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James C. May

HARD CASES FROM EASY CASES GROW: IN DEFENSE OF THE FACT- AND LAW-INTENSIVE ADMINISTRATIVE LAW CASE

JAMES C. MAY*

INTRODUCTION

In a recent essay in the pages of the CLINICAL LAW REVIEW,[1] Paul Reingold, Director of the University of Michigan Clinical Law Program, made a strong case for why civil practice clinics, specialized (handling one or two types of cases) and general programs alike, should take on "hard" cases as opposed to "easy," routine ones. No doubt Reingold's essay touched a nerve in many a clinical teacher: who among us has not wrestled with the dilemma of balancing students' learning needs with our own professional development as attorneys and teachers?

Reingold's essay at the outset fairly presents the case for the "opposing view," that is, that students learn better by doing the simpler, more routine cases typically associated with many specialized clinics and general clinics that do not take on overly complex matters. He then asserts that a steady dose of such cases can be destructive, or at least dulling, to clinical students as well as faculty (and, ultimately, to the reputation of the clinic itself). After giving his definition of what a "hard" case is, he gives examples of two such cases handled in his own clinic, and tells of the powerful, beneficial effect they had on everyone associated with them.[2]

This essay is a response to Reingold's article. I argue that while he is certainly on solid ground in recommending that tough cases be tackled, he underestimates the potential of apparently routine service matters not only to constitute suitable teaching material beut also to rise to the level of difficult cases. I will demonstrate this by highlighting two veterans benefits cases

* Clinical Professor of Law, Vermont Law School, and Director, South Royalton Legal Clinic. Special thanks are due to Mark Klarich, a former clinic student, and Jennifer Johnson and Errol Tabacco, work-study students, for their help in organizing materials for this article, and to the clients who allowed their stories to be told.

1. Paul D. Reingold, *Why Hard Cases Make Good (Clinical) Law*, 2 CLINICAL L. REV. 545 (1996).

2. *Id.*

handled by Vermont Law School's South Royalton Legal Clinic, a general clinic which does primarily legal aid-type service cases of widely varying complexity and difficulty.

I. OF EASY AND HARD CASES, AND WHY CLINICIANS DO THEM

As Reingold's essay points out, there are plenty of defensible reasons advanced for why some clinics specialize in doing repetitive casework in just a few areas of law, and why even non-specialized, general clinics tend to do simpler cases. The argument for specialization was succinctly stated: "Students get to handle routine cases in a way that lets them build on what they have done before, and students are better positioned to see the broader policy issues within the specialty, as well as to engage in law reform."[3]

Similarly, Reingold points out that where skills training is seen as the main justification for a clinic's existence, the following values and goals have traditionally been advanced to justify focusing on simpler matters:

COMPLETENESS AND RESPONSIBILITY: Students who are able to handle a case from start to finish get to see the process as a whole, and may get to engage in hearing representation in which they make the major decisions, thus developing a sense of personal and professional responsibility.[4]

SAFETY: Cases with smaller dollar stakes pose "a lower risk of serious error or malpractice." Also, since more "easy" cases can be supervised than difficult ones, the value of repetition is enhanced and the chance of error diminished.[5]

SERVICE: Easier cases, because they tend to be non-controversial and done in volume, generate less opposition within the community and provide a greater public relations benefit to the law school, since students are seen as serving the needs of the indigent in an era of shrinking free legal resources.[6]

SERENDIPITY: "The more cases that a clinic processes in a term, the greater the chances that some of them will present interesting and useful ethical [and other] issues."[7]

THE ACADEMIC CALENDAR: Deprived of clinical students to work on cases in the summer, and facing the necessity of using that season to pursue writing projects in order to keep their jobs, clinical faculty, as a survival mechanism, need to be able to wrap up most of their cases in May and June each year. This can only be done with "easy" cases.[8]

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3. *Id.* at 545 (footnotes omitted).
4. *Id.* at 548-49.
5. *Id.*
6. Reingold, *supra* note 1, at 548-49.
7. *Id.* at 550.
8. *Id.* at 548-51.

Despite these apparent virtues of simpler, repetitive cases, which were the norm in his clinic in the early 1980s, attorney Reingold found that they were personally unsatisfying for three reasons, all of which will be familiar to experienced clinical faculty:

1. Routine, simple cases were boring, and, worse, promoted uncreative, stereotypical thinking among the faculty.

2. Weak or non-existent opposition, such as in some landlord-tenant litigation and social security disability matters, eliminated various skills opportunities for clinicians, such as jury trials or simply having to overcome competent, zealous opposing counsel.

3. Clinical students, themselves bored by cases that were too easy, indicated little interest in pursuing public interest careers based upon their clinical experiences.[9]

For these reasons, Reingold and his colleagues set out to transform their general civil clinic, by way of increasing credits, teaching more substantive law, creating an advanced clinical experience for veterans of the clinic, and revamping the caseload. This last reform was achieved with the assistance of the U.S. Department of Education's Title IX Law School Clinical Experience Program, which allowed the faculty to hire highly qualified attorney-faculty so that they could develop areas of specialty in two areas (prisoners' civil rights and employment discrimination) within the general civil clinic, and take on tougher issues within the general clinic's traditional areas of expertise, housing law and mental health law.

As a result of these changes, the Michigan civil clinic was able to take on a number of "hard" cases, such as the Michigan state civil rights aspect of the *International Union, UAW v. Johnson Controls*[10] case and a collection of cases, ultimately certified as a federal class action, challenging Michigan's amendment of its statutes to reduce the frequency of parole review for long-term inmates. Reingold provides an insightful evaluation, listing both pro's and con's, of the clinic's handling of these "hard" cases, a term which he defines as having these characteristics: The "hard" case:

> (1) poses the risk of taxing the program's resources; (2) may be controversial either in the public eye or to some constituent group of the law school; (3) is likely to outlive (figuratively if not literally) the

9. *Id.* at 553-54.

10. 499 U.S. 187 (1991). While the United Auto Workers' counsel pursued the Title VII case to the U.S. Supreme Court, individual Michigan plaintiffs, represented by the Michigan Law School Civil Clinic, relied on state law to challenge Johnson Controls' failure to rehire them after a layoff before the Michigan Department of Civil Rights. At issue in all cases was the company's policy to bar all fertile women, as defined, from specific jobs making batteries, due to environmental hazards.

students assigned to it, and (4) presents legal issues of a scope, scale, character, or complexity not ordinarily handled by the program.[11]

II. A RECURRING PROBLEM

Clinic directors and faculty, not to mention law school deans and curriculum committees, have long struggled with issues of clinic caseload design. In another (and even more recent) article in the CLINICAL LAW REVIEW, Veteran clinician Philip Schrag of Georgetown University recently described how his law faculty dealt with choosing goals, subject matter and intensity of clinical practice over the past two decades.[12] Beginning with the proposition that clinic design must be a function of rationally selected and articulated goals,[13] Schrag describes fifteen often-cited goals which have guided him in his work over three decades creating six different clinical programs. Goals selected will "point [a clinic] in either direction with respect to the question of whether to specialize at all."[14] In addition to the rationales cited by Reingold for choosing to specialize or not, or to do simpler, more repetitive cases or not, Schrag specifically recognizes that "[a] significant extrinsic factor affecting the choice to specialize is the nature of the community in which a clinic is located. In a small city, for example, the paucity of cases of one or two particular types may preclude specialization."[15]

Schrag tells two instructive stories about clinic design at Georgetown's Center for Applied Legal Studies (CALS). In the early 1980s, following a decision by the school's administration to limit clinical terms to a single semester, the CALS staff reevaluated its program and, in light of its primary goal of

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11. Reingold, *supra* note 1, at 546-47.

12. Philip G. Schrag, *Constructing A Clinic*, 3 CLINICAL L. REV. 175 (1996).

13. *Id.* at 179. Schrag quotes Peter T. Hoffman on the subject: "An effective clinical course should be the result of a rational process of selecting and adapting specific means to specified ends [starting with] the determination of course objectives [but this sequence] is rarely followed in reality." *Id.* (quoting Peter T. Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L.J. 277, 278 n.4 (1982)).

14. Schrag, *supra* note 12, at 191. *See also* Association of American Law Schools, *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 553-54 (1992) [hereinafter *In-House Clinic Future*] (making the same point while simultaneously calling for an expansion of the definition of the appropriate clinic case).

15. Schrag, *supra* note 12, at 191. Schrag sees the proper decision making sequence as first deciding whether cases should be larger and more complex, or "smaller," and from there proceeding to choose areas of specialization; the latter choice, he recognizes, is influenced by a number of important extrinsic factors, such as case-type requirements of funding sources; student practice rules; levels of student interest, coordination with the law school's curriculum, and other factors. *Id.*

"devolving as much responsibility to students as possible," chose to focus its caseload on Social Security disability and consumer protection small claims matters. Both types of cases would involve significant work (or even be able to be completed) within one term, and while the Social Security work was mainly fact-specific, it did involve work with experts, while the consumer protection cases "offered endless legal complexity."[16]

But by 1994, the staff sought to diversify its case offerings to meet the clinical faculty's desire to learn new areas of practice, and the students' desires to work in the area of international human rights. Ultimately, the faculty chose to work in the area of asylum hearings before U.S. Immigration and Naturalization Service (INS) hearing officers and resulting court hearings before U.S. immigration judges. Each type of case might be substantially completed within a semester's time, but while the cases were, from that perspective, manageable, they were not minor or small cases. As Schrag observes: "Each case involved high stakes, because a client could be deported to torture and death in her own country, but the universe of relevant facts and law could easily be mastered by a student within the clinic's semester."[17]

Thus, while faculty and student desire for change did indeed result in change at both Michigan and Georgetown, the faculty at Georgetown maintained its goal of devolving significant responsibility upon each student by selecting repetitive-type cases that were challenging both factually and legally, yet were able to be substantially completed within a semester. The larger issue then becomes whether, as a general matter, service cases can rise to or near the level of the "hard" cases Reingold describes, or at least do so often enough to satisfy the interest levels of both faculty and students, and still provide challenging learning experiences that meet the clinic's goals. I believe that they can. Indeed, for smaller schools that only offer one or two clinics, and have limited numbers of clinical faculty, they must. This would not preclude such clinics from also taking on some cases that are, from the outset, more difficult, complex and challenging.

III. REPETITIVE SERVICE-TYPE CASES ARE APPROPRIATE TEACHING VEHICLES

A. Regardless of the Number or Types of Clinics at a Given School, Each Clinic Should Have Within Its Caseload Some Service-Type Cases, or Casework Functions

There are so many advantages to relatively brief service-type cases that every clinic should afford its students the opportunity to

16. *Id.*
17. *Id.* at 196.

work on at least one. The high turnover rate of, for example, some types of welfare, housing, landlord-tenant and family law cases allows clinic students to perform a wide array of lawyering functions, see the results of their work, interact personally with clients, and face and resolve ethical issues. Even in specialty clinics featuring more complex cases in fewer legal areas, reserving some time for initial intakes and day-to-day solving of clients' problems makes sense.

But brief service cases alone do not reflect what a practicing lawyer's caseload looks like after a year or two. For that reason, every clinic should strive to offer students as balanced a set of client- and skills-related experiences as possible. This relates to both subject matter of cases accepted, and the learning opportunities of many types (analysis, traditional skills, cross-cultural exposure, etc.) afforded by those cases. Certainly smaller schools, not blessed with Georgetown's twelve clinics,[18] or Michigan's five,[19] must rely upon broad ranges of both case types and case complexity to provide a balanced clinical caseload.[20] This is particularly true for schools located in smaller communities which need representation by generalists.[21]

B. Repetitive, Service-Type Cases Predictably May Ripen into "Hard" Cases

Assuming that it is a good thing for clinical students to work on a variety of case types of varying complexity, including "hard" cases, can enough repetitive, service-type cases ripen into "hard"

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18. Schrag, *supra* note 12, at 178.

19. Michigan has three regular in-house clinics staffed by law school faculty members (Michigan Clinical Law Program, featuring three concentrations: civil, criminal and women in poverty; Child Advocacy Law Clinic, and Legal Assistance for Urban Communities), plus two innovative clinical programs staffed by outside attorneys (Environmental Law Program, affiliated with the National Wildlife Federation, and Criminal Appellate Practice). E-mail from Paul Reingold, Director, University of Michigan Clinical Law Program (Sept. 22, 1998) (on file at the South Royalton Legal Clinic).

