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Education of the Prof: A Work in Progress

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I. INTRODUCTION

The sights and the sounds are instantly familiar. It has been more than a decade since I left, but it now seems like I never left. As I sit in the waiting room of the Legal Services office, I am instantly reminded of my earlier tenure in a different program, in a different state, and in a different generation. The furniture is second-hand. Lining the shelves are brochures describing the rights of people in areas of law as diverse as repossessions, security deposits, cancellation of contracts, and housing discrimination. Affixed to the walls are notices describing grievance procedures, posters detailing Head Start programs, heat assistance, and Food Stamp facts, and newspaper articles showing various accomplishments of the staff. Given the passage of time, certain aspects of the waiting area appear different. For instance, a buzzer was used to announce my entry suggesting security concerns. Crates of children's toys and books are present, and, perhaps as a concession to the realities of today's entertainment world, a VCR is available to watch children's videos (fortunately, there are no "Barney" tapes) or workshops on "Renting an Apartment" or "The District Justice Hearing." The phones ring constantly, a reminder of the ever-present needs of clients. The responses I overhear indicate the urgent nature of many of the inquiries.

It has been over two decades since I began my legal career at Legal Services as a public-service oriented and reform-minded attorney fresh out of law school. Now, revisiting that

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start in light of subsequent career path as a legislative lobbyist, a litigator in a private firm, and eventually, a full-time teacher upon my return to academia, I am on the brink of yet another new experience. After having survived the perils of the tenure process, it is now time for my first sabbatical.

As the time of my sabbatical approached, I often thought about how to use this respite. So much so, that I put off the taking of a sabbatical for one full year while deciding on its best application. The thought of returning to practice, without the classroom commitment or the committee responsibilities began to creep into my mind more and more as I focused on the idea of what a sabbatical would mean. This would prompt a chance to "try out" what I had been professing; to learn if my own self-education over the past few years would make a difference in the real world; to take the opportunity to be of service to those in need; and ultimately, to determine if practice would help "inform" my teaching (as well as update my war stories!).

Admittedly, the whole concept of a sabbatical was new to me. Having left the nest of law school upon my graduation, I had returned to its challenges, although this time from the other end of the lectern. Now here I was, on the precipice of returning to the world of practice I had reveled in during a "past life," I questioned my capabilities to revisit it after so many years. Would I be able to again switch my energies — this time from academic to practitioner? How much of my practice skills had I retained? Was it like the proverbial return to riding one's bicycle or instead an attempt to mount a motorcycle never before ridden? How would I react to the realities of advocating in arenas where answers are needed today rather than in the forum where ideas are discussed and shades of gray abound? Beyond these important issues, having long escaped the daily tedium of wearing suits to work, were mine still in style and would they even fit (not to mention the effect they would have on my cleaning bill)?

These fears unresolved, I meet with the managing attorney of the office. She appreciates my choice to serve the next four months as a volunteer staff attorney. At the same time, she questions my background and inclinations toward working with the economically disadvantaged. We discuss the needs of the clients and office priorities. In reality, the clients' needs could never be fully met by the staff, regardless of their abili-

ties and motivations because there are too many eligible poor people with too many legal problems for too few staff members. Once again, this is a reminder of my prior days at legal services, where inquiries were all too often met with "We're sorry, our limited resources put your case outside our priorities," when, to the client, his case was his utmost priority.

I inform the managing attorney that I am very open to handling all manner of cases, although she may not have wanted me to staff matters that would be difficult to transfer upon the completion of my sabbatical. We discuss unemployment compensation cases (which have a relatively short "life"), housing concerns (including evictions), consumer cases (including repossessions and bankruptcies), and domestic matters (especially the protection from abuse cases that dominate office resources, both in terms of staffing and hours). We tour the office and all is a blur; its configuration is peculiar, with pathways leading through one office to reach another, shared space, and noticeably small quarters. The names of those I meet blend together — attorneys, paralegals, support staff, and law students working as interns. I admittedly cannot help but add to my anxiety the thought of working with some of the students. How will they judge my work product, my conduct, my successes, and my lack of the same? In student circles, word tends to travel fast. I also wonder why one of the paralegals ended her welcoming comments by adding that, "I can't believe that you gave up your sabbatical to come here!"

