

# LEARNING FROM COLLEAGUES: A CASE STUDY IN THE RELATIONSHIP BETWEEN "ACADEMIC" AND "ECOLOGICAL" CLINICAL LEGAL EDUCATION

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## INTRODUCTION

From the beginning of its resurgence in the 1960s, the clinical movement in American legal education has been driven by a kind of "academic" perspective.<sup>1</sup> Emphasizing the necessary relationship be-

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<sup>1</sup> Programs in and arguments about clinical legal education go back at least to the 1930s, *see, e.g.*, John S. Bradway, *Some Distinctive Features of a Legal Aid Clinic Course*, 1 U. CHI. L. REV. 469 (1933); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 107 (1933); George K. Gardiner, *Why Not a Clinical Lawyer-School?—Some Reflections*, 82 U. PA. L. REV. 785 (1934); Karl N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935), and have been a regular feature of law school discourse about the curriculum since then. *See, e.g.*, CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE (Edmund W. Kitch ed., 1970) (The University of Chicago Law School Conference Series No. 20); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 213-16 (1983); Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 374 (Working Papers for CLEPR National Conference 1973); Arch M. Cantrall, *Law Schools and the Layman: Is Legal Education Doing Its Job?*, 38 A.B.A.J. 907 (1952); Jerome Frank, *Both Ends Against the Middle*, 100 U. PA. L. REV. 20 (1951); Jerome Frank, *A Plea for Lawyer Schools*, 56 YALE L.J. 1303 (1947); Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211 (1948); Karl N. Llewellyn, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345 (1945); Joseph A. McClain, Jr., *Is Legal Education Doing Its Job? A Reply*, 39 A.B.A.J. 120 (1953); Carl McGowan, *The University Law School and Practical Education*, 65 A.B.A.J. 374 (1979). *See also* Robert MacCrate, *Keynote Address—The 21st Century Lawyer: Is There a Gap to Be Narrowed?*, 69 WASH. L. REV. 517, 519-21 (1994) (describing the history of the skills debate and its place in the development of modern American legal education).

The flurry of interest in the topic in the last thirty years represents only the most recent discussion of the subject. In one sense, of course, all discussions of the curriculum of the modern law school go back, if not to Langdell, at least to Josef Redlich and Alfred Reed, *see* STEVENS, *supra*, at 112-23 (1983); John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 157-73 (1993), but it was in the 1930s that law professors started to argue about skills instruction in the law journals in modern day terms. One of the perhaps surprising things about this debate is how little if at all the arguments for and against clinical instruction have

tween theory and practice, the central role of ideas in the development of behavioral competence, and the importance of the intellectual dimension of professional socialization, this perspective has shaped not only the intellectual content of most American clinical legal education, but also its programmatic structure. Academic clinical instruction is characterized by a commitment to supervision by full-time law faculty, on cases selected principally for their educational value, based in law offices established in and controlled by law schools (the so-called in-house clinic),<sup>2</sup> to help students acquire a critical and self-conscious understanding of lawyer skill practice, as much as, if not more than, a mastery of those practices in their own right.<sup>3</sup> While

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changed over the years. For example, compare the "modern" arguments of William Pincus with the "antiquarian" ones of Jerome Frank and Karl Llewellyn above. See, e.g., William Pincus, *The Clinical Component in University Professional Education*, 32 OHIO ST. L.J. 283 (1971). Prominent members of the bar and highly respected legal academics have championed the clinical education cause, and numerous ABA, ALI and AALS studies and reports have been produced to provide supporting evidence. For a complete list of the studies and reports, see AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 341-43 (1992) [hereinafter MACCRATE REPORT]. Supporters include former Presidents of the American Bar Association (Talbot D'Alemberte, a member of the MacCrate Task Force), well known and highly respected judges (Jerome Frank, and any of the several on the MacCrate Task Force), and professors at elite law schools (Karl Llewellyn, and any of the several on the MacCrate Task Force).

<sup>2</sup> In contrast, the American Bar Association defines "field placement program" and "externship" as "any . . . program in which actual rendition of legal services or other legal activity are used and in which full time members of the faculty are not ultimately responsible for the quality of the service or other activity." See Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 CLIN. L. REV. 413, 413 n.2 (1996) (quoting Memorandum from James P. White, Consultant on Legal Education to the American Bar Association, to Members of Site Evaluation Team at 15 (Sept. 1988)).

<sup>3</sup> Understanding skill is a higher priority than mastering it, because skill mastery is not a realistic possibility in so short a period of time as a semester. Skill is ultimately based on habit, and the acquisition of habit is too complicated a process to be completed in a semester. Accord James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLIN. L. REV. 457, 463 (1996) ("students . . . barely begin to discover their sea legs . . . when the semester comes to an end"); see also James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83, 94-96 (1991) (summarizing debate over the question of whether it is possible for law schools to teach values).

The "critical" understanding of practice that students are to achieve extends to, and in part is based upon, students' critical evaluation of their own performances. Students are expected to engage in "critical self-reflection," and clinical courses to contain a "reflection" component. See, e.g., Peter A. Joy, *Clinical Scholarship: Improving the Practice of Law*, 2 CLIN. L. REV. 385, 393-97 (1996); Seibel & Morton, *supra* note 2, at 419-20 ("placement teachers . . . teach . . . students to use their fieldwork experiences to learn reflective thinking"); Abbe Smith, *Carrying On in Criminal Court: When Criminal Defense Is Not So Sexy and Other Grievances*, 1 CLIN. L. REV. 723, 728 (1995) ("the mantra of clinical pedagogy [is] reflect, reflect, reflect"); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths From Rhetoric to Practice*, 1 CLIN. L. REV. 157, 170 (1994)

many forces contributed to its ascendancy, the academic perspective grew principally out of the lessons learned by clinical teachers from the failure of the apprenticeship (now called externship) method of clinical instruction, popular in the late nineteenth and early twentieth centuries, to gain widespread acceptance in law schools.

In apprenticeship instruction, students worked under the tutelage of practicing lawyers, in law offices located outside of the law school, on whatever cases came in the door. They followed conventionally accepted conceptions of lawyer skill passed on by their lawyer supervisors, and analyzed these skill conceptions critically and self-consciously only when economic, ideological, aesthetic and practical considerations permitted, which usually was not often.<sup>4</sup> In the eyes of

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("Reflection must be central to . . . a clinic's work because the fundamental goal of the clinic itself is to build theory . . ."). On the particular importance of critical reflection to clinical study, see David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 63 (1995) ("Precisely because clinical education is a more powerful cultivator of affect and judgment than the classroom, it runs a heightened danger of being a corrupter of youth unless clinicians systematically build into their teaching the capacity for reflection and self-critique . . ."). I argued for the importance of a critical perspective in clinical study myself a few years ago, in an article that might have been read more receptively if it had been given a different title. See Robert J. Condlin, "Tastes Great, Less Filling": *The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45, 77-78 (1986).

<sup>4</sup> Moreover, and perhaps more importantly, traditional apprenticeship instruction and today's academic clinical instruction differ in the importance they accord "learning to learn" in their respective conceptions of the law practice subject matter. The academic perspective makes learning to learn a practice skill in its own right, nearly equal in importance to the more traditional skills of interviewing, negotiating, examining witnesses, arguing to courts, and the like. Drawing on the literature of social and cognitive psychology, academic clinicians and their students sometimes study themselves learning almost as much as they study the legal work they produce, to determine what kinds of persons they are becoming as much as how well they are performing as lawyers. They move regularly in and out of lawyer role, asking both what should be done and how that decision was made, focusing equally on both outcome and process.

Apprenticeship was far less self-conscious about the way it operated. For apprenticeship students, critical reflection meant asking about the best way to gain a strategic advantage against an adversary, or the best way to perform a particular tactical maneuver, and not about the kinds of persons they were becoming. They were less interested in the nature of the work relationships they formed than in the nature of the work they did for clients.

The difference between these two approaches is not that one method is intellectually sophisticated and the other not, though this is often how they are differentiated. Apprenticeship instruction, usually stereotyped as the less intellectual, can be quite complicated and difficult, challenging the most intelligent of students and teachers—as clinical scholarship focusing on similarly "practical" concerns reflects. See, e.g., Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984) (describing a conception of clinical instruction based on ends-means or instrumental thinking); Paul D. Reingold, *Why Hard Cases Make Good (Clinical) Law*, 2 CLIN. L. REV. 545 (1996) (describing an intellectually challenging clinical program based on the apprenticeship model). Rather, the difference is just that each has a different conception of the law practice subject matter. Apprenticeship instruction asked what works, and academic

most traditional law teachers apprenticeship was a kind of glorified bookkeeping, in which students performed menial, repetitive and intellectually unchallenging tasks, in an unreflective, unsupervised and imitative fashion. It was thought more a system for providing cheap, exploitable labor to law firms than a method for teaching students about the practice of law.<sup>5</sup> One could debate the accuracy of this view, but accurate or not, it pervaded the legal academy.

To differentiate themselves from apprenticeship instruction clinical educators emphasized their commitment to ideas and theory. Modern clinical education, it was said, would teach students how lawyer skill practices were constituted, how they intersected with and helped define substantive legal rights and obligations, and how lawyer skill, as an independent variable, contributed to the just and fair operation of the American legal system. Teaching a politics of law practice as well as a technique, clinical educators promised to produce a so-called "reflective practitioner,"<sup>6</sup> someone able to perform the interpersonal tasks of law practice with sensitivity, dexterity and grace, but at the same time someone also sufficiently understanding of and distant from those tasks to be able to analyze them critically, both to know when individual performances had failed, and when prevailing conceptions of good practice needed to be changed.<sup>7</sup>

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clinical education asks, in addition, how that is known.

<sup>5</sup> See STEVENS, *supra* note 1, at 10-11 nn.5 & 6. Stevens quotes an 1881 ABA Report describing the experience of being an apprentice as follows:

The applicant for admission spends a year or two thumbing Blackstone or Kent, or both, with now and then a dip into Chitty or Starkie, in the lonesome, dusty, dreary round of a country attorney's office, where he was left to work his way as best he could with little to guide him except his common sense (which was often no guidance at all). He may have asked a few vague questions and received a few vague answers.

*Id.* at 30 n.28 (quoting J.A. Hutchinson, *Appendix to the Report of the Committee on Legal Education*, 4 ABA REP. 278 (1981)).

<sup>6</sup> The term is Donald Schön's, and the idea behind it comes from the work of Schön and Chris Argyris. See CHRIS ARGYRIS & DONALD A. SCHÖN, *THEORY IN PRACTICE* (1974); CHRIS ARGYRIS, *INCREASING LEADERSHIP EFFECTIVENESS* (1976); DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER* (1984); DONALD A. SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER* (1987); Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 CLIN. L. REV. 231 (1995). Argyris and Schön's work, in turn, can be traced to that of Leon Festinger. See LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1956).

<sup>7</sup> The principal attraction of the academic perspective was its ability to meet head-on the traditional law teacher concern about incorporating overly vocational instruction into the legal curriculum. Insecure about their own place in the academy, traditional law teachers were fearful of adding new members to their ranks who would be thought more suspect intellectually than themselves. Any program of legal instruction, or group of legal instructors, resurrecting the specter of unreflective, unsupervised and uncritical law practice triggered this fear, and because of this, was almost certain to fail. Whatever else it aspired to be, clinical education could not be apprenticeship reincarnate. The emphasis on "academics" by the new clinical teacher class held out the promise (or perhaps just the hope) that this would not happen.

The academic perspective has held up well. It remains the preferred view of most clinicians, continues to define the structure of most clinical programs, and is still the central element in modern clinical pedagogy.<sup>8</sup> There have always been dissenters, of course, some explicitly disavowing the perspective,<sup>9</sup> and others claiming to have adopted it but whose actual programs may belie the claim.<sup>10</sup> But for most clinicians the superiority of the academic (as opposed to apprenticeship) approach to clinical instruction has not been a matter for serious debate for a long time.

Recently, this received wisdom was seriously challenged with the publication of two important articles championing the virtues of externship-based clinical instruction. The first was Stephen Maher's unapologetic and provocative *The Praise of Folly*.<sup>11</sup> In an intelligent if sometimes overstated manner, Maher made a strong case for the claim that outside law offices are at least as effective an instructional environment for teaching legal practice skills as in-house clinics. Maher's arguments created a minor stir in parts of the clinical community and reactions were mixed, though when the dust had settled, it is probably fair to say that few clinicians thought any less of the aca-

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<sup>8</sup> Robert Stevens has likened an early version of this approach—a view that made clinical instruction synonymous with student practice and ruled out instruction based on simulation exercises, in-court observations, and the like—to a “compulsory chapel” perspective. See Robert Stevens, *Preface*, 1977 B.Y.U. L. REV. 689, 692-94. The phrase captures much of the intensity of many of those early discussions.

<sup>9</sup> Gary Palm is one who has always struck me as being more interested in practicing well with students than studying that practice from some theoretical perspective. See Gary Palm, *Reconceptualizing Clinical Scholarship as Clinical Instruction*, 1 CLIN. L. REV. 127 (1994).

<sup>10</sup> Ironically, Gary Bellow's program at Harvard Law School, in which I was a teaching fellow in the early 1970s, gave practicing well a higher priority than reflecting on practice learning. In meetings with students, the program's teaching fellow and practitioner supervisors usually took up critical questions last, if at all, and when they did the questions typically had more to do with lawyering strategy than student development or student-supervisor interaction. I recall this as being the cause of mild embarrassment among some of the teaching fellows at the time, and the inspiration for several in-jokes about “reflection.” It was ironic because Professor Bellow was one of the first and most important champions of the academic perspective, and never more so than when I was in the program. See, e.g., Bellow, *supra* note 1. This should not be taken as a criticism of the program. It was terrific—the best I have ever seen.

<sup>11</sup> See Stephen T. Maher, *The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education*, 69 NEB. L. REV. 538 (1990). Maher was not the first to defend externship instruction, or to describe the qualities of a successful externship program in detail, see, e.g., Janet Motley, *Self-Directed Learning and the Out-of-House Placement*, 19 N.M. L. REV. 211 (1989); Henry Rose, *Legal Externships: Can They Be Valuable Clinical Experiences for Law Students?*, 12 NOVA L. REV. 95 (1987); Marc Stickgold, *Exploring the Invisible Curriculum: Clinical Field Work in American Law Schools*, 19 N.M. L. REV. 287 (1989), but he was the first to mount an unapologetic all-out assault on the academic perspective in the process of doing so. He forced the issue more aggressively than did any of his predecessors.

democratic approach, or felt any less committed to the in-house clinic.<sup>12</sup> As it turned out, however, this was just the opening exchange.

The critique of the academic perspective intensified with the publication by Brook Baker and his colleagues at Northeastern University Law School, of their daunting and forcefully argued *Learning Through Work*.<sup>13</sup> Articulating a theory of "ecological learning," based on a body of research grounded in various forms of educational and cognitive psychology, Baker and his colleagues revived the case for externship instruction with gusto, arguing that "the [outside law office] practice setting may be the optimal place to learn lawyering skills."<sup>14</sup> Rejecting two foundational beliefs of the academic perspective, that students learn practice skills best from full-time law teachers, and that in learning skills an explicit understanding of theory is prior to and more important than experience, Baker and his colleagues claimed that "work experiences are already educationally rich,"<sup>15</sup> and "are at least as important as any aspect of supervision in explaining what distinguishes a good learning environment" from a bad one.<sup>16</sup>

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<sup>12</sup> Maher describes the nature of in-house clinician resistance to externship instruction, and the obstacles placed in his path by the ABA and AALS while he was writing his article. See Maher, *supra* note 11, at 640-48. Many clinical readers of the present article in manuscript form have assured me that the historical antipathy of in-house clinicians for externship instruction is a thing of the past, and that the in-house/externship distinction no longer exists in any tangible form. Perhaps this is right, but I am not convinced. Maher's difficulties with the clinical establishment are not all that distant, and my own more recent experiences are similarly mixed. For example, more than a few in-house clinical readers of the article have told me that they do not like externship programs, and never will. In addition, at Maryland (and I suspect other schools as well), externship programs are not directed by anyone designated or thought of as a clinical teacher, and none of the programs is thought to be part of the clinical curriculum. No doubt clinicians' views on this issue are more varied now than in the early 1970s, but my own take on the issue is that most of the change has been at the margin.

<sup>13</sup> See Daniel J. Givelber, Brook K. Baker, John McDevitt & Robyn Miliano, *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. LEGAL EDUC. 1 (1995); see also Seibel & Morton, *supra* note 2 (also defending externship instruction). I refer to the Northeastern group as "Brook Baker and his colleagues" because the *Learning Through Work* piece is based on a series of earlier articles Baker wrote by himself. See Givelber et al., *supra*, at 2 n.2. It is not surprising to find a defense of externship instruction coming from Northeastern. The school is defined by its reliance on externship instruction. Its "one semester in school, one semester out" format is what makes the school distinctive. But this is not an objection to the Northeastern argument. Good arguments are good arguments whatever the motivation, and necessity is often the mother of invention. Moreover, Northeastern's reliance on this approach also means that its faculty have more experience with it than most of their counterparts at other schools.

<sup>14</sup> See *id.* at 3.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.* at 3. Given the timing of their article, Baker and his colleagues ended up challenging not just the popular academic perspective and in-house clinic, but also the MacCrate Report, the American Bar Association and clinical establishment's recent blueprint for clinical education. See MACCRATE REPORT, *supra* note 1. The MacCrate Report ratifies the academic perspective, perhaps with a vengeance (though it may be read more

Because it avoids the anti-practitioner bias and intellectual hubris that sometimes go hand-in-hand with the academic perspective,<sup>17</sup> the theory of ecological learning, or at least its underlying spirit, has a certain appeal. It provides a fresh and interesting argument for the attractiveness of externship instruction, and introduces a new and sophisticated body of non-legal scholarship into clinical writing in the course of making this argument. These are considerable accomplishments. On the other hand, the world of law office practice, like any social system, has its vulgarities, mistaken skill notions, and untrustworthy exemplars, and experiencing it in an unexpurgated or uninter-

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benignly than this, *see* Seibel & Morton, *supra* note 2, at 448), so that to advocate an ecological (i.e., apprenticeship) approach after this report is, in some ways, to draw swords with the most powerful forces in clinical education today. *Learning Through Work* is nervous about MacCrate, but acknowledges that the Report's implications still remain "obscure." *See* Givelber et al., *supra* note 13, at 2 n.3. Others also have expressed concern about the "increasing . . . specificity" of ABA accreditation standards for externship programs, arguing that the content of these standards is wrong headed. *See* Seibel & Morton, *supra*, at 414-17, 440-41. My own view is that there are fundamental problems with the MacCrate Report. *See* Robert J. Condlin, *MacScholarship: (Yet) Another Perspective on the MacCrate Report, and the Tortured Relationship Between Lawyering Skills and Legal Education* (1995) (unpublished manuscript, on file with author). Given the steady student demand for practice instruction, however, and the shrinking pool of law school resources from which to fund it, the relatively cheap externship format is likely to be around for the foreseeable future. Whatever its theoretical implications, the MacCrate Report is too practical a document to be meant to dislodge this reality.

<sup>17</sup> This Article is not an argument against the academic perspective *per se*. As I have already mentioned, I advocated a critical perspective in clinical education years ago, *see* Condlin, *supra* note 3. While it is true that I also criticized some versions of the academic perspective in the *Tastes Great* article, I nonetheless emphasized the importance of an academic dimension to clinical instruction, and do so again in this Article. Indeed, the central point of that article was to argue that practice skills might be best understood and learned in ordinary law office settings, since an externship teacher who—unlike an in-house clinician—is not directly involved in the work of representation is likely to be more able to provide a *full critique* of the student's experiences. *See id.* at 53-59, 63-73. The problem I see is not with the academic perspective itself, but with the forms into which it is sometimes twisted.

Specifically, I am concerned with the caricatured version of this perspective used by some to weed out what they take to be intellectually non-rigorous approaches to clinical instruction. Used as litmus paper rather than as an analytical tool, the academic perspective has caused some in clinical education to miss the value (including the academic value) in non-law school based approaches to practice instruction. Maher's experience with clinical teachers in writing his article provides a recent example of such behavior, *see* Maher, *supra* note 11, at 640-48, and I have run into the same weeding-out sentiment repeatedly throughout my more than twenty years of externship teaching. *See* note 12 *supra*.

The theory of ecological learning is also appealing for the tacit respect it shows for legal practitioners. While no one would deny that practitioners are not always "all that they can be" (indeed, later in the Article I provide several case studies of less than perfect practitioner behavior), lawyers as a group understand practice behavior with as much intelligence, sophistication, and insight as clinical (including externship) teachers. Some understand a little more and some a little less, but I have found that to be the case with ourselves as well.

puted form sometimes can teach the wrong lessons. That it sometimes teaches the wrong lessons has been a recurrent objection to externship instruction, and it is one that the theory of ecological learning must deal with adequately if it is to revive the fortunes of that venerable methodology.

Whether *Learning Through Work* meets this test is not yet clear. The argument for ecological learning is ambiguous at several key points, so that it is often difficult to determine what the theory prescribes, or why it prescribes it.<sup>18</sup> But more importantly for present

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<sup>18</sup> For example, I am not clear on what the following prescription for dealing with the risk of students' learning bad habits of practice from their placements actually envisions:

Despite the learning potential inherent in contextualized experience, mere experience is no guarantee of competence, let alone expertise. One explanation of duffers is the cognitive acceptability of suboptimal methods that are nonetheless viable internally for the duffer and externally within the larger social domain. To countermand minimal viability requires increasing a sense of engagement and increasing the potential for connection and integration. These two features, engagement and cognitive integration, battle suboptimality by creating a positive sense of functional competence.

Givelber et al., *supra* note 13, at 11 n.43 (citations omitted).

The argument for ecological learning is also flawed by its reliance on potentially misleading data derived from student opinion surveys. In discussing whether students are capable of "evaluating their own learning," *see id.* at 20-22, a critical issue for an analysis based on student opinion survey data, *Learning Through Work* does not distinguish between whether students are good empiricists (i.e., whether they collect data about what they do accurately), and whether they are good theoreticians (i.e., whether they evaluate what they do against sophisticated conceptions of lawyering skill practice). The instrument used to survey student opinion does not inquire about these two subjects separately, or provide an independent source of factual information about student practice from which to check the accuracy of the students' overall conclusions. It is not possible for a reader to tell, therefore, whether the students' almost uniformly favorable evaluations of their externship experiences make sense. While the evaluations may be consistent with the students' overall impressions of what happened, these impressions may not have a close connection with what actually went on, or be the best interpretations to be given those experiences. The case studies in Part III of this Article illustrate how this can happen. *See also* Richard E. Nisbet & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 *PSYCH. REV.* 231 (1977); David F. Chavkin, *Matchmaker, Matchmaker: Student Collaboration in Clinical Programs*, 1 *CLIN. L. REV.* 199, 230-32 (1994) (discussing methodology issues in gathering data on student clinical learning).

This failure to be more empirical opens up the Northeastern group to one of the criticisms it levels at academic clinicians. Baker and his colleagues debunk the preference for in-house clinics as a kind of article of faith, unsupported by hard evidence about which practice settings work best for clinical instruction. Yet the failure to evaluate their own survey data from a perspective outside of that data gives their view an article of faith quality of its own. No doubt students learn something when they are immersed in any setting, but what they learn, and whether it is worthwhile, are different questions which must be examined separately. The Northeastern group acknowledges that students may not be the best judges of what they have learned (and, one could add, whether it was desirable to have learned it), but concludes that the students must be taken at their word nevertheless because there is no realistic alternative. *See* Givelber et al., *supra*, at 21. This conclusion seems premature. The case study data of Part III provide some evidence of what students learn from externships, and there are others working with different method-



purposes, the argument is based on what looks to be at best an incomplete, and at worst an inaccurate, understanding of the manner in which externship learning takes place. Until these, and no doubt other, difficulties are worked out, an endorsement of ecological learning must necessarily remain qualified. This article is about some of those qualifications. With considerable hesitation, but more empathy, I want to tell a cautionary tale about taking ecological learning, in its present form, too literally. I do so in the spirit of the theory itself, which calls for further study of law office learning, based on different perspectives and new types of data.<sup>19</sup>

My conclusions are simple and uncontroversially stated. Students do not invariably learn effective practice skills working in outside law offices; sometimes they just “practice their mistakes,”<sup>20</sup> and those of their offices. Because these mistakes often have identifiable patterns likely to be more visible to someone looking at the work from an academic perspective, and because identifying these patterns would help improve the work, there is a complementarity to the academic and ecological perspectives which suggests the need for both in a program for teaching lawyer skills. Since most instructional methodologies are more complementary than antagonistic, however, this is not likely to be news. The more important point is that there are simple, easily implemented methods for combining the two approaches, methods that do not create logistical nightmares, impose impossible work burdens on supervisors, or introduce unacceptable financial costs. This Article describes one such method.

I will explain my concerns about ecological learning in the context of a discussion of the subject of learning from colleagues. This is an unusual subject, so I should say a little about why I have chosen it. Lawyers and law students, indeed workers of all types, have more and better ideas for improving their work when they are able to draw on the experiences and insights of others who understand and do the same kind of work. The ability to look at familiar problems through different lenses, and without being committed to and emotionally in-

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ologies who have made additional progress on this question as well. It is too soon to throw up one's hands on this methodological problem. Once an empirical question is identified, methodologies for investigating it always emerge. (I understand that the Northeastern group itself is now at work on this project.)

<sup>19</sup> See *id.* at 47. The Article is also prompted, in part, by a quick and compressed reading of all of the back issues of the *Clinical Law Review*. I was impressed with what a good journal it has become, and how it is doing for clinical scholarship what the *Georgetown Journal of Legal Ethics* has done for legal ethics scholarship, that is, providing an intellectually sophisticated outlet for writing that has a difficult time finding sympathetic readers on editorial boards of more general purpose journals.

<sup>20</sup> I first learned this expression from a piano teacher, but it captures a distinct phenomenon in the study of all kinds of skill.

vested in choices already made, often frees others to identify and suggest courses of conduct that persons principally responsible for the work would never see. Since there is a professional obligation to work competently for clients,<sup>21</sup> being able to draw out and run with others' insights and experiences is not an optional or inconsequential practice skill. It is an essential component of professional practice.<sup>22</sup>

The importance of the subject notwithstanding, legal academics do not write much about learning from colleagues. This is a little surprising given the interest in anthropological, ethnographic, feminist and narrative approaches to legal scholarship generally, but it is true nonetheless.<sup>23</sup> The subject of lawyer interpersonal interaction has not

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<sup>21</sup> The professional obligation to work competently for clients is found in Model Rule 1.1. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983) ("competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").

<sup>22</sup> Accord Jane H. Aiken, David A. Koplow, Lisa G. Lerman, J.P. Ogilvy, & Philip G. Schrag, *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047, 1055 (1985) ("Collaboration takes more time than individual work, but it produces better results . . ."). But see Chavkin, *supra* note 18, at 204-08 (summarizing the "available empirical research on the impact of collaboration on work product [as] extremely inconsistent"). In addition to the benefits it provides for client representation, being able to learn from the different ideas and experiences of others helps lawyers grow and develop in all facets of their lives, including the personal. Others (not all of them, of course) are often in the best position to help one get beyond expectations, beliefs, assumptions and biases, to determine whether what one did is what one wanted to do, and whether, on reflection, it makes sense to want to do that. Professor Chavkin discusses this full range of benefits in detail. *Id.* at 208-19.

<sup>23</sup> Learning from colleagues is a common subject of analysis in fields other than law. The work of Chris Argyris and Donald Schön, *supra* note 6, for example, is only a small part of the organizational psychology literature on the subject, and in linguistics the work of Deborah Tannen and the small industry that has grown up around her writing provide another famous example. See, e.g., DEBORAH TANNEN, *TALKING FROM 9 TO 5* (1994). I have already indicated that I find the Argyris and Schön work helpful, and draw on it to a considerable extent. Professor Tannen's work is equally insightful, and never more so than early in her career when she published her Ph.D. thesis, analyzing patterns in the conversations at a Thanksgiving dinner party she attended with five of her friends. DEBORAH TANNEN, *CONVERSATIONAL STYLE: ANALYZING TALK AMONG FRIENDS* (1984).

In this first full articulation of her conceptual framework, Professor Tannen used mostly behavioral language to categorize communicative practices (the number and timing of interruptions, length of statements, responsiveness of remarks, and the like), rather than the gender-based categories which have come to be associated with some of her more recent and more widely known work. See, e.g., DEBORAH TANNEN, *GENDER AND DISCOURSE* (1994); TANNEN, *TALKING FROM 9 TO 5*, *supra*; DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990). The index to *Conversational Style*, for example, contains only two one-page entries, in total, for the topics of "men," "women," and "gender," but eight entries for "amplitude," fourteen for "intonation," thirteen for "pause," eleven for "rate of speech," eight for "rhythm," eight for "syntax," twelve for "topic," and so on.