20. This is not to imply that even at larger schools, the question of what case and experience mix to offer within any given clinic is an easy one. Philip Schrag notes that at Georgetown, each of the dozen clinics has "its own goals, subject areas, teaching methods, etc." Schrag, *supra* note 12, at 178 n.10. And Paul Reingold's article makes clear that in Michigan's Civil Clinic, there are still a sufficient number of repetitive service-types of cases to guarantee that students will "get into court early and often." Reingold, *supra* note 1, at 556. The issue posed by Reingold is whether any particular clinic, whether specialty or general, should accept primarily "hard," as opposed to "easy," cases. *Id.* at 546. This raises the question of whether service cases can be, or become, "hard" cases, and, if so, how many tough cases of this type a clinic should handle.

21. Both Reingold and Schrag acknowledge that community expectations play a large part in clinic design and mission. *See* Reingold, *supra* note 1, at 549, and Schrag, *supra* note 12, at 191.

cases so that a clinic is justified in basing its caseload on them? In my experience, the answer is yes. Even smaller schools, with far more limited clinical resources and smaller population bases from which to draw cases, have no problem in finding some "hard" cases, because they evolve naturally within the caseload.[22] Indeed, the general caseload can present enough difficult material to keep virtually every student busy each term on at least one complex case, while allowing time for each student to work on other matters that, although less complex, are highly instructive.

Vermont Law School's general civil clinic, known as the South Royalton Legal Clinic, has had a number of very challenging cases grow naturally out of its caseload over the years, and they continue to do so.[23] Because of the school's location in an area of

22. Both Reingold and Schrag note that great complexity can flow out of a standard caseload. Reingold in particular qualifies his definition of a "hard" case by acknowledging that "this is a loose definition, and . . . cases are relative." Reingold, *supra* note 1, n.7 at 547. Although he next insists that the distinction between "hard" and "easy" cases is fairly clear, he admits that his program "occasionally get[s] blind-sided" by a service-type case that blossoms into a "hard" one (the example is of a $300 medical bill collection defense that blossomed into an admirable class action which, four years later, resulted in a change of state law and multi-million dollar provision of free medical care to the indigent). *Id.* In my experience, the evolution of "standard" cases into far more challenging matters occurs more frequently than occasionally. Of course, my perspective is itself relative, and may be shaped by the workload in our campus's only real client clinic.

23. Clinic students have been involved in a variety of federal actions in the past 15 years, plus a number of Vermont Supreme Court appeals and other challenging cases. In *Derby v. Town of Hartford*, 599 F. Supp. 130 (D. Vt. 1984) clinic students successfully challenged a town's loitering ordinance on vagueness grounds. In *Blake v. O'Rourke*, Civ. No. 84-208 (D. Vt.) (dismissed Apr. 22, 1985), clinic students represented a class challenging the 1981 OBRA legislation which disallowed inclusion of actual work expenses as a factor in calculating welfare eligibility. The action was dismissed following the U.S. Supreme Court's decision upholding the legislation in *Heckler v. Turner*, 470 U.S. 184 (1985). *Kendall v. Brock*, 689 F. Supp. 354 (D. Vt. 1987), was a class action challenging the U.S. Department of Labor's failure to provide notice and opportunity to be heard prior to reduction or termination of federal workers compensation benefits. The case lasted over two years, had a preliminary injunction hearing, broad discovery and multiple motions hearings and status conferences, and a final trial on the merits; it resulted in a change in the Department's regulations to afford notice and hearing relief nationwide. Attorney's fees were recovered. In *Flint v. U.S. Department of Agriculture*, No. 96-CV-102 (D. Vt. Sept. 26, 1997), plaintiffs challenged defendant's refusal to extend homestead and leaseback/buyback protection to them following foreclosure on their farm. Homestead protection was ultimately afforded. Representation of these clients proceeded, for various reasons, simultaneously in three courts, federal district, U.S. Bankruptcy and state superior. *Mason v. Thetford School Board.*, 457 A.2d 647 (Vt. 1983), was an action by parents challenging a school district's failure to pay tuition for their child to attend a school of their choice. The case of *In re M.L.C.*, No. 84-048 (Vt. June 14, 1985) (dismissed as moot upon the client's release from confinement during the course of the case), involved a challenge (briefed and

the state underserved by the local legal services program,[24] it was natural for the law school administration and faculty to choose a public service focus for the clinic. The clinic's educational goals[25]

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argued) to the constitutionality of Vermont's emergency civil commitment procedures. *In re V.C.*, 505 A.2d 1214 (Vt. 1985), established that the special district court dealing with mental health commitments, upon finding that a patient is not receiving adequate treatment at the state mental hospital, has the authority to order the Commissioner of Mental Health to make best efforts to find an appropriate placement (but the court may not mandate any specific placement).

Two unemployment compensation appeals broke new ground in the state: in *Skudlarek v. Department of Employment*, 627 A.2d 340 (Vt. 1993) the court ruled that an employer's unilaterally imposed significant change in hours (in that case, an increase) for a part-time worker afforded good cause to quit. In *McGrath v. DET*, No. 92-523 (Vt. July 26, 1993) the court ruled, in a fully reasoned but unpublished opinion, that a claimant subjected to a sexually hostile work environment had good cause to quit. In *Howard v. Department of Social Welfare*, 655 A.2d 1102 (Vt. 1994) the court voided a state welfare regulation that tracked a federal one, and, relying upon the Americans With Disabilities Act, ruled that the Department could not refuse to provide ANFC benefits to 18-year-old students who could not graduate by age 19 due to disabilities. Certainly worth numbering among our difficult cases would be some of our family law matters (primarily contested divorces) and a few of our federal court disability cases.

24. Vermont Legal Aid (VLA), with which our clinic has always had a strong working relationship, once was able to provide attorney coverage for almost the entire state, except for a few "underserved areas," so called because of their distance from a legal aid office. Vermont Law School, and our clinic, lies in such an underserved area, on the border of a two-county area with a significant low-income population. In recent years, VLA's ability to provide attorney representation statewide has been reduced due to federal legal services budget cutbacks and restrictions on representation.

25. Not surprisingly, our clinic's goals are comprised within the 15 set out by Philip Schrag, which include: responsibility, doctrine and institutions, service, problem-solving, collaboration, cross-cultural awareness, understanding the role of emotions, coping with facts, values, ethics, creativity, authority, learning to learn, traditional skills and students' goals. *See* Schrag, *supra* note 12, at 179-86. Our evaluation criteria list most (but not all) of these, and virtually all of the others come up in evaluations in connection with the listed criteria. Four additional goals well worth explicitly adopting, or at least considering in connection with those listed above, include: developing analytical skills, dealing with unstructured situations, acting in role, and critiquing the capacities and limitations of lawyers and the legal system. *See* Marjorie A. McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand Their Beachhead*, 35 N.Y.L.SCH.L.REV. 239, 249 (1990); *In-House Clinic Future*, *supra* note 14, at 512-17; Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 614-17 (1984). *See generally* American Bar Association, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM at 135-221 (1992).

These goals, and even the clinical method itself, are not without their critics. *Cf.* Minna Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185 (1989) (challenging the centrality of acting in role as a hallmark of proper clinical method); Robert Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*,

were well served by a law office that afforded students the opportunity to represent clients in a wide variety of cases and act in advocating, negotiating and litigating on their behalf. While certain cases were minor ones easily resolved in weeks or even days (e.g., some utility, landlord-tenant and consumer complaints), other aspects of the caseload created a heavier burden, such as contested family law matters and impact cases in the public benefits area. With the exception of child support hearings, at which relaxed rules of evidence apply, our family law contests are done subject to the full rules of evidence, and many cases have involved protracted proceedings over a lengthy period of time. Because of these demands placed upon us by our public service caseload, within a few years of its founding, clinic staff decided both to lengthen the up-front substantive introductory classroom component[26] and to create a full-time option (13 credits) for the one-semester course. This proved to be very popular, and allowed us to broaden our coverage and take on, or continue representation in, cases of greater complexity. Balanced against this greater availability of student time was a subsequently created tenure-track status for the two "regular" full-time members of the clinical faculty, necessitating release time for writing. A third attorney, funded with a mix of soft and institutional money, has provided an important measure of stability in caseload supervision as the other two attorneys (including the director) have maintained their progress on the tenure and retention front.

In recent years, students enrolling in the clinic have increasingly chosen the part-time (six credits) option, in order to

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40 MD. L. REV. 223 (1981) and *"Tastes Great, Less Filling": The Law School Clinic and Political Critique*, 35 J. LEGAL EDUC. 45 (1986) (challenging clinical teaching methods as being prone to authoritarianism, and clinical critique of performance as being inadequate due to faculty disinterest in, or lack of capacity to critique, and faculty members' desires to shield their lawyering decisions from criticism). For replies to Condlin's articles, see generally Norman Redlich, *The Moral Value of Clinical Legal Education: A Reply*, 33 J. LEGAL EDUC. 613 (1983) and Kenny Hegland, *Condlin's Critique of Conventional Clinics: The Case of the Missing Case*, 36 J. LEGAL EDUC. 427 (1986).

26. Since 1983 that component has featured a three week intensive exposure to five broad substantive areas, plus simulation skills sessions in interviewing, counseling, negotiation and motions practice. During that time, students spend their time with our 600-page student manual, and, with few exceptions, do not meet or represent clients. The substantive areas are public entitlements (welfare, food stamps and home heating), family law (divorce, separation and child support), juvenile, landlord-tenant and public utilities, and disability-based entitlements (including Social Security disability insurance, Supplemental Security income and Medicaid). There are also classes on law office management, case preparation, discovery and state court practice. Our office routinely provides representation in bankruptcy, veterans benefits and consumer matters, but training in these is done on a case-by-case basis with the individual student responsible for the case.

maximize their chances of participating in other curricular options (including limited enrollment courses tested on the bar exam). Thus, with both attorney and student time increasingly constrained, our future will remain firmly tied to a traditional service caseload, out of which must come whatever impact/law reform/extra difficult (or "hard") cases we will do.

C. Even Administrative Law Cases of the Repetitive, Service-Oriented Type Can Constitute Sufficiently Difficult Material to Challenge Students and Faculty Alike, and Yield Valuable Lessons

Administrative law cases afford clinics ample opportunities to meet many of the goals of clinical legal education; criticism of them stems largely from the fact that at hearings, the rules of evidence are often not strictly followed, and there is no opposing counsel.[27] These are obviously serious drawbacks, and dictate that however good the case may be, a student assigned such a case should have, as a counterbalance, a caseload that includes other matters involving either or both of the missing elements. But the criticism does not compel the conclusion that administrative cases have low value as teaching vehicles. During the course of a term, they afford clinical students ample opportunity to exercise considerable responsibility for advancing the matter both factually and legally. Clients and witnesses may be interviewed, facts investigated, witnesses (including experts) consulted, hearings prepared and conducted, appeals perfected, and the like. Supposedly non-adversarial proceedings can be remarkably adversarial when the hearing officer assumes, consciously or not, the role of adversary or even antagonist. Some hearings (welfare, for instance) are adversarial, with the state agency represented by an assistant attorney general. Many administrative cases do not wrap up in a semester, and can take on complex characteristics. Ethical issues predictably arise and must be resolved. Within almost any area of administrative law, systemic abuses may be observed, leading to civil litigation, and perhaps class actions, in state or federal court. This has been my experience in state administrative hearings involving, in turn, vocational rehabilitation and ANFC, resulting in three pieces of impact litigation, two of them class actions in federal court. A federal administrative hearing likewise evolved into a significant federal class action. This is not to say that all administrative matters are tough cases; we know they are not. Nor is it to say that every class action is a good teaching vehicle. But a balanced caseload can produce balanced learning experiences of all types, among the most valuable of which is exposure to living human beings, their problems, hopes and fears, their cultures, and their needs. And

27. *See* Reingold, *supra* note 1, at 549, 553-54.

while becoming sensitive to these, the student must learn to marshall facts, a theory of the case, and compelling legal argument, sometimes in areas in which the law, or proof requirements, are not clear. It was in this context that my clinic found representation of a military veteran (and, later, his widow), and the former fiancee of another such veteran, to be both professionally and personally rewarding, as well as challenging. In many, if not all, respects, they were "hard" cases.

IV. STUDIES OF TWO VETERANS' CASES AS CHALLENGING ADMINISTRATIVE LAW CASES

A. Nelson K

1. The Case

In late autumn 1990, Nelson K[28] came to our clinic to get help re-filing an application for service-connected disability (and related health care) benefits, based upon a back injury. Records he brought with him showed that on October 13, 1966, at age 17, he had enlisted in the Army for three years but was honorably discharged early, on January 31, 1969, to reenlist for six additional years. He never finished that second service, as he requested discharge "for the good of the service," in lieu of trial by court martial; his discharge, effective March 24, 1971, was under "other than honorable conditions." In February 1979, the VA had determined that the character of this March 1971 discharge constituted a bar to award of VA benefits, based on findings that K had been absent without leave (AWOL) for a continuous period in excess of 180 days during the second enlistment, and his first obligated period of service was not considered "faithful and meritorious." He never appealed that decision.

