2010 Poverty Law Conference

Golden Gate Law School

Unseen, Unheard, Unknowledgeable, and Underrepresented Populations—How Can Law Schools Develop Law-Student Interest in Helping Disadvantaged People?

By Doug Simpson
www.simpsonlawfirm.com
dsimpson@simpsonlawfirm.com

"If a free society cannot help the many who are poor it cannot save the few who are rich."[1]

This paper presents for discussion a practitioner's view on a method that law schools can use to help promote positive change and to further environmental justice by sensitizing law students to issues facing the disadvantaged via a small but focused cross-curricular program.

[1] From John F' Kennedy's inaugural address, January 20, 1961: "To those peoples in the huts and villages across the globe struggling to break the bonds of mass misery, we pledge our best efforts to help them help themselves, for whatever period is required—not because the Communists may be doing it, not because we seek their votes, but because it is right. If a free society cannot help the many who are poor, it cannot save the few who are rich."

The Social Problem:

Populations most exposed to injustices, especially to environmental injustices and to related injuries via toxics exposure often are those least able to help themselves, by virtue of economics, race, age, gender, education, native language, or a combination thereof. Such people might be not have been empowered to help themselves, and might not be sensitized to the importance of exposure prevention. Combined with potentially long latency periods between dates of exposure and of disease symptoms, disadvantaged people might not grasp the connection between toxic exposure and disease, and they often do not have medical care that might assist in making the causal connection.

Moreover, corporate culture often fails to understand, to care, or even ignores or takes advantage of such people. The disadvantages often are unable to afford lawyers, or to understand how they might be an instrument of positive change, and the disadvantaged suffer injuries without redress.

Compounding the problem, lawyers often fail to understand or appreciate interrelationships between corporate conduct, or even everyday toxic exposures, and how such exposures cause injuries, especially to disadvantaged populations. They thus are unable to effectively counsel clients to prevent harm to the disadvantaged.

Typical Law-School Curricula:

Law students across the country typically pour over casebooks filled with reported appellate cases—cases that have not only been tried or have otherwise gone to judgment, but have also been litigated through to an appeal, generally reflecting vast economic resources unavailable to the disadvantaged. Some law-school programs present legal subjects stand-alone—unlike actual cases, often there is little to no reference to the interrelationships between law-school subjects. Students learn their casebooks' law, but perhaps without frames of reference that might help them in their legal careers.

Many cases, and in particular environmental and toxic-tort cases, often present themselves as multidisciplinary matters involving a number of law-school subjects including torts, contracts, property, corporations, criminal law, civil procedure, property, constitutional law, legal writing, evidence, trial practice, insurance, and of course, environmental law. Such multidisciplinary lawsuits provide law schools with an opportunity to use case histories as a thread tying separate law-school subjects together, while also sensitizing law students to problems that disadvantaged people face.

A Proposed Multidisciplinary Program:

This paper proposes a multidisciplinary case-history-based program in which students in multiple separate subjects are presented with the same case-based fact pattern at the outset of their law-school careers, a fact pattern that evolves like layers of an onion as the semester progresses—just as real cases unfold through investigation and discovery. As law-student knowledge increases, their multidisciplinary understanding increases, as well as their understanding and empathy for disadvantaged populations. Each subject matter would work off the same basic fact pattern, emphasizing certain aspects of it as is appropriate to the subject. Legal writing classes should tie the subjects together, and provide students practical, multidisciplinary writing experience.

Illustration of the Proposed Multidisciplinary Program:

At the outset of the semester, and in several separate subjects, students are presented with a fact pattern such as that set forth below. Regularly during each of the courses thereafter, reference is made to the fact pattern and to how the particular case or subject of study during that day, week, or unit relates to the fact pattern—the fact pattern evolves over a period of days or weeks as a multidisciplinary hypothetical.

