

Witnessing: New Roles for Lawyers Out of Old Traditions

Nancy Cook, Roger Williams

The basic issue I am concerned with is whether lawyers, who are positioned to observe social reality through their work, have a responsibility, or at least some authority, to bear witness to that reality outside the context of individual client representation. If so, is witnessing a skill that can or should be taught?

Background. The clinical work I do has increasingly been anchored in the community. This has come to mean that my students operate less from a law office to which clients come and more as a legal presence or resource in existing service centers. The students in the Community Justice and Legal Assistance Clinic that I now direct participate as members of teams of service providers trying to assist people with multidimensional individual, family and community problems. They enter clients' lives through many portals: conventional intakes at community sites; interdisciplinary problem-solving with community case managers and social workers; in conjunction with service fairs and community education workshops; and as part of organizational or institutional service programs.

The classroom component of the CJLA Clinic includes a number of familiar skills subjects, such as interviewing and counseling, collaboration, advocacy and fact investigation. I've tried to devise a syllabus that also responds to the particular experiences students in a community-based clinic are likely to have. My students are interacting with people who do not have specific legal problems, or whose legal problems are presented as only a piece of a larger dilemma; they are also working with groups of people who are struggling to address the systemic aspects of cases or community issues. Consequently, often, a few weeks into the semester, students feel overwhelmed by the problems clients and client populations are facing. Many of them experience role confusion because their law school education has not prepared them for this type of work. Many also experience a kind of culture shock, often related to race or national origin and even more often related to socioeconomic status.

One of the assignments I use to help students get acclimated to the clinic and to introduce them to the new worlds they are finding themselves in is an observation assignment (copy attached). The students are asked to step back from their past experience, and detach themselves from their current experience, long enough to take note of what is around them. So they are to look, listen, record and not analyze. At the same time, they are asked to make note of things that could have meaning; they are to choose facts to record from which inferences about the justice system could be drawn. Thus, "A tall man was wearing a blue suit in the DHS office" would probably not meet the standard, but "A man wearing a blue suit and sandals was denied admittance to the DHS office" probably would. "There was a clock on the wall in the courtroom" would provide little opportunity for drawing inferences, but "There was no clock in the courtroom," might be worth noting.

This is a recurring assignment in the clinic, and I use it for a number of reasons. In addition to providing students with a way to orient themselves to new surroundings and experiences, I think it helps them learn about withholding judgments and recognizing assumptions. I use it to help develop fact investigation skills. It gives us a kind of “testimony” to use in understanding the process of getting from fact (or evidence) to inference and conclusion. We also use the students’ collection of facts in systemic analysis and discussions about justice. Thus, in “theory,” this is a skill building exercise, and it is related to the work that lawyers do: investigate, collect evidence, analyze facts and assumptions, critique systems and procedures.

Lately, however, I have felt a disconnect between what I theorize I am doing and what I intuit I am doing. My practice may be, in this case, a few steps ahead of my theory. In truth, I am not satisfied if my students walk away from our classes with an understanding of how detached observation can be useful in fact investigation, or of how factual perceptions can be used as tools to reach legal conclusions. Rather, I harbor the hope that they will walk away with a different kind of skill—that of witnessing.

Defining the Contours of the Issue. I don’t have a clear definition of witnessing yet, but my thoughts run something like this: as lawyers, we are exposed to—in fact, are privileged to see—a great many aspects of our clients’ life experiences. To some extent, what we see and hear is in the context of representation; we are privy to our clients’ stories, we are participants in the legal system, we investigate and “discover” facts related to our clients’ cases. But we are also witnesses to a great deal more, and this is particularly true for lawyers who are working with and for client populations in community settings. My students, for example, learn many things that have no apparent bearing at all on their cases—they’ve seen people working three jobs so they can make rent payments, parents so depressed they can’t get their children to school, teen-agers illegally in the country who have avoided detection by the INS for four or five years. These are just tiny examples; yet each of these examples could give rise to a story of social significance.

The question this raises for me is whether it is appropriate for—even demanded of—lawyers to speak of what they see and hear outside the context of case work. How and when to speak and how much to say would be legitimate and important questions, and ones, I suspect, that will have no clear answers. I can envision limits that would have to be observed, but I can also envision many forums for lawyer witnessing, from legislatures to academic publications to magazine articles to Rotary Clubs to churches to soap boxes. The first questions I want to address are, however, should we speak as “witnesses,” and, if so, should we be teaching our students to do the same?

Theoretical Bases. In exploring this topic, I want to look for help in several different areas: law, religion, and literature. Each of these three disciplines has a tradition of witnessing that could help illuminate the issues. My research will involve learning how, in each of these areas, “witnessing” is defined. In addition, I want to investigate when a duty or responsibility to witness is thought to arise and what processes are common in fulfilling such responsibilities.

Historically, the connection between religion and courtroom procedure is fairly evident. While that history is important, I believe certain current movements in law have some particular significance. Humanism, therapeutic jurisprudence, and restorative justice are some of the theoretical schools that encompass relevant ideas. In the more concrete area of trial advocacy and evidence, there have been changes in rules of evidence and practice that reflect a shift in perspectives on truth-telling. The development of nonadversarial courts such as drug courts and reentry courts are also worth noting. Law and Literature and Law and Narrative scholarship has led to reevaluations of lawyers' and law teachers' roles.

Issues. One of the first issues to consider is whether lawyers have a duty *not* to speak. Certainly, with respect to confidential communications, that restriction exists. Even assuming the line between confidential communications and public information can be negotiated, however, questions remain. The privileged position of lawyers—the access to clients' and communities' experiences that is made possible by virtue of the lawyer's position—should not be a call to exploitation. Considerations of privacy, trust, accountability, and story appropriation have to be carefully weighed.

Other considerations press for a witnessing role for lawyers. The idea that lawyers, well educated and having some socially-assigned credibility, are positioned to speak truth to power is a powerful one. The privilege that lawyers enjoy can be utilized for privilege, but it can also be used for equality and justice. If there are roles for the privileged in the struggles for justice and equality, witnessing may be one important service lawyers can provide. There is a need for truth to be told outside the confines of cases; while the need for, and rights of, individuals and communities without privilege to tell their own stories is to be respected, there may be times when a lawyer can appropriately serve as a conduit for the stories, even outside case bounds. Perhaps more importantly, as lawyers become more invested in communities through their work, they come to witness less and less as outsiders. The stories the witness tells, in time, become the witness's own stories.

CJLA Clinic
OBSERVATION AND RECORDING
Journal Assignment

There are several goals to this assignment:

- step back from you think you know and see the world from a fresh perspective;
- take the time to really observe what is around you;
- pay attention to details;
- understand the difference between facts and inferences;
- learn to report in language that is free from bias, assumptions, opinion and other influences;
- take note of and respect your intuitive sense of meaning.

The assignment requires you to keep a journal. Unlike other journals you may have done, this journal is for recording observations, not feelings, ideas or conclusions. You will have an opportunity at the end of the course to reflect on what you've seen and what you've recorded in your journal.

Throughout the semester you will be making observations about client populations and the various systems that serve them. As you make these observations, you will record them in your journal. You do not have to record everything you see; rather, once a week, choose an event, situation, or place to focus on and record in detail what you see there. Some examples:

- attending court
- sitting in on a meeting with a client
- meeting at Family Life Center
- field trip to Re-entry Court, the ACI, DCYF
- meeting between attorneys
- tour of the Training School

Some opportunities for observation will come from other assignments, from field work, or from your cases. I encourage you to create additional opportunities for observation. For example, you may want to attend a workshop on parenting, attend a community forum on education issues, or interview a professional in family services.

What you are looking for are facts. You don't need to record everything; in fact, you should be selective. Most importantly, identify "telling details." Obviously, only

you will be in a position to decide what is "telling." I want you to record facts, but I also want you to choose what facts are worthy of recording. One way to think about this is to ask yourself, could someone draw an inference from this fact (or cluster of facts) that says something about the justice system or about social justice?

Here are some guidelines and possibilities:

- Describe the scene. This includes size, color, materials. Who or what is there? What happens?
- Describe people. What do you notice? Describe clothes, hair, size, distinguishing characteristics, make-up, jewelry, body movements, speech. How are people situated? Who is with whom?
- Record dialogue (accurately).
- Describe smells or sounds.
- Note the ways individuals express emotions.
- Pay attention to time. When does something start? Or how much time does something take? What is the pace?
- Measure and count things. How many, how much, how long, how far, what size, what speed, what intensity.
- Note things that are missing from the scene. (For example, no questions were asked, the child's parents weren't there, they didn't look at each other).

It is difficult to put a word count on this assignment, but a good rule of thumb would be 500 words per week (the equivalent of 2 typed pages, double-spaced). Journals are to be turned in to the clinic secretary four times during the semester: January 21; February 25; March 24; and April 21.