, but she was dissatisfied and angry because she received only the bluebook value of her car rather than the cost to repair, or alternatively, she received only the auto damages and not medical damages. Given her demeanor and my inexperience, I could also foresee a complete loss. Given how much she had banked on this case, I felt that something had to be done.

I decided to have a heart-to-heart talk with her. I told her that there was a limit to what the legal system could achieve. I explained that juries are unpredictable and they may not see things our way. I told her that she may not get all the money she was asking for. At best, she could be awarded a certain sum of money, but money can only achieve so much. The court could not force the defendant or GEICO to admit wrongdoing or apologize, and money would not make up for the lost time and energy, and it would probably not, on its own, bring her peace of mind. For that, win or lose, she was going to have to be the bigger person and forgive them for whatever they had done. If this was not about the money, but

about justice, as she had always insisted, then the jury verdict would inevitably leave her dissatisfied because all the jury could do for her in this suit was award money. True "closure," if it came at all, would come from within.

For the first time in our dozens of meetings and countless hours together, I finally felt that she was listening to me. As I braced for a digression on chiropractics, her response appeared to be thoughtful silence. It seemed that I had said something that sunk in. I did not know if it was more than a temporary effect, but for the next week or two before trial, she seemed a bit different.

The trial was a disaster. The judge ruled against us in almost every pretrial motion. He knew the GEICO attorney well from her weekly trials; I was an unknown. Every objection went against us. My opening and closing statement were faltering and uneven. My client came across as robotic and her father came across as a forgetful old man. The defendant was smooth and confident. I was happy to get through it without too much embarrassment, but the verdict did not come as a surprise. My client was seventy percent at fault and the defendant was thirty percent at fault. Under Texas's comparative negligence rules, my client received nothing.[6] It was a complete loss. She had invested a lot of time and energy into this for naught, and I was at least partly to blame. I was dejected and I knew she would be too. I did not look forward to the aftermath.

As we met back at the office, I received what was perhaps the biggest shock of my young legal career. She looked relieved and almost happy, and thanked me effusively for my hard work. The judge and jury had not seen things our way, but she felt I had done a good job. More importantly, she was happy the ordeal was over and that she could now get on with her life. She could live without the money, she said, but at least she knew she gave it her all and did what she thought was right. In her perspective the defendant and GEICO would have to live with what she considered their dishonest presentation and dishonorable conduct. She felt she had won by fighting her case the right way, and they had lost by sacrificing their values for the sake of prevailing in court. She mentioned our conversation, and said she realized I was right about how to think about this ordeal. It was the only time in our long relationship that I had seen her not stressed and worried, but genuinely happy. Even though she lost her case, she had won peace of mind, which, she had eventually realized, was her true objective.

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6. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (West 2008) (providing that comparative negligence law, officially called proportionate responsibility, bars recovery if the plaintiff is more than fifty percent at fault).

III. The Client Who Lost Despite Winning

I got off to a much better start with the client who is the basis for the second instructive case. A Vietnam vet, he lived in a manufactured home on a lot in a rural county outside San Antonio. He had entered into an agreement with the owner of the home and lot in which he would pay the owner a certain amount of money for twenty-four months, after which he would take ownership of the home. My client was also required to pay taxes and maintenance during the two-year period. This kind of rent-to-own property contract, typically called a contract for deed,[7] frequently results in scams and disputes. It is common that as the payment period nears its end; the owner tries to find ways to claim a breach by the tenant-purchaser so the owner can keep the monthly payments without transferring ownership. Sure enough, after twenty-three months of payments, the owner of my client's home refused to accept the final payment, claimed nonpayment-of-rent breach, and initiated eviction proceedings against my client. For good measure, he also alerted my client to the fact that he had a gun and broadly hinted that he might use it. My client responded that he was also in possession of a firearm, and—as he told me many times over the course of my representation—he would have preferred to settle this dispute the old-fashioned way. My client assured me that what this measure lacked in legality, it more than made up for in efficiency and finality.

I told him I was reasonably confident I could get the owner to comply with the agreement—to accept his final payment and transfer ownership of the mobile home. I thought we might even be able to get the owner to pay a little extra for my client's trouble. My client wanted payback for the way he had been treated and for the injustice he had been forced to endure; he was mad and felt he had been "screwed." I said I felt we could achieve a good outcome, but I warned him that judges and juries are reluctant to go much beyond compensatory damages in these kinds of cases. I felt that would be a good outcome if we could get the deal back on track, and get some reasonable damages. Especially since the mobile home was decades old, in bad shape, and had little to no resale value. I told him not to expect much beyond that. Since he liked me and trusted me, he accepted that, and we proceeded to file suit for breach of contract

7. Contracts for deed in Texas are officially called "executory contracts for conveyance" and are governed by Chapter 5, Subsection D, of the Texas Property Code. Tex. Prop. Code Ann. § 5.062(a) (West 2004) "[A]n option to purchase real property that includes or is combined or executed concurrently with a residential lease agreement, together with the lease, is considered an executory contract for conveyance of real property." *Id.* at (a)(2) (West Supp. 2011).

and deceptive trade practices, as well as for statutory violations of the property code relating to the sale of manufactured housing.

We went through the usual rounds of discovery, depositions, motions, and settlement negotiations without resolution. Finally, we ended up in court-ordered mediation, but by this point, my client's frustration with the process and his demands had increased. Now, he wanted the defendant to give him the home, to pay for the move (a cost of about $1,500 because of the special equipment needed to move a mobile home), and pay additional thousands of dollars in damages. I reminded him that under the initial contract all he would have gotten was the home by making one additional payment to the defendant, so what he was asking for was substantially more than he would have gotten under the original bargain. In fact, I told him, it would be well in excess of what a jury would think is reasonable for the delay he had been forced to suffer. No amount of persuasion would work, and my client insisted on the whole package. I was more certain than ever that we were headed for trial.