As with actual lawsuits, and as the semester unfolds, additional facts are added to the fact pattern to highlight subjects being learned in class, while also sensitizing students to challenges that vulnerable people face. An essential feature of the process is hanging flesh on the bones by providing actual character to the individuals in the fact pattern, to sensitize students and to assist in developing empathy and interest—the people described in the fact patterns are real, event though their plight never made it to a reported decision.

Legal-writing projects should be tied into the fact pattern, and testing at least in part, in various subjects can be coordinated with the ongoing fact pattern. Students' interest is captured as the semester progresses by the ongoing fact pattern with characters having some depth, much like the way lawsuits ultimately humanize parties before a jury. Additional facts and fact patterns can be added to highlight important issues as well, to be understood and to be addressed much in the way a lawyer handles more than one ongoing case at a time.

Please see case history examples that follow.

Example—Fact-Pattern No. 1—Life in the High Desert:

12-year-old Ruth and her younger brother, Bill, a nine-year-old boy, tended to themselves after school and all summer long because their parents worked full time at the nearby natural-gas compressor station. Living in the high California desert, the days were both long and hot, but every day the kids cooled themselves in the mist that came from the compressor-station's cooling towers. They learned to hang out there with their friends after school, playing cards, jacks, or just hanging out. The mist was cool on the skin. The evaporation tempered the day's hot sun.

The kids also spent long summer days swimming in the compressor station's employee swimming pool. The thought the color of the water was funny looking.

At home a block away, the family cooled their home with swamp coolers. Swamp coolers, much like cooling towers, cool the air by evaporation, by blowing air through cascading water streams.

The family quenched their thirst by drinking water drawn from the family's well. The water was used in drinks such as in iced tea, in baby formula, in ice cubes, and in cooking. The well served as the water supply for the family's bathing needs also.

Unbeknownst to Ruth and her brother Bill, the cooling-tower water and related mist were laden with carconigenic hexavalent chromium, a cooling-tower corrosion inhibiter. The purpose of the hexavalent chromium was to give the plant's pipes a continuously renewed protective coating.

But the water also had biocides and slimicides mixed in. These products were designed and manufactured to keep the water free of biological growth.

The cooling-tower mist emitted from the tops of the towers bathed hundreds of acres of surrounding area in these contaminants, day in and day out. The homes closest to the plant were hit with the greatest concentration.

The gas-compressor station changed its cooling-tower water frequently. The discharged water, called blowdown, is dumped daily into unlined settling ponds in the sandy desert soil.

The gas company knows the exact location and owner of every drinking water well in the area. There are several hundred such wells in the compressor station's immediate vicinity.

Unbeknownst to Ruth and Bill, the carcinogenic contaminants migrate directly into the aquifer that supplies their home with water—the very same water in which they shower daily, the same water that feeds their swamp cooler, the same water what washes their clothes and their bed sheets, and the same water that they drink in their iced teas. This also is the very same water that was used to mix their baby-formula powder fed to them when they were babies.

As youngsters, Ruth and Bill have a higher resting respiration rate than adults. Moreover, they are much more active, and thus their respiration rate is even higher than an active adult. The kids consequently are more severely exposed than adults breathing the same air—kids get a much larger dose of toxins.

By the time the kids reach high-school age, they are orphaned. Their parents worked at the compressor station, but died of cancer. Both parents had had colon cancer the times of their deaths.

Both parents had worked at the compressor station as cooling-tower cleaners, dermally exposed daily to the water as they inhaled and ingested the mist. They never were told of the true nature of contaminants in the water. They never were trained in industrial hygiene, nor were they issued respirators or other personal protective equipment.

The gas company that used the corrosion inhibiter knew the location of contaminated water. It also knew that people's wells were being impacted, and thus that people were being exposed, but did nothing about it.

Ruth and Bill both had osteotomies by age sixteen, and now suffer from lung cancer. They had suffered a lifetime of inhalation exposure, dermal exposure, and ingestive exposure to known carcinogens.

