Legal Interviewing and Counseling: An Introduction [article]

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In this article, the authors, who are writing their own textbook on interviewing and counseling, reflect on the ways in which Gary Bellow & Bea Moulton's groundbreaking textbook, The Lawyering Process, has shaped and is shaping their work. The authors include the introductory chapter of their forthcoming textbook interspersed with commentary on the influence of Bellow & Moulton on each of the primary themes through which their textbook will explore interviewing and counseling: variations in the lawyer-client relationship, context, connection, ethics and theory-driven lawyering. This review allows them to evaluate, not only how deeply and pervasively the Bellow & Moulton text has shaped clinical education, but also how much of the environment of clinical education and scholarship has changed since the publication of The Lawyering Process.

As one of us wrote a number of years ago:

In the field of clinical legal education, textbooks matter. At their best, they serve not just as pedagogical tools reflecting doctrinal developments but as intellectual signposts. Clinical texts organize what we think we know about the world of lawyers and lawyering. They also let us see, sometimes unwittingly, what we do not yet know about that world.1

Although these words were not written about the Bellow & Moulton text,2 they certainly could have been. If anything, they under-emphasize the book's extraordinary influence on clinical teachers.

The four of us are engaged in writing a textbook for Thomson West tentatively entitled Legal Interviewing and Counseling. Inevitably, our textbook will draw upon the wisdom of those who have pre-

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ceded us in the textbook endeavor, most famously, of course, Bellow and Moulton, as well as the other authors represented in this Symposium. Because our book is not yet completed, unlike the other participants in this Symposium, we have the opportunity to consider this foundational text and the approaches it takes as an ongoing influence on the book we are writing. Indeed, the happy circumstance of this Symposium has encouraged us to think more explicitly about this (and other) influences on our project.

We approach with humility the task of identifying the influence Bellow & Moulton and the other clinical texts have had on us and on our book. All four of us are experienced clinical teachers who began our teaching careers in the mid-1980's. We were not clinical teachers at the time Bellow and Moulton wrote their text, and thus were not part of the "common enterprise" and "dialogue throughout the country" that the book reflects. But it is not possible to have been a clinical teacher during this period without adopting the background frameworks and structures for organizing clinical thought that the Bellow & Moulton book created, and absorbing at least some of its wisdom.

To convey the extent to which Bellow & Moulton has influenced the approach we have adopted in our forthcoming text, we have provided a version of our book's introduction, which starts with a lawyer-client dialogue and then identifies the five themes that our book will address: variations in the lawyer-client relationship; context; connection; ethics; and theory-driven lawyering. After the discussion of each of these themes, we intersperse brief discussion of the ways that those themes follow, or diverge from, the approaches in the Bellow &

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3 Hence, our appreciation for the dedication that appeared in one of the books by three of our co-participants in the Symposium, Marilyn Berger, John Mitchell and Ronald Clark:

TO OUR FAMILIES...
This is the last word. . . . Oh wait a minute. I just have one more thing to write. . . . It will be just a minute. . . . What? Fifteen minutes already? Give me a few more minutes. Why don’t you go ahead to the park and I will meet you.

What? Back from the park already? It’s dinnertime? Just give me a few more minutes. I’m almost finished.
This is it. We are done."

Marilyn J. Berger, John B. Mitchell & Ronald H. Clark, Pretrial Advocacy: Planning, Analysis, and Strategy (unpaginated dedication page) (1988). We eagerly anticipate the day when the last two sentences are accurate for our project.


5 Ann Shalleck, however, was a clinical student at Harvard (class of ’78), and worked with Gary Bellow in the Harvard Legal Aid Bureau, part of Harvard’s clinical program.

6 Bellow & Moulton, supra note 2, at xxv.
Moulton text. This exercise is not meant to be a pure or neat comparison. Because each book is a product of the time when it was written, precise comparisons obscure the role of the historical development of clinical thought. Rather, we hope that by juxtaposing our choices with Bellow and Moulton’s, we will animate the themes of connection and context that we set out in our book, which are both constitutive of our approach to lawyering and also characterize the clinical enterprise itself.

We—and all the other authors in this Symposium—have a connection (not to mention owing an enormous debt) to Bellow & Moulton and the other clinical textbooks, and the context for our own work necessarily includes their path-breaking efforts. By providing commentary on the major themes of our ongoing project from the perspective of Bellow and Moulton’s treatment of those themes, we hope to make explicit some of the choices that authors of clinical texts must make, to illustrate the impact of Bellow and Moulton’s work on those choices, and to reflect on how those choices are made differently in a context that has been both shaped by their work and has developed in directions beyond it.

The Bellow & Moulton text is ambitious both in substantive coverage and in the nature of material on which it draws. The book covers a wide range of lawyering skills, including interviewing, case preparation and investigation, negotiation, witness examination, legal argument, and counseling. It draws on a rich mixture of psychological, psychiatric, and medical literature, game theory, fiction, other non-legal literature, and the trial practice literature. The book’s breadth and depth are remarkable.

Bellow and Moulton envisioned a Socratic, or at least “rather ‘traditional’” classroom as providing an important context for the book. They tell us that few suggested models and analytic frameworks... can simply be ‘applied’ to law practice. Nor are all the readings precisely relevant to lawyer work. They are intended to stimulate discussion of similarities and differences in the expectation that they will be reworked by student and teacher to make better sense of what lawyering and law are actually about. Those of you used to working with casebooks will find this a familiar teaching strategy.

Bellow and Moulton go on to underline this point, noting that “our

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7 Id. at xxiii. The authors also write, “On the other hand, we recognize that what we have in mind is sufficiently different from the way a casebook might be used in a law school classroom to require a number of caveats,” and describe some of the differences between the clinical and traditional course. Id.

8 Id.
primary interest lies not in persuading you of the usefulness of these particular models, but in encouraging you to clarify and make explicit your own images of what 'good lawyering' seems to be about."\(^9\)

In many ways, our book is considerably less ambitious than the Bellow & Moulton text. For example, rather than covering a wide range of lawyering activities, our book is limited quite consciously to interviewing and counseling.\(^10\) The reduced scope reflects, in part, our judgment about what will work in a clinical classroom. Conventional wisdom has it that Bellow & Moulton was a failure with students (though clinical teachers found its insights incredibly valuable), perhaps in part because of its sprawling and intellectually demanding nature. Our book, we hope, will be accessible to clinical students and new practitioners without being simplistic or reductionist.

Our approach also reflects the degree to which clinical teaching, and our understanding of it, are now more fully defined, and less experimental, than when Bellow & Moulton was published. To state one obvious point, we have the luxury of relying on an increasingly rich clinical legal literature that was only in its infancy when Bellow and Moulton wrote their book. That literature reflects the multiplicity of contributions to our knowledge of lawyering that have come from clinical teachers around the country.\(^11\) At the same time, our ability to rely more on insights from within clinical pedagogy and clinical scholarship attests to the breadth of insights that clinical work has as-

\(^9\) \textit{Id.} at xxiv.

\(^10\) However, we approach these two topics with the knowledge that the isolation of them from the other activities of lawyering can be both helpful and distorting. We hope that our focus upon interviewing and counseling allows us to probe the complexities of these activities while showing how they are bound up with case theory development, investigation, trial preparation, negotiation, strategic planning and other components of client representation.

sembled. While we all have more to learn, we also now have more to teach that has become our own.

