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Writing Across the Curriculum: Professional Communication and the Writing That Supports It

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To Be Of Service: The Lawyer’s Aware Use Of The Human Skills Associated With The Perceptive Self

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The life of the law has not been logic, it has been experience.

Justice Oliver Wendell Homes, Jr.¹

I. INTRODUCTION

This Article addresses the exclusion of several mental processes and behaviors from conscious lawyering activity which are present in the work of a lawyer. First, the current views on the scope of human skills which are accepted as a legitimate part of professional behavior are discussed. This acceptable view of lawyering behavior is labeled the "doing of technical work to or for others." Certain intrapersonal and interpersonal skills are identified as human skills which may be part of any lawyering task. These human skills are characterized into two categories: the perceptive self and the knowing self. The reader will see that lawyers have historically recognized the skills of lawyering which are associated with the knowing self, but have failed to recognize the significant skills associated with the perceptive self. The categories are not formulated to indicate theoretical inclusion or exclusion. Instead, the organization involves the identification of several functions which lawyers use and which are not generally viewed as seriously affecting the quality of the lawyer's work.

An alternative model is then presented for defining the scope of observable behavior by the professional when lawyering: “working

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* Assistant Professor of Law, CUNY Law School at Queens College. I am indebted to my colleagues at the Center for Dispute Resolution and the Law School at Williamette University for encouraging me to commence this writing in 1987. I want to acknowledge the invaluable contributions made to the evolution of this article by the following colleagues: Mary Lu Bilek, Richard Boldt, Susan Bryant, Ellen James, Joyce McConnell, and Patricia Williams. Also, I have been generously helped by: Howard Lesnick, Lawrence Hoover, Donald Weckstein, and Peter Margulies. In addition, I thank my research assistants: Nicholas Kambolis, Karen Campbell, and Joe Cozzi. Lastly, I am grateful to CUNY Law School at Queens College which, from its inception, has fostered a critical exploration of lawyering among its faculty and student body.

with others." The extent to which law practice requires the aware use of the perceptive self and a broad range of human skills is then explored. The argument is made for the aware use of both the perceptive and the knowing selves in the practice of law. This argument is based upon the premise that either proficient or incompetent practice of certain overlooked human skills directly affects the quality of the attorney's performance in a variety of functions. Self-awareness in the exercise of communication skills is advocated as a goal worthy of striving for because it leads to better lawyering, self-satisfaction, economy of effort, and active respect for the autonomy of clients and others with whom the lawyer works. "Working with others" evolved from

2. John Ayer advocates a similar philosophic perspective on the law which views the law as the product of integrated human functioning. He presents a framework "for understanding the law as an essentially human enterprise." Ayer, Isn't There Enough Reality to Go Around, 53 N.Y.U. L. REV. 475, 476 (1978). Lynne Henderson also observes that normal discourse in the law excludes a significant mode of understanding human reality. She, like me, does not view legality and empathy as mutually exclusive realms. Rather, she demonstrates how empathetic understanding contributes significant meaning to our interpretation of the law. Henderson, Legality and Empathy, 85 MICH. L. REV. 1574 (1987). Julius Getman identifies several distinct voices which are used in legal education and the law. Significantly, he laments the "undervaluing" of the "human voice" in both legal education and scholarship. He then goes on to describe aspects of empathy, understanding, and communication necessary for effective lawyering. He is describing some of the skills associated with the perceptive self. It is interesting that both he and I use "voice" to explain our theories. Getman, Colloquy: Human Voice in Legal Discourse, 66 TEX. L. REV. 557, 582, 583 (1988).

3. Some of these skills, such as the ability to use nonjudgmental listening and expressing skills, are acknowledged as part of the counseling function in lawyering. My analysis demonstrates how these and other skills operate in a lawyering activity beyond the counseling function. See Watson, The Lawyer as Counselor, 5 J. FAM. L. 7 (1965); Watson, Professionalizing the Lawyer's Role as Counselor: Risk-taking for Rewards, 1989 ARIZ. ST. L.J. 17-35.

4. There are legal authors who have each commented upon at least one of these several aspects. See Sarat, Lawyers and Clients: Putting Professional Service in the Agenda of Legal Education, 1990 AALS Mini-Workshop on Teaching the Law and Ethics of Lawyering Throughout the Law Curriculum. See also G. Bellow & B. Moulton, The Lawyerizing Process: Materials for Clinical Instruction in Advocacy (1978); D. Binder & S. Price, Legal Interviewing and Counseling: A Client Centered Approach (1977); W. Lehman, How We Make Decisions (Institute for Legal Studies Working Papers Series 1 No. 5, February 1986); Barkai, How to Develop the Skill of Active Listening, 30 PRAC. LAW 73 (June 1984); Barkai & Fine, Empathy Training for Lawyers and Law Students, 13 SW. U. L. REV. 505 (1983); Griswold, Law School and Human Relations, 37 CHI. B. REC. (1956); Lehman, The Pursuit of a Client's Interest, 77 MICH. L. REV. 1078 (1979); Lehman, Justice and the War of Reasons, 1 CAN. J. L. & JURIS. 127 (1988); Margulies, "Who are you to tell me that?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Non-
the realization that few lawyers are intrapersonally developed; that is, few are self-aware of their own behavioral preferences, modes of communication, values, and sense of self. Because rendering professional service occurs through the use of interpersonal skills, lawyers must become aware of how they use the perceptive and knowing selves professionally and how they are experienced by others. This integrated self-awareness in communication and problem solving skills is not easy to achieve. Any change in self-concept, let alone professional self-concept, is rarely viewed as effortless even when desirable. This article demonstrates why such effort is worthwhile. The focus is on these important issues because they have yet to become a part of the lawyer’s concept of professional activity for which the lawyer should be held accountable.

The reader is then exposed to the core rationalizations which lawyers employ to limit the attention paid to the human skills associated with the perceptive self in lawyering. Through this exposure, he or she may become more open to privately exploring his or her behavior through examination of the reasons commonly used to justify the status quo’s limited perspective on what communication and behavior constitutes conduct for which lawyers should be held accountable.

This writing, in large part, is a product of reflection on my experience in lawyering, teaching, mediating, and counseling. In addition, there are significant bodies of literature which have assisted me in for-

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I draw significant support for my expanded view of professional role from the works of J. KATZ, THE SILENT WORLD OF THE DOCTOR-PATIENT RELATIONSHIP (1984); and D. SCHON, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983). Katz expounds upon the need for a trusting communication between doctor and patient as a complex issue requiring rigorous study. Although his book touches upon several aspects of a reflective and client centered model, he stresses the need for the practitioner to explore her interactions with patients. Schön’s work traces and examines the development of professionalism. He explains the development of “rational technology” as the prevalent model of professional role with the correlative public dissatisfaction with professional service. In contrast, he posits a model of effective practice which also requires conscious use of non-logical processes and acquiring knowledge through reflection in action.

5. For several years, I had a community-based law practice in Washington, D.C. In addition, for almost a decade, I have mediated a variety of disputes and assisted individual mediators and programs on a national basis. For nine years, I have taught advocacy skills, non-advocacy skills and mediation skills to law students, lawyers and others. I have also had extensive training and work experience in counseling. In 1989, I successfully completed training in the use and administration of the Myers-Briggs Type Indicator (MBTI). I presently use this personal growth instrument in my teaching and training.
mulating this theoretical framework for understanding the influence of the existing range of mental processes and behavioral choices in lawyers' interactions with themselves and with others. The commonality of this literature is a major paradigm shift from the view that learning and human functioning occur within the separate traditional behavior modes suggested in the dichotomies of: empathy versus intellect, will versus reason, cognitive versus affective, perception versus analysis, rational versus irrational. This literature is significant to lawyering because it demonstrates that the "rational functions" of lawyering tasks are not accomplished independently from the other methods by which humans assimilate, synthesize, and choose their interactions with external and internal conditions. Extending existing theory, I designed the constructs

6. This literature comes from different sources including sociology of the legal profession; the role of the professional in other occupations; legal ethics and professional responsibility and the role of the lawyer; clinical legal education theory; alternative dispute resolution theory; mediation theory; communications theory; psychology and brain research; feminist theory; and education or learning theory. It is beyond the scope of the present article to examine the process of synthesis from all these fields of theory which span several years of study. The contributions from all these areas, however, should be examined separately and may appear later as another article or book. Nevertheless, many of the footnotes to follow will introduce some of this literature to the reader primarily in the areas of psychology, education, urban planning, in addition to several pieces of legal scholarship.