The kids' parents could not read. The Material Safety Data Sheets (MSDSs) and product labels, even if they had been provided to these gas-company employees, would have been meaningless. The labels might as well have been in Russian.

The hexavalent chromium supplier is a publicly traded Fortune-500 company that has produced its corrosion-inhibiter product since the 1930s. It had its headquarters and all of its operations in Pennsylvania, but shipped products to several states.

In the 1940s, the company supplied the product to customers in barrels marked with 12" square label complete with a skull-and-crossbones, with warning words as set forth below:

Danger! Harmful or fatal if swallowed!
May cause cancer, including lung cancer, or death.
Prevent skin contact. Do not ingest or inhale.
In case of ingestion, induce vomiting, and seek immediate medical attention!

But one of the chief salesman believed that the warning inhibited sales. This salesman was legendary in the company, selling much more than others, in part by telling customers including the gas company that they had to run fewer cycles of the product than the company advertised, which of course yielded not only a greater consumption rate, but also a greater rate of disposal. He advised customers whose unlined blowdown settling ponds were coagulated with used chromium at the bottom a condition that inhibited dissipation of the water, that they could plow the bottoms of the settling ponds with tractors to increase the dissipation rate.

The hexavalent-chromium company changed its warnings in the 1950s. It removed the skull-and-crossbones image, then changed the warning language to read as follows: "Caution. Use only with adequate ventilation. May cause skin irritation."

But medical evidence did not justify the downgraded warnings. The evolving but generally accepted medical knowledge, including several hundred books on the topic within the hexavalent chromium supplier's library, supported the human health effects that the company had warned about in the 1940s product label, but did not support the downgraded warnings.

Moreover, the hexavalent chromium company repeatedly performed animal testing in which the eyes of rabbits were sutured open, and then the product was repeatedly applied to the eyes to determine the extent of eye irriation caused by the product. Rabbits' skin was shaved, then abraded with sandpaper to expose more sensitive layers beneath, and then the hexavalent-chromium product was applied to determine the skin-irritation effects of the product. Lab rats were fed the material and forced to inhale the product to determine the extent of cancer cases in the lab-rat population, to be extrapolated to humans.

Inexplicably, the MSDSs that the manufacturer *supplied to its customers* differed from those it received *from its own suppliers,* and had fewer warnings provided to customers as to adverse human-health effects than the MSDSs relied upon in-house by the company's own internal industrial hygienists to protect worker safety for the wokers who created the product. Likewise, the personal protective equipment recommended on the supplied-with-product MSDSs differed from the the protective equipment recommended internally. Internal handlers of the product were told to wear Tyvek suits and respirators; customers were told only that paper masks should be worn.

The company later upgraded its warnings. But the warnings are not as significant as the warnings given by NIOSH (National Institute for Occupational Safety and Health).

Cooling towers sometimes got slimy, which gummed up the works. The hexavalent chromium suppler developed, sold, and advised customers as to the use and disposal of slimicides and biocides in the cooling tower water.

Thus the hexavalent-chromium supplier advocated a mixture of water laced with corrosion inhibitors, slimicides, and biocides. Although the hexavalent-chromium supplier advocated this mixture, all within the same stream of water, it had no program whatsoever for warning customers of the human-health effects of the resulting mixture, or whether active ingredients, when combined with other chemicals might cause human healtheffects not envisioned by the products when use separately—as if the company sold *nitro and glycerin*, never warning or caring enough to learn and to warn about the effects of *nitro glycerin.*

In fact, the corrosion inhibiters, the slimicides, and the biocides were products created by separate corporate divisions. Several people within the chain of command, in private meetings, expressed concer about mixing the products together. But nobody wanted to be the bearer of bad corporate news—the products we extremely profitable, and anything restricting their use could decrease company profitability, and make the employee who raised the concern a corporate pariah.