Although less comprehensive in scope, our study of interviewing and counseling is in a sense more holistic than Bellow and Moulton's, not because we take more considerations into account—Bellow & Moulton sets a very demanding standard on this score—but because we integrate practice, theory, ethics and skills, more thoroughly into a single discussion. Because we see issues of skills, values, ethics, and difference (by which we mean differences related to race, ethnicity, gender, sexual orientation, ability, and class, to name just some) as inextricably interrelated, our chapters do not have separate sections for the "skill dimension" or the "ethical dimension" or a separate discussion of values, but rather attempt to integrate all of these matters throughout the discussion.

While we hope that a generation's effort truly has given us a measure of understanding that Bellow and Moulton did not have, it would be a mistake to overstate the omniscience of the present day. We regard some principles as strongly supported, but we do not claim any as revealed truth. Indeed, we hope in our book to reach questions that have been too little addressed in the conventional wisdom of clinical teaching. We ask, for example, whether lawyers actually should seek the truth from their clients, and if so how. We endorse the idea that lawyers can sometimes offer advice to their clients based not just on client self-interest but on morality, and we look frankly at how lawyers can accomplish this task. We hope to look unflinchingly at lawyers' feelings for their clients, positive and negative, and to suggest ways for lawyers to cope with what they feel. We insist on the importance of lawyers' responding to client diversity, but we equally acknowledge that doing so can be difficult, and we offer guidance as well for lawyers representing clients who do not have the decisionmaking capacity that most people enjoy. In all of these respects, we acknowledge that, like Bellow and Moulton, we are trying to guide law students and lawyers in a careful, caring, ongoing experiment.
Because we believe strongly in the value of concrete experience as a take-off point for clinical learning, we rely heavily upon transcripts of interactions between lawyers and clients to ground our analysis of that interaction. Most chapters begin with these dialogues while some intersperse them throughout the analysis. In this respect, our book borrows more stylistically from Binder & Price18 than from Bellow & Moulton, who begin their chapters with vivid interactions set out in sections on “preliminary perspectives,” but do not focus their subsequent analysis on the details of these introductory illustrations and instead turn to the elaboration of models and perspectives on the tasks at issue. The difference, of course, is not that we see ethics, skills, practice and theory as interwoven, while Bellow and Moulton did not.19 Rather, Bellow & Moulton separated the issues to see them more clearly, and we, a generation later, can bring the issues back together to see them more comprehensively.

We begin, then, with the dialogue that will be the start of the introduction to our book, in which we offer an overview of the issues in the relationship between lawyer and client that will be the concern of the rest of the book.20

INTRODUCTION TO OUR BOOK

Chapter 1, Issues in the Relationship Between Lawyer and Client

[Karen Davies and Mark Corbett, two students in a clinical program, arrive at 4:00 p.m. at the home of Laura Stevens to meet with Ms. Stevens’s sister, Janice Woods]

Laura Stevens: Hello. You must be the students from the law school clinical program. Janice said you would be here about now.

Karen Davies: Yes, I'm Karen Davies and this is my partner, Mark

“experimentation” in developing approaches to help clients determine their priorities).

18 David A. Binder & Susan C. Price, Legal Interviewing and Counseling: A Client-Centered Approach (1977). It is interesting that Binder & Price and Bellow & Moulton were published within a year of each other. Both books have had a profound influence on clinical teachers and on our conceptualization of lawyering.

19 To be sure, Bellow and Moulton recognized that, to be useful in a clinical program, their book would need to be supplemented with considerable additional materials, including transcripts and other real-world material. See Bellow & Moulton, supra note 2, at xxiv. They published two extensive problem supplements simultaneously with The Lawyering Process, Problem Supplement: Criminal and Problem Supplement: Civil. The need for supplementation is, of course, true for us as well, but we have attempted within the subjects we do cover to provide a more self-contained and explicitly interrelated set of materials for clinical educators and students to use.

20 To assist the reader in separating our additional commentary, the chapter excerpt itself is reproduced in a different font.
Mark Corbett: Thank you so much for having us.

Laura Stevens: No trouble at all. Janice told me that she didn’t feel up to going out—and I agree with her, she shouldn’t—and I really wanted her to meet with you. Things are kind of cramped here, with all of us in just these four rooms, but I’m sure we’ll manage. I’ll go get Janice out of bed. She’s still pretty weak.

[Janice Woods comes into the living room/dining room area, holding onto her sister’s arm.]

Karen Davies: Hello, Ms. Woods. We spoke on the phone. I’m Karen Davies and this is my partner Mark Corbett. I’m glad to meet you.

Mark Corbett: Good afternoon.

Janice Woods: Thanks for coming here. I know it’s pretty far for you. I just wasn’t up to traveling. Here, have a seat.

[As Karen and Mark sit on the couch, Janice Woods sits in the chair to Mark’s right and Laura Stevens sits on the chair to Karen’s left. Three children come running into the room.]

Janice Woods: Kevin, come here and meet our guests. [Turning to Karen and Mark] This is my son Kevin. He’s three. He’s been staying here with my sister and her kids since I went into the hospital. That’s Raquel and Martin—they’re 4 and 7.

Kevin Woods: Hi. Bye. [Kisses his mother on the cheek]

Mark Corbett: It looks like he has better things to do than talk to us.

Janice Woods: He never stops moving. I love to see him so happy.

Karen Davies: He sure seems to like playing with his cousins.

Laura Stevens: Yeah. They like to take care of them. Though sometimes they all get carried away.

Karen Davies: Ms. Woods, Laurence Borders from Memorial Hospital called us to say you might be calling—that he had referred you—but he didn’t talk to us about why. He sometimes refers his patients to the clinic. He seems like a very concerned guy. Not so many people like that in hospitals these days—who can take the time? You also said on the phone that you were calling at his suggestion. What can we do for you?

Mark Corbett: Before we start, Ms. Woods—I know this may seem kind of strange, but it’s important that we talk just to you.

Janice Woods: Laura can stay. Anyway, she’s really the one who pushed me to follow up on Mr. Borders’s suggestion. Also, she
knows a lot of what's been going on.

[Kevin, Raquel and Martin all come over.]

Martin Stevens: Aunt Janice, Kevin won't listen to me. He says he's allowed to have a cookie in the afternoon, and I said it's almost dinner time. He keeps trying to get into the cabinet where the cookies are.

Janice Woods: Kevin. Listen to Martin. Dinner won't be too long from now.

Kevin Woods: It's not fair. I get bossed around by Martin just because he's older. [Crawls into his mother's lap; Martin and Raquel go into the kitchen]

Karen Davies: Going back to what we were saying about talking to you - I know it's pretty inconvenient, but we really do need to talk to you alone. You see, it has to do with our being able to keep what you tell us private, if you want us to. As part of our lawyer-client relationship with you, we have a duty to keep your secrets. Also, we can't be made to reveal almost anything you don't want us to - but that protection you have can be damaged if other people have heard the things you tell us.

Janice Woods: I don't really understand what you're telling me. And there's no place for Laura to go in this apartment - there's just the two bedrooms and the kitchen - and you can hear everything through the walls. And, as I said, she's the one who wants me to talk to you anyway.