Before I leave the office that initial day, it is decided that I will serve on "general intake," handling all substantive areas, but with a "mini-specialization" in unemployment compensation cases. This will alleviate the managing attorney's caseload and free up her time to concentrate on necessary administrative concerns. I also decide to spend a few minutes with the student interns. They are quite curious about my desire to devote my sabbatical to the office, expressing surprise at my decision to leave the perceived "comfort" of the academic world. They express their own enjoyment of their work, and how they believe they are learning how to be "real" lawyers while helping those in need. As they discuss their cases, it quickly dawns on me that the tables have been turned; though I was once a practitioner, these students have been exposed to the realities of state law practice more recently than I have. Consequently, they have a better working relationship with state substantive

law and rules than I have gained through my years in teaching a "national" approach to the law. Yet, they are all very energized and seem to like the fact that I will be their "colleague" doing similar work. The lectern has vanished and I bring only my own prior experience to the table.

I have always stressed preparation in the classroom, both to the students and to myself. My own misgivings and desire to relieve my pre-sabbatical "stress" had led me to audit our school's course in state procedural law, taught, ironically, by one of the local trial judges before whom I will appear. My attendance clearly piqued the curiosities of the students, many of whom joked (quite inaccurately) that I would "bust the curve." I also studied the new state rules of evidence. Coincidentally, these were recently enacted by the state supreme court and are scheduled for implementation during my sabbatical. Since I have taught Evidence from the view of the Federal Rules, the previously-fragmented state "rules" rarely entered the picture. I secured certification that I had continued to be a member in good standing from the supreme court of the previous state in which I had practiced, and was temporarily admitted by the judiciary to practice for two and one-half years. Likewise, the Continuing Legal Education Board gave word of requirements to stay licensed during that limited time. I also made it my business to familiarize myself with Legal Service's various manuals and procedures so that I would be familiar with them once my sabbatical began.

I realized from the beginning that I would be limited in my return to practice. After all, it took me years to profess an "expertise" in my areas of teaching — how much would I really be able to learn in the four plus months I would commit to full-time practice? While I was open and wanted to learn about all areas, I remembered that the reality of practice involves "putting out fires" rather than concentrating on specific issues as is possible with the time that the academy affords. Admittedly, the law professor as an "attorney" is not new concept.[1] However, the focus is different when one tries to function as both a full-time law professor and a trial attorney in a more limited capacity.[2] My sabbatical thus provides the opportunity to de-

1. Jonathan L. Entin, *The Law Professor as Advocate*, 38 CASE W. RES. L. REV. 512, 522 (1987-88).

2. Henry Gabriel, *Juggling Scholarship and Social Commitment: Service to the Community Through Representing Indigent Criminal Defendants*, 20 N.C. CENT. L.J.

termine if the teacher can once again become the practitioner; if my lessons have advanced my own education and enhanced my ability as an educator to teach in the real world.

This article will discuss my experiences at Legal Services from the perspective of how teaching others in the classroom affected my own competency in returning to practice. As teachers, we frequently comment about the learning process — how our writing informs our teaching and how we learn from our students while they are hopefully learning from us. At times we may wonder whether we also learn from "ourselves." Will our return to practice make us more effective practitioners, now that we have had the benefit of the academic life to study the "bigger picture?" Will practice be different than it once was? How do the rules (or lack thereof), the procedures, and the theories we espouse translate to situations in actual forums? Each part of this article addresses a different aspect of the cases I handled. Part II discusses the effect of the existing rules and procedures on the pre-hearing preparations for litigation while Part III focuses on the use of the case theme. Finally, Part IV presents an example of how the advocate may need to use newly enacted rules to educate both the judiciary as well as the opponent.

II. THE INFORMALITY OF RULES: AN END RUN TO DISCOVERY

My Evidence class focuses on the Federal Rules of Evidence as a teaching mechanism by way of both statutory interpretation and strategies in using the Rules as the proponent/opponent of various proofs. I encourage the students to establish two records, one for the trier of fact and the other for a possible appellate tribunal. We also discuss the importance of knowing the local judge's interpretation of the Rules.[3] Early on, students come to realize how important it is to determine the elements of a particular claim so they will know what types and sources of proof must be sought during the discovery process. Yet, I realized early in my sabbatical that we do not often discuss processes in which evidence is proffered to a forum

223, 227 (1992).

3. I learned early in my sabbatical that one of the local judges habitually overruled a hearsay objection to all previous out-of-court statements by a declarant-witness if that declarant was in court to testify. If he was "here" in court, nothing he had earlier said could be "hearsay"!

whose procedures are less than formal.