As mediation got under way, we opened with what I considered to be a ridiculous demand for the home, the move, and an additional $15,000. The money alone was at least several times what the dilapidated home could possibly have fetched on the open market under even the rosiest projection. I prepared to hear the sound of a slamming door as the defendant and his lawyer stormed out of the mediation center. Instead, they came back with a counteroffer to hand over the home and pay for the move. Could this actually work? After all-day negotiations, we got a mediator's proposal for the home, the move, and $10,000. I could not believe our good fortune. My client had pushed for a good deal, and he got something better than I ever thought was possible. However, he was reluctant to sign off, afraid he was still getting a raw deal. After a little arm-twisting—and a heavy reliance on the goodwill and trust I had developed over the course of the representation—my client finally agreed to the deal. The agreement was signed later that day. Exhausted, I went home satisfied with what I considered to be a great outcome.

It was a few weeks later that the problems started. Under Texas law, when a mobile home is moved from one location to another, it has to be set up and grounded in the new location according to certain specifications.[8] The defendant's mobile home moving company wanted to move the home to my client's property and leave it there for him to set up, which the defendant felt was consistent with the agreement to "move" the home. My client insisted that a move of a mobile home implicitly includes the set-up of the home in the new location. My reading of the

8. *See* 10 TEX. ADMIN. CODE § 80.21(b) (West Supp. 2011) ("All used manufactured homes shall be installed by a licensed installer . . . .").

state's manufactured housing regulations seemed to agree with the defendant's position that moving entailed only the actual transport.[9] My client, on the other hand, was not convinced. He refused to open the gate to let the home in unless they agreed to set up the home properly. Consequently, the defendant refused to release the $10,000 check and sign over ownership until my client opened the gate and allowed them to unload the home. It was a standoff. The talk of being "screwed" and resolving the problem the "old-fashioned way" began to resurface.

As the deluge of phone calls to me, to my secretary, and to anyone who would listen continued, I was at a loss as to how to mollify my client. We had just hired a senior attorney who had worked at the Office of the Attorney General, Consumer Affairs Division. The attorney had actually written the regulations governing manufactured housing, and I went to him for an expert opinion on whether the move of a home also included setting it up. After looking carefully through the law and the regulations, he came to the same conclusion that I did—the installation was separate and apart from the transport of the home. He added that with the deal he got, my client could easily afford to pay the few hundred dollars to set up the home, and still come out way ahead. Around this time my client informed me he had just been diagnosed with post-traumatic stress disorder from his service in Vietnam and that he was about to receive $500,000 dollars from the Veterans Administration for his accumulated benefits, interest, and penalties. His fight over a few hundred dollars seemed less and less rational.

After a little more fighting, he accepted the home and fired me. My great victory had come to an ignominious end. I could not figure out what went wrong. He received everything he could have wanted and then some. He had the mobile home, the defendant paid to move it, and he also was paid a significant amount of money for his troubles. But, looking back on it, he did not get what he really wanted—revenge. He wanted the defendant to pay for what he did in unmistakable terms. Any hint that the defendant was getting away with something, and possibly getting the better of him, was unacceptable to my client. He won everything he could have won from the system and more, but he lost in his effort to achieve his true objective: sweet and certain revenge.

IV. Lessons Learned

The two cases detailed above demonstrate that "winning" a case does not necessarily coincide with achieving a *good* outcome for the client, and

9. *Id.* § 80.33(c) (West 2009) ("A person contracting directly with the consumer for only the transportation of a manufactured home to its site is not deemed by virtue of being the transporter to also be the installer.").

"losing" a case does not necessarily coincide with a *bad* outcome for the client. The "client who won despite losing" lost in court, but she came out of the process satisfied and ready to move on with her life. I like to think my talk with her was more than just a positive spin or making the best of a bad situation. While my advocacy may have been lacking, I believe my counsel helped her achieve what she erroneously thought she could only get from a money judgment: a sense of closure, of restored dignity, and of justice. The "client who lost despite winning" won a very favorable settlement, but it did not help him achieve the sense of knowing revenge and schadenfreude[10] that he was really after. While I was satisfied with my advocacy of his position within the confines of the legal case, I lost sight of the human element at play and the underlying motivations of the dispute. In short, one of the biggest mistakes made by myself and other young lawyers is confusing a successful legal outcome with achieving the client's objectives. To the extent that law school clinics reinforce this false notion, they are doing a disservice to their students.

A. *Lesson One*

The first lesson I drew from these cases is that there can be a divergence between legal victory and successful representation. People generally come to see an attorney because something unfortunate and unexpected has occurred in their life. They are trying to process the traumatic event and achieve resolution and they often want a lawyer to help them navigate the foreign situation they find themselves in to reach a more familiar shore. Rather than hiring a lawyer to achieve a particular legal outcome, they expect the lawyer to help them discover what would be a satisfactory outcome and guide them there. Indeed, sometimes the legal process itself can have a cathartic effect and help clients make sense of what has happened. As my experiences above illustrate, to a striking degree, the client's satisfaction is often divorced from the legal outcome of a case.