During the course of the interview, as we learned more of his life, it appeared that Nelson might be suffering from post-traumatic stress disorder, or PTSD. He had served in Vietnam for a year, November 1967 to November 1968, primarily with the Headquarters Company, 15th Engineer Battalion, 9th Infantry Division, in the Mekong Delta region, and had had a number of combat experiences. His life in the military came to be characterized by alcohol and drug use. His life after the military was characterized by substance abuse, a chaotic personal life, several suicide attempts, and finally a conviction for second degree murder. When we saw him, he was free on parole, and beginning

28. In the following accounts, the names of the veterans and their family members have been changed for the sake of privacy. Substantiating materials for both cases are on file at the Sout Royalton Legal Clinic as part of the clients' confidential case files.

to put his life back together. The interview was memorable. K told us that when he first arrived in Vietnam he was diverted from his specialty, wheeled and tracked vehicle repair, into a combat infantry assignment with the "flame platoon," which, using flame throwers and other weapons, set up safe perimeters for other units. Two months later, and for the next six months after that, he served in the Mekong Delta primarily with the "Riverines" aboard a unique type of small, highly maneuverable U.S. Navy vessel. In that capacity he was a machine gunner on a tracked vehicle that, mounted inside such a boat, primarily served as a flame thrower. Operating in concert with similar vessels and larger mother ships, the small boats provided support to combat operations and were frequently fired upon. They, in turn, could select targets along the riverbank, and did so. While describing some of the unit's encounters, K became visibly emotionally upset.

The interview presented us with challenging proof problems. First, K's service record (DA 20, Enlisted Qualifications Record) showed that his military occupational specialties (or MOS) were "Wheeled Vehicle Mechanic," "Track Vehicle Mechanic," "General Vehicle Repairman," and "Wheeled Vehicle Repairman." There was no mention of service with a "flame platoon," on the river, on Navy vessels or with the Riverines. Nor was there any indication of precisely where he was posted. Second, his memory of precisely where the vessels operated was spotty. He was able to recall that the radio code for his vessel was either "Flame" or "Zippo 1" (or perhaps both at different times) and that they called a part of the river system where they sometimes operated "Snoopy's Nose," presumably because of the shape of the shoreline. Finally, he had not had any psychiatric or related treatment during his military service, nor could he recall, with one exception, any significant physical treatment, other than occasional visits to doctors for pain relief, given at the time of, or after, his back injury. He did recall being slightly wounded in the back of both legs with shrapnel in the spring of 1968, but said he was treated on a ship and released the same day; his medical records did not reflect this episode. We left further exploration of his experiences on the river to later interviews.

Two students, one a full-time clinician, the other part-time, had been assigned to this interview. They quickly undertook to divide up the tasks to be done by way of gathering basic evidence, while simultaneously learning about service-connected disability benefits,[29] and PTSD[30] (which K, now our client, had authorized us

29. Service-connected disability benefits are paid to veterans who can show that a disability was incurred in or aggravated by service. 38 U.S.C. § 1110 (1994); 38 C.F.R. § 3.303 (1997). [Note: Unless otherwise indicated, all citations are to current statutes and regulations which were also in effect at the time this case was being developed]. A "veteran" is a "person who served

in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." 38 U.S.C § 101(2) (1998). Discharge or release includes:

> . . . retirement from active service . . . the satisfactory completion of the period of active service . . . for which a person was obligated at the time of entry into such service in the case of a person who, due to enlistment or reenlistment, was not awarded a discharge or release from such period of service at the time of such completion thereof and who, at such time, would otherwise have been eligible for the award of a discharge or release under conditions other than dishonorable.

38 U.S.C. § 101(18) (1998). A discharge to reenlist is a "conditional discharge," if issued during the Vietnam era. 38 C.F.R. § 3.13(a)(2) (1998).

30. Post-traumatic stress disorder (PTSD) was characterized as an anxiety disorder by the *Diagnostic and Statistical Manual of Mental Disorders* 235 (3d ed. 1987) (DSM-III-R), in effect at the time of our initial client interview. According to DSM-III-R:

> the essential feature of this disorder is the development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience. The stressor producing this syndrome would be markedly distressing to almost anyone, and is usually experienced with intense fear, terror, and helplessness. The characteristic symptoms involve reexperiencing the traumatic event, avoidance of stimuli associated with the event or numbing of general responsiveness, and increased arousal.

Id. at 247.

The current edition of the DSM, DSM-IV, changed the criteria for establishing the existence of a stressor, by eliminating DSM-III-R's requirement that the experienced event be "outside the range of usual human experience and . . . be markedly distressing to almost anyone." *Diagnostic and Statistical Manual of Mental Disorders* 427 (4th ed. 1994) [hereinafter *DSM-IV*]. The new criteria, adopted by the VA in November 1996, are more subjective and in effect recognize that "[an event] may be traumatic to one person but not to another." National Veterans Legal Services Program (NVLSP), *The New Guide to PTSD Claims*, 8 VETERANS ADVOCATE, 89 (May-June 1997). To establish a stressor now, one must show that "(1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others, [and] (2) the person's response involved intense fear, helplessness or horror." DSM-IV, *supra* at 427-28. VA regulations include PTSD within the Schedule for Disabilities at 38 C.F.R. § 4.130 Diagnostic Code (DC) 9411 (1997). 38 C.F.R. § 3.304 (f) requires, for establishment of service connection for PTSD, "medical evidence establishing a clear diagnosis of the condition, credible supporting evidence that the claimed inservice stressor actually occurred, and a link, established by medical evidence, between current symptomology and the claimed inservice stressor." 38 C.F.R. § 3.304(f) (1998).

Detailed regulations governing proof requirements for PTSD are found in the VA ADJUDICATION PROCEDURE MANUAL M21-1. The section governing PTSD, formerly designated as section 50.45e, had required that service records support the veteran's assertion of exposure to a stressor, but it was amended during the course of our case on March 26, 1991 (VA Interim Issue 21-91-1) to conform with recently amended statutory and regulatory provisions. VA ADJUDICATION PROCEDURE MANUAL M21-1 § 50.45e (1989). The new section 50.45e read: "If the evidence shows the veteran engaged in combat with the enemy and the claimed stressor is related to combat, no

to investigate). In doing this, they had one advantage: our clinic had, the previous spring, completed representation in another VA/PTSD case, so we had some institutional memory of useful approaches to adopt. That case, Mark R, is described below at pages 120-26.

2. Fact Gathering and Theory Development

In short order the students[31] began to sharpen their knowledge of the VA benefits system, primarily with the help of substantive VA resource materials published by the Vietnam Veterans of America (VVA) and the National Veterans Legal Services Program (NVLSP).[32] They also had what we termed "The Red Book" (based on the color of its cover at the time) available to them. This is a publication prepared by the U.S. Army and Joint Services Environmental Support Group (ESG) describing how personal military records can be obtained and used to prove PTSD claims.[33]

Through careful reading, much correspondence and substantial followup on leads, by May 1991 the clinicians had formulated a basic theory of the case (probable PTSD, possibly able to be proved, and a back injury, said to be congenital in the service records, difficult to prove and of uncertain severity) and gathered a substantial number of military service and medical records. The first goal was to determine whether or not a service-connected disability existed. This would involve discovering and developing medical evidence of K's former and current mental states for the PTSD claim, evidence of combat experience, and any

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further development for evidence of a stressor is necessary." VA ADJUDICATION PROCEDURE MANUAL M21-1, § 50.45e *as amended* (Feb. 13, 1997). Section 50.45e has been redesignated and is now located at M21-1, Part VI, para. 11.38 (Feb. 13, 1997). This paragraph no longer includes the quoted language of para. 50.45e, but maintains the same approach. *Id.* Although the amendment helped us at the time in making proof, it did not solve our problems, since his official individual service records did not explicitly show that K had engaged in combat. *See also* 38 U.S.C. §§ 1154(b), 3.304(d) (1998).

31. Betty Chalifoux and Colleen Stiger worked into January 1991, when Christian Root took over the case for the spring term.

32. The VVA book was KEITH D. SNYDER ET AL., GUIDE TO VETERANS BENEFITS (REV. ED. 1985). Over the next year, our students quickly moved from these materials to NVLSP's comprehensive two-volume (now with a 1992-93 Supplement) publication, M. WILDHABER ET AL., VETERANS BENEFITS MANUAL: AN ADVOCATE'S GUIDE TO REPRESENTING VETERANS AND THEIR DEPENDENTS (1991). They also used VETERANS EDUCATION PROJECT ET AL., THE VETERAN'S SELF-HELP GUIDE TO DISCHARGE UPGRADING (1990).

33. U.S. ARMY AND JOINT SERVICES ENVIRONMENTAL SUPPORT GROUP (ESG), GUIDE FOR THE PREPARATION AND SUBMISSION OF POST TRAUMATIC STRESS DISORDER RESEARCH REQUESTS (3d ed. 1996). The ESG is now known as the U.S. Armed Services Center for Research of Unit Records, and is located in Springfield, VA.

useful information on the back claim. Assuming the existence of a service-connected disability, we would look at separating the two periods of service to see if benefits could be payable under either the first period of enlistment, for which we would need to show "honest, faithful and meritorious" service, or under the second period of service, for which we would need to show a "compelling circumstances" exception to the bar on benefits for 180 days AWOL.[34]

As we came to know our client and his facts, the PTSD claim loomed larger, and the back impairment, although supported by some evidence, receded in importance. Proof of combat experience was essential to establishing not only the PTSD impairment, but also our defenses to the bars to benefits. Our first step toward proving this came in a letter from the U.S. Army Military History Institute, Carlisle, Pennsylvania, which said that while it had no published histories of the 15th Engineer Battalion, it did have a unit history published in a secondary source called *Vietnam Order of Battle*; an enclosed page from that book stated that the 15th Engineers were part of the 9th Infantry Division, and that parts of the 15th "became specialized in Riverine operations required by the 2d Brigade's unique Vietnam mission."[35] Also enclosed were bibliographies of the 9th Infantry Division (16 items) and "Riverine Warfare, Vietnam" (31 items). We ordered copies of what looked helpful.

The next response gave us less cause for hope, and highlighted the evidentiary bind our client was in. The U.S. Naval Historical Center indicated that it had histories and deck logs of commissioned U.S. Navy ships only, and this did not include any landing craft or river patrol units that operated with the Mobile Riverine Forces (MRF) in Vietnam. The letter added: "It [K's craft] may well have been a US Army craft since Mr. [K] was a member of the US Army."[36] However, the author did give the valuable tip that the U.S. Army Center of Military History,

34. 38 C.F.R. § 3.12(c)(6) (1998). This section also provides that the bar will not apply "if there are compelling circumstances to warrant the prolonged unauthorized absence." *Id.* Factors to be considered include length and character of service exclusive of the AWOL period, the reasons for going AWOL, and existence of a valid legal defense for the absence which would have precluded a conviction for AWOL. *Id.* The 1979 VA decision in fact appeared to have separated the two periods of service, finding the second period barred by the 180 day AWOL provision, and the first barred by 38 C.F.R. § 3.12(d)(4), which provides that a discharge for willful and persistent misconduct is a bar to benefits. 38 U.S.C. § 3.12(d)(4) (1998). That section goes on to say, however, that "a discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious." *Id.*

35. SHELBY L. STANTON, VIETNAM ORDER OF BATTLE 170 (1981).

36. Letter from Dep't of the Navy 1 (Apr. 19, 1991) (on file with The South Royalton Legal Clinic).

Washington, D.C., might be of assistance.

Then, our first major break occurred. In early May 1991 a librarian at the National Archives, Kathryn Jacob, wrote that she had located 12,500 pages of records dealing with the 15th Engineer Battalion.[37] More important, she recommended two books which she thought "might be helpful." One of them, she said, was *Seven Firefights in Vietnam*, which "contains a chapter on 'Fight #4: The Fight Along the Rach Ba Rai,' also known as the 'Battle of Snoopy's Nose.' The chapter contains maps, illustrations, and photographs of ships used on the river and references to the 'Riverines.'"[38] We ordered the books, and over the summer of 1991 retained the services of Robert Pommer, a Catholic University law student affiliated with Columbus Community Legal Services in Washington, D.C., to go to the National Archives and copy what was useful on the 15th Engineers. His work yielded documentary proof that elements of the 2d Brigade, 9th Infantry were attached to the U.S.S. Benewah (later established to be a Riverine "mother ship") and engaged in frequent combat with Viet Cong forces.[39] Journal entries of January and February 1968 (the time of the Tet Offensive)[40] for the 15th Engineers likewise showed frequent contact with Viet Cong forces and referred to the "flame section," "flame tracks," "six boats," "Mobile Riverine Force" and "everyone playing infantry." Although K's name did not appear in any journal entries, few names did, and our circumstantial case slowly grew stronger.