A nearby property owner owns a dairy farm. The gas-compressor company, knowing that its unlined settling ponds have caused contamination to the regional groundwater supply, recently told the farmer that the *farmer's dairy operation* was causing groundwater contamination, not other way around—the company advise the farmer that his dairy farm was making the water unusable for the company's industrial water supply, and it expected the farmer to stop, and clean up the groundwater, or it would sue the farmer. The farmer knew that he had a groundwater problem. After all, his turkeys' eggs have been coming out yellow, and the water for the dairy cows has been yellow-green. This color has been similar cow urine. To

avoid the lawsuit, the farmer agreed to sell the farm that had been in his family for generations to the gas company, but at ten cents on the dollar.

Unbeknownst to the farmer, his property was downgradient from the gas-compressor company. The water was indeed tainted, but tainted by the gas-compressor-company's hexavalent chromium, not by his own dairy operation. The gas-company representative in charge of the negotiation with the farmer earned a bonus in return for keeping a lid on the farmer's suit, and for avoiding the potential of other suits.

Ruth and Bill knew nothing of a possible claim until a paralegal from the plaintiff's attorney's firm came knocking on the door, explaining the situation. The paralegal then signed them up as additional plaintiffs. The paralegal personally went to all the homes within several miles of the gas company, and signed up plaintiffs.

Many of the possible plaintiffs lived on the gas-company property while working for the gas company. Although the gas company knew or suspected their injuries as a consequence of the proximity ot the cooling-tower emissions, it allowed the workers to stay in the nearby buildings, arguably aggravating the workers' injuries.

The product supplier has had insurance for a period of sixty years. With different contractual provisions, the policies provide the company with defense and indemnity. The gas company has a high self-insured retention, with excess polices above the retention. All carriers are entitled to subrogate against those who caused the loss.

The Regional Water Quality Control Board (RWQCB), an administrative agency whose primary purpose is the protection of the water quality of the state, recently issued a cleanup and abatement order directing the gas company and the hexavalent chromium supplier to cleanup and to abate the effects of the nuisance created by the groundwater contamination.

The insurers claim that they need not defend or indemnify because the action by the administrative agency is not a lawsuit, and thus is not within coverage afforded by the insurance policy. The insureds claim that the insurance policy provides coverage, or is ambiguous, and should be interpreted in their favor.

By statute, there is no insurance coverage for certain acts committed by an insured: "An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." Insurers claim that there is no possibility of insurance coverage because there was no accident, and hence there is no need to provide the defendants with insurer-retained counsel.

The RWQCB also recently had a hearing, after formal notice and public comment, naming the site to a standing general order that prohibits the dumping of industrial wastewater without a proper permit. The standing general order quasi-legislative, that it asserts is not subject to judicial review or even to a *writ of mandamus*—it must be enforced as a matter of comity.

The wastewater dumping impacts nearby streams. The streams are tributaries that lead to the ocean, blue-line streams, over which the Army Corps of Engineers might have jurisdiction. The waters thus might be federal-jurisdictional waters.

The RWQCB has in effect been deputized by the USEPA to issue permits for wastewater dumping pursuant to the Clean Water Act. RWQCB administer such permits by deputizing municipalities to issue waste water subpermits.

The local city government has failed to properly enforce its own wastewater-dumping subpermit. It thus violated a statue designed to protect the class of individuals including the plaintiffs. The wastewater permit statute was intended to prevent the types of harms that occurred.

After the paralegal contacted them, a law firm put ads in the local newspapers about town-hall meetings to discuss the causes and effects of the water contamination. Several thousand people attended several public meetings.

The community has had cancer clusters, as well as many cases of IBS, and more-than-usual osteotomies and IBS cases. One expert opined that a single molecule of hexavalent chromium can cause and with substantial medical certainty will cause cancer. Other experts dispute that position and dispute the reliability of the other expert's methods.

About one year after the initial lawyer inspired newspaper calls for public meetings, the first plaintiff began suing the gas company and the hexavalent chromium supplier. The companies demurred based on the one-year statute of limitations.

The defendant insured tendered the lawsuits to the insurers, seeking defense and indemnity. Some insurers accepted the defense; others denied coverage, some accepted the defense while reserving rights to disclaim coverage.

Publicly traded, the hexavalent-chromium supplier has annual SEC reporting requirements. It has failed to report that the claims exist. There are now 6,000 individual claimants. The claimants seek damages not only for their personal injuries but also for nuisance and trespass to their properties. All plaintiffs claim that they cannot use the water for drinking, bathing, or for livestock. They are also suing the city for inverse condemnation and breach of mandatory duty, based on the failure to enforce the waste-water permit standards. The seek attorney's fees.

A test group of 240 claimants went forward to a custom-designed trial before a three-judge panel. The judges awarded an average of $550,000 to each claimant, a judgment of about $133 million. This is the first of several trial phases.

The plaintiff's attorney's firm, with its $43 million of attorneys' fees earned, then rented a cruise ship in the Mediterranean Sea, and invited the three judges, and others from the courthouse where the remaining claims are venued, to "lecture" aboard the cruise ship.

Given the size of the case, a cruiser Judge who was assigned the case in Superior Court appointed a friend and retired judge, another cruiser judge, as a discovery referee. The referee/cruiser judges recently heard the plaintiffs' motion to compel discovery from the hexavalent chromium supplier.

The hexavalent chromium supplier produced only 70 pages of documents when asked for its knowledge about hexavalent chromium's health effects. But its library contained in excess of one million pages of such research. It also was asked to produce all MSDSs, all labels, all information concerning product design, all industrial hygiene information, and communications between the company and regulators. But it refused to produce any such documents.

The discovery referee/cruiser judge granted the motion to compel, and issued evidence sanctions. The evidence sanction, said the judge, is an order that the defendant is liable to all plaintiffs', and the only remaining question is damages.

Months pass, but defense counsel does not report the fact of evidence sanctions to his own client—it is bad news. The client again fails to report the news to the SEC in its annual public reports. Defense counsel also does not report the evidence sanction to the insurers, who upon learning the information later, claim it is a breach of the cooperation clause in the insurance policy, entitling them to disclaim coverage.

Teaching Opportunities That Can Be Drawn from the Fact Pattern:

The above fact pattern is but one of many multidisciplinary fact patterns emerging from a practice of environmental and toxic-tort law practice involving vulnerable populations. The fact pattern involves children, who by themselves are a vulnerable population and are foreseeable bystanders of a product manufactured by one company then sold and used by another. The children's parents are less educated, illiterate, minimum-wage laborers, exploited by the company employing them, and neglected by the chemical company that could have and should have foreseen and protected against injuries.

The fact that pattern can be used to develop or to illustrate areas of law in various classes as follows:

- Torts: Nuisance, trespass, waste, battery, strict liability failure to warn, strict liability design defect, strict liability manufacturing defect, fraud, inverse condemnation, government immunity, breach of mandatory duty (governmental negligence *per se)*.
- Contracts: Implied warranty of merchantability, contracts of insurance and other indemnity agreements.
- Labor law: the exclusive remedy rule, exceptions thereto.
- Administrative Law: Regulatory oversight and enforcement of environmental laws, and the process of appeal.
- Constitutional Law: Jurisdiction. Comity, and the ability of the judicial branch to review quasi-legislative orders of regulatory agencies, local government acting to enforce federal government legislation, condemnation, and inverse condemnation.
- Evidence: Are the manufacturer's internal industrial-hygiene standards an admission of the company's knowledge of the dangerous propensities in side effects of its products? Can the internal standard for handling products used as the standard of care for negligence claim as against the manufacturer? Can later changes to product labels and to MSDSs be used as a post-occurrence change to show the defective nature of the earlier warnings in a strict liability case? Can plaintiffs prove general and specific causation—whether the particular products can cause and in this case did cause the injuries, and through what experts and procedures such as preliminary causation hearings? Are 40-year old documents admissible as business records or otherwise where there is no witness to testify as to the mode of preparation of the documents?
- Trial Practice: students can portray the various sides of the case including (1) plaintiffs (2) the gas-compressor company, (3) the product manufacturer, (4) the administrative agency seeking cleanup, (5) the municipality that alleged breached mandatory duties and inversely condemned property, and (6) the product manufacturer's and the gas-compressor company's insurers.

- Environmental Law: What environmental laws have been violated by the migration of contaminants from the gas-compressor facility? What plaintiffs have a private right of action? What conduct can they attempt to force through declaratory relief or otherwise? What regulatory agencies have jurisdiction, and what effect are violations of their regulations? What will be the regulatory path that oversight of this facility will take, and what can the public due to influence that regulatory path? What can be done to protect individuals from such harm from this and similar sites in the future?
- Legal Writing: Research projects can involve the preparation of objective memoranda as well as argumentative motions such as motions to dismiss/demurrers and motions for summary judgment. For example, given the latency period between exposure and understanding of the harms as set forth in plaintiffs' complaint, students can be asked to prepare a demurrer based on the statute of limitations. Written discovery projects can be coordinated with civil procedure, and can include various written discovery tools.
- Insurance: Insurance has evolved over several decades, a fact that often comes into play in environmental cases because of the long period of time between causative events and resulting harms. Issues include contract interpretation, whether the claims fall within the coverage provisions, whether any exclusions, conditions, or limitations apply that affect coverage, whether policies properly stack horizontally or vertically, whether excess or umbrella policies are anticipated, and drop down to provide defense or indemnity as against the claims.
- Civil Procedure: The fact pattern can be used to illustrate the use of interrogatories, requests for admissions, depositions, requests for production of documents, subpoenas and expert-witness discovery. Sanctions for failure to produce discovery. Demurrers or motions to dismiss, for want of jurisdiction, and based on the statue of limitations. This can be coordinated with the legal-writing class.
- Professional Responsibility: The propriety of advertising, targeted advertising, signing up plaintiffs by knocking on individuals' doors, judicial misconduct.
- Corporations: Often the profit motive gets in the way of sound judgment. How within the corporate structure can or should change be made, whether as to labeling, product composition, advice as to clients' disposal practices, and reporting to shareholders?
- Criminal law: Knowing that death or serious bodily injury could occur from exposure to impacted drinking water wells or through other emissions, what crimes have been committed?

Example—Fact Pattern No. 2—Defamation, Sexual Harassment, or Embezzlement?

A middle-aged woman walks into the civil lawyer's office, and tells the lawyer that she has been contacted by a collection agency in its efforts to collect $60,000, asserting that she took the money. The collection agency threatens to ruin her credit, to contact the secretary of state to have all of her licenses revoked, and to sue her for the collection, seeking attorney's fees as well.

The woman was a bookkeeper at a country club until she was fired 11 months ago. The club terminated her because they believed that she took money from the club.

But she adamantly disputes having taken a single penny. Moreover, the club was very loose with its money—waiters collected cash every night, then put cash into an envelope every night, which then went into an unlocked drawer in an unlocked desk in an unlocked room—without ever being tabulated or reconciled.

The club's claim against her has a four-years statute of limitations. Her possible claims of defamation *per se* for accusing her of a crime, and other claims, have a one year statute of limitations.

The woman believes that this is all retribution. She had complained to the club's manager that her direct supervisor, a CPA and the head accountant, had been coming onto her. He said things like "I cannot concentrate on what you are saying because I cannot stop looking at your breasts." He had invited her several times to offsite meetings at a hotel, which she had refused.

The club had employee-dishonesty insurance. As part of the claim process, the club manager filled out a proof of loss form in which he stated that the woman had taken the money over a one year period.

The insurer paid the claim to the club. Subrogated to the club's rights to the extent of payments made, the insurer hired a collection agency to act as the insurer's agent in collecting the alleged debt.

The woman worked 8 to 5 weekdays. Cash was collected during hours that the club restaurant and bar were open, 6 to midnight and weekends. The schedules did not overlap.

The Club's CPA knew when it hired the woman that she had not been a bookkeeper before; she had only been an accounts receivable clerk. But the club hired her anyway, saying that it would give her the training that she needed. The club was about to adopt a new accounting system, a system that would solve old problems, and she would be trained in the operation of that new system.

She never got the training. The club decided against acquiring the new accounting system. She was told that she need no reconcile various accounts, including those with cash.

Waiters at the club had the habit of taking their banks home with them. "Banks" are the cash necessary to make change, but also included cash receipts. Sometimes these banks were $500 to $1,000.

The allegation has been made that the club's deposits do not match the receipts. But there were no reconciliations of these cash accounts. Moreover, the club had a habit of mixing cash receipts to be deposited with petty cash that was used in the course of the club's operations.

Her supervisor had told her that she was doing such a good job, that he wanted her to move into the club manager position. The club manager got wind of this, and expressed his displeasure. The club manager has been known to take money from the petty cash drawer for his dry cleaning.

The woman has a high-school education, with no college thereafter. She is no longer employable as a bookkeeper. She cannot get a bookkeeping reference, and thus cannot get a bookkeeping job, because of her termination.

She was earning $46,000 plus health benefits annually. Now she is a cleaning lady. Her white-collar desk job is now a blue-collar manual-labor job.

The woman has terrible arthritis in her hands, shoulders, and neck. Cleaning toilets is especially painful. She is able to earn about $1,000 to $2,000 monthly.

She is the sole custodial parent of a minor child. The minor child is in high school, and suffers from a palsy that causes partial paralysis for roughly six months per episode. The episodes are brought on by stress.

The woman and her daughter were evicted from their home on Christmas Eve. The have been staying with a friend in a one-bedroom apartment, taking turns sleeping on the floor.

Last week the woman was contacted by the police, and invited to undergo a videotaped interview. She does not have the money to hire a criminal-defense lawyer, who will do pretrial work for $20,000 up front.

The police said that she would walk out of the interview without being arrested. But they did not promise that an arrest warrant would not issue on the basis of facts learned.

The public defender advised that the right to counsel does not exist until the arraignment. Arraignment occurs within 72 business hours of being arrested. Thus an arrest on Thursday might mean being jailed all weekend and into the next week. She believes herself innocent, and doesn't believe she should be jailed for 5 days based on the assertions made by a sexually harassing former employer.

She just received a call from her daughter that the police are at the place she has been staying. They have a warrant for her arrest.

Each public defender has 150 cases at every moment. Few receive much attention, and the likelihood is that this case will be no different. If the woman pleas guilty, then she has no defamation claim, but the club's statement will have been proven true. But if she goes to trial and loses, she faces 6 years in jail.

On the civil side, depositions of each club witness will cost about $2,500 apiece in court reporter fees alone. She has no money. The depositions might be used to show reasonable doubt in the criminal case as to the theft by showing the club's overly loose cash-handling practices, or problems predating her employment. But deposition-taking requires an active civil lawsuit, and it requires time. If the suit is filed, but ultimately is shown to have been initiated without a reasonable basis, both lawyer and client can be sued for malicious prosecution.

The woman's daughter is in the top five percent of high school seniors in the state. She wants to be a neurosurgeon, wants to cure her palsy, and wants to cure cancer. She has just been accepted to two of the state's top schools. Her mother's successful lawsuit would help her fund college.

What should be done to help the woman?

Teaching Opportunities That Can Be Drawn from the Fact Pattern:

- Torts—defamation, negligence, sexual harassment, fraud
- Contracts—At-will employment versus implied in fact agreement to employ
- Criminal law—embezzlement
- Constitutional law—right to counsel, right to effective assistance of counsel
- Civil procedure—statutes of limitation, discovery