7. "A new paradigm is established as a result of many small decisions and choices and only much later does anyone make the discovery that lo! we have a new paradigm." Hills, What is a Paradigm Shift?, 15 WORLD FUTURE SOC'Y. BULL., 1, 1 (March -April 1981). As a profession incorporates a new paradigm, it must overcome resistance presented by the old ways of thinking particular to that profession. See T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970).


The Shaffers have also noted how the practice of Rispetto allows lawyers to keep their dignity and sense of self. The exercise of Rispetto operates as a construct for analysis which excludes polar dichotomies. Shaffer & Shaffer, Character and Community: Rispetto as Virtue in the Tradition of Italian-American Lawyers, 64 NOTRE DAME L. REV. 838 (1989).

9. Ayer argues for a broader framework for understanding doctrine or law. Ayer, supra note 2. I argue for a broader understanding of the practice of law. John Mudd
for determining the human skills used in lawyering which are associated with the perceptive self and the knowing self.

II. EBENEZER LEGAL: A TALE OF LAWYERING PAST AND FUTURE

The reader is invited to read a script of fictional dialogue which introduces all of the key concepts in this article. I ask the reader to enjoy herself as she reads this script. After this odyssey, the reader should be well equipped to explore the theory in the remainder of this article.10

A. Introduction By the Characters or Voices

EBENEZER LEGAL: I am the voice of the author and projected reader, the complex human being functioning as a hardworking, well intentioned, somewhat reflective, basically competent attorney. I am conditioned in the traditional perspective of lawyering which is the “doing of technical work to or for others.” I am the client’s champion and an officer of the court. I am the leading actor, if you will. I do not handle people as though law practice were a “helping profession,” which is what “Working With Others” idealistically believes should be my role. The Code of Professional Ethics does not require me to define my role this way, and in fact at times prohibits it.11 I may interact with people but I


10. My decision to incorporate a fictional dialogue as a means of introducing my theory is an outgrowth both of my study of learning theory and my individual propensity to demonstrate ideas by creating exercises, role-plays, simulations, and story-telling. The use of this dialogue is intended to ease the overall general framework into the reader’s mind. Thereafter, the regular discourse of the piece should permit easier integration and critique by the reader. In the subsequent sections reference is made to the illustrations within the dialogue for examples. For an introduction to this learning theory, see P. Kline, THE EVERYDAY GENIUS: RESTORING CHILDREN’S NATURAL JOY OF LEARNING - AND YOURS TOO (1988); J. Quina, EFFECTIVE SECONDARY TEACHING: GOING BEYOND THE BELL CURVE (1989); C. Rose, ACCELERATED LEARNING (1985).

11. It has been the subject of comment elsewhere that the ABA Code of Professional Responsibility neglects the counseling function. See Redmount, Client Counseling and the Regulation of Professional Conduct, 26 St. LOUIS U.L.J. 629 (1982). Cannons 5, 6, and 7 can be interpreted to prevent the type of attention I suggest. See MODEL CODE OF
do so only as a secondary matter for the instrumental purposes of making the law work for my clients. Beware, some of the other characters in this discussion are into pop psychology! I am sure that you, the reader, will end up agreeing with me that much of what they regard as a significant part of lawyering is not central to my role as it has been defined by our society.

PERCEPTIVE SELF: I am the voice for the abilities to use different nonjudgmental listening and expressing skills, the ability to monitor internal bias, abilities in the attending skills focused on the accurate understanding of the other, the ability to see patterns from analogy and from shifts in examining particularities to examining generalities. I am always part of why Ebenezer succeeds and why he fails. He could increase his odds of success if he simply acknowledged my presence, understood my functions, and paid attention to what I do when he works. Instead, he regularly calls upon his loyal servant, "Core Rationalizations," to blind him to my presence. Pity, since I will continue to be involved in his work. It is about time Ebenezer paid some attention to me. If he did, he would know how and when I can be useful. I want Ebenezer to look to the advantages of my presence and consciously cultivate my participation.

I also assist Ebenezer by contributing intuitive understanding to his work. He never appreciates that he is referring to me every time he declares: "I have a hunch!" The truth of the matter is that often he


12. Pop psychology is a derogatory term used to identify lay psychobabble. It is often used as well to discredit meaningful discussions about human behavior and motivation.

13. Duncan Kennedy acknowledged the importance of self-knowledge regarding one’s effects on others. As a victimized law student, he lamented the absence of self awareness in the execution of the professional role of the law professor. At that time, he stressed that awareness of one’s conduct on others should be considered as part of one’s professional role. See Kennedy, How the Law School Fails: A Polemic, 1 Yale Rev. Law Soc. Ac. 71 (1970).

Philosophically, Ebenezer’s use of the perceptive self is intended to create the dialogical relationship and the virtuous friendship characterized by trust and safety. Aristotle regarded this level of human interaction as the highest form of friendship where one attends to the other, experiences the state of the other, and does the foregoing because this experience is good. See Aristotle, Nicomachean Ethics, 1164a1 - 1172a15. Martin Buber, mid-twentieth century philosopher, examined how achieving understanding of the other to that person’s satisfaction is the centerpiece in the construction of the dialogical relationship. Buber explores the value of such dialogical relations for self, the other, and community. See M. Buber, Between Man and Man (1969); M. Buber, I and Thou (1958).
overlooks his hunches and the experiential bases which validate them.

KNOWING SELF: I am the voice for the abilities to clinically evaluate both behavioral and substantive choices by applying norms and standards to specific current actions. I include the ability to uncover and test one’s own assumptions and conclusions concurrently with one’s execution of legal functions. I use these abilities in planning and modifying fact investigation such as the ability to critically evaluate the worth of evidence. Principally, I am the abilities in inductive and deductive reasoning. I have the reputation of being solely responsible for Ebenezer’s analytic rigor in using the law to solve problems.

HUMAN SKILLS: I am the voice for the entire inventory of intrapersonal and interpersonal skills utilized by Ebenezer in lawyering activity. From this universe, perceptive self and knowing self evolved into distinct categories of human skills utilized by any lawyer. These categories are for the convenience of understanding the theory. Therefore, I am the complete range of mental processes and behaviors which resides within any lawyer. In the real world, I am not neatly divided into perceptive and knowing parts of the self. Rather, several different skills may be participating together in the accomplishment of goals or tasks.

WORKING WITH OTHERS: I am the voice of Lawyering Future. I do not elevate the role of lawyer above that of client or involved others. Instead, I see the lawyer as an equal human being whose quality of thought and behavior is not solely evaluated by the technical correctness of a legal answer. Much of what Ebenezer does as a lawyer extends beyond his limited self-concept as a rational technician. Understanding the law requires more than the use of rational analysis. Rather, much of what Ebenezer does involves working with others, and working with others involves a number of mental and behavioral processes. Yet, Ebenezer goes about the work unaware of the many things he does which affect the quality of what he does. In these aspects, I better let “Perceptive

14. See supra notes 4 & 9; see also T. SHAFFER & J. ELKINS, LEGAL INTERVIEWING AND COUNSELING (1987), which also addresses the moral and ethical dimensions of a broader perspective on lawyering.

15. See Lehman, in Pursuit of a Client’s Interest, supra note 4, which cuts to the core of the matter: Self awareness about the perceptual differences between lawyer and client and about the influence of the lawyer’s values on the client is needed by the lawyer. My additional concerns go beyond the interviewing and counseling relationship, as such, to what we do not see in the full representation of a matter. From a philosophic perspective, Lehman discusses the existence of the “arbiter” in the lawyer which embodies the use of the full self in decision making in lawyering. See W. LEHMAN, HOW
Self” and “Human Skills” speak for themselves. Speaking for myself, I think Ebenezer should regard his professional role as encompassing my concerns. He might become more efficient and satisfied if he could appreciate that when working, he relies on many people to assist him: the client; his colleagues; employees; adversaries; civil servants; and decision makers.

Further, I see the need for meshing human interaction with legal tasks. In this context, I view Ebenezer as having responsibility for promoting understanding in communication and for appreciating how his behavior affects the choices of the client and the outcomes of discrete lawyering tasks.