An ever-present example of the informality of proceedings involves administrative hearings. Due to the nature of my sabbatical, I was a "short-timer;" I wanted to handle as many hearings and appearances as I could, but court cases inevitably took longer to develop because of discovery rights and due process concerns. By contrast, the administrative process, with which I became intimately familiar through unemployment compensation cases, moved quickly. There was no pre-hearing discovery, no pre-trial orders, and hearings were scheduled within a month of the client's claim for benefits. The Rules of Evidence were, by statute, loosely applied.

My representation of clients in unemployment compensation hearings led me to quickly conclude that the role of advocate in those hearings could be even more challenging than it is in courtroom proceedings. In these cases, counsel ardently tries to show facts that justify a finding of no "willful misconduct" in a termination or "good cause" if the claimant quit her job. Given these standards, the cases are very fact-oriented. The problem faced by claimant's counsel is therefore to determine what proof the employer will try to introduce. While counsel has access to documents that the employer submits to the Department of Labor concerning the case, as well as the right to subpoena witnesses and documents to the hearing itself, there is no formal process to learn which witnesses will testify or the substance of their testimony. Therefore, counsel must decide whether to contact the client's former employer in an attempt to obtain such information or instead rely upon the element of "surprise" in appearing with the claimant at the hearing. The former may not assure cooperation and could result in the employer being even more ardent in preparing for the hearing; the choice of the latter leaves claimant's counsel pondering just how best to prepare. How can one cross-examine witnesses that one has not heard testify until the hearing? How does one use documents that are first seen at the hearing itself? Do you subpoena witnesses when it is possible that they are still working for the employer and may show bias against the claimant to protect their own employment?

I was faced with these issues in the case of nurse "W," who had been terminated by her nursing home employer for alleged "wrongful misconduct." The supervisor's affidavit filed with the Department of Labor indicated that she had fired nurse "W" for

leaving medication unattended in a hallway and within reach of the nursing home residents for several hours during a particular shift. This allegedly created a "dangerous" condition because of the risk that these medicines could be taken improperly. The employer further submitted various affidavits from nurse "W's" co-workers that they had seen medicine sitting unattended in the hallway at various times during that shift. Curiously, these affidavits were not signed until days after the supervisor's own affidavit; nurse "W" was not terminated until then. The claims examiner had denied unemployment compensation benefits to nurse "W" based on the affidavits of her co-workers. We then filed an appeal requesting a hearing.

During our initial office conference, nurse "W" vehemently denied ever having left medications unattended. She described in detail her daily itinerary and the location of medications throughout that time. In discussing the affidavits of her former colleagues, she suggested that her supervisor could be quite "heavy-handed" and may have exerted "pressure" to sign them after-the-fact. I queried whether these employees would appear at the hearing and if they would admit to such suspected coercion. The answers were not self-evident yet could prove critical to the results of the hearing. Nurse "W" and I discussed the pros and cons of contacting these potential witnesses. While they might talk to me, they were not obligated to do so. They could alert the employer to nurse "W's" representation at the hearing. Weighing these risks, we decided on a strategy where the client became her own "discoverer" — she knew each of the affiants, she would call them and discuss things "casually." We scripted questions for her to ask: What had they seen that day? When had they seen it? What had prompted them to fill out their affidavits? Were they going to be attending the hearing? If they had evidence favorable to nurse "W" would they testify to this at the hearing, either voluntarily or via subpoena?

Nurse "W" proved a worthy investigator. She contacted the affiants and learned that the supervisor had requested each of them to sign affidavits, suggesting what to state in them. They did not think that they would be asked to testify because the supervisor had recently assured them that the situation was "under control" and that she only needed their affidavits. However, none of the affiants were willing to testify for nurse "W." They did not want to risk their own employment by testifying about the supervisor's improper contacts.

The day of the hearing arrived. The supervisor appeared, accompanied by the nursing home manager and counsel. However, none of the affiants came. The supervisor was allowed to testify to her own recollections concerning the medications, but I objected to the admission of the affidavits as hearsay. The informality of the process again created a problem. An administrative tribunal is not bound by all the "technical rules of evidence" that are followed in a court of law;[4] nonetheless, hearsay evidence cannot by itself support a finding of fact.[5] My objection was not fully sustained, yet this ruling did not prove fatal to our case. Nurse "W" testified as to her own care with the medications and as to her conversations with each of the affiants. Although the employer objected on hearsay grounds, I responded that such testimony was offered for the limited purpose of impeachment. I must admit that for a minute I thought I noticed a "deer in the headlights" expression on the hearing officer's face; I went on to explain that the affiants' statements to nurse "W' did not have to be taken for their truth value, but only for the fact that they were said. This would impeach whatever value the affidavits might otherwise have. The employer was not limited in its cross-examination of nurse "W." The hearing officer hesitated and a long moment passed before he admitted this testimony for impeachment purposes.