With our client's approval, we decided to gather as much evidence as possible before seeking to reopen his application. Over the next eighteen months we absorbed the records that began to come in, pursued new leads, and undertook to figure out how to use the information we did have to generate new information and usable evidence. A particularly useful piece of information we

37. Letter from Kathryn Jacob, Suitland Reference Branch, National Archives (May 6, 1991) (on file with The South Royalton Legal Clinic).

38. Jacob, *supra* note 37. The book referred to is J. ALBRIGHT ET AL., SEVEN FIREFIGHTS IN VIETNAM (1970). The other book was W. FULTON, VIETNAM STUDIES: RIVERINE OPERATIONS 1966-1969 (1970). It contains photos and maps with references to "Snoopy's Nose."

39. The U.S.S. Benewah's journal of contact with Viet Cong forces for just one day, May 8, 1968, is eight single-spaced pages long, and concludes with references to ambushes of "monitors" (Riverine vessels) and an "ATC flame thrower," resulting in 10 U.S. WIAs.

40. The Tet Offensive was a surprise attack throughout South Vietnam by 84,000 National Liberation Front (NLF) and North Vietnamese Army (NVA) troops, launched on the Vietnamese New Year, the night January 30-31, 1968. ENCYCLOPEDIA OF THE VIETNAM WAR 536-41 (Stanley I. Kutler ed., 1996). Designed to regain the initiative in the war, the attacks, which lasted for a week in Saigon to early March in Hue, were a military failure for the NLF and NVA, but began the process of changing American public opinion on the war, resulting in eventual U.S. withdrawal. *Id.*

received (from the Center of Military History) was a list of the commanders of the Riverine infantry battalions during the period at issue. We found their current addresses, wrote to several, and one responded; he would later supply us with authoritative information on the structure of the 15th Engineer Battalion. During this time we also filed a court action to gain access to K's state prison medical records, and reviewed them; reviewed new medical evidence from the state mental hospital; and concluded a series of probing interviews of our client, and began to distill his story into affidavit form. We also pursued leads to identify witnesses to our client's behavior before, during and after military service; to get whatever information we could from the U.S. Navy to substantiate K's story, and to identify a competent psychiatrist to meet our client and render a diagnosis of his past and present mental conditions.

In the spring of 1993 we re-applied for VA benefits, and also filed applications for discharge recharacterization with the Army Board for Correction of Military Records (ABCMR)[41] and Army Discharge Review Board (ADRB);[42] each application was supported by new evidence[43] and a memorandum, and each application was rejected. The VA decision did not discuss the new evidence in any detail (it did not even mention the new psychiatrist's opinion or probative x-ray report), characterized the rest of the evidence submitted as redundant or mere statements, and concluded that the bar to benefits remained in place.[44] We appealed the VA

41. *See* 10 U.S.C. § 1552 (1998) and 32 C.F.R. § 581.3 (1998).

42. *See* 10 U.S.C. § 1553 (1998) and 32 C.F.R. § 581.2 (1998).

43. The best of the new evidence was a recent report from Ronald L. Green, M.D., a psychiatrist from Dartmouth-Hitchcock Medical Center, stating that during and since the military, K had shown numerous signs and symptoms of PTSD. A second piece of new evidence was a recent x-ray report indicating that there was a metallic foreign body, irregular in shape, located in K's right thigh, and that it "has the appearance of being a piece of shrapnel." It was also noted on another view of both upper femurs that K had multiple metallic foreign bodies, "one of them shaped as a pin and the other one shaped as clips." However, because there was no irregularity in shape or deformity to these pieces (as opposed to the first piece, which was irregular), the roentgenologist was unwilling to certify that they were shrapnel. In an interview with us, K had said that he thought that the B-40 rockets were Russian-made and may well have contained pin-shaped shrapnel, based upon remnants he had found after rocket attacks.

44. The negative decision of the ABCMR was grounded on the veteran's failure to apply for relief within three years of his date of discharge, pursuant to 10 U.S.C. § 1552(b) (1993); the Board could have waived the three year limit if it found it "in the interest of justice" to so decide, but was unwilling to do so. Letter from David R. Kinneer, Executive Secretary, Dep't of the Army, ADRB 2 (Sept. 24, 1993) (on file with The South Royalton Legal Clinic). The decision of the ADRB was based upon the veteran's separation over fifteen years prior to the filing of his request for review. *Id. See* 10 U.S.C. § 1553(a) (1998).

denial.

Summer 1993 brought terrible news: K was diagnosed with lung cancer. He commenced treatment at a private hospital, as VA medical care was still denied him.

We prepared for his appeal hearing by interviewing relatives, drafting affidavits, classifying new information on the Riverines, and scheduling a new consultation with Dr. Green, the psychiatrist. We supplied him with all of the evidence we had amassed to date, so that he could compare it with his patient's account of his life. Our letter to him of February 7, 1994[45] was an admirable piece of student work, reciting our involvement with him to date (and enclosing copies of all prior correspondence with prior enclosures); briefly outlining the theory of the case and its procedural posture, and enclosing three affidavits of our client and family members; eight articles establishing that elements of the 15th Engineers were assigned in support of the Mobile Riverine Force and saw substantial battle, and ships' histories (with daily logs) of the U.S.S. Benewah and U.S.S. Colleton which, based on the eight articles and their own logs, were shown to have been "mother ships" to the small Riverine vessels. We asked that he first review all the material, then see K again, and later answer interrogatories from us. Finally, we pursued developing a new legal theory: that in addition to (or as part of) PTSD, K had suffered from "insanity"[46] as defined in the VA regulations, during his service and thereafter, and therefore was not subject to the bar on benefits.

At hearing in April on K's renewed request to reopen his claim, a report and interrogatory responses from the psychiatrist firmly established that K's family background included factors that would make him vulnerable to PTSD; that he had suffered

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45. Letter from David Royer, Student Intern, South Royalton Legal Clinic 1 (Feb. 10, 1994) (on file with South Royalton Legal Clinic). David Royer, who wrote it, also did a fine job of organizing and correlating the very substantial amount of evidence we had received to date. He would go on to represent K at his April 1994 appeal hearing, and present new evidence which he had helped to develop. David's work built upon all the prior work done by clinicians since May 1991: Jennings Cantrell, David Venman, Rob Honigman, Rachel Houseman, and Gerry Tallman.

46. An insane person is:

> one who . . . exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.

38 C.F.R. § 3.354(a) (1998). The bars to benefits recited in the character of discharge regulations do not apply if "it is found that the person was insane at the time of committing the offense causing such discharge." 38 C.F.R. § 3.12(b) (1998).

from combat-induced PTSD, and that it was highly likely that his PTSD both caused his AWOL behavior and also rendered him "insane" as defined in the regulations. An affidavit from K's sister, Linda, indicated that their father deserted the family when Nelson was three years old. Their mother worked and raised the family, but they never had much money. Before entering the military, Nelson was involved in some petty thefts, and was sent to "some kind of religious camp or school" in Vermont. He then took the family car and wrecked it, and was given the choice by a judge of going to jail or joining the Army. When Nelson got back from military service, he "was really wacky." She said she remembered particularly the times he spoke of a soldier who was standing right next to him being blown apart by enemy fire. After his return, Nelson was not functional, drank heavily and had no job skills. He told his sister of his belief that he could separate his mind from his body. After their mother died, Nelson lived with Linda. He was drinking heavily, and owned several guns. He would at times hide on the porch and scream, "Incoming!" and throw himself behind couches, or onto the floor. At other times he would hide behind furniture, and became obsessed with the shrapnel remaining in his body. He became deranged and violent at this time, and stopped talking about Vietnam. At this point Linda and others were afraid of Nelson, especially when he was drunk or drinking. He was violent and frightening, and a "lost soul." Private medical records showed two suicide attempts in the military, and two after discharge. Military medical and discharge records showed "attempted suicide" while in the military. Although the existence of "identifying body marks, scars, tattoos," "nervous trouble," "depression or excessive worry," and "frequent trouble sleeping," were not noted on the induction physical examination form (SF-88), nevertheless, the person completing the discharge medical examination form listed all these as "lifetime problems," without explanation.

K's story was put into evidence by way of both affidavit and direct testimony. He said that one to two weeks after his arrival in Vietnam in October, 1967 he "was assigned to a position in the field with the flame platoon." Initially he "served as a gunner on a three-quarter ton truck with a . . . machine gun mounted on the back." Later he served as a driver/gunner on a track-mounted flame thrower. His unit "set up security perimeters for other units so they could 'dig in.'" On one occasion that month he was working on a road between "Rubber Arm's House," a name given by the soldiers to a particular location on the road, and "Bearcat," the American base, working on a mine sweeping operation. A two-and-a-half ton truck carrying two ARVN (Army of South Vietnam) soldiers came toward them. His group signaled them to stop, which they did; when the two ARVN soldiers got out of the truck, a

mine exploded under them, killing one and injuring one. K drove the injured man to a field hospital. In January 1968, a U.S. Army officer was killed and his driver wounded in an ambush. K's flame platoon was sent to secure the area. Upon arriving at the scene, he fired his machine gun into the area where the Viet Cong were suspected to have been. A three-quarter ton escort truck was also there, and the gunner on it began firing in the direction of vendors along the road, among whom were women and children. K "saw two women drop behind a bank, but [he] did not know if they were hit by, or dodging, bullets." Later that month he was assigned to the Riverine Force; he was a machine gunner on a tracked-vehicle flamethrower on a vessel (which, we asserted at a later hearing, operated often in the "Snoopy's Nose" area). On the river, he experienced about thirty firefights in which no one was injured or killed, but several others in which they were. On one occasion a boat near his was hit by a B-40 rocket; as he understood it, the boat captain was killed. On another occasion, he "saw a sailor who had lost an arm . . . being taken off a boat." He recalled that during one mission in or about April 1968, "[his] boat began taking enemy fire . . . As [it headed to shore], a sailor returned fire with an M-79 grenade launcher. The grenade [apparently] struck an [overhead] tree limb and exploded." The sailor, about 10 feet away, was hit in the throat by shrapnel, bled profusely and was evacuated. On yet another occasion (he recalled it being in April or May, 1968) several boats came under B-40 rocket attack. When it was over, one man lay dead, another was injured, and K had shrapnel wounds in the backs of both legs. He assisted with some difficulty in helping to offload the body of the casualty. K succeeded in getting medical help to remove most, but not all, of the shrapnel from his body. On another occasion (he recalled it as being during the Tet Offensive) K was hurried off the river to Saigon to be positioned at a machine gun emplacement at one end of the "Y" bridge.

In July 1968, he left the Riverines after a transfer to the 264th Transportation Company and was shifted to a post further north. Soon thereafter, while on convoy duty with a ten to twenty vehicle column, they came upon a serious traffic accident involving two civilian trucks and a track vehicle. The trucks were in flames, and K and two others were told to "clean it up." They pulled the body of a badly burned child from the truck and left at least one body in the truck. The child, still alive, was placed by the side of the road in the care of nearby civilians. On another occasion, during convoy duty, his column became involved in a small fire fight in which a pregnant civilian was wounded in the stomach by shrapnel. She walked up to K's track, pulled up her dress and showed him the hole in her stomach.

As a result of his combat experiences, K began using drugs to

handle the psychological effects of combat. While on the river, he used them sparingly, because he felt he needed all his faculties to stay alive. Later, however, with the Transportation Company, he felt the danger was less, and began smoking opium and taking speed and downers. Upon returning to the United States, he felt that he was a completely different person from who he had been, and began to use alcohol. He reenlisted, went AWOL, and was eventually discharged. He found that he was unable to develop relationships with others, hold a job or function normally in daily life. He began to relive some of the combat experiences, had trouble sleeping and experienced unexplained outbursts of anger, particularly toward family members. He became suicidal, and tried three times to kill himself, once by slashing his neck (in 1974), and on two other occasions by driving his car into solid objects. In 1982, he was convicted of second degree murder for a crime committed when he had been drinking. (Other evidence showed that on two occasions between his discharge and 1982 conviction, he had stabbed a person, both events occurring when he was startled by the unexpected arrival of someone he didn't like).