Laura Stevens: Janice, I have an idea. These nice people came all the way out here to meet with you, and they say I shouldn't be here when you talk to them. They can talk to me later if they want. I'll take the kids out to the playground for a while. Come on Kevin. Martin. Raquel.

Kevin Woods: I don't want to go to the playground. I want to stay with Mommy.

Laura Stevens: Come on Kevin. Let's see if we can find some ice cream to have for dessert.

[Laura Stevens leaves with the three children]

Mark Corbett: Sorry for all the disruption, Ms. Woods. If you want, we can explain more about why it was important for us to talk to you alone. Or we can talk about how you think we might be able to help you.

Janice Woods: Let's just talk about what started this whole thing.
was in the hospital because my husband beat me up. I got a
broken rib and a concussion. And my blood pressure got very
high. So they kept me in the hospital for a couple of days. As
you know, Kevin stayed with my sister. But I don’t know if there’s
anything you can do to help. Jerome hasn’t bothered me or Ke-
vin since I went to the hospital. I haven’t heard from him or seen
him. Both Mr. Borders and Laura have been pushing me to bring
criminal charges against him or to get a protective order. But I’m
really worried about both those things. I don’t know what’s right.

Karen Davies: No doubt, you’re going to have really hard choices to
make. And I don’t know if we’ll be able to help or not. What we
can do is get some more information from you about what has
been happening, give you information about the different kinds of
things that might be useful in your situation, give you a chance to
figure out what you would like to have happen, and then do as
much as possible to help make that happen. You can decide at
any point what you want our involvement to be.

Janice Woods: Like I said, I don’t know if any of this talking is worth
much, but I promised Laura I would at least think through what I
can do. Ask me whatever you want.

Mark Corbett: Let’s begin with the things that happened when you
ended up in the hospital. It seems like they were pretty serious.

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Although this depiction of an initial meeting between two stu-
dents in a clinical program and a client may not conform to many
stereotypes of the ways that lawyers begin their representation of cli-
ents, it introduces the major themes that we will explore in detail
throughout this book. Most of the time that lawyers spend and the
intellectual energy that they bring to their work is not devoted to
events in a tribunal, whether it be a trial or appellate court, an admin-
istrative agency or before some other decision-making authority.
Much of lawyers’ work and talents are devoted to the development of
a relationship with their client. Throughout this book, we will explore
the principles that guide, the questions that arise in and the skills that
further the creation of a helpful and sustaining relationship between
lawyer and client.

Frequently, the development of the lawyer-client relationship is
understood in terms of two of the activities of the lawyer: interviewing
and counseling. Giving names to these activities of a lawyer can help
to organize our thinking about the experiences of lawyers and our
understanding of those activities. Our conceptions and practices
when we interview and counsel clients are a product of our societal
and cultural understanding of the lawyer-client relationship. Decisions we make about how to interview or counsel clients often reflect visions of what we think lawyers do or ought to do. In turn, the ways that lawyers actually interview and counsel clients shape cultural understandings of that relationship. Thus, we approach interviewing and counseling as conceptual categories that help us understand both the constraints and the possibilities that exist within all lawyering activities. We bring to this understanding of interviewing and counseling our views about the fundamental principles that we think should infuse the entire lawyer-client relationship.

Furthermore, we do not think of interviewing and counseling as discrete and separable moments that we can easily delineate from each other or from the many other parts of lawyering. They are, however, sometimes useful labels that we give to clusters of activities that lawyers undertake as part of their representation of clients. For example, lawyers gather information from clients in many different ways, over the course of multiple encounters that occur over time and in a variety of settings. Lawyers work to earn the trust of their clients from the first moment of the first meeting through the conclusion of the representation. They listen to clients' accounts of events that are at issue in a matter that a client brings to a lawyer, to clients' perceptions about the relationships and social practices that surround that event, and to clients' often shifting ideas about what they want to achieve in going to a lawyer. The lawyers maintain a commitment to help their clients as the clients come to understand the help they want. Lawyers bring to their interactions with clients their knowledge of the law and the working of various institutions that the law contributes to shaping. Their expertise is rooted in that knowledge and experience. They hear the accounts of clients through their knowledge of the law and the possibilities and limitations it presents, yet seek to shape the advice they give to clients in terms of the clients' own understandings of themselves, their relationships with others and the world and the clients' evolving desires about what they want.

These aspects of the interaction between lawyers and clients are sometimes labeled "interviewing" and "counseling," even though these clusters of activities do not occur at discrete and easily identifiable moments in the relationship. These aspects of the lawyer-client relationship occur throughout all parts of the representation and affect the lawyer's ability to conduct other lawyering tasks, such as investigation, negotiation, or direct examination. Therefore, we approach the complex and fluid activities of interviewing and counseling as interwoven parts of the whole project of creating a lawyer-client relationship throughout the course of representation. In analyzing
interviewing and counseling, as we would analyze other aspects of client representation, we consider five themes to be critical to an understanding of lawyering. We will address each of these interrelated issues throughout the book as we explore the development of the lawyer-client relationship.

1. Variations in the Lawyer-Client Relationship

The scenario with which we introduce this book presents an atypical beginning of a lawyer-client relationship. The students meet Janice Woods, their client, in the home of the Laura Stevens, the client’s sister, with various members of Ms. Woods’s family present. In varying this initial meeting from the standard vision of how lawyers and clients first encounter each other, we mean to emphasize the importance of recognizing the variations in how lawyers and clients may interact with each other. Even though lawyers may most commonly first meet their clients in a lawyer’s office with only the lawyer and client present, lawyers may also encounter or even wish to generate alternative ways in which they first meet their prospective clients. The reasons for departing from the expected scenario may vary enormously from wanting to allay the fears of a client about dealing with a lawyer, to imagining that conversations during a golf game will lead to the type of interchange that will make the prospective client like and trust the lawyer, to accommodating to the necessity of meeting a criminal defendant in a cell block, to predicting that a meeting at the client’s own workplace may help the lawyer understand the activities and problem of the client. We want students to be able to think flexibly and creatively about how to approach the variety of interactions that can occur within the lawyer-client relationship, rather than unreflectively reverting to a standardized vision of the relationship that makes other interactions seem deviant.

At the same time, the scenario demonstrates some of the elements of the lawyer-client relationship that we think are fundamental in defining the view of that relationship that we bring to this book. For example, the students have come to the home of Ms. Woods’s sister because they believe that their presence there will be helpful to Ms. Woods. It appears that they have had a prior telephone conversation with Ms. Woods in which she has asked them to come to her sister’s house because she was not “up to traveling.” Therefore, even before meeting Ms. Woods in person and knowing much about why she wants to meet with them, the students have conveyed to Ms. Woods that they will travel “far” to help her. Thus, the lawyer’s role is a helping one, in which the client ultimately determines the meaning of help.

In addition, Ms. Woods has set up the meeting even though she
is not sure that she wants to be involved with lawyers. The students have received a call from a Mr. Borders, who works at a hospital, saying that he has referred Ms. Woods to the clinic, but he has not provided any information regarding the subject of the referral. Ms. Woods has also indicated in her telephone conversation setting up the meeting that Mr. Borders suggested that she call. And she tells the students early in the meeting that her sister “pushed” her “to follow up” on Mr. Borders’s suggestion. These early comments from Ms. Woods should alert the students to the need to assess what Ms. Woods wants from the interaction with the students and to wonder how her call to the students fits into the relationships in her life. Thus, the lawyer needs to be attentive to the complexities of discerning how the client’s views of and desires about the lawyer-client relationship are shaped. The client may not care about obtaining the lawyers’ knowledge and experience or may think that other concerns are more important.