In my closing argument, I noted the tainted nature of the affidavits as well as their suspect timing. I maintained that the heavy-handed nature of the supervisor's conduct made her own testimony suspect. The very fact that others, including the supervisor, had supposedly seen the "dangerous" medication left out for hours and had not locked it away belied that this had ever happened.

The decision arrived two weeks later. The hearing officer held that there was no "willful misconduct;" the employer had not met its burden of proving that the medication had been left unattended. The decision noted that the supervisor's own testimony was made all the more incredulous by her conduct in securing the affidavits under very suspicious circumstances. It was my first hearing in a decade — a chance to use what I had

4. 2 PA. CONS. STAT. ANN. § 505. *See also* Vann v. UCBR, 494 A.2d 1081 (Pa. Commw. 1985).

5. Anderson v. Commonwealth Dept. of Pub. Wel., 468 A.2d 1167, 1169 (Pa. Commw. 1983); Burks v. Commw. Dept. Of Pub. Wel. 408 A.2d 912, 914 (Pa. Commw. 1979); Walker v. UCBR, 367 A.2d 522 (Pa. Commw. 1976).

professed in class. I was able to use the rules, even in their most informal state, to the client's advantage. And nurse "W," as her own "discoverer," allowed us to use the informality of an administrative hearing to her ultimate benefit. It was great to be back!

III. THE THEME: HOW TO "KISS" AND MAKE GOOD

One of the lessons I try to convey in my Evidence class is that, in whatever forum — be it negotiation, mediation, boardroom, or courtroom — it behooves the advocate to advance a "theme." The purpose is to capture the essence of the case in four or five words to catch the attention of the audience or arbiter. One's proof centers around this theme. I am essentially suggesting that we strive to boil our cases down to a sort of mantra, one that will encapsulate the proof that will be or has been presented. One of my sisters, a non-lawyer and therefore possibly much better in getting to the point, uses the term "KISS" to emphasize this point — "keep it simple, stupid."[6]

While this lesson appears simple on its face, I have noticed that it is not always easy to put into practice. Perhaps this is a result of having stressed legal analysis so much that students have become convinced that analysis equals verbosity. Indeed, I am reminded of the difficulty many students have in expressing a theme when I ask them to explain their advocacy position in six words or less, as if speaking to a layperson (e.g., a juror). Almost invariably, I must cut off their explanation some twenty-five to thirty words later.

I was reminded of the importance of themes during my sabbatical in what became affectionately known in the Legal Services office as "The Case of the Bullet in the Monkey's Mouth." Client "L" first came into our office having been denied unemployment benefits and after being terminated from employment with the state. She was quite articulate and detailed about her work history, having kept a journal of various contacts and confrontations that had occurred throughout the period of employment. She informed me that numerous comments had been made by her employer regarding not only her conduct at work but also her private life. According to "L," her work had never been affected by any of these "private" concerns, yet she be-

6. I have yet to take this personally, though perhaps I should.

lieved that she was less than welcome in the workplace. So why had she lost her job?

The client had an affection for stuffed animals. One of them, a stuffed monkey, had been visibly placed on her workstation throughout her nearly three years on the job. In its mouth, imminently visible, was a bullet. "L" placed it there as a self-serving reminder to just do her job, to "bite the bullet" despite office chitchat about her "different" ways. It turned out that another state employee, from a separate office, had used "L's" desk one day and had seen the missile-mouthed monkey. She then reported this to "L's" supervisor. When "L" returned to her desk, she was immediately called into a meeting with her supervisor and other superiors and told she had been placed on probation because she had created a "dangerous" situation in the workplace. She was directed to sign a COCE (Conditions of Continuing Employment) contract if she wished to return to her job. Having no alternative, she signed the contract requiring her to attend state-scheduled appointments with appropriate medical personnel for purposes of evaluation and recommendations to address the "dangerous situation" and possible return to the workplace.