CORE RATIONALIZATIONS: I am the voice for existing rationales which embody important values and perspectives governing the development of the profession. Core rationalizations is the body of thought which forms the framework for Ebenezer’s traditional view of lawyering as the “doing of technical work to or for others.” My thoughts have been around for a very long time. The legal system is quite accustomed to coming to me to provide unquestionable authority for acceptable positions. For the record, I am present in this discussion in order to assist Ebenezer on any issue where he needs me. Ebenezer should feel free to scan my collection, or if he wishes, I can suggest which selections might be more appropriate for the occasion.

B. The Scene

SETTING: All voices are assembled with Ebenezer in his law firm’s conference room. Reluctantly, he has called this meeting to discuss his handling of a particular case. He thinks that perhaps these rowdy and rau-cous characters can help him unravel what happened in that case. In other words, Ebenezer is about to reflect on his ideas about what a lawyer is.

EBENEZER: As you all know, I am under pressure of deadlines in the matter of Clark v. Smith. I propose to discuss my handling of this one case with you. You are all admonished not to disclose the contents of this conversation with anyone else. Let me then begin by providing some background on this case.

WORKING WITH OTHERS: Good! Do fill us in not only on the legal status of this matter, but include as well questions arising from the interactions in

WE MAKE DECISIONS, supra note 4.
this case. I am pleased that you are trying to integrate us all into a framework which makes sense. Previously, you have overlooked the fact that we interact with each other all of the time. Therefore, your attitudes towards any one of us has affected us all. We hope this discussion helps you to make use of us in your work in a more cooperative and efficient manner.

KNOWING SELF: Yes, we need to be filled in so that we can analyze the issues properly. Of course, I am interested in the concrete intellectual analysis of the case. However, I provide better analysis when I am informed of the actual perceptions and desires about which “Perceptive Self” has accurate knowledge. In addition, hopefully you will begin to see that I perform many functions, only some of which you now habitually use while overlooking my other processes.

PERCEPTIVE SELF: Yes, we need this information to understand the context within which you have identified issues because we can then determine whether our focus should be changed and our issues modified or developed. Your exclusion of me in the past has made me angry. Ebenezer, I was gratified to receive your invitation to attend this meeting. I am also sincerely interested in hearing why you have valued “Knowing Self” so much more than me?

HUMAN SKILLS: Yes, let’s look at the matter for both the narrow and the broader concerns and for where we all fit in realizing our goals. We need to ponder the benefits of what each of us will say today. Ebenezer, you are going to experience now how both “Knowing Self” and “Perceptive Self” need each other when working with you in order to give competent legal service. Even for those tasks which you identify as solely containing functions of “Knowing Self,” if we break down all the incremental steps of that task, we would probably find functions of “Perceptive Self” also present.

CORE RATIONALIZATIONS: Ebenezer, let me warn you. What you have begun to hear has little to do with how you generally perceive yourself. May I suggest that you set a time limit for your discussion with these voices. If you let them, they will take up too much of your valuable attention. You know how distracting some of them have been all along.

EBENEZER: Thank you, Core Rationalizations. I am watching the clock on this discussion! Mr. Smith is my client. He is the owner of a taxicab company. I want to set aside matters of proper incorporation and the functioning of his business as a partnership as these matters are not
what are troubling me presently. Mr. Smith and his company are being sued in a negligence action involving one of his taxis in an accident. This action is brought by Terry Clark, a law student, who sustained injuries while riding in a Smith taxi which ran a red light at an intersection. We have just about completed discovery. The plaintiff has also alleged ultra vires activity on the part of the corporation and is seeking to pierce the corporate veil of Smith Transportation Company. We have a trial date set for six weeks from now. As you might know, we are in a comparative negligence jurisdiction.

Negotiations have gone well and I expect a favorable settlement. My current settlement offer is pending while at the same time I face a deadline for filing my Motion for Summary Judgment. I have not started drafting the Memorandum of Points and Authorities. Although this case is ripe for settlement, I believe my Motion has merit and I am going ahead with its preparation. This motion should make my settlement offer more attractive.

All in all, I thought the case was progressing nicely. Given my client’s situation, he can easily handle the terms of the settlement and the business would continue to be in a relatively healthy state. However, all of a sudden, a new set of issues have emerged in this litigation that have side-tracked my client and put the functioning of the corporation at risk.

Troubles began early in the discovery period. Plaintiff deposed both my client, Mr. Smith, in his capacity as president of Smith Transportation Company, and Smith’s comptroller, Mr. Lee Harris. Harris has been Smith’s comptroller for eighteen years. Harris did a good job in preparing for and in doing the deposition with me. Smith was in attendance at this deposition. Both men have been close associates and Smith relied upon Harris as his right-hand in managing much of the work. This is now all changed since the Harris deposition.

Frankly, I will tell you that although I thought this matter was not my concern as Smith’s lawyer, I have begun to rethink this position. I now face a situation where, in part because of this litigation, my client’s company is falling apart. Our legal defense is still quite necessary. However, we now face a dysfunctional work relationship which is affecting my client’s business as well as his capacity to engage in this litigation. Let me give you one example of what is going on. Recently Smith decided to create a new position of manager in order to free himself for other activities. My client did not select Harris as the manager of the

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16. Smith Transportation Corporation is self-insured.
place. In the past it was understood between these two men that Harris would be responsible for managing any company business that Smith did not. Harris recently consulted an attorney and is now contemplating suing Smith on some sort of breach of contract theory.

PERCEPTIVE SELF: I can tell that certain aspects of this case, which do not address directly the legal merits of our defense, are influencing significantly the client’s welfare. We should examine your choices here and see if there is an effective role for you to play in these matters which can help you handle the Clark case.

EBENEZER: Okay. First of all, Mr. Smith has strong ideas about how discovery should have proceeded in the Clark litigation which do not comport with mine. I am the expert here and Mr. Smith should trust my judgment. He does not fully understand our defense objectives in a deposition. In response to opposing counsel’s questions, Harris responded “yes” or “no” without much elaboration. He followed my instructions and did not volunteer any information. As a result, Mr. Smith is upset with what he calls “give aways” in the deposition. He felt that Harris should have “stood up” for Smith more. Actually, in my view, Harris was appropriately conservative in the deposition. Since then, the relationship between the two men has seriously deteriorated. At the time, I basically stated that the Harris deposition essentially went well according to my plan.

I remember the preparation of the Harris deposition very well. Harris had never been involved in any serious litigation before. This was his first deposition. I, of course, took the extra time to explain the process and attend to Harris’s apprehensions. Clearly, Harris took the deposition seriously. His preparation for our meetings was impeccable. Harris stated that he was deeply committed to Smith and wanted to do the best he could for him.

PERCEPTIVE SELF: You construed Smith’s concerns as questioning your handling of the deposition and not as an issue likely to affect Smith’s behavior toward Harris. I noticed you did not explore with Smith his concern about Harris’s performance. Similarly, you did not disclose to Smith the extent to which Harris prepared in order to perform well, nor his thorough commitment to Smith. I wonder why?

EBENEZER: Look at how pressured I am. Besides, it’s off the point! The deposition went well and I told Smith so! To be truthful, I do not even know how to have the type of conversation you suggest.
CORE RATIONALIZATIONS: Exactly my point! Let me add, what Smith wants is for Ebenezer simply to get the Clark matter handled. Smith did not and does not look to Ebenezer as someone who should become involved in the personnel matters of the office.

KNOWING SELF: I am not sure that I agree. After all, it appears by not doing so, by omission, Ebenezer is now faced with being involved in those exact same issues, albeit now at an exaggerated and more defensive posture than he might have been earlier. In addition, Ebenezer, you are now facing trial and you may have real difficulties with your witnesses. Thus, your reliance on “Core Rationalizations” is contributing to the difficulty with Smith. Instead you should address and perhaps resolve issues of importance to the client which impinge upon his subsequent actions. I believe that when Smith expressed his dissatisfaction about Harris, Ebenezer knew that the client’s perceptions of the deposition might influence Smith’s behavior towards Harris, making Harris a far more reluctant witness at trial. Thus, Smith’s reactions have repercussions in this case and beyond this case. Ebenezer, you just as much said so a few minutes ago!

PERCEPTIVE SELF: Ebenezer, I was aware of the possibility of Smith’s concerns. After all, he expressed them forthrightly. They just did not fit into the picture of what you felt you had to address. I can appreciate that. After all, you are concerned about how little time you have to give to Smith as well as your other clients. I want the same thing! That’s why I said, although you would not hear me, that we should discuss Smith’s concerns and explore his assumptions about Harris since they affect the principal relationship upon which the Smith Transportation Company is built. I felt at this time that although you and Smith were talking to one another that no real communication was taking place. That is, Smith was unable to listen to you because he was too concerned about his own expectations of the matter and you could not really understand Smith at the time, because of your impulse to view such matters as extraneous to your representation. Rather, some discussion may have altered Smith’s perceptions, as well as given you feedback on the deposition which may or may not have been useful to you.