The first client was shocked to be in a car accident, to have the other driver's insurance company refuse to cover her damages, to be mistreated by the legal system in small claims court, and ultimately, as she perceived it, to be adjudged as an angry driver who lied to cover up her offensive behavior. I am convinced, more than anything that she wanted someone to believe her and to fight for her; she wanted her "day in court," and she wanted to find a way to deal with this distressful series of events. After the trial was over, she could have found any number of ways to blame me for not achieving victory, a reaction that would have been entirely consis-

10. "To delight in another's misfortune." *Shadenfreude*, DICTIONARY.COM, http://dictionary.reference.com/browse/schadenfreude (last visited Dec. 13, 2011).

tent with the angry, embittered person I had come to know who just suffered a stinging defeat. Indeed, I was upset with myself for several of the decisions and actions I took over the course of the trial, but her reaction was just the opposite. She blamed the judge for some of his adverse rulings, the jury for not understanding the situation, and even herself for her performance on the stand. But she saw that I believed her, fought for her, and helped her get her day in court. Moreover, our discussion and the legal process itself had helped her deal with what happened, and she now felt free to close this unfortunate chapter in her life and move on.

The second client, on the other hand, never fully processed what happened to him or discovered a meaningful resolution. He wanted a smashing, unmistakable victory, but what he got was a deal that his opponent agreed to and, from my client's perspective, did not fully comply with. In my client's eyes, he believed the defendant, rather than getting the comeuppance deserved for his nefarious behavior had gotten the best of him yet again, and he thought it had been achieved with the help of his own attorney who sold him on a raw deal. He was not convinced that I was fighting for him and he was angry he did not get his day in court. Rather he got the home he bargained for and money he did not need. But instead of being cathartic, the process left him angrier than ever. People want someone to hear and believe their story, to empathize with them, to understand their suffering, and to help them find a way out. A client's satisfaction and a lawyer's sense of accomplishment must sometimes come from these more ambiguous sources than a definitive courtroom victory. This knowledge and these skills are an essential component in any legal education.

B. *Lesson Two*

A second important lesson drawn from the above cases is that sometimes a successful legal outcome simply cannot be achieved under the factual situation initially presented. That is, instead of merely winning the case, the lawyer must sometimes refashion the facts to create a case that can be won. Sometimes, this is just the old lawyers' trick of reframing the case. For example, the "client who won despite losing" was happy in the aftermath of the trial because she had her day in court and gave it her best shot. The fact that the jury went against her became incidental because she was not searching for victory in the form of a jury verdict. For her, victory came from following the process through to what felt like a conclusion, thus granting her release to fix her car and resume her life.

In the second case, the "client who lost despite winning," victory could only be achieved by defeating his adversary. His objective was framed as something that could not realistically be achieved. Since he was not convinced to accept the settlement as total victory, the client was inevitably

going to be disappointed with the outcome. His search for a problem with the settlement in order to reignite the dispute was a manifestation of his failure to achieve what he considered a satisfactory resolution. My attempt to appease him by explaining how he was still coming out ahead financially was futile because it was not about the money at that point.

For the first client, a victory was achieved by merely putting up a good fight, while the second client would only have been satisfied by the fulfillment of his fantasy to achieve justice at the barrel of a gun. These examples are not just a matter of managing expectations; they are about helping clients realize what their case is really about so that the resolution will lead to something that feels like victory. Moreover, "creating" a winning case by aligning objectives with achievable outcomes often goes beyond reframing the existing facts. Situations may arise where a lawyer must be a participant in constructing the facts themselves. Factual situations are fluid and often still developing at the time the client sees the lawyer, and the client's action will be affected by what the lawyer tells her. Thus, the mere participation of the lawyer in the case can change the facts of the case, whether intended or not. Naturally, this fact and the awareness of it on the part of the lawyer raise complicated ethical and practical considerations. Part of the rich complication of the legal occupation is dealing with the tension between observer and participant. When cases have an established factual foundation, which may be known, or undiscovered, but certainly unchangeable, the student-lawyer is denied the opportunity of appreciating the true complexity of the profession he is about to enter.

C. *Lesson Three*

A third important lesson to draw from these cases is the degree to which non-legal skills and solutions must be utilized in pursuit of a positive outcome to a legal dispute. The client is a human being with human problems that require human solutions, and only some of these solutions and problems can be addressed through legalistic means. Moreover, even the pursuit of legal outcomes through legal means often requires the use of practical skills and creative thinking that go beyond anything that can be taught under the rubric of legal skill-building. Lawyers are ultimately problem-solvers, and not all problems can be solved through the proper application of purely legal skills. In the cases above, both clients needed someone to help them discover a new perspective on what happened to them and how they should react to it. This goes beyond merely the "empathetic listening" taught as a legal interviewing skill in many clinics. Instead of being a victim with a series of grievances, the "client who won despite losing" was able to see herself as the bigger person who did the right thing, whether the jury recognized it or not. She went from the

humiliation of victimhood to the self-pride of occupying the moral high ground. The "client who lost despite winning," however, never saw himself as anything other than a victim, and when an objectively minor dispute over the implementation of the settlement agreement arose, it was seen as yet another grievance and humiliation he was forced to endure.

Therapy and psychological counseling are not part of a lawyer's traditional job description but they are very often part of the job. While law schools cannot be expected to teach these and other specific non-legal skills that often are required in practice, it is useful to educate future lawyers that they will need to draw on a wide variety of other skills and experiences during the regular course of representation.

The two cases above demonstrate the divergence between legal victory and successful representation. A lawyer must be an advocate and counsel for his client. While advocacy can be taught through the usual skill-building exercises, counseling requires an ability to deal with the human aspects of the client relationship. A client enters the relationship after suffering some harm. The lawyer has a role in understanding the problem, defining the objective, creating the facts, and accomplishing the solution through legal and non-legal means. Skilled advocacy is crucial to the lawyer's job, but is rarely enough when divorced from this larger context. In a sense, a lawyer must operate on two separate levels: winning the case (advocacy) and winning for the client (counseling). These two kinds of victories will not always coincide, and will many times require the lawyer's skill and dexterity to define a harmony of the competing victories. Resolving this tension between advocacy and counseling is the essence of the art of lawyering.

Asylum clinics avoid this tension by making sure these roles coincide. The client's problem and objective are clearly defined; the facts are well established and simply waiting to be discovered; and the solution will come through skilled courtroom advocacy. In this way, asylum-based immigration clinics avoid the ambiguities and tensions that are the most interesting and challenging aspect of the lawyer's job. Rather than avoiding these ambiguities to have clean cases in which to teach advocacy, clinical programs should embrace the need to deal with these tensions as central to the student's representation of the client and to the individuals own legal education.

The challenging lesson of resolving these tensions helped me conceive the kind of law school clinical program I wished to create when given the opportunity. Just as I had learned from the messiness of real cases that had not been primed for "skills-building," I wanted students in this program to have the same experience of surprising and unexpected insights. In fact, the lessons I learned from these cases—the dichotomy between legal outcomes and client satisfaction, the role of the lawyer in influenc-

ing the facts, and the importance of non-legal skills and approaches—would all crop up in the cases handled by students in our clinical program, as described in more detail in Part VI below. In the next two sections, I discuss how and why I decided to construct Washington and Lee's immigration program the way I did, and the way those choices have played out in the early days of the program.

V. THE COMPETING PARADIGMS

The case of the "client who won despite losing," the case of the "client who lost despite winning," and the lessons I derived from them, informed crucial decisions I made in constructing the Washington and Lee Citizenship and Immigration Program. These cases taught me that successful representation requires more than mastery of legal skills, that factual situations are not necessarily stable and pre-determined, and that the best outcome often requires the advocate to look beyond legal results. In the clinic I was creating, I wanted students to be exposed to this broader perspective on their role as a lawyer. In order to achieve this goal, I believe students need to be exposed to all manner of cases without too much packaging—to have an experience where they can fully appreciate the integration of legal skills into the broader human experience. Before I return to how these experiences informed the decisions I made, I would like to step back and provide some context.

In the summer of 2010, I became the Oliver Hill Law Fellow at Washington and Lee University School of Law. Oliver Hill was a path-breaking civil rights lawyer who, among other things, worked to desegregate public schools in Virginia.[11] Along with his former law school classmate, Thurgood Marshall, Hill was instrumental[12] in *Brown v. Board of Education*.[13] The law school sought to honor his legacy by training future lawyers to fight for fairness and equality on behalf of those on the margins of society. Likewise, the law school was looking to expand its clinical offerings, particularly because the school's decision to require at least one live-client experience of all students as part of its new third-year curriculum.[14] These twin goals led to the creation of the Citizenship and Immigration

11. Adam Bernstein, *Oliver W. Hill, 100: Lawyer Fought Segregation Battles*, L.A. TIMES, Aug. 6, 2007, http://articles.latimes.com/2007/aug/06/local/me-hill6.

12. *Id.*

13. 347 U.S. 483 (1954).

14. *See Washington and Lee's New Third Year Reform*, WASH. & LEE UNIV. SCH. L., http://www.law.wlu.edu/thirdyear/ (last visited Dec. 7, 2011). The third-year curriculum consists of four components:

> [A] two week long skills immersion at the beginning of each semester, one focusing on litigation and conflict resolution, the other on transactional practice[;] [f]our elective courses, one real-client experience . . . and three additional electives taught in a

Program at Washington and Lee, which provides students the opportunity to engage in direct representation of clients in immigration cases.

Upon my summer arrival, I was confronted with the immediate task of establishing the caseload for the fall semester, only a few months away. Washington and Lee is located in Lexington, Virginia, a small town of about 7,000 people near the Blue Ridge mountains.[15] While there is an immigrant population in Lexington, the city was clearly too small to support an immigration clinic. As I looked around at different possibilities, it quickly became clear that I had two broad options. The first option was to take advantage of the significant number of asylum cases[16] in the Washington, D.C./Northern Virginia area. While the three-hour drive from Lexington was inconvenient, it was still manageable. We could easily have filled up our caseload by the beginning of the semester, by becoming an asylum clinic and assisting the large number of non-profit organizations for handling asylum cases in need of pro bono assistance,

The second option was to take a variety of immigration cases in cities that are geographically closer to Lexington, such as Roanoke, Harrisonburg, and Lynchburg. By reaching out to the cities surrounding Lexington the hope was that they would provide enough cases for our clinic. Though some of the cases might be asylum, others would be VAWA self-petitions,[17] U visas,[18] Special Immigrant Juvenile status,[19] deportation de-

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problems-based, practicum style[;] [a]t least sixty hours of law-related service[;] and [p]articipation in a semester-long professionalism program.

Id.

15. *Quick facts,* WASH. & LEE UNIV. SCH. L., http://law.wlu.edu/admissions/page.asp?pageid=303&openpanel=0 (last visited Dec. 13, 2011).

16. Asylum confers permanent resident status on migrants who can demonstrate they cannot or are unwilling to return to "any county of such person's nationality" or "any country in which such person last habitually resided" due to "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ." Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A) (2006).

17. *See VAWA Laws for Abuse Victims*, WOMENSLAW.ORG, http://www.womenslaw.org/laws_state_type.php?id=10270&state_code=US&open_id=all&lang=en (last updated Nov. 11, 2011) (stating that Violence Against Women Act (VAWA) self-petitioners may be allowed to petition for legal status in the United States without relying on their abusive spouses to sponsor their petitions).

18. *U Visa for Immigrants who are Victims of Crimes*, US IMMIG. SUPPORT, http://www.usimmigrationsupport.org/visa-u.html (last visited Dec. 7, 2011). A U visa is available to immigrants who suffered substantial physical or mental abuse as a result of having been a victim of certain criminal activities and have been helpful to law enforcement in investigating or prosecuting the offender. *Id.*

19. 8 U.S.C. § 1101(a)(27)(J). Special Immigrant Juvenile Status is available to a child for whom reunification with one or both parents is not viable "due to abuse, neglect, or abandonment," and "who has been declared dependent on a juvenile court" or placed by such a court in the care of an individual, entity, or state agency. *Id.*

fense, adjustments, and other immigration matters. This approach required more initiative to develop a caseload. It would require partnering with various legal aid bureaus, non-profit organizations, government agencies, and community groups, many of whom were not accustomed to dealing with immigrants or immigration law. To be successful we would have to conduct extensive outreach at stores, shelters, and churches to make people aware of our presence and aware of legal options they may not have known were even available to them.

In the end, I decided on the second option, and I have been successfully able to maintain an active and varied caseload for the students. I believe this approach is certainly better for the people who live in this region, which has a growing and underserved immigrant population. But, more relevant to this Essay, I also concluded that this was best for the education of the students.

Two trends—the growing and increasingly disbursed immigrant population and the growth of clinical programs in American law schools—will most likely lead to other clinicians having to consider the same choice that confronted me. The immigrant population, especially from Latin America, continues to grow at a rapid pace. A study from the University of New Hampshire found that "Hispanic growth since 2000 has accelerated, and by July 2007 had already grown by 10.2 million. Even more remarkable, though Hispanics represented only 12.5[%] of the U.S. population in 2000, they produced one-half of the entire U.S. population increase between 2000 and 2007."[20] Contrary to popular perception, much of this growth is occurring outside of the major metropolitan areas of New York, Los Angeles, Houston, and Chicago. The study continues: "Hispanics are a major source of growth in rural America. Between 2000 and 2005, Hispanics accounted for 45.5[%] of nonmetro population growth . . . . For many rural communities, such Hispanic gains represent the first population growth in decades."[21]

Latinos are not only moving to rural and urban areas, they are also moving into parts of the country that are not accustomed to large immigrant populations. The study found:

> Hispanic growth in both rural and urban areas has been accompanied by a spreading of the population to new destinations . . . . Hispanics are now playing an important role in the demographic and economic transformation of many communities. About one-half of the nonmetro Hispanic population now resides outside traditional Hispanic settlements in the rural Southwest. Moreover, a substantial

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20. KENNETH M. JOHNSON & DANIEL T. LICHTER, CARSEY INST., POLICY BRIEF NO. 8, POPULATION GROWTH IN NEW HISPANIC DESTINATIONS 1 (2008).

21. *Id.* (internal citation omitted).

> and growing number of nonmetro counties experiencing non-Hispanic white population declines, especially in the Great Plains, have growing Hispanic populations.[22]

The immigrant population is growing and is increasingly found in small towns and rural areas in all corners of the country. These changes will lead to a growing demand for immigration lawyers, and also immigration clinics in law schools located outside of large metropolitan areas and the American Southwest.

Coinciding with this trend is the growing prominence of clinical education in American law schools. Since the 1960s there has been a dramatic increase in law school clinics. Professor Peter Joy found that "[a]lthough few law schools created clinical programs in the first half of the twentieth century . . . clinical programs [became] permanent parts of law school curricula and spread rapidly from the 1960s through the 1990s."[23] This movement is attributable to a number of factors, including grants from the Ford Foundation and the Department of Education. Perhaps the most important factor was the American Bar Association's decision that every accredited "law school shall offer live-client or other real-life practice experiences."[24] Likewise, the ABA's *MacCrate Report* recommended the integration of practice experience in legal education programs.[25] Consequently, over 180 law schools currently have clinical programs.[26]

The rapid growth in clinical legal education appears to be a permanent and growing fixture of legal education. The growing presence of law school clinics and the growing immigrant population will likely lead to a growing demand for immigration clinics. If legal education follows the changing legal market, these law school immigration clinics will increasingly be in small towns and rural areas throughout the country. In short, the question I confronted at Washington and Lee—whether to take asylum cases from a nearby large metropolitan area with an established immigrant population or whether to focus on a wider variety of cases among

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22. *Id.* The study also found that the Hispanic population has a higher fertility rate, averaging 2.8 children per woman as compared with 2.0 children per woman in the total population. *Id.* at 2.

23. Peter A. Joy, *The Law School Clinic as a Model Ethical Office*, 30 WM. MITCHELL L. REV. (ESSAY COLLECTION) 35, 39 (2003).

24. A.B.A. STANDARDS FOR APPROVAL OF LAW SCHOOLS, § 302(c)(2) 2007-2008.

25. A.B.A. SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM 234–35 (1992).

26. Margaret Martin Barry, et al., *Clinical Education for This Millennium: The Third Wave,* 7 CLINICAL L. REV. 1, 31 (2000) (stating that 183 law schools have clinical programs); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers,* 91 CALIF. L. REV. 209, 236 (2003) (stating that 182 law schools have clinics).

newer immigrants in the less densely populated area around the law school—is one that will be increasingly confronted in the years ahead across the country by newly established law clinics.

The asylum-based approach is popular and has undeniable benefits, particularly in the area of traditional clinical goals, namely legal skill-building. Asylum is the primary or exclusive focus of immigration clinics at, among other law schools, Harvard,[27] Georgetown,[28] Yale,[29] Cornell,[30] Villanova,[31] Pepperdine,[32] and the University of Connecticut.[33] The director of Georgetown's Center for Applied Legal Studies (which only handles asylum cases) explained that the rationale behind focusing on asylum centers is their usefulness in allowing students to exercise a variety of legal skills in a positive environment.[34] The immigration judges seem "intelligent and of good temperament" and conduct "unhurried" hearings.[35] The "universe of relevant facts and law" are easily mastered by students within the clinic's timeframe.[36] There is an "extensive body of case law and a constant supply of novel issues" to work with.[37] Also, students can exercise their cross-cultural and empathetic interviewing skills as a result of an existing diverse clientele.[38] The students can conduct fact investigations of their client's particular story and of the country conditions that support the asylum claim.[39] The students are also able to work with a variety of witnesses such as doctors and mental health pro-

27. *Harvard Immigration and Refugee Clinic*, HARV. L. SCH., http://www.law.harvard.edu/academics/clinical/hirc/index.html (last visited Dec. 7, 2011).

28. *Center for Applied Legal Studies*, GEO. L., http://www.law.georgetown.edu/clinics/cals/ (last visited Dec. 7, 2011).

29. *Immigration Clinic*, YALE L. SCH. http://www.law.yale.edu/academics/1211.htm (last visited Dec. 7, 2011).

30. *Immigration Appellate Law and Advocacy Clinic*, CORNELL UNIV. L. SCH., http://www.lawschool.cornell.edu/academics/clinicalprogram/Asylum-Clinic/index.cfm (last visited Dec. 7, 2011).

31. *Clinic for Asylum Refugee and Emigrant Services*, VILL. UNIV. SCH. L., http://www.law.villanova.edu/Academics/Clinical%20Programs/Clinics/Clinic%20for%20Asylum%20Refugee%20and%20Emigrant%20Services.aspx (last visited Dec. 7, 2011).

32. *Clinical Education Program: Asylum Clinic*, PEPP. UNIV. SCH. L., http://law.pepperdine.edu/clinical-education/asylum-clinic/ (last visited Dec. 7, 2011).

33. *Asylum and Human Rights Clinic*, U. CONN. SCH. L., http://www.law.uconn.edu/clinics-experiential-learning/-house-legal-clinics/asylum-and-human-rights-clinic (last visited Dec. 7, 2011).

34. *See* Philip G. Schrag, *Constructing a Clinic,* 3 CLINICAL L. REV. 175, 175–77 (1996) (discussing the steps taken to implement a clinic at Georgetown).

35. *Id.* at 196 (discussing Georgetown's shift from a social security and consumer protection clinit to an asylum law clinic).

36. *Id.*

37. *Id.*

38. *Id.*

39. Schrag, *supra* note 34, at 196.

fessionals, overseas eyewitnesses, and country experts.[40] Professor Schrag continues by stating that "immigration judges usually announce[ ] their decision and deliver[ ] an extensive oral opinion from the bench, minutes after the hearing end[s]. Thus, students . . . get instant feedback (and, we hoped, reason for satisfaction) immediately following what [is], for most of them, the first hearing of their professional lives."[41] Asylum cases can be packaged to fit within the academic calendar, exercise a number of important legal skills, and provide a satisfying, victorious outcome to reward the students' efforts.

The focus on how the asylum clinic helps the student, as opposed to the client, is consistent with a broader trend in clinical legal education. Professor Minna Kotkin explains that clinics began in the 1960s with a focus on serving the poor and underserved.[42] She writes: "[C]linical education began with law students working in local legal services offices. All parties involved—the law schools, the students, and the offices—saw this as a service oriented effort, however, separate from the function of traditional legal education."[43] Even when clinics were brought in-house, they continued to function on the legal aid model.[44] "The lawyers staffing these programs were largely drawn from the legal services and public interest community . . . . In large part, these lawyers simply replicated the service models with which they were familiar."[45] Beginning in the 1970s, in order to justify their place in law schools, these clinics began to focus more on their educational goals at the expense of community service or social justice.[46] "This chain of development led to a concentration of attention on how clinicians were using students' practical experiences to achieve generalized learning about the lawyering process. It was no longer considered appropriate by many to even consider service as a valued goal of clinical programs."[47] As Professor Kotkin points out, the AALS/ABA

40. *Id.*

41. *Id.* at 197.

42. Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education,* 19 N.M. L. REV. 185, 189 (1989).

43. *Id. at* 190.

44. *See id.* at 190–91 (describing how the creation of the Council on Legal Education and Professional Responsibility led to the establishment of the first in-house clinics in which faculty members hired lawyers to run the program; the CLEPR provided funds to develop academic programs that provide legal services to the underserved).

45. *Id.* at 191.

46. *Id.* at 191–92.

47. Kotkin, *supra* note 42 at 192. This change offered students the opportunity to "[act] like a real lawyer." *Id.* In contrast with law firm clerkships, students in the clinic "could actually represent a client, try a case, take a deposition, [and] argue a motion." *Id.* Furthermore, this new model mirrored that of medical school and other professional school programs for hands-on experience, reiterating the learning theory developed by psychologists which indicates that "adults profit most from experiential learning." *Id.*

Guidelines for Clinic Legal Education in 1980 stated explicitly that the "primary purpose of clinical legal studies is to further the educational goals of the law school, rather than to provide service."[48] Thus, the packaging of cases for maximum skills-building, as done by the asylum clinic at Georgetown and other schools, is entirely consistent with the modern understanding of the role of clinical legal education.

However, even assuming that the development of lawyering skills should be the primary objective of clinical programs, I do not believe the asylum-based approach is the best way to achieve this goal in an immigration clinic. The asylum-based approach, reinforces the notion common among law school students that lawyering is essentially about winning cases through factual discovery and legal research. I believe this approach misses a key component, perhaps *the* key component of a lawyer's job. Litigation is one avenue, and a decreasingly trafficked one, within the lawyer's larger mission of helping people sort through problems. Being a lawyer may entail advising, strategizing, sympathizing, counseling, creatively working through problems, negotiating, and, yes, litigating. Successful representation can involve losing a case, or at least, dealing with a losing case. Indeed, sometimes there is uncertainty as to whether a case exists and what kind of case it is.

The "case of the client who won despite losing" and the "case of the client who lost despite winning" taught me that real cases are messy because life is messy. Clinical education requires the student to understand how legal knowledge and skills integrate with other skills they have developed throughout law school and life to lead to effective representation. This connection between the world of law school and the real world is essential to their career development. As a legal skill, it is important to teach students to operate with the moral, ethical, factual, and legal ambiguity they will confront in the world outside law school. Rather than a mere skill-building exercise that leads to a tidy conclusion, clinical cases should be an experience in the more nuanced, and ultimately satisfying, art of lawyering. A review of some of the cases handled by the students at Washington and Lee, and how these experiences contributed to their education helps to illustrate this point.

VI. Examples from Our Program

By engaging in cases that closely approximate what they will confront in their careers, clinical students can learn valuable lessons before they graduate, much like I learned from the cases discussed above. To understand this phenomenon, it is useful to look at examples of some recent

48. *Id.* at 192 n.36.

cases from our clinical program. The first case I will discuss illustrates how a client's objectives can be defined and achieved in a case that cannot be "won"—in a similar way as I was able to help the "client who won despite losing" redefine her goals. The second case deals with the development and framing of the factual underpinnings of the case, something that I failed to do with the "client who lost despite winning." Finally, I will discuss a case in which bringing non-legal skills to bear led to a successful outcome that would not have been possible with a narrow focus on legal advocacy, something I learned from my experiences in the two cases described above.

A. *Case One*

In the first case, the clinic was contacted by a couple from Brazil whose employment-based application for adjustment of status had been pending for nine years. They contacted us after receiving a notice of intent to revoke the immigrant worker petition upon which the application was based.[49] The proposed revocation was based primarily on two grounds. First, the general manager's signature sponsoring their employer petition was dated after the manager had left the employment of the company and therefore he could not act on the company's behalf. Second, the position at this company, a pizza chain, had not been properly advertised to American workers before receiving labor certification.[50] The couple was certain that the general manager signed their petition while still working for the restaurant and that the restaurant had advertised the position. When they alerted the lawyer who handled their case nine years ago about these problems, he told them that he was under investigation by the government and could not handle their case anymore. The couple was searching for answers. They wanted to know what was going on and what they should do next.

The student working on the case looked through the couple's paperwork and realized that they were missing several key documents, including the petitions and evidence filed on their behalf by their previous attorney. The first thing she did was to help them obtain these documents. After reviewing these papers, it was evident that the signature had been dated by a different hand than the signer. In other words, it may have been signed on time, but was dated at a later time, presumably by someone in the lawyer's office prior to filing. She also found that the

49. The government may revoke an approved petition when reason for such revocation comes to its attention after providing written notice of intent to revoke and providing the alien an opportunity to respond. 8 C.F.R. § 205.2 (2010).

50. Employers are required to adequately advertise a job opening before sponsoring an employment-based immigrant petition. 20 C.F.R. § 656 (2011).

employer had advertised the position, but that the advertising was not done in accordance with the regulations. She discussed these findings with the clients. They were naturally upset and wanted to sue their prior attorney for malpractice. She discussed the benefits and drawbacks of such an action. She helped them draft a response to the notice of intent to revoke. She explored other options for adjustment, including through a sister who is a permanent resident and their daughter who was married to a U.S. citizen. She discussed with them what their options would be in the likely event that their petition is denied, and helped them think through the pros and cons of each option.

In the end, it is very unlikely we will "win" this case. The facts were largely determined before the case reached us and there was no realistic possibility of relief. Yet, I believe this student performed a valuable service for these clients. They gained an understanding of their situation and what they could do about it. While the news was not pleasant, it at least gave them the opportunity to make plans based on an understanding of their predicament and a realistic appraisal of their legal options. They will no longer be vulnerable to an attorney or notario[51] promising easy answers (that don't exist) for the right price. They had a sympathetic ear that understood and appreciated the wrong that had been done to them. Like the "client who won despite losing" hopefully these clients are now able to use the experience to process what happened to them and move beyond the frustration with the system and think about their next steps. The student helped move them from a bewildering, inexplicable problem to at least an understanding and consideration of the best response. Though less immediately gratifying than the thrill of a courtroom victory, I believe this kind of nuanced representation provides the professional's quiet satisfaction of skillful work under difficult circumstances.

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51. Some notary publics working in immigrant communities take advantage of the fact that a "notario" is a kind of lawyer in Mexico and other Latin American countries, implying they have legal education and training far in excess of what their actual status indicates. *See, e.g.*, Ann M. Simmons, *Immigrants Exploited by 'Notarios': Officials Crack Down on Those Who Take Advantage of Confusion Over the Word, Which Can Mean 'Lawyer,'* L.A. TIMES, Aug. 10, 2004, Part B, Pg. 1, *available at* http://articles.latimes.com/2004/aug/10/local/me-notarios10 (discussing the differences between a notary in the American and Mexican cultures). In the United States, a "notario" is, as the word indicates, a notary, whose function is limited to witnessing and certifying documents. *Id.* The "notarios" posing as lawyers often target immigrants seeking asylum, with a small chance of success. *Id.* Furthermore, the immigrants who are scammed by "notarios" generally do not report the crime because they fear being taken into immigration authority's custody. *Id.*

B. *Case Two*

In the second case, a student was forced to grapple with the ethical and legal ambiguity of a situation in which her own representation could alter the very facts of the case. In this case, the client was a seventeen-year-old Guatemalan who crossed the Texas border illegally in order to reunite with her mother in Virginia. After being caught by Border Patrol, she was released to a family friend in Virginia who is a lawful permanent resident. As a minor who was abandoned by her parents, the client was eligible for a form of relief called a Special Immigrant Juvenile (SIJ Status), which would allow her to become a legal resident.[52] However, by the time the case came to our clinic, the client had left the home of the family friend after a falling-out and had moved in with her mother. Since she could no longer claim to be abandoned by her parents, this event made her ineligible for SIJ Status, the only relief from deportation available to her. The student could not ethically advise her to leave her mother's residence in order to create abandonment. However, the student had a responsibility to inform the client of the status of her case,[53] and such information could unintentionally lead the client to take that very action. Naturally, this scenario created a complicated and delicate ethical dilemma. In the end, the student carefully provided the client with a factual, objective explanation of the status of her case that fulfilled her duty to keep her client informed without trying to unduly influence the case.

The challenge in this case did not lie in understanding the law or in discovering the existent facts. If the client had stayed with the family friend, she clearly would have been eligible for the requested relief. That is, "winning" the legal case would actually have been the easiest part of the representation. Instead, the difficulty in this case appeared in the ethical and practical dilemmas raised by a fluid factual situation in which the student is not simply an observer, but potentially an actor as well. The fact that she could unintentionally help "create" the facts of the case she was hired to work on creates a layer of complication absent from the packaged cases of asylum-based immigration clinics. I believe this student learned more about lawyering from grappling with the dynamic interaction between a fluid factual situation and her own status as a legal

52. *See supra* note 20 and accompanying text.

53. *See* Virginia Rules of Prof'l Conduct 1.4(a) (2010) ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."). "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* at 1.4(b).

representative than she would have from a case with the rough edges removed to clear the way for litigation skills-building.

C. *Case Three*

Finally, the third case involved a successful legal outcome that was dependent on exercising non-legal judgment and skills. In this case a student in our clinic was confronted with an SIJ case in which the seventeen-year-old Salvadoran client was living with a preacher after his parents abandoned him. The first step the student needed to take was to have the preacher petition a local court for custody, so the client could get the judicial order needed to apply for SIJ status. The student built a strong rapport with the client and the preacher through repeated visits and shared meals. He began to notice an inexplicable reluctance from the preacher to apply for legal guardianship. It finally emerged that he had been arrested recently for public lewdness after an incident in a public parking lot. Naturally, this development not only disrupted our plans for obtaining the order we needed for the immigration case, it also raised a host of ethical questions related to the child's living arrangement. Because the student had developed a level of trust with the client, he was able to speak to him privately about the emerging situation.

After this discussion, the student was satisfied that the minor was not being abused and was not in any danger at home. He also helped his client locate a teacher who was willing to apply for legal guardianship instead of the preacher, whose application would surely be rejected. Due to his creative thinking and the rapport he developed with his client, he was able to get the case back on track despite a major unexpected setback.

In this case, the client's legal right to the relief sought is not in doubt. However, achieving that legal victory required the use of non-legal skills. The student was required to relate to the client despite cultural and linguistic barriers, understand his obligations in the face of potential abuse, and think of creative ways to revive his case after his initial plan became untenable. My failure to see beyond the legal four-squares of the case of the "client who lost despite winning" led to an unhappy client in spite of an objectively successful legal outcome. Conversely, my attentiveness to the non-legal aspects of the case of the "client who won despite losing" helped me snatch victory for the client from the jaws of a defeated case. In this case, the student's awareness of the non-legal issues and his ability to draw on his own life experience to address those non-legal issues through non-legal approaches saved his legal case. The student was forced to integrate his legal abilities with his broader personality and skill set to achieve effective representation of his client. I believe this student had a richer, more textured experience that more closely approximated

what he will face after graduation than he would have in a case that was designed solely for legal skills-building.

VII. Conclusion

With the expansion of clinical legal education and the growth and dispersion of immigrant populations, clinicians will increasingly face the dilemma I faced in constructing a live-client immigration legal program at Washington and Lee School of Law. Future clinicians will likely be presented with the choice to represent asylum-claimants in a nearby metropolitan area or to take a mix of cases in various stages of formation and development in the area immediately surrounding the law school. I chose the latter option because I felt it would best contribute to the education of future lawyers. There is undoubtedly a benefit in crafting a real case into a vehicle for teaching particular advocacy skills. It ensures that certain pedagogical objectives are uniformly met by all clinic participants, with the frisson of knowing that real lives are at stake. However, as illustrated by the cases of the "client who won despite losing" and the "client who lost despite winning," lawyering is a more interesting and complicated job than the application of skillful litigation technique. The art of lawyering requires the utilization of these and other skills in the context of a larger, more nuanced interaction between the lawyer and her client.

Handling raw cases as they would confront attorneys in practice can be chaotic and unpredictable, yet deeply satisfying. They lend an air of verisimilitude to clinical practice that even the well-polished—indeed, especially the most well-polished—asylum cases cannot. In a sense, this question comes down to the degree of control a clinical instructor is willing to give up. Under the approach I took, cases will track the course of human experience—some will disappoint, some will go as planned, and others will have surprising twists and turns. However, a clinician's willingness to tolerate the unruly nature of this approach will allow students to experience the unruliness of legal practice, with all of the practical challenges, factual confusion and dynamism, and ethical dilemmas that are inherent in practice.

To be sure, these kinds of problems could emerge in asylum cases. But, when cases are packaged to make sure students exercise certain skills, it reinforces the notion that lawyering is about litigating a well-framed set of facts that will turn on skillful presentation and winning legal points, as opposed to an activity that deals with all the complexities of human experience. The closer we can bring clinical education to true legal practice, the more rewarding the experience will be for our students.