Lawyers should not expect clients necessarily to be clear about what their goals are or how involvement in the legal system (including involvement with a lawyer) may or may not further those desires. The client’s objectives emerge from and change during the course of the representation and in light of the nature of the relationship between lawyer and client. Thus, another role of the lawyer is to respect and seek to further the client’s understanding of the different possible purposes of the representation in light of the client’s situation. While the lawyer needs to respect the autonomy of the client in making these decisions, the lawyer also needs to work to understand and respect the ways that the client exists within a framework of relationships that can affect the ways the client views the world, her own situation, and the choices she has.

Further, the lawyer needs to see the ways that the dynamic between lawyer and client helps create the client’s understanding of the different purposes of the representation and the ways that the representation can affect the client’s own view of her situation and the possibilities available to her. The lawyer’s own sense of what is possible can broaden the client’s understanding. Ms. Woods might not understand before speaking with Karen and Mark that they can help her in ways that have nothing to do with a legal action, let alone an action to obtain a restraining order against the person who caused her injuries. There might be issues related to housing, medical care or employment that seem more pressing to Ms. Woods. Ms. Woods might have no idea that this kind of help is available from the students unless they make that discussion a part of the relationship.

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In emphasizing the many ways that a lawyer-client relationship can be structured and can develop, we are very much following in Bellow & Moulton's tradition. Bellow and Moulton take very little for granted. Indeed, they specifically ask, in the course of a brief but striking discussion of interview settings, what the effect would be "[o]f going regularly to clients' homes to conduct interviews."

They go on to consider the importance of the physical layout of the interview setting in light of studies of "proxemics." And they are very sensitive to the reality that the client's goals are inevitably affected by the relationship the client develops with the lawyer.

It is possible to provide guidance, and even some guidelines, for shaping these relationships, but in the end it is not possible to make this work simple. For Bellow & Moulton, the lawyer-client relationship is a complex negotiation between parties who largely share common goals, but bring to their encounter different perspectives and backgrounds that can enhance, but also undercut, their work together. As the Bellow & Moulton text notes in focusing on the challenges present in client interviewing:

The task of dealing with the immediate pressures of the interview situation (e.g., time, anxiety) and maintaining rapport, and obtaining a complete, accurate and understandable account of the 'facts' of the case is surprisingly difficult. Our experience is that you will have to be at once both open and organized, spontaneous and purposive, responsive and directive if you are to get the information you need and relate to clients in the way you would like.

In truth, doing all of the above really well is so hard that it is not surprising that Bellow and Moulton themselves, discussing their own "conception of a good interview," remind readers that "we are rarely able to carry it out." What they add, and we embrace, is that, "whether you agree or disagree [with our conception], however, you will need to attend to these issues beforehand, at least in a general way. They cannot be effectively dealt with in the give and take of the actual interview situation." Nor, it seems to us, can lawyers launch themselves into interviews or other lawyering tasks just on the strength of some set of philosophical principles or pre-established concrete instructions. Our eyes must remain open. The self-conscious, nuanced form of lawyering that the Bellow & Moulton text articulates sets a tone that we hope to adopt in our own work.

21 BELLOW & MOULTON, supra note 2, at 175.
22 Id.
23 Id. at 999-1000.
24 Id. at 139 (emphasis in original).
25 Id. at 172.
26 Id.
2. Context

In this book, we will examine the context within which the lawyer and client shape their relationship and the effects that those contextual factors have on creating different sorts of lawyer-client relationships. We will present many of the variable contexts within which the lawyer-client relationship arises and develops to explore the ways those multiple contexts affect our understanding of that relationship. Throughout the book we will suggest the many meanings of “context.” For example, in the scenario at the beginning of this chapter, the context can be understood as the situational factors surrounding the interactions between the students and the client — the setting in which lawyers work and clients live. When Karen and Mark meet Janice Woods, there is no receptionist, no desk, no law books on a shelf, no computer. What difference, if any, do these situational factors surrounding the lawyer-client interactions make? How might the students’ presence at the client’s temporary home make a difference in the lawyer-client relationship? How might the students’ presence affect the others in the home? How might the situation look different for a client with more resources, fewer complications, or more certainty of aim? Might there still be reasons that the lawyer meets with the client in the client’s home or office? Does the life situation of the client, however, change the meaning of the meeting in the client’s home?

How do the conditions of the lawyer’s own work and life affect the interaction? In the scenario, how do the norms and values that characterize the clinic in which the students work affect Mark and Karen’s visit to Ms. Woods’s home? Is the visit seen as a routine option to be considered or an atypical response to an extraordinary situation? In other practice settings, do lawyers engage in a form of practice where they regularly meet with clients in different places within the client’s community or do they routinely expect the clients to come to their offices? In what kind of area are their offices located? An office building in an upscale downtown area, a storefront in a local community, a home office in a residential neighborhood? How do the values and expectations communicated to a lawyer in the lawyer’s work setting shape his or her views about appearing at the client’s home?

Beyond these situational factors, we will analyze how differences of race, class, gender, sexual orientation, disability, culture and other axes of difference between lawyers and clients create differing contexts for the development of lawyer-client relationships. How do dif-
ferences affect the resulting relationship between lawyer and client? How can lawyers become knowledgeable and reflective about how these differences affect them and their clients and what kind of impact the differences may have on the relationships they form? We do not presume that effective lawyering across difference is impossible, or that sociological and cultural differences automatically translate into actual differences between people. Furthermore, we do not assume that individual differences necessarily flow from differences in group membership and identification. Neither, however, do we presume that effective lawyering across difference can automatically be achieved without conscious, self-critical attention.

In the above scenario, we do not know much about many of these elements of difference in the relationship between the student attorneys and their client. We do have some information about gender. How does this information affect the students' views of the situation? How can the students be aware of the assumptions that this limited information produces? How can they assess the accuracy of assumptions that they make? If we vary the elements of difference in imagining the characters in the scene, does our analysis of the development of the relationships change? If so, why and how? Does the race of the various participants change our view of the situation? How do racial identifications affect the analysis of gender? Do we think differently about the scenario if the students are African American and the client is white? Or if the students are Hispanic and the client African American? Or if the students are of different races? What assumptions about race are embedded in different reactions that we may bring to the situation? How do we evaluate and respond to those assumptions? In exploring the impact of difference, we will consider what special techniques might be useful and ask whether (and, if so, how to judge when) a particular lawyer might just not be the right lawyer for a particular client.

In addition, in evaluating the contextual elements of the lawyer-client relationship, we will analyze how differences among clients — their resources, their social status, their power — may affect how the lawyer conceives of the lawyer-client relationship and his or her tasks within it. Can and should the lawyer's approach to representation differ depending upon either power differentials within the relationship itself or the lawyer's view of the client's exercise of power in the world? Does the profession embody a value that all clients should be treated the same, whatever their power? Is this value purely aspirational when the availability of legal services is largely controlled by the market? How can a lawyer make choices about the development of the lawyer-client relationship when much is controlled by the mar-
ket? What are the parameters within which a lawyer may vary his or her approach to client representation? Can these differences be justified? If so, how? How might interviewing and counseling be different if the lawyer varies his or her approach to the overall representation?