EBENEZER: Your awareness may be all well and good, but just what concretely do you suggest might have been more appropriate choices for me to make? Show me that it is worthwhile for me to make such choices.
PERCEPTIVE SELF: Valid question!* First, choose to simply pause and play back the matter. It is not all that time-consuming! Rather, this type of listening is difficult because we do not yet know how to listen and comprehend well, although we believe we do.18 Simply pause and restate what you are hearing to the satisfaction of your client. Your client will then take the next steps. In doing this, you permit yourself to focus on satisfying the other person that you have understood the person’s intent as well as their unspoken concerns. When doing this, you may experience a change in your original comprehension of what was said.

HUMAN SKILLS: You are right “Perceptive Self”, but this is easier said than done. Ebenezer, I think it is helpful to focus on a number of distinct skills which allow you to identify when certain types of interactions or interventions are appropriate. For instance, this is a complex situation involving your ability to accurately understand Smith from his perspective, your self-awareness of your internal bias and reactions, and your ability to withhold judgment when you are listening, perceiving, and talking to Smith. To some extent, all of these skills are implicated in your ability to communicate as “Perceptive Self” recommends. If we plan now to pay attention in the future to how you can actually practice these skills, you should find it easier to interact in this manner at appropriate times.

WORKING WITH OTHERS: The concern I hear voiced today is that you make the work more difficult, you sometimes thwart your desired results, and perhaps alienate others by not paying attention to this interaction within you.19 May I add another point here? These skills identi-

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17. In one sense, I am critical of “Perceptive Self’s” acceptance of Ebenezer’s remark as a “valid question.” It is too common and too easy for a critic to assert that alternatives must be fully articulated before considering a different perspective. Rather, Ebenezer should explore a different perspective because of its potential to alter his perceptions. His request for solutions should not be used as a switch to turn off his reflection on the issues. At this moment in the dialogue, Ebenezer gives an overpowersing response which, in the sense I have just described, is an invalid question. Nevertheless, “Perceptive Self” responds in order to engage Ebenezer further in reflection and to challenge the sufficiency of Ebenezer’s point. In actuality, perhaps “Knowing Self” would be more suited to give such a response to Ebenezer.

18. Carl Rogers made this point in discussing the road blocks experienced by most people (including professionals) to good communication. See C. ROGERS, ON BECOMING A PERSON ch. 3 (1961).

19. Martha Minow, in Feminist Reason: Getting It and Losing It, 38 J. LEGAL EDUC. 47 (1988), begins her discussion by acknowledging the common practice among us of adopting “unstated reference points that hide from view a preferred position and
fied by "Perceptive Self" will in actuality enable you to give some control of the discussion to your client.²⁰ If you do give some direction back to the client, you may well be rewarded with some new information. In this matter, for instance, not only might you hear more about how Smith relates to Harris, but also Smith might shed some light on the extent to which he, rather than Harris, controls the books for the corporations.

KNOWING-SELF: Agreed! This might have given you more data on the functioning of his company, which goes to the heart of your legal argument against piercing the corporate veil for liability. This information may have led to earlier preparation of your memo. I raise this point even though you started this discussion saying that these matters were not part of today's discussion. I think we all agree, however, that these matters must be addressed in your Motion and Memorandum of Points and Authorities. Furthermore, they will influence your settlement discussions.

PERCEPTIVE SELF: You are quite capable of hearing the observations of both "Knowing Self" and me while engaged in this matter. You often reflect in the moment of lawyering. You simply need to acknowledge this fact and expand your hearing to a broader range of points. This takes practice, just as learning how to reflect in the first place took practice.²¹

shield it from challenge by other plausible alternatives." Id. at 48. She discusses the barriers we theoretically and behaviorally construct to block other versions of truth in our interactions. See also supra notes 4, 9, 13 & 15.


²¹ See Smith & Nester, supra note 20. See also Lehman, The Pursuit of a Client's Interest, supra note 4; Himmelstein & Lesnick, Unpublished Essay (1981) (on file with the author), which explores the necessity for taking personal responsibility for our behavior
From reflection, such as we are doing now, you will be more able to identify the specific types of skills, about which "Human Skills" spoke, that are in need of your conscious attention. For instance, Ebenezer, you could have asked Smith some questions about his perceptions. This would have permitted you to educate your client on matters that perplexed him. It is not decisive here that you thought you were understood. Let's take the deposition. You could have simply requested, "Please tell me more about your reactions to the deposition." You could follow up with more specific inquiries such as: "Are you thinking that in this deposition it was most important for Harris to make statements that explicitly spoke about your intentions?" Then you could clarify the matter for Mr. Smith, such as: "Let me clarify our purposes in the Harris deposition." Then you would explain what those purposes were. After your explanation, you might ask, "In light of the purposes I've just explained, what are your thoughts now?" Also, you could inform Smith of Harris's intent. "Are you aware that Harris wanted to do well for you?" You can go on to relate Mr. Harris's specific comments. Further, you can explain why you think Harris did a good job for Smith. You should take responsibility for how you coached Harris, and let Smith argue with you about the decisions that were made rather than letting Smith transfer that hostility onto Harris.

CORE RATIONALIZATIONS: This is going too far! I must be heard! Ebenezer, I can't believe you are paying so much attention to these voices of distraction. Your rational skill and effective partisanship must come first at all costs. Should you divert your energies into these collateral concerns, you risk impairing your ability to act as a detached objective lawyer in all circumstances.

EBENEZER: Wait a minute, "Core Rationalizations," I have learned something here which may help me in my work with Smith. I am no longer convinced that some attention to these matters will lessen my ability to advocate well. What these voices are saying to me is that if I asked these questions and took time for this level of interaction, I might have

in lawyering. Himmelstein & Lesnick put human relationships at the core rather than the periphery of lawyering. They argue for a new framework which broadens lawyering to include the practice of care, compassion, and responsiveness. Their entire discourse is premised on persuading the practitioner to be more reflective in practice. See also Lesnick, Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum, 37 UCLA L. REV. 1157 (1990). For a fuller discussion of the role of reflection in professional work, see D. SCHON, supra note 4.
alleviated a lot of Smith's concerns which contribute to his present uncooperative state of mind and to the unstable condition of his company's affairs.

C. The Doing of Technical Work To or For Others

The dominant culture of professional conduct in lawyering is the doing of technical work to or for others in opposition to other people. In other words, our work exists within a legal culture which posits legal work as a technical service done within an adversary process.22 When the attorney is working as a member of a team, co-counsel or client advisor, he or she is not necessarily working within a collaborative or cooperative framework. Although these different formats of legal work exist, they exist within the overriding epistemology of legal work which sets up the construct of legal work as the doing of technical work to or for others. Thus, the attorney may not perceive the adversarial per-

22. For an illustration of this view, see Curtis, The Ethics of Advocacy, 4 Stan. L. Rev. 3 (1951). See also T. Shaffer & J. Elkins, supra note 14; Redmount, supra note 11 (discussion on the different models of the attorney-client relationship, noting the prevalence of this view).

Stephen Ellmann places client decision making at the center of the relationship. He recognizes the reality that many "lawyers may never listen to their client's well enough to understand their actual needs and concerns." Ellmann, Lawyers and Clients, 34 UCLA L. Rev. 717, 720 (1987). However, he thereupon argues that the nonjudgmental active listening methodology is a psychologically manipulative tool which may inhibit the client's genuine exercise of power to make the decisions in her case. He argues that this manipulation may be exploitative rather than benign. This argument is made in support of client autonomy and in recognition of the effects of social status and economic class. Nevertheless, Ellmann's concerns support a technocratic view of a lawyer's work which excludes the challenge to explore openly such manipulation with the client. Both he and I view manipulation as universally present in all human interaction regardless of the presence or absence of skill. Of course, exploitative manipulation can occur through ignorance, disregard, and lack of reflection. I view the issue as whether the participants acknowledge and examine the consequences of their particular form of communication. Lawyer-client communications which exclude attention to active listening and empathy may nevertheless be injuriously manipulative. Furthermore, the experience of manipulation may be more oppressive because the power imbalance is not addressed and the communication is far more directive. It is also important to separate the issues of nonjudgmental empathetic understanding from neutrality regarding moral choice. In my view, the attorney should be both an attentive listener as well as one who helps the client question her moral choices. Although Ellman gives an example of where a moral need was translated into a psychological need, both needs can be addressed. Id. at 749. These are simply two functions that attorneys should provide. What is significant here is the lawyer's exercise or lack of skill, and the lawyer's acceptance or rejection of both listening and challenging in effective ways.
spective she brings into her collaborative and cooperative relations with others.23

Within this dominant legal culture, the attorney bases her interactions on being the possessor of technical knowledge or being perceived as the possessor of technical knowledge. While it is certainly true that the attorney possesses technical knowledge, it is also true that the attorney may excessively rely on this fact in constructing a professional vision of what constitutes appropriate attitudes, communications, and behaviors. The vision of the lawyer as an objective, detached practitioner of specialized knowledge has permitted us to remain non-self-aware communicators. This fact continues to distance the practitioner from self, client, and others.