During our initial interview, "L" shared a copy of the COCE contract with me. She informed me that she had indeed attended the sessions the state had scheduled and had been diagnosed as fit to return to the job. "L" subsequently did return to the job, and then used leave time to see her own physician for a separate problem. Her supervisor requested that "L" provide her with copies of those additional medical records, claiming "L's" private treatment was covered by the COCE contract. "L" refused to do so, believing that it was not legally required. The state then sought this information directly from the medical provider, without success. Despite threats of termination, "L" maintained her unwillingness to provide this separate medical documentation. She was subsequently terminated and sought assistance from Legal Services.

I knew in advance that the employer would be represented at the hearing. The employer's counsel learned of my representation of "L" and contacted me to seek my consent for presentation of telephonic testimony of certain state witnesses who would not be able to appear at the hearing. While I recognized that it might be difficult to cross-examine a witness I had never met and could never look in the eye, at least I had the benefit of

knowing beforehand the names of the particular adverse witnesses. I was also aware that although "[i]n-person testimony is normally preferable," testimony by phone was allowed for "compelling reasons."[7] Moreover, I sensed that I might be able to use the physical absence of the witnesses to my advantage when it came to questions of credibility.

I realized the stakes were high when "L" revealed that she had filed a state grievance procedure, and two separate complaints with the Human Resources Department. This led me to an additional witness: "L's" union representative. At first she was hesitant to discuss the case with me without the approval of the union's counsel, but she later proved to be quite accommodating in her explanations of the conditions under which "L" had signed the COCE contract. Despite her cooperation, she requested that I subpoena her to the hearing. I believed this would be to "L's" advantage; a presumably favorable witness had been "compelled" to testify, thus mitigating any claims that might be raised concerning her credibility.

The search for a "theme" necessarily began early in the life of this case. As I often stress in class, I started with my closing argument and worked backwards to determine just what proof I would need to support my position. A component of this closing was to determine how best to encapsulate the event: "They violated her privacy;" "A stuffed animal, openly displayed;" "The contract was vague;" and "She honored the contract" all played out in my head. As the hearing neared, I became convinced that the case called for a "cumulative" theme: one addressing the law, another focused on public policy, and a third based on the use of demonstrative evidence.

The hearing was lengthy, in contrast to the typical unemployment compensation case. Nearly four hours of testimony centered on the events leading to the COCE contract (the bullet in the monkey's mouth), the interpretation of that contract (the ambiguity of the terms), and the aftermath of the contract (honored by "L," an invasion of privacy by the state). At the beginning of the hearing, I asked the hearing officer to offer into evidence pictures of the by now "notorious" bullet-mouthed monkey, which was all of five inches tall ("L" hesitated in parting with the monkey itself by tendering it as an exhibit). I then placed the actual monkey, bullet properly inserted, on the

7. *See* 34 PA. CODE §§ 101.127 et seq.

counsel table within a few feet of the hearing officer. Testimony supported our contention that the monkey had been conspicuous for over two years, that "L" had attended her state-scheduled doctors' appointments, that those medical providers had indicated that she could return to the job without further therapy, and that the state sought medical information from "L" based on subsequent visits she had scheduled on her own. Even the telephonic questioning of the state's faceless witnesses proved positive; they stumbled in their efforts to define the meaning of certain terms of the COCE contract. All of this played into the cumulative theme presented in my closing argument. The state had failed to prove that "L" had committed "willful misconduct." More significantly, the "contract was vague" (the stumblings by the telephonic witnesses were a bonus), and she had "honored her commitments" by attending the state scheduled appointments. The "state had invaded her privacy." Public policy should not condone the state seeking out medical evidence from its employees who seek their own professional assistance and then "punish" employees for not disclosing such information. In addition, "a stuffed animal, always conspicuous" did not create a "dangerous condition" (quite demonstrably, the furry creature obediently perched in front of the hearing officer for the entirety of the hearing — no one appeared endangered).[8]

The decision came within the week, and it was wholly favorable for "L." Indeed, the decision read like my theme, noting the vagueness of the COCE contract, the compliance by "L," and the overreaching by the state. Perhaps the hearing officer remembered my own comments about how, if the state's conduct was upheld, even hearing officers, being state employees, could be subject to such overreaching. There was no comment about our little stuffed friend being present at the hearing, but I do believe it had its positive effect.[9] Ultimately, our theme rang true and provided the basis for this favorable decision.