If Janice Stevens had said clearly, after Laura Stevens had left the apartment with the children, that she did not want to seek a protective order or bring criminal charges and did not want to talk to Karen and Mark at all, should Karen and Mark have pursued the conversation? How should Karen and Mark deal with their own sense of Ms. Woods's power in the world? What if they see her as a victim who needs help even if she does not want it? Does their decision vary depending on whether they want Ms. Woods to pursue possible court actions or want to inform her of other options? Should it? Is it ever right for a lawyer to persevere in trying to get a client to reconsider possibilities that the client has rejected? If so, under what circumstances? Should the relative power of Ms. Woods and the students affect the students' evaluation of how hard to push her? What if Ms. Woods has worked with the social welfare system and knows about resources available to women who have been abused? How if Laura Stevens had wealth and knowledge that Ms. Woods does not? How should the students approach that power differential?

When lawyers are cognizant of and critical about the assumptions about difference that they bring to any lawyer-client interaction, they have a basis for making better judgments about the choices available to them and the actions they take in shaping the relationship. They also may develop a more sophisticated critical vision of both the aspirational value of treating all clients the same, and the causes for divergence between aspiration and reality.

*B* *B*

Bellow and Moulton are acutely sensitive to the issue of power, in society and in the encounters between lawyers and clients who may be more, or less, able to wield society's levers of influence than their lawyers are. They are no less sensitive to issues of values, and to the contexts—law school, followed by membership in the legal profession—in which lawyers must address them. Writing about how law students should think about values, for example, they observe:

27 *Cf.* Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1, 46-51 (1990) (describing how client's knowledge and intuitions about the welfare system and her caseworker led her to pursue a hearing strategy that differed from that which her lawyer devised).*
This leaves us, finally, with the sober problem of how you will talk to each other (and us) about such things. However you personally resolve values questions, we do urge on you the premise that discussion of values—of goals, purposes, and consequences—is possible and desirable in lawyer work. If lawyers are to take the problem of responsibility seriously—that is, if they are to choose rather than simply accept an ethical system—they will need reasons for doing so. This requires honestly confronting the unease and drift that are so often felt in contemporary discussions of morality.28

Our concern with context and difference responds to very similar issues. But while Bellow and Moulton discuss "understanding the larger context" when constructing a case,29 they are less explicit in discussing the contexts of race, class, gender, and other issues that we think are important. Again, we are in the fortunate position of being able to take advantage of the important contributions that feminism30 and critical race and difference theories31 have made to clinical legal education. Our choice to begin the book with a legal issue that does not explicitly involve rich against poor, or white against black, but rather husband against wife, exemplifies the past decades' gradual recognition of the salience of forms of injustice that once were less central to lawyers' concerns. Similarly, our decision to highlight, at once, the impact of difference within the lawyer-client relationship itself reflects the emerging sense that such issues of difference are always and everywhere present, and need to be taken into account, not only in special cases but as a matter of routine. Bellow and Moulton would have shared all of these concerns, but our emphases embody our day's intense attention to them.

Looking at Bellow and Moulton's book, it is hard not to read between its lines the program of organized poverty lawyering that Gary Bellow developed at Harvard Law School over many years and Bea Moulton's work in training legal services lawyers and then teaching at Hastings College of the Law. The book itself does not lecture about politics, but politics do remain part of it. At the end of the

28 BELLOW & MOULTON, supra note 2, at 117.
29 Id. at 324.
31 See, e.g., Isabelle Gunning, Diversity Issues in Mediation: Controlling Negative Cultural Myths, 1995 J. DISP. RESOL. 55; Bill Ong Hing, Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses, 45 STAN. L. REV. 1807 (1993); Kimberly E. O'Leary, Using 'Difference Analysis' to Teach Problem-Solving, 4 CLIN. L. REV. 65 (1997).
counseling chapter, after reprinting extensive excerpts from a critique of Washington power-broker lawyering, Bellow and Moulton suggest that we need to avoid

... too narrow a view of what must change if any vision of the 'public interest' is to be clarified. Consider whether it really is possible to resolve the issues [of this critique] ... without — far greater limits on the exercise of private corporate power; — far less inequality in wealth, income and security within the country; — a different cultural orientation toward cooperation, acquisitiveness, and participation in social life.\(^3\)

Characteristically, the authors immediately add that "You may, of course, add to this list, criticize or modify it, or hopefully develop a very different one of your own. . . . But surely [these] concerns would require some larger social and ethical vision."\(^3\)

Most clinical programs in this country reflect the public interest concerns of their teachers. But clinicians have also struggled to offer an education to all students, regardless of politics, and have hesitated about the danger that they might themselves exercise a power they did not rightly claim, by shaping their students' politics in ways the students could not resist. Probably most clinicians resolve this tension roughly as Bellow and Moulton do, by hoping that they can present, even urge, their views without overwhelming their students in the process. We share that hope; our book is meant for all students but it is also focused quite heavily on those areas of practice, and those aspects of any practice in which such issues as social justice and human autonomy seem to us to be most at stake.

* * *

3. Connection

Third, even when clients come to lawyers as individuals, they often bring with them, literally and symbolically, many others to whom they have powerful connections. Although the lawyer may see the client as the person whom he or she is representing, the connections that the client feels to others may be powerful determinants in shaping the resulting connections between the lawyer and client. Laura Stevens, Ms. Woods's sister, Kevin, her son, and Laurence Borders, the person from Memorial Hospital who made the referral to the clinic students, are all powerful presences of whom Karen and Mark must be aware as they are about to begin forming their relationship with Ms. Woods, even though the students have excluded these other

\(^3\) BELLOW & MOULTON, supra note 2, at 1104.

\(^3\) Id.
people from the room. Beyond these people who have been directly involved with the situation that has gotten Ms. Woods to her student lawyers, there may be others among her friends and family, in her neighborhood, or in a broader community of which she feels a part who might have a powerful affect on her feelings of trust, on her willingness to be open, on her perceptions of the choices available to her, or on her attitudes toward state power and the judicial system. When the client is a group, the relationships among diverse, yet interconnected, individuals become an explicit part of the complexities of forming and sustaining a lawyer-client relationship.

The many meanings of client autonomy and dignity that shape the lawyer-client relationship are complex. Lawyers and clients may bring different assumptions about individuality and community to their interactions, assumptions that are often deeply rooted in cultural understandings. Lawyers need to recognize that their own understandings of individuality and community may be culturally and socially grounded, as may the client’s. Lawyers need to be aware of their own cultural understandings, while seeking to understand those of the client. Values of dignity, care and community may conflict with a conception of the client as an autonomous individual. The lawyer must consider that the client’s own understanding of his or her interests is often profoundly shaped by his or her connections to others. Lawyers may not sufficiently identify or account for the importance of those aspects of the client’s views that are embedded in various communities, from communities of family, friends and neighborhood to communities of racial, ethnic or national identity. Similarly, lawyers must consider that their understanding of the client’s interests is embedded in the lawyers’ own communities. Furthermore, lawyers need to be aware of how values and assumptions underlying the legal system and the particular legal communities within which they operate are shaped by social, political and cultural dynamics. Therefore, furthering autonomy and dignity in the lawyer-client relationship can have multiple meanings and associations. For example, respecting client autonomy does not necessarily mean treating the client as an isolated individual. Because the client’s own sense of autonomy may be rooted in relationships to and feelings about others, the lawyer needs to be aware of what it means to the client to vindicate his or her own desires. For a client who experiences and understands autonomy and dignity as rooted in community and connection to others, the lawyer’s task is to sustain those connections, unless the client chooses otherwise.