I find these earlier behavioral categories more descriptive, less confusing, and easier to operationalize than their gender equivalents. Cf., e.g., Gay Gellhorn, Lynne Robins & Pat Roth, *Law and Language: An Interdisciplinary Study of Client Interviews*, 1 CLIN. L. REV. 245 (1994) (linguistic analysis using equivalent behavioral categories); Linda F. Smith, *In-*

been ignored altogether. For example, there is a small but intelligent body of literature on inter-disciplinary collaboration, showing how difficult it can sometimes be for lawyers to coordinate their efforts with other types of professionals who understand the world through different diagnostic categories.<sup>24</sup> This is a more esoteric and complicated colleague communication problem, however, than the relatively simple one presented when persons trained only in law attempt to learn from one another.

There is also a much larger body of writing on in-house clinical supervision discussing, among other things, how clinical teachers should speak with students in reviewing clinical work.<sup>25</sup> This literature overlaps extensively with the subject of learning from colleagues, but it also differs from it in significant respects. Clinical supervisory relationships tend to be defined and understood explicitly in teacher-student terms, and are likely to have instruction as their major if not exclusive goal. Law office relationships involve a more complicated mix of roles and relations, both work and social, and conversation serves a wider variety of ends than teaching and learning. The relationships are similar in many respects, but they are not the same.<sup>26</sup>

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*interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centered" Interview*, 1 CLIN. L. REV. 541 (1995) (same). For example, Professor Tannen's own communicative style, described in detail in her write-up of the Thanksgiving dinner party, would be more masculine than feminine under a more gendered conceptual scheme, and the styles of some of her male friends would be more feminine than masculine. (See, e.g., her discussion of the "enthusiasm constraint," and "the machine-gun question," in *Conversational Style*, *supra*, at 58-71.) When female is male and male female in this way, gender-based categories lose much of their analytical and descriptive power. This is not to say, however, that men and women behave toward one another in the same way. Often, they do not. See TANNEN, TALKING FROM 9 TO 5, *supra*, at 242-76 (chapter on "What's Sex Got To Do With It").

<sup>24</sup> See, e.g., Saul W. Baerstein, *Functional Relations Between Law and Psychiatry—A Study of Characteristics Inherent in Professional Interaction*, 23 J. LEGAL EDUC. 399 (1971); J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741 (1988).

<sup>25</sup> See, e.g., Bellow, *supra* note 1; Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321 (1982); Robert J. Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223 (1981); Peter T. Hoffman, *The Stages of the Clinical Supervisory Relationship*, 4 ANTIOCH L.J. 301 (1986); Kenneth R. Kreiling, *Clinical Education and Lawyering Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981); Michael Meltsner, James V. Rowan & Daniel J. Givelber, *The Bike Tour Leader's Dilemma: Talking About Supervision*, 13 VT. L. REV. 399 (1989).

<sup>26</sup> There is also a body of literature on teaching outside lawyers to supervise externship students. See, e.g., Liz R. Cole, *Training the Mentor: Improving the Ability of Legal Experts to Teach Students and New Lawyers*, 19 N.M. L. REV. 163 (1989). This work fuses the two supervisory relationships into a hybrid middle category, which might lead to the best of all possible worlds—if the perspectives of practicing lawyer and academic critic can be fused—or the worst—if the result is only that supervisors attempt to do too many different

Even in the feminist and communitarian literature, where there is a longstanding interest in cooperative, bilateral, and mutually reinforcing modes of interaction, learning from colleagues is discussed infrequently and usually only in passing. Feminist and communitarian scholarship is interested more in issues of lawyer-client relationships (such as reducing lawyer domination of client choices, helping lawyers express client stories in the clients' own voices, and the like), and of adversary advocacy (for example, ameliorating the wasteful and harmful effects of zero-sum and competitive approaches to dispute resolution), than it is in issues about how lawyers learn from one another.<sup>27</sup> Each of these is an important subject in its own right, of course, and all are closely related, but they are discrete subjects nonetheless. The often compelling, though perhaps also beguiling, narratives of feminist scholarship rarely speak directly to the problem of learning from colleagues,<sup>28</sup> and the lessons this literature may suggest for this particular

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things, and not any of them very well, at once.

Sometimes the supervision literature gets very interesting. The most famous example is the exchange between Robert Rader and Abbe Smith in the pages of this journal, see Robert Rader, *Confessions of Guilt: A Clinic Student's Reflection on Representing Indigent Criminal Defendants*, 1 CLIN. L. REV. 299 (1994); Smith, *supra* note 3, about the frustrations (Rader's) of working with a supervisor (Smith), among other things. The exchange is marked by a level of insight, strong feeling, articulateness, and candor that is rare in this kind of writing, making one think more rather than less of the participants for having spoken up. Rader's complaints are not idiosyncratic, and Smith's sympathetic understanding of them, while still pointing out where they go wrong, would make any supervisor proud. The two articles are an exemplar of student-supervisor conversation at its most sophisticated level. All teachers and students should be so sharp (in both senses of the term).

Mary Twitchell also has written an interesting article on a related subject, see Mary Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 77 MINN. L. REV. 697 (1988), and clinical students sometimes write insightfully about the experience of working with other students. See, e.g., Jennifer Howard, *Learning to "Think like a Lawyer" Through Experience*, 2 CLIN. L. REV. 167 (1995).

<sup>27</sup> See, e.g., Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017 (1992); Margaret Martin Barry, *Clinical Supervision: Walking That Fine Line*, 2 CLIN. L. REV. 137 (1995); Nancy Cook, *Legal Fictions: Clinical Experiences, Lace Collars, and Boundless Stories*, 1 CLIN. L. REV. 41 (1994); Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1559 (1991); Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71 (1996); Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theoretic of Practice Movement*, 61 BROOK. L. REV. 889 (1995); Linda Morton, *Creating a Classroom Component for Field Placement Programs: Enhancing Clinical Goals with Feminist Pedagogy*, 45 ME. L. REV. 19 (1993); Lucie White, *supra* note 3; Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

<sup>28</sup> This new writing, characteristically in the form of richly annotated ethnographies of law practice, is about colleague relationships in only the most indirect and attenuated

problem may be ambiguous.<sup>29</sup>

sense. Its central concerns have to do with the elements of living well as a lawyer, treating other people (mostly clients) humanely, pursuing justice before material or reputational success, and living full emotional, social and intellectual lives. It draws on the insights and methods of developmental psychology, narrative jurisprudence, communitarian social theory, social anthropology and the like, to shift the scholarly focus from anonymous people and events in the aggregate, to the stories of individual lives. These stories are often deeply moving, using real-person vantage points on the operation of the legal system to show how neutral rules do not always produce fair or just results, how institutional and systemic failure is rampant, and how professional behavior sometimes aggravates these problems more than it alleviates them.

It is usually persuasive in the way that good story-telling ought to be, though in this it is more a literature of argument than analysis (these are never completely separate, of course). And as with all story telling by just one person, even when described as the story of many, the story-teller's biases, personal history, understanding, and ability to communicate limit the extent to which the story can be complete, or true. See Gary Bellow & Martha Minow *Introduction: Rita's Case and Other Law Stories*, in *LAW STORIES* 1, 18-29 (Gary Bellow & Martha Minow eds., 1996) (illustrating how many different stories are inevitably imbedded in any single story; or how, in the authors' words, "[a]ll tellings are unique, incomplete, and inaccurate," *id.* at 18). Moreover, built as it is on the metaphor of intimate relationships such as friendship and marriage, this literature characteristically assumes that professional relationships are roughly equivalent, that functioning effectively in the latter is just a matter of extrapolating intelligently from the former. It seems not to entertain the possibility that each type of relationship might have its own core set of appropriate behaviors, feelings, duties, entitlements and the like, and that work might not be just a vulgar facsimile of love (or vice versa).

<sup>29</sup> For an illustration of the strength and the omissions of such narratives, consider Phyllis Goldfarb's story about working on the death-penalty representation of Chris Burger. Phyllis Goldfarb, *A Clinic Runs Through It*, 1 *CLIN. L. REV.* 63, 86-91 (1994). Goldfarb's story about Burger coming to know and accept himself, his life and death, and the relationships he formed with people associated with his defense, is movingly and sympathetically told. Burger comes across, articulately, as an admirable figure, someone whom it would be easy to identify with and to call one's friend, but this reaction might be more complicated if the story was more detailed.

For example, in the five pages of narrative we never learn what Burger did, or allegedly did, to cause him to be sentenced to death by a Georgia court. According to the trial court opinion (Goldfarb, interestingly, provides a citation to only the state appellate court opinion, and that opinion does not describe Burger's alleged crime), after forcing one Honeycutt, a fellow soldier at Fort Stewart, Georgia, to sodomize a compatriot, one Stevens, Burger locked Honeycutt into the trunk of Honeycutt's cab and drove the cab into a pond while Honeycutt was still alive. Honeycutt drowned. See *Burger v. State*, 247 S.E.2d 834, 836 (1978).

There is always more to such stories, of course, than legal facts report. Maybe Burger did not do it (there was some dispute over the relative roles of Stevens and Burger), maybe he was not given a fair chance to defend himself (there were serious *Miranda* and *Brady* problems with the prosecution, resulting in a Supreme Court reversal and remand), maybe he was incapacitated (the court found that he had been drinking), and maybe death is too harsh a penalty even if the facts were as the court concluded (he was only seventeen at the time, and was, in the Court's words "of low intelligence," though this latter conclusion is hard to reconcile with Burger's letters to Goldfarb, see Goldfarb, *supra*, at 88). But surely his alleged crime is part of Burger's story. It does not have to be described coldly, or luridly, but it is the reason Burger and Goldfarb have a relationship to begin with, and thus seemingly a background dimension to everything they do.

Goldfarb leaves this information out, as is her and any story-teller's prerogative, presumably because it is not relevant to the message she wants to convey (in other words, to

Learning from colleagues also is interesting because it offers a natural baseline for studying lawyer interpersonal communication generally. Colleague conversation is a pervasive phenomenon in law practice, probably the most common experience in a lawyer's life, and thus, a process which is practiced on a daily basis. It is also a process on which much depends, including both a lawyer's personal development and professional advancement, in and outside of the law office. It is fair to expect, therefore, that when lawyers talk with colleagues they will normally use their most effective strategies for drawing these others out. Such conversations can be said to represent lawyers at their learning best. Dysfunctional learning patterns in colleague conversations are likely to appear in other types of lawyer communication, including interactions with clients, adversaries, officials and the like, and to undermine performance in those relationships as well. The strategies embodied in lawyer-colleague conversation thus can be seen as a kind of rosetta stone of lawyer learning, and as such, a rich source of information about what type of communicative animals lawyers are, and perhaps even how they got to be that way.

Learning from colleagues is also one of the easiest practice skills on which to collect data, and thus, for purely practical reasons, a natural subject of study. Law office conversations can be tape recorded and transcribed when all involved agree, and even when they do not, conversations can be reconstructed after the fact, in case studies, journals, and the like, by one or more of the participants. These recon-

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the story she wants to tell). But that is the problem with stories. They are always an advocacy move, used as much to make a point as to discover one, even if the storyteller does not think so. It is true that all work of reconstruction and synthesis reflects the biases, beliefs, and blind-spots of the one doing it, that in the end analysis cannot help but be advocacy to some extent. But most investigative disciplines, history for example, have methods designed to reduce the extent of this bias, and to provide the reader with as accurate a description of the event under discussion as one person can produce. See, e.g., DAVID HACKETT FISCHER, *HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* (1970). Story telling has no need for such methods because its primary goal is to persuade rather than reconstruct or synthesize. (For an extensive and sophisticated discussion of these issues, based on a more nuanced and comprehensive view of storytelling and the narrative method, see Richard Weisberg, *Proclaiming Trials as Narratives: Premises and Pretenses*, in *LAW'S STORIES* 61 (Peter Brooks & Paul Gewirtz eds., 1995). For an eloquent defense of the claim that "novelists are as qualified as historians to attempt the ascent of the glassy slopes of the past," see Hilary Mantel, *Murder and Memory*, N.Y. REV. BOOKS, Dec. 19, 1996, at 9 (reviewing MARGARET ATWOOD, *ALIAS GRACE* (1996)).) I should add, I have nothing against storytelling. This article itself, after all, is just a "cautionary tale." See page 345 *supra*.

There is an additional interesting feature of Goldfarb's article. She points out that she has not had as emotionally close a relationship with a client since Burger, see Goldfarb, *supra*, at 87 n.135, perhaps indicating the difficulty of living over the course of a career in accordance with a conception of role that makes representing clients a facsimile of forming intimate relationships.

structions are always interesting, even when they do not reproduce the real world verbatim, because they offer revealing evidence of what the persons constructing the cases think makes for effective learning. Cases articulate tacitly their authors' espoused theories of how to learn. There are difficult validity problems with reconstructed case data, of course, but these problems are no more difficult than the ones encountered in survey research about clinical teacher and student opinion, the principal alternative sources of data on law office learning. Given the availability of ample data, the importance of the issues involved, and the subject's easy fit with presently popular approaches to legal scholarship, therefore, it is a little surprising that learning from colleagues has not received more attention in legal academic writing than it has. This lack of interest notwithstanding, I propose to take it up here.

The discussion has four parts. In the next section, Part I, I describe my views about lawyer communicative competence generally, including what I believe to be the characteristics of effective conversational learning. This section elaborates on an earlier discussion of the same topic,<sup>30</sup> and provides the standard against which the data presented later in the Article will be evaluated. Part II describes the origins of the present study, the methods used to collect data on law office learning, and the reasons for undertaking the study in the first instance. Part III is the heart of the article. It sets out eight case studies in learning from colleagues which make up the evidence for the article's central analytical claims. It is here that my argument for not taking the theory of ecological learning too literally will either rise or fall. Finally, in Part IV, I explore some of the causes of the communication patterns I find, and discuss implications of my analysis for programmatic questions about the design and administration of clinical instructional programs. My conclusions are modest, tentative and somewhat lukewarmly held, and they include the possibility that perhaps nothing at all can or should be done. It may be that I have simply met the enemy once more, and rediscovered that it is us.<sup>31</sup>

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<sup>30</sup> See Condlin, *supra* note 25, at 228-48.

<sup>31</sup> For a similar reaction to the related issue of justifying lawyer role behavior, see Edward Dauer & Arthur A. Leff, Correspondence, *The Lawyer as Friend*, 86 YALE L.J. 573, 582 (1977) (lawyer role behavior justifiable because lawyers as a class simply "no rotter than the generality of people acting, so to speak, as amateurs"). The Dauer and Leff perspective is not for everyone, but its lack of hyperbole, and acceptance of imperfection in human striving, give it a certain appeal when compared with the breezy, self-serving, and overstated assertions that characterize many justifications of lawyer practice behavior.

## I. LAWYER COMMUNICATIVE COMPETENCE

In a useful oversimplification,<sup>32</sup> one can think of lawyer communication as being a mixture of two distinctively different ways of speaking, talking to persuade and talking to learn, or what I have previously called persuasion and learning mode discourse.<sup>33</sup> These modes of speaking are defined by the rhetorical conventions they employ, the background assumptions they make about the nature and purposes of lawyer communication, the strategic objectives they pursue, and the moral and political world views they presuppose. They are analytical constructs or pure types rather than descriptions of any particular reality. Individual lawyer statements and ways of speaking invariably will contain qualities from each mode, so that to describe a particular statement or even an entire conversation as persuasion or learning mode, is to describe a difference in overall purpose, content, or strategy, rather than a difference in the manner or style of what was said. In theory, lawyers should move seamlessly in conversation from one mode to the other as circumstances and purposes dictate—though the reality of lawyer communication may be somewhat more undifferentiated than that.

The modes differ principally in the way they respond to the elasticity built into language. Statements lawyers (or people generally)

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<sup>32</sup> There are more elaborate conceptual frameworks for analyzing student-teacher communication than the bipolar continuum I will use here. See, e.g., Barry, *supra* note 27, at 163-64 n.48 (reproducing the "Grading Standard for Families and the Law Clinic, Catholic University of America, Columbus Law School"). There are also other forms of speech that are important in some contexts, but play little role in student-teacher communication, such as deliberately offensive speech or perhaps speech primarily meant to establish an emotional bond with another person rather than to engage with, or inquire into, that person's thinking. I could make my framework more complex by adding additional categories, produced by mixing the properties of the poles in different combinations, but I believe it is more useful to introduce this complexity in the examination of data. A conceptual framework can be too complicated for its own good, making analysis more, rather than less, difficult to do. To paraphrase Richard Epstein (defending the utility-maximizing model of rational choice theory), a "very simple model involving a choice between two alternatives . . . hardly hurts the overall analysis when we extend it to choices between many [options], or across many different domains of social life. . . . There is nothing about [such a] model that seems to fly in the face of ordinary experience. . . . [It] is robust enough to account for complex cases, yet simple enough to understand why they develop and what might be done about them." See Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 1995 UTAH L. REV. 683, 685, 697-98. Anatol Rapoport's simple reciprocity program of "tit-for-tat," which cleaned up in Robert Axelrod's prisoner's dilemma game tournament, even against much more complex programs designed to beat it, is another illustration of the power of a simple model. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 30-54 (1984).

<sup>33</sup> See Conklin, *supra* note 25, at 228-48. Like many analytical frameworks based on some variant of a cooperation-competition continuum, the persuasion-learning mode construct owes a lot to the writings of Morton Deutsch. See, e.g., MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT* (1973).



make to one another have no unambiguous meaning that emerges ineluctably regardless of the words used, or the circumstances in which they were uttered, or the way in which they were spoken. Communication, even in its simplest and purest form, is not so static, acontextual, or thin a phenomenon. Language is inevitably ambiguous and this ambiguity is enhanced by context, convention, and circumstances.<sup>34</sup> Words do not have the same meaning in all situations, and norms that regulate discourse often promote values other than clarity. Knowing a speaker's motives or purposes, for example, gives statements meaning that words alone do not convey. Explaining motive or purpose in advance, however, can seem presumptuous, or be confusing, and may only add another layer of ambiguity to the message the speaker tried to send.

The important and yet sometimes unrecognized point in most conversation, then, is that meaning is constructed as much as it is found.<sup>35</sup> Language is interpreted, it is not just decoded. Within the inevitable boundaries of "communities of interpretation,"<sup>36</sup> the ways lawyers interpret are distinctively personal, shaped by the lawyers' own beliefs, values, experiences, ideology, imagination, expectations, and stereotypes about the way the world works and the way people are, and by structural features of the situation in which the communi-

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<sup>34</sup> See Michael L. Geis, *The Meaning of Meaning in the Law*, 73 WASH. U. L.Q. 1125, 1125-32 (1995) (discussing the role of convention and context in establishing the meaning of statements).

<sup>35</sup> This is a commonplace, even fashionable, view in some quarters, given the legal academy's recent interest in post-modernist literary theory, and hermeneutics in particular. See, e.g., David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135 (1985). But I do not mean to endorse this most extreme of the constructivist views. Steven Knapp and Walter Michaels have convinced me that "the problem of hermeneutics is that there is no fundamental hermeneutic problem." See Steven Knapp & Walter Benn Michaels, *Against Theory 2: Sentence Meaning, Hermeneutics* 10 (Protocol of the Fifty-Second Colloquy: 8 December 1985, Center for Hermeneutical Studies in Hellenistic and Modern Culture). See also Steven Knapp & Walter Benn Michaels, *Against Theory*, in *AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM* 11 (W.J.T. Mitchell ed., 1985).

<sup>36</sup> An interpretive community is "not so much a group of individuals who share a point of view, but a point of view or way of organizing experience that shares individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance are the content of the consciousness of community members who are therefore no longer individuals, but, insofar as they are embedded in the community's enterprise, community property." See STANLEY FISH, *DOING WHAT COMES NATURALLY* 141-50 (1989); see also STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* (1968). The concept is Professor Fish's most well known contribution to the interpretation debate, and the heart of his anti-realist theory of meaning. See DENNIS PATTERSON, *LAW AND TRUTH* 120-27 (1996). Some find the concept useful, see, e.g., Kenneth Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 RUTGERS L. REV. 676 (1979), and some do not. See, e.g., Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

cation occurs, as much as they are by other persons' words. The meanings lawyers hear in others' statements often tell more about the lawyers themselves, their situations and intellectual, moral and emotional commitments, than they do about what the others tried to say. The persuasion and learning modes represent alternative and distinctively different strategies for dealing with this unavoidable need to interpret built into the nature of interpersonal communication.

Persuasion mode discourse tries to impose a self-interested and largely pre-determined meaning on communication, principally by arguing with others over the authorship of ideas. Using it, speakers conceal their ends and plans for achieving them, attribute meaning to others' ambiguous statements before investigating those statements fully to determine if the attributions are correct, argue for preferences subliminally and indirectly, suppress strongly felt and hard to articulate but relevant feelings and ideas when raising them would not advance the speakers' ends, protect others from difficult but necessary topics either by ignoring the topics altogether or by discussing them in euphemistic (i.e., misleading) terms, argue for beliefs in needlessly stylized and overstated ways, and feign agreement to produce illusory consensus when underlying beliefs are the opposite. These attributes, taken together, make up a kind of instrumental world view in which speakers define communicative interaction as competitive, and see winning the competition as imposing their own meaning on others' words. Strategic calculation and positive legal rules are the only check on a speaker's behavior, morality is collapsed into legality, and maximizing to the limits of one's constraints is the operative moral code.

At first glance, this may seem to be another way of describing the widely disparaged stereotype of lawyer adversarial or "positional" advocacy,<sup>37</sup> and while there is some truth to this, persuasion mode discourse, as I think of it, is different in important respects from some forms of adversary behavior. The biggest difference has to do with the distinction between substance and style. Persuasion mode communication is not characterized principally by stylistic qualities such as belligerence, rudeness, *ad hominem* attack, or rhetorical forcefulness, but more by substantive and structural qualities such as keeping agendas private, disavowing responsibility for failure, intellectualizing all topics including those involving deeply held feelings, arguing coercively but not abusively, and sealing oneself off from meta-data about one's own ideological commitments and communication strategies. Persuasion mode communication is rarely if ever unpleasant or personally

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<sup>37</sup> For descriptions of "positional" advocacy, see ROGER FISHER & WILLIAM URY, *GETTING TO YES* 3-8 (1981); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 758, 764-94 (1984).

offensive. It is a low-visibility, indirect, and often even cordial method of manipulating others, by controlling the form and content of conversation, rather than its tone.

For example, persuasion mode speakers try to produce more ideas than others in a conversation, and with greater eloquence, conviction and complexity, so that they will be thought more knowledgeable and insightful, and thus entitled to greater deference. They express their ideas in long, well-edited soliloquies, take dense, complicated substantive positions, and speak in a rapid-fire but friendly manner. All of these features make it difficult for others to respond, but also difficult for them to become offended or resentful. Like persons who have no movie preference until the group chooses against their wishes, they keep their agendas secret until it becomes necessary or opportune to protect them. They consider new and interesting ideas in private where learning, if it occurs, need not be acknowledged. They suppress undeveloped or uncomfortable ideas, and take positions only when they can be defended fluently and fully. They rarely express half-thoughts, tentative beliefs, or whimsical musings even when relevant or asked for. They avoid conversation about conversation itself, so that they are never distracted by critical insights about how their manner of speaking and listening might distort what they think they heard others say.

Three processes are central to persuasion mode discourse. First, persuasion mode speakers attribute meaning to others' statements rather than investigate that meaning directly and test it publicly. Attributing meaning permits an immediate response, makes it unnecessary to mull over or assess what has been said, and, within limits, allows one to shape the issues with which one joins. Confusion, doubt, and uncertainty attendant to exploring meaning in public are avoided, views are articulated more convincingly, and conversations are more easily controlled. Second, persuasion mode speakers react to others' ideas reflexively in evaluative terms. They know whether such ideas are good or bad before it is possible to understand completely what has been said, or to determine whether what was said makes sense. Initially, this evaluative reaction is private, defining the way persuasion mode speakers respond internally to new ideas or suggestions, but it is also expressed publicly as an "agree-disagree" reaction, the third of the persuasion mode processes, so as to force all conversation into some form of an argument. Persuasion mode speakers investigate ideas, increase understanding, and refine views by challenging what others say. To the extent that they learn, they learn by arguing.

Persuasion mode speakers also often unintentionally misrepresent what they truly believe, making the information they communi-

cate frequently incomplete or untrustworthy. Because their primary concern is protecting themselves from evaluation and embarrassment, they express fewer and more defensible (i.e., commonplace) ideas than they would under less threatening conditions, and with greater commitment than they truly feel. (The discomfort generated by having one's ideas and judgments constantly called into question is all the more troublesome because the rules of persuasion mode discourse do not permit it to be discussed.) The commonplace nature of the ideas expressed may cause others to discount them, and the excess of conviction may influence others not to pursue the ideas further (or the converse, to challenge them more vigorously than is warranted), when the wiser course may be more extensive and open-ended investigation. Similarly, intellectualizing discussion, whatever the subject, causes persuasion mode speakers to suppress feelings, intuitions, and hunches that may contain important insights helpful in resolving the problem at hand, and can intensify such feelings, making it harder to think clearly about the analytical issues involved. In addition, forcing all conversation into an "agree-disagree" format encourages persuasion mode speakers to concentrate on preparing and defending what they have to say, rather than listening carefully to the ideas of others, and to settle quickly on single, simple explanations for complex problems, rather than generate and test more numerous and open-ended possibilities. Each of these effects distorts communication, making a persuasion mode speaker's comments more difficult to understand, and harder to use.

Persuasion mode discourse produces few problems in situations of strategic interaction, such as courtroom advocacy, where the point of conversation is understood by everyone involved to be instrumental success, but it creates difficulties in relationships of friendship, trust and dependence, where one side expects to share power and responsibility, and the other side expects to seize them. Persons inadvertently caught up in persuasion mode conversations have two familiar choices. They may flee, by breaking off conversations prematurely before all of their work is done, or by avoiding people altogether with whom they expect conversation to take a persuasion mode turn. Or they may fight, by arguing back, or by channeling discussion into topics that do not require exposing gaps in their understanding, or limits to their rhetorical skill. For many, the psychological costs of learning under such circumstances are thought greater than the benefits to be gained from the new ideas persuasion mode speakers may have to share. Out of its element, in conference rooms, lawyers' offices, and even around the water cooler, where the object of conversation is discovering what others think, persuasion mode discourse makes learn-

ing more difficult and, in the process, undermines lawyer competence.

Having said all of this, it is important to add that persuasion mode discourse is not an anachronistic vestige of a more adversarial era, or a mutant and ignoble strain of ideal lawyer communication. It is an important part of our modern day system of adversary advocacy (though not the only part), and has respectable origins in mainstream legal discourse. In fact, it may be an exemplar of mainstream legal discourse. In the formal, stylized, rule-bound, and arms-length world of legal advocacy, particularly courtroom advocacy and its cognates, lawyers must be able to convince others (or at least silence them), on command. Doing justice in individual cases frequently requires the manipulation of opponents, officials and judges to produce particular results. This may seem an unfortunate feature of a system of justice, particularly if one holds perfectionist views about the possibilities of legal institutions, norms, procedures, and lawyer communicative practices, but it is a real feature of our present system nonetheless, and one that is not likely to go away simply because it sometimes requires behavior that would be inappropriate in other settings.

Persuasion mode discourse's only real sin, so to speak, is to be caught out of its element, used in situations where it does not fit and is not expected. But to discredit it, even to this limited extent, is not to replace it. One must show how else lawyers could converse, how else they could discover the benefits of their colleagues' different perspectives, insights and experiences without jeopardizing the non-learning and strategic interests inevitably present in all conversation. Put another way, what alternatives do lawyers have to persuasion mode discourse?

It is not difficult to imagine or describe a learning mode method of lawyer communication, though finding real-life examples can sometimes be hard. Learning mode behavior, as an ideal type, is characterized by curiosity about whether and how others' views could be different, candor and honesty in expressing one's own beliefs, warts and all, an expansive sense of relevance in determining what additional topics might be worthy of investigation, and a refusal to accept personal conviction as a substitute for evidence and analysis in determining what to believe. Learning mode actors make the nature of their ends, their affective reactions to situations, and their plans for adapting available means to those ends, explicit. They explore the ambiguities in, and candidly articulate their evaluative responses to, each other's formulations, responses to those responses, and so on, until consensus is achieved. The purpose of this recursive communication process is not to win or to silence others, but to produce understanding and uncoerced agreement, if agreement is what the evidence

supports. Learning mode discourse, in short, attempts to achieve a consensus on the legitimacy of ends and the rational relationship of ends to means, evaluating ends and means in each other's lights, through a process of communication that is public, bilateral, critical, and cooperative.

As with persuasion mode discourse, three processes are central. The first is inquiry. In every manner imaginable, and at every point in a conversation, learning mode speakers probe for the details at the base of others' views. They are incorrigibly curious. They want to know about the experiences on which others' ideas are based, the inferences and deductions made from those experiences, and the theories which inform and sustain those deductions. They suspend judgment on new ideas until they have considered them fully, ask questions rather than agree or disagree as a first reaction, and encourage others to keep talking either by using what some social psychology calls non-verbal facilitators,<sup>38</sup> or simply by being quiet and not getting in the way as others elaborate on their own. Inquiry embodies a state of mind as well as a set of techniques, grounded in the sincerely held belief that others almost always have new and useful things to tell us if only we would let them and, when necessary, draw them out.

Second, learning mode communication is also evaluative and candid, but in a manner designed to extend conversation rather than end it. It includes an element of what might be called "owning up," that is, the expression of considered reactions to others' views even when those reactions are negative, in a way that treats the others as collaborators rather than opponents. Learning mode speakers "attack errors," as Susanne Langer puts it, rather than "throw out a whole theoretical speculation because it contains an error." They "aim at truth," trying to set an argument right, and "steer [their] course by checking with the proponent: Is this what you mean? Is that really what you would say?"<sup>39</sup> Learning mode speakers own up to positive reactions as well as negative ones, and to feelings that qualify or explain their views, such as embarrassment, anger, confusion, ignorance, admiration, envy, or even the difficulty of owning up itself, if working through such feelings would help in getting their views correct. They do not resort to rapid-fire one-liners, where pejorative language, clever expression and punishing tone carry the brunt of their message, but rely instead on direct evidence and explicitly articulated analysis

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<sup>38</sup> See, e.g., ALFRED BENJAMIN, *THE HELPING INTERVIEW* 109-18 (2d ed. 1974); DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 34-35, 40-44 (1991).

<sup>39</sup> See SUSANNE LANGER, *PHILOSOPHY IN A NEW KEY* ix (1971).

to support their conclusions. They leave room for and encourage others to disagree, based on contrary experiences, evidence and analysis, and see it as a positive sign when they do. When others do not raise known objections worth considering, learning mode speakers raise them on their own. They eschew *ad hominem* or personal attack of any kind, and rely on the power of ideas rather than rhetorical skill to produce understanding rather than victory.

Owning up does not dominate learning mode discourse in the way evaluation dominates the persuasion mode. It is not an automatic first response to the statements of others. When, how, and to what one owns up are matters of judgment rather than reflex. Ideas may be new and not yet intelligibly formed, circumstances or relationships may not allow for the consideration of difficult, basic, or complicated points, some topics may be too sensitive or emotionally loaded to be discussed clearly, and some views, while accurate and interesting, may be irrelevant to the tasks at hand. Unlike evaluation, which is nearly all of persuasion mode discourse, owning up is only a small part of learning mode communication, and works well only when used in equal measure with inquiry and testing.

Testing is the third constitutive learning mode process. Learning mode actors understand that their views could be idiosyncratic or wrong, and want to assess their conclusions in light of others' judgments, relevant data, and agreed-on criteria of validity, to determine whether this is so. They start with the assumption that even deeply held convictions must be seen as tentative or provisional (and do not require others to point this out), and base judgments only on what the relevant evidence and analysis support. Testing is driven by intrinsic rather than strategic concerns, grounded in a need to know what is true, rather than a need to know what it will take to convince. In testing, learning mode actors consider all relevant arguments before coming to closure, treat patterns in evidence as generally more significant than particular pieces of data, reconsider conclusions when told something new, and treat all conclusions as provisional, sufficient to go forward with, but no more.

While both persuasion and learning mode methods have their place in law practice, learning mode behavior is more appropriate in conversations with colleagues most of the time. Relationships with colleagues are not adversarial, at least not in the courtroom sense, and trying automatically to convince colleagues of one's pre-determined views before hearing what they have to say is usually not an effective way to proceed. In writing a brief, preparing a prospectus, drafting a contract, or devising a takeover strategy, the first and most important step from everyone's perspective is to get the greatest number of ideas

on the table. Each member of the group needs to be drawn out, her or his distinctive insights identified and unique twists on familiar strategies recognized. For a problem of any complexity and novelty, the first step in developing strategy is identifying the realm of the possible. This can be difficult and frustrating, particularly when progress is intermittent or halting, but it cannot be skipped over without paying a price.

Communication strategies which demean others' contributions by criticizing them automatically, ignore difficult to discuss but relevant points, recast others' ideas to make them appear to be one's own, reduce complex phenomena to some of their parts, suppress tentativeness, contingency, and uncertainty, fail to understand how perspectives can be one-sided or biased even when sincerely held, hedge bets, cut losses and pick winnable fights, and are generally secretive about what they seek to achieve, are a liability in this "brainstorming" stage of work. They turn up fewer and more pedestrian ideas, produce shorter and more acrimonious conversations, and introduce more distracting emotional "noise" into conversation than do their learning mode counterparts. In an ideal world, lawyers would avoid persuasion mode communication in law office conversation most of the time. Whether they do is the question I now want to take up.

## II. A MODEST EMPIRICAL STUDY ABOUT LEARNING FROM COLLEAGUES

The idea for a study of learning from colleagues, and the creation of the data base on which it is grounded, are classic examples of necessity being the mother of invention. A large number of Maryland students work part-time during the school year, and full-time during the summer, in a wide variety of public and private law offices, courts, administrative agencies, corporations, and other types of law related organizations, both for academic credit in externship programs, and for money.<sup>40</sup> This will not surprise anyone. It is the case virtually

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<sup>40</sup> Students in this study received money only in the few situations where their case studies came from part-time work rather than externships. One such case is reproduced here. Maryland has not adopted the "credit plus money" model of externship instruction. For a recent discussion of the difficult question of whether students should be allowed to receive credit and money for the same clinical practice work, see Gary Laser, *Significant Curricular Developments: The MacCrate Report and Beyond*, 1 CLIN. L. REV. 425 (1994) (in favor of students getting both money and credit), and Lisa G. Lerman, *Fee For Service Clinical Teaching: Slipping Toward Commercialism*, 1 CLIN. L. REV. 685 (1994) (against). See also Interpretation 1 of ABA Accreditation Standard 306(a), which provides, "Student participants in a law school externship program may not receive compensation for a program for which they receive academic credit." AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Standard 306(a), Interpretation 1 (1996) [hereinafter ACCREDITATION STANDARDS]. For a discussion of the development



everywhere in American legal education.

As is also the case almost everywhere, supervision of this work has been delegated, for the most part, to the lawyers, judges, and officials who work full-time in the various outside cooperating organizations, and who have agreed to be responsible for the students' learning. In theory, and sometimes in practice, full-time law faculty members monitor this work, but even at its best, such monitoring is far from day-to-day, and at its worst, it is non-existent. None of the programs was described in this way when presented to the faculty for approval; instead, they just settled into this format over time as both professors and students discovered that such a format was in their respective self-interests.

A combination of the ABA's recent decision to take its externship standard more seriously in the accreditation process,<sup>41</sup> a looming site visit by an ABA inspection team, and the Maryland faculty's own growing sense that the educational potential of student law firm work was not being fully exploited, produced a familiar curricular reform. We decided to add (or beef up, depending upon just how badly one thought things were being done), an "academic component"<sup>42</sup> to each of our externship programs. This is a "reform," I dare say, that has been discussed or enacted in some variation in many if not most American law schools. Most of our externships involved work in one or more clearly identifiable substantive law or practice skill areas (such as public law, including government agency work and legal services for the poor, health law, environmental law, intellectual property, corporate finance, law and entrepreneurship, judicial clerking, and the like). For these externships, it was relatively simple to have someone already teaching in the substantive law or practice skill field put together a set of materials and teach a seminar organized more or less around the theme of "Selected Problems in \_\_\_\_\_."

Each semester, however, there was always a residual group of externs, made up of students whose work either did not fit easily into

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of Interpretation 1, see Maher, *supra* note 11, at 617-21.

<sup>41</sup> See Seibel & Morton, *supra* note 2, at 439-41.

<sup>42</sup> The ABA requires that all externship programs with a credit allocation of over six units have a classroom component. See ACCREDITATION STANDARDS, *supra* note 40, Standard 306(c), Interpretation 2(h)(1)-(3); see also Seibel & Morton, *supra* note 2, at 429-30 (discussing extent to which externship programs have classroom components). The phrase "academic component" has always struck me as one of the strangest euphemisms in American legal education. "Academic" in this context could be used pejoratively to mean something like "impractical," "ethereal," or "gratuitously pedantic," in which case there would be no reason to include such a component in an externship program at all, or it could be used literally to mean "scholarly," "learned," or "instructional," in which case it ought not to be restricted to only a part ("component") of the program. I suppose the phrase is just another offspring of the alleged theory-practice dichotomy.

any existing substantive law or practice skill categories, or who were working in a recognized field but during a semester in which the seminar in that subject was not being offered. These students needed an "academic component" to their externships as well, but the types of work they did usually had few if any themes in common.

This is where the invention came in. While sub-groups within the residual extern class did work that overlapped in different ways, the only thing all of the groups had in common was the fact that they worked for practitioners (in the most expansive sense of that term) who were not law teachers. It seemed obvious, therefore, that that was what we should study: learning to learn from someone who does not see herself or himself principally as a law teacher, in an environment where student learning is not the highest (or sometimes even a high) priority. Put another way, we decided to study the process of learning from colleagues in law practice settings.<sup>43</sup>

To move the seminar beyond the discussion of abstract theories of communicative modes, a step which seemed advisable given the unfamiliarity of the subject, and to learn more about what the students were doing in their externships, I decided to conduct a modest empirical study of the way students learned at work. To do this I resuscitated and revised a data collection device I had used once before to study in-house clinic supervision. The device comes from the work of Chris Argyris and Donald Schön, the two scholars most responsible for developing the idea of the "reflective practitioner," and is discussed in detail in their work.<sup>44</sup> I asked each of the students to produce a case study illustrating a situation in which the student was trying to learn from a supervisor about how to improve her or his (the student's) work.<sup>45</sup> I gave the students the following instructions for

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<sup>43</sup> Learning from colleagues is not studied in the classroom component of most externship programs, see Seibel & Morton, *supra* note 2, at 431-34.

<sup>44</sup> See ARGYRIS & SCHÖN, *supra* note 6, at 38-42; CHRIS ARGYRIS, INTERVENTION THEORY AND METHOD 103-26 (1970).

<sup>45</sup> I offered this seminar on a pass/fail basis for four semesters, to a total of sixty-four students, and have at least one case study from each of the students. (Two cases have been selected from each of the four semesters I offered the course, to make up the eight cases reported in Part III.) A few students developed an intense interest in the subject and produced more cases as part of independent writing projects that grew out of the seminar. One student, in fact, wrote a 167-page paper about six new cases collected from several different contexts over the course of two years. The cases were given to me in an anonymous form, as the instructions required, usually with the designations of student and supervisor in place of the participants' names, and with all characteristics which might identify the externship office removed. I reviewed each case to make sure this had been done before distributing copies to the class. Each student led the discussion of her or his case in class, first stating what he or she wanted to learn from the discussion, and then fielding questions, comments and the like. I participated as another (talkative) student, but at the end of each case discussion I summarized what I thought had been the general themes

preparing their case studies.

#### Instructions for Preparing A Personal Case Study

Describe a learning interaction with one or more individuals, preferably but not necessarily from your work as an extern, that you have experienced already or expect to experience in the near future. Begin the description with a paragraph about the nature of the interaction, the setting, the people involved, and any other details you think important to place the reader in context. Use fictitious names for all persons other than yourself, or describe them in terms of title, role, relationship to you, or the like. Be sure that they are not personally identifiable.<sup>46</sup> Next, describe your purposes for the interaction. What did you want to accomplish, how did you plan to do this, and why did you pick those goals and strategies?

Next, write a few pages of dialogue that actually occurred or that you expect to occur. Reconstruct it from memory as best you can, if you do not have a tape or transcript of the exchange. Use the following format.

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raised and points made. About forty percent of the students talked with me individually about their cases after their respective presentations in class. On a number of occasions, these post-class conversations lasted for over an hour.

At the beginning of each semester I told the students that I might use one or more of their cases as part of a writing project I had in mind. They were asked to let me know if they did not want to be included in the project, and ten did. In retrospect, I would be more scrupulous about the consent process if I did this again. I think that the significance, and perhaps even the fact, of my announcement did not register with some students. However, virtually all of my comments on the cases in Part III were raised with the respective students involved during the class discussions. In fact, the content of the present discussion is taken directly from the notes made for and used in those class discussions. The students were also instructed to tell their practitioner supervisors about the seminar, and the case study assignment, but I did not check to see if they did this because I wanted the supervisors to remain anonymous.

The residual externs were reasonably representative of the school population at large. 15% were people of color (lower than the 25% for the school as a whole), 55% percent were women (nearly identical to the school percentage), 40% percent were members of one of the two law journals at the school (higher than the 30% for the school as a whole), the group's mean grade point average was a little higher than the mean for the whole school, and the average age of its members was 26, also nearly identical to the school average. About 90% percent were third year students. The seminar no longer exists, having been swept away by yet another wave of curriculum reform.

<sup>46</sup> The fact that the cases were anonymous had some information costs, of course, but it also made it safer for the students to tell me what they were truly thinking and feeling in the situations reported. See note 47 *infra*. In addition, anonymity neutralized any expectations, stereotypes or beliefs I might have had about the offices involved, and forced me to deal directly with the data of the cases. It also helped prevent inadvertent disclosure of confidential client information in violation of the Maryland Rules of Professional Conduct. During the four semesters I taught the course I did not come across a case I could identify from the information supplied by the students. I did ask the students, however, whether there was ever a situation in which two students in the class were involved in the same case, either on the same or opposite sides, and there was not.

On this side of the page,<sup>47</sup> write your UNDERLYING THOUGHTS AND FEELINGS, that is, what was going on in your mind while each person in the dialogue (including you) was speaking.

On this side of the page, write DIALOGUE, that is, what each person actually said or what you expect he/she would say. Continue writing the dialogue until you believe the gist of the conversation is illustrated (this should be for at least a couple of pages).

After having prepared your case in this way, reread it for the purpose of analyzing the effectiveness of your efforts. Approach the analysis as if you knew nothing about your intentions, wishes, desires or expectations, and had only your behavior in the case to work with. What assumptions about effective learning do you seem to make? What communication habits do you seem to have? How related are your goals and strategies?

Since this was an unusual request, I gave the students until the fourth week of the semester to hand in their case studies. By then we had discussed the differences between persuasion and learning mode behavior for three full class sessions (six hours), and had analyzed several anonymous case studies similar to those the students were asked to prepare. Moving as deliberately as this seemed to help. When it came time to prepare the cases no student expressed difficulty in understanding the instructions or in constructing an individual case.<sup>48</sup> Virtually all of the cases were complicated, interesting, and rich in learning-from-supervisor issues, and were produced quickly, easily, and often with a great deal of enthusiasm.<sup>49</sup> In fact, many of the stu-

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<sup>47</sup> A good deal of clinical writing is now based on data reproducing the dialogue of practice instruction in verbatim or near verbatim form (such as transcripts, case studies, journals, and the like), but the data do not usually include underlying student thoughts and feelings. See, e.g., Barry, *supra* note 27. This, in part, is probably because the clinical teachers who collect and write about this material are usually also participants in the conversations reproduced, and would find it difficult to convince students to reveal what they truly thought and felt after the fact. If the students had wanted to share this information, presumably they would have done so in the conversations themselves.

I was not a participant in any of the conversations reproduced here, and could not identify any of the students' supervisors from the content of the case studies. The students knew this, and as a consequence, did not worry that their thoughts and feelings would get back to their supervisors if they shared them with me. This was not because of any particular trust in me, but because it would have been difficult if not impossible for me to know whom to tell, even if I wanted to. I also promised that I would not tell should I happen to find out the names of supervisors by accident, but I never found out and the issue never arose. Not knowing the students' supervisors cost me relevant information, of course, but the cost was more than offset by the additional analysis made possible by the inclusion of the students' underlying thoughts and feelings.

For a discussion of filling in the left hand column, see Condlin, *supra* note 25, at 252 n.70.

<sup>48</sup> For one qualification on this, see note 52 *infra*.

<sup>49</sup> It was a little surprising that in some ways the students were more competent at the unfamiliar task of preparing a case study than they were at the lawyer skill practices they had been studying for a couple of years in law school.

dents could not wait to talk about their cases in class.

Except for the occasional accounts of water cooler conversations about office politics, or of advocacy preparation sessions (such as rehearsing a witness for trial, deposing an opposing party, cataloguing exhibits, and the like), most of the cases are about one or another aspect of doing substantive law research and writing legal memos.<sup>50</sup> These are stereotypical law firm associate tasks and ones law students are also thought qualified to do, or as qualified as they are to do anything.<sup>51</sup>

Typically the case studies show the students trying to find out more about the nature of their assignments (for example, what questions should be answered, when is the memo due, what is the proper format, and most commonly, against what criteria will the memo be judged), or explaining and defending work they have already submitted. The discussions usually take place in the supervisors' offices, last anywhere from three minutes to two hours, and involve mainstream problems of interpreting and arguing substantive law. In short, the cases involve students solving live law practice research and writing problems, under real time and money conditions, in the same fashion as a beginning lawyer.

While there are serious questions about how much one can read into or extrapolate from student case studies, particularly with respect to the issue of whether they represent law office conversation generally,<sup>52</sup> they make one major addition to the opinion survey research

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<sup>50</sup> Students took the research and memo writing seriously and worked hard at it. Their draft memos were incorporated regularly into documents filed with courts and agencies, sometimes verbatim, so they knew that what they wrote could have serious consequences for real clients. Even when their memos were not used in this way, clients often were billed for their work, so that working efficiently to eliminate needless costs was a high priority.

<sup>51</sup> On the process by which students learn to do effective legal writing, see Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1, 9-16 (1991) (describing how novice lawyers learn to write competently over time by being socialized into a community of knowledge and expertise).

<sup>52</sup> The excerpts also may not be perfectly representative of the conversations from which they are taken, or the relationships between the students and supervisors involved. They might be the most difficult or frustrating cases the students could remember, for example, or the ones in which they thought their behavior was the most problematic. The case study instructions did not ask students to reproduce their most difficult or problematic conversations, but such conversations are often the ones remembered best. When students asked how to choose from among several cases all of which were interesting, I often advised them to pick the ones associated with the strongest feelings, on the theory that these cases would be the easiest to reconstruct. But this may have been interpreted as advice to pick one's most difficult case, or the case with which one was the least satisfied. If so, the case studies would resemble a law school casebook of sorts, a catalogue of (self-identified) abnormal learning strategies under stress, rather than prototypical learning strategies under conditions of relaxation and confidence. Most of the students did not see the cases as problematic until after their respective class presentations, however, so if the cases were

advanced by the advocates of ecological learning.<sup>53</sup> The cases report specifically on what the students said and did in their interactions with supervisors, not just what they thought they learned from those interactions.<sup>54</sup> By separating the task of data reconstruction from the task of analysis, the undifferentiated inquiries of "What did you learn?" and "Was it worthwhile?" were divided into the more specific "What did you and your supervisor do and say?" "Was it effective?" and "Why or why not?" The answer to the question "What did you and your supervisor do and say?" provides an independent vantage point from which to think along with the students in assessing what was learned, and permits readers to make their own judgments about whether the students' conclusions are the only or best ones which could be drawn from the data. The case study device turns an "on balance, was the experience worthwhile?" inquiry into one of "first, what happened? and then, was it worthwhile?"<sup>55</sup>

The students could still cook the data by describing what happened in terms that were circular with how well they thought things went, but that did not seem to occur. Invariably students liked their externships. They saw them as teaching about important practice skills under realistic time and money constraints, providing information about the nature and organization of law practice which they could use in making choices about where and for whom to work, and creating opportunities to escape the subservient roles often assigned to anyone with student status in law school. Yet, regularly, they also produced case studies which undercut at least the first of these conclusions. Their cases were full of questionable and sometimes demonstrably ineffective practice behavior that was either ignored or reinforced by their supervisors, and debatable conceptions of appropriate skill practice that often went unchallenged and undiscussed.

Moreover, the students did not always see these problems before presenting their cases in class. On the contrary, many began their discussions confident that they had performed well, but as the class raised concerns or expressed doubts about actions taken in the cases, this demeanor often changed. A few students became defensive, refusing to acknowledge the legitimacy of any interpretation other than

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picked for this quality the picking was done at some tacit or pre-conscious level.

<sup>53</sup> See note 18 *supra*.

<sup>54</sup> A few students reconstructed only idealized stories of how they thought their conversations should have gone (or should go in the future). Even these stories reveal useful and detailed information about the students' theories of how learning from colleagues occurs.

<sup>55</sup> Thus these case studies provide a vantage point on student experience different from that in Givelber et al., *supra* note 13, at 24-27, and from the approach of Seibel & Morton, *supra* note 2, at 417-39 (discussing "contribution of externships to legal education" based on "descriptive data" about "existing programs" taken from clinical teacher surveys).

their own (“you had to be there to understand”), but most, though initially surprised and sometimes visibly disappointed, became interested in the class’s different interpretations, discussing them at length, often even agreeing.<sup>56</sup>

If the students constructed the cases with an eye toward justifying their positive evaluations of the externships, their presenting cases which contained ineffective practice strategies is hard to explain. Similarly, if they tried to build “strategic flaws” into the cases to make their own after-the-fact analysis seem more impressive, one would expect that analysis to have appeared in the case studies themselves, where it was requested, and where it would have had the biggest impact, but that also rarely happened. The students’ reactions of surprise, disappointment, curiosity and ultimately agreement when the class raised concerns about the cases are also hard to explain on this view. In short, it is hard to understand why the students consistently produced cases that called their effectiveness into question, unless what they reported is roughly what they remembered happening and feeling.<sup>57</sup>

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<sup>56</sup> Initially, I had planned to use excerpts from the classroom discussions as further evidence of the best interpretations to be given the students’ behavior in the case studies. Classroom discussion was another instance of learning from colleagues, and student behavior in these discussions might have been expected to mirror their behavior in the cases. Using class data proved to be too difficult in all but a few cases, however, and the students voted down the idea of tape recording the class sessions for consideration at a later date. My subjective impression is that there were numerous parallels between the conversational patterns in the cases and the conversational patterns in the classes, but it was more confusing than helpful when I tried to point these parallels out. Even had I been able to collect such data, finding a manageable way to present it in this Article would have been difficult.

<sup>57</sup> See Nisbet & Wilson, *supra* note 18, at 255 (people have “little or no direct introspective access to higher order cognitive processes” but do have direct access to their “focus of attention . . . current sensations . . . emotions, evaluations, and plans”), see also ARGYRIS & SCHÖN, *supra* note 6, at 66 (“[e]ach individual’s data overwhelmingly challenged his competence [and] [i]t is difficult to see why people would write distorted cases that make them appear incompetent”). Cases transcribed from tape recorded conversations do not raise this accuracy problem (though tapes have other problems of their own), but only about ten percent of the cases were transcribed from tapes. There was no discernible difference between the conversational patterns in the taped and reconstructed cases. This is not to say that the students’ reconstructions captured every word of their conversations; rather, it may well be that the case studies in effect reduced these conversations to their essential parts. The case studies may therefore—and usefully—have made the problems of the interactions appear more starkly, but they did not change the problems themselves.

The students’ behavior might be explained as a consequence of the widely shared *belief* that new lawyers cannot write. See Williams, *supra* note 51, at 24-25 (describing the “pre-socialized” legal writer). Claude Steele and Joshua Aronson have shown how stereotypes about the ability of African-American students to perform on standardized tests create a kind of “stereotype threat,” which in turn causes the students to perform poorly. It is not that students accept the stereotypes, but that in trying not to give credence to them they redouble their efforts, only to work too quickly or inefficiently. Take away the situa-

### III. THE CASE STUDIES

It is now time to ask how the students, as lawyers, interacted with their supervisors to draw on and learn from the latter's different insights and more extensive experience. What strategies did they employ, tacitly or otherwise, to add to their understanding and improve their work? Were they curious when supervisors reached conclusions different from their own or saw issues in distinctively different lights? Did they suspend judgment on new ideas and perspectives, inquire into their bases, question, probe, and test these views, and take only direct evidence rather than supervisor conviction as proof? Did they share their own views directly and completely, discussing ideas in a non-dogmatic, non-proprietary and non-defensive fashion? Did they act on suggestions which proved to be helpful, redoing their work to the extent necessary? Or, instead, did they enter work conversations convinced of the correctness of their own take on the matter, and try to convince their supervisors to see things their way, all the while keeping this agenda secret? Did they judge their supervisors and their ideas quickly, privately, and harshly, on the basis of insufficient or non-existent evidence, thus in effect writing their own predispositions, biases, and stereotypes into fact? In other words, did they converse to learn or to persuade?<sup>58</sup>

Complete answers to these questions must await a reading of the cases, of course, but some preliminary observations are possible. More than anything else in their conversations with supervisors, students were concerned profoundly and pervasively with not "looking stupid," and this concern seemed to drive everything they said and did. The concern took many forms. Students worried that they were

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tional cues that trigger the stereotypes and the students' performances improve. See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERS. & SOC. PSYCHOL. 797, 798-99 (1995). It may be that the law students in the cases discussed here were similarly preoccupied with the belief that not much was expected from them (that no matter what they did they would "look stupid"), and that in trying to compensate for this stereotype they performed poorly. I did not know of the Steele-Aronson hypothesis when I collected the case study data for this article, and thus did not try to determine whether some form of stereotype threat was involved. The hypothesis is interesting, however, and is well worth testing in the clinical practice context. It is important to keep in mind, however, that stereotype threat, if present, would explain the students' behavior in the cases, not undercut its representativeness or trustworthiness. It responds to the question of why the students would behave in this way, not the question of whether they do.

<sup>58</sup> Many would argue that this is a vulgar understanding of the term "persuade," and I agree with them. Persuasion mode speaking aims to silence others, or have them admit defeat, as often as it does to help them come to a new understanding. I expressed the same reservation several years ago when I first wrote about the persuasion mode-learning mode construct, but in the intervening years I have not found a better term. So I continue to use "persuade." See Conklin, *supra* note 25, at 231 n.20, 247 n.62.



not from the right law school, that they did not know enough law, that their research was rudimentary and missed cases directly on point, that their insights were pedestrian and self-evident, that their problems had clear answers known to everyone (including their supervisors) but themselves, that work assignments were just staged tests of their abilities to perform and not genuine real-life problems, and that their supervisors were constantly evaluating them as lawyers and finding them inadequate.

These concerns are present throughout the conversations in the case studies. It sometimes seems as if a small thundercloud of insecurity hung over everything the students said and did, causing them to interpret supervisor comments in their most negative light and to see experiences in their most debilitating form. This self-doubt was not paralyzing, and may not have been apparent to many of the supervisors. The students did not speak openly of themselves in self-deprecating terms, or disparage their work publicly. They did not wring their hands, ooze angst, or twist aimlessly and helplessly in the wind. On the contrary, they appeared to work quickly, competently, now and then elegantly, at a skill level comparable to that of their peers, and consistent with what one would expect from someone with their education and experience.<sup>59</sup> For all outward appearances, they were functioning without difficulty, contingency, or concern. But in their underlying thoughts and feelings a richer and more troubling picture emerges. Here, the students' surface confidence and self-assurance dissolves. Here, they are plagued by pervasive self-doubt, and this doubt has real and harmful effects on the quality of their work and their efforts to improve it. Like evidence at trial which seems convincing until one discovers what other evidence was available, student behavior in the case studies seems unremarkable until one looks at the students' underlying thoughts and feelings.

In one sense, of course, it is understandable that students would be anxious. This was the first law firm job for some, and one of the first for everyone. Even at a rudimentary level the tasks of law practice are unfamiliar to novices, difficult to do well, and have important and substantial consequences for real people with real interests (including the students). When people are asked to perform difficult tasks that they are not yet skilled at, with a lot riding on how they do, it is reasonable for them to be a little nervous. Even research and memorandum writing, familiar and reasonably well understood processes for law students, can be scary when the body of law that must be described and analyzed is new and complicated. First cuts on

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<sup>59</sup> These conclusions are based on my own reading of the legal memoranda the students produced. I received copies of everything they wrote, also in laundered form.

any subject are rarely sophisticated, and students know this, and so it is natural for them to be concerned that a truly intelligent perspective would look totally different. Anxiety on the part of the students about whether they were ready for law practice was to be expected, therefore, and thus was not surprising when it appeared in the cases. But the self-doubt expressed in the cases seems deeper and more structural than that occasioned by the stress of new challenges. It is so pervasive and strongly felt that it seems almost built into the students' conception, albeit a provisional and temporary conception, of themselves as lawyers. The students seem to believe that doing legal work at all, not just well, entails being nagged by self-doubt about competence and worth.

Concern about what others think of one's work is debilitating and must be managed if one is to function. This is as true for novice lawyers as it is for big city mayors.<sup>60</sup> The students seemed to realize this since they adopted one or more of several well known strategies for keeping their anxieties in check. Ironically, however, these strategies produced new difficulties, and new anxieties of their own. I will describe the strategies briefly here, but a reading of the cases will be necessary for a full understanding of their subtlety and sophistication.

The most common strategy for not looking stupid was to bluff, that is, to pretend to be knowledgeable even when one did not have a clue, and attempt to discover what one needed to know indirectly during the course of the conversation. To some extent, this strategy is based on a contradiction. Students were committed to learning from their supervisors what they professed already to understand. But that did not diminish its popularity. The strategy, which I'll call "indirection," was characterized by secrecy, equivocation, and pretense. Students thought one thing and said another, asked ambiguous and equivocal questions for purposes other than the ostensible ones, asked friends and co-workers rather than supervisors themselves to explain or interpret supervisor comments (and in a carefully controlled manner so that the friends and co-workers did not know all that was going on), and examined the implications of supervisor comments in private, rather than risk engaging in an open process of learning.

Indirection was attractive because when successful it allowed the students to learn without appearing to have not understood, to become knowledgeable without appearing to have been ignorant. It eliminated the perceived stigma of being a newcomer. The students could be experts simply by pretending to have expertise. Missing background experience and understanding could be filled in on the

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<sup>60</sup> Ed Koch, the former mayor of New York City, was regularly reported to have asked citizens in his frequent travels through the boroughs, "How'm I doing?"

fly, as needed, without supervisors knowing that that was being done. Those awkward moments of intellectual and professional growth all of us would like to forget could remain forever the students' own private secret. The strategy was sometimes transparent, or so it appears in the case studies that follow, but supervisors also played along, talking in the coded vocabulary of indirection themselves. To an outside observer it might have seemed that each side was aware that the other meant more than was being said, but also willing to respect the other's tacit choice to pretend that neither side knew that.

The second most popular strategy for interacting with supervisors, which I will call "take charge," was made up of a range of more explicitly competitive and controlling maneuvers than those of indirection, maneuvers commonly associated with the stereotype of lawyer adversarial discourse. Here, students argued differences with supervisors openly and aggressively, challenged comments critical of their work, reacted to new ideas and suggestions in an agree/disagree fashion even when it was too soon to have a considered view, defined the agendas of supervisory conversations and the standards of successful work performance unilaterally, and generally expressed their feelings and beliefs, sometimes in an exaggerated fashion, with respect to all aspects of their situations and work, apparently both as a form of catharsis and as a way of influencing the outcome of the conversation. The students were not belligerent or rude but just pervasively assertive (though some find pervasive assertiveness belligerent or rude), very much focused on their own needs and perspectives, and intent on having the last word on most issues. Unlike indirection, the take charge strategy was used to convince others openly and unabashedly, rather than lead them indirectly into doing something they did not know they were being led to do. With take charge, what the students said, for the most part, was what they meant.

Take charge is a difficult strategy for novices to use with veterans, but periodically it would work. Sometimes supervisors would seem to agree (or stop disagreeing) with aggressive student arguments either because they thought the arguments were correct, or because the issues involved were not worth fighting about. This happened most frequently when the students seemed to have a strong emotional stake in the outcome, and were persistent. Even when the strategy did not produce such satisfying results, however, students often felt good about using it because they saw arguing aggressively as paradigmatic lawyer behavior, and thought themselves more lawyer-like for being able to do it, particularly with lawyers who were more experienced than themselves.

In many ways take charge was easier than indirection for supervi-

sors to understand and deal with. Overtly aggressive statements usually came closer to representing what was on the students' minds than did indirect and manipulative ones, and as such, relieved the supervisors of the need to guess about what the students were trying to say. Take charge also was more respectful of supervisors as persons because it did not try to mislead them, consciously or otherwise, or to protect them unilaterally from information the students thought would be too difficult for them to handle.

These qualities notwithstanding, the constant evaluation and competition underlying the take charge strategy, and the strong feelings generated by the arguments the strategy produced, made it difficult over time for supervisors not to take student comments personally and to feel attacked. When the supervisors defended themselves, the students understandably responded in kind, with the ultimate effect that each side began to share less and less of what it thought, and only its most defensible (in other words, commonplace and uncontroversial) thoughts at that, so as to give the other less "ammunition" to work with. Most of the time, the take charge strategy ultimately reduced conversations to stylized fights.

A third distinctive strategy, present in a significant percentage of the cases, might appropriately be called "belly up," or "roll over."<sup>61</sup> Here, the students gave up all hope of influencing supervisor understanding, and tried to discover what supervisors already believed so that they could ratify it. Belly up was secretive like indirection, but not as aggressive or competitive as indirection covertly was. Students going belly up were critical of supervisor instructions and comments, but they did not express or act on these criticisms publicly. They either saw themselves as powerless to influence supervisor views, or were convinced that what the supervisors said must be right. They were fatalists of sorts, seeing themselves at the mercy of forces outside their control, and rolling with the punches as their most advantageous option. They felt no need to examine their supervisors' tacit conceptions of good practice critically because they did not believe that they could act on critical insights even if they had any. They listened to supervisors at all only to be sure that they did what they were told. Going belly up made work easier because it removed most of the fric-

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<sup>61</sup> I mean no offense by these terms. This Article is an analysis of communication strategies that are problematic but common, and is meant to help all of us to notice and improve these strategies rather than to criticize the young men and women who revealed their use of these approaches in their case studies. I take the terms from the adaptive response of some animals to appease a powerful and threatening adversary. Konrad Lorenz has described the wide range of such appeasement behavior. See KONRAD LORENZ, *ON AGGRESSION* 131-38 (1963). Belly-up and roll-over have a lighter side, of course, as any one with a dog or cat for a pet will attest.

tion from student-supervisor conversations, and for many students the absence of friction was a working definition of a successful conversation. It also absolved the students from responsibility for the hard choices that needed to be made in many of their cases, since supervisor judgments always controlled. Again, for many, this freedom from responsibility made for a more congenial world.

I have described the foregoing strategies in terms of their different approaches to, and attitudes about, influencing conversational ends. Each reflects the competitive approach to conversation characteristic of the persuasion mode. Thus indirection seeks to influence outcome by not letting on that influence is being exercised. This strategy is a form of competing to succeed without letting the other person in the conversation know that he or she has interests at stake and should argue back if interested in protecting them. It aims to minimize resistance by anesthetizing it. Take charge turns conversation into argument and tries to win arguments overtly. It seeks to overpower others, to silence them and treat their silence as agreement. Belly up tries to eliminate friction from conversation by eliminating disagreement. It is a passive-aggressive form of competition, albeit for the purpose of cutting one's losses in a conversation rather than winning most of its points. Its only major goal is to end the interaction itself.

But the strategies also could be described in terms of their constitutive maneuvers and techniques, and here too one can see their link to persuasion mode discourse. Students using each of the above strategies regularly attributed single (often uncomplimentary) meanings to supervisor comments when additional, more mixed interpretations were possible, and sometimes more plausible. Rather than ask the historian's question of "What could he or she mean by that?" and test the possibilities against other data from the conversation, the context, and the relationship as a whole, they would ask the persuasion mode corollary of "Why would he or she say that about me?". The meanings the students thus attributed often mirrored the students' own conversational strategies (and the students' use of these strategies may have contributed to the supervisors' actually behaving in the ways the students imputed to them). That is, competitive students saw their supervisors as aggressive and difficult to deal with, indirect students saw supervisors as less than fully forthcoming, and students going belly up complained that supervisors abdicated responsibility by not telling them (the students) what to do. Understanding what was being said became a quite complicated task for all involved, as one would expect, when the meanings attributed were not the meanings intended.

The students also were frequently judgmental, regularly evaluating the worth of their supervisors' ideas and suggestions, and the legit-

imacy of the motives behind them. Sometimes they called their supervisors harsh and unflattering names (privately, of course), and sometimes complimentary ones, but in most cases these characterizations did not seem to be based on extended deliberation or clear evidence. In fact, many of the students' judgments appeared almost reflexive, showing little awareness of their (the students') own role in helping to produce or shape the supervisors' actions. It was as if the students believed they should always be judging, that at every moment in the conversation they should have a bottom line view, up or down, about the accuracy and worth of what their supervisors said and did.

The students also regularly suppressed relevant ideas and feelings when they were not sure how their supervisors would react. Indirect students were reluctant to be candid for fear that their real objectives would seem offensive or unimpressive. Competitive students, assertive as they were, still hesitated to articulate all of their views in the somewhat overstated language of advocacy for fear that such language would be misconstrued. And students going belly up did not want to do so too obviously, out of anxiety that they would appear obsequious if they were too overtly accepting of supervisor ideas, and that this, in turn, would make it difficult for them to look impressive. All of these were legitimate concerns in the abstract, of course, and some were justified in context, but the loss to the work relationships resulting from the students' suppressed ideas and feelings often was considerable.

It is time to see these patterns in more specific detail. The following eight cases were selected for their representativeness, with each offered as a good example of the particular strategies and patterns it embodies. Other cases illustrating the same strategies and patterns could be presented, each case a little different in its own right, but there is little strategic maneuvering present in the cases in their entirety that is not captured in the eight reproduced here.

#### *Case One—Simple Indirection*<sup>62</sup>

The student ("ST") reporting the case described it in the following way:

It was my first day on the job and I wanted to make a good impres-

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<sup>62</sup> I have categorized each case according to what I think is the principal strategy it illustrates, though even a brief reading will make clear that all of the cases contain aspects of all of the strategies. From my perspective, nothing turns on the labels attached to individual cases, so that if a reader wants to move a case from, say, the take charge category into the indirection category (because it involves taking charge by passive means, for example), that is fine with me.

The case studies are presented here essentially as written by the students, with light editing of matters such as form and spelling.

sion, especially since I was the only law clerk hired for the summer. My first assignment was to "redact" part of a document that was discoverable material based upon a motion granted by the court. The only problem was that I did not know what the term "redact" meant in a legal sense, nor was I clear about which sections of the document were to be redacted. I felt silly asking my supervisor ["SU"] directly although she had breezed through her instructions to me as she was getting ready to leave for a meeting. This conversation took place in my cubicle. My supervisor was on her way out of the office and had stopped by to check my progress. My goal for this conversation was to find out what my supervisor meant by redact without having to ask my supervisor directly.

Underlying Thoughts  
and Feelings

I'm glad she asked, now I can try and figure out what she meant. I'll try not to take up too much of her time.

I'll really feel stupid if I ask straight out what redact means. How can I phrase my question subtly?

Great, she is blowing me off, and I am going to end up looking like a fool if I don't get this done today. Maybe if I rephrase the question.

Dialogue

- SU: How is it [the project] going?  
 ST: I think I am making some headway. But I have a few questions. Do you have a minute?  
 SU: I'm running late for a meeting, are your questions quick?  
 ST: Yes. Can you suggest the best strategy for redacting this document?  
 SU: Well, I suppose you could just use a black marker or a highlighter and then photocopy the document until it is taken care of. Or wait, you know what, why don't you ask \_\_\_\_ how to do it. I think she has done this sort of thing before. I am going to be late. If \_\_\_\_ can't help come talk to me when I get back.  
 ST: No problem. Just one more thing, what does the highlighting on this motion mean?  
 SU: Oh, it just means that the judge granted our motions as to those parts of the document. Just follow his highlights and you'll be fine. Anything else before I go?

I assume the fact that she is jingling her keys means she doesn't want to hear any more questions. Actually I think I have it now. I suppose she has confidence in me if she thinks I'll be fine. I still better check how much time I have to work on this.

ST: Uh, no. I got it, no problem. Is there a time constraint on this project?

SU: Just be done sometime this afternoon.

The student evaluated her effectiveness in the conversation in the following way.

Overall, I think I accomplished what I had set out to do. The assignment was simple. I was to edit out sections of a document as directed by the court. I'm glad I did not directly ask what redact meant, especially because it became clear in her answer to my strategy question and was clarified even more by her answer to my second question. In hindsight, I don't think my supervisor was blowing off my questions, rather I think she was just running late. I think I was hypersensitive to her reaction because it was my first day on the job and I was eager to impress.

This case, as the student said, presents a simple problem. The student had not heard of and did not understand the term "redact," yet she had been asked to redact a discovery document. The seemingly obvious thing for her to do would be to ask her supervisor what "redact" means. She could have phrased the question in different ways: "That's a new term to me, could you tell me what it means?" or "This is my first time redacting a document, could you (or someone you could point me to) explain what is involved?" or "I never heard that expression in law school. Could you explain it to me?" The student's ignorance was only terminological. She knew how to redact, as the rest of the conversation makes clear, even though she did not know that she knew. The student's failing, if it was a failing, was only one of vocabulary. It did not call her competence or intelligence into question.

Moreover, the supervisor might well have welcomed, or even hoped for, such a request for explanation from the student. Since it was the student's first assignment on her first day on the job, the supervisor might have been using the assignment to determine the level of work she (the student) was capable of doing, and would have wanted this "test" to be as accurate as possible. The supervisor might even have used the term to discover the student's response to confusion or doubt. Supervisors need to know whether students will bluff when they do not understand something in order to determine what assignments to give and how much to rely on work that is turned in.



Consequently, they sometimes give intentionally cryptic instructions in matters of little import early in a supervisory relationship to see what response the students will make. That may have been all that was going on here.

Given the context, then, the student should not have “felt silly” asking her supervisor what she meant by redact, and thinking that she would look silly was not a reasonable view. What could explain it? Did the student assume that she had studied redacting in law school and forgotten what she had learned? This was not likely. She had a reputation for being a thoughtful and conscientious student, one to whom others went for class notes and explanations of difficult doctrines and concepts. It was more likely that a discussion of redacting had never occurred than that she had missed or forgotten it. Did she believe that competent lawyers always act as if they know something when they do not? It is not unusual for students to believe this, and yet to state the view is to discredit it. Whatever the reason, the student was committed to the not perfectly compatible goals of learning what the supervisor meant, and not asking directly.

Her principal strategy was to ask a somewhat disingenuous question instead. She asked “Can you suggest the best strategy for redacting this document?” but she meant “Can you define redacting?” Seemingly, she tried to use a question about procedure to obtain an answer about substance, and not let on that that was what she was doing. The supervisor either understood what was happening and refused to provide an easy way out, answering the question literally as asked (“use a black marker or a highlighter”), or took the question at face value and was fooled.

The student’s reaction to this (“she is blowing me off”) seems too harsh. The supervisor answered the question the student asked, very possibly understanding it as the student wanted it to be understood. It does not seem fair to fault the supervisor for failing to answer a question the student was unwilling to ask. While the student backed away from her “blowing me off” characterization in her evaluation of the conversation, she did not acknowledge the disingenuous nature of her question, the unfairness of her reaction to the supervisor’s answer, or the extent to which her own behavior helped shape the supervisor’s reply.

The student’s next question must have seemed strange to the supervisor if, up until now, she (the supervisor) had taken the student’s statements at face value. Why would someone who understands how to redact need to ask what the court’s “highlighting on this motion mean[s]?” This question illustrates the difficulty of inquiring indirectly without tipping one’s hand. If the supervisor saw the question

as a signal that the student was bluffing, she had reason to become concerned. Having now learned that the student will pretend to know something when she does not, even in a small matter where little is at stake, she might be reluctant to assign important work to the student in the future, unsure of whether she could rely on what the student turned in.

In many ways the matters raised by this case are small and relatively unimportant. The student learned what it means to redact in about the same time it would have taken to learn by asking directly, though there was a fair amount of fortuity in this outcome. So we might ask, "Why be concerned with technical imperfections? Isn't this a case of 'no harm-no foul'?" Yet, in another sense, the quotidian and trivial nature of the interaction makes the student's actions all the more troubling. The student was secretive and disingenuous when there would have been minimal risk in being more direct. It was her first day on the job, and her first assignment. Her confusion was over a term she could be expected not to know. She had just been given the assignment, and had wasted no time spinning her wheels trying to resolve the confusion on her own. If she could not communicate more straightforwardly under these conditions, where the interests at stake were so small, and her blameworthiness, if any, so slight, there is not much reason to believe that she would be able to do so when more important issues were involved. Moreover, the fact that the strategy "worked" this time makes it that much easier to use the next time too, as the student indicated in her *post hoc* evaluation of the case, when she said she was "glad" that she "did not directly ask what redact meant." In such conclusions, multiplied many times over, lie the seeds of large scale persuasion mode behavior.

#### *Case Two—Competitive and Didactic Indirection*

The student ("ST") reporting the case described it in the following way:

On Friday I was invited to sit in on a deposition of a witness for a case I was working on. The witness was general counsel of a large firm. One of the issues in the case involved registration of employees and whether the employees were properly registered to perform their duties. There were two attorneys for [my firm], a young attorney (YA), who is very friendly and approachable, and an older attorney (OA), who is supposed to be my supervisor but who generally seems bothered whenever I approach him, which needless to say is not often. The head attorney for the defense (HAD) is a hot shot and is about the same age as OA. OA obviously resents HAD's success, making disparaging comments about HAD's salary (\$600,000-\$700,000 a year), and later praising his own nobility ("I

wouldn't work this hard for so little unless I took my job seriously."). On the other hand, HAD clearly had expected OA to give him more consideration, and this fact was recognized by OA ("He should know I am not a gentleman."). I sat in only in the afternoon and they had been at it all morning, so things were really tense.

The room was very small, hot and crowded. My chair was in the corner behind the door, the other corner chair on our side being occupied by YA's documents. This meant that every time the witness wanted to confer with his counsel I had to get up and move so that the defense team could file out into the hall. Other than getting up to open the door, I had not spoken or moved for three hours. At this point, OA began asking a question to the effect that "Did you ever observe any employees doing anything unlawful?" This question resulted in the witness asking to confer with counsel. After the aforementioned laborious process exiting the room, the defense team would return and HAD would say that the answer was "privileged." OA would restate the question and the process would repeat itself. This went on for a period of about two hours. The firm attorneys were doing a weak job of arguing why this information is not privileged and the defense attorneys were getting very frustrated with each other. During one of these periods when the defense team was out in the hall and the firm attorneys were obviously just waiting for their return, I asked a few questions to try and understand privilege. I also had the secondary goal of trying to help the attorney articulate his position, since I felt he was not doing this well.

Underlying Thoughts and Feelings	Dialogue
I really don't understand where the basis for the privilege argument lies.	ST: Is [defense attorney] trying to assert that because the witness is in-house counsel everything he has knowledge of is essentially a privileged communication?
Is this an answer to my question? Please listen to what I have to say. I might say something of use.	OA: The term in-house counsel is a dangerous term. Not everything an attorney does is privileged. Only communications are privileged.
It seems like if the attorney is hired to observe and then provide legal advice, the allowed observations are a "communication."	ST: So therefore, although the observations of the attorney are gained by virtue of his position, such restricted observations are not considered "communications"?
It is clear that the attorneys either are not able or don't want to explain the finer points of privilege to me.	OA: Only oral communications are protected.

Why don't you challenge the other attorney's assertion.

ST: So your position is that the witness's observations and report are work product and since they are not prepared in anticipation of litigation then they are not protected?

End of discussion.

OA: Basically.

The student continued:

A couple of minutes passed before the defense team reentered. Soon afterward, OA asked the same question and they went out in the hall. This happened at least one additional time during which the firm attorneys went to confer with another attorney about the issue of limited waiver. When they returned, the other attorney introduced herself and told me I should have come to their conference. When the deposition resumed, OA asked his same question and the defense team left to confer again. Everybody was getting very frustrated. I wondered why they didn't answer subject to objection as I had seen in other depositions and thought I would ask.

Underlying Thoughts  
and Feelings

Dialogue

Look out! First of all, I wouldn't call the last conversation a "hashing." Second, this is only the second time I have spoken and I didn't talk at all during the last break. Thirdly, most people prepare for the olympics. He is clearly taking his frustrations out on me.

ST: Why. . .

OA: Look. I don't want to hash this out with you every time they leave!

(Silence).

(Apologetically) It is like the olympics, I need to be prepared mentally to perform.

The student evaluated his effectiveness in the conversation in the following way:

It will be a while before I talk to this guy again. At the end of the day (the issue had not advanced a hair), I thanked him for allowing me to sit in and apologized for disturbing him. He apologized in a general way and we parted. Next time I open my mouth I will have to try to be even more obsequious and non-assertive than I was.

The student in the first case used indirection to learn surreptitiously, so as to protect herself from having to acknowledge that she did not already understand. In this case, the student used indirection to conceal a private evaluation of the supervisor's performance, an attempt to take control of (a small part of) the deposition questioning process, and an effort to instruct the supervisor in substantive law and deposition technique in the process. The student does not appear any more knowledgeable about the issues at hand than the student in the first case, but his willingness to assert himself was greater.

The case involved a discussion of whether an opposing attorney's numerous privilege objections to deposition questions were war-

ranted, and whether the deposing attorney, the student's supervisor, could do a better job of getting his questions answered. The student's stated objectives for the discussion were mixed and somewhat inconsistent. On the one hand, he believed that his supervisor was doing a "weak job of arguing why [the] information is not privileged," and wanted to "help the attorney articulate his position" better. At the same time, another goal for the conversation was "to try and understand privilege." If the student did not understand privilege, it is not clear how he determined that his supervisor's efforts were "weak," or why he believed he could articulate the supervisor's position better. His underlying thoughts and feelings indicate that his understanding of privilege could be clearer (as could the supervisor's), but this does not prevent him from criticizing the supervisor's performance, both by disparaging particular maneuvers and by attributing unflattering meanings to the supervisor's statements. This attribution and judgment continued throughout the discussion, and became more negative as the conversation proceeded. The student's own views, by contrast, were seen as "clearly" or "obviously" correct.

The student's comments also often appear to be more didactic than curious. For example, his opening statement, ostensibly a question about the opposing attorney's privilege objection, asked the supervisor to confirm or deny the student's description of the objection, rather than explain the objection in the first instance. In a context in which the supervisor was performing under the watchful eye of other attorneys, such a comment easily could have been seen as an attempt to give advice, or correct a misunderstanding, rather than an effort to learn what was going on. So interpreted, it would not be unusual for an experienced attorney to view the comment, coming as it did from a new "lawyer" and one only partly familiar with the case, as presumptuous, or at least distracting, and treat it accordingly. The supervisor answered the question after a fashion ("Only communications are privileged"), but the student's incomplete understanding of privilege (he seems to have believed that all attorney "observations" are privileged),<sup>63</sup> might have prevented him from recognizing the statement as a response. His subsequent criticism of the supervisor for not being responsive, therefore, seems either unjustified, or at least premature.

The next exchange had much the same structure. The student made a statement about privilege, but under the guise of asking a question. The supervisor answered the question, though not in a completely accurate fashion ("Only oral communications are protected.").

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<sup>63</sup> Perhaps he confused the evidentiary privilege with the ethical rule on confidentiality, which ordinarily protects everything learned "relating to" the representation. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983).

The student criticized this answer privately for not being responsive (“the attorneys are not able or don’t want to explain . . . privilege to me”), and then summarized the supervisor’s view in a less than complete fashion. Because the summary was confusing (for example, the statement that “the witness’s observations . . . are work product . . . since they are not prepared in anticipation of litigation” appears self-contradictory), the supervisor may have decided to wait for another time to discuss the issue, not knowing whether the student’s confusion could be sorted out quickly in the context of the deposition.

The student’s last attempt to converse with the supervisor, a query about why the deposition questions were not answered “subject to objection,” seems to have been a genuine inquiry rather than a rhetorically concealed instructional point. The student stated it as a question in his underlying thoughts and feelings, and it might have come out that way in the conversation. Unfortunately, the supervisor squelched the comment before it was fully (or even partly) articulated, perhaps because he thought the student still wanted to talk about privilege. The student interpreted the move as unfriendly—the supervisor taking out his frustrations on the student—but it could also be explained as a practical judgment about how best to use deposition time, based on a reasonable if inaccurate assumption about what the student was going to say. The supervisor had more pressing concerns at the moment, and the earlier exchange about privilege might have raised doubts in his mind about the usefulness of trying to make “educational” points in the deposition context.

The lesson the student drew from the experience, to minimize contact with the supervisor in the future, and to be “even more obsequious and non-assertive” when contact is unavoidable, is also suspect. It is not clear, to begin with, that the student was “obsequious and non-assertive.” While he did not state his views directly (his private thoughts were probably too harsh for that), his public comments were replete with implicit suggestion, tacit evaluation, and veiled assertion. It seems unlikely that anyone in the deposition doubted that he had views.

If one grants the student’s characterization of “obsequious and non-assertive,” however, it may still be wrong to conclude that a shortage of obsequiousness led to the breakdown of the conversation. The supervisor may have been less piqued by the student’s manner than by his confusion over privilege, less upset by the fact that he spoke up than by what he said. Moreover, although it might have been difficult for the supervisor to learn from the student’s comments in the heat of the deposition, at the end the supervisor apologized for being brusque, and thus apparently acknowledged that he had been

wrong. The attorney's overall conduct does not demonstrate that he wanted only obsequiousness from the student in the future.

Overall, this student seems to have been more evaluative, attributive, and secretive than most of the others in these case studies. He tried, surreptitiously, to take control of a practice task assigned to his supervisor, and then failed to understand why his supervisor reacted defensively, or how his (the student's) own behavior helped produce the reaction. He may have backed his supervisor into a corner, making it more difficult for his (the student's) points to register. Combined, these actions contributed to truncating the conversation, making a detailed examination of the privilege issue less likely, and decreased the likelihood that the student and supervisor would speak with one another again in the future. In fact, this last point is one of the "lessons" the student drew from the experience. A conversational method that inadvertently truncates and discourages conversation is not yet a fully developed conversational method.

### *Case Three—Manipulative Indirection*

The student ("ST") reporting the case described it in the following way:

I was talking to my supervisor ["SU"] about an assignment she had given me, to research the elements of a particular cause of action, and focus on one of the elements. After that, I had to apply my research to the facts of our case. I had done some preliminary research and began to wonder what my supervisor actually expected me to find. I decided to speak to her and "feel her out" *vis à vis* her expectations. This was the first conversation we had had about the assignment since I had begun to work on it. My plan was to see exactly what my supervisor wanted me to find and how she expected the information to be presented. I then wanted to tell her how I believed the job would be done based on my preliminary research. I did this so that I could "plant a seed" in her head as to the reality of the job I was going to perform. Therefore, my supervisor's expectations would be roughly equivalent to what I intended to deliver to her.

#### Underlying Thoughts and Feelings

I'm glad she asked me how I'm doing. Now I can clear up this issue. I hope she expects what I can give her.

#### Dialogue

SU: How are you today? How is the assignment going?

ST: I'm fine. How are you?

SU: Fine.

I'd like to catch her in a good mood and with some free time so that she will be tolerant of me if she thinks my questions are stupid.

I hope this gal does not think I plan on finding a "gem" of a case. All I can find are these little pieces. I'll just have to force the facts into the law that I have found. Let me make sure she knows I'm not dogging my assignment. I'll tell her what I've done to date.

I just told you no. If I found a case with a broad definition don't you think I would have used it? Geez. Well maybe this will pacify her, although it's pretty much useless. I'll just let her know I'm trying.

No shit. I can't imagine how I got this far without that wonderful piece of information. I better try to save myself and establish that I'm not the idiot this gal now thinks I am. I'll give her examples of my competence. Let's get back to the issue. What does this gal want?

ST: About that assignment, I wanted to ask you a few questions. Do you have a couple of moments?

SU: Yes, what do you need to know?

ST: I am uncertain about what you expect me to find on the issues I am researching. I have done some research on the issue and there is no "great" case that lists the elements of the cause of action. Some cases discuss one element while others discuss other elements. But no case just lays it out nice and neat. I've checked the Supreme Court case law, federal and state case law, and administrative hearing reporters with no success.

SU: What have you come up with so far? Has anything given you a broad definition?

ST: Well, there have been some law review articles that give a nice definition, but they carry little precedential value so I left them alone. I researched the footnote citations in hopes of finding something. I just keep coming up with pieces, not answers.

SU: That's what lawyering is. You're rarely going to find a case that spoon-feeds you the answer you're looking for. Most of the time you have to put the pieces together and then "lawyer" them to fit the case you're working on. That is what it means to be a lawyer.

ST: Yes, I understand that. My concern was that you were expecting me to find something that was the "end-all" answer. Of course you have to work your facts into the law, that was never the question. Every paper I have ever written has been done in that fashion. I just wanted to make sure your expectations met mine.



- I'd like to cement the competence issue again and give her something to look forward to. I hope I can meet this self-imposed deadline—I doubt it.
- This risk element seems trivial. Most courts don't even bother with it. Why does she keep harping on risk?
- Well they are wrong. There are many elements of the case that they have.
- Risk just is not that big of a deal, unless I am missing the big picture . . . . Which is always a distinct possibility.
- I'M SAYING RISK DOES NOT MATTER!!!!!! I think????
- Okay. I must escape from this room. I am feeling very uncomfortable. The whole conversation established facts I already knew yet made me look or at least feel like an idiot.
- SEE YA. Hopefully she will need me later. I doubt it.
- SP: Just find whatever elements you can find and see if our case has any of them. Focus on the element of risk and write me a memo on your findings.
- ST: That I can do without any problem. The research for that type of memo is substantially completed. Let me just run down a few more leads and I'll be done. I should be able to give you a hard copy by next Monday. Is that alright?
- SU: Yes. That will give me time to read some of the cases you researched already. Is there anything else you need to ask.
- ST: Yes. I'm uncertain as to why the key focus of this case is risk. Risk kept showing up in your Request for Action Memorandum and in your notes, but it is rarely discussed in the case law. What's the story on risk.
- SU: The clients claim that risk is the key element of the cause of action, and that since risk passed along with the sale . . . , the sale was legitimate. But, we feel that there was no real risk passing in the transaction. Also, the reason you're doing your research is to find out just how important risk is in this case.
- ST: I guess that is why I'm confused. My research indicates that risk is not as crucial an element as it has been made out to be.
- SU: What are you saying?
- ST: Basically, my research indicates that risk is rarely focused on and when it is considered it has been dispensed with rather quickly by the Court.
- SU: Bring that to my attention in your memo. Can you meet me around 3:00 this afternoon to discuss your progress in more detail?
- ST: No problem. I'll see you then. If you need me I'll be in the library.

The student evaluated his effectiveness in the conversation in the following way:

I believe that my supervisor took my action as a sign of incompetence. I then had to "bail myself out" and try to establish a situation that was at least equivalent to the situation prior to the conversation. By this I mean, I wanted my supervisor to know that I was not incompetent, or at least feel the same way about me as she did before we had the conversation.

This case presents the law office version of a familiar law school conversation, perhaps best characterized as "What do I have to do to get an A?", and represents the most popular use of the indirection strategy. The student seems to have little substantive work to do in the conversation, and mostly to want reassurance that he should write up his research in the way he understood it. In effect, he appears to be asking, "Should I trust my own judgment in summarizing my research?" The answer to this question must always be "yes," of course, for what other basis could one possibly use for writing a memorandum? Surprisingly, students often asked supervisors to answer some facsimile of this question, only to feel bad afterwards for having done so (as the student did in this case).

The discussion has two parts. In the first, the student asked the supervisor "what [she] expects [him] to find on the issues [he] is researching." The concern, he said, is that there is no "great" case that "just lays it out nice and neat," there are just "pieces, not answers." The supervisor's response, in effect, was not to worry, that "that's what lawyering is. You're rarely going to find a case that spoon-feeds you . . . . Most of the time you have to put the pieces together and then 'lawyer' them to fit." The student got upset at this admittedly platitudinous advice ("No shit. I can't imagine how I got this far without that wonderful piece of information."), but what more satisfactory answer could the supervisor have given? If the supervisor knew what the student would find in his research presumably she would not have asked him to do it in the first instance. Not clear about what was being asked, therefore, the supervisor may have given a rhetorical answer to a rhetorical question, perhaps hoping that the inadequacy of her response would cause the student to rephrase the question. She may not have been clairvoyant, but she might not have been unresponsive either.

What does the student seek to accomplish with this general inquiry? His comments reflect that one of his purposes was to "make sure [the supervisor] knows I'm not dogging my assignment," but he would have better served this purpose simply by writing up his research and turning it in. The clearest evidence of diligence is compe-

tent work, submitted on time. Even his more manipulative purpose, to “plant a seed in [the supervisor’s] head . . . [so as to make her] expectations . . . roughly equivalent to what I intended to deliver to her,” required that he first determine what the memorandum would say when finished. The fact that neither of these articulated objectives was served by the approach adopted suggests that the student’s goal in this part of the conversation must have been different from the ones he stated. Perhaps, like many of the students in these cases, he wanted no more than for the supervisor to attest to his (the student’s) competence, and express confidence in his ability to do the work. The difficulty with this, however, is that there is not a close relationship between being thought competent and asking to be stroked.

We might ask how risky it would have been for the student to have been more direct with the supervisor. Suppose he had said something like, “I’m nervous about doing this memo correctly, and have a couple of questions, which might be non-questions to you. Would you mind if I asked them anyway?” Would the supervisor have thought less of him for starting in this way? Students frequently say yes. But most supervisors I have spoken with believe that nervousness in these circumstances is understandable. They are not bothered by it, believe that it takes more confidence to acknowledge nervousness than to suppress it, and think more highly of students who are direct, provided that they also continue to function. Since nervousness is also often transparent, they say, there seems to be little point in trying to deny or ignore it.

The second half of the conversation is about the student and supervisor’s different perspectives on the importance of risk in the problem under investigation. Here, the student had a genuine question, which he asked fairly straightforwardly (“I’m uncertain as to why the key focus of this case is risk.”). When the supervisor answered equally directly (“The clients claim that risk is the key element”), the exchange might have ended since the client was not a party to the conversation.<sup>64</sup> Instead, it continued in much the same fashion as before. The student disagreed with the client’s view, inviting a response, but for the supervisor to respond she would have had to hear the student’s entire argument, and read the cases herself. Although the student does succeed in getting the supervisor’s attention on the risk issue,

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<sup>64</sup> The supervisor’s response, reprinted on page 385 *supra* as reported by the student, is puzzling. How do the clients know what the key elements of the cause of action are, as the supervisor is quoted saying? And why is the supervisor apparently using the client’s theory on risk to reach a conclusion opposite to the client’s (and perhaps contrary to the client’s interests), namely that the sale was not legitimate? It may be that here the student’s memory, or at least his transcription of it, erred.

here too he would have been better off putting his thoughts in the memorandum, where he could explain his position in detail. As with his first point, the student seems more interested in obtaining approval in advance than in discussing the issue of risk in detail.

At the end of this session, the supervisor might have thought that the student understood the point about deciding for himself how to write the memorandum. But this would have been wrong. At the end of the exchange, the student's underlying thoughts and feelings were critical of the supervisor's response, preoccupied with looking good, and lacking any indication that the student had decided to make his own judgments about how to frame the analysis. The next time a similar problem comes up there is not much reason to believe that the student will behave differently. This is a conversation that probably could have been avoided, but once begun, would have worked better if it had been carried on more directly.

#### *Case Four—Taking Charge Over Work*

The student ("ST") reporting the case described it in the following way:

I walked confidently to my supervisor's ["SU"] office and stood at the door of the office until I was invited in and asked to have a seat. She was on the telephone for what seemed a very long time, but I sat patiently pretending to be undisturbed by the way in which she was wasting my time. I wondered why she did not ask me to come back at a later time. She finally ended her telephone conversation and looked at me with an apologetic expression.

My purpose in the interaction was to express my criticisms of a song writer's contract which I was asked to review. The contract was written for our client who was a musical artist. However, the agreement seemed to be more beneficial to the producer. I wanted to revise the contract in such a way that would be more beneficial to our client. I planned to accomplish this goal by explaining my views to my supervisor in an aggressive manner. I decided to speak in an aggressive manner because I thought that to do otherwise would result in my opinion not being taken seriously.

Underlying Thoughts and Feelings	Dialogue
I am just giving constructive criticism.	SU: What can I help you with. ST: Well, I reviewed the contract and I wrote down some things that I thought needed to be changed.

- She is not acknowledging my opinions.
- I need to get more confrontational.
- So what. While this may be true it has nothing to do with the point I am trying to make.
- She is holding her experience over my head. I still think that I am right.
- SU: There are no provisions in the contract that need to be changed and there is nothing that needs to be added. I wanted you to review the contract only for grammar. I have used similar contracts with all of the artists that I have represented.
- ST: This contract seems to benefit the promoter more than it benefits the writer. The writer is left with almost nothing.
- SU: In order to exploit a writer's material this type of contract is essential. It is very difficult for writers to find good producers. You want to be careful not to scare producers away.
- ST: With all due respect I disagree. I think that we should at least attempt to devise a different type of agreement. If the producer does not agree he will express his dismay but how will we ever know unless we try.
- SP: I have been doing this for many years and I know what should and should not be included in a contract. I think that the contract should remain unaltered.

The student evaluated her effectiveness in the conversation in the following way: "I seem to be making the assumption that effective learning is not effective (sic). I seem to have a habit of becoming defensive when others do not agree with me."

In the take charge strategy there is a much greater correspondence between what a student thinks and what she says. Here, for example, in order "to revise [a song writer's] contract . . . [to make it] more beneficial to [the] client," the student began by telling the supervisor that "some things [in the contract] . . . needed to be changed." The supervisor immediately responded that such changes were unnecessary and furthermore were not within the student's assignment or authority. The student pressed on, expressing her views "aggressively," as she put it, but also accurately. She thought, and said, that the contract was unduly beneficial to the producer, and that there was no risk in trying to change it. The supervisor explained why the contract was drafted as it was ("It is very difficult for writers to find good producers. You want to be careful not to scare producers away."), but the student seemed either not to hear this explanation, or not to believe it ("this [explanation] has nothing to do with the point I

am trying to make”; “she is holding her experience over my head”; “I still think that I am right”).

With the issue thus joined, around the question of what was possible, the student was destined to lose the argument. She had no experience in drafting song-writing contracts, and the supervisor did, so that however long the conversation went on the supervisor would have the final authoritative word. The student could be expected to be angry about this, since generalized assertions of experience are hard to confront and test, and thus make it look as if the deck was stacked against the student from the beginning, as in some ways it was.

But it was not inevitable that the conversation would take this course. A “point-counterpoint” or “salvo-salvo-truce” format is not the only way the student could have chosen to proceed. For example, the contract “seemed” one-sided to her, and from this she concluded that it “needed” to be changed. She might instead have been curious about whether the contract was truly one-sided (her unfamiliarity with the law or the structure of the song-writing industry might have made it seem more one-sided than it was), or about why it was written in a one-sided fashion if in fact it was (producers might be able to demand one-sided terms because they have more bargaining leverage). This curiosity might have caused her to initiate the discussion by asking a question rather than making a statement. She might have asked, for example, “Is this document unfair to our client, or is it just me?”, “How do producers get away with putting terms like this in a contract?”, “Would Madonna have to sign this type of contract?”, or some other such question.

Instead, the student began confrontationally, and so confrontational a start is difficult for a supervisor not to take personally. By rejecting a document the supervisor had used over time, the student in effect attacked the supervisor’s work in general, and not just the present contract. What is surprising is not that the supervisor was defensive, but that in the course of defending her work she explained to the student why the contract was drafted as it was (it is “essential” to agree to such terms because “it is very difficult for writers to find good producers”). But the student adhered to her “aggressive” posture, and did not probe this explanation, to discover whether all producers had such leverage, whether it had always been that way, whether other writers had tried to bargain for different terms and what had happened to them when they did, or how all of this is known about an industry which is private by its nature. The student needed answers to these questions whether she wanted to test her conclusions, or argue for them persuasively.

When we ask “Why did the student proceed in this way if it was

not in her interest?" we are thrown back on a familiar explanation. The student wanted to be "taken seriously" by her supervisor, and believed that presenting her views "aggressively" was the best way to insure that this happened. Aggressively, in this context, meant directly, forcefully, and without doubt or equivocation, as if her views were indisputably true. Perhaps trapped in a trial advocacy view of legal conversation, she felt that to be successful on her own terms she needed to be all-knowing, and to take unilateral charge of the task at hand. "Take charge" was not as popular as "indirection." For most students it proved emotionally too difficult to sustain. But it appealed to this student, and a number of others like her.

### *Case Five—Taking Charge of the Agenda*

The student ("ST") reporting the case described it in the following way:

Two years ago I began working for a small law firm. At the time I started there was another law clerk who had been there for over a year. He and I worked well together, occasionally assisting on each other's assignments. In June he decided that he needed to stop working in order to adequately prepare for the Bar Exam. The two of us reviewed the major cases that he was handling, so that I could step right in to assist the attorney in charge ["SU"]. The [present] conversation took place between the attorney and myself during the last week that the other clerk was working.

Underlying Thoughts and Feelings	Dialogue
I wanted to control the meeting because the attorney never has real time for questions and only gives minor assignments. That's okay. I have already been briefed by the other clerk.	ST: I asked for this meeting so I could begin working on the X case, the Y case, and the Z case. SU: Well, I am not sure what you can do for me. The cases are complex and I have had [the other clerk] working on those cases.
I can do the work and understand the cases. I wanted him to know that I was aware of the various time constraints and motions.	ST: Actually, I am familiar with the different cases because [the other clerk] and I have reviewed them. What I am interested in is completing the work that was in progress and beginning research on the next steps.
I felt that he was putting me off.	SU: I appreciate your willingness to discuss the cases, but I really haven't done much work with them and would need to read the files before giving an assignment.

- I really wanted him to be aware of my wanting and ability to help. ST: If it would help, I could give you a written summary of the recent activity and a factual summary. I read the files last week and discussed them with [the other clerk].
- Damn, another minor simple project. SU: That's okay, I need to sit down and read the files before that and I would need to review them anyway. What you can do is arrange a conference with the other attorney in the Z case so I can have a deadline to read that file by.
- I felt like I could do the job and wanted to try a different tactic. ST: The pretrial is already set for October 4th and to get discovery of the other side by then, I really should draft interrogatories for you to review at the same time.
- I was frustrated and felt he did not think me capable of doing the work. SU: I think you should hold off until I've read the file, so we can discuss it at that time. What else are you working on for the other attorneys?
- I wanted him to know I've done all the major projects and needed work. ST: I finished the motion to dismiss an indictment in A's criminal case, the jurisdictional based motion to dismiss in your case and the summary judgment motion in B's federal case. So this is the perfect time to work on your cases.
- Damn! I just wanted to scream because a court runner/or high school student could do these jobs. SU: Let's see, with X I'm waiting to hear from two doctors regarding expert opinions. You could contact each of them and see if they will help. And in Y, I'd like you to stop by bankruptcy court and pick up some forms for subpoenaing witnesses in an active hearing. And next week, I'll give you other projects to complete.

The student evaluated his effectiveness in the conversation in the following way:

At that point [SU] thanked me for asking to help and said to let him know when I needed other work. I felt that I had done an okay job of trying to pick up the cases. But, the conversation felt hurried, like he was impatient to leave and didn't want my help. Maybe, I should have been prepared for the little assignments and told him that I could be of more use doing the research areas. The ending just left me frustrated and I, in some way, felt that I could do more and was misunderstood. As an aside, [SU] asked an ex-partner to



step back in on the Z case and the discovery still is not complete. Basically, I still get the same projects from him. However, the other attorneys have given me major projects.

This case is similar to the previous one in some respects, and as a consequence, many of the same comments apply. In both cases, the students made decisions about what needed to be done in the work and then set out to convince their supervisors to allow them to do it. But Case Five also illustrates another dimension of the take charge strategy not prominent in the earlier case. The student wanted to work on bigger cases than this supervisor had given him, and decided to use the occasion of another law clerk's leaving to orchestrate such an assignment. In the conversation the student proposed directly that he take over certain of the departing clerk's cases, and even suggested specific actions to be taken in the cases right away. Without disagreeing, the supervisor put the student off, delaying decisions on both re-assignment of the cases, and the specific work to be done. At the end of the discussion, to the student's growing frustration, the supervisor assigned the student new "minor, simple" projects of the type he was trying to escape. The student's attempt to take over the other clerk's cases had not worked. So far, nothing surprising: attempts to control conversations usually meet with resistance, and students are not often in a good position to overcome such resistance from their supervisors.

What is noteworthy about the case, however, is the student's reluctance to attempt to understand the interaction from the perspective of the supervisor. Rather than examine why the supervisor resisted his entreaties, the student grew increasingly frustrated by the failure of his efforts and attributed his lack of success to the supervisor's not "think[ing] me capable of doing the work"—a recurrent student anxiety. But consider the various ways in which the supervisor might have interpreted the student's comments. He might have taken them at face value, as an attempt to orchestrate work assignments, and thought that such a move was presumptuous. He might have liked to give law clerks small, simple tasks at first, to evaluate their skills and build up confidence in their work, and might have seen the student as trying to short-circuit that process. He might also have looked upon clerks as "gophers" or "runners," just as the student feared, and have reacted to the student's efforts as an attack on that view. Or his reaction might have had nothing to do with his attitudes toward law clerks. Instead, he might not have wanted responsibility for the former clerk's cases himself, and hoped to use the occasion of the clerk's leaving as a reason for passing them on to someone else. Asking an ex-partner to step back in on one of the cases suggests that this was at least part (and maybe all) of what was going on. There were a number of

possibilities.

The issue is not whether any of these interpretations of the supervisor's behavior is necessarily correct, for the conversation is too cryptic to be able to tell. Instead, the issue is why the student did not generate multiple interpretations of the supervisor's actions, and test to determine which interpretation was most likely to be true.<sup>65</sup> He could have framed the question to be answered as "What could explain the supervisor's behavior?" rather than "Why is he doing this to me?" To answer this question he could have asked the departing clerk how long it took before the supervisor gave him major projects, or whether the supervisor put off important decisions in conversations with him as well. He could have observed the supervisor's interactions with other people in the office, to determine if strong personalities and confrontational approaches made the supervisor nervous. He could have asked secretaries and paralegals if the supervisor dealt differently with non-lawyers, or if he routinely let cases sit untended for long periods of time, on a kind of "out of sight, out of mind" philosophy. In other words, he could have tried to figure out what interpretation of the supervisor's behavior took account of the largest range of available data, to discover whether the troublesome patterns were present in all of the supervisor's interactions, or just in the supervisor's interactions with him. Without such an analysis, even the decision of how best to take charge of the case assignment task would have been difficult to make. Had the student focused on these possibilities, he might not have *spoken* any differently during this particular conversation, but he might well have suspended judgment about the reasons for the resistance he encountered, and proceeded afterwards to search out information from which to shape a more effective strategy for later meetings with the supervisor.<sup>66</sup>

The inclination to attribute meaning rather than investigate it has more than an accidental relationship to the persuasion mode. Attempts to control conversations usually meet with resistance, as I have mentioned, and anyone using such a strategy must be prepared to overcome it. Reconfiguring another's views, to put them in their

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<sup>65</sup> Perhaps the the student did do this, at some other time that he does not refer to in the case study. My analysis is addressed just to what the case study reports. Even if there was more to this particular story, however, this kind of premature attribution was a recurrent pattern in the cases.

<sup>66</sup> It is worth noting that if the student had pursued this issue with others in the office, he would not thereby have fallen into persuasion mode again. I have mentioned that one element of the "indirection" strategy is to engage in veiled questioning of co-workers rather than speak plainly with supervisors themselves, *see* page 370 *supra*. Here, however, the student's objective would not have been to avoid conversation with the supervisor, but to prepare for it.

weakest form, is one way to do this. There is a limit to the extent one can hear what one wants to hear, since words and ideas are not infinitely malleable, but as we have seen in this and other cases, people rarely speak in a manner that can be understood in only one way. Invariably there is play in the communicative joints, and thus the opportunity to choose, within limits, the version of the other's comments to which one will respond. Taking on an argument in its weakest form does not guarantee that one will overcome it, but it increases the odds that this will happen. For the take charge strategist, therefore, attributing meaning is preferable to investigating it, because it allows one to respond to the argument one is best prepared to rebut.<sup>67</sup>

### *Case Six—Belly Up over Agenda*

The student ("ST") reporting the case described it in the following way:

I approached my supervisor ["SU"] hoping to get more guidance on a project I was doing. She had asked me to update case files, which meant I first had to inventory and summarize the files she already had. There was a problem with doing complete summaries, as some of the information contained in the files was still confidential. I needed to find out the length and detail required of the summaries, as well as establish the exact documents which were still confidential. I set out to ask my supervisor these questions directly, as I thought they were fairly simple and straightforward. I was a little worried though, about appearing stupid because my questions were very easily answered.

#### Underlying Thoughts and Feelings

I just want to establish some rapport with her before asking all my questions. Sometimes I am not always positive she remembers exactly who I am.

#### Dialogue

ST: Hi Ms. \_\_\_\_\_, how are you today?

SU: I'm fine \_\_\_\_\_, what do you have for me today?

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<sup>67</sup> Some students may pursue a different kind of purpose in their attributions of meaning to their supervisors. They may choose, not the most refutable rationale, but the most psychologically comfortable one. Some people may find it more satisfying, at least in an unconscious sense, to see themselves as the victims of unavoidable injustice, rather than as people with continuing potential, and hence responsibility, for changing things.

Good, it looks like she has a little time for me, and will be receptive to what I have to ask. I just keep worrying about how the questions are going to come out sounding. I feel a little tentative here. I am very much aware of how much more experience she has than I do.

So far, so good. Looks like I may actually get what I came for here.

Time out. Why is she hitting me with all this information? I only have a couple of questions to ask her about what I am doing. I do not remember asking her about everything on her desk. If she didn't have time for me she could have said so. I feel kind of ambushed by her complaints. I had nothing to do with a congressional request.

Sure, of course I will do something for you. After all, that really is what I am here for. Work on a congressional report could be pretty interesting stuff. I wonder if she will ever get back to my questions though.

ST: I have just a couple of questions about the stuff you gave me to do last week. I just want to be sure that we're on the same wavelength.

SU: Great, hit me with what you've got.

ST: Okay, here goes . . . .

SU: You understand that I'm a little preoccupied today. This (gesturing to her desk) is all in response to a congressional inquiry. It has me a little crazy, this all has to be ready to go by the end of the day. They want to know how effective some of our programs have been.

ST: That sounds pretty interesting.

SU: Actually, as long as you're here, why don't you do something for me (shuffles through the papers on her desk looking for something). Here, I need cites for these cases (hands me a piece of paper with case names on it). You do know how to use Lexis don't you?

ST: Yes, I have my student password with me . . . .

SU: Great, here you go.

ST: I'm sorry, which of these cases did you need cites for? I can't make out all the names. I have trouble too when I write in pencil, sometimes the lead smears (we're both left-handed).

No problem. I am glad she clarified things, otherwise I would be downstairs forever looking for cases that do not exist, and worse, are not even necessary for the report.

SU: I know what you mean. Here, some of the cases are ones we cooperated on with [another office], so they might have the cite. This one has a litigation release number, so just verify it. Okay, and this one had no litigation release made, so you may not find anything on file. Just check and see if the [other] office was wrong.

ST: No problem. I'll be back as soon as I find all of them.

SU: Oh, as long as you're looking for the cites, you might as well copy the cases, just so I can make sure everything is okay.

Not a problem. Clear instructions are definitely a plus.

ST: Okay, I'll be back as soon as I get done.

The student's report continues:

Time passes. I get almost all of the cites, but cannot find three of them. I head back to [the supervisor's] office to let her know how I did on the assignment, and also to see if now I can get her to answer the questions I came in with the first time I saw her today.

Underlying Thoughts  
and Feelings

I hope this is what she wanted from me. I feel bad that I could not get cites for all of the cases we wanted to use.

Well, here goes nothing. Hopefully her expectations were not too high.

I hope she will be a little impressed that I looked anyway, just to see if there was anything else that could have been useful for her to use.

Dialogue

ST: (after knocking on the door)  
Hi, I'm back from the library.

SU: How did you do?

ST: I found almost everything you asked me to look for. Here are the copies of those cases and litigation releases. I couldn't find this other one in either of the libraries. The search came up with nothing.

SU: That's fine. You know what probably happened? The company being investigated was called [name], but the case was filed under a different name. I'll just get back on the phone with the [other] office and find out how the case was filed. When I find out, I'll get you, so you can get the cite for this one also.

ST: I also looked for the one with no litigation release, just to see if there was anything else out there involving the case that you could use.

Whew! I am glad she understands that there was no cite for the case.

Oops. Guess I should have taken her at her word and not done any more than what was requested of me.

I feel a little dismissed by her. She is done with me, so now I have to go. Well, I may as well try to get my first questions answered now.

I feel like I have just been shut out. I may have more of an idea as to the length of the summaries, but I still have not gotten the answer to my questions. I feel a little frustrated, but I do not want to push my luck by asking too many questions. I am not sure of where I stand with her, so I will let things drop. At any rate, I do not have too much more time to put in today, I can always try again tomorrow.

The student evaluated her effectiveness in the conversation in the following way:

I did not accomplish anything I had expressly set out to do. Rather than get any clarification of the original assignment, I was given an entirely new one to work on. This was not a frustrating experience, however, because my supervisor was very open to most of my requests to clarify the assignment. I think that my approach would have been an effective one, if it were not for the fact that my supervisor's priorities had changed. At the end of our conversation, I felt too tentative to go on, so rather than take a chance on rejection, I left instead of asking questions which would have accomplished my stated goals. I need to be more assertive in my dealings with bosses, and not be so afraid of looking stupid or insecure. Looking at my thoughts and feelings throughout the conversation, I was struck by the insecurity and tentativeness I expressed. I need to work on my perceptions of myself in order to be more successful at achieving my goals.

At the outset, the student's approach reflected the familiar pat-

SU: There would not be anything else on the case since there was no litigation release filed on it. What else have you got for me?

ST: The only other case I couldn't find was this one.

SU: Okay. It probably had the same problem as the other case. I'll call the [other] office and find out what really happened to the case. Thanks for your help. It's been great.

ST: I still have a couple of questions to ask about the stuff from earlier.

SU: Right. Just summarize the files. You should get about two good paragraphs out of them. Use my existing outline as a model.

tern of maneuvering for advantage characteristic of persuasion-mode communication. She initiated the conversation to “find out the length and detail required of the summaries” she had been asked to prepare. This description (and understanding) of her objectives was comfortably unspecific, giving her lots of wiggle room to succeed. For example, what exactly did she want to know? How many pages, on average, each summary should contain? Whether confidential information should be included? How to determine what information was confidential? Whether to summarize the procedural posture of each case, the evidence, or both? Or what? Understanding her objectives at this level of generality made it much easier for her to feel that she had achieved them, whatever her performance. If the supervisor later criticized the summaries, the student could blame the supervisor for not giving clearer and more specific instructions. Framing objectives to guarantee success is one form of competing for advantage, and as such, a subtle but fairly common example of persuasion mode communication behavior.

In addition, the student’s basic query in the conversation, about the length and detail required of the summaries, might actually have been a difficult one to answer. Without reading each file carefully, the supervisor could not say how much detail would be needed to make a summary complete. Yet reading each file carefully was what the supervisor hoped to avoid in asking the student to prepare summaries. “Use your own judgment” would have been a responsive answer, but the supervisor could reasonably have inferred that the student had rejected this solution in deciding to ask the question in the first instance. If she sensed that the question could not be answered easily, the supervisor had two choices: give a rhetorical answer, as in the third case study (“That’s what lawyering is. . .”), or duck the question altogether, as she did. The student criticized the supervisor for not answering, albeit privately, and the conversation moved on, leaving the issue unresolved and the student frustrated, but without a more specific question, it is hard to see how things could have been otherwise. In the process, moreover, the student placed responsibility for the supervisor’s failure to answer on the supervisor, without acknowledging her own possible contribution to the problem. Perhaps, in addition, the question’s unanswerability was part of what made it strategically useful, since any deficiencies in the supervisor’s answer could operate as excuses if the student’s work product was later criticized.

The student’s comments throughout the conversation have many of the same attributive, evaluative, and secretive properties found in the case studies in general. For example, she felt “ambushed” when

the supervisor changed the topic to the new congressional inquiry. But the supervisor might have done this because she did not know how to answer a rhetorical question. Or she might have been concerned about what she might be getting into given the student's possible "wind up" before asking her question ("okay, here goes . . ."), especially if the student's underlying anxieties were manifest in some non-verbal way. The student also suppressed feelings of insecurity, inadequacy, and tentativeness, though she was not an insecure person or she could not have reported and analyzed the case as she did. On the contrary, she was a reflective and insightful student who saw much of what was problematic in the conversation she reported. Still, she did not seem willing to trust the supervisor with her nervousness, perhaps fearful that she might "appear stupid" if she did. Like many of the students in these cases, she might simply have wanted to be assured that she was competent.

The new feature of the case, and the one from which it takes its name, is the student's decision, made privately and unilaterally, to give up on her agenda for the conversation. She began the discussion with a specific question in mind, one which she thought could be "very easily answered." At the end of the discussion many hours later, the question remained unanswered, leaving the student "frustrated" and disappointed. In her *post hoc* evaluation, she attributed this failure to her supervisor's change in priorities. But the student must share part of the blame. The supervisor did not refuse to answer the student's question. The question was not asked. The student's reason was familiar. She did not want "to push [her] luck by asking too many questions," because she was "not sure where [she stood] with [the supervisor]." While this concern is understandable, it is quite possible that either the original decision to ask so vague a question, or the later decision to give up on asking it, jeopardized her standing with the supervisor too.

This case involved a small assignment, which was perhaps makework to begin with, and the student got a partial answer to her question in spite of her hesitation ("You should get about two good paragraphs out of them."). So the effects of her reluctance to be more assertive were minimal. But as in the first case study, if the student could not ask a relevant, work-related question under these conditions, when the stakes were relatively small, how likely is it that she would be able to ask one when more important interests were involved? If she could not ask for herself, shouldn't she have done so for the firm and its clients? For example, if she went away from the conversation unclear about how to prepare the summaries and overdid them just to be safe, spending more hours than necessary



writing them up, wouldn't the office, and perhaps the clients, have been measurably worse off because of this mistaken use of her time? Giving up on a question because a supervisor tries to avoid answering it is appropriate only if the question is unimportant. But if the question is unimportant, it is not clear why the student would want to ask it in the first place. Learning mode discourse requires some measure of assertiveness (though not, to be sure, the over-assertiveness of the take charge strategy).

### *Case Seven—Belly Up over Work*

The student ("ST") reporting the case described it in the following way:

This conversation took place about three days after I got the assignment. And this day was the first time I was able to see my direct supervisor ["SU"] for the work. I had already been working on it by reviewing the files and having my supervisor for assignments [i.e., the one assigning clerks to attorneys] fill in the gaps by answering my questions. But neither of us knew exactly what the work supervisor wanted. So I started the assignment as best as I could. Asking her [i.e., the work supervisor] about it was kind of intimidating because I hadn't really spoken to her before and she was *the* boss in the office.

#### Underlying Thoughts and Feelings

I don't know if I should bother her now since we're at a break from court.

Conversion? But the note on my desk stated that I should dismiss it. Maybe she doesn't know of that additional information yet.

#### Dialogue

ST: I wanted to ask you about these cases. Do you want Motions to Convert or Dismiss on these cases?

SU: On this case, do a conversion motion.

ST: Did you see the note from [another attorney in the office] stating that the Debtor does not have any contact with the attorney's office?

That sounds kind of harsh, but she doesn't sound like she means it in a malicious way. I hope she doesn't think that I'm second-guessing her.

Now I understand the reasoning why we would ask for conversion in some cases and dismissal in others—or at least this attorney's philosophy on it. This is different from what [another attorney] said about the Motion. He said that he asks for both in an either/or situation because he wants to cover all of his options. I wonder if I should tell her what this other attorney said.

I hope that she doesn't think that I'm stupid because she thinks that she's telling me something which she probably considers very elementary.

I understand the reasoning but I'm still a little unclear about the other cases. They seem so new to me and I don't want to make a mistake now. It's better to know her reasoning for a variety of situations so next time I can make the determination on my own.

Does she mean just to ask for only the dismissal or the conversion or ask for both like the other attorney suggested to cover all bases? I don't want to ask her because it does sound like she wants me to ask for just one or the other. I can always ask the other attorney and then she can make corrections on it later.

SU: I don't care what [the other attorney] says. Don't listen to what [that attorney] says because I'm in charge of the case. He wants to file a Motion of Default but Judge \_\_\_\_\_ doesn't like them. And I don't like them, either. I think that there should be penance. The debtor filed a voluntary petition and then if the case is dismissed, he gets everything he wanted because he was able to get the creditors off his back for a little while. He's back to the same position and the creditors might not get anything. So I want to put as many mechanisms in place to prevent just a dismissal. The debtor shouldn't benefit from his lack of diligence and good faith.

ST: I understand. So with this case, should I file a motion to dismiss it or to convert it?

SU: For this first case, you can do a conversion, and this second one, it's ok to do a dismissal.

ST: Ok.  
(She then introduces me to the attorney whose fees are being contested by the debtor. She was the Assistant Trustee so she had to be there also.)  
(She then turns to me.)

Great. I will do that when we finish in court. At least she's saying that she will talk to me about it later. I hope she's not thinking that I don't know what I'm doing and therefore she needs to talk to me first before I do anything further.

I want her to know that I've done work on it already. I don't want her to think that I haven't done anything just because I asked her to clarify what she wanted me to do for the assignment. This was the first time I spoke to her about it because she wasn't in the office when I received the assignment last week.

SU: So check the docket sheet and then after you have everything, come see me and we can talk about it.

ST: I've already finished most of it.

SU: Great

The student did not evaluate his effectiveness in the conversation.

This case presents a substantive law variation on the theme of deferring to supervisor authority and expertise. The student wanted to know whether the supervisor agreed with the decision to assent to a motion to dismiss a voluntary petition in bankruptcy. Another attorney in the office had said that a dismissal was all right, but the student thought it wise to check this out with the supervisor directly responsible for the case. The student was nervous about raising the issue because the supervisor was "kind of intimidating," and the most powerful attorney in the office. On the other hand, she (the supervisor) had praised the student's work on a prior project, and also was "nice" and "patient."<sup>68</sup> The student had the familiar complement of insecurities and anxieties, not wanting to seem stupid, thinking that his questions were elementary, and worrying that the supervisor would think he did not know what he was doing, and he suppressed the same sorts of important questions and confusions. In these respects his case is much like the others.

The interesting feature of the case stems from the supervisor's low-level modification of the bankruptcy code to add a "penance" element to the statutory requirements for dismissal of a voluntary petition. "Penance" was not a legislative or doctrinal term, or a rule of the bankruptcy court, but a personal requirement of the supervisor. She did not want a debtor to "benefit from his lack of diligence and good faith." Penance also was not a consensus requirement of the office. We know from the student's underlying thoughts and feelings

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<sup>68</sup> These positive aspects of the supervisor's behavior came out during the discussion of the case in class.

that at least one other attorney did not demand penance before agreeing to dismiss, and the student evidently had not come across the idea in his work before then. Perhaps without realizing it, the student had uncovered an interesting and familiar issue of legal process, an illustration of the way in which law is modified in its application by the interpretation of enforcing agents. In effect, the supervisor amended the bankruptcy code under certain conditions (though under what conditions was not clear), to make dismissal more or less difficult in particular cases, and this practice raised interesting questions about the fairness, legitimacy, and scope of the bankruptcy law, at least as enforced by this office. For a law teacher, this example of the intersection of practice norms and substantive law is an ideal subject for study.

For the student, however, it may have been just more evidence of the cacophony of expert opinion, something to be coped with or endured rather than inquired into. Yet there were many questions the student might have been curious about, even without reaching issues of jurisprudential abstraction. The student could have wondered how one differentiates between bankruptcy petitioners who get dismissal with penance and those who do not (and in fact he was somewhat curious on this score). What kinds of experiences should count as penance? If only some attorneys in the office had a penance requirement, how did the office insure that all petitioners were treated evenhandedly? Was consideration given to this issue in assigning cases to lawyers in the first instance, or was the issue ignored as a *de minimis* one, not worthy of serious consideration? Did the office have formal guidelines on the issue, or was the matter left to the discretion of individual attorneys? Had the attorneys in the office discussed the issue among themselves, and did each know what standards the others used in determining when to agree to a dismissal?

We do not know which, if any, of these or related questions occurred to the student. At one point, he stated (to himself) that he "understands the reasoning why we would ask for conversion in some cases and dismissals in others," but it is not clear how he formed such an understanding. The supervisor had expressed her "penance" rationale, but had not said what counts as doing penance, whether it was a requirement in every case, why it was required in this case, or why it had not been satisfied. The student acknowledged as much when he reflected that he was "still a little unclear about the other cases."

He also was confused by the conflicting strategic advice he had received from the other attorney ("cover all of [your] options"), but decided not to mention this so as not to look "stupid." His concern almost certainly was unjustified. If two experienced attorneys disa-

gree on an issue of professional practice with which each is conversant, the question of what should be done is not likely to be "elementary." And it is not "stupid" for a person who must work with both attorneys to want to resolve the contradiction, at least in his own mind, before deciding how to act, or what to believe. Moreover, the supervisor's long and perhaps defensive explanation of her position suggests that she might have understood that her view was controversial, and despite its abruptness may indicate that she was willing to talk about it if asked.

Faced with these difficult and confusing questions of policy and strategy which he had to resolve in order to fully understand the work he was doing, the student suppressed his concerns and followed the directions of his most immediate superior. This decision may or may not have weakened the firm's handling of the bankruptcy case, but its effects on the student's understanding of the bankruptcy process and the role of lawyers in operationalizing law might have been considerable. The student chose not to pursue a clearly presented opportunity to discuss the way in which lawyers make, and learn to make, expert judgments, of both strategy and policy. This is almost tantamount to passing on the best experience of being an intern. The student did not think of his decision in these terms, of course, but in hindsight it seems clear that his deferential approach risked undercutting both his own learning and the quality of his work at the firm.

#### *Case Eight—Partial but Troubling Success*

The student ("ST") reporting the case described it in the following way:

As a summer associate . . . of a large law firm, I was working at a branch office of the firm. The firm policy was to have each branch summer associate spend two weeks at the firm's main office in the city to get exposure to the attorneys and practice groups downtown. The advice given to me regarding this two weeks was to get as many small, meaningful, and substantive projects done (and with as many different attorneys) as possible.

The first assignment given to me involved drafting a Complaint for a client/subcontractor who had not received final payment for a construction project. The owner of this construction project had filed for bankruptcy, and failed to make the final payment to the contractor, who in turn withheld payment to the subcontractor (our client, herein "C").

The assigning attorney ["SU"] . . . reviewed the contract and found that there was no language which stipulated that payment to the contractor was a condition precedent to the contractor fulfilling its obligation to pay the subcontractor (Md. law requires such a con-

dition to be express). However, after reviewing the law and studying the contract it seemed that something was missing. In the client's file I discovered that there were Supplements to the Contract, one of which specifically provided that "final payment to the subcontractor was conditioned precedent [*inter alia*] upon the Contractor's receipt of final payment from the Owner."

I was faced with the awkward position of having found what I thought was either: (1) an oversight on behalf of the attorney, or (2) a situation which I could not reconcile with the most recent Maryland case law (i.e., it appeared we didn't have a cause of action until the contractor was paid and then refused to pay our client). I needed to speak with the attorney to determine if: (1) I could be put "back on track" because, perhaps, I had failed to understand how our cause of action arose under Maryland law; or, (2) I should move on to another project because drafting a Complaint, in light of this contractual language, would be putting the cart before the horse (or some such metaphor).

#### Underlying Thoughts and Feelings

I need to indicate that I have done most of the work and have stopped short of writing due to this discovery.

Good mood today, lucky me.

Lay the foundation for the "bad news" and try and sound "legally coherent." Every time I do this I feel like I'm speaking real slowly trying to make the case law logic fall into place, while anticipating the possible questions.

Lucky again, it's probably so easy that if I had screwed it up I would really look silly. He seems to be pushing this to a conclusion . . . maybe I gave the impression that I needed confirmation of my analysis of the case law just cited. Oh, but an important safety tip on the Causes of Action, glad I asked.

#### Dialogue

ST: Hi, Mr. [SU], I was hoping you might have some time to help me focus more on the Complaint you need for Mr. C and to make sure, after having done the necessary research, that I'm still on the right track.

SU: Sure, have a seat . . . tell me what you've found.

ST: [Explain the evolution of case law to the recent Md. cases which call for the "condition precedent" language to be effective].

SU: Okay that sounds good . . . from what I can tell we should be able to put together a Complaint with Breach of Contract, Substantial Performance, Quantum Meruit, etc. . . . Find out which Causes of Action fit, and draft up an appropriate Complaint . . . there's a great book which specifically addresses Maryland Causes of Action.

I'm not going to flounder around here, I'll just slip in this little problem I found innocently . . . I don't want him to think I'm second guessing him, or come across as, "ah ha, found something you missed!"

Thank goodness he cut me off, I was having trouble saying that . . . Why did he throw in the explanation about Mr. C, I hope he didn't think I accused him of missing something, how can I follow up with a completely objective statement of my problem without implying that this was something which should have been known before a draft Complaint was requested?

Maybe if I show him the language he'll recognize it and explain to me what he conceived as the appropriate approach to take with this Complaint. I can at least appear like I have given it a shot (which I have). Actually, I've given it the ol' college try, and I've found something he missed. Maybe he'll cancel this assignment altogether and give me something that is really going to be useful to someone. I don't want to get stuck doing a project that's a "sure loser" or one that will never be seen or used by anyone. I've only got two weeks downtown here to get some good work done.

Uh-oh, either I missed something, or I'm to be asked to do something I find very distasteful. Oh great, a project to be kept on file . . . why? because it's a loser. When he says "straightforward" does he mean it's going to be a lot harder for me to draft this or that it's going to be a lot harder to win the case for our client. I hate advocating a position that I can't support myself.

ST: [jotting notes] . . . Great, I haven't come upon that book yet. I was also troubled by the language which I found in the Supplements to the Contract because it appears it may give us some problems in light of the recent holding in Maryland cases . . .

SU: The Supplements! Do you have them with you . . . I may not have looked closely enough at them. Unfortunately, Mr. C entered these contracts without counsel and then came to us last week when he realized payment was not forthcoming.

ST: [showing [SU] the paragraph and phrase in particular] . . . it seems like the drafter of this contract has reacted to the very language in the Maryland cases because the phrase here is verbatim as to the requirement to create a condition precedent . . . so I'm having trouble finding the appropriate language to use to give our Complaint the necessary assertiveness.

SU: [pondering] Okay, we can still do this . . . it just may not be as straightforward as I had hoped . . . in fact, it may be something I just keep on file until the time comes. It has been some time and I'm afraid if I don't get something in we'll run into limitations problems.

Oh well, if I'm going to do it, I want to get it right the first time so I don't have to re-do it. I'll go out on a limb and explain what I think this breach claim will look like so he knows what's coming or where I was coming from.

He said "yes," but he meant to say "not really," I think. This means I'll have to get as close to attacking the contract without (somehow) drawing attention to the fact that they gave us an explicit condition precedent which sinks our ship.

I'm fishing for any kind of help with the language in hopes that maybe he's done something similar before, or could give me an example.

Oops, he doesn't seem to think we're as bad off as I do, I'll bet that means that there is something I can find to give fairly strong support for the other claims.

I hate when they say "try everything," it sounds so endless. Surely he appreciates that I'm only down here for two weeks.

Time to sound confident again, I feel like I'm floundering in here.

Maybe if I respond with a legal argument, carefully refuting his concern regarding the possible limitations problem, I can get another shot at canceling this project altogether. At least I can show that I'm thinking.

ST: Do you still want the breach of contract claim in the Complaint because that's what I'll probably have the most trouble with . . . just finding the words to make it sound forceful enough, I mean I can do it, I may just have to make it as simple as . . . "we had a contract, we complied with it, and we haven't been paid."

SU: Yes, the breach of contract claim will be the main thing here, you'll need to allege the elements and make reference to the contract.

ST: Okay, I guess I'm just troubled by making reference to the contract, at least with any specificity, because surely the opposition will be relying heavily on the provisions in the Supplements . . . how do you do that without seemingly ignoring the obvious flaw, and yet . . .

SU: Well, we're not sunk on this thing . . . I agree that the provision hurts us, but we have substantial performance and all [thinking] . . . I think you can supply me with a Complaint using general language under the breach claim and then follow-up with appropriate specificity in the other alternative claims of recovery. Try everything . . . like I said, I'll have to review all this . . . I would just like to have a Complaint ready.

ST: Okay, I can do that, I just wanted to make sure that I wasn't misreading the provisions here, and to confirm that you wanted me to go ahead with this. I don't think there'll be limitations problems with this because we could argue that the cause of action hasn't arisen yet until the Contractor receives payment, that is when the obligation arises to pay Mr. C his final payment . . .

[pregnant pause]



Darn, he didn't jump at the hint that limitations wouldn't be a problem, I hope he doesn't think I'm whining, well I'm just going to have to make this the best Complaint he's seen . . . I think I'll hand it in early too, to make up for any "cool points" I may have lost here.

What's that, I'm right! I missed that, say that again . . . but I still have this project.

The student did not evaluate his effectiveness in the conversation.

This case presents a more interesting and complicated set of issues than we have seen till now. The student was faced with the difficult and not infrequent problem of correcting an oversight by his supervisor. The supervisor had asked the student to draft a complaint for a subcontractor client who wanted to sue a general contractor for nonpayment for work done on a construction project. During the course of his research the student discovered a set of Supplements to the construction contract which conditioned payment to the client on payment by the project owner to the general contractor. The general contractor had not been paid, and was not likely to be since the owner had filed for bankruptcy. The supervisor did not seem to be aware of the Supplements or this condition precedent in asking the student to draft the complaint. The student was in the "awkward position" of having to point out the supervisor's oversight without making the supervisor "think [the student was] second guessing him, or com[ing] across as [saying] 'ah ha, found something you missed.'"

Assessing this case is complicated because of the seemingly successful, yet problematic, character of the student's response. The student was able to point out the existence of the Supplements, and their importance to the case, without antagonizing the supervisor, or provoking him into a feared defensive or vindictive response.<sup>69</sup> By most standards this would make the interaction a success. The student was

Anyway, I'll move ahead with this, at least now you'll know why some of the claims in the Complaint will seem kind of "shallow" or less forceful than the others.

SU: Not a problem, do the best you can with it, it'll really save me time, then I can see I may be doing some editing in the future on it. Thanks for coming in, I think you're right on about the Supplement provisions, I just wish Mr. C had come to me before he signed all these.

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<sup>69</sup> The student's concern about retaliation might have been justified. Supervisors in the cases sometimes did punish students who pointed out supervisor mistakes, though these punishments were not always imposed consciously or mean-spiritedly. This may have happened here also, as I will discuss shortly. The threat of retaliation is sometimes genuine. Nevertheless, my impression from discussions with students both about the cases in this study and about externship work generally, is that this threat is usually more perceived than real.

happy with his efforts, and most students in his position would have been as well. Lawyers looking at the interaction describe the student's maneuvering as skillful and clever. But the student accomplished what he did in an indirect, somewhat manipulative, and potentially misleading manner, and these qualities may have had long range consequences for the supervisor, the firm, the client, and the student himself. In the end, the scenario is troubling, both for what it might have taught the student about working with colleagues, and for what it says about the way lawyers in practice avoid important but difficult normative dimensions of the strategy decisions they face.

The first noteworthy feature of the case is that it involves an unusually sophisticated and confident student. Unlike many of the earlier cases, where supervisors pretty much decided what the conversations would be about, here the student controlled the content and form of most of the discussion. Although ostensibly questioning the supervisor about what should be done, for the most part the student identified the subjects to be discussed, decided when the topic should be changed, and chose the course for the conversation to take (though he did not obtain the result he had hoped for).

The overall structure of the student's presentation was "Socratic" in the "primrose path" sense of that term. That is, he began by laying a foundation of substantive background law against which the questions to come would be analyzed. This was his summary of the Maryland case law on conditions precedent. Then he set a "Socratic" trap ("I was also troubled by the language which I found in the Supplements to the contract because it appears it may give us some problems . . ."). The relevance of the Supplements appears to have been a surprise to the supervisor, as the student predicted it would be, but he (the supervisor) recovered immediately by acknowledging that he might have missed something ("The Supplements! I may not have looked closely enough at them"), and, in the same sentence, by blaming the client for signing the contracts without consulting counsel first. Whether the supervisor knew about the Supplements at all seems an open question. The student then sprung the trap, by "showing [the supervisor] the paragraphs" in the Supplements which contained the condition precedent language, and pointing out how they made it difficult to find "appropriate language . . . to give [the] Complaint the necessary assertiveness."

This had the potential to be a tense moment in the conversation. The supervisor might have been put off by the student's indirect approach, which might have made him feel he had been set up rather than informed. Rather than begin the conversation with a direct statement of what he wanted to say, such as "I found some language

in the Supplements to our contract that makes it look like we might not have a breach of contract claim after all, at least not yet,” and then explain what he meant in response to the supervisor’s almost certain request for details, the student made the same point obliquely and calculatingly. He (the student) did not say that he thought the Supplement language was fatal, but instead only hinted that it might be, explaining that he was “having trouble finding appropriate language” for the complaint, and asking rhetorically how he could allege breach of contract “without . . . ignoring the obvious flaw” in the claim.

The feared tension never emerged, however. The condition precedent point was not lost on the supervisor, but he did not seem to fault the student for raising it indirectly. In fact, the student’s inexplicit, almost apologetic way of presenting the point may have been what allowed it to register. The supervisor may have interpreted the student as “walking on eggs” and being filled with self-doubt and tentativeness, and this may have prevented him from thinking that the student was saying “Ah ha, [I] found something you missed.” Once assured that he was not being put down by the student, the supervisor was free to incorporate the student’s contribution into his understanding of the problem.

The difficulty with the student’s choice of an indirect, “no friction” (one is tempted to say “win-win”) approach to the conversation is that it still seemed to be meant to avoid any more discussion of controversial and difficult issues than necessary, and to measure that necessity in a worryingly narrow way. For example, rather than “push his luck”—as he might have perceived it—once the hard issue of pointing out the Supplement language had been navigated “successfully,” the student allowed the discussion to end. The result was that other important but hard issues were left unresolved. The student still had to prepare a draft complaint in which the breach of contract claim would be “the main thing.” He was to do this “using general language under the breach claim and then . . . appropriate specificity in the . . . alternative claims.”<sup>70</sup> “Try everything,” he was told, as if this would have any more meaning to the student than it did to the supervisor. How the student was to allege the elements of breach of contract, when the facts necessary to establish such allegations did not exist, was in some ways a more difficult question than the question of whether a breach existed in the first instance.

The student apparently decided not to ask this and related questions because he was concerned that the supervisor might think he was “whining.” He resolved instead “to make this the best Complaint [the

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<sup>70</sup> The supervisor obviously did not hold himself to the latter half of this standard—the requirement of “appropriate specificity”—in giving the student instructions.

supervisor's] seen." A few moments earlier, he had already told the supervisor that he could "have a Complaint ready," even though he did not know how he would finesse the condition precedent issue, thought the project was "distasteful" and a "sure loser," and believed that the complaint would "never be seen or used by anyone."

If it was up to him he would have cancelled the project altogether, but he did not say this. He thought that telling the supervisor about the Supplement language would cause him (the supervisor) to cancel the project on his own, but this seems wishful thinking. If the supervisor did not want to hear about the Supplement language, and was surprised and dismayed by it, as the student thought he would be, then denying its significance was as likely a response as cancelling the project. There was no reason to expect the supervisor to take responsibility for making an argument the student understood better, but was unwilling to make.

Moreover, there was ample reason to be concerned about the assignment to draft this flawed complaint. Perhaps the supervisor truly wanted to prepare a complaint for the file, as he said, so that it would be available for use should the appropriate occasion arise.<sup>71</sup> Having pleadings already prepared can sometimes corroborate leveraging moves in negotiation, and is thus often a useful thing to do in advance. But if this was the supervisor's motive he would not have wanted the student to prepare a pleading which equivocated on, or ignored, the condition precedent issue. A complaint which failed to allege compliance with a condition precedent could not survive a motion to dismiss, and a complaint which alleged compliance could not have been drafted in good faith. Drafting a complaint which would have been either useless or legally insufficient, therefore, had more of the earmarks of a gesture to save face than of actual, meaningful work on the case. It seemed designed to allow the supervisor to acknowledge the importance of the student's discovery without requiring that he (the supervisor) admit his oversight in giving instructions to the student in the first place.

It is also conceivable that with this assignment the supervisor after all may have punished the student for pointing out the problem created by the Supplement language. Made aware that a complaint based on breach of contract was now premature and, given the owner's bankruptcy, probably not going to be needed at all, the supervisor told the student to continue to work on it anyway. If this was

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<sup>71</sup> It is also possible that the supervisor planned to file the complaint, fudging on the issue of compliance with the condition precedent. This seems to have been the student's view, and in its support, the supervisor did say that he was "afraid if [they didn't] get something in [they would] run into limitations problems."

largely dead-end and time-consuming work, which would deny the student "exposure to attorneys and practice groups downtown," as the student feared, then the supervisor's instructions prevented the student from making a good impression in his important two-week assignment in the main office. The supervisor may have put the student's career in the firm on hold, in other words, whether intentionally or not. If the student saw it that way, it would not be surprising if he resolved not to raise such problems in the future. In retrospect, it is not clear whether being direct about the condition precedent problem would have been any more harmful to the student's interests than bringing it up obliquely. What at first glance appeared to be a skillful resolution of a difficult dilemma may turn out, on reflection, to have been too clever for its own good.

It is also noteworthy that there was a Rule 11 concern lurking in the background, of whether the student could draft a complaint he knew could not be filed in good faith. This concern does not appear anywhere in the student's statements or thoughts, though in many ways it was the most serious of the problems raised by the student's discovery. This problem existed, moreover, even if the complaint was not destined for immediate use in court but only for the attorney's own files. In a perfectly plausible scenario, the student might have drafted the complaint so as to avoid reference to the condition precedent issue, placed it in the client's file and forgotten about it. Another clerk or lawyer, at some future date, unaware of this history or the condition precedent issue itself, might have activated the draft, filed the complaint thinking it was ready to go, and subjected the firm and possibly the client to Rule 11 sanctions. Since the "empty head, pure heart" defense to Rule 11 is no longer available,<sup>72</sup> serious harm could have resulted, all because the student's willingness to risk the friction resulting from direct confrontation, and the supervisor's tolerance for embarrassment resulting from admitting a mistake, were limited. Multiply this commonplace interaction many times over, and one gets a sense of how the difficult normative questions involved in commencing litigation for a client can drop out of day-to-day law office conversation. When this happens, lawyers do not flout the law so much as simply not see it. Other lawyers in the office do not usually point this out because there is little if any incentive for them to do so, and no immediate penalty if they do not. Lawyers are no more immune from short term thinking than the polity generally.

It would have been nice if the student had responded to his predicament in a more direct manner, but that rarely happened in the

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<sup>72</sup> See *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.), *cert. denied*, 497 U.S. 851 (1986).

cases I collected. The approach described in this case is about as skillful as students got in hard cases, that is, those in which something ambitious and difficult was being tried. This student articulated a somewhat accurate version of what he believed and felt, without antagonizing the supervisor in the process, and his point seemed to influence work on the case. The supervisor was able to avoid embarrassment by blaming the client, and the student was able to avoid antagonizing the supervisor by being awkward and apologetic. The student changed the direction of the case from that set by the supervisor for the good, without rupturing his working relationship with the supervisor, and that is quite a lot.

But looked at from another perspective, the case is also a good illustration of what is wrong with persuasion mode conversational strategies, even when they "work." One should not have to go to such lengths to help a supervisor save face, or have to choose which difficult issue to raise on the theory that raising more than one is "pushing one's luck." Work which is improved so incrementally and hesitatingly is likely never to be sophisticated, and decisions made under the cloud of so much irrelevant baggage are likely never to be truly intelligent. Persuasion mode interactional strategies are, to paraphrase Owen Fiss, a concession—to the conditions of modern law practice, to the nature of legal training, perhaps even to the type of person attracted to law—to be tolerated perhaps, but neither praised nor admired,<sup>73</sup> and, one might add, to be improved upon whenever possible.

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In reading through the foregoing cases several distinct impressions emerge. It is clear, for example, that students thought about a whole lot more than they expressed to their supervisors, and that much of what they did not say was highly personal and critical. In fact, for me, the extent and intensity of this underlying criticism was the biggest surprise in the cases. It is probably safe to say that these patterns are also present in students' law school conversations with their professors. A few of the cases collected in the study, but not reproduced here, involved conversations with law professors, and in those cases most of the same patterns were present. The cartoon bubble over the students' heads, in other words, is often a whole lot more interesting and negative than the words that come out of their mouths.

One is also struck by the absence of any expression of curiosity, ignorance, doubt, or sense of shared responsibility for client interests

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<sup>73</sup> See Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (settlement is no cause for celebration, but at best "a capitulation to the conditions of mass society," a capitulation that "should be neither encouraged nor praised").

in the cases, both in what the students said and in what they thought. They did not seem to see themselves as their supervisors' colleagues (even if "junior" colleagues), notwithstanding that that was the relationship they professed to want. They were novices at most of the work they were asked to do, recognized that, and agreed in principle that novices need to ask for help from experts. Yet they rarely did this in a candid way. They behaved as if they were certain when they were confused, knowledgeable when they did not understand, suspicious when they could have been trusting, and accepting when they should have been questioning. Many of their private thoughts were highly insightful, and would have been quite useful to supervisors who were not thin-skinned and could have run with them. But they were afraid to be transparent because they thought they would "look stupid." Perhaps to avoid facing rejection, they rejected themselves and their supervisors preemptively—but of course that meant they endured a form of rejection anyway.

It is hard to know whether these patterns reflect a problem of law practice generally, or a problem of a particular group of novice lawyers. Did the students talk this way because of something structural and timeless about law practice discourse, or because of who they were, and how they had been educated? Would they have conversed in the same manner if they had been novice monks, musicians, or morticians? It would be interesting to see if similar patterns appear in the conversations of experienced lawyers, but collecting such data would be much more difficult to do. Lawyers are not as guileless as students (I mean this as a compliment to students). Their professional personas, like those of politicians, are "on" more of the time, and getting them to fill in the left-hand column of underlying thoughts and feelings in a non-strategic and candid fashion would be exponentially more difficult.

The students in these cases were relatively willing to reconstruct and report personal data spontaneously without first asking how it would look. And having reconstructed it, they also were willing to analyze the data honestly and critically. Lawyers are less likely to provide such data and to analyze it as critically because they have less need for the insights such a study would provide. They have discourse strategies which "work" in some sense, and are more likely to believe that what works need not be fixed (or examined). Student strategies are still developing, and studying the various forms they could take is often thought by students to have real payoffs (and does).

It is my impression that persuasion mode strategies are quite widespread throughout law practice discourse generally, but this would be difficult to establish. Certainly, many of the supervisors in

the cases studied here seemed to use persuasion mode strategies as extensively as the students (though without knowing the supervisors' underlying thoughts and feelings we cannot be altogether sure about this). Lawyers seem to develop in one of two directions as they become experienced and successful. Some become more candid, curious and cooperative in their interactions with colleagues. As they have less to prove, they seem to discover that they have more to learn, and as the (always unrealistic) anxiety of looking stupid subsides, the interest in learning from others increases. Others—it is hard to say which group is larger—seem to become more closed, defensive, combative, and controlling as they achieve greater and greater success because, they believe, of these very qualities. They seem to view looking critically at their conversational strategies as a threat to all they have achieved, and self-knowledge as an impediment to continued effective performance. The case studies we have just examined do not tell us which pattern of development is more common, nor whether persuasion mode discourse is a problem of the profession as a whole.<sup>74</sup> Nonetheless it is helpful to see what such discourse looks like at the creation, to see how innocent and innocuous it often is when just getting started.

#### IV. WHAT THESE CASES TELL US ABOUT EXTERNSHIP INSTRUCTION AND WHAT IF ANYTHING SHOULD BE DONE ABOUT IT

The foregoing cases suggest that the process of ecological learning can be a deeply problematic one, in which students are absorbed into a practice world where communication patterns discourage student reflection more than they enhance it. These patterns stand out in the case studies, though they may escape detection in surveys of student and teacher opinion about what has been learned. The conversations we have just examined frequently were less collaborative explorations of strategic puzzles than they were struggles over the imposition of pre-determined and sometimes quite debatable solutions for what were seen as relatively straightforward problems. In these

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<sup>74</sup> Lawyers may be no more effective in talking with one another than they are in talking with clients, *see, e.g.*, DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* (1974); Hurder, *supra* note 27; Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 *YALE L.J.* 1663 (1989); William H. Simon, *Visions of Practice in Legal Thought*, 36 *STAN. L. REV.* 469 (1984); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUMAN RIGHTS* 1 (1975), or talking with adversaries, either in private negotiations, *see, e.g.*, Menkel-Meadow, *supra* note 37, at 964-94, or in courtroom advocacy, *see* Condlin, *supra* note 16, at 17 n.28, and authorities cited therein.



struggles, students—and supervisors<sup>75</sup>—frequently were more secretive than open, more controlling than curious, more indirect than candid, more locked into pre-set views than interested in discovering new perspectives, and more intent on taking unilateral control than on sharing authority. The case studies paint a picture of an educationally less attractive world (at least with respect to the subject of learning from colleagues), or even a less benign one, than is often claimed to be the case, and law schools are right to be concerned about sending students into it in an unmonitored way. This is not to say that externship settings are educationally more problematic than those of the in-house clinic, for all is not perfect in the clinic either,<sup>76</sup> but it is to say that legal education's long-standing nervousness about apprenticeship or externship instruction has a basis in fact.

#### A. *The Causes of Students' Persuasion Mode Behavior*

To identify the problem is not to identify its solution. Before we can say how this problem might be addressed, and in particular how externship instruction can be shaped so as to respond to this problem while still retaining the value of ecological learning, we need to understand its causes. Thus we should ask *why* the students behaved in these ways. They were nervous about performing well, and unsure that they would be able to measure up to what they took to be their supervisors' expectations (which, in retrospect, probably were their own unrealistic expectations for themselves). Under the stress of these pressures they seemed to revert to basic, if not always consciously understood, beliefs about what it means to perform well as a lawyer. These beliefs, it turned out, gave a higher priority to managing relationships and conversations than they did to learning from them. At one level, this says something about who the students were, and more generally, something about the kinds of persons who become lawyers. There is a good deal of intelligent writing on this "psychological" explanation for lawyer persuasion mode (or "adversarial") behavior, however, and I will not pursue it here.<sup>77</sup>

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<sup>75</sup> Throughout this discussion I have focused consistently on student failings, and yet it is arguable that the supervisors performed at least as badly. Some might see this focus as a form of blaming the victim, or at least the less powerful, but that is not my intent. The case study project was designed to be a study of only student learning. The data collected are complete (or as complete as the method used permits) only for students, and I have discussed the issues raised by the cases only with the students involved. No doubt a richer analysis would be possible if supervisor perspectives could be factored in, but trying to get this information would have had costs as well. See note 46 *supra*.

<sup>76</sup> See Condlin, *supra* note 25, at 260-74 (discussing communication patterns in in-house clinic supervision).

<sup>77</sup> See, e.g., RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS (1989); Robert

More interesting are the nurture corollaries to this nature argument. Here I will consider three such “environmental” explanations: students’ immersion in office culture; their subjection to supervisor power; and their training in law school. First, the students’ behavior might represent the results of conscious choices based on calculations about what traits and skills would be valued by the offices in which they worked. The “possessive individualism”<sup>78</sup> at the heart of the culture at large is often reproduced in a related “take charge, never explain, and never apologize” ethos in law firm practice, partly captured in the popular notion of the lawyer as adversary champion. Trying to take charge of conversations, one of the strategies the case studies display, fits smoothly with this ethos. More broadly, while persuasion mode behavior is not the same as at least the most well-known forms of adversary champion behavior—except for some versions of the take charge strategy it is not theatrical or stylized enough for the courtroom—it contributes to or constitutes adversary champion behavior in some essential respects. Most importantly, it helps win conversational exchanges without appearing to have done so. In other words, it increases the likelihood that the outcomes sought by persuasion mode speakers will be accepted and implemented by other members of the relationships or groups in which they are acting, while at the same time minimizing resistance to and animosity for their (persuasion mode speakers’) getting their way. This latter quality allows lawyers to succeed in adversarial maneuvering over the course of a career in law practice without building up a reservoir of anger or resentment in others that will sometimes spill over in particular cases to the lawyers’ disadvantage.

Recognizing this fit, the students might have predicted that their supervisors would see a predisposition to “win” conversations as a desirable trait and would want to reinforce and develop it. They might have inferred that their supervisors would view any in-house cost in lost learning (to the extent they thought about it) as more than offset by client gains realized when the students were turned loose on adversaries. Almost all of the students received good to rave reviews from their supervisors, and many were asked to continue on in their firms after their externship semesters ended, so this calculation might have been correct.

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Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972 (1961); Alan Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971); Andrew Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93 (1968).

<sup>78</sup> The phrase, and the theory underlying it, are from C.B. MacPherson. See CRAWFORD B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1979).

On the other hand, the students would have worked in their offices for only a short time before making these calculations. It seems a little remarkable that they sized up their situations so quickly, and a little surprising that the situations turned out to be so much alike. The unlikelihood of so many independent calculations being made so rapidly suggests that a pre-existing and shared conception of appropriate lawyer behavior was driving the students' actions, more than particularized calculations about the kinds of behaviors that would play well in their respective situations. Individual law firm cultures may have reinforced the students' conception of appropriate behavior, but my lack of knowledge about the firms involved prevents me from pursuing that possibility here.

Second, it is possible that the students acted as they did out of fear. The students were only junior "colleagues"—in other words, subordinates—of their supervisors, and the supervisors had power over the students, to enhance or impair their job prospects. There also were sometimes significant differences, on such factors as race, gender or other such characteristics, between students and their supervisors. The externship students were filled with anxiety,<sup>79</sup> and the sources of student fear deserve more examination. My own data and discussions with the students simply do not support generalizations either way about the role of issues of difference. It is also difficult to be certain whether students actually faced real risks of unfair, vindictive behavior by supervisors, though my sense is that usually such risks, if they were felt, were more perceived than real.<sup>80</sup>

Overall, my sense from discussions with the students is that they were not fearful of particular supervisors as persons. Rather their anxiety seemed to be directed to the supervisors as supervisors, that is, to the supervisors acting in role. On this score, aside from the obvious concern the students had about earning positive rather than negative evaluations, it seemed that they feared supervisors because the supervisors were, or at least were perceived to be, expert practitioners. As such, the supervisors were the antithesis of what the students saw themselves to be, and also the ultimate embodiment of what the students wanted to become. To the extent that supervisors frightened students, it seemed to be primarily because the supervisors reminded the students of the size of the gap between the students' ideal world and their real world, and the very real possibility that they might not close this gap. I take it, however, that this is the fear of law practice itself, for which the supervisors were a proxy, and not of the supervisors themselves as people. To the extent that students adopted persuasion

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<sup>79</sup> See pages 368-70 *supra*.

<sup>80</sup> See note 69 *supra*.

mode tactics out of fear, then, the fear they were addressing may largely have been a generalized anxiety about law practice, rather than any specific danger of harm at the hands of their supervisors.

A third type of "cultural" explanation is particularly important for law teachers to consider. The patterns in the students' conversations look remarkably like the patterns in law school communication generally, in and outside of the classroom, and in the journals as well. This assertion will be controversial. Many legal academics explicitly reject the adversarial model of lawyer role, and the controlling and competitive communication practices associated with it. They see legal relationships as cooperative undertakings based on mutual trust and support, shared power and responsibility, and an underlying consensus on applicable principles and norms.<sup>81</sup> They believe that such relationships are created and sustained by learning mode types of behavior (though they do not use this term), and that they teach their students this more communitarian way of interacting. But these teachers probably remain a minority within the academy. Moreover, while the differences between adversarial and communitarian views are numerous and profound, the various ways in which the two views are discussed and defended in law school conversation frequently are not. Proponents of each view often make the case for their respective positions, so to speak, in persuasion mode terms.<sup>82</sup> Since law school

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<sup>81</sup> Alternate dispute resolution, feminist, and communitarian legal theory are the areas of scholarship where these views are most prominent. See, e.g., FISHER & URY, *supra* note 37; MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); Glennon, *supra* note 27; Goldfarb, *supra* note 27; Menkel-Meadow, *supra* note 37; White, *supra* note 27.

<sup>82</sup> I do not mean to suggest that all advocates of non-adversarial thinking fall into combative modes of advocacy, for they do not. For a discussion of all of the current hot-button issues in legal education by a clearly identified communitarian thinker, in a cordial, balanced, and bipartisan manner, see GLENDON, *supra* note 81, at 199-229. While Glendon's chapter titles are not always that friendly (for example, "The New Academy - Look Ma! No Hands!"), I assume that an editor wrote these titles.

Carrie Menkel-Meadow's recent dispute with David Luban over the relative merits of settlement versus adjudication, however, is a good example of the kind of argument I have in mind. Luban adds an important philosophical dimension to an early Owen Fiss argument against settlement, see Fiss, *supra* note 73, at 1075, in part by grounding Fiss's argument in a "public-life conception" of political legitimacy. See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2626-40 (1995). (Luban's discussion is much more complicated than this, ultimately rewriting Fiss' argument as much as grounding it, but for present purposes the foregoing summary will do.) Menkel-Meadow responds, not by exploring what Luban could mean by a "public-life conception" of political legitimacy, or how his argument differs from Fiss', but principally by claiming that Luban has got it wrong. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L. J. 2663 (1995). The title of her response, *Whose Dispute Is It Anyway?*, sets this adversarial tone from the outset, and she maintains the tone throughout.

This is surprising, since Menkel-Meadow is well known for her long-standing rejection

conversation is the dominant image most students have of the way lawyers talk, it is not surprising that they would try to imitate it in their first legal jobs.

This is not to say that legal educators set out consciously to teach students to attribute rather than investigate meaning, keep agendas private, agree or disagree as a matter of reflex, fail to inquire, own up or test, and the like, at least not exclusively, but just that they regularly act that way themselves, and students understandably follow their lead. Again, the problem is not with these practices in their own right. Persuasion mode behavior has a place in legal advocacy, and always will be part of a competent lawyer's complete repertoire of communication skills. That, in part, is why law teachers learned these skills in the first instance, and why many consciously continue to teach them to their students. The difficulty, instead, is that legal educators often fail to articulate or demonstrate an alternative or corollary

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of adversarial, competitive, and antagonistic communicative methods generally, as she reminds us in a mildly astonishing opening paragraph:

I have often thought myself ill-suited to my chosen profession. I love to argue, but I am often too quick to say both, "yes, I see your point" and concede something to the "other side," and to say of my own arguments, "yes, but, it's not that simple." In short, I have trouble with polarized argument, debate, and the adversarialism that characterizes much of our work. Where others see black and white, I often see not just the "grey" but the purple and red—in short, the complexity of human issues that appear before the law for resolution.

*Id.* at 2663.

The paragraph is "mildly astonishing" because Menkel-Meadow seems to suggest that Luban (or perhaps everyone other than herself—her term is "others") does not understand the "complexity" of the issues involved in the "informalism" debate. There is plenty of evidence to the contrary with respect to Luban. In addition to the *Erosion of the Public Realm* piece, *supra*, see, e.g., David Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 PHIL. & PUB. AFF. 397 (1985); David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381 (1989).

More importantly, there is little about the manner in which Menkel-Meadow argues with Luban that is different in any fundamental respect from the adversarial manner she rejects. Her objection to adversarialism, in other words, is itself an instance of adversarialism. She argues well. My point is not that she is wrong and Luban right (that question does not concern us), but just that she is more evaluative, judgmental and dismissive of what Luban has to say, than curious about whether he has added anything new to the discussion. She does not try to see the links between her view and his, or identify the interpretive and argumentative moments, in the data they start with and the theories they espouse, at which their respective analyses took different turns. Instead, she tries simply to show that Luban is mistaken, a move made even stranger by the fact that she and Luban do not disagree about very much at all. Luban seems to recognize this in the introduction to his article, where he states that "the question cannot be 'for or against settlement?' but 'how much settlement?'," see Luban, *Settlements and the Erosion of the Public Realm*, *supra*, at 2620, echoing and agreeing with the title to and argument of an earlier Menkel-Meadow response to Fiss. See Carrie Menkel-Meadow, *For and Against Settlement: The Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985). Yet Menkel-Meadow seems not to see it this way.

method of communication, appropriate for situations and relationships in which the principal objective is learning and not advocacy. When only one approach is presented, the tacit lesson to be drawn is that there is but one way to talk in law, irrespective of the situation, relationship, or task, and the lesson usually registers. Persuasion mode communication skill may be the one subject law schools teach successfully by the pervasive method.

### *B. What Should Law Schools Do?*

If law schools are one of the causes of persuasion mode behavior, or even if they are simply one possible vantage point from which to challenge the forces within the profession that encourage such action, we might then urge the schools to chart a new course. The most obvious response is to suggest that law schools should teach students how to learn from colleagues. The curriculum could differentiate between advocacy and learning, show how each process contributes in distinctive but equally important ways to the practice of law, and help students to develop both kinds of skills. While acknowledging that advocacy-based communication strategies produce learning, legal educators could show how these strategies inhibit it as well, and how they need to be supplemented if they are to represent a complete package of lawyer communication skills. While initially attractive, however, this reform may be easier to describe than to implement. The reason is one I have already alluded to, namely the existence of widely shared conceptions of the lawyering role, conceptions that favor adversary behavior.

Lawyers are essentially communicative animals. They are constituted by their talk. Any attempt to change that talk, because it is a change of identity and not just skill, must be consistent with the nature and limits of lawyer role if it is to succeed. This requirement creates problems for the project to make lawyers more self-conscious learners. With all of the filigree and garnish removed, the core of what most lawyers do is to act as relational agents<sup>83</sup> "within the bounds of

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<sup>83</sup> I have borrowed this term from William Eskridge's discussion of the judge's role in statutory interpretation. As Eskridge explains, "A relational contract is one that establishes an ongoing relationship between the parties over time; in many respects the contract is incomplete because of uncertainty about what problems will occur, but the parties understand that all will make their best efforts to accomplish the common objectives. In a principal-agent contract of this type, the agent is supposed to follow the general directives embodied in the contract and the specific orders given her by the principal, but her primary obligation is to use her best efforts to carry out the general goals and specific orders over time." WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 125 (1994). In the context of lawyering roles, Eskridge's definition helpfully focuses on the considerable discretion lawyers do enjoy, and on the ultimate confinement of that discretion within the bounds of fidelity to the lawyer's principal, namely the client. See generally MODEL

law.”<sup>84</sup> Lawyers are not free-lance policy planners, wild-card social critics, or public-good problem solvers. They are agents. They represent clients, whether “in trouble” or not, with interests potentially or actually adverse to other persons,<sup>85</sup> and their overriding responsibility in this representational process is to protect client interests.

The obligations of relational agency are complicated, occasionally work at cross purposes, and differ from one setting to the next. Overall, they would seem to require lawyers to be various combinations of learner and advocate as different situations demand, though not always in equal measure, or necessarily at the same time. In relations with clients and colleagues lawyers should be principally learners.<sup>86</sup>

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RULES OF PROFESSIONAL CONDUCT Rules 1.2 & 1.4 (1983).

<sup>84</sup> The phrase comes from the famous “zealousness” obligation of Canon 7 of the Model Code of Professional Responsibility. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980) (“A lawyer should represent a client zealously within the bounds of law”). The content of the obligation, if not its literal language, has been largely carried over into the Model Rules, notably in the Comment to Rule 1.3. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1983) (“A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client.”).

The “within the bounds of law” qualification is needed to capture the idea of the lawyer as an “officer of the court,” with responsibilities to judges, adverse lawyers, other parties, witnesses, and the like. See Ruth Bader Ginsburg, *Supreme Court Discourse on the Good Behavior of Lawyers: Leeway Within Limits*, 44 *DRAKE L. REV.* 183, 185 (1995) (“in Supreme Court decisions reflecting the justices’ perceptions of how lawyers work or should work . . . one . . . theme repeats: lawyers . . . are officers of the court”). Although the direct obligations of relational agency are to the client, therefore, the faithful agent is also constrained by the law.

The relative strength of these opposing pulls of lawyer role, the individualist interests of the client on the one hand and the communitarian interests of the social system at large on the other, is a matter of longstanding debate. In general, however, and despite many famous exceptions, it seems fair to say that the obligations of relational agency are today first and foremost obligations to a client. The law permits a great deal of mean-spirited, self-centered and destructive behavior, which lawyers are bound to undertake unless they are allowed to withdraw from the case, if it is in the client’s interest and the client insists that it be done.

<sup>85</sup> “Adversity” is a necessary condition in this relationship. Without the potential for opposition there is no reason for client concern, and nothing about which to consult a lawyer. Sometimes the adversity is only feared, or imagined, and often it is far off in the future, if it materializes at all. But without the potential for someone upsetting the client’s plans there would be no need to ask a lawyer to memorialize those plans in a document, strategy, or the like. Nature taking its course would be all the protection the client needed.

<sup>86</sup> The key term here is “principally.” Lawyers learn when they advocate and advocate when they learn. A clear line between the two processes does not exist except in the constructs used here to separate them out for purposes of analysis. There is no such thing as disembodied learning done from no particular point of view, and no such thing as pure advocacy devoid of all inquiry, testing and the like. Learning always starts from a perspective, however tentatively held, so that all or almost all communication to learn has within it at least a tacit, provisional argument that things ought to be viewed in a certain way. Similarly, successful advocacy must understand and respond to the effects it has on an audience. Speakers who do not adjust arguments to take listener concerns or corrections into ac-

They should try to understand client interests accurately, so that when they defend these interests they do so faithfully, and they should try to understand colleague suggestions fully, so that when they act for clients they do so on the basis of a reasonably complete range of relevant strategic factors and considerations. But in relationships with adverse lawyers this emphasis changes. Here, lawyers are principally advocates who try to convince adversaries to do what their own clients want.<sup>87</sup>

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count, or who do not stop when points have been successfully communicated, for example, are not persuasive even when their arguments are correct. The level at which persuasion and learning converge, however, is considerably more abstract than the level at which ordinary law office conversation occurs. The two processes are experienced as quite different behavioral phenomena in the law office, and it is this behavior rather than its epistemological foundation that is my focus here.

A complete discussion of the persuasion-learning dichotomy would take us very far afield, ultimately even into areas as esoteric as the Kuhn-Popper debate about the nature of scientific understanding and investigation, and the underlying realist-relativist debate about the nature and existence of the physical, abstract, and theoretical universe. See, e.g., ALBERT GENE MOSLEY, *PERSPECTIVES ON THE KUHN-POPPE DEBATE: NEW DIRECTIONS IN EPISTEMOLOGY* 75-84, 129-45 (1978) (discussing whether scientific argument consists of an attempt to communicate insights into an alternative framework for the purpose of producing a paradigm shift, or whether it is the presentation of empirical, inductive falsifications taken from simple sense perceptions of objective reality); STEVEN WEINBERG, *DREAMS OF A FINAL THEORY: THE SEARCH FOR THE FUNDAMENTAL LAWS OF NATURE* 184-90 (1994) (defending objective nature of scientific knowledge and inquiry against philosophical and sociological relativism); Chhanda Gupta, *Putnam's Resolution of the Popper-Kuhn Controversy*, 43 *PHIL. Q.* 319 (1993) (attempted reconciliation of the realist-relativist conflict). See also *CHALLENGES TO EMPIRICISM* (Harold Morick ed., 1972), for a collection of essays by many of the most well known participants in this important chapter in the philosophy of science.

<sup>87</sup> Sometimes the obligations of advocacy require that lawyers cooperate for mutual gain, but this is not because cooperating is intrinsically good, the best way to show respect for others as persons, or a solid foundation on which to build a social system. It is because cooperating is the course of action most likely to protect client interests under the circumstances. The obligations of advocacy also sometimes require lawyers to compete over scarce resources to obtain disproportionate shares of whatever is at stake for their clients' benefit and at the adversaries' expense. Both types of behavior, cooperation and competition, are self-interested action, when they are undertaken to advance client interests.

There is sometimes a tendency to think of lawyers as self-authorizing Platonic guardians, charged with the generalized task of building a better world, and no doubt they should contribute to this task whenever they get the chance. As lawyers, however, they are mostly just agents, obligated to be loyal, competent and diligent on behalf of a client, rather than on behalf of an idea, a group, or themselves. (For a thoughtful discussion of these differing role definitions, see Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?*, 1 *CLIN. L. REV.* 639 (1995).) Even the laudable structural changes in the profession during the past twenty years that have softened some of the harsher aspects of adversary advocacy, such as the development of alternative methods of dispute resolution, the reform of the Rules of Professional Conduct, and the elimination of "Socratic" grilling as the educational method of choice, have often been justified by arguments based on client (and sometimes lawyer) self-interest.

Individual lawyers may reject the relational agent role, across the board or in particular instances, and pay whatever price is entailed, but they cannot make that role into one of



As learners, lawyers must be more open, trusting and direct than they are as advocates, and as advocates, they must be more controlling, skeptical and circumspect than they are as learners. Internalizing the dispositions, skills and values needed to shift between these different although not opposite perspectives is more difficult than choosing one or the other perspective and using it across the board, and, not surprisingly, the latter move is more popular. The reductionist response to the difficulties of dealing with a multi-faceted conception of lawyer role, namely to see the relational agent duty in terms of only one of its two distinctive dimensions, has always been popular with lawyers, so much so that it is difficult to write it off as reflecting just a failure of understanding, or a lack of character. It is a brute fact of legal professional life and, as it will turn out, a major concern for the project to teach lawyers to be better learners.

With lawyers, advocacy has always been the first among equals in the obligations that make up the relational agent role. The metaphor of "adversary champion" has never explained all that lawyers do, but unlike "boardroom facilitator,"<sup>88</sup> broker,<sup>89</sup> "lawyer for the situation,"<sup>90</sup> "transaction cost engineer,"<sup>91</sup> "limited purpose friend"<sup>92</sup> (at least as modified by Alan Donegan),<sup>93</sup> and the like, it has achieved a central place in the ideology of the profession.<sup>94</sup> It is the key element

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a principal.

<sup>88</sup> This is one way of describing the Model Rules' new image of lawyer role. I must have learned the expression from someone, but I no longer remember from whom.

<sup>89</sup> HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS & ORDINARY LITIGATION* 12-19 (1990).

<sup>90</sup> Louis Brandeis used this phrase during the confirmation hearings on his nomination to be Associate Justice of the United States Supreme Court, to describe his role in the Lennox case. See John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 *STAN. L. REV.* 683, 694-98 (1965). It has since become a stock item in the catalogue of lawyer role descriptions, so well known that it is often quoted without attribution.

<sup>91</sup> See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239, 253-56 (1984).

<sup>92</sup> See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1084 (1976).

<sup>93</sup> See Alan Donegan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 123, 130-33 (David Luban ed., 1983). Donegan requires that a client's claims be "reasonably defensible" and the facts on which they are based be "possibly true." *Id.* at 133. While there is every reason to believe that Fried would accept these qualifications, see CHARLES FRIED, *RIGHT AND WRONG* 179 (1978), he did not include them in his original discussion, and it is possible to read the "Lawyer as Friend" article in more adversary champion terms. Even with these qualifications, the model of the lawyer as friend is a very adversary one. For highly critical responses to Fried's essay, see, for example, Dauer & Leff, *supra* note 31; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *WISC. L. REV.* 29, 106-13.

<sup>94</sup> David Luban has made a spirited, cogent and, for me, convincing "moral activist" case for the irrationality of the adversary champion conception of lawyer role. See David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 *GEO. WASH. L.*

in the mythic moral and political tale lawyers tell about themselves to the outside world (probably because mythic tales are told about warriors, not merchants or bureaucrats), and such stories have a way of becoming self-fulfilling. Of all of the metaphors used to describe lawyer role, it is the most prominent and the most enduring. It dominates the way lawyers think about themselves and about how they should act.<sup>95</sup> Legal educators may be able to refine or expand the conception of adversary champion at the margins, but they are not likely to alter it fundamentally, or remove it from its primacy of place, at least not as long as litigation and its facsimiles remain the default alternatives for resolving legal disputes.

Even a modest reform, such as making the ability to learn from colleagues part of the repertoire of practice skills thought to define professional competence, and teaching about this skill in the law school curriculum, presents several difficulties. To begin with, it would require law schools to expand the content of a curriculum already overloaded with course subdivisions, or to insert new material into existing courses already crammed to the brim with particular topics. Change of this sort is difficult at any time, wholly apart from the subject matter added, but even more so when that subject matter would require law teachers to develop new teaching materials from, and become expert in, bodies of scholarship outside of law.

One might respond that law schools already teach about learning from colleagues, so that any curricular changes, materials development, or faculty retooling would be minimal. I agree that law schools already teach in this area, in the sense that they pervasively inculcate

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REV. 955, 963-73 (1995). For a brief history of Luban's moral activism, see Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining*, 51 MD. L. REV. 1, 69 n.187 (1992). Irrationality notwithstanding, however, even Luban does not expect this conception to be displaced any time soon. Such a conception seems to serve fundamental aesthetic, ideological and psychological ends as much as systemic and instrumental ones. It is appealing to many, it seems, more because it is intrinsically satisfying than because it produces good social effects. Luban shows how it could not pass a "good social effects" test. This means that arguments about its irrationality, and even its dangers, are slightly off the mark, at least insofar as altering its "brute fact" status is concerned.

<sup>95</sup> It is easier to see this dominance in the way lawyers represent "persons in trouble," such as criminal defendants, than in their representation of persons who face only potential and future trouble, such as settlors of estates, or makers of contracts. Nevertheless the latter types of representation are also best understood as requiring a fidelity to client interests akin to that of the adversary champion.

The conception of adversary champion does not apply to mixed lawyer representational roles, such as "intermediary," now permitted under MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983), or to lawyers acting in non-representational capacities such as mediator, arbitrator, or private judge. See, e.g., Stark, *supra* note 3, at 477-97 (discussing "complications" of mediator role). While the number of such roles is increasing, most lawyers still function principally as relational agents.

persuasion mode communication habits, but much of that present teaching is problematic and *sub rosa*. It would need to be made explicit and examined critically, and a richer theoretical model of lawyer learning would need to be adopted. Again, all of this is hard enough under ideal conditions, where there is a consensus that the project is worthwhile, and a commitment exists to carry it out. When it also requires overcoming the institutional and personal interests that caused the instruction to be kept *sub rosa* in the first instance, it becomes that much harder.

More importantly, students and faculty would need to be persuaded that being able to learn from colleagues is a valuable practice skill, a skill that firms take into account when hiring and promoting, for example, or that can be a factor in developing a professional reputation, or whose absence could be the basis of malpractice liability or professional discipline. Otherwise, why should they study it? Given the legal system's commitment to the adversary champion model, claims such as these would be difficult to make convincing.

Certainly, the bar could make the skill valuable by including it in a more nuanced formal definition of professional role, one based on obligations of both advocacy and collegueship, and making a failure of either obligation a problem of professional competence.<sup>96</sup> But it has not done this, and is not likely to. Such a definition would describe law practice more accurately, but conceptions of role based on clashing metaphors have always been problematic. Such conceptions are difficult to internalize as default rules because they are too complex, requiring complicated "both hands"<sup>97</sup> type judgments which lawyers (and perhaps people in general) do not like to make. We tend to have recourse to role definition in a pinch, when it is supposed to help resolve dilemmas, not add new layers of difficulty to them. A dissonant definition lacks the singlemindedness and clarity of purpose that make such resolutions easy.<sup>98</sup> I do not suggest that the effort to expand the

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<sup>96</sup> I have in mind a conception of lawyer role in which the duties of advocacy and collegueship would be seen as co-equal, neither one being more important than the other, and each being necessary. Present definitions of role permit lawyers to learn from one another, but they do not make it mandatory, or as important as being an adversary champion. In my different view, it would be as grave a mistake to dominate a conversation inappropriately and as a result not grasp a client's true wishes, for example, as it would be to miss a filing deadline, or commingle funds. While this might modify the idea of adversary champion in a substantial way, it would not be as radical an alteration as is found in the idea of lawyer as "intermediary," introduced by Model Rule 2.2. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983). See also Stark, *supra* note 3, at 501 ("Mediation training is training against the dominant paradigm, and in certain respects, is subversive of values deemed fundamental in American legal culture.").

<sup>97</sup> By this I mean judgments based on analysis which takes the form of "On the one hand we should do this, but on the other we should do that."

<sup>98</sup> These qualities of clarity and singlemindedness of purpose are also essential to moral

profession's conception of role is hopeless, just that it is a roll against the odds, so to speak.

As a practical matter, therefore, any response that law schools make is likely not to be a broad institutional refocusing but rather an effort by individual faculty members. Some will find the subject of learning from colleagues intrinsically interesting and will want to accommodate their schedules to study and teach about it. This group probably never will be large, however, because the incentive structure of law school teaching does not contain many inducements for choosing this course. Student demand for such instruction is not likely to be widespread, colleagues may see the subject as "soft," and practitioners accustomed to the adversary champion model may dismiss instruction in learning skills as a waste of time.<sup>99</sup> Each of these is a powerful pressure, and collectively they can be overwhelming. Law schools have an institutional interest in making such instruction available for those who want it, but this interest probably will be served by the few faculty members who choose to teach the subject for its own sake. Non-volunteers are not likely to be pressed into service.

Those who do choose this course must be careful not to indulge in an excess of enthusiasm. Students should not be led to believe that they must do a communicative about-face and become singleminded learners where once they were singleminded advocates, or that they must achieve some ideal learning state in which they never conceal, never prejudge, and never compete. Learning skills do not replace advocacy skills but work in tandem with them, and there is no evidence that anyone has ever become completely transparent, non-judgmental and non-competitive, even in the most trusting and nurturing of relationships.

In addition, if the instruction is to be more than preaching to the converted, law teachers will need to show students how learning from colleagues is a useful skill, not just a morally or aesthetically attractive one. Arguments from taste will work with true believers and disciples,

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and political myth-making, whether the myth is based on a competitive or cooperative conception of lawyer role. The alternative dispute resolution, feminist, and communitarian literature is filled with attempts to define lawyer role in cooperative terms, but these definitions tend to be presented as alternatives, and not complements, to the adversary champion model. Advocates of cooperative lawyering often have little if anything good to say about adversarial behavior, and respond to adversary "possessive individualism" with a similarly sweeping assumption of the harmony of group and individual interests. In general, neither side in this debate seems to see itself as a corollary of the other. Neither articulates an overarching conception of lawyer role large enough to include all aspects of the work lawyers do, and all facets of a lawyer's complicated set of overlapping and contradictory duties.

<sup>99</sup> See Stark, *supra* note 3, at 476 ("relevance of 'communication facilitation' to many legal practitioners is [not] clear").

but neither group is likely to be large.<sup>100</sup> Students will not be more direct, candid, and cooperative in colleague relationships until they are convinced that it will not cause them to appear weak, fragile, or naive, or hinder their advancement in practice. Legal academics sometimes dismiss such careerist concerns as ignoble, but they are real concerns of students nonetheless, and instructional programs which ignore them have a way a being dismissed themselves.

Part of the way in which these concerns can be addressed is to show students how little cost there usually is in expressing what is truly on their minds. In almost all of the cases set out in Part III students would have been more impressive (their stated goal) if they could have expressed their underlying thoughts and feelings instead of much of what appears in their dialogue. This would be uniformly true if one added the additional condition that they edit their underlying thoughts and feelings one more time before expressing them (which they would do if the thoughts and feelings had to be expressed).

Students frequently held to the not perfectly compatible beliefs that their own successes were attributable to their ability to bluff, dissemble, argue, and the like, but that when others did these things they had little positive effect, and were always obvious. Students seemed not to extrapolate from the fact that they detected such behavior in others to the fact that others detected it in them, or from the fact that such behavior did not impress them to the fact that it did not impress others either. Consistently, they made themselves the exceptional case and did not realize that they were doing this. It was a major breakthrough for many when they considered, often for the first time, that many of their achievements had come in spite, rather than because, of some of the things they did.

It also will help to show students that learning from others is not an innate and unteachable ability, but rather has a skill dimension that can be studied, acquired and internalized as disposition.<sup>101</sup> This means that teachers must be able to describe learning skills in behavioral terms, show how they can be practiced, predict the stages through which their development will proceed, and give students realistic standards of what can be accomplished, and how quickly. Learning to learn is like any other subject. One must be able to specify what is to be learned, and measure when learning has taken place.<sup>102</sup>

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<sup>100</sup> No argument will be necessary for those who already believe that "the life which is unexamined is not worth living." See 3 THE DIALOGUES OF PLATO 129 (Benjamin Jowett trans., National Library).

<sup>101</sup> *But see* Stark, *supra* note 3, at 494-96 ("the jury is still out on the question of whether and to what degree [interpersonal] skills can be taught, at least to adults").

<sup>102</sup> This is not a suggestion that work is all technique, or that career success is defined solely by technical accomplishment. I believe that the politics and morality of work

Some students may need to be cautioned against trying to do too much rather than too little. For example, it is best to practice new learning skills one at a time, at the margins, rather than all at once, as part of a complete personality makeover. The latter is destined to fail, and thus is an unfair test of whether the new skills can be learned. It also is necessary to think carefully about where and when to practice such skills, choosing situations in which supervisors understand, or are at least sympathetic to, what one is trying to do, and client interests are adequately protected. Students are not likely to act in ways that will call undue attention to themselves, or jeopardize their reputations for being good adversary champions, and there is nothing wrong with this. We all define ourselves in terms of the "coordinates on the map" of our social and work situations. Students are no different from anyone else in this regard. Learning new skills is a time-consuming, incremental, halting, and somewhat serendipitous process, a process of slow change over time that students should be encouraged to get into for the long haul. That is the only way lasting progress will be made.

*C. Can the Problems of Persuasion Mode Communication Be Addressed in Externships?*

The foregoing cases raise serious questions about the kinds of lessons students may learn ecologically if they enter their externship settings with no accompanying academic examination of what they are experiencing. Yet externships also provide distinctive practice experiences too important to waste. Among other things, these include opportunities to work on out-of-the-ordinary substantive law problems (those presented by the song-writer contract in Case Four, for example), to confront low visibility lawyer-client conflicts of interest not policed effectively by formal ethics rules (such as the tension between doing what is necessary to get a job offer and what is necessary to protect the client's interests in Case Eight), and to study the effect of money, status and power on the conduct of adversary advocacy (for instance, in the deposition sparring between rival lawyers in Case Two).<sup>103</sup> Each of these opportunities has its counterpart or approxi-

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choices ultimately have a closer relationship to career satisfaction than technical accomplishment does, though sometimes this is not realized until later in life. But it does not follow, as many seem to think, that in subjects seen as inherently fuzzy and soft (such as learning to learn), technique is unimportant, or cannot be described. Accepting this view is often a way of dismissing the subjects as unimportant or not capable of being learned. Learning from colleagues has a skill dimension, notwithstanding that it is ultimately about much more than being skillful, and developing this skill is an important step in moving toward a more complicated understanding of the process.

<sup>103</sup> For a more extensive discussion of the benefits of externship instruction, see Condlin, *supra* note 3, at 63-73; Maher, *supra* note 11, at 544-47, 562-73.

mation in the in-house clinic, of course, but externships provide the chance to work on the problems in their post-law school form, under real time and money constraints, where fewer extrapolations and leaps of faith are required for the lessons to be transferred. Externships do not substitute for the in-house clinic, but they do complement it.

There are two principal quality control problems with externship instruction. First, it is difficult for externship students to know quickly when they are just practicing mistakes. Supervision is not as continuous as it is in the in-house clinic (the outside supervisor is also a full-time practitioner with other responsibilities), and a great deal of time can pass before mistakes come to light. Second, externship students have a greater tendency to accept supervisor (practitioner) advice uncritically, as received wisdom, than do clinic students. There is no ethos of listening critically, as there is in the clinic, and it is awkward for supervisors to try to prevent this from happening by intentionally criticizing their own actions.<sup>104</sup>

Many remedies have been suggested for these problems.<sup>105</sup> The most popular, and the one adopted by the ABA in its accreditation standards, tries to solve the problems by requiring a stronger law faculty presence in the externship office. It specifies, among other things, how often faculty members must meet with outside supervisors, review student work, and even make site visits to the outside office during the semester.<sup>106</sup> This remedy seems to operate on the premise that externships will be effective to the extent that they can be made to resemble in-house clinics.

Many have questioned the wisdom of so procrustean an approach, arguing that there are effective and manageable methods for incorporating a critical perspective into externship practice which also preserve that format's distinctive identity as "outside" instruction.<sup>107</sup> These criticisms make sense. It is true that externship students need a critical perspective, and true as well that law teachers are well positioned to help them achieve this, but law schools do not need to bring

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<sup>104</sup> See page 434 *infra*. For a more extensive discussion of the weaknesses of the externship format, see Maher, *supra* note 11, at 576-97.

<sup>105</sup> See, e.g., Givelber et al., *supra* note 13, at 43-48; Maher, *supra* note 11, at 598-605; Seibel & Morton, *supra* note 2, at 446-51.

<sup>106</sup> See ACCREDITATION STANDARDS, *supra* note 40, Standard 306(c), Interpretation 2. For discussions of the Standard (including Interpretation 2) in its various drafts, see Givelber et al., *supra* note 13, at 45-48; Maher, *supra* note 11, at 622-30; Seibel & Morton, *supra* note 2, at 440-51. For a history of ABA regulation of externships, see MACCRATE REPORT, *supra* note 1, at 105-13. For a discussion of the less stringent Association of American Law Schools standard, see Seibel & Morton, *supra*, at 439 n.56.

<sup>107</sup> See Givelber et al., *supra* note 13, at 46-47; Maher, *supra* note 11, at 623-25; Seibel & Morton, *supra* note 2, at 443-46.

all clinical work in-house, or send their clinicians into externship practice settings, to pursue this goal.

Instead, law teachers need two types of information to review student practice experience critically: student conclusions about what they learned from the experiences, and trustworthy and detailed descriptions of what the students did. Student conclusions about what they learned are actually working hypotheses about lawyer skill practice, which teachers and students analyze, refine, and eventually adopt in the course of their conversations. Detailed factual descriptions of what the students did are the independent data bases from which teachers and students evaluate the wisdom of their conclusions. Testing analysis against empirical evidence in this fashion is the heart of what critical review is all about. It does not matter so much where, when, or how often teachers and students meet, as it does that their analysis and evidence be on the table in an accurate and testable form when they do. Distance from the actions under study may even improve analysis. Defensiveness and emotional commitments often subside with time, and interest in understanding what happened, and why, often increases.

Student conclusions about what they learned from their experiences are available to direct supervisors and law teachers alike, but the actual supervisors usually know a lot more about what the students did. Either they were present when the work was done and observed it directly, or they are able to read more into after-the-fact reports because of what they know about the situations and parties involved. Moving law teachers into outside offices is one way to reduce this difference, and moving the law office into the law school (that is, creating an in-house clinic) is another. But these are not the only solutions, or even necessarily the best.

The case study device described in this Article, for example, provides a way to overcome this information gap in large measure, and thus to enable the student to have the benefit not only of the input of her or his direct supervisor but also of a well-informed academic interpreter.<sup>108</sup> It is logistically less cumbersome and less intrusive than moving teachers or offices between the law school and the world of practice. Moreover, it provides rich data about student practice behavior, data that are hard for students to ignore, avoid, or dismiss when *post hoc* analysis turns up problems they did not foresee. Case studies are produced before students know what they want them to show, in a

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<sup>108</sup> While the case studies used here focused on the particular issue of learning from colleagues, there are other comparable sources of information from which academic externship teachers can study additional aspects of students' work. These include court and deposition transcripts, office records, and the like.



kind of clinical “original position,” so that once self-interest becomes clear, it is hardly credible to deny that they are accurate.

Aside from the issue of self-interest, it also is important to recognize the distinct benefits of analysis based on some memorialization of the students’ practice experiences. Memorializations separate the process of figuring out what happened from the process of figuring out what it means, to both processes’ advantage. Such written records provide a common data base on which to ground analysis so that everyone works on the same problem. They are more detailed than conversational recollections, allowing for more finely grained analyses, and they do not change, so that interpretations may be refined many times over before becoming final.

In externships, case studies are to the study of practice experience what case opinions are to the study of legal doctrine. Without them, clinical supervision would be roughly akin to studying doctrine on the basis of student and teacher recollections of what a court said. It is possible to make progress in this way, but difficult. In-house clinical teaching often relies on such joint, unwritten recollections. One result may be that in supervision sessions in the in-house clinics, more attention will be devoted to what happened, as opposed to what was meant to happen and why, than in externship teaching. This is especially likely because such factual disputes are intellectually and emotionally safer than disputes over what would have worked best. They are safer because they are less conclusive (and therefore less productive), since often there is no dispositive way to break evidentiary ties over whose memory is better, or whose observations were more accurate. Arguments over theory have winners and losers.

Moreover, even a poorly prepared case reveals a student’s tacit theories about effective performance and provides a basis for critical supervisor review. For example, students may regularly choose easy or unambitious problems, report underlying thoughts and feelings in platitudinous terms, or consistently present cases in which their work is not substantially involved. These patterns can become data in their own right, about the students’ (lack of) readiness to analyze their practice experiences, data which teachers may use to raise issues of their own.<sup>109</sup>

This kind of intervention, however, should probably happen only in rare cases—and in the externship setting, the choice not to probe is one the teacher can safely make. As a rule, questions of what topics to

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<sup>109</sup> Case studies which seem too simple, or too good to be true, can be checked for accuracy with the others involved, but the decision of when this is to be done should be left to law teachers to make on an individual basis, and not be required across the board in accreditation standards.

take up are better left to students. They know what they are interested in, and what they are prepared to confront. The freedom to set the agenda in this fashion is not as available in the in-house clinic, where students have more unilateral responsibility for client interests, and the agenda of supervisory discussions is dictated more by events in the cases than by student and teacher interests. One of the advantages of externship instruction is that it permits students and teachers to work on selected practice issues in depth, rather than on all issues raised by the students' casework. This is possible precisely because outside supervisors relieve students of the unilateral responsibility for insuring that client interests are adequately protected.

Finally, it is important to recognize that externships provide a congenial setting for studying the particular skill with which this Article is concerned, namely the process of learning from colleagues. In externship instruction, at least when case studies of the sort presented here are made part of the course, law faculty supervisors are freer than practitioner-supervisors to discuss student-supervisor interaction because it is not their behavior under review. Faculty are less likely to be defensive about, or protective of, actions taken or statements made in conversations between the students and their direct supervisors, and less likely to rule out discussion of sensitive topics on principle, or otherwise. This is not a special quality of law faculty supervisors. If the situations were reversed, and faculty discussion with students was under review, practitioner-supervisors would have this advantage. It is easier to analyze without qualification and remorse when the subject of the analysis is not personally threatening.<sup>110</sup>

#### CONCLUSION

Historically, legal education has been about the study of *law*, its content, nature and effects, the interests it serves, and the extent to which it embodies and effectuates the principles and policies of our societal commitments.<sup>111</sup> The principal goal in this study has always been intellectual understanding, and the only skills directly implicated have been those of reasoning and research. Other lawyer practice skills, relevant to the study of whether the legal system (through lawyers) delivers on what law promises, have not been directly in-

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<sup>110</sup> See Conklin, *supra* note 3, at 53-54 (describing difficulties of being both data and critic). Accord Seibel & Morton, *supra* note 2, at 417-18. For another illustration of the use of a tripartite method of clinical supervision, this time in the context of an in-house clinical program, see Luban & Millemann, *supra* note 3, at 64-87.

<sup>111</sup> In a Langdellian legal universe, where law was discovered not made, legal education was concerned more with the content than the nature or effects of law (though, not surprisingly, discovered law usually reflected prevailing beliefs about desirable effects). But the history of legal education, taken as a whole, reflects all of these concerns.

volved.<sup>112</sup> Because of this, changes in the content of legal education typically have resulted from new injections of theory, that is, from closer looks at legal rules, policies, institutions, and systems in light of critical perspectives grounded in reasonably well worked out descriptive and normative theories borrowed from other mature bodies of thought.<sup>113</sup>

Clinical legal instruction, on the other hand, has generally approached the task of law curriculum reform from the opposite direction. Although there have been and continue to be notable exceptions, overall clinical education has been concerned more with refining practice and pedagogical technique than legal rules and policies, more with improving individual lawyer behavior than legal institutions and systems, and more with achieving technical and instrumental success than justice.<sup>114</sup> It has been more of a bottom-up than top-down reform, and this has always made it somewhat of an ugly duckling in the law school world.

For this and other reasons, modern clinical educators have joined

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<sup>112</sup> See Costonis, *supra* note 1, at 164 n.28, 194. Other reasons for this inattention to most lawyering skills have to do with the short time frame of legal education, the difficulty of acquiring legal analytical skills themselves, the high teacher-student ratios in law schools (which dictate large classes and make graduate school, or mentor-like, instruction impossible), the fact that the best practitioners cannot be convinced to join law faculties because they would lose too much income, and the like. Accord Peter Toll Hoffman, *Clinical Scholarship and Skills Training*, 1 CLIN. L. REV. 93, 108 (1994). The salary problem is not a new one. See LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960* at 172 (1986) (Thurman Arnold explaining to Jerome Frank in 1933 that they could not get practitioners to join the Yale faculty because they were "making too much money"). All of these factors have appeared to dictate, in Dean Costonis' words, that "[l]egal education's comparative instructional advantage over law practice lies in doctrinal and general-education instruction, not in skills training." Costonis, *supra*, at 194.

<sup>113</sup> For a more extensive discussion of this topic, see Condlin, *supra* note 16, at 2-9.

<sup>114</sup> I do not suggest that justice and individual instrumental success are unrelated, but just that the connection between the two is not self-evident, or one-for-one, and needs to be made explicit in clinical scholarship and instruction. This is not always done. Instrumental thinking can be sophisticated, interesting, and great fun to read, see Amsterdam, *supra* note 4 (explicating ends-means thinking). Moreover, it sometimes has heuristic effects, provoking ideas about new and better ways of doing things, and so it can also play a central role in improving our understanding and design of skill practices generally.

But it is also essential that clinical education focus directly on developing "new and better ways" of doing things, and on exploring the background propositions of theory that are essential to conceiving or refining such reforms. Accord Phoebe A. Haddon, *Education for a Public Calling in the 21st Century*, 69 WASH. L. REV. 573, 577-82 (1994) (arguing that skills study must be structured to include "serious reflection on how legal education can better contribute to the profession's conception of its public responsibility"). Without a reformist dimension, the study of instrumental technique, no matter how highly developed, is just motor-skill training. While such training can sustain an individual scholarly and instructional life, a discipline needs basic theory on which to ground such puzzle-solving discussions. For clinical legal education that ultimately means a theory of justice, for it is justice that we seek, or should seek, with the techniques we develop and teach.

in the turn to theory, and have come to explain and defend their programs more in terms of their intellectual rigor than their practical benefits. Clinical law teachers have sought to establish that they adhere to the same standards and use the same methods of analytical inquiry as traditional law teachers, and that they are motivated by the same kinds of intellectual values and goals. The proof for these claims is to be found in the designs of clinical programs, designs which are top-heavy with opportunities for "critical reflection." The "mantra" of clinical pedagogy, as Abbe Smith put it, became "reflect, reflect, reflect."<sup>115</sup>

Reflection is important, and designing programs to provide opportunities for it is important too. But it is also important not to approach the challenge of program design in a narrow way. Unfortunately, certain program formats (notably, in-house clinics) have come to be thought of by many as intrinsically superior to others (in particular, externships), while other formats (here I am thinking of simulation-based programs) have come to be thought of by many as not sufficiently clinical. The emphasis on design has shifted clinical education's substantive focus somewhat from the content of instruction to its format, and this shift creates the danger that form will be privileged over substance. Not everyone preoccupied with program design privileges form over substance, of course, but the ABA may be among those that do, and if so, this is unfortunate.<sup>116</sup>

There is no magic programmatic bullet for guaranteeing the effectiveness of clinical (or any other kind of) instruction. Student practice must be monitored to be sure, but this does not mean that law faculty supervisors necessarily must be responsible for reviewing all student lawyering decisions, or that externship offices must be made to look like in-house clinics.<sup>117</sup> It means only that students cannot be permit-

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<sup>115</sup> See Smith, *supra* note 3, at 728.

<sup>116</sup> The ABA is such a difficult concept to operationalize. I have in mind here mostly things like Accreditation Standard 306(c), *see* note 106 *supra*, and the MacCrate Report, *see* note 1 *supra*. The problem with such documents is that they are drafted by or for committees, and as a result, tend to include something for everyone. They are hard to pin down to single positions because there is always something that goes the other way, whatever the other way is. *See, e.g.,* Conklin, *supra* note 16, at 2 n.16 (discussing the MacCrate Report's having it both ways on the issue of whether it is intended as an accreditation standard). I do not have any direct experience with ABA programmatic rigidity in reviewing externship offerings, though like everyone else I have heard stories, but I have experienced the *in terrorem* effect that a concern about such rigidity can have on a law faculty, and the crazy things it can cause a faculty to consider, and sometimes do.

<sup>117</sup> Indeed, I am inclined not to favor training externship practice supervisors to supervise in more academic fashion. *But cf.* Cole, *supra* note 26. In my view, externship offices should not change in any way to accommodate law students, since they already represent post-law school practice settings accurately. Externship students should enter such offices without a ripple, so to speak, just as other law clerks do. In this way, externships will not

ted to practice in an uncritical, unself-conscious fashion, internalizing questionable habits, beliefs, and values, without knowing that they are doing so. The key to preventing unself-conscious socialization, however, does not have to do with how often, or where, or about what topics students and teachers meet, but what they say to one another, and on the basis of what data, when they do. The content of conversation is everything in clinical (or any other kind of) instruction. There is no design or structural protection against bad conversation, and no design or structural morass that good conversation cannot transcend and transform. Clinical teaching is successful to the extent it helps students think about their practice experiences "from the standpoint of somebody else";<sup>118</sup> to the extent it helps them step outside their beliefs, expectations, hopes, and assumptions, and see their own behavior as data like all other data, and themselves as subjects like all other subjects. Any instructional format which produces this result, under whatever conditions, in whatever settings, produces reflective,

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distort law practice experience in the process of providing it.

<sup>118</sup> The phrase is Hannah Arendt's. See HANNAH ARENDT, *EICHMANN IN JERUSALEM* 49 (1963). For an extended and sympathetic discussion of the idea, and the Kantian framework from which it is derived, see Luban & Millemann, *supra* note 3, at 60-62. Seeing things from another's perspective is a difficult task under the best of circumstances, and sometimes not possible even then, as the psychological and anthropological literature on participant observation makes clear. See, e.g., CHRIS ARGYRIS, *BEHIND THE FRONT PAGE* 110-52 (1974) (describing difficulties encountered by newspaper editors trying to learn, with the help of a psychologist, how to interpret one another's communications accurately while discussing editorial policy decisions); CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 55-70 (1983) (discussing the "nature of anthropological understanding"); CLIFFORD GEERTZ, *WORKS AND LIVES: THE ANTHROPOLOGIST AS AUTHOR* 14-16, 145-46 (1988) (discussing process of "authorial self-inspection"); GEORGE W. STOCKING, JR., *OBSERVERS OBSERVED: ESSAYS ON ETHNOGRAPHIC FIELDWORK* 128-30, 137-39 (1983) (discussing ethnographic interrogation). Sometimes, to paraphrase Henry Friendly who had a very different situation in mind, seeing practice experience from the standpoint of somebody else may even require a student to "determine what [the supervisor] would think the [student] would think on an issue about which neither has thought." *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960).

The need to see matters from another's perspective is a recurrent issue in lawyers' work. Trying to deduce legislative or framers' intent in doing statutory or constitutional interpretation presents a group facsimile of this problem. See ESKRIDGE, *supra* note 83. The problem also arises in legal negotiation, where bargainers must understand one another's perspectives before making and accepting offers. The negotiation literature has not yet come to grips with the difficulty of this process, and has characteristically opted instead for a set of interpretive rules of thumb, which do little more than exhort bargainers to avoid over-interpretation and be careful about projection. See Condlin, *supra* note 94, at 23. For a recent example, see ROGER FISHER, ELIZABETH KOPELMAN, & ANDREA KUPFER SCHNEIDER, *BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT* 19-66 (1994).

Ultimately, this task embodies a variation of analytic philosophy's "other minds" problem, see, e.g., THOMAS NAGEL, *WHAT DOES IT ALL MEAN* 19-27 (1987) (discussing "other minds" problem), and the related problem of understanding the "subjective character of experience." See THOMAS NAGEL, *MORTAL QUESTIONS* 166-75 (1979).

critical practice, and reflective, critical practice is the necessary and sufficient condition of ecological learning.<sup>119</sup> The ABA, and clinical educators generally, should acknowledge this fact and let a thousand flowers bloom. They should also see to it that the flowers are well tended.

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<sup>119</sup> There are lots of other purposes for clinical instruction, of course, the most prominent of which is simple technique development. (I have in mind here the internalization of question-asking repertoires, argument moves and maneuvers, investigation strategies, and the like.) But the essential elements of technique are taught best in simulation exercises, where students can repeat tasks over and over until they have them under control. Live practice is distinctive for the opportunities it presents to study the political, moral, and social dimensions of practice skill. It is somewhat of a waste to use it to teach just technique. This is true notwithstanding that using practice skills in real life situations and relationships is the final stage in the development of technique.