As lawyers we are trained to be rule bound. After all, lawyers often apply rules in problem-solving. In order to isolate the rules for application, lawyers look backward in history to find precedent. Lawyers freeze present facts in order to compare them with the facts in precedential cases for purposes of application and distinction in pending cases. In other words, every problem becomes a static set of facts to be applied to a legal rule or compared to an earlier problem defined in terms of its relationship to a legal rule. Even where new facts come to light distinguishing a present matter from existing doctrine, the present facts are still parsed from surrounding reality and become static in order to permit analysis.24 In all likelihood, in the matter of Clark v. Smith, the matters that attracted our legal attention are comparative negligence and the safeguarding of the corporate entity. Thus, both the

23. See D. SCHON, supra note 4, for a historical development of professionalism which tracks this analysis and includes the legal profession. See also Riskin, Mediation and Lawyers, 43 OHIO ST. L.J. 29 (1982), for a discussion of what he labels the “lawyer’s standard philosophical map”. For a description of the history of lawyering as a profession, see Abel, The Transformation of the American Legal Profession, 20 LAW & SOC’Y REV. 7 (1986).

Robert Burt asserts that mistrust is prevalent in the attorney-client relationship. This mistrust affects the quality of attorney-client communications. Burt states that attorneys see, and only want to see, their own good intentions toward the client and fail to notice the suspicion engendered by their unwelcome prognosis and advice. Thus, mistrust that influences the entire course of the relation between attorney and the client can arise though neither is prepared to acknowledge this fact to the other.


24. For instance, the excellent instruction in developing the facts and building the theory of a case in D. BINDER & P. BERGMAN, FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF (1984) demonstrates how it is necessary to do exactly this in order to craft good case planning and argumentation.
rules and the reality of the facts are controlled by the lawyer, within limits, but nonetheless controlled.

As lawyers we are trained to view matters instinctively as involving dichotomous positions. That is, we view matters as right or wrong, relevant or irrelevant, rational or irrational, meritorious or frivolous. Given particular legal tasks, such findings may have merit and may be desirable. However, we often instinctively think and behave in this positional mode even when it is not beneficial. This mode prevents us from seeing different perspectives or options which would help solve the matter. Our legal culture conditions us to believe that legal analy-

25. See supra note 8. See also Savoy, Toward a New Politics of Legal Education, 79 YALE L. J. 444 (1970) (author addresses the existence and consequences of such dualisms in legal education and lawyering and specifically laments the consequence of divorcing intellect from creativity in the training of legal thought); Parker, A Review of Zen and the Art of Motorcycle Maintenance with Some Remarks on the Teaching of Law, 29 RUTGERS L. REV. 318 (1976) (the author discusses the effects of dualisms in maintaining an incomplete understanding of reality by separating subjective and objective reality).

26. As discussed later in this article, there are additional modes of perception which can enhance the lawyer's understanding of a matter. One of my premises is that in waking activity we utilize several different modes of perception. Of course we use them in varying degrees in varying tasks. We also use them differently as individuals. However, we do utilize distinct skills in learning and in extending that learning to the external world. Learning theory supports my premise. Learning theory is found both in the literature of psychology and education.

Learning theory is focused on heightened retention, recall and performance by the activation of all the mental processes in doing a particular assignment or learning unit. The associated literature includes both theory building and quantitative studies. Dr. Georgi Lozanov is well known in Bulgaria, in fact recognized by the United Nations, for enhancing the learning potential of students through a method built upon current understandings of the brain and mind. His theory is essentially to recreate the conditions for the ease of learning associated with the first years of life when there is little constraint or learning blocks impeding the functioning of both the brain and the mind in the normal child. The recreation of such conditions is by means of promoting curiosity and the overlay of several different modes of stimulation in understanding any matter. G. Lozanov, Suggestology and Outlines of Suggestopedy (1978).

In the United States, there are several scholars engaged in using, extending and amending the basic theory of an integrated use of the self in the learning process. Among these individuals are: Dr. Peter Kline, author of EVERYDAY GENIUS: RESTORING CHILDREN'S NATURAL JOY OF LEARNING — AND YOURS TOO, supra note 10; Dr. James Quina, author of EFFECTIVE SECONDARY TEACHING: GOING BEYOND THE BELL CURVE, supra note 10; and Dr. Ivan Barzakov from the Barzak Educational Institute. The reader may be familiar with the ample popular literature applying this theory to such specific tasks as writing and drawing. Examples of this development are G. RICO, WRITING THE NATURAL WAY: USING RIGHT-BRAIN TECHNIQUES TO RELEASE YOUR EXPRESSIVE POWERS (1983) and B. EDWARDS, DRAWING
sis is adequate where positions are contrasted and ambiguity contained. After identifying legal issues, the lawyer's task becomes the replacement of ambiguity with specific meaning. Therefore, we tend to respond automatically to the inherent conflict or the dispute in the case by developing the differences and opposing interests. Thus, our communications and behavior are affected by our profession's orientation towards conflict and ambiguity.

Although we may often engage in various formats in legal work where we see ourselves actively cooperating or collaborating with others, we, nevertheless, operate within our overriding legal perspective of the attorney functioning with an individualistic non-self-aware style towards tasks and responsibilities. This approach to work is due in part to the tension between regularly working in disputes within the adversarial legal process and being prone to reduce ambiguity in legal work. A significant result of this orientation is the need among lawyers to achieve control in conflict, i.e., control over the client, control of the work place and translation of competitive behavior into presumptively successful professional behavior.

III. HUMAN SKILLS: THE PERCEPTIVE SELF AND THE KNOWING SELF EXPLAINED

The label "the perceptive self" is representative of the number of distinct skills or mental processes which an individual uses in order to function effectively in daily interaction and problem-solving, but which are rarely consciously attended to in the performance of lawyering tasks. These distinct skills permit an individual to perceive internal ex-

ON THE RIGHT SIDE OF THE BRAIN (1979). See also G. Strong, The Lawyer's Left Hand (unpublished manuscript on file with the author) (discusses "right-brain lawyering").
27. See Curtis, supra note 22 (illustration of this perspective).
30. I find support for my articulation of the perceptive self in lawyering in the writings by J. KATZ, supra note 4. He explores the ways by which physicians can more consciously employ the human skills to develop a more mature and mutually responsible doctor-patient relationship. He points out that the occurrence of professional conversations that yield mutually satisfactory results are in fact rare. He admonishes, "[W]e have spared no effort [at technical progress] but have paid little attention to learning how to better communicate with one another." Id. at XIV.

Yet it is this level of skill that he finds deeply affects the quality of the doctor-patient relationship. Katz says that trust must be forged in a joint effort to disclose what is known and what is unknown, warning that blind trust by the client is dangerous. Furthermore, he also emphasizes that the more one does not understand one's self, the
experience and external surrounding circumstances; to separate perception or observation from the processes of interpretation and judgment; and to create and change the frameworks within which interpretation and judgment take place.31

We use these skills when testing understanding in communication, such as an interview or any exchange in any work task.32 For instance,

greater the impediment to achieving actual understanding with one’s client. Specifically, among the points he advocates are self awareness and expanding the concept of professional responsibility in doctoring to include behavior for interacting with the understanding of others. These are all principles that I include in my framework. I find the existence of Katz’s work supportive of my theory because there is much which the two professional relationships have in common. The danger of blind trust by the client is certainly one such commonality.