At the same time, the lawyer may not favor his or her own view of the client’s connections to others above the client’s own view of those
connections. The lawyer also must make the client aware of possibilities and choices that may be in conflict with the preferences of those with whom the client feels connection. Otherwise, the lawyer denies the client the opportunity, through the decisions made with the lawyer, to shape his or her own relationship to others within the client’s life. Respect for different conceptions of autonomy, ones that are connected to care, dignity and community, while furthering the ability of the client to shape his or her life, may call for techniques that may overlap with but also vary from those that are most appropriate to encounters grounded in more individualistic conceptions of autonomy.

If Janice Woods believes that her sister is an essential participant in her decisions about how to handle the situation with her husband, the students face the complex task of shaping a set of interactions with Ms. Woods that reflects the centrality of Laura Stevens in her sister’s world, while also providing Ms. Woods with the opportunity to move outside of the relationship with her sister in making decisions about her husband. Ms. Woods’s views about the appropriate role for her sister may change during the course of the representation as her knowledge about possibilities and consequences changes (or the nature of the relationship changes for non-case related reasons). Therefore, the students need to anticipate and adapt to Ms. Woods’s desires about her sister’s role in the representation.

A second aspect of connection in the lawyer-client relationship is the development of the connection between lawyer and client. This connection may form concerning almost any aspect of the relationship between lawyer and client. It may be confined to matters directly related to the legal claims or it may extend into all aspects of the representation. It is important that the lawyer be aware of the power of these connections, as they may assist the lawyer in developing a theory to guide the representation of the client that reflects the client’s changing views of the representation. These connections can, however, distort the lawyer’s view of the client’s situation if the lawyer does not remain aware of his or her own assumptions about and reactions to the client.

If Janice Woods is skeptical about meeting with lawyers because she distrusts the legal system, the students need to understand the source of that mistrust and develop empathy for the client’s feelings concerning her encounters with the legal system. They must also critically examine their own assumptions about the legitimacy and efficacy of the legal system and not impose these upon Ms. Woods. If Ms. Woods does not want her husband caught up in that system, the
lawyers need to be aware of the values she brings to that decision, as well as the aspects of her life that lead her to that decision. Further, they need to be able to express an empathic understanding of that decision so that they can be of assistance to her in facing difficult choices. If she wants primarily peace and safety for herself and her son, the students need to see what peace and safety mean for her. They should not impose their own understanding of these terms.

While technique is critical to achieving success in these aspects of the lawyer-client relationship, the underlying vision of the lawyer as able, through techniques of lawyering, to divorce within herself or himself reactions to the decisions that Ms. Woods faces may not provide the lawyer with sufficient means for identifying or addressing those aspects of his or her own experience that shape the nature of the representation. The lawyer may sometimes need to supplement empathy with rigorous self-examination to provide both caring and dispassionate representation. For example, the students who visit Ms. Woods may have had their own experiences with violent relationships that interact with their ability to maintain an empathic connection to Ms. Woods. Their own experiences may sometimes assist them in understanding Ms. Woods’s situation but also may also lead them to impose their own views on Ms. Woods. Throughout the book, we will identify ways for the lawyer to render objective judgments, while remaining a human being whose reactions are both inevitable and, potentially, fruitful elements of the lawyer's capacity to form a meaningful connection with the client.

Finally, we recognize that bonds between lawyer and client can occur across enormous chasms of difference, as well as across sameness. It may be that these bonds grow more easily within sameness. But, it may also be that aspects of sameness can cause both lawyers and clients to make assumptions that keep them from working to achieve mutual understanding. The connections that develop between lawyer and client over the course of representation can be a powerful force in giving shape to the lawyer-client relationship that emerges and can affect the client’s own vision of what is desirable or possible in his or her situation. Thus, the potential connections between the students and Ms. Woods may themselves be powerful in shaping her ideas about herself and the actions she wishes to take.

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The clinical movement has its roots in public interest and poverty law. Both of those forms of practice assert the goal of empowering

34 See Robert D. Dinerstein, Client-Centered Counseling: Reappraisal and Refinement,
disadvantaged people, and it is a short — though not universally taken — step from that objective to the recognition that in the lawyer-client relationship power too must be redistributed so that clients become more of a match, if not a master, for their attorneys. In different ways, Bellow & Moulton as well as Binder & Price speak to this concern. Binder & Price sweepingly, though not quite absolutely, urged lawyers to get out of the advice-giving business; the lawyer's job was to enable the client to gather and integrate all the relevant information and then to make her own choice. Bellow and Moulton took a different stance. Clearly sensitive to the problem of lawyer domination, they felt that it was nevertheless impossible to eradicate lawyer influence. Their guidance for lawyers and clients became, in a sense, like their guidance to students in their book: they took positions, made suggestions, and encouraged independent response by their readers — and they envisaged lawyers who would act similarly with their clients. They see no perfect formulations, but they believe lawyers can "recognize the tendencies in given formulations and the degree to which the wording and tone of advice invites the client to disagree, or at least ask questions." In discussing the difficult choices involved in providing clients with the information they need — while not overwhelming them with "guidance" that they cannot respond to — Bellow and Moulton sum up their approach: "A lawyer can, with care and patience in using language, provide guidance and direction without implicitly giving orders."

Today, most clinicians agree, and so do we, that sometimes it is

35 See id. at 509-10. At the American University Washington College of Law Colloquium, Critical Moments in the Conceptualization of Lawyering: Reflections Upon the Quarter Century Since Publication of Bellow and Moulton's The Lawyering Process, David Binder stated that his first edition consciously overstated the need for lawyers to eschew giving advice to clients out of his belief that lawyers in practice were too inclined to dominate their clients. Transcript Colloquium: Critical Moments in the Conceptualization of Lawyering: Reflections Upon the Quarter Century Since Publication of Bellow's and Moulton's "The Lawyering Process" (American University, Washington College of Law Feb. 21, 2003) available at http://www.wcl.american.edu/clinical/lawyeringprocesstranscript.cfm. Indeed, in the second edition of their text, the authors write:

[w]e recognize that in some circumstances, it is both proper and desirable for lawyers to give advice about what clients ought to do. . . . The earlier book, perhaps in overreaction to the tendency of many lawyers to tell their clients what to do, gave little comfort to those who thought that clients often expected and benefitted from their lawyers' opinions. Taking what we now believe is a more realistic approach to advice-giving enables us to discuss how to give advice in a way that preserves client autonomy.