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8. The student intern who worked with me on this case commented that the use of the stuffed monkey had presented a "Seinfeldian" moment to the otherwise dry litigation process; I suspect that this is another evidentiary concept I will need to consider before this semester's Evidence class.

9. Apparently, these furry critters have staying power. As a going-away present at the end of my sabbatical, the Legal Services staff presented me with a stuffed monkey, with, of course, a bullet in its mouth. It is prominently—and conspicuously—displayed in my office; I have not, as yet, been subject to any disciplinary threats!

IV. THE USE OF RULES: EDUCATING THE HEARING OFFICER

As fate would have it, the Supreme Court of Pennsylvania adopted state Rules of Evidence shortly before my sabbatical began. This marked the first time that state court proceedings would be so governed. These rules did not apply to non-court tribunals, such as administrative agencies, except as provided by law or unless the tribunal chose to apply them.[10] Nevertheless, they provided a framework for hearing officers to determine whether proof was more reliable than not. The new rules, with which I was already familiar due to my service on the State Bar Committee on Evidence, were to go into effect during my sabbatical. This presented me with an opportunity to share my expertise with my Legal Services colleagues and test out the rules on my own.

The very occasion to do this emerged in the case of client "H," a laborer who had been terminated after twenty-fours years with his industrial employer. The separation notice indicated that "H" had been fired for "insubordination." The specific violation was not wearing earplugs as required by ear company policy. "H" readily admitted to me that he had not worn earplugs but maintained that he was not acting in defiance — indeed, he had been instructed by his doctors not to wear inner ear protection due to an ear infection. He remained willing to wear over-the-ear protection as the job required.

The difficulty arose in finding proof to support "H's" position. The medical documentation that "H" had submitted when his benefits claim was initially rejected revealed that his doctors had stated four years earlier that he should not wear earplugs because of an ear infection, but that this condition had since healed. A four-year gap in medical documentation ended on the date of his dismissal. The post-termination medical reports again indicated some irritation inside the ear. Curiously, it was "H" himself who had submitted the entirety of this medical documentation, even though the post-diagnostic notes indicated that healing had occurred. "H" insisted that he had shared at least two separate doctor's notes with his prior supervisor in 1994 concerning his ongoing ear problems. The employer responded that he had only received an earlier note without any update on his condition. Moreover, "H" had signed

10. Comment of 1997 Ad Hoc Committee on Evidence to Rule 101.

an attendance form indicating that he had attended a meeting in which he was instructed in the use of earplugs and he had agreed to use those plugs.

During our office conferences, one of "H's" difficulties became evident. He was functionally illiterate, having been permanently expelled from school in the ninth grade. Although he had advanced to that grade, he had always been placed in special education classes and was never taught the basics. As a result, "H" found himself frequently the object of practical jokes at work when others would falsely tell him the contents of various posters and memos. Rather than admit his inadequacies, he tried to hide them. When individuals in management circulated forms or petitions to be signed, he just etched his name. Such was the case with the attendance form concerning the earplugs. This form was brought to his workstation and he was told to sign it without the opportunity to have it explained to him.

My series of conferences with "H" left me wondering whether he actually knew, at least according to his doctors' notes, that his ear ailments had healed. He insistently stated that they had never informed him. He explained that his ear condition was the result of an injury suffered during childhood, and that his ear had become inflamed and leaked intermittently since that time. Accordingly, he did not believe that he had any reason to continue seeing his doctors after 1994, as he understood he would just have to live with these difficulties—albeit without having to wear earplugs. I attempted to obtain verification concerning the "H's" actual knowledge by contacting those doctors; I never was able to get past the nurses, nor was I able to learn exactly what had been disclosed to "H." All suggestions that those doctors testify on behalf of "H" were met with the response that "there would be a $600 fee for any testimony."

The only other recourse was to seek testimony from "H's" union representative, who had been present at the grievance hearing that had been held upon his termination. According to that representative, one of the attendees was "H's" former supervisor. This supervisor admitted at the meeting that "H" had indeed handed him two doctors' notes explaining his ear condition in 1994, both of which recommended that he not wear inner ear protection until his condition had healed. The supervisor admitted that he had acquiesced to "H" not wearing such

protection. Unfortunately, the latter of those two notes could not be found, that prescribing doctor had since retired and destroyed his files, and there was no subsequent documentation in the personnel file. The words of this former supervisor could support both "H's" contentions that he had both provided notice to his employer and had been relieved of the requirement to wear inner ear protection. We therefore intended to rely on these statements by that supervisor, as the agent of the party-opponent (employer), to provide favorable evidence at the hearing.