Robert Burt explains how both physicians and lawyers suppress acknowledgment of mistrust by the people they service in the professional relationship. Both professions expect obedience and trust. Instead, Burt believes that trust must be earned by the practitioner in every encounter. Burt posits that trust will occur in the individual relationship when the legal profession adopts rules of professional conduct which mandate attention to this issue. Burt, supra note 23, at 1046.

The need to cultivate reflective abilities in using the intrapersonal skills in lawyering in order to uncover and not distort the client’s wishes is given serious examination in Lehman’s influential article The Pursuit of a Client's Interest, supra note 4. There has been some prior comment in legal literature recognizing that a focus on human skills should be included in the law school curriculum in a meaningful way. See Barkai, supra note 4; Griswold, supra note 4; Riskin, supra note 23. See also Watson, On Teaching Lawyers Professionalism: A Continuing Psychiatric Analysis, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 139 (1973); Redmount, The Transactional Emphasis in Legal Education, 26 J. LEGAL EDUC. 253 (1974); Sarat, supra note 4; Stone, Legal Education on the Couch, 85 HARV. L. REV. 392 (1971).

31. In lawyering, much of what the lawyer does is to learn by means of solving problems. She then extends that understanding in some fashion in the external world. This is an integral part of my theory which is also supported by C. JUNG, PSYCHOLOGICAL TYPES (1923); I. MYERS, GIFTS DIFFERING (1980); C. ROGERS, supra note 18. This literature focuses upon the development of the self and the existence of different personality types based upon different modes for perceiving information, for making judgments or decisions on information, and for dealing with the outside world.

32. Carl Rogers developed a model of the human as capable of learning about self through thoughtful nonjudgmental reflection of thoughts and behaviors. He developed a framework for the types of communication skills that are necessary in order to comprehend and examine the reality of others. His contribution to my theory is in the exploration of the intrapersonal tasks required of the listener in achieving this dynamic for the interpersonal skills of active listening. His writings dealt with the training of the professional in performing these functions. See C. ROGERS, supra note 18, at 331-33. Many of the purposes for such skills are similar to the needs of a lawyer in conducting fact investigation and in comprehending the scope of the issues to be addressed. The lawyer uses these skills in order to execute many discrete lawyering tasks. Again, how-
Ebenezer might have said to Smith: "You appear to be looking for something else in my responses. Please tell me what that is so that I may respond to your real concerns." The skills of the perceptive self are also used to judge one's observation of data. For example, Ebenezer asks Smith: "You seem to be disappointed with Harris's performance?" We also use the perceptive self to identify the lawyer's reactions to circumstances and to understand them in a proper context. Thus, Ebenezer might use his perceptive self to identify his own reactions to Smith's feelings about the deposition. For instance, Ebenezer would ask himself, "Why am I annoyed at Smith's insistence on seeing Harris's performance at the deposition as unsatisfactory?"

Awareness of the perceptive self in legal tasks permits the possibility of embracing the idea that decision-making in law practice is not entirely centered upon a rational method.\(^{33}\) Equally important to lawy-

\[\text{ever, the lawyer is likely not to be self aware of the existence nor quality of her usage of these skills. Nevertheless this self awareness is acquirable. Therefore, I transport the need of self awareness in the exercise of these skills into lawyering by defining the range of professional activity to explicitly include such behavior. See D. BINDER & S. PRICE, supra note 4, at 20-37, for a fine job of exploring the particular skills of active listening in client interviews. Such skills are an important part of the human skills associated with the perceptive self in lawyering.}\]

\(^{33}\) Howard Gardner's work is particularly supportive of my theory that we use different forms of knowledge in making communication and behavioral choices. H. GARDNER, FRAMES OF MIND (1983). His theory is that there is not one general form of intelligence that is responsible for thought in the mind. This is a radical departure from the Binet concept of Intelligence Quotient which is now deeply imbedded in our culture and which recognizes solely the mathematical, logical intelligence as rational thought. In the early 1900s, Binet developed his theory by observing what was useful behavior for learning in the classroom and thus that context governed the creation of his theory on intelligence. Gardner, Beyond the IQ: Education and Human Development, 57 HARV. EDUC. REV. 187 (1987). Gardner defines intelligence as "the ability to solve problems or to fashion products that are valued in one or more cultural settings." \textit{Id.} at 189. Gardner studied different human groups including brain impaired people and surveyed data on different human and animal samples. He found that there were at least seven distinct intelligences in the brain and that all were equally important to the functioning of the human mind. These seven included the two already accepted as the definition of intelligence: logical-mathematical and spatial which account for abstract thought, precision, logical structure, keen observation, visual thinking, mental images and metaphor. The additional intelligences he identified are: linguistic, musical, kines-

\[\text{thetic, interpersonal and intrapersonal.}\]

It is particularly the last two intelligences which complement my theory. Interperso-

\[\text{nal intelligence is the set of skills associated with the abilities to understand others. Intrapersonal intelligence is the set of skills associated with self-knowledge and the use of one's values, purposes, and feelings in the use of the self. \textit{Id.} at 190. I not only recognize the importance of the existence of these forms of intelligence in lawyering, I}\]
ering, awareness of the functioning of the perceptive self permits conscious use of such nonreactive skills as withholding judgment or understanding the other’s perspective. Each of these skills are crucial for lawyers to practice if they are to refrain from making nonreflective judgements. Awareness of the perceptive self permits the attorney to take advantage consciously of intuition, inventiveness, and inclination. These skills also permit client-centered lawyering.

"The knowing self" is a label for those skills, functions or mental processes which are openly accepted as the core of lawyering skills. These are the processes or skills we use to evaluate a situation deliberately or to reach a decision. This, of course, includes the small evaluations, decisions, and value judgments that may occur just beyond the realm of our conscious mind. For instance, when Ebenezer judges that attending to Smith’s needs is not within the scope of his role, he is applying a rule, norm, standard or value in coming to a conclusion or in taking a specific course of action. The abilities in reasoning inductively and deductively are present in the knowing self. For instance, Ebene-

also include them as capable of being consciously learned and practiced.

One scholar has taken issue with the widely held belief that logical thinking alone leads to good moral judgments. Carol Gilligan does acknowledge the role of the interpersonal dimension in reaching moral judgments. This observation stands apart from discussing her main thesis and her critics’ responses. See C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982).

34. Self awareness and ability in some of the human skills associated with perceptive self have been acknowledged by other disciplines as having profound impact upon the delivery of professional service. D. Schön addresses the crises in confidence experienced by all professions and the challenge to become reflective in practice. He devotes special attention to how the professional can learn to be reflective in the process of doing professional tasks, thus increasing the likelihood of individual satisfaction for the practitioner and effective service for the client. See D. SCHON, supra note 4. In addition, John Forrester stresses that the tasks of the professional urban planner are often “deeply social” and require the practitioner to keenly reflect on one’s own interactions with clients and others. He focuses upon the critical importance of adequately understanding others and of possessing “critical listening skills.” FORRESTER, PLANNING IN THE FACE OF POWER ch. 7 (1989).

35. See J. ADAMS, CONCEPTUAL BLOCK-BUSTING (3rd ed. 1986) (full exploration of the development of non-linear thinking which produces creative problem solving or inventiveness). Understanding the epistemology of intuition and inclination is beyond the scope of this article.

36. See supra note 20. Much of the literature assumes or implies the effective presence of the perceptive self in the lawyer.

37. See Feinman & Feldman, Pedagogy and Politics, 73 GEO. L. J. 875 (1985). This article focuses on learning objectives in clinical legal education. It articulates, albeit with a different schema, the particular skills associated with the knowing self.
zer's efforts to interpret logically the impact of Harris's actions upon Smith imply certain premises. This aspect of ourself, the knowing self, also involves the skills of planning and modifying our actions intentionally. Typically, it is only the knowing self which is credited for our ability to distill legal issues in live cases, apply the appropriate doctrine, and function technically in the methods of formal legal discourse.38

I articulate below the component skills which are exercised within the knowing self and within the perceptive self. This listing is not intended to be exhaustive. Rather, this listing should be viewed as a preliminary effort to identify what we value and devalue in the work of a lawyer even though all aspects may have great bearing on the success of our efforts.39 Obviously, no such division of two different selves exists within the attorney. In reality, these skills or functions exist together and not in separate spheres or domains. Thus, I identify the perceptive self and the knowing self as artificial categorizations within the whole set of human skills possessed by the attorney. In actuality, the individual lawyer's abilities to effectively interact with others and engage in problem-solving requires the interactive usage of the entire set of human skills. These two listings are provided in order to concretize the theory of this article to specific functions we all perform.40

38. See supra note 23.
39. See supra notes 20 & 37.
40. Theories regarding intelligence, the "holographic" brain, and the "triune" brain are compatible with my formulation of the perceptive and the knowing selves in lawyering, each as a package of complementary skills which are not divided along the lines of cognitive versus affective, will versus reason, rational versus irrational, intuitive versus analytical and left-brain versus right-brain. Admittedly, there are several different characteristics attributable to left-brain and right-brain functions and the two hemispheres do process information differently. Sperry, Lateral Specialization in the Surgically Separated Hemispheres, in THE NEURO-SCIENCES THIRD STUDY PROGRAM 5 (F. Schmitt, F. Worden, & G. Adelman ed. 1974). Nevertheless, both hemispheres share in many mental processes, and "higher" mental functions such as synthesis are not attributable to either hemisphere alone. Hand, The Brain and Accelerative Learning, 1 PER LINGUAM 6 (1986).