36 Bellow & Moulton, supra note 2, at 1040.
37 Id.
appropriate for lawyers to provide not just useful information but persuasive advice. Nevertheless, we view this problem as a persistent, troubling one in lawyer-client relations. There are, no doubt, clients, especially those with economic and social power, whom lawyers can be confident they will not unduly influence. There are also, certainly, techniques of persuasion that are more, and less, likely to manipulate a client's independent judgment. What makes this issue so difficult, however, is that the boundaries of right action are not fixed but ambiguous, reflecting both ethical and skills considerations that may or may not coincide. Sometimes the stakes, for third parties or for the client herself, may be so high as to justify such manipulation; sometimes techniques that are well-designed not to manipulate still give the lawyer a power he may wish to escape. Lawyers may not be able to choose one clear course of supportive non-coerciveness; they may have to sacrifice one ethical concern as they honor another.

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4. Ethics

In pressing hard to meet with their client with no one else literally present, Karen and Mark are, among other things, responding to structural constraints concerning a lawyer's duty of confidentiality and protection of the lawyer-client privilege that result from the operation of the Rules of Professional Responsibility. We will examine how lawyers' ethical responsibilities interact with the decisions that they and the client must make in how to conduct the representation. The rules sometimes place unclear parameters upon the behavior of the lawyer. The assumptions underlying the rules may reflect sometimes conflicting values about lawyering contained within the legal system. Lawyers must first be aware of and be able to articulate the ethical principles that they bring to the representation and to justify their own stance toward those assumptions and values underlying those ethical principles. They must then confront the challenges that the rules pose in adhering to those principles and analyze the ways that the rules provide important, but sometimes limited, guidance.

How does the way that Karen and Mark handle issues of confidentiality and privilege with Ms. Woods relate to the comfort she feels? The trust she has? The desires she is willing to articulate? The dynamic in her relationship with her sister? Complex ethical issues arise unexpectedly, yet with great frequency, in almost any part

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38 See supra note 35.

of client representation. The law and the policies are often unclear. The assumptions underlying any analysis of ethical questions are almost always contested. Lawyers and clients do not always share the same perspective on the assumptions underlying or the meaning of the rules. How is the lawyer to handle disagreements? Could Karen and Mark have proceeded with the interview with the others present? Would the client have felt greater connection with Mark and Karen for recognizing connections that were important to her? Did the students' insistence on meeting with the client without others present lay the groundwork for the client's ability later on to decide how the others in her life would figure into decisions that she would make? Should the students have included Ms. Woods in the decision about excluding others? How should the potential legal consequences of that decision figure into the decision about how to structure the meeting? How much time and energy at this point in the representation should Karen and Mark have devoted to analysis of this question with the client? In the course of representation, ethical issues regularly arise embedded in a complicated dynamic of lawyer action or client decision making, a dynamic that often makes both analysis and decision more difficult. The techniques that the students use in bringing about a meeting with their client with no one else present are critical components in achieving the goals that they wish to achieve in this first meeting.

Throughout the book, we will examine the ways that ethical issues emerge in the dynamics of the lawyer-client relationship. For example, the lawyer throughout the process of representation confronts the issue of truth. It is well understood that lawyers can phrase questions so as to influence clients' answers—by asking, say, "How fast were the cars going when they slammed into each other?" or instead "Could you tell what their rate of speed was at the time of the accident?" Which formulation is better, and why? How does the overall vision of the lawyer-client relationship shape one's answers to those questions? It is also well understood that lawyers who explain the law to their clients before questioning them may then elicit answers that conform remarkably to the law's necessities—yet it is also acknowledged that clients are entitled to learn the law from their lawyers. How can lawyers provide clients with the information to which they are entitled, while not fostering untrue accounts of events? What is the relationship between truthful information and useful information? Should the lawyer be seeking truth? And how far should lawyers press their clients, and by what means, to elicit the truth? Does the lawyer believe that the conception of truth is contested? What does it mean to each lawyer to obtain a truthful account of an
event? How can different conceptions of truth affect a lawyer's decisions about whether and how to seek it? At the very least, we understand that different individuals will experience, understand and remember the same event in different ways. People's perceptions of truth, even the truth about themselves and their reporting of it, are subject to all kinds of pressures and variations. Lawyers constantly struggle with how different accounts of events and different perceptions of truth relate to their actions in working with clients. We will also continually face the question of whether goals of truth and justice come into conflict. If so, how are they to be resolved? Are the answers the same in all contexts? These are only examples of the complex ethical problems that can arise in almost any encounter between lawyer and client and that are critical to the development of the lawyer-client relationship.

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A fundamental aspect of the Bellow & Moulton text is its focus on ethical issues. For the authors, the ethical dimension of the decisions and actions available to the lawyer is an essential component of all lawyering activity. Each of the substantive chapters in Part Two of the text contains a Section 3, "The Ethical Dimension." These sections begin with a lawyer interacting with a client, another lawyer, or other participant in the legal system. Following these dialogues, the text presents extensive discussions of the ethical issues involved and the sections of the Model Code of Professional Responsibility implicated. These discussions are not only very rich, but also urge students to go beyond "what the rules require" and examine the moral dimension of the activities in which lawyers engage.

The Bellow & Moulton focus on ethical issues reflects the close relationship between clinical work and professional responsibility that characterized the early modern clinical education movement. For many clinical teachers, including us, professional responsibility issues that arise in the context of clinical programs are particularly intense for students, in large part because their own actions (or failures to act) are implicated in the issues presented. Compared to ethical issues that surface in the relatively safe (and, consequently, relatively disengaged) haven of the required professional responsibility class, those

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40 The Model Rules of Professional Conduct, first promulgated in 1983, were not in existence at the time Bellow & Moulton was published.

41 See, e.g., BELLOW & MOULTON, supra note 2, at 270-72 (discussion of "The Larger Puzzle: Professional Role and Client Autonomy" at end of ethics discussion in chapter on interviewing); and at 1095-1104 (discussion of "The Larger Puzzle: The Lawyer's Responsibility for Consequences," at end of ethics discussion in chapter on counseling).

42 See Dinerstein, supra note 1, at 725 and n.104 (citing sources).
that arise in clinical programs are frequently challenging and often provide unparalleled opportunities for student learning.\(^{43}\)

As noted earlier, however, our approach is to integrate ethical issues into the main discussion of the topics we address rather than setting out separate sections on ethical issues as does the Bellow & Moulton text.\(^{44}\) To some extent, the distinction between separate and integrated treatment of ethics can seem stylistic, or even arbitrary. But for us, the message that ethical and professional responsibility issues are immanent in all clinical work is more powerful if these matters arise as they do in real life—in the midst of difficult representational issues, and not as what students might imagine to be an apparent afterthought, even a thoughtful one.\(^{45}\)

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5. Theory-driven Lawyering

The fifth issue that we explore throughout the book is the interrelationships among the various activities that constitute lawyering. When a lawyer meets with a client to interview or counsel the client, those activities are not separate from the many other activities of the lawyer. By ignoring the interconnectedness of the different parts of lawyering, lawyers may treat case theory development, investigation, planning and negotiation as afterthoughts in their meetings with their clients, activities to be performed elsewhere, under other circumstances. The activities are dis-aggregated but never reconnected. In this book, we will attempt to make theory-driven lawyering basic to each activity of the lawyer.

Part of the enormous responsibility and privilege that comes with the practice of law is the access that lawyers have to all kinds of infor-

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\(^{43}\) Of course, no one clinical program can hope to raise all of the professional responsibility issues of which students need to be aware prior to entering the practice of law. In particular, ethical issues concerning fee arrangements and commingling client funds may arise relatively rarely in clinical programs oriented toward providing legal services to poor people.

\(^{44}\) *See, e.g., Ellmann, supra note 13* (incorporating discussion of ethical issues involved in interviewing for “truth”).

\(^{45}\) While the Bellow & Moulton ethical discussions are detailed and rich, the very length of the transcripts that form the basis of the ethical problems may detract from the ability of students to focus on the ethical issues presented. In addition, the extreme nature of at least some of the problems, while serving to highlight the ethical issues, may make it easier for students to distance themselves from the kinds of problems they are likely to experience in at least the early part of their experience as practitioners. *See, e.g., BELLOW & MOULTON, supra note 2, at 1080, et seq.* (in one lawyer-client dialogue, the corporate CEO proposes: delaying the disclosure of a title problem in connection with a public offering; violating a collective bargaining agreement; proposing the continued production of a potentially dangerous product; and delaying discovery responses to leverage a more favorable settlement from plaintiffs).
mation about their clients' lives, much of which is complex, ambiguous, intimate or emotion-laden. Lawyers must work not just to conceptualize and understand the legal questions raised by their clients' cases, but also to integrate the information that they learn during the course of the representation with the possibilities presented by the legal alternatives they construct. Lawyers are constantly making decisions, in consultation with their clients, about how to proceed in light of the parameters created by the client's desires, by law, and by the information they obtain, all of which are frequently uncertain. Throughout this process, the lawyer formulates and reformulates not just her or his case theories, but also the relationship with the client.

In the scenario, the students should already be starting to think about the relationship of the interactions that occur as they sit in Laura Stevens's living room to their overall representation of Janice Woods and the creation of their relationship with her. They must be attentive to the signals they are getting about the factors that might affect the information Ms. Woods provides, the desires she expresses, or the decisions that she makes — all the classic material of interviewing and counseling. These same factors, however, are connected to decisions about investigation, planning, negotiation and trial. The students must also be considering how the factors possibly influencing Ms. Woods's information, desires and decisions affect their possible theories of the case. The theories of the case are the potential accounts that integrate the experiences of the client, her relationships with others, the law and the facts to achieve the result that Ms. Woods wants. In this early stage of the development of the relationship with Ms. Woods, Karen and Mark need to know what she thinks about each of the possible accounts they identify. They also must explore what alternative accounts Ms. Woods may have. The possible theories about the case and about Ms. Woods's view of the case they have as they leave the initial meeting will help to define and guide their actions. For example, depending upon the potential case theories they form throughout their meeting, they will be making tentative decisions about the investigation that they will do when they leave. They need to test the appropriateness of these investigative actions with Ms. Woods.

Simultaneously, Mark and Karen must be considering possible overall theories of representation (or theory of the client, as described by David Chavkin46) — that is, theories that provide guiding principles to the lawyer and client about the purposes of the representation.

Mark and Karen can probably already see from their initial interactions that Ms. Woods is not clear about why she is speaking with them. They do not yet know what reasons she may have, what conflicting motivations might be operating, or how the people surrounding her are influencing her, but they do know that their own purpose in being in Ms. Stevens’s living room is not yet clear. As they develop their relationship with Ms. Woods, her purpose in engaging in that relationship may change, perhaps partly as a result of the relationship she forms with Mark and Karen. Thus, a theory of the representation requires the lawyer to attend to a client’s shifting vision of why he or she wants to be in this relationship at all and enables the lawyer to remain self-conscious about the nature of his or her involvement with the client so that all aspects of representation remain consistent with the overarching vision of the representation.

As Bellow and Moulton observe about their book, “This is a book about the experience of being a lawyer. It asks the student practitioner to describe and generalize from his or her law practice, or—to state it more expansively—it asks that lawyers make lawyering a subject of inquiry.” Theory-driven lawyering is simply another way to say that not only is lawyering a fit subject of inquiry, but the lawyer (and all of his or her actions) should be animated by articulable theories when considering how to approach lawyering and its constituent parts.

Clinical teachers know a lot more now about some of the components of the lawyering that Bellow and Moulton urge be a “subject of inquiry.” We now have our own lawyering theories to describe what lawyers do. We have, for example, a well-developed theory of client-centered representation, along with critiques and alternative ap-

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47 BELLOW & MOULTON, supra note 2, at xix.

48 Our co-participant in the Symposium, David Binder, along with the co-author of the first edition of his interviewing and counseling text, Susan Price, first popularized client-centered representation in the clinical literature. See BINDER & PRICE, supra note 18. Bellow & Moulton contains a brief excerpt from the Binder & Price text. BELLOW & MOULTON, supra note 2, at 1046-1050. Interestingly, given the later centrality of client-centeredness to clinical practice and scholarship, see generally, Dinerstein, supra note 34, Bellow and Moulton make virtually no mention of the term itself (other than a brief allusion to Thomas Shaffer’s reliance on the “client-centered model”). BELLOW & MOULTON, supra note 2, at 1074. They do, however, address issues of client participation and the lawyer’s role in decisionmaking. They set out a position somewhat different from the lawyer neutrality position Binder and Price advocated:

Dealing separately with the judgments a lawyer might and (in our view) should make, may appear to be inconsistent with a commitment to client participation and choice. Nevertheless, in our experience a lawyer who is willing to reach tentative conclusions on the decisions facing a client often offers more real choice to a client
proaches.\textsuperscript{49} We have drawn upon Bellow and Moulton’s references to
theory of the case\textsuperscript{50} and made them central to our understanding of
how lawyers organize facts, theories, and law, and the complex relationship among them.\textsuperscript{51}

As Ann Shalleck recently has noted, it is now possible to describe
a robust form of clinical jurisprudence that contains three important
characteristics: lawyering as a site for the creation, interpretation and
elaboration of law; factual malleability as critical to the development
of law; and the lawyer-client relationship as mediating the intersection
between legal and social knowledge.\textsuperscript{52} The meta-theories and sub-
theories that animate this jurisprudence have their roots in legal realism, and in the world view that Bellow and Moulton articulated in \textit{The Lawyering Process}. Twenty-five years later, we are able to note their
far-sightedness even as we aim to continue the journey on which they
started us.

\textbf{CONCLUSION}

In the final analysis, one cannot examine (or re-examine) Bellow
\& Moulton without feeling a sense of awe regarding the breadth of
the authors’ knowledge and the multifarious sources on which they
drew for their insights on lawyering. Our book will not be precisely
like Bellow & Moulton—how could it be?—but we hope that our in-
sights will serve, along with the other books in the ever-increasing
clinical canon, to continue the dialogue that Bellow and Moulton not
only participated in but shaped.


\textsuperscript{50} BELLOW \& MOULTON, \textit{supra} note 2, at 304-307.

\textsuperscript{51} See, e.g., Binny Miller, \textit{Give Them Back Their Lives: Recognizing Client Narrative in Case Theory}, 93 MICH. L. REV. 485 (1994). \textit{See also BELLOW \& MOULTON, \textit{supra} note 2, at 151, \textit{quoting C. Morris, How Lawyers Think}, 33-36 (1937) (“So in the lawyer’s working day he is constantly involved in an interplay between emerging facts and constructed theories. The facts which are recited initially suggest theories, which when amplified and modified by thought and work suggest further inquiries concerning facts, which again suggest amplification and modification of theories”).

\textsuperscript{52} See Shalleck, \textit{supra} note 11.