At the hearing, K described how, in his view, he came to have trouble dealing with people:

> [P]rior to my transfer up north into this moving company they had me with I was in daily combat, and never really had a chance to think much about what I was doing, who I was doing it to, or who I [was] doing it with, or anything else. It was just a do it type of a situation. Do it or die. Then when I got up north it was a whole different set of circumstances where we are in a presumably sa[f]e situation, and they wanted us to be friendly with the villagers and the people around, you know, to interact with the[m] socially. I found that very difficult if not impossible to do because what happened was that while I was down in the south I had to take the opinion or the position that those villagers and their property and possessions and everything else that they didn't have any value. That was the only way that I could function there was that those people and their property had no value, and then I get up north and they start trying to drill into me that these people have value, and I couldn't accept that because if the people up north had value then that meant that the people down south had value, and that meant that what I had done, excuse me (crying), what I had done down south was really wrong. So, I tried to block it out with the use of drugs, more alcohol, and sometimes in behavior. I carried that with me back to the States with my use of terpine (sic) alcohol, and even behavior. I just couldn't accept the people, even later when I was married and had a child of my own. I don't think I ever really accepted that they had value, nor could I love them, because to place that kind of value on anybody would again revert back to that first eight months in Vietnam where people couldn't have value, or what I was doing was wrong. That's where I think I got a lot of my

> opinions that I carried through most of my life from that period of time. That's all I have to say.[47]

Offered in support of K's testimony were all the literature and records shown to Dr. Green, including a letter from the retired U.S. Army colonel who commanded the 15th Engineer Battalion during K's service with it in Vietnam. He was of the opinion that if K's records showed that he served with "HHC" of the 15th, he did not doubt that K had experienced the incidents he reported. The author of a now-declassified Army War College Case Study about Riverine operations for 1966-1970, the Colonel indicated that typical encounters on the waterways "were often extremely violent and short-lived. RPG's [rocket-propelled grenades], Claymores [mines], grenades and [a]utomatic weapons fire could erupt from concealed positions along the waterways completely without warning. If the VC [Viet Cong] wanted to stay a fight, or were cornered, quite a vicious battle could develop."[48]

The student clinician, David Royer, argued that the law no longer required independent evidence in official military records of occurrence of a particular stressor;[49] that lay evidence alone was

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47. Transcript of hearing, April 13, 1994, 14. In response to the hearing officer's question about what caused his AWOL period from March to December 1970, K said, "It was just everything. I didn't want to play anymore. . . . I just didn't want to be there anymore. So, I left." *Id.* at 20. He further testified that after turning himself in and being sent to Fort Devens, he developed the belief that he could separate his mind from his body, and shared this belief with a psychiatrist. *Id.* at 16. His discharge followed shortly thereafter. *Id.*

48. Letter from Thomas C. Loper, Colonel, U.S. Army (Ret.) 1 (Feb. 17, 1994) (on file with the South Royalton Legal Clinic). The literature submitted at hearing did not specifically refer to K by name, but did establish that elements of the 15th Engr. Bn. 9th Inf. Div. USARPAC, and in particular, HHC (Headquarters, Headquarters Company), were assigned in support of the Mobile Riverine operations and saw substantial combat action in the Mekong Delta region during K's service in Vietnam. Considered together, the ships' histories, the colonel's letter, K's testimony, and K's discharge records (which did indicate cryptically that he participated in Vietnam Counteroffensives PH III, IV and V, and PH Tet, and was awarded the Vietnam Service Medal and Vietnam Campaign Medal), would allow inferences to be fairly drawn that he was present at the site of combat and had experienced combat. In addition to the military records reciting the history of the 15th Engineer Battalion and the book by Stanton, *supra* note 35, the materials included such titles as: *Round Two for the Ironclads*, ARMY DIG. Jan. 1968, Maj. R. Funderbunk, *Warfare in the Delta*, INFANTRY, Mar.-Apr. 1968, at 41-42; LT. GEN. J. HAY, JR., VIETNAM STUDIES: TACTICAL AND MATERIAL INNOVATIONS 66-77 (1974); and R. Weaver, Jr., *The Second Mobile Riverine Force: A Page from History,* XII JOURNAL OF THE COUNCIL ON ABANDONED MILITARY POSTS, Jan. 1981, at 3-10. The study written by Col. Loper was entitled *The Mobile Riverine Force, or The Marriage of the Brown Water Navy and the Rice Paddy Army*, U.S. Army War College, (1970). It was submitted into evidence at a later hearing.

49. VA ADJUDICATION PROCEDURE MANUAL M21-1, § 50.45e *as amended, supra* note 30 and Wood v. Derwinski, 1 Vet. App. 406 (1991) (Steinberg, J.,

sufficient to establish that the veteran engaged in combat;[50] that the VA cannot use unsubstantiated medical opinions to refute an expert opinion of the type we had offered,[51] and that a service-connected disability can be established even though the claimed condition was not diagnosed in the service or for many years after service.[52] On the issue of the 180-day AWOL bar, he argued that the initial enlistment should be considered separately from the second,[53] and, considered on its own merits, the first enlistment was not subject to the bar because K did not amass 180 days of AWOL during the first three years of service. Nor was the first period disqualified due to "willful and persistent misconduct" because his AWOL time was insignificant during the first three years.[54] As to the second period of service, which did have well over 180 days of AWOL, Royer argued that while the bar did apply, there were "compelling circumstances," as defined in the regulations, to allow the bar to be lifted. (This argument, our weakest in terms of the kinds of proof required by the regulations, was made only in a memorandum of law). Finally, he argued that all the evidence, including the medical evidence, established that K was insane at the time he committed the offense causing his discharge, and the bar to benefits therefore should be removed.

In his July 1994 decision, the VA senior claims analyst ruled that the first period of service was under dishonorable conditions for VA purposes, and in any event was not faithful and meritorious; the second period was barred by the 180-day AWOL rule, without evidence of compelling circumstances to overcome it; and there was no evidence of combat experience. The decision did not state whether or not any service-connected disability existed.

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dissenting).

50. *See* Tryteck v. Derwinski, 3 Vet. App. 153 (1992).

51. *Id.*

52. *See* Cosman v. Principi, 3 Vet. App. 503 (1992) and 38 C.F.R. § 3.303(d). *See also* Caluza v. Brown, 7 Vet. App. 498 (1995), *aff'd* 78 F.3d 604 (Fed.Cir. 1996), *reh'g den.* (1996).

53. We argued that K's first enlistment should be considered separately because it was controlled by 38 C.F.R. § 3.13, which provides that a discharge to reenlist is conditional if issued during the Vietnam era, but even where such a discharge occurs, it will be considered unconditional if (1) the person served for the period of time obligated at the time of entry; (2) "the person was not discharged . . . at the time of completing [the first obligated period] due to an intervening . . . reenlistment," and (3) "the person would have been eligible for a discharge . . . under conditions other than dishonorable [then] except for the intervening . . . reenlistment." 38 C.F.R. § 3.13(c) (1998).

54. We relied upon *Winter v. Principi*, in which the court held that a serviceman's AWOL offenses were persistent misconduct because they amounted to 18% of his service time. Winter v. Principi, 4 Vet. App. 29, 32 (1993). By contrast, K's AWOL time in his first three year obligated period was only 5.3%, all of the lost time coming after a year of faithful and meritorious service in Vietnam.

It did not mention the new medical evidence or any of the evidence showing combat experience of the 15th Engineer Battalion, nor did it address the insanity argument.[55]

K's physical condition rapidly worsened during the summer of 1994, as the cancer spread from his lungs to the spine and brain. By early October we were able to establish a service-connected disability of cancer based upon presumptive herbicide (Agent Orange) exposure[56] and the VA awarded medical care benefits solely for treatment of lung cancer. K was too ill to attend his VA appeal hearing that month, so a clinic attorney and student, Eric Lopez, appeared alone on his behalf. The hearing officer affirmed the prior denials. In December, K died. His widow, Anna, had energetically assisted him in all phases of his life since their marriage during his incarceration (she was a health care worker in the prison), and she vowed to carry on his case. We filed an application for accrued benefits,[57] Dependency and Indemnity Compensation (DIC),[58] Dependents' Educational Assistance,[59] and burial benefits[60] on behalf of her and their child. A claim was also

55. The decision maker did rule that pursuant to 38 U.S.C. §. 17 the claimant was eligible for medical benefits based upon the first full period of service (1966-1969) "for any disability determined to be service connected" but made no ruling on whether such a disability existed. A Statement of the Case prepared in September 1994 addressed our August 1994 Notice of Disagreement contentions, but concluded that "the record contains absolutely nothing from a psychiatric standpoint," again ignoring Dr. Green's letter and interrogatory answers.

56. *See Diseases Associated With Exposure to Certain Herbicide Agents (Multiple Myeloma and Respiratory Cancers)* 59 Fed. Reg. 29,723 (1994) (to be codified at 38 C.F.R. pt. 3).

57. Upon the death of a veteran, periodic monetary benefits to which he or she was entitled at death, or those based on evidence in file at the date of death and due and unpaid for up to two years, shall be paid to survivors in this order: (1) spouse, (2) children, and (3) dependent parents. 38 U.S.C. § 5121(a)(2) (1996); 38 C.F.R. § 3.1000(a)(1) (1998).

58. DIC compensation benefits are available to a surviving spouse, child or dependent parent of a veteran who has died from a service-connected disability or injury. 38 U.S.C. §§ 101(14) and 1317 (1998); 38 C.F.R. § 3.5(a), (c) (1998).

59. The spouse and dependent children of a veteran who has died of a service-connected disability are eligible for educational assistance. 38 U.S.C. § 35 (1998); 38 C.F.R. pt. 21, subpt. C (1998).

60. See 38 C.F.R. § 3.1600 with respect to burial expense allowances, grave markers and national cemetery burial rights. 38 C.F.R. § 3.160(b)-(d), (f), (g) (1998). Award of the burial allowance was an issue because after Nelson's death in December 1994 the local VA office had told Anna that she was eligible to receive the burial allowance. After she incurred the bill for Nelson's funeral, but before it paid her the allowance, the VA reversed its decision and refused to pay, on the ground that the award had been made in error, since the bar to compensation also operated as a bar on payment of a burial allowance. We appealed, and the issue was not resolved for two and a half years, as part of the overall final resolution of the case.

timely filed for inclusion of K's survivors as parties to the Agent Orange [Payment] Program.[61]

K's case was finally resolved after 30 additional months and two additional hearings. Following a hearing in May 1995, the hearing officer reaffirmed the bar to benefits by reasoning that "service connection for [PTSD] is not in order when the evidence does not establish a causal link between the diagnosis of [PTSD] and military service, if there is no verifiable objective qualifying stressor."[62] This opinion was notably the first official VA document to recognize evidence in the file indicating that Dr. Green had rendered a diagnosis of PTSD. All previous decisions had ignored it.

In February 1996, the Board of Veterans' Appeals held a hearing on our appeal. We were determined to leave nothing to chance with the record, so clinicians Michael Alevy and Jonathan Kilburn, supported by work-study student Stephen Zakos, prepared and submitted a thick binder containing 36 of our strongest exhibits, including some new exhibits. Additional evidence was submitted in the weeks following the hearing. Some of the evidence consisted of newly discovered medical, psychiatric, and parole records. A 1976 community mental health services report acknowledged K's severe alcohol problem, yet also suggested that "upon more careful examination the problem appears to be more of one involving anxiety and depression, feelings of failure, feelings of worthlessness and helplessness." A 1982 forensic report recounted K's "marginal" early family life. The report also revealed that he may have been sexually abused as a youth (outside the home, at a residential youth placement). Further, the report discussed K's service with the flame platoon in Vietnam, the stabbing, the suicide attempts, the murder episodes, chronic post-service depression and alcoholism. It concluded that an insanity defense in his murder trial "might be successful." A 1989 letter from a VA psychologist, written when K had been abstinent from alcohol for seven years, suggested that it would be important for K "to eventually be able to process some of your feelings, as a sober individual, regarding your experience in Vietnam." The psychologist recommended that he contact the local Vet Center to arrange participation in "some form of

61. This program provided payments to veterans or their survivors benefiting from the court's decision in In re: "Agent Orange" Product Liability Litigation, MDL No. 381 (E.D.N.Y. 1985). The class action resulted in creation of a settlement fund of $180 million, a portion of the fund was set aside to help fund the activities of programs which could assist the class, such as NVLSP. Our client, Anna, received a modest distribution from the fund.

62. Dep't of Veterans Affairs, Hearing Officer's Decision, at 5 (May 2, 1995) (enclosed as Supplemental Statement of the Case, VA to Anna K, October 20, 1995). Clinician Scott Moore represented Anna at this hearing.

posttraumatic stress group meetings/workshop, etc." He went to the Vet Center, and a counsellor there in 1991 wrote that K's work on his problems "allowed him to re-learn to be a citizen in this society. I say re-learn because Mr. [K]'s Vietnam experiences and subsequent life-style allowed him to drift outside this socities (sic) behavioral norms." Finally, a 1995 letter, written by a psychologist who had known Nelson since 1973, said that Nelson was in treatment for chronic alcoholism and depression from 1973 to 1980, and during that time "was tireless in his efforts" as a volunteer to help open a fledgling detoxification center in Burlington, Vermont. He added:

> At the time I treated [Nelson], not much was known about Post Traumatic Stress Disorder (PTSD). Looking back, however, he certainly displayed many of the symptoms. He was decidedly hypervigilant and I recall him having a very restricted range of affect. He was avoidant and aloof, but I could discern that he wanted to be a part of the social group but somehow feared contact.... Most significantly, [Nelson] never mentioned his veteran status to me until after he was convicted of homicide. I can only speculate that [Nelson] suffered from PTSD, but *it is my opinion that he did.* (emphasis in original) I believe that there is a strong likelihood that his alcoholism arose from self-medication of his PTSD.

Col. Loper, K's former commanding officer, provided us with a new fax describing in detail the command structure of the 15th Engineer Battalion. Headquarters and Headquarters Company, to which K's records indicated he was attached, contained several sections and platoons, including a "Tank Dozer Platoon" and a "Flame Platoon," as well as "Two Infantry Platoons w/aprox 24 Boston Whalers and 24 Airboats."[63] He also described vehicular incidents involving casualties caused by ambushes, two of which resembled incidents described by K in his affidavit. We later submitted a deposition of Col. Loper, in which he discussed the command structure of the 15th Engineer Battalion, the flame platoon, and various incidents, in greater detail, and also answered questions relating K's MOS, or military occupational specialty, to his duty with the flame platoon.[64]

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63. Facsimile from Col. Thomas Loper (U.S. Army Ret.) 2 (Feb. 5, 1996) (on file with the South Royalton Legal Clinic).

64. Telephone Deposition of Col. Thomas Loper (U. S. Army Ret.), Feb. 15, 1996. In a follow up letter, Col. Loper shed light on a subject of particular interest to the local VA adjudication office: K's training and how it related to his later combat role. Interpreting C's DA Form 20, he noted:

> [K] did complete the Basic Combat, and Advanced Individual Training at Fort Dix, the first of which is basic Infantry, so it cannot be said that [K] had no combat training. Advanced Individual Training or MOS training also has considerable "infantry" type training.... [K] was a Track Vehicle Mechanic, and the Flame Track was a tracked vehicle. So

The Department of the Army provided us with the declassified Operational Report of the 15th Engineer Battalion for the quarter ending January 31, 1968. The entry for Headquarters Company included details concerning "The Flame Tank Platoon," which "has been used extensively for job site security and support to the 1st, 2nd, and 3rd [Brigades] and the RTAVR [Republic of Thailand Army Volunteer Regiment]."[65] It recounted that:

> [t]wo flame tracks have been engaged in operations with the MRF [Mobile Riverine Force]. The tracks are taken aboard the boats and provide effective direct fire on enemy positions along the waterways. The remaining two flame tracks were found effective in clearing heavily booby trapped areas. During the period the flame tracks expended a total of 10,800 gallons of napalm.[66]

From the archives of the U.S. Army Military History Institute came an excerpt from a history of the 9th Infantry Division entitled "May Offensive and Battle of Y-Bridge." It detailed how in May 1968 elements of the 9th Infantry, 3d Brigade, fought a major five day battle with Viet Cong and North Vietnamese Army forces on the southern outskirts of Saigon, at and around the Y Bridge, about two miles from the center of Saigon and the Presidential Palace.[67]

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the assignment to HCC, 9th Inf Div was not unusual.
Letter from Col. Thomas Loper 1 (Feb. 20, 1996) (on file with the South Royalton Legal Clinic).

65. Dep't of the Army, Headquarters, 15th Engineer Battalion, 9th Infantry Division, *Operational Report for Quarterly Period Ending 31 January 1968*, to Commanding General, 9th Infantry Division (Jan. 31, 1968) (Unclassified).

66. *Id.* An additional piece of evidence about the "flame platoons" came from an article describing the history and command structure of the "Riverines." Established in 1966 by Army and Navy planners as a way to insert U.S. troops into a densely populated and geographically difficult area, the unit was called the Mekong Delta Mobile Afloat Force (MDMAF) and was designated Task Force 117 (TF-117); its code name was the Mobile Riverine Force (MRF). *Mobile Riverine Force (TF-117)*, ARMY DIG. June 1972. The article depicted the "mother ships," U.S.S Benewah and U.S.S. Colleton, and described the Monitors, standard Riverine boats used for close fire support. One photograph of a Monitor had this cut line: "This particular Monitor has had the forward 40mm turret replaced with two flame throwers. Nicknamed 'ZIPPOs', these craft were used to burn away the dense jungle foliage which often grew down to the water's edge." *Id.*

67. The abstract is taken from *The Infantry: 9th Infantry Division Papers*, "The 9th Infantry Division in Vietnam, 1966-70." The transmittal fax from the Military History Institute notes: "Most references are to 3d Bde. involvement. Still doesn't preclude small attachments [from other brigades]". Facsimile from Dave Keough, U.S. Army Military History Institute 1 (Feb. 6, 1996) (on file with the South Royalton Legal Clinic). In any event, the abstract demonstrates the importance of the Y Bridge location and lends some support to K's assertion that he (a member of the 2d Brigade) was detailed there briefly at some point (he recalled it being during the Tet Offensive). In May 1968, the NVA launched what have been termed "mini-Tet Offensives" against several cities. ENCYCLOPEDIA OF THE VIETNAM WAR, *supra* note 40, at 540.

Following the hearing and our refusal to waive review of the new evidence by the local VA office, the VA issued a Supplemental Statement of the Case, and again denied benefits based upon the character of discharge. The VA considered only one type of new evidence, the former commander's deposition and letter, and said that that evidence did "not contain hard evidence that Mr. [K] engaged in combat."[68] Clinician Jonathan Kilburn filed objections, faulting the VA for failing to consider all the evidence on record, for not giving sufficient reasons for rejection of corroborating evidence, and for not assisting the claimant in developing facts pertinent to his claim.[69] In response, the VA filed yet another Supplemental Statement, expanding the amount of new evidence considered, and recharacterizing the issues. On the issue of accrued benefits, it said it could consider "only that evidence in file at the time of Mr. [K]'s death," and denied benefits.[70] On the issue of burial payments and service-connected death benefits, it again denied benefits, but, considering the new evidence, conceded that it:

> substantially verifies Mr. [K]'s affidavit where he related various episodes while in Viet Nam. Resolving any doubt in Mr. [K]'s favor, we concede that Mr. K was exposed to combat situations based on the lay statements submitted. However, the evidence does not show that his combat experiences were the cause of his problems after his return from Viet Nam and the character of his subsequent release from service.[71]

In October 1996, clinician Mark Klarich responded with a powerful brief summarizing our entire case. He included legal authority for the proposition that evidence can be accepted after death if it is corroborating evidence.[72] Subsequently, the Board of

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This fax was forwarded to us by Diana Harrington, Staff Assistant, Office of U.S. Sen. James Jeffords (R. VT). Ms. Harrington assisted us with great zeal and effectiveness in the latter stages of the case. We also received assistance from David Weinstein, Staff Assistant, Office of U.S. Rep. Bernard Sanders (Ind. VT).

68. U.S. Dep't of Veterans Affairs, *Supplemental Statement of the Case* (Apr. 1, 1996).

69. See Trytek v. Derwinski, 3 Vet.App. 153 (1992) and Zarycki v. Brown, 6 Vet. App. 91 (1993) in support of these arguments.

70. U.S. Dep't of Veterans Affairs, *Supplemental Statement of the Case* (June 26, 1996).

71. *Id.*

72. *See* Hayes v. Brown, 4 Vet. App. 353 (1993) and VA ADJUDICATION PROCEDURE MANUAL M21-1 ¶ 5.06(a) (Aug. 16, 1996) ("Entitlement must be based on evidence in file or deemed in file at date of death."). As to what may be deemed, see paragraph 27.08(b) (July 14, 1995) ("[A] claimant may confirm the prima facie evidence in file at the date of death by submitting evidence in connection with the claim for accrued benefits") as well as paragraph 5.27(b) (May 8, 1995) ("The cited regulations also provide for the acceptance of evidence after death for verifying or corroborating evidence 'in file' at death.").

Veterans' Appeals in Washington, D.C. reviewed the file. In July 1997, the Board, in a 26-page decision, concluded that insanity existed at the time K committed the offenses leading to his discharge, and thus the character of discharge was not a bar to receipt of VA benefits.[73] Further, the Board found that the evidence (all of which apparently was considered) was in equipoise as to the existence of the combat-related stressors K reported.[74] The Board afforded the appellant the statutory benefit of the doubt[75] in ruling that the record supported a grant of service connection for PTSD for accrued benefits purposes. On remand, the VA awarded accrued benefits, plus DIC and dependents' educational benefits, and the burial allowance.[76]

3. Reflections on the Case

Nelson K's case lasted for a longer time than any of us expected at the first interview. But then, none of us knew how time-consuming it was to assemble our proof, or what turns the case would take. The major delay occurred at the front end. Clinicians worked to understand the complexities of the federal statute and regulations[77] to identify all the legal issues, and to develop necessary proofs. In that regard, the case was well-suited to our clinic. Proof was developed in a creative way from many sources: personal, administrative, military, medical and historical. The legal issues, manageable in number, were complex but not overly so. Successive students, sometimes working in teams, made the proof (and legal) picture clearer each semester.

This case challenged, but did not overwhelm, clinicians assigned to it (though they often felt overwhelmed when they took the case over, seeing the increasing size of the file).[78] Work on the

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73. U.S. Dep't of Veterans Affairs, Bd. of Veterans Appeals, *Decision* (July 31, 1997).

74. *Id*

75. *See* 38 U.S.C. § 5107(b) (1998).

76. U.S. Dep't of Veterans Affairs, Bd. of Veterans Appeals, *Decision* (Aug. 26, 1997).

77. One clinician who played a leading role in the case, stated in his final evaluation of his clinic experience that:

> [w]orking on my VA case was a real test of my patience and sanity. Title 38 [of the U.S. Code] is the most convoluted piece of legislation I have ever read-just as bad as the tax code-and if I managed, to some degree, to work through it, there is little doubt in my mind about my ability to analyze and interpret statutes in the future.

Memorandum from David Royer, Student Intern, South Royalton Legal Clinic 2 (Apr. 27, 1994) (on file with South Royalton Legal Clinic).

78. *See generally* Naomi R. Cahn & Norman Schneider, *The Next Best Thing: Transferred Clients*, 36 CATH. U. L. REV. 367 (1987) (presenting several case management issues noted in Nelson K's case). We relied primarily upon transfer memos, multi-person case reviews, and meetings of the supervisor and clinicians (including, at various times, and in various combinations, the

case waxed and waned in intensity depending on whether a hearing was imminent (or whether the client had a personal crisis develop, which did occur). Some students, such as those who prepared for and appeared at hearings, had broader experiences than others, but many of those other students made evidentiary breakthroughs.

The hearings, while requiring a good deal of preparation, were less intense compared to many of our family law contests. Yet the case was compelling due to the great breadth of proof required, evolving legal issues, a strong emotional component based on our client's condition, and the case's subject matter. Aspects of Nelson K's story were representative of the stories of many Americans who served in Vietnam and returned home permanently affected by their experiences. His story called out for more light, more explanation, more understanding, and, to meet the VA's requirements, more proof. Fortunately, the case allowed us to match several students to it who were personally interested for various reasons: one student was a military institute graduate, and three were veterans (one of them served with the U.S. Army in Vietnam). On the other hand, another student forthrightly acknowledged toward the end of his successful tenure on the case that he didn't much like it, thus providing us with valuable material for discussion.

Compared to what might be learned on a typical difficult public benefits class action, or appellate effort, Nelson K's case presented great diversity. Students either communicated directly with our medical expert, or had to employ his findings effectively. There were joint case reviews with outside medical and social work experts. Aside from learning about the formal structure of the VA and the military, clinicians learned about a vitally important parallel "shadow" structure of resources (i.e., the National Veterans Legal Services Project, the U.S. Armed Services Center of Research of Unit Records, the local VA in-house Veterans' Service Center, the local "Vet Center", the staffs of two of the client's elected representatives to Congress, etc.). With respect to the VA, the students learned that the it is a complex organization: on the one hand, one can access and even develop excellent information from the medical and social services providers; on the other, one should not expect a particularly liberal or sympathetic hearing outcome (even while being treated with great courtesy and afforded full due process rights), unless the evidence is very strongly in favor of the veteran. Particularly fascinating to the students was the chance to perform (or manage)

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current student, and the former and incoming students assigned to the case) to maintain file control and current knowledge of the case and client.

original historical research on the Vietnam War,[79] involving contact with Army and Navy historical repositories; unit research at the National Archives; review of military unit reports (some formerly classified), and specialized journal articles and monographs on Army and Navy operations. A high point of student-directed case development involved locating the former commander of K's unit, and enlisting his aid in clarifying the unit's structure, function, and experiences. On the personal level, a few clinicians and their supervisor learned about the dying and death of a client, the involvement of institutions in that process, and the unresolved issue of payment of K's funeral bill.

Clinicians working on this case were captivated by the desire to develop the facts and tell Nelson K's story. To be successful, they had to exercise a wide range of legal skills: interviewing, researching legal issues, "mapping" informal discovery sources, conducting discovery, drafting, hearing preparation, and conducting hearings, etc. The work in sum addressed a healthy number of the commonly accepted goals of clinical legal education,[80] including two of the most important, cultural/cross-cultural awareness and ethics. As to the former, they learned of Nelson K's often difficult upbringing, patterns of behavior under stress in the military, and the effects of PTSD, which included dysfunctional personal behavior within subcultures of drugs and alcohol, and a crime for which K was imprisoned. Students were also forced to think about many issues raised by the war, particularly why and where and how it was fought, its intensity and the level of human misery and dislocation it entailed, how the United States' stated objectives were reflected in the military documents they read, and what the short and long-term effects were upon everyone involved due to the sheer volume of firepower used by both sides.[81]

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79. Most of the students were too young to have any memory of that conflict, but all had been constantly exposed to the lore and legend of it through the news media and particularly through popular culture by way of movies such as APOCALYPSE NOW, PLATOON, and MISSING IN ACTION, to name but a few. The original research allowed them to get some understanding of what the conflict (and the military reporting of it) was like, day-to-day, in a hotly contested zone. Equally important, the research also provided, via specialized articles and declassified documents, insights into contemporary military thinking about the conduct and progress of the war.

80. *See supra* note 25 and related textual discussion.

81. What was learned working on this case would have enabled the clinical students to read with enhanced knowledge and understanding such "traditional" works on the war as JONATHAN SCHELL, THE VILLAGE OF BEN SUC (Random House 1967); NEIL SHEEHAN, ET AL., THE PENTAGON PAPERS: THE SECRET HISTORY OF THE VIETNAM WAR . . . AS PUBLISHED BY THE NEW YORK TIMES (Bantam Books 1971); FRANCES FITZGERALD, FIRE IN THE LAKE (Little, Brown and Co. 1972), as well as such contemporary works as HAROLD G. MOORE & JOSEPH L. GALLOWAY, WE WERE SOLDIERS ONCE . . . AND YOUNG

As to ethics, although we faced few real dilemmas, one stands out: to what extent, and in what way, should we help prepare Nelson for his hearing testimony, particularly as to his reasons for going AWOL upon his return to the United States? The regulations suggested that the more sympathetic the reason for his AWOL, the more sympathetic the hearing officer's decision might be.[82] We decided against any intensive preparation on this point for several reasons, believing at bottom that our client should tell his story in his own unique way.[83]

B. Mark R

1. The Case

In February 1989, Rita L., Mark R's fiancee, sought the clinic's help in obtaining Dependency and Indemnity Compensation from the Veterans' Administration for her infant son, based upon his father's suicide in August 1988. The VA denial was based on a finding that the death was not due to a

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(Harper Collins 1992) (reciting details of the pivotal Battle of the Ia Drang Valley in November 1965) and ERIC T. DEAN, SHOOK OVER HELL POST-TRAUMATIC STRESS, VIETNAM AND THE CIVIL WAR (Harvard University Press 1997) (comparing the psychological effects of violence on soldiers in the Civil and Vietnam Wars, examining the origins of PTSD as a recognized disorder, and calling into question popularly accepted views of the Vietnam veteran as singularly affected by trauma due to the nature of that war).

82. Any intensive preparation we might have done would, of course, have been based upon Nelson's recollection of his reasons, and would have been done ethically. The problem was that what he could recall of his reason(s) so many years later was fairly vague and presented evidence of (we thought) more a kind of massive mental and emotional disengagement existing at the time than the kinds of very specific reasons set out by the regulations as possibly justifying or excusing going AWOL. To try to organize K's recollections, such as they were, into testimony was to raise three ethical flags: first, it raised the question of whether we would be beginning a process in which he unconsciously began to recall reasons of the type suggested by the regulations; second, would any attempt by us to organize his recollections be an exercise by us in incompetence, causing his story, otherwise to be told in his own unique and chiseled words, to be put into an artificial and unconvincing format? Third, if we strongly influenced his manner of expressing his recollections, would we be simply dominating our client, based upon his dependence upon us? In any event, although our client was aware of the regulations' examples, he never showed the slightest inclination to modify his story to try to fit his experience into them. Under these circumstances, to tamper with his manner of expressing why he went AWOL seemed inadvisable.

83. Nelson K did tell his story in his own unique way, and the hearing officer specifically found his reasons not to constitute "compelling circumstances" to excuse the AWOL. However, we were prepared for this, and argued later, based upon the medical evidence, that his description of his historical reasons for going AWOL was an example of the emotional state, past and present, of a person with PTSD.

service-connected disease or injury. Over the next fourteen months three clinicians[84] worked relentlessly to establish that the veteran suffered from a "disease", PTSD, that was service-connected and caused his death. During the fourteen months, the clinicians demonstrated that on the medical side, the VA appeared to have lost track of an earlier-made PTSD diagnosis, and on the administrative side, the VA had ignored a massively compelling case for the existence of PTSD.

This case was constructed upon a solid foundation of fact-gathering and evidence development supporting pillars of proof. Military service records were obtained from one place, military and private medical records from other sources. Clinicians obtained addresses of family members and old and recent friends. The clinicians also conducted interviews and prepared affidavits. A key piece of evidence which had been relied upon in denying benefits was subject to reinterpretation and legal modification due to the development of new psychiatric evidence.

While this process was typical for case preparation, and does not appear to be complex (even if it is labor-intensive), it was complex enough to present a first-rate learning experience for law students, particularly when one added legal analysis to the equation. Equally as important, this process of administrative law representation allowed a small group of law students to change an official U.S. government determination. Moreover, the students forever altered the child's life prospects, the child's view of who his father was, and why he died.[85]

A brief review of the initial VA view of Mark R's life, compared with the view it adopted after our hearing presentation, demonstrates the value of the representation, and of the learning

84. The clinicians were Maureen Holland, who did the initial intake and evidence gathering, Laura Brevitz, who developed and managed the case as a summer work-study student, and Tony Hernandez, who synthesized all the evidentiary leads, put together final forms of affidavits, prepared witnesses, and represented our client at hearing before a VA hearing officer.

85. We are reliably informed by the child's mother, Rita, that he often takes his father's photograph to school. Some day that child will be told why his father died. Which version is better, the VA's initial determination, which did not reflect reality, or its decision after hearing, which did? The answer may lie in another case handled by our clinic, in which a girl in her mid-teens and her mother sought our help to overturn a decision by the Social Security Administration that the woman's deceased husband was not actually the father of the girl, although she had been conceived during the marriage, had always been told he was her father, and had been raised by him in a nuclear family situation with her mother and siblings. Upon receiving notification from SSA of its negative paternity decision, the girl's behavior took a nosedive and she dropped out of school. When she came to our clinic for an interview, her forearm bore a large scab which spelled out the name of the man she had known as, and still believed to be, her father. She had scraped in his name with a knife.

experience. Despite the VA's having had the same opportunity to locate the same records and witnesses we discovered, its Statement of the Case summarized R's life in 10 lines, listing the following: two periods of service (1966-1974, honorable discharge; 1974-1976, separated under honorable conditions); a December 1983 VA psychiatric examination which showed "no evidence of psychiatric disability" and at which "alcohol dependence was diagnosed"; in February 1984 service connection was disallowed for a claimed nervous condition, and in August 1988 "[t]he veteran died of a self-inflicted gunshot wound. Alcohol abuse was implicated on the Death Certificate." On this record, the three line "Reasons for Decision" entry was no surprise: "There is no evidence to suggest that the veteran's self-inflicted gunshot wound was the product of service connected disease or injury. Service connection may not be established for death which results from alcohol abuse."[86]

Our search for evidence of combat experience and likely stressors was markedly different in this case compared to what we would experience when representing Nelson K almost two years later. Rita told us he said he had experienced very significant combat. Another witness told us Mark told him that he had "thrown away all his medals" at one point.

Over the next several months we assembled, from various sources, the story of his overseas service. Military discharge records showed that he had served with both the 82d and 101st Airborne Divisions in Vietnam, obtained expert and sharpshooter badges for operation of the M-16 rifle, and rose to the rank of sergeant before being reduced in rank to private just before his final discharge in 1976. (The reduction in rank was the result of convictions for AWOL offenses occurring in 1976 when he was stationed in the Canal Zone). For three separate enlistment periods, his badges and awards were as follows: (1966-68)—Combat Infantryman's Badge, Parachutist Badge, Vietnamese Service Medal, Vietnamese Campaign Medal w/Device, and Overseas Service Bar; (1968-74)—The same as for 1966-68, plus four more Overseas Service Bars, National Defense Service Medal, Bronze Star Medal with 'V' (Valor) Device, and Bronze Star Medal with 1st-3d Oak Leaf Clusters, (1974-76)—The same as for 1966-68 (except for Overseas Service Bar), plus National Defense Service Medal, Good Conduct Medal, Vietnam Cross of Gallantry with Palm, Bronze Star, and Silver Star. A correction form also showed that he had been awarded the Purple Heart on an unspecified date. From another U.S. Army records center, we obtained the citations that went with the Bronze and Silver Stars,

86. Veterans Administration, *Statement of the Case, in the Appeal of MR* (Dec. 15, 1989).

and Purple Heart, and they established (to put it mildly) the existence of stressors.[87] We also discovered that he had been awarded the Air Medal for having participated in over twenty-five aerial missions between January and November 1971 "in support of counterinsurgency operations."

In preparation for the appeal hearing, we conducted a search of available literature on PTSD and alcohol abuse and their interaction, with the cooperation of the National Center for PTSD, located within the VA Regional Office complex at White River Junction, Vermont. Although not submitted into evidence at hearing, the voluminous literature we copied helped us to understand our own case and to confidently discuss the alcohol issue with our experts. We also developed affidavits based upon the accounts of family and friends which contained more evidence of stressors and PTSD symptoms, in which Mark R. talked of: guns and occasionally about killing people; a landmine explosion which injured Mark R. killed the soldier in front of him; one occasion in Vietnam when he had to sleep under dead bodies to keep warm. Additionally, he had frequent mood shifts, difficulty being affectionate and had to be awakened with great care (some people prodded him with a broom) or he could react violently. Mark R. had great trouble sleeping due to intrusive dreams about his Vietnam experiences. He drank alcohol to get to sleep. He often

87. The Silver Star, the second highest award for battlefield valor below the Congressional Medal of Honor, was awarded for R's actions on December 23, 1970, while serving with Company E, 4th Battalion (Airborne), 503d Infantry, 173d Airborne Brigade. The commendation reads in part:

> On that date, during the early morning hours, a large enemy force breached the defensive wire of Stag 8 and moved into the perimeter. Sergeant [R] was on guard at the northern end of the perimeter when the enemy initiated the attack by destroying the fire direction center bunker at the southern end of the perimeter. Undaunted by the intense small arms and mortar fire, Sergeant [R] aggressively moved throughout the area insuring that his personnel were located in the best possible fighting positions. Exposing himself to fierce enemy small arms fire, Sergeant [R] carried several wounded comrades from their fighting positions to the temporary aid station for medical attention. Throughout the ensuing battle, he personally directed the retaliatory fires of his men while repeatedly exposed to intense hostile fire, and was most instrumental in reconsolidating positions near the northern end of the perimeter. Sergeant [R] then directed the reaction force into the perimeter and personally lead them in clearing the entire position of enemy soldiers.