Although there are studies indicating which mental process or activity is associated with one particular brain hemisphere, there is research indicating that many functions can occur by using either hemisphere. Springer, Educating the Two Sides of the Brain, 161 AM. EDUC. 34 (1989). See also S. SPRINGER & G. DEUTSCH, LEFT BRAIN, RIGHT BRAIN (1985). The variety of different mental functions and the associations of used and unused mental processes which can be tapped in more conscious ways is a premise useful to support my theory that human skills can be leaned and developed. The theory of the holographic brain is compatible with my theory in that it models the brain as a complex network of neurological interactions in the brain as a whole. This theory sees the many different centers of brain activity as transportable and highly interactive. H. GARDNER, THE
IV. THE AWARE USE OF THE KNOWING SELF

The skills of the knowing self are those skills we value in our law-ering work. These are the skills associated with legal analysis and the use of logical paradigms to reach judgments and take action. Further, these same skills are employed to evaluate prior actions and to modify a pending legal task or anticipate a future legal task. The following list articulates the component human skills that are part of the knowing self.\(^4\)

1. The ability to evaluate one’s own behavioral choices by applying norms to specific actions. — For instance, this is Ebenezer’s ability to examine consciously whether his original statements to Smith were appropriate given Ebenezer’s intention of effectively addressing Smith’s concerns.

2. The ability to evaluate one’s own choices in internal mental judgments by applying norms or standards to specific judgments. — For instance, this is Ebenezer’s conscious ability to judge the appropriateness of his private judgment that Smith is incapable of handling his own affairs in light of the standards Ebenezer uses to judge mismanagement. In other words, Ebenezer applies norms to perceive Smith’s misunderstanding of the deposition’s purpose and Smith’s overreaction to Harris’s performance in the deposition.

3. The ability to identify one’s assumptions or conclusions concurrently or consecutively with one’s actions. — For instance, this is Ebenezer’s ability to tune into his mental judgments of Smith’s character during his decision or after his decision to ignore any further complaints by Smith about Harris’s performance.

4. The ability to test one’s assumptions or conclusions concur-

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MIND’S NEW SCIENCE: A HISTORY OF THE COGNITIVE REVOLUTION (1985). In perceptual research, Dr. Paul MacLean developed the model of the triune brain as a schema for achieving the full human potential in any task. MacLean, On the Evolution of Three Mentalities, in 2 NEW DIMENSIONS IN PSYCHIATRY: A WORLD REVIEW 305 (S. Arieti & G. Chranowski ed. 1977). Useful here is Dr MacLean’s assertion that to function completely in creative tasks, one must join those parts of the brain responsible for intellectual activity with those parts responsible for feeling and emotion. This synergy supports my assertion that both knowing and perceptive functions are intermingled in conscious activity, they are knowable, and they can be used to enrich each other when one is aware of the mixture. It goes without saying that the two can work against each other when we are blind to their co-existence.

41. The illustrations provided are brief because there should be no difficulty for the reader in specifically applying the abstract process to concrete examples in one’s work. See supra note 37.
rently or consecutively with one's actions. — For instance, this is Ebenezer's ability to evaluate whether his judgment of Smith's character is appropriate during his decision or after his decision to ignore any further complaints by Smith about Harris's performance.

5. The ability to summarize or expand content. — Expanding content is the ability to develop detail on a given point. For instance, this is Ebenezer's ability to articulate specifically and to develop from Smith some textured specificity or content as to any one of Smith's general concerns.

6. Deliberate planning for the undertaking of specific actions to achieve goals or objectives. — For instance, this is Ebenezer's ability to plan his strategy and tactics for the Harris deposition in light of his overall litigation strategy for the case.

7. Modifying or changing the range of one's response as an aware outcome after reflection. — For instance, this is Ebenezer's ability to alter his attention in this case to include the well-being of his client's employment relations with Harris if Ebenezer concludes such a shift is warranted after evaluating what issues with Smith warrant his attention.

8. Inductive and deductive reasoning (cause and effect). — For instance, this is Ebenezer's ability to articulate the premises; grounds or principles which justify his finding in this case that total liability should be contested or for finding that certain specific facts are relevant to a judicial decision to protect the corporate entity. This reasoning would include Ebenezer's articulation of the law and facts which support his legal theories.

9. The ability to structure comparisons for analogy and distinction which includes the ability to categorize and organize data. — This ability is, in actuality, many distinct skills. For example, Ebenezer has first sorted and organized the facts and law of this case, and then has subsequently compared it with other such cases in order to assess the viability of plaintiff's cause of action. Armed with this analysis, Ebenezer plans his defense strategy, which includes his approach to the Harris deposition.

V. THE AWARE USE OF THE PERCEPTIVE SELF

The skills of the perceptive self are those skills we do not value in our lawyering work. These are the skills associated with nonjudgmental listening and expressing; the ability to monitor internal bias; attending skills for accurate understanding of others; and the ability to see patterns from analogy and from shifts in examining particularities to examining generalities. Because these skills are less obvious to the reader, I
provide more thorough explanation and illustration to aid comprehension.

1. The ability to use nonjudgmental listening and expressing skills. — Both listening and expressing are stated jointly because often the attorney may internally comprehend accurately the information communicated, but is unable to express that understanding without judging it or being perceived to have judged it. The former requires the ability to play back accurately what one is perceiving. The latter further requires the ability to identify misperception and then to clarify the matter for the other person. The misperception may be that of the lawyer or the other person. Precision and accuracy are required in the active expressing skills. It is often ineffective to express content in vague or general terms.

Illustration: Suppose Smith had just expressed anger at Ebenezer for his defense of Harris’s deposition. A judgmental response by Ebenezer would be: “Don’t get defensive. I am simply stating my observations of the matter.” A nonjudgmental response would be: “You appear angry and disappointed by my remarks.”

2. The ability to use attending skills. — Attending skills are the abilities to invite further understanding of the content which the attorney has understood by active listening and expressing. Illustration: Using the example above, a nonattending response by Ebenezer would be: “You appear angry and disappointed by my remarks.” An attending response would be: “You appear angry and disappointed by my remarks. What about them upsets you so?”

3. The ability to monitor internal bias and reaction. — I use the term “monitor” as the label for the ability to identify consciously one’s biases or prejudices and then control one’s behavioral responses.

Illustration: Ebenezer is hearing the remarks from Smith directed at him. Overall, because of Smith’s reactions to Harris, Ebenezer has concluded that his client is domineering and selfish. As a result, Ebenezer quietly decides to spend as little time interacting with his client as possible. The absence of use of these monitoring skills leaves Ebenezer open to raw reaction. That is to say, he is making behavioral choices in reaction to these prejudices in less than a deliberate manner. Ebenezer is making judgments about his client as a result of his bias against Smith’s overt emotionality. These judgments influence Ebenezer’s behavioral choices.

A response indicative of the use of these monitoring skills would be three-fold. First, Ebenezer is able to hear inside himself, and understand that he is affixing these labels to his client. Second,
Ebenezer would reflect upon his basis for such judgment and the ways in which Ebenezer might discuss these reactions with Smith. Third, Ebenezer would consciously attempt to compensate for or put aside these reactions when examining the necessity for interaction with his client.

