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## ARTICLES

### THE NEXT BEST THING: TRANSFERRED CLIENTS IN A LEGAL CLINIC\*

*Naomi R. Cahn\*\**  
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In almost every nonsimulation clinic, cases do not begin and end with each wave of students. Instead, cases flow beyond the artificial time limits of the academic calendar, and can continue across semesters, summers, and years.<sup>1</sup> Whereas students in a case that begins with the school year can develop their own strategy, students in a transferred case must deal with the work of previous students and the complex web of interpersonal relationships between the previous students, the supervising attorney, and the client.<sup>2</sup>

Clinicians recognize that a student needs time to adjust to the clinical setting.<sup>3</sup> A clinic is, generally, the first time in her legal experience that a

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\* This article is a revised version of a presentation delivered to the Columbus Community Legal Services Anniversary Symposium on Clinical Legal Education, October 18, 1986. The authors regard this article as an outline of an important topic for all lawyers to consider. The authors greatly appreciate the help of Rob Muller and would also like to thank Joyce McConnell and Sally Frank, panelists at the Columbus Symposium, the other conference participants, Ellen Scully, and David Koplow.

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1. Some clinics choose cases that are relatively simple and are designed to begin and end with the semester or school year; others choose more complex litigation. Even relatively simple cases may develop problems that do not allow the first set of students to finish the case.

2. "Transfer" issues may arise even in those cases entirely represented by only one student. If, for example, a supervisor has conducted an extensive intake interview, the client may feel that her case has been "transferred" when it is assigned to a student.

3. See Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67, 101-03 (1979). Barnhizer suggests that students undergo a three stage process in clinical development. In the first stage of four to seven weeks, they become familiar with the applicable laws and processes, and begin to develop their own frame of reference for their clinical work.

student is faced with real clients and the problems of real people.<sup>4</sup> The authors view this article as a preliminary attempt to expose some of the issues inherent in the transfer situation.<sup>5</sup>

In studying transfer aspects of cases, we are concerned with maximizing learning in the clinical setting<sup>6</sup> and better serving the client, as well as more efficiently managing the clinic. These are the concerns which a clinic must balance.<sup>7</sup>

There is a consensus in clinical education that effective learning is experience-based.<sup>8</sup> But what are the best experiences from which a student can learn? Different types of cases have their proponents and commentators justify their choices according to their educational goals. Although all clinics study the students' legal experiences, different clinics emphasize different cases and experiences. Some clinicians declare that criminal cases offer the best learning experiences because they "create a dynamic pressure generated primarily by the immediate deadline responsibility of court appearance, negotiation, and clearly impending consequences for the client."<sup>9</sup> For some, the case-type itself is almost irrelevant; the educational goals do not depend on litigation-oriented skills, although these skills are an important component of the clinical method.<sup>10</sup>

Problems can develop regardless of the educational goals. How a clinic

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4. Facing real clients with real problems is inherent in the definition of clinical legal education. See A. Amsterdam, Memorandum to Stanford Law School (July 27, 1973), outlining his conception of clinical legal education.

5. We expect that future articles will extend and refine the analysis of the issues which develop when transferring a case. Although this study focuses on legal clinics, we believe that the issue is relevant to all transfer situations.

6. We are aware that our ability to analyze this aspect of the clinical experience is a reflection of how clinical legal education has developed since its early stages. For discussions of the history of clinical legal education, see, e.g., Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162 (1974).

7. For an early discussion of this balancing, see Johnson, *Education Versus Service: Three Variations on the Theme* in CLINICAL EDUCATION FOR THE LAW STUDENT 414 (CLEPR ed. 1973). Johnson suggests that clinical programs mix short-term projects, skills-training, and long term projects, which provide research on important legal issues.

8. Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology* in CLINICAL EDUCATION FOR THE LAW STUDENT 374, 378 (CLEPR ed. 1973). Bellow characterized the radical potential of legal education as its ability to intertwine the study of the law with experience of the law in operation, and to force students to examine "the rigid distinctions between theory and practice." His essay prodded clinicians to view clinical education as a methodology to be studied and analyzed. See also ASSOC. OF AM. L. SCHOOLS-AM. BAR ASSOC., CLINICAL LEGAL EDUCATION 254 (1980).

9. Barnhizer, *supra* note 3, at 91.

10. See, e.g., Meltner & Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581, 587 (1976). To them, teaching skills is an important by-product of an educational method that has more ambitious goals.

handles the issues that surround the transfer of cases illustrates that clinic's pedagogy. The issues underlying transfer cases implicitly address how students learn in clinics.<sup>11</sup>

All clinics, deliberately or not, will have some cases that do not end when the students leave.<sup>12</sup> Clinics, as institutions, must handle these cases until the next class of students arrives. They must also decide whether to transfer the cases to students—as opposed to a supervisor handling the transfer—and then, how to make the transfer.

In many clinics, cases are transferred at the end of each year, regardless of their substantive stage. Cases can be transferred anywhere from a few months before a hearing to a few weeks after a hearing, at a point when the new students must write a post-hearing brief. Thus, students with a transferred case are always at a different substantive stage than students who begin with new cases.<sup>13</sup> Clinics must examine their goals and institutional constraints to decide if a case is appropriate for transfer. Because a clinic must serve its clients,<sup>14</sup> and because students cannot continue after the school year,<sup>15</sup> transferring a case to a new student may be necessary to guarantee continuing representation.

Cases are generally transferred based on such institutional and contextual issues. While this technique for case transfer may be a necessary product of constraints on the clinic as an institution,<sup>16</sup> it should not be viewed as the only—or even the most desirable—method. Thus, our first step in approaching the topic of transfer cases is to identify those issues which arise when a case is transferred. We have identified three categories of factors that affect case transfers: substantive, institutional, and psychosocial. The substantive factors are content-based and reflect the type of case, the meth-

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11. In analyzing transfer cases, we expect to learn more about experience-based learning.

12. This is also true of most other legal institutions. For instance, the average tenure of an attorney at the Federal Trade Commission or the Securities and Exchange Commission is shorter than the average case, and many cases outlast state attorneys general or district attorneys. Firms continuously lose associates and partners. In all of these situations, the transfer issues discussed in this article are relevant.

13. Because different clinics choose different types of cases, the transferred case will either be the anomaly or the norm. In a clinic where all students have transferred cases, obviously, transferred cases present less of a problem. It is in clinics where students must handle both transferred and new cases that transfer problems are amplified.

14. Clinics, as providers of legal services, are subject to the Code of Professional Responsibility.

15. There are some exceptions to this rule. Antioch Law School allows students to follow cases even after they have moved to another clinic, and sometimes to take cases with them when they are graduated and have been admitted to the bar.

16. See *infra* note 28 and accompanying text for a discussion of the factors impacting on transferred cases which result from the clinic as an institution and as part of the law school institution.

ods of transfer, and other such issues. The institutional factors are those imposed by the clinic as an institution and the law school as an institution with control over the clinic, and include professional responsibility factors, as well. The psychosocial factors underlie and affect the various legal relationships between the previous and subsequent students, the supervisor, and the client.

The following case illustrates some typical transfer issues:<sup>17</sup>

#### CASE SCENARIO

Donnie Marie, a 68-year old Hispanic woman, came to the Clinic in February 1986 because she had been defrauded by the Oily Repair Company. Her primary complaint was that she paid to have her roof repaired and the work, although already paid for, was improperly completed. She says that the roof leaks worse than before. Ms. Marie wants the student to get her money back, and, failing that, to harass the company as she claims they harassed her.

When Student *A*, a white 22-year old female, went to inspect the repair work, Ms. Marie showed up 45 minutes late. Student *A* began investigating the case and found that Ms. Marie's description of the leak was overstated. There seemed to be a leak, but when the student viewed the leak in the kitchen, she thought it was from a bathtub above, rather than from the roof. Student *A* looked at the signed contract and saw that Ms. Marie paid a deposit of \$100 and paid the balance after the work was done, at which time she signed on a line indicating that she had inspected the work. Student *A* informed Ms. Marie that in her opinion there was little hope for recovery, but that she would look into the problem.

Two months later, as the semester neared conclusion, Student *A* realized that she had done little work on Ms. Marie's complaint. Because Student *A* didn't really like Ms. Marie, she had hardly spoken to her. She spoke to the Oily Repair Company and discov-

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17. This case scenario was shown to the participants of the Columbus Symposium on Clinical Education in October 1986, who were given the following instructions:

"Please take a few minutes to read the scenario. As you read the description, jot down those issues which you think might affect the smoothness of the transfer situation. Also, please think about those factors which might aid the new clinical student and those factors which will help the client. As a side note, it is important to consider that clinics have two generally distinct functions: service to the client and education to the student. Consider those functions as you analyze transfer applicability." The panelists and participants developed a list of issues raised by the scenario. See *infra* note 19. By using this case as an illustration, we are not suggesting that most clinics have such poor supervision. Although the scenario describes this situation, no clinic that the authors have observed would purposefully commit future students to a schedule which would create unreasonable pressures so early in the next term. Nonetheless, we believe that the scenario presents uncommon, yet significant hazards.

ered that Ms. Marie argued with the workers and sometimes didn't let the workers in at the hour they were to begin work. With two weeks left in the semester, at another student's suggestion, Student *A* reviewed licensing requirements and discovered that the Oily Repair Company was not licensed to perform repair work in the District of Columbia.<sup>18</sup> Because Oily Repair took a deposit, the contract may be void under D.C. law. She filed a Complaint at Small Claims Court. At the request of her supervisor, she asked for a hearing date three weeks into the next semester.

Student *A* wrote a transfer memo which indicated the breakthrough she had discovered, but explained that because of the difficult nature of the case, it took her several months to investigate the facts underlying the complaint. Student *A* indicated in the memo that the hearing should be easy because Oily Repair has little basis to refute the licensing claim. Ms. Marie was written a letter which indicates that her case is being transferred to another student who will begin work next fall.

Student *B*, a 29-year old Hispanic male, is assigned *Marie v. Oily Repair Co.* on September 1, 1986. The hearing is set for September 21, 1986. Based on the possibly misleading information from Student *A*, the supervisor tells Student *B* that the case should be easy because all of the factual investigation has been completed.

There are many obvious issues within the scenario,<sup>19</sup> some specific to trans-

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18. We chose this forum because the Columbus Community Legal Services Anniversary Symposium on Clinical Legal Education met in the District of Columbia.

19. The panelists and participants developed the following nonexhaustive list of issues presented by the scenario:

1. There may be professional responsibility violations because the supervisor has not adequately supervised Student *A*'s work.
2. The client wants the student to engage in extra-legal activity, which may entail doing what the client is unwilling to do herself (i.e., harass the company) and, thus, the new student may be confronted with ethical choices which the previous student had dismissed.
3. Student egotism (student assumes sophisticated knowledge of roof leaks) inhibited the factual investigation and has left the new student with a less-than-satisfactory record.
4. Student *A* assumed that the client is literate in reading contracts, which Student *B* may have to reassess.
5. The mechanism that the clinic requires, to recognize that student contact with a client is remiss, may either have malfunctioned or been lacking. For instance, how do students document contact with the client? When do students meet with supervisors?
6. The supervisor has relied on Student *A*'s representations and, thus, the clinic itself may be in the dark about many of the problems of the representation.
7. There may be an institutional policy concerning summer recess which affects both the case continuity and the client's perception of her representation.
8. The person who writes a letter to the client about her transfer may affect the

fer issues and some generally applicable to all types of representation. Many of the factors interrelate. In this article, we will explore some of these issues and demonstrate why participants in a transferred case must be particularly aware of the situation they are entering. After an explanation of the poten-

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client's perception of her representation, which may in turn affect her relationship with Student *B*.

9. There may be institutional pressures on clinical faculty during the summer recess which may reflect the clinic's commitment during the summer to the type of cases selected.

10. There may be a conflict between the pedagogical and service goals of the clinic. For instance, is pedagogy elevated over client service? Does the clinic have any orientation concerning this issue?

11. The client is old; the students are young. Is age a factor in this particular representation? Does it matter that Student *B* is slightly older than Student *A*?

12. The client is Hispanic; Student *A* is white; Student *B* is Hispanic. Is race a factor in this particular representation? If so, how?

13. The client is female; Student *A* is female; Student *B* is male. Is gender a factor in this particular representation? If so, how?

14. Student *A*'s description of the investigation shows that she may distrust the client. This could cause tension, or relieve a strained representation, in the developing relationship. Will Student *B* be able to establish adequate rapport with the client?

15. Student *A* tells the client that she has no hope for recovery. Student *B* may have trouble reestablishing confidence.

16. Student *A* did not work diligently on the case. Student *B* may not have time to catch up with all the issues remaining from Student *A*'s lack of work.

17. Student *A* hardly spoke to the client. The client may not be prepared for contact and may lack confidence that Student *B* will actually represent her.

18. The client/student relationship may be recreating the client's relationship with the worker as symbolized by the late arrival to appointments.

19. Student *A* indicated to the supervisor that the case is simple. Student *B*, in discovering the complexity of the case, may anger the supervisor through the need for supervision greater than anticipated.

20. The supervisor told Student *B* that the case was simple. Will the supervisor be locked into this opinion even as Student *B* uncovers new facets of the case?

21. Student *A* may not have fully disclosed her involvement—or lack of involvement—in the case through the transfer memo. Thus, Student *B* may be totally unprepared for the other issues contained in this list.

22. The client is an individual; the opponent is a company. It is possible that the two students see their roles in fighting companies differently. If so, the formulation of the case may need alteration.

23. The problem is important to the client, yet Student *A* has not treated it that way. Will Student *B* step into a situation where the client has lost interest in fighting the case, or where the problem has increased importance to the client?

24. The dispute is a personal issue for the client (as represented by the fact that she may not want a monetary award, but may just want the company harassed). Will Student *B* be able to understand and prepare his case to reflect the personal nature of the demand?

25. Student *A* felt institutional pressure to remain with the case even though she thought there was no hope for recovery. Student *B* may feel institutional pressure to

tial factors affecting the transfer of a case from one student to another, the authors will present some guidelines for creating smoother transfers.

### I. SUBSTANTIVE FACTORS AFFECTING THE TRANSFER

The substantive factors are drawn from the legal nature of the case, including the type of case, its stage in the legal proceedings and the various actions taken to reach that stage, and the underlying documentation of these actions. Substantive factors may receive the most attention because they are so obvious—it is clear to clinicians and students that cases are transferred at different stages in the legal proceedings, and that some students maintain better case files than others. Nonetheless, these may not be confronted in the transfer process. The four factors we have identified that affect case transfer are:

1. Different types of cases that require different transfer methods and decisions.<sup>20</sup>

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complete the case quickly, even though he thinks that recovery is possible, but unlikely given the state of the case.

26. Student *B* is beginning his first client representation.

27. Student *B* is joining the representation mid-case, a point at which the clinic supervisor believes to be acceptable.

28. Student *B* is unfamiliar with the legal, factual, and procedural issues in the case, and has little time to prepare.

29. Student *B* is pressured by his supervisor's potentially unrealizable expectations.

30. Student *B* is pressured by Student *A*'s potentially unrealizable expectations.

31. Student *B* is not beginning a case at the same stage as most of his classmates.

32. The client may be hostile with respect to further delays in the case.

33. The client's problem may have worsened during recess and, thus, the original damages requests may be outdated and require further investigation and estimates.

34. The client may not understand the transfer process and may be unclear as to why Student *B* has taken over the case.

35. The client may resent having law student representation, especially after the way she has been treated by Student *A*.

36. The client may have no longer wish to remain with the clinic.

37. Because Oily Repair may not know of the change of representation, it may be unprepared for discussions with Student *B*.

38. Student *A* states that the nature of the case was difficult, that it took her several months to investigate the facts, but that everything else should be easy. Student *B* may not have time to evaluate this analysis.

20. Case types can vary from: one client to a group client, the first transfer to the third transfer, federal class action claims to administrative hearings, and litigation oriented to counseling- or negotiation-oriented. There may have been many contacts with outsiders or only contact with the client. Each of these reflects the goals of the clinic and each affects how a case is transferred. For instance, a clinic which only accepts federal litigation cases has a different transfer situation than a clinic which handles clients charged with misdemeanors.

In their search for a model clinical teaching case, Meltsner and Schrag began with "large cases," moved to simulation, and then chose cases that begin and end in a semester. Meltsner



2. The level of action completed by the previous student.<sup>21</sup>
3. The substantive actions of the previous student which affect the next student's decision-making.
4. The underlying documentation of memos to the file throughout the case<sup>22</sup> and the transfer memo itself.<sup>23</sup>

Because Student *A* in the scenario put forth relatively little effort, the case has few memos describing the factual investigation.<sup>24</sup> Although, on the one hand, Student *B* is locked into Student *A*'s planning, Student *A* has afforded Student *B* little guidance on the steps in her planning. It will be difficult for Student *B* to recreate Student *A*'s efforts, especially with only three weeks before the hearing. To learn the facts, Student *B* may have to conduct his own investigation. Although he may duplicate some of Student *A*'s steps, he may also develop some of his own legal theories and do additional legal investigation.

Student *A* has left no legal memos due to her lack of time. She has merely stated in her transfer memo that the hearing will be easy because Oily Repair has few defenses. This means that Student *B* must also do the background research to evaluate his client's legal position.

While transferring the case may benefit the client, because she will have someone to represent her, the new student may not be placed in a situation conducive to learning. In her struggles to understand the case, she may become frustrated, both at her supervisor's expectation that she will have no problems with it, and at her own lack of control over the progress of the

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& Schrag, *Scenes from A Clinic*, 127 U. PA. L. REV. 1, 1-2 (1978). They did not explicitly recognize the transfer problems of complex cases. Instead, because their pedagogical goals were for students to step into the lawyering role, they were disappointed in complex cases. Complex cases allowed students to experience only one or two aspects of the legal process, rather than the full richness of the planning process. Meltsner & Schrag, *supra* note 10, at 590.

21. Obviously, if a student has not moved far enough along in a case, the transfer of the case will simply mean that another student must begin from scratch. However, if a student has moved to a point where there is only a step or two remaining, the transfer will be different.

22. The more memos to the file describing the previous student's actions and reasoning, the easier the transfer in terms of the new student's understanding of the legal posture of the case. The new student will have substantially more difficulty learning a case if the previous student has not set out the steps followed in developing the factual investigation and legal theories of the case. The ongoing documentation problem may be exacerbated by a transfer memo which does not explain the posture of the case. But blaming the documentation begs the question of what other issues underlie the transfer process. Thorough documentation is part of the solution, but it alone does not cure a bad transfer situation.

23. Transfer memos are discussed *infra* note 94 and accompanying text.

24. Students who fail to document their cases adequately cause problems in case management. Poor documentation in a transferred case makes the situation markedly worse.

case. Clearly, the clinic wants to avoid this situation.<sup>25</sup>

## II. INSTITUTIONAL FACTORS AFFECTING THE TRANSFER

In contemplating the institutional factors, there are two "institutions" involved here, the clinic and the law school under which it operates. The clinic, as an institution, makes decisions about its method of handling cases, including whether the two sets of students should be encouraged to talk to one another and at what point during the semester the new student receives a case. Additionally, the decision on how to handle transfer cases over the summer is an institutional decision.<sup>26</sup>

The law school, as an institution, places different pressures on clinics. Institutional pressures result, in part, from the financial pressures on clinics and the relatively low status of clinicians. As clinicians raise their status in the law school, they must become more like "traditional" faculty members. This means assuming additional responsibilities, such as committee assignments, and feeling the inevitable pressure to publish.<sup>27</sup>

The law school's demands require additional time from clinicians. The goals of the clinic, either client service or maximum student learning from experience, and the goals of the law school, requiring clinicians to fund-raise, or increasing the status of clinicians through traditional requirements of scholarship, may conflict.<sup>28</sup>

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25. For suggestions on how to avoid these problems and a discussion of potential solutions to transfer problems, see *infra* note 94 and accompanying text.

26. The transfer decision must be informed by the experiences of the individual supervisor. However, "larger" decisions of the clinic are institutional, such as whether consciously to consider the problems from transfer cases, whether to choose cases that will begin and end in one semester, and whether supervisors will be expected to assume the responsibilities for any cases on which they have worked.

27. Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, BRIGHAM YOUNG U.L. REV. 695, 890-91 (1977). As clinicians have sought to raise their status, there has been a corresponding pressure to publish. Because clinicians must work full-time in their clinics during the school year, the only possible free time is during the summer. Other faculty members have constant teaching pressures, but do plan their research and writing for the summer. Zenoff & Barron, *So You Want to Be a Law Professor?*, 12 J. LAW & EDUC. 379, 382 (1983) (persuasively shows that law school teaching is not a part-time job, and that a typical 40 hour work week for faculty members may include no time for research during the academic year). Clinicians have the additional pressure of carrying cases through the summer, as well as preparing to teach.

There is debate over what clinicians should be expected to publish. Should they be held to traditional scholarship? If not, does that perpetuate the myth of clinicians as second-class law professors?

28. Not all clinics have goals different from the law school or university to which they are attached. Nonetheless, many law schools, even if they provide client services, will not allow students to become involved in legal matters contrary to the policies of the university. For instance, the Georgetown University Law Center Sex Discrimination Clinic is not permitted to

Based on their educational goals and the institutional constraints, clinics make certain choices about the type of cases they choose, and the probability that they will end at the close of each school term.<sup>29</sup> Whenever these cases remain after the students leave, clinics, as institutions, must handle these cases until the next class of students. Clinics must also decide whether to transfer the cases to students and then, how to transfer each case effectively.

We have identified five institutional factors which impact on the transfer situation.

1. The goals of the clinic as service-provider and educator.<sup>30</sup>
2. The administrative context of the new student's experience.<sup>31</sup>
3. The clinic's establishment of a relationship between the new student and the previous student.<sup>32</sup>
4. Institutional obligations placed on permanent staff to compete for tenure or promotion and/or fund raising.
5. The clinic's professional responsibility to competently and zealously represent the client.<sup>33</sup>

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represent groups which advocate a pro-choice view on abortion. Not all clinics are institutionally supported and, therefore, the degree to which the law school may impose fiscal and ideological responsibility is not uniform. Nevertheless, these two potentially competing "institutions" play an important role in how and why a case is transferred from one student to another.

29. A clinic which is pressured to fund-raise for its existence is more likely to look for group clients that can afford to pay a minimal amount, or cases with the possibility of recovering attorney's fees. Generally, these cases cannot be resolved in one semester, so the clinics must transfer cases. A clinic which encourages scholarship may only take cases that begin and end in one semester, and may set up methods for other lawyers to handle unfinished cases during the summer. Some clinics are semester-long, some year-long, and some continue throughout the year. As such, the problems described here vary.

30. A clinic needs to attract clients and, therefore, must provide better-than-adequate service to the community. Yet, through the process of providing that service, the clinic also educates previously less-than-skilled students. How does the clinic as an institution balance these potentially competing interests?

31. How does the clinic prepare the student to assume a case? Is a student assigned a case on the first day of the semester? Does the clinic do intensive skills training before the student talks to the client?

32. What kind of relationship does the clinic encourage between the old and the new students? This factor, then, provides the framework for the psychosocial factors, discussed *supra* note 19, of how the relationship between the two students affects the representation. Some clinics encourage communication and sharing of ideas, while others prefer that the new students learn from their own experiences, with little outside help.

33. Under canons 6 and 7, lawyers must competently and zealously represent their clients. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 6, 7. What happens to clients over the summer? What is the minimal amount of legal work that the clinic can do for a client without potential disbarment of staff members? What decisions can the clinic staff leave for the new student without jeopardizing the client's legal claims? See Condlin, *The Moral Failure of Clinical Legal Education* in D. LUBAN, *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 317 (1983).

In the scenario, the clinic has decided that the case does not require any active involvement over the summer. The supervisor does not even contact the client to let her know that she is available to answer questions over the summer. The clinic's mechanism for handling cases over the summer is inadequate because, for three or four months, the client has no one to contact and the supervisor does not appear to understand the case.

The institutional decision not to monitor the case over the summer contributes to the discontinuity between the two student clinicians. The final letter does not explicitly state what will happen over the summer and, therefore, the client may have expectations concerning the clinic which may not be realized. Specifically, the client may expect that work will continue on her case over the summer and that the new student will "hit the ground running." Because the clinic does not afford the new student case responsibility before the beginning of the term, the new student will be unable to live up to this expectation.