As fate might have it, the newly enacted Pennsylvania Rules of Evidence had gone into effect shortly before the day of our hearing. The hearing officer, from my prior experiences, deferred to rules of courtroom procedure. I believed this to be to our benefit; the new Rules contained a hearsay exception that allowed for admission of "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" offered against a party.[11] Nonetheless, I was aware that this exception, although accepted in the overwhelming majority of other states, was new to Pennsylvania law. I anticipated some difficulties in the application of this new rule of law.

The hearing itself went smoothly, despite what I can only describe as the "attack dog" mentality of the employer's counsel. He was more than adversarial, alternatively displaying both sarcasm and belligerence towards many of the witnesses, even belittling "H's" functional illiteracy, which actually portrayed "H" in a more sympathetic light. The situation became contentious when the union representative attempted to testify about the former supervisor's statements that had been made at the grievance hearing. Immediately upon the objection by the employer's counsel, the hearing officer, without awaiting or soliciting a response from me, sustained the objection. When I asked to be heard on the objection, the hearing officer suggested that it was unnecessary, because this was clearly hearsay. However, I persisted in going on the record with an offer of proof to explain that the supervisor's comment was the admission of the party-opponent (the employer) by its agent. Immediately, counsel for the employer and the hearing officer, almost in unison, responded by noting that any such exception

11. PA. R. EVID. 803(25)(D).

was inapplicable because "H" was no longer employed by this employer and, additionally, there was no such exception recognized in the commonwealth. It was then that a true "teaching" moment occurred in a forum outside the traditional classroom. As a result of the recent passage and implementation of state rules of evidence, I was prepared—I offered as exhibits both the new "agency of the party-opponent" rule, along with the commentary to that rule supporting its usage. I further suggested that both the hearing officer and the employer's counsel " inadvertently misunderstood" the effect of this rule, which focused on whether the agent of the party-opponent was acting within his agency at the time of the statements, not whether the employee was still working for that employer. In our case, not only was the prior supervisor still employed with the company, but he had also continued working in that position with no change in responsibilities for the past several years. The hearing officer was swayed by this explanation and reversed her ruling on the spot; the employer's counsel was clearly flustered. The union representative was then able to testify that "H's" former supervisor had admitted at the grievance hearing that "H" had provided two doctor's notices, putting the employer on notice of his inner ear problems. The employer did not submit any counterproof to this evidence.

Ultimately, we received a favorable decision. Among the reasons listed supporting that ruling were the statements of admission by the former supervisor. Yes, it also helped that the record revealed no proof that "H" had been advised of the supposed improvement in his ear condition, that he had in good faith continued to believe he had problems because of ongoing symptoms in his ear, and that he was indeed willing to wear over-the-ear protection (which was not offered to him). However, admissions by one's agent can clearly be powerful evidence in support of the opponent's case, especially because of that person's "inside knowledge" and the fact that employees may be risking their own employment in offering such proof. Knowledge was clearly power—the use of the new rules helped to both educate and prevail.

V. CONCLUSION

As I return to the classroom, I am grateful for the opportunity during my sabbatical to have used academic materials in a

different classroom—the real world. I was presented with the challenge of employing what I had professed and the insights I had learned within the tower to augment my years of pre-teaching practice. Yes, my years in academia facilitated my understanding of concepts, theories, and public policy at a more profound level than in my prior life as a practitioner. The big picture was much more in focus; I dared not dwell on the thoughts of my inadequacies during my earlier tour of practice. The picture itself became all the more comforting when I discovered how my months of practice further enhanced my academic understanding of evidentiary rules and practices in the everyday world. I was better off as a practitioner but even more so as a professor.

I appreciated the opportunity to serve in this true-to-life laboratory as both an advocate for my Legal Services clients and was flattered to remain the teacher for my colleagues on evidentiary and trial tactics. I admit that it was also nice to not have bluebooks awaiting me at the semester's end. However, I will continue to remind myself that as long as clients have problems, lawyers will be there to serve; in doing so, the essence of practice has not really changed over the last decade—we still need to listen, counsel, analyze, and communicate. My anxieties had been overstated and truly do learn from our experiences. My years in academia had proven to be the best teacher of all.