4. **The ability to understand accurately another from the other's perspective.**—This particular ability encompasses the three abilities above and further includes an ability to test whether the understanding one has achieved through active listening and expressing, attending, and monitoring bias or prejudice is the one intended to be conveyed by the other person. For example, an attorney may leave an interview or any interaction satisfied of her understanding due to her good exercise of the previous skills. The other person (client, witness or colleague) may have a different view of how well she or he is understood. Understanding the other's perspective includes understanding that the individual may have underlying concerns which have not been expressed. Such understanding is necessary for an accurate understanding of the other person's circumstances.

Illustration: Ebenezer and Smith had all the previous exchanges using the skills of the perceptive self. What follows is an example of what may occur when not testing whether the other person has been understood. Ebenezer has learned from this interaction much more about Smith's reactions to the Harris deposition. Ebenezer thinks he now understands "where his client is coming from" and leaves it at that. After all, Ebenezer certainly took good care of his client by effectively listening and expressing, attending, and monitoring his own reactions. Ebenezer assumes, as a result of his good work, his client is now in a different and better posture about the matter.

In fact, the client has changed, but is far from being in a different spot regarding his pending and future actions. Smith has responded to all of Ebenezer's inquiries candidly and perhaps experiences some discomfort at this level of candor, but expects to hear some understanding of his position from Ebenezer as a result of this discussion. Since Ebenezer is silent, Smith concludes that Ebenezer was trying to explore Smith's concerns, but assumes that Ebenezer understands the situation no differently than before since Ebenezer had nothing to say about the matter in the end. As a result, Smith decides never to let himself have another conversation like this with Ebenezer. He should have known better; lawyers never really understand what their clients are experiencing, but only some abstraction of the client's life experience. Smith, having discussed Har-
ris, is once again quite (but quietly) agitated about Harris.

Assume instead that Ebenezer elected also to inquire whether Smith concludes he is understood. After exercising all the previous skills of the perceptive self, Ebenezer now states: "Let me summarize what you have been telling me for a moment before we proceed. I want to see whether I have heard you correctly. Essentially, you have expressed dissatisfaction with both me and Harris regarding the handling of the deposition. More particularly, you have commented that . . ." Here Ebenezer briefly restates what he has understood from Smith. Ebenezer concludes this section by asking Smith: "Do I understand what you have been saying?" Smith responds mostly yes, but not on one important point. Smith then discloses that he has been terribly affected by the change in Harris's behavior. He has experienced great disappointment over a business relationship seventeen years in the making and really cannot understand why Harris did what he did. Ebenezer is now in a position to make some different choices regarding the direction of the conversation with Smith.

5. The ability to see shifts in examining particularities to examining generalities. — This particular skill refers to creative thought, which is the ability to see larger contexts, patterns and frameworks. Such ability permits a different assessment of the communication because it is deliberately being reviewed for different contexts which might alter the lawyer's understanding of the information.

Within this skill, there is also the ability to respond to intuition and examine the situation in light of that shift. Mapping or clustering is an intentional activity to look at a particular area, but in undirected and nonsequential fashion. Rather, once the issue or topic is identified, the individual permits the mind to make its associations in any way it flows. This substance is not automatically harnessed into a structure or order because that organization can easily occur later. Therefore, if you visualize this activity, you would see your written random thoughts in various spaces on the yellow pad and appearing as distinct clusters of thought. Ebenezer might write in the center of the page the core concern, such as Smith's dissatisfaction with the deposition, and then commence to write several different thoughts randomly elsewhere on the

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42. Creative thought is viewed as a consequence of a mixture of processes as well as attitudes. See P. KLINE, supra note 10; MacLean, supra note 40. See also Greenebaum, How Professionals (Including Legal Educators) Treat Their Clients, 37 J. LEGAL EDUC. 554, 564 (1987) (discussion of the skill of searching. Searching is analogous to this ability). Greenebaum views searching as the skill which law students need to give extra attention. See id.
page relating to this concern. This flow of diverse thoughts may allow for the capture of insights and new perspectives. Ebenezer should be able to look at Smith’s reactions and brainstorm several different contexts for the understanding of Smith’s reactions. This brainstorming includes the ability to construct different hypothetical connections within or among such categories or concepts.

Illustration: Ebenezer might formulate the following as the possible contexts for Smith’s statements or behaviors: Smith’s reactions relate to the particulars of the legal representation; to current issues with Harris; to historical issues with Harris; or to his business concerns. Quickly scanning these possibilities, Ebenezer may or may not come up with the most likely context for understanding Smith’s concerns. Intuition may voice some indication as to the proper or most likely contexts in which to place Smith’s issues. By considering the different contexts, Ebenezer is able to identify different criteria for judging the situation. Ebenezer, therefore, may have the opportunity to inform his choice of responses by considering all the contexts. Ebenezer may determine that some contexts overlap in certain ways. Thus, Ebenezer may still view the matter, for instance, as a current reaction to the behavior of Harris. However, pondering the different contexts may soften the boundaries of that judgment so that Ebenezer is able to consider that Smith may have been influenced by the other considerations mentioned. Ebenezer may then have more choices in how to respond to or limit the role of Smith’s concern in going forward with the case.

VI. WORKING WITH OTHERS

"Working with others" is an alternative frame of reference that expands the scope of observable behavior in lawyering. Effective lawyering requires a competent level of self-awareness and social interaction if the reach of an attorney’s professional activity is extended to

43. See supra notes 4, 9, 14, 15, 20, 21 & 30. There is a client centered model of practice which is value free or neutral and in which the lawyer is not self aware. See Bastress, supra note 20. Client centeredness does not explicitly integrate the full range of human skills that I suggest, nor give emphasis to the effect of these skills on the lawyer’s values and thoughts. By extension, the potential consequences to the client and others are overlooked. I bring a perceptive self skills focus to client centeredness which I label, “working with others.” J. Elkins proposes that lawyers adopt an ethics of searching, questioning, and reflecting regarding ethical choice. I propose such reflection on the quality of the lawyer’s interactions in human relationships. Elkins, Ethics: Professionalism, Craft, and Failure, 73 KY. L.J. 937 (1984).
her behavior when "working with others." From this perspective, law practice requires the meshing rather than the separation of human interaction and legal tasks. In other words, the boundaries between substantive legal tasks and the processes of human interaction are not fixed. Because their respective contents are often commingled, paying attention to the quality of human interaction is often not a diversion from the necessary attention to the quality of the substance of legal tasks. Effectively "working with others" requires the pragmatic lawyer to cultivate her ability to use the nonadversarial communication skills which I identified earlier as associated with the perceptive self. A precondition to the effective practice of these skills is self awareness in the use of these skills.

Expanding the range of behavior deemed part of a lawyer's professional conduct to include "working with others" originates from my view that all lawyering has an essential public purpose. Although the attorney and the client may enter into a private contractual relationship for the provision of legal services, this service is distinct from all other private professional services in that it is by this relationship that the client interfaces with the norms of her government in being part of the social order. The lawyer is the transmitter of these norms and to some degree represents the authority of the legal system. In addition, through the use of lawyers, vast segments of the public gain access to government for determination of rights, duties, and obligations in society and to society. Even for the large numbers of our population financially unable to retain legal assistance, their rights and duties are often affected by lawyers with the responsibility to carry out public tasks. For instance, an unrepresented person may face a prosecutor, judge or other public official acting in one of a variety of different roles such as an agency attorney or an administrative hearing officer.

44. The work of N. Brill, WORKING WITH PEOPLE: THE HELPING PROCESS (1973) is supportive of my frame of reference. She focused on self awareness and abilities in many of the skills associated with the perceptive self as necessary conditions for the construction of an effective helping relationship. Although her background is that of a social worker, her context is that of any person working with people. Many of the tasks of such a helping relationship overlap with that of the attorney-client relationship.

45. See Barkai, supra note 4; Mudd, supra note 9.


The quality of the nonadversarial communication, collaboration, and problem-solving skills used by the perceptive self in any of these public roles is as important as the substance of the activity because both affect the outcome. In the client’s perception, this is usually an outcome representing the authority of the social and legal order in resolving the client’s case. This authority is perceived by the client as dictating the actual outcome no matter whether the outcome is negotiated, litigated or adjudicated. The actions of attorneys affect a lay person’s opinion and understanding of her government. Lay persons respond not only to the substance of their issues but also to the human interaction of their lawyers as well. It necessarily follows that lawyers, as public actors, should be seriously concerned about the quality of their behaviors in human interaction.

Ebenezer is faced with legal tasks which intertwine human interaction with the execution of legal tasks in Clark v. Smith. Ebenezer has faced the complexity of this reality in his client contact and his preparation during discovery. This intermixture of human interaction and rