BOOK REVIEW

PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION. By Michael Meltsner and Philip G. Schrag. Boston, Mass.: Little, Brown & Co., 1974. Pp. xii, 418. $9.50. Reviewed by Linda Champlin*

One of the difficulties of using "real" cases as the vehicle for teaching the lawyering process[1] is assuring coverage of all the basic skills and techniques involved in case handling. Generally, the capacity of a clinical course to handle cases is severely limited so that despite careful selection of cases on the basis of skills to be utilized, it is almost impossible, within the time available, to have on-going cases that offer experience across the board. If it is necessary to have broad coverage, and I think it is, there is a need for supplementary material to fill the gaps. *Public Interest Advocacy* is a convenient way of filling those gaps. It provides the student with large doses of primary materials and problems set in concrete situations that go far in approximating the real practice of law.

The book has three parts. The first part is a series of excerpts of articles which attempt to describe public interest advocacy and raise most of the basic structural problems associated with the area. The second part is devoted to skills of public interest advocacy. Two detailed case studies comprise the third section of the book.

Part I deals with the allocation of limited resources, not in terms of what substantive problems should be addressed, but in terms of who should make that decision and what vehicles (test litigation, lobbying, organization) can most effectively achieve the ends decided upon. The political restraints on publicly funded operations are noted, and there is a somewhat superficial chapter on the institutional settings where public interest advocacy is practiced. The articles are interspersed with thoughtful textual comments and problems designed to elaborate on the points made in the excerpted articles in the context of concrete situations. For example, the problem at the end of Part I asks the student to draft a proposal to obtain funding for a three-year, $100,000 per year, experimental legal services program. The directions instruct the drafter to include a description of the clients to be served, explanation of problems the program will address, techniques the program will use (*i.e.*, test case, orga-

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[1] The authors have written a book for a clinical course in public interest advocacy as opposed to private interest advocacy, or some other aspect of the practice of law. It should be noted that while much of the materials on skill development is applicable to a more general examination of civil practice, a large part of the material speaks to problems which are peculiar to the public interest advocate.

nization, etc.), political problems anticipated, sources of funding after grant expires, and budget.

One point clearly made in Part I is that the enchantment in the mid- and late '60's with the "test" case as *the* answer to substantive problems, and to the problem of allocation of scarce resources, was naive, if not altogether misconceived. In this first section, the test case technique is viewed not only as one of many tools in the public interest advocacy shed, but as one that at best has very limited value. Except for the successful assertion of constitutional principle (and sometimes even then), legislative action can wipe out a victory three years in coming. Without a power base of community support to insure enforcement, the victory achieved in the courts will have almost no impact. Most of the authors included in Part I urge the public interest advocate to explore techniques outside the judicial process: lobbying, organizing, public relations.

Given the very convincing case made for directing public interest advocacy resources to techniques other than test litigation, it is a little disconcerting that Meltsner and Schrag devote an overwhelmingly large portion of Part II, entitled "Techniques of Public Interest Advocacy," to the development of test case litigation skills. Of the eleven techniques specifically explored, seven deal explicitly and exclusively with litigation skills including some of the most specialized variety, *e.g.*, "Certiorari Practice." Only four of the techniques—interviewing, counseling, drafting and negotiation—have obvious applicability to the non-litigation activities suggested in Part I as being equally if not more useful than litigation. And even these techniques are discussed in a context that is usually directly or indirectly related to the judicial process. For example, the chapter on "Negotiation" assumes (aside from a brief comment that indicates there are other settings) that the negotiation takes place in the context of ongoing litigation. None of the material in Part II directly addresses activities unrelated to the judicial process, such as organization or lobbying.

The authors' explanation for the inconsistency between their convincing argument in Part I that the test case technique is limited at best and their almost total devotion in Part II to development of litigation skills is not sufficient. The authors note that a substantial proportion of public interest advocates spend much of their time doing test litigation because they are convinced that it provides special opportunities to improve society not available to the publicist and lobbyist. This bald assertion is neither explored further nor documented; in fact, the statement itself does not say that test litigation is more effective, but merely that it is "special." Equally as plausible is the argument that public in-

terest advocates engage in so much test litigation because that is what they know how to do. Law school training, insofar as it prepares anyone for the practice of public interest law, probably prepares for litigation—certainly not for public relations or organizing efforts. If know-how rather than "special advantage" is the explanation for the current allocation of public interest resources to test case litigation, then the use of these materials as the main resource for clinical legal education will reinforce this phenomenon.

Despite this unexplained contradiction between Parts I and II, *Public Interest Advocacy* is a valuable teaching aid. The section on skills, Part II of the materials, is, for the most part, extremely well done. The key to the success of this section is the very liberal inclusion of primary material taken from real cases. The problems are a means of focusing the discussion on concrete situations, avoiding what could easily become a discussion too abstract to be meaningful. They are particularly effective because the authors give sufficient primary material to work with. For example, the chapter on motions practice relates in detail the history of the litigation under discussion, allowing instructor and student to recognize many of the factors involved in real litigation and limiting the necessity to "suppose." (I particularly liked this section for another reason. There is no way other than detailed description to communicate the limitations and frustration of litigation. Saying that the litigation took three years may tell you something of the limitations but does not convey the sense of frustration of which the prospective public interest advocate should be made aware.)

In addition to the large segments of primary material found in Part II, Part III provides two extremely detailed case studies with transcripts of interviews and depositions. Especially helpful are the marginal notes and questions by the authors dispersed throughout the two case studies.

Since Part II of these materials is the heart of the book, it deserves more specific comment. As noted above, the discussion of the techniques included in this part is of extremely high quality. There are, however, a few exceptions. The section on interviewing is singularly unhelpful, except for the problems at the end. The body of the section is replete with pretentious and meaningless discussions of such things as "topic control," "the recapitulation probe," and "mutations." In contrast, the problems place the student in realistic and difficult situations that illustrate the need for attention to interviewing skill. For example, the student is asked to prepare an interview outline for a meeting with a sullen, hostile welfare recipient who is being threatened with proceedings to take away her children on the ground of child abuse. How do you get the

facts in an extremely sensitive area without alienating an already hostile person?

The section on drafting properly stresses that ordinary English is good enough, but it is so boring that even this simple, but important, lesson gets lost. (Perhaps it got lost for the authors as well when they decided to include the article on interviewing referred to above.) Ironically, given the message of Part I, the chapter on "Planning a Test Case" probably is the best section in the book. Professor Amsterdam's letter on the negative aspects of class action litigation included in this chapter brilliantly urges a much needed restraint in the use of this device.

In view of the almost consistently high quality of the material contained in Part II, one is a little surprised at some obvious omissions. Most notably, in the discussion of depositions, there is no mention of taking depositions by other than stenographic means as authorized by rule 30(b) of the Federal Rules of Civil Procedure and many similar state provisions. The authors quite properly note that one of the serious drawbacks of depositions in public interest advocacy is their very high cost but fail to mention this relatively cheap alternative. Clearly, tape recorded depositions are not as useful as stenographic depositions. They can be taken and used only upon order of the court, which has great discretion in terms of means and use, and they require recording equipment and large expenditure of secretarial and attorney time in preparation. Despite these drawbacks, recorded depositions make discovery possible where the cheaper form of discovery — interrogatories, production of documents, and admissions — are not suitable, but money is not available for stenographic recording. Using the problem technique they employ so well, the authors could have instructed the student to draft a motion and supporting memorandum requesting the use of taped depositions which addresses itself to questions of equipment to be used, method of transcription, approval by the witness and opposing counsel of the transcript, and use to be made of the transcript at trial. The authors missed an opportunity to give instruction in a very valuable skill which is particularly relevant to the economic realities of public interest advocacy.

Unfortunately, the above-noted omission is symptomatic of the book's more general weakness in the crucial area of fact development through both formal discovery and informal fact gathering. As regards formal discovery, no mention is made of production of documents or requests for admissions, particularly from the point of view of relating them in sequence and timing to depositions and interrogatories, which are discussed. The student has at least been exposed to the formal discovery process in civil procedure courses, but will probably not have had prior

instruction in informal fact gathering. The authors pay no attention to this skill. How to find witnesses, who may be spoken to directly rather than going through opposing counsel, the use and misuse of statistical data, to name just a few areas, are completely ignored. Statistical techniques, their use both offensively (for example, gathering and interpreting already published data or constructing and executing surveys to get data), and defensively (to discredit the opposition's proof), is an area that will have increasing importance in litigation. More mundane, but crucial to proper fact development, is proper file-keeping. Given the overwhelming importance of fact development in litigation, the weakness in this area is a serious limitation on the usefulness of the Meltsner and Schrag book.

One other omission, discussion of the importance and development of skill in drafting the proposed order after victory, is a major limitation of these materials. The importance of a well conceived and carefully drafted order in cases where injunctive relief is requested (which is the major form of relief sought in test litigation), cannot be overemphasized. Too many "legal" battles are won only to be rendered meaningless because of inattention to the provisions of the final order. Too often it is assumed that the judicial pronouncement is the end of the ball game. In fact, that is when the really meaningful work begins — with enforcement of the legal victory so that changes result. This battle begins with the final order — and its terms are crucial to ultimate victory. A statement of the legal conclusion without specific directions as to implementation, particularly notification and monitoring procedures, is generally of little use. It is the implementation detail that so often makes the difference between real change and a hollow legal victory. At the very least, the student should be made aware of the importance of the final order, be presented with problems that offer an opportunity to think about the variety of things which might be included in an order, and be given some experience in drafting such a document. All the preceding learning about winning the legal victory will be for nought if, once it is achieved, business goes on as usual.

Despite these limitations, Meltsner and Schrag's *Public Interest Advocacy: Materials for Clinical Legal Education* is without doubt the best (and with little doubt the only) workable set of materials for clinical education currently in publication. The prodigious use of primary material and construction of realistic problems based on those materials enable the instructor to approximate real case-handling situations.

A word of caution is necessary. Primary material and problems give neither the full picture nor the experience of an actual ongoing case-handling situation. To use this book in lieu of real cases would be to

subvert the authors' purposes and to leave out of clinical education its most valuable aspect. When used, as the authors instruct, to fill in the gaps when one's own files do not provide a suitable vehicle for instruction in a particular technique and as a reference and backdrop for actual case handling and resource allocation decision making, *Public Interest Advocacy* is a valuable asset to a clinical legal education course.