Additionally, while the clinic may encourage contact between the two students, so that the transfer is smoother, this will prejudice Student *B* because he will only hear negative comments about the client. Student *A*'s other comments will also be unhelpful because of her mishandling of the case.

### III. PSYCHOSOCIAL FACTORS AFFECTING TRANSFER CASES

The nature of interpersonal relationships between clients, lawyers, and supervising lawyers has not been adequately investigated in legal literature.<sup>34</sup> There have been few attempts to integrate the psychological literature with the realities of legal practice.<sup>35</sup> But these relationships are extremely important. Supreme Court Justice Abe Fortas, for instance, noted that, for lawyers, such relationships "with clients, witnesses, judges and jurors are at least as important as their mastering of the statutes in precedence."<sup>36</sup>

Because the legal relationship is between people, significant interpersonal issues appear when lawyers begin to handle a case.<sup>37</sup> These issues are exact-

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34. In the past, lawyers have focused on issues of professional responsibility and manipulation, rather than on issues in the psychology of relationships. *E.g.*, Luban, *Paternalism and the Legal Profession*, 1981 WISC. L. REV. 454; Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1 (1963).

35. See especially the work of Andrew Watson. A. WATSON, *PSYCHIATRY FOR LAWYERS* (1978); A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* (1976). See also T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1976).

36. Fortas, *The Legal Interview*, 15 *PSYCHIATRY* 91 (1952), cited in A. WATSON, *PSYCHIATRY FOR LAWYERS* 3 (1978).

37. Lawyers are socialized into their role as lawyers. For readings discussing and challenging this, see *BECOMING A LAWYER* (Himmelstein, Dvorkin, & Lesnick, eds. 1981).

erbated in the transfer situation because of the complexity and number of interpersonal relationships. As a result of lawyers' focus on their roles as professionals,<sup>38</sup> they have avoided discussion of the psychosocial factors involved in legal cases generally, and transfer cases specifically.<sup>39</sup>

There have been studies of psychotherapy transfers which indicate the potential for trauma to all participants in the transfer situation.<sup>40</sup> While psychologists examine relationships, and lawyers study the law, lawyers can apply some principles from psychotherapy.<sup>41</sup>

Drawing on the psychological literature, there are at least seven identifiable factors<sup>42</sup> which influence the progress of representation when a case is transferred:

1. The developmental level of the new student.<sup>43</sup>

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38. Discussing the psychological relationships means going behind the role, probing difficult and subjective issues. Lawyers view themselves as professionals, able to separate their personal feelings from their clients. "Lawyers, like other professionals, are also able to rely on their professional role to keep some distance on the feelings that may attend their work." B. Bezdek, *Decision Theory in the Law School Clinic: Teaching Competent Choice Counseling* 27 (Dec. 1985) (unpublished manuscript submitted for the LL.M. at Georgetown University Law Center). Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 2 (1975) states that "at best the lawyer's world is a simplified moral world; often it is an amoral one; and more than occasionally, perhaps, an overtly immoral one." *Id.* at 2. He also notes that "my job as a lawyer is not to judge the rights and wrong[s] of the client or the cause; it is to defend as best I can my client's interests." *Id.* at 9.

39. Many of the psychosocial factors are as obvious to clinicians as substantive and institutional factors. Others, however, such as transference and countertransference, are more difficult to identify because they generally are not part of legal parlance. Therefore, in our description of the psychosocial factors, we more fully discuss these less familiar issues.

40. See R. FLESCH, *TREATMENT CONSIDERATIONS IN THE REASSIGNMENT OF CLIENTS* (1947); Harper, *Manifestations of Behavioral and Somatic Reactions to Reassignment*, 28 SMITH COLLEGE STUDIES IN SOC. WORK 157 (1957); Keith, *Multiple Transfers of Psychotherapy Patients*, 14 ARCHIVES OF GEN. PSYCHIATRY 185 (1966); Meyer & Tolman, *The Reactions of Patients to Enforced Changes of Therapists*, 19 J. CLINICAL PSYCHOLOGY 241 (1963); Muller, *The Trainee and the Transfer Case: Why is this Case Different from All Other Cases?*, 60 AM. J. PSYCHOTHERAPY 265 (1986); Pumpian-Mindlin, *Comments on Techniques of Termination and Transfer in a Clinic Setting*, 12 AM. J. PSYCHOTHERAPY 455 (1958); Reider, *A Type of Transference to Institutions*, 17 BULL. MENNINGER CLINIC 58 (1953); Scher, *The Process of Changing Therapists*, 24 AM. J. PSYCHOTHERAPY 278 (1970); Sederer, *Psychotherapy Patient Transfer: Secondhand Rose*, 132 AM. J. PSYCHIATRY 1057 (1975); Tantum & Klerman, *Patient Transfers From One Clinician to Another and Dropping Out of Out-Patient Treatment*, 14 SOC. PSYCHIATRY 107 (1979).

41. Psychology can help lawyers understand interpersonal and personal issues, and lawyers are beginning to use the insights from psychology can be applied to the law. E.g., Himmelstein, *Reassessing Law Schooling: An Inquiry Into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. REV. 514 (1978) (explaining how humanistic psychology can help lawyers become more aware of the personal issues inherent in their role as lawyers).

42. The first six factors were identified by Muller. See generally Muller, *supra* note 40.

43. Does the new student have the expertise to understand what the client needs and what

2. The degree to which aspects of the student's previous relationships are recreated in the lawyer/client and lawyer/supervisor relationship.<sup>44</sup>
3. The client's experience with the previous student lawyer.<sup>45</sup>
4. The degree to which the psychological and interpersonal problems which the client brings to the new relationship are recreated within the new relationship.<sup>46</sup>
5. The new student's relationship to the old student.<sup>47</sup>
6. The supervisory relationship.<sup>48</sup>
7. The class/race/age/gender/sexual preference differences between the student and the client.<sup>49</sup>

These issues occur in almost every clinical setting and within almost every transferred case, but not every transferred case will manifest each issue. Sometimes their impact is masked by other issues, and sometimes the issues are so interrelated<sup>50</sup> that singling out any particular factor as dispositive becomes a useless gesture. At times, however, certain factors may dominate the relationship, and may force the legal work to the back of the agenda. The various psychosocial factors listed above will now be discussed in turn.

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the student can provide? Is the new student actually able to provide help or must the new student rely heavily on the suggestions of the supervisor?

44. This is called "countertransference" in the psychological literature. How are unresolved, and even unconscious, conflicts in the new student's background brought into the new relationship? Does the student wish to make things right for the client in a way that his parents did not? Does the student hope to recreate the perfect parent/child relationship with the supervisor? Does a "sibling rivalry" develop with the previous student?

45. How was that relationship structured? How was the previous relationship terminated? Were the client's needs met by the previous student?

46. This is called transference in the psychological literature. How do the client's characteristic ways of participating in relationships unfold within the new relationship? Does the client unconsciously recreate aspects of his/her previous relationships? Does the new relationship recreate problems between the client and others?

47. Did the old student properly prepare the client and the new student for each other? Was the old student able to let go of the case? Did the old student do something to add pressure to the situation? How does the new student compare herself to the old student? Are the new student's ideas about the old student's relationship well-founded?

48. How does the supervisor assist the new student in gaining both faith in his abilities and control over the case? Does the supervisor contribute to the transfer problems by suggesting that previous work was either better or worse than the present work? Has there also been a change of supervisors? What is the level of the supervisory assistance?

49. Are there differences in class/status? How are these differences addressed by each of the lawyers? What does the client expect in the relationship? What does the lawyer expect in the relationship?

50. The psychosocial factors may be so interrelated with substantive and institutional factors that even defining a problem as psychosocial in origin is a wasted effort. *See supra* notes 20-33 and accompanying text.

A. *The Developmental Level of the Student*<sup>51</sup>

In clinics, students experience their first actual client representation.<sup>52</sup> Because they have not previously handled the responsibility of representing clients, the beginning student often will be too tentative in developing a new theory or a new strategy for a case.

The volume of materials<sup>53</sup> and the enormous new responsibilities facing the beginning student when embarking on clinic work for the first time can be overwhelming.<sup>54</sup> Meeting a real client and establishing a professional relationship can be more challenging than anything the student has done in law school.<sup>55</sup> In a transferred case, the relationships between the beginning student and the client, and their attendant problems, are multiplied.<sup>56</sup>

Not surprisingly, one psychologist found that beginning psychology trainees "encountered greater difficulty working with transfer cases than did more experienced trainees."<sup>57</sup> When an inexperienced clinician is faced with a transferred client, there is greater reliance upon the work of the previous

51. The developmental level of the student always has an impact on a case. The transfer exacerbates this situation and makes it more apparent, because a client must handle the unexpected change from a "seasoned" student to a "novice."

52. Student practice rules generally prohibit students from practicing before they are admitted to the bar, except in certain controlled situations.

53. In most clinics, the student must learn the law applicable in each case and the skills necessary for successful client representation.

54. See G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 2-121 (1978). One law student quoted by the authors noted the hardest parts of clinic work:

Coping with the sudden quantum increase of live tension was the hardest part: conflicting time demands, the experienced incongruity of being both student and lawyer, and the simultaneous perception of both one's incompetence and the need to perform competently all contributed to an insecurity which, of course, needed no encouragement to grow and feed upon itself.

*Id.* at 5.

55. Not only is the law student normally unprepared for actual client representation, but most of the role models the student may choose come from the ranks of the faculty at the law school, where Andrew Watson noted in 1963,

law professors . . . have had little or no experience in dealing with these matters . . . [and] [n]ever having suffered these conflicts directly, they cannot help those who are struggling with them. Nor can they freely empathize with such suffering since this would subject them to a source of anxiety that they quite naturally attempt to avoid.

Watson, *supra* note 34, at 12. Although the situation has improved in the last two decades, as schools teach better pre-trial and client counseling skills, law students have little idea of what they will find once they arrive at a legal clinic. Thus, because few law students have actually had clients before, there will generally be a substantial difference between the clinic development of the previous and subsequent students.

56. For a discussion of the other factors, see *infra* notes 59-61 and accompanying text.

57. Muller, *supra* note 40, at 266.

clinician and the supervisor.<sup>58</sup> He noted four factors which reflect the developmental level of the psychology trainee and which are useful in understanding the potential transfer difficulties in the law school clinic:<sup>59</sup> 1) the student's theoretical and clinical skills; 2) the student's developing realistic expectations in the representation; 3) the student's moderation of his own narcissistic needs;<sup>60</sup> and 4) the student's sense of herself as a competent lawyer.<sup>61</sup>

The student's developmental level, including expectations about client representation, will affect the initial handling of the case. If the clinic carefully trains the new student in preclinic orientations, the clinic may overcome any deficiencies in the competency and expectations of the new student. Nonetheless, developmental problems will likely assert themselves in some area of the clinic work.

### *B. Countertransference*<sup>62</sup>

One of the most important factors<sup>63</sup> involved in the transfer of a case from one student clinician to another stems from what the psychological literature refers to as "countertransference."<sup>64</sup> In the countertransference situation, the clinician brings conscious and unconscious aspects of him/herself to the relationship with the client.<sup>65</sup> All student cases are likely to exhibit the

58. See generally Chessick, *How the Resident and the Supervisor Disappoint Each Other*, 25 AM. J. PSYCHOTHERAPY 272 (1971).

59. Muller, *supra* note 40, at 266.

60. Depending on the situation, a student may feel that the success or failure of the case is a personal reflection of himself. There is always a healthy degree of narcissism in the work, but the student must moderate this desire. See A. MILLER, *PRISONERS OF CHILDHOOD: THE DRAMA OF THE GIFTED CHILD AND THE SEARCH FOR THE TRUE SELF* (1981).

61. As a student develops into a lawyer, his skills will improve, he will develop realistic expectations, he will moderate his narcissistic needs, and he will feel more competent. At the beginning of the clinical training, students will be at differing levels of competence.

62. The authors are discussing countertransference issues before discussing transference issues, following the premise stated by Andrew Watson that "any accurate utilization of transference must stem from a skillful analysis and recognition of countertransference." A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS*, *supra* note 35, at 79-80. Furthermore, the authors believe that countertransference issues are more significant in the client transfer situation, because those issues are more accessible to lawyers.

63. In fact, one author has described countertransference as "perhaps the single most important factor" in the success of a transfer case. Pumpian-Mindlin, *supra* note 40, at 455.

64. See generally CLASSICS IN PSYCHOANALYTIC TECHNIQUE 137-232 (R. Langs ed. 1981) (discussing countertransference). This article follows the general definition provided by Paula Heimann: "For the purpose of this paper I am using the term 'counter-transference' to cover all the feelings which the analyst experiences towards his patient." Heimann, *On Counter-Transference* in CLASSICS IN PSYCHOANALYTIC TECHNIQUE 140 (1981). Thus, countertransference is all resolved and unresolved feelings that the student has towards the client.

65. Freud and his followers developed the concept of "countertransference" to refer to



strain of countertransference,<sup>66</sup> but because of the inherent stress on the beginning clinician, these issues generally come to the forefront in the attorney-client relationship.<sup>67</sup>

The clinical student generally feels that she will be judged by the results she obtains in her case. Each client represents a test of her abilities and, as such, success becomes extremely important. Because clinics constrain the boundaries of the attorney-client relationship, and, in particular, proscribe limits upon the duration of the student's involvement in the work, the student has pressures which do not exist as strongly in the outside world. Within the constraints of a semester or two, the student clinician feels she must succeed on each case, and must provide both actual progress on the case for the client and sufficient progress for the supervisor. Fortunately, most clinics give students a small caseload. This factor, coupled with the student's initial zeal to work hard and succeed, leads to a situation where the countertransference issues are somewhat veiled.

Because clinic students generally are experiencing their first taste of client representation, they often feel a heightened interest in their clients. To the student, the client can simultaneously be a terrible burden and a terrific asset to their learning; the client can equally be seen as someone who needs expertise and someone who provides experience.<sup>68</sup> But whatever the student feels, there will generally develop an intense relationship between the two. It is important to suggest to the student that this powerful situation will develop so that the student can understand some of what occurs within the relationship.

For example, during the course of the attorney-client relationship, the student may begin to pull away from the client and replace the initial intensity

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what they view as the analyst's problematic unanalyzed and distorted responses to the patient. Freud stated that "we must reckon not only [with] the structure of the patient's ego but the personal characteristics of the analyst." S. FREUD, ANALYSIS TERMINABLE AND INTERMINABLE (1937) reprinted in THERAPY AND TECHNIQUE 265 (1963). See generally H. SEARLES, COUNTERTRANSFERENCE AND RELATED SUBJECTS: SELECTED PAPERS (1979); Kanefield, *Feminist Values and Psychoanalysis: The Patient's Curative Capacities*, in 1 YEARBOOK OF PSYCHOANALYSIS AND PSYCHOTHERAPY 3, 9-12 (1985).

66. See A. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS, *supra* note 35, at 79-88, for an excellent description of the lawyer's need to "know thyself" and to understand the dynamics of countertransference.

67. Beginning clinical students have a special relationship with their first clients. Because of naivete or heightened interest, the beginning student views her representation as a chance to solve all of the client's problems. Because of this over-identification with the client, countertransference issues are amplified. In a transferred case these relationships, and their attendant problems, are multiplied and possibly exacerbated.

68. See generally Kanefield, *supra* note 65.

with a more detached and often arrogant attitude toward the client.<sup>69</sup> When the student realizes this movement, she may panic: Am I doing something wrong? Will my supervisor discover that I don't care about the client anymore? Will I be unable to work as hard? Will I fail to win the case for the client? These questions, often hidden in the background of student-supervisor discussions, become paramount to the student. If the case is complicated or the student is unable to resolve the problem adequately, the panic becomes even more severe as the term nears conclusion.

As the student begins to realize that the client will be transferred, several changes occur in the attorney-client relationship: the student may prepare the client for the switch; the student may ignore the impending switch; the student may perform menial tasks on the case to make it appear (to either the client or supervisor—or both) that progress is being made; the student may distance himself to protect his ego from the impending "failure"; or the student may "go public" with his anxieties and search for a solution to both problems of representation (the actual case representation of the client and the representation of what he has performed for the client to the supervisor).

Whatever tactic the student chooses impacts upon the new relationship when the client is picked up by another clinician. The client may feel abandoned by the student and be willing to have another student attempt to represent her, or the client may feel abandoned by the clinic and disappointed at having little choice, but another clinician who she feels will equally fail to assist her. In the scenario, we have insufficient information about the students to discuss countertransference issues.

### C. *The Client's Relationship with the Previous Student*

Naturally, the client's relationship with the previous student will affect the new relationship.<sup>70</sup> If the previous relationship has been problematic, the new student will have to rebuild trust and confidence in the clinic's represen-

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69. This is but one example of the possible countertransference problems. Watson notes several others, including seductiveness:

This may vary from soft inflections of the voice to not-so-subtle proffers of assistance in exchange for favorable responses including actual sexual involvement. Some clients may view these expressions and the reactions they stimulate as love, while others would react with fear and withdrawal if counsel were to respond to their unconscious seductive behavior.

A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS*, *supra* note 35, at 85. Clearly, if such a situation develops within the previous lawyer-client relationship, the subsequent student lawyer will be establishing a relationship under difficult circumstances.

70. These issues are explored in greater depth in the discussion of countertransference, *supra* notes 62 to 65 and accompanying text, and transference, *infra* notes 71 to 74 and accompanying text.

tation. If the previous relationship was stellar, the new student will face the unenviable task of either having to recreate that relationship or disappoint the client.

Student *B* must deal with what was a problematic relationship between Ms. Marie and Student *A*. He is representing a client who may not trust the clinic to represent her adequately. Ms. Marie may feel betrayed by the clinic because of the lack of contact over the summer and Student *A*'s lackadaisical pursuit of her claim.

#### *D. Transference*<sup>71</sup>

Like countertransference, this issue has its basis in unconscious thoughts.<sup>72</sup> Transference, for our purposes, is the client's tendency to view her relationship with the lawyer in a manner which recreates earlier relationships the client may have had with other significant people in the past.<sup>73</sup> Lawyers and clients must form a relationship to work effectively; therefore, transference is salient in every representation.

While transference may be a difficult part of a legal relationship,<sup>74</sup> it is undoubtedly an important tool toward understanding client motivation.<sup>75</sup> If understood properly, the transference reaction can be:

71. One legal commentator notes that "[t]ransference is not limited to psychotherapeutic relationships. It may occur in any relationship." Shaffer, *supra* note 35, at 174.

72. See Klein, *The Origins of Transference*, in CLASSICS IN PSYCHOANALYTIC TECHNIQUE 9-15 (1981); see generally CLASSICS IN PSYCHOANALYTIC TECHNIQUE, *supra* note 64, at 1-82 (discussing transference) and *id.* at 83-135 (discussing nontransference). See Shaffer, *supra* note 35, at 160-80, (an excellent introduction to many of the terms discussed herein and an extended discussion of the relevance of transference issues within the lawyer-client relationship). Watson has stated that "[t]ransference and countertransference are two halves in a circle of dynamic interaction between the personalities of the two individuals in the relationship." A. WATSON, PSYCHIATRY FOR LAWYERS, *supra* note 35, at 8.

73. One psychiatrist, Ralph Greenson, has noted the chief characteristic of transference: a repetition of the past in a manner inappropriate to the present. Greenson defines transference as "the experiencing of feelings, drives, attitudes, fantasies, and defenses toward a person in the present which are inappropriate to that person and are a repetition, a displacement of reactions originating in regard to significant persons of early childhood." Greenson, *The Working Alliance and the Transference Neurosis*, 34 PSYCHOANALYTIC Q. 155, 156 (1965).

74. Bird, *Notes on Transference: Universal Phenomenon and Hardest Part of Analysis*, 20 J. AM. PSYCHOANALYTIC ASS'N 267, 301 (1972) in CLASSICS IN PSYCHOANALYTIC TECHNIQUE 51-67 (R. Langs ed. (1981)). Bird states that transference occurs in any relationship, and it may be the most difficult and most obvious aspects of the therapeutic relationship. Transference is certainly more obvious to therapists than lawyers because therapy concentrates on interpersonal relationships. Because lawyers and therapists counsel their clients on different problems, transference is not as obvious to lawyers or as apparent in the relationship. Rarely do lawyers know enough about their clients to see the recreation of their prior relationships in the legal representation.

75. A. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS, *supra* note 35, at 88.

very revealing about the client and his personality . . . enabl[ing] counsel to test and retest important issues such as how the client responds to aggressiveness; how willing he is to share inner self with another; how much he needs to control the surroundings and activities to which they relate; and a multitude of other important questions often, if not always, related to the client's behavior.<sup>76</sup>

Lawyers should be aware that ignorance of the transference issues is not a solution. While such issues are derived from the psychological literature, they are a part of any legal relationship. Courts have not yet imposed liability for problems resulting from transference within legal relationships, but at least one court has imposed liability on a psychiatrist who mishandled transference. In *Zipkin v. Freeman*,<sup>77</sup> the court declared that a psychiatrist mishandled the "transference phenomenon, which is a reaction the psychiatrists anticipate and which must be handled properly."<sup>78</sup> The court's holding indicates that "therapists—even those whose theoretical orientation does not include the transference concept—may be held accountable for the inappropriate handling of a phenomenon that they may view as an invalid concept or at least one with minimal importance for therapy."<sup>79</sup>

Likewise, even those lawyers whose theoretical orientation does not include the transference concept should be aware of its applicability and universality.<sup>80</sup> Transference occurs whether or not the participants are aware of it.<sup>81</sup> Because the phenomenon differs depending on the partici-

76. *Id.*

77. 436 S.W.2d 753 (Mo. 1968). This case concerned a male psychiatrist who treated a female patient. A sexual attraction developed and the psychiatrist advised his patient that she should leave her husband and live in a room near the psychiatrist's office. The relationship included trips out of the state, and group therapy sessions that involved nude swimming and sex. The court, noting the overwhelming impropriety, stated that "[i]t is pretty clear from the medical evidence that the damage would have been done to Mrs. Zipkin even if the trips outside the state were carefully chaperoned, the swimming done with suits on, and if there had been ballroom dancing instead of sexual relations." *Id.* at 761.

78. *Id.*

79. Pope, Keith-Spiegel & Tabachnick, *Sexual Attraction to Clients: The Human Therapist and the (Sometimes) Inhuman Training System*, 41 AM. PSYCHOLOGIST 147, 150 (1986).

80. Freud noted that "[i]f the theory of analytic technique is gone into, it becomes evident that transference is an inevitable necessity. Practical experience, at all events, shows conclusively that there is no means of avoiding it, and that this latest creation of the disease must be combated like all the earlier ones." S. FREUD, DORA—AN ANALYSIS OF A CASE OF HYSTERIA 138 (1905/1963).

81. One psychiatrist has noted that "if two people are repeatedly alone together some sort of emotional bond will develop between them." Greenacre, *The Role of Transference*, 2 J. AM. PSYCHOANALYTIC ASS'N 671, 671 (1954), cited in CLASSICS IN PSYCHOANALYTIC TECHNIQUE, *supra* note 64, at 17. She continues:

Even though they may be strangers engaged in relatively neutral occupations, not directed by one or the other for or against the "other one," it will probably not be long before a predominantly friendly or predominantly unfriendly tone will develop

pants, different issues develop when a new lawyer takes over a case. One author notes three variables which determine the transference issues that will develop: "(1) the psychological characteristics of the client; (2) the psychological characteristics of the lawyer; and (3) the role demands of the legal task to be carried out."<sup>82</sup> In a transferred case, how the old and new student lawyers respond to these variables alters the transference issues.

Awareness of the transference issues which have developed under both students significantly aids case planning and strategy because lawyer-client rapport may be better understood. But it is especially important to realize that the client may react to the new student in a manner different from what the previous student experienced. When confronted with the personality and style of the new student, the client may bring out different parts of her unconscious. For instance, one possibility is that Ms. Marie may react to the anxiety of Student *B* by treating Student *B* in the manner she treated her own children. Because Student *A* did not engender these feelings, Ms. Marie may appear to be a completely different person than Student *B* was led to believe.

#### *E. Student Relationships*<sup>83</sup>

Sometimes a new clinical student has an existing relationship with the previous student. This situation affects the ability of the new student to investigate adequately and to explore the possibilities of a case. For instance, if the new student has an unfounded admiration of the previous student, the new student may hesitate to alter the plans or adjust the strategy of a case because of either trust or confidence that the previous student has done stellar work. Even if the new student only reads the old student's memos to the file, the new student will have some feelings towards the old student. Because law schools tend to reward competitiveness, it would be unusual if competitive feelings between the new and the old student failed to develop.

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between them. The speed and the intensity of this development will be enhanced by the frequency of the periods in each other's company.

*Id.* at 671. Watson notes that "a substantial part of these [transference] responses is related to unconscious activity, [and] counsel may only be aware of a sense of question or doubt when he encounters such difficulties." A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS*, *supra* note 35, at 92.

82. A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS*, *supra* note 35, at 93.

83. As with the section concerning the client's relationship with the old student, these issues are explored in greater detail in the section on countertransference and transference, *supra* notes 62-65, 71-74.

### F. The Supervisory Relationship

Supervisors often have established important relationships with the client and previous student lawyer.<sup>84</sup> The new student walks into this situation without knowledge of these relationships and without a strong relationship with either the supervisor or the client. Naturally this creates a situation which the new student must negotiate.

Likewise, the supervisor sometimes enters the transferred case without knowledge of the client or the previous representation and, thus, must rely heavily upon the new student to learn and translate case activities. Because students want approval—and even admiration—from their peers and faculty, the supervisory relationship often develops into the situation in which a student tries to do whatever the supervisor requests.<sup>85</sup> When this relationship is challenged by a transfer case, there can be a conflict between what and how well the previous student did in the supervisor's eyes and what the new student believes is requested of him.

However this transferred case is received, the supervisory relationship with the new student significantly affects the adequacy of the client representation. The psychiatric student often looks to the supervisor for:

“potent remedies,” both realistic and magical, in order to increase his sense of power and competence. He hopes to please his supervisor, to make an impressive presentation in seminars so as to achieve prestige among his peers, and to have his work accredited by the training program. All these aspects of the social context of his work are competing and sometimes interfering with what ought to be his primary wish—“to be an effective therapist with his patient for the patient's sake.”<sup>86</sup>

This is equally true in the lawyer/client relationship, where the student simultaneously wants answers from the supervisor and a good grade.

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84. For one perspective on the supervisory relationship, see Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981). Here, as in other areas of the clinical relationship, not much has been published, although the authors suspect that there are many internal clinic memos. The Clinical Legal Education section of the Association of American Law Schools recently held a conference where the only topic was the supervisory relationship.

85. This may even include clerical tasks such as the situation described in Aiken, Koplów, Lerman, Ogilvy & Schrag, *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047, 1077 n.101 (1985) [hereinafter Aiken] (students displaying “anger at [their] advisors for insisting that [they] put in order a messy case file which [they] had inherited from former interns.”).

86. Chessick, *supra* note 58, at 277.

### G. Differences Between the Client and Student<sup>87</sup>

Often race/sex/class/sexual preference and other differences and similarities between the client and the student affect the progress of a case.<sup>88</sup> In the transfer situation, the differences between client and student change when the case is transferred, and this necessarily has some effect on the legal relationship. To understand how these differences affect the change in representation, we need to understand how they affect the representation itself.

These differences between client and student are often unacknowledged. They have been called "closet issues" because lawyers, as a profession, have refused to confront them and law teachers have not confronted them in the classroom.<sup>89</sup> As a result of this lack of study, the effect of race/sex/class/sexual preference on legal relationships is difficult to analyze. But, as one commentator noted, "it is empirically proven that the way we perceive other people affects the way we feel about them, talk about them, treat them, represent them, and make decisions about their lives."<sup>90</sup>

Not all of these factors may affect the representation in the same way, and not all of these factors are as obvious to participants in the relationship as others.<sup>91</sup> For instance, the switch from a male to a female lawyer may affect a client in ways in which a student may be unprepared to handle.

Because clients may have such stereotypes—or others concerning race, age, or sexual preference<sup>92</sup>—the transfer of a client from a student of a par-

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87. See generally Address by J. McConnell, Association of American Law Schools Conference (January 1, 1986) (discussing how issues of gender, race, and class affect the teaching and practice of law) (transcript available from the authors).

88. These issues can affect the legal relationship in unforeseeable ways. In addition to the differences between the client and the student, the differences between the students may also affect the representation. For instance, male and female students can have different reactions to their clients; female students may be more likely to place a legal problem within the context of interpersonal relationships, while male students may view a legal problem in terms of right and wrong according to the law. See generally C. GILLIGAN, *IN A DIFFERENT VOICE* (1982) (discussing the differences in the psychological and moral development of males and females). See Tittle, *Gender Research and Education*, 41 *AM. PSYCHOLOGIST* 1161 (1986), for an overview of the literature on the effects of gender in education and learning style.

89. In her presentation to the Association of American Law Schools, McConnell described the issues this way. McConnell, *supra* note 87, at 2.

90. McConnell, *supra* note 87, at 3.

91. For instance, sex and race are generally visible signs, but class status, although often assumed by the client, is not always accurately perceived. Thus, even those traits which might be similar can be misinterpreted or mishandled and may affect a relationship in which a knowledgeable outsider would consider there to be no possibility of conflict.

92. Stereotypes pervade the legal system. One reason to avoid these stereotypes is that they are incredibly idiosyncratic. Wishman, in discussing jury selection, notes the more common stereotypes: prosecutors want their juries to be composed of "men, Republicans, the prosperous, bankers, engineers, and accountants; defense lawyers generally favor women, Democrats, poorer people, social scientists, and minorities." S. WISHMAN, *ANATOMY OF A*

ticular group to a student of a different group may lead to complex interpersonal issues. For example, in this scenario, the apparent differences between the student lawyers may lead the client to perceive Students *A* and *B* differently. Ms. Marie may expect less from a female lawyer than a male lawyer, she may feel more comfortable with a minority than a white lawyer. And the students themselves, who may perceive their roles differently because of their socialization, will react differently to the client.

We will quickly discuss one important factor affecting the transfer: the client's experience with Student *A*. Donnie Marie's experience with Student *A* has been problematic. Ms. Marie obviously cares about the roof leak and the lack of concern by the repair company. But Student *A* apparently ignores these concerns and concentrates on her own agenda. Student *A* assumes knowledge greater than Ms. Marie concerning both the particulars of the roof leak—which she says comes from a bathtub instead—to the inability of Ms. Marie to read the contract, and, more importantly, to the fact that Student *A* tells Ms. Marie that she has no hope for recovery. Clearly, the situation is not one of strong rapport between the client and the student.

To further complicate the relationship—and to make the transfer situation more difficult—Student *A* has very little contact with the client. Ms. Marie is hardly spoken to during the period of Student *A*'s representation, and receives a note at the end of the representation that indicates a delay of another three months. For Ms. Marie not to be angry at this lack of care would take an extraordinarily passive client, and Ms. Marie does not appear to be that type.

One other troubling aspect of the client/student relationship is the replication of the situation about which Ms. Marie originally complained: the workers did not care enough about Ms. Marie to have the courtesy to show up for their appointments. In the representation, Ms. Marie showed up late for her appointment and obviously annoyed Student *A*. Student *A* responded to this aspect of the representation—in combination with other factors—by ignoring Ms. Marie and not working diligently on her case. How will Student *B* improve this situation? How will Student *B* recognize this pattern of behavior if Student *A* has failed to point it out? These and other questions are important in developing a successful transfer.

#### IV. SOLUTIONS

The solution to transfer problems begins with explicit awareness and con-

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JURY: THE SYSTEM ON TRIAL 107 (1986). See also R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 121-23 (1983) (discussing competing and contradictory selection strategies).



sideration of the issues inherent in the process. How each clinic then decides to handle the issues depends on the structure of the clinic, its pedagogy, and the clinicians themselves. Nonetheless, we suggest some methods by which clinics can confront these issues.

#### A. *The Transfer Memo*

A good transfer memo is one solution.<sup>93</sup> Each clinic needs to develop guidelines for a transfer memo, so that students know what to write. These guidelines should be distributed to students at the beginning of the school term. Even in clinics which do not expect cases to transfer, students must be aware that they may be unable to finish their cases. Knowing at the beginning of the semester that they may not finish their cases may help students prepare the transfer memo, and may encourage students to better document the actions they take.

The guidelines for the transfer memo's content and organization must be determined by the individual clinics. Here is one possible transfer memo<sup>94</sup> which attempts to establish standards for an effective transfer:

#### TRANSFER MEMO GUIDELINES

##### How to Transfer a Case

How you transfer your case is critical to case administration and case success. When you transfer the case, your goals are to let the clinic know what worked for you, what needs to be done, and what cannot be done. You are providing a thorough map of the work you did during the past year, and a strategic plan for the summer and the beginning of the next school year. You are identifying the players and the problems for your supervisor and for next year's students. You are also preparing the client for life without you.

To achieve these goals, you must write at least two transfer memos—one to the clinic file and one to your client, and possibly a third one to your supervisor.

**CLINIC TRANSFER MEMO.** There are many factors to keep in mind as you transfer a case. How will next year's students react? Will they be overwhelmed by the work you have done? Will the client feel threatened by a new group of students? Do you feel that you have scarcely helped your client? One way to know what be-

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93. In fact, this is the first solution which the participants at the Columbus Symposium identified. Of course, a transfer memo is only a partial solution.

94. This memo is adapted from one written by Naomi Cahn for the Harrison Institute for Public Law at Georgetown University Law Center for the Spring 1986 semester.

longs in a transfer memo is to remember back to last August; remember your confusion with your case, and figure out what would have helped you then. This is the basis for the transfer memo. At a minimum, your transfer memo must include:

1. *A General Summary of the Case.* Introductory remarks on the type of case; race, gender, and age of the client; the nature of opposing counsel (if any); names and numbers of important contacts; "helper" groups; and important resources. This is the place to include your telephone numbers for the summer and for next year. Questions, which only you can handle, will frequently arise during the next few months.

2. *A Summary of Your Actions.* What are the more important actions that you took during the year? Why were they important? Discuss these actions chronologically, and refer to the portions of the case file where these actions are recorded. What did you learn? For example, is it necessary to document all telephone conversations? Is constant follow-up on meetings necessary?

3. *An Analysis of your Relations with the Client.* Were there any important disagreements with the client? Do you feel that the client trusted you? Did you trust the client? What special factors in building your relationship with the client might be important for the next student to know? If you were going to begin your relationship with the client again, what would you do differently?

4. *A Strategic Plan for the Summer and Next Fall.* If you could stay here for the next six months, what would you do? What are the most important issues that need to be resolved? How can they be resolved?

The memo should be organized and useful, with an index on the first page. Its length should be between 7-10 pages, although it can be longer.

**TRANSFER MEMO TO CLIENT.** The purpose of this memo is to say good-bye to your client. You need to let the client know that you will no longer be involved in the case, that he/she should direct any questions to your supervisor, and that a new student lawyer will likely begin work in the fall.

This memo is also your opportunity, if you wish, to summarize your actions over the past year. How and for what do you want the client to remember you? You can also tell the client how much you enjoyed working with him/her (if you did), and suggest future strategies.

As you write this memo, think about the situation from the client's perspective. The client has established a relationship with

you over the past year, and is accustomed to dealing with you and to seeing you at meetings. Suddenly, because of the arbitrary time limits of the school year, you will no longer be there. This can be confusing, especially if the client does not have sufficient information to understand the discontinuity.

As lawyers, we often do not give enough attention to the people who are our clients, and to their reactions, when we transfer a case. We have an ethical responsibility to serve our clients, and to ensure that the new lawyer comprehends the legal situation. But what is our ethical responsibility to our client when we leave a case? What is our responsibility to a new lawyer to warn that person about our client's personality? You have developed more than a legal relationship when you leave. Part of helping a new lawyer on the case is making sure that the client can trust the transition process, and that the new lawyer understands the complexities of the interpersonal relationships.

**TRANSFER MEMO TO SUPERVISOR.** The purpose of this memo is to convey those interpersonal and idiosyncratic details of the case which might be inappropriate for a public file memo, but which you want your supervisor to know. It will then be the supervisor's responsibility to decide what to convey to the new student and how to convey it. If you write this memo, it should include:

1. *Your Reasons for Privacy.* Indicate the reason why the material you are about to discuss is inappropriate for the file memo. This might include such interpersonal issues as heterosexual/homosexual issues; racial and gender issues; and other issues which you do not want fellow or future students to know about you or your client without more explicit discussion.

2. *How the Issues you Discuss will Affect the Case.* In what way do you think the substance of the issue might affect the future relationship? In what way do you think the new student may have to adjust to this situation? What problems have developed or do you see developing?

3. *Proposed Remedies.* Can the situation you describe be overcome by the new student? Discuss what actions you think the new student should take to serve the client effectively. What would you do if you were the supervisor and wanted to prepare for the next student?

The written memo is a partial method of conveying this important and private material. Many of these issues should be discussed further with your supervisor.

Some clinics (or particular cases within the clinic) may require all three transfer memos. In other clinics, supervisors encourage students to discover as much as possible about the case by themselves, decreasing reliance on outside help.<sup>95</sup> Thus, one memo which describes the various personalities involved and the best methods for research could be prepared for the clinic, and another, setting out the basic intake situation, for the incoming students. The form for the transfer memo probably should change after every set of students. As incoming students use the previous year's transfer memos, they can comment on the transfer memo—and on the transfer method itself.

### B. Other Solutions

Incoming students should be encouraged to discuss their reactions to transferred cases. This may mean an additional seminar, just for students with transferred cases and their supervisors. The seminar might focus on the various issues identified in this paper which make the cases that these students must face different from those of their peers. Letting students know that other students are experiencing the same feelings of frustration, or that they are comparing themselves to the previous students, will help them adjust to their case.<sup>96</sup>

Supervisors must be sensitive to the issues in transferred cases, and to their own expectation of the new student. As the supervisor describes possible issues which may develop during the new student's case management, she can facilitate discussion of those issues that specifically result from the transfer situation. In those situations in which students have written transfer memos to the supervisor, the supervisor should review the issues raised and discuss the situation further with the student. After careful consideration, the supervisor should develop a plan to monitor the new student's encounter with the unfolding of the issue.

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95. In the Center for Applied Legal Studies at the Georgetown University Law Center, the supervisors generally do not give advice or direction unless the intern specifically requests it, to encourage students to use themselves as resources before going to their supervisors. When one woman's case was assigned to her roommate the following semester, she refused to discuss anything that was said in case team meetings because she did not want to undermine the clinic's pedagogy. Aiken, *supra* note 85, at 1080. This behavior is not universal.

96. When a lawyer is learning how to cope with the many emotional reactions stimulated by the interview situation, the knowledge that he is not the first one to encounter these problems can be helpful in dealing with them. When human beings struggle with intrapsychic conflicts they have a strong tendency to believe that they are going it alone. This tends to create a sense of isolation with the progressive feeling of despair an attitude which does not facilitate the resolution of emotional problems.

A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS*, *supra* note 35, at 100. While Watson discusses these issues in the context of the initial interview, his observations are equally true when a student begins work on a transferred case.

At the end of each school term, the supervising clinicians should meet to discuss transfer issues. They can discuss which cases should be transferred, which ones must be handled during the school break by supervisors, and how to handle any others.

This is not a comprehensive list of suggestions for effective transfer. Rather, it is intended to be thought provoking; an introduction to possible solutions.

## V. CONCLUSION

Although most of the issues that have been presented in this article relate to the progress of any case a student might confront in a legal clinic, the potential problems arising from these issues are compounded in the transfer situation.

We have proposed several possible remedies for the dilemmas of the transfer situation. We believe that some of the potential problems we have described can be avoided, and that client service can be enhanced as students become aware of the problems inherent in transferred cases. Of course, there is always the risk that some of these solutions may create new problems in the transfer situation.

By exploring problems and suggesting solutions, we hope to integrate psychological insights with clinical legal education. Transfer cases are a microcosm of some of the problems inherent in clinical education. By examining the "extreme" problems of the beginning student who is confronted with a transfer case, clinicians can understand the "normal" problems of the beginning law student as well. Understanding transfer cases can lead to better adjustments by students to the clinical setting, which, in turn, may improve student education and client representation. These psychological insights into how law students learn in clinics have important implications for law school teaching.<sup>97</sup>

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97. See generally Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612 (1984) (suggesting that law schools of the twenty-first century will emphasize experiential-based learning because students will be unable to learn any one complete area of the law in a one semester-long class).