The Purple Heart was awarded for wounds received on April 8, 1968, but no description of the incident accompanied the award certificate. (Other evidence of record indicates that on that date he sustained multiple fragment wounds to the left and right legs, and left arm. On May 6 he was transferred to Walter Reed Army Medical Center in Washington, D.C. and returned to duty on June 18). The last Bronze Star was received for personally leading troops in repelling either the same or another enemy perimeter breach (no date is given on the citation), resulting in fifteen enemy killed.

reacted strongly to loud noises, and on several occasions, after hearing them, said that people were shooting at him. In Vietnam, a friend he was drinking with went to a jeep for cigarettes and was killed when the booby-trapped jeep exploded. He questioned how an entire platoon could be killed while he survived. Despite his heavy drinking, Mark R. was unable to escape his disturbing dreams.

At the hearing, clinic student Hernandez argued that the VA's December 5, 1983, psychiatric exam, relied on to deny benefits, simply missed the PTSD symptomology. We were able to point to the veteran's 1976 medical separation report, which indicated frequent trouble sleeping, nervous trouble and depression; and five affidavits from friends and family members attesting to behavior consistent with PTSD symptoms. Further, we also noted a 1978 medical diagnosis of depressive neurosis, a 1984 VA diagnosis of alcohol dependence with depression, and a 1987 Indiana VA Medical Center diagnosis of PTSD (not referred to in the local VA Office's 1989 denial of benefits). On August 1, 1988, his fiancee had taken Mark R. to the local VA Medical Center where he complained of "losing it" and sought "medication for nerves."

As new and material evidence to support a new factual basis for service connection, we submitted two recently written reports by experts on PTSD. The first was a five page "psychiatric autopsy" completed by John P. Wilson, Ph.D., an internationally recognized expert on PTSD. Having reviewed the body of evidence in the case, Dr. Wilson concluded that R's suicide "was in all likelihood caused by the existence of his post-traumatic stress disorder, chronic and untreated which, in turn, led to alcohol abuse and dysthymia."[88] The second report was from David A. Grady, Psy.D., a former member of the VA's Advisory Committee on the Readjustment Problems of Vietnam Veterans. He concluded that Mark R. suffered from PTSD as a result of his Vietnam experiences, that his alcoholism was secondary to, that is, a manifestation of, the PTSD, and that he took his own life as a direct result of this service-connected condition.[89] (A third report which reached the same conclusions, written by a New Hampshire psychiatrist, was received too late to be put into evidence, and so was held in reserve as new evidence if further appeal was necessary).

A final piece of evidence was also persuasive. In the days prior to the hearing, clinician Hernandez showed the accumulated exhibits to the Vermont Regional Medical Examiner who had

88. Letter from John P. Wilson, Ph.D. 1 (Apr. 3, 1990) (on file with the South Royalton Legal Clinic).

89. Letter from David A. Grady, Psy.D., 1 (Apr. 10 and May 8, 1990) (on file with the South Royalton Legal Clinic).

completed the initial Report of Investigation on the suicide. On the day of Mark's death, the examiner had written "? Alcohol Abuse" in response to the form question "Other Contributory Medical Conditions." He also had checked a box that said "Serious Depression/Mental Disorder." All of this information was based on hearsay. When it came time for the official Death Certificate to be filled out, the simple phrase "alcohol abuse" was typed in as a response to a categorical question which read: "Other Significant Conditions: Conditions contributing to death but not related to cause given [above, i.e., gunshot wound]." It was this small entry on which the VA had built its initial denial. Upon reviewing all the evidence in the case, the medical examiner concluded that the original Death Certificate was in error. Accordingly, he petitioned the probate court to change that entry on the certificate, so that the response to the "Other Significant Conditions" category would read: "Post Traumatic Stress Disorder; Alcohol Abuse." The court approved the petition two days before our hearing, and the hearing officer cited this change in his decision reversing the initial denial, and finding service connection for the cause of death.[90]

2. Reflections on the Case

The Mark R case was both less complex than the Nelson K case would prove to be, and less difficult overall. Yet it presented a significant challenge to the students, because it moved on a fairly rapid timeline. Our client, the single mother of an orphan, had great financial need, and it was the first case of its type our clinic had handled.

Our proof problems were demanding, requiring that we rapidly develop facility with the law governing service-connected disability, PTSD, suicide and alcoholism. The students also needed to discover all available medical and service information, and work up new medical evidence based upon both already-discovered evidence and other new evidence we were simultaneously working up, such as affidavits from family and

90. In light of the evidence, the hearing officer did not dwell to any extent on the VA's subtle regulations dealing with suicide and chronic use of alcohol. *See* 38 C.F.R. § 3.302 (1998); 38 C.R.F. § 3.301 (1998). We, however, spent a fair amount of time analyzing the interplay between the two regulations. The regulation on alcohol, in particular, made it appear at first glance impossible to qualify for benefits if alcohol had anything to do with the cause of death. (Under the regulation, benefits are not payable for willful misconduct; a veteran's death will be considered to be the result of willful misconduct "[i]f, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death." 38 C.F.R. § 3.301). In Mark R's case, having such a wealth of evidence on stressors not only made it possible to establish the existence of PTSD, but also to obtain medical reports which established that the cause of the suicide was untreated PTSD, and that the alcohol use was merely a manifestation of the PTSD.

friends. Completed in just fourteen months, the case yielded huge rewards for Mark's son, and for our clinic, as it gave us a roadmap for approaching other such cases.

The case was a type that a civil law school clinic should be able to handle, assuming a willingness to carry cases from term-to-term. Aside from the task of mastering the law and locating all pertinent records, the case afforded each clinician an unforgettable series of interviews. They compared interviews to one another and the record, then rolled them into affidavits and preparation of hearing testimony. The case was a triumph from the standpoint of at least one aspect of supervision, in matching the students to a case likely to benefit from their existing strengths and at the same time providing them with challenging learning experiences. The student who did intake and the original broad-ranging legal research was a born proceduralist and researcher. The student who next took it for over seven months was highly disciplined, analytical, and a born case manager. The clinician who represented the client at hearing was a talented and passionate advocate.

Aside from the internal case reviews to which the file was subjected, most light was shed on it by our medical experts commenting upon the military, medical and personal evidence we supplied to them. The very fruitful interchanges with these experts was built upon the students' prior close reading of all existing records, the materials from the National Center for PTSD, and the DSM-III-R. Along the way the students also learned about backup resources, such as NVLSP and the Armed Services Center for Research of Unit Records. They also learned about the Vietnam War and the Veterans Administration.

Mark R's case proceeded fairly rapidly along orderly lines of inquiry, following the early probing interviews. As in Nelson K's case, a wide range of legal skills was exercised, particularly interviewing and case preparation. In light of the conduct and outcome of the case, I would list the most prominent clinical goals addressed to have been responsibility, service, cultural and cross-cultural awareness, understanding the role of emotions, creativity, and critiquing the legal system. On the other hand, the case presented no significant ethical dilemmas and only limited counselling opportunities, nearly all dealing with tangential issues and matters, such as eligibility for Social Security Survivors benefits and certain income maintenance problems.

CONCLUSION

Nelson K and Mark R were transporting experiences which placed our clinicians and faculty inside different lives, alongside a dying veteran, his widow and daughter, and with the orphaned son and bereaved fiancee of another veteran. Second and third

year law students heard the stories our clients had unsuccessfully tried to tell the VA during their lifetimes, and they persuaded the it to listen. All who worked on the cases learned something about the Vietnam War, a segment of those who fought in it, and the effects it had on them, their families, and even their societies.

Although the cases may not have met Paul Reingold's definition of the "hard" case, since they were not controversial, they were nonetheless difficult and challenging. Each case in its own way presented legal issues and proof problems of a scope and character not ordinarily handled by our program. Nelson K figuratively outlived nearly all the students assigned to it. Due to its sheer bulk and the breadth of its demands, Nelson K taxed the abilities and patience of many of those who labored to understand and advance it (but the clinic as an institution was not depleted by it). Mark R, while not controversial or depleting, required novel and substantial legal analysis and proof work to be successfully accomplished in fourteen months by three clinicians. By completing the Mark R case, the Clinic as an institution was better prepared when confronted with Nelson K's problem.

These cases were well-suited to our clinic precisely because they were novel, challenging and tough, but not so difficult that they overwhelmed us. With just three clinical faculty (and one of them facing job funding uncertainty), tenure and retention writing, committee and public service obligations, an ongoing school and clinic commitment to help start a legal clinic at Petrozavodsk State University in Karelia, Russia, and the need to make sure all of our clinical students have as balanced a set of learning experiences as possible, we are stretched thin enough so that each new case must be analyzed carefully with respect to the impact it might have on the program. In my experience, some cases, such as *Kendall*, have threatened to (but in fact did not) overwhelm both the program and the students assigned to them. Indeed, in that case, we strove to spread out the work as able and give to the clinicians working on it other, different cases involving different skills. In contrast, these veterans cases gave us a broad range of lawyering challenges and opportunities for significant public service in a manageable format.[91] In providing that service in a competent and zealous way, our clinic's reputation was enhanced. The cases also positioned us to be able to begin to

91. One important strand of clinical scholarship stresses that public service not be lost sight of as an important goal of clinical legal education, and an important value that should be imparted by the general law school curriculum. *See, e.g.*, David Barnhizer, *The Justice Mission of American Law Schools*, 40 CLEV. ST. L. REV. 285 (1992); Jill Chaifetz, *The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School*, 45 STAN. L. REV. 1695 (1995) and Robert T. Dinerstein, *Clinical Scholarship and the Justice Mission*, 40 CLEV. ST. L. REV. 469 (1992).

participate, in a limited but real way, in an important new initiative in veterans' law - the work of The Veterans Consortium Pro Bono Program, which seeks to match volunteer attorneys with veterans appearing *pro se* before the U.S. Court of Veterans Appeals.[92] Both cases provided occasion for reflection on some of the major themes in clinical teaching, such as how well we listened, and what we thought was important, in client interviews,[93] and how we structured the attorney-clinician supervisory relationship at a time when the supervising attorney (the author) was sometimes very heavily committed with other work obligations.[94]

Too much should not be made of the fact that the veterans' hearings were not based on the rules of evidence, or that there was no opposing counsel. In my experience, it is often more difficult trying to prove a tough case in the absence of highly qualified opposing counsel than otherwise. Qualified opposing counsel

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92. The Veterans Consortium Pro Bono Program operates out of offices in Washington, D.C. Brian D. Robertson, (202) 628-8164, is Director for Case Evaluation and Placement, and David Addlestone, (202) 265-8305, is Director for Outreach and Education.

93. The interviews raised questions about both our goals and techniques in interviewing, and our evaluation and classification of the stories we heard. The classification issue, that is, how we valued, or failed to value, things we were told (or later read, based on the interviews), had a direct bearing on our formulation of theories of the cases, what kinds of evidence we thought would be persuasive, and how hard we worked to achieve certain goals. For example, to Nelson K, it was vitally important that in his lifetime he establish his right, as a veteran, to receive medical treatment at a VA hospital. That desire, which appeared to exceed his interest in proving that he suffered from PTSD, motivated us to pursue that issue aggressively. In his final illness he was admitted to the VA medical facility (at a time when he could have been admitted to another hospital and had many of his bills paid through Medicaid). Because the VA treatment issue meant a great deal to him, it meant a great deal to our clinicians. There is a substantial body of literature on listening closely to clients' stories, so that the interviewing experience is an enhancing, rather than an enfeebling, experience for them. Much of this literature can be located by reviewing the bibliography of articles on clinical legal education prepared by Prof. Karen Czapanskiy; it is accessible on the World Wide Web at http://www.law.umab.edu/clinic/clinedu/. Among the many who have written constructively, but not necessarily with a uniform voice, on this subject are Anthony Alfieri; Robert Bastress and Joseph Harbaugh; David Binder and Susan Price; Richard Delgado; Robert Dinerstein; Gerald Lopez; Binny Miller, and Don and Martha Peters. *Also see* Symposium, *Lawyers As Storytellers & Storytellers As Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law*, 18 VT. L. REV. 565 (1994).

94. *See* Kenneth R. 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); Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 NYU REV. L. & SOC. CHANGE 109 (1993) (explaining useful insights on the subject of clinical supervision).

generally can be counted on (as in many cases we have had in both federal and state courts) to clarify issues, to stipulate to given facts, to respond to discovery with reliable information, and generally to try to make sense of the litigation. No such clarification is generally forthcoming from an unrepresented administrative agency (in any context), which often ignores key evidence and fails to assist affirmatively in discovering hard-to-find existing evidence. Put another way, as one experienced administrative law advocate said to me (and I paraphrase), "What is harder, dealing with one or two lawyers, or having an entire agency lined up against you?"

As Paul Reingold pointed out in his essay, we have an obligation as clinical teachers to remain vitally interested and interesting in our teaching and legal representation. However local conditions shape the final choices, the process of careful case selection across a broad range of case types and complexity holds out the promise of our own personal and professional renewal and growth, our students' enlightenment, and our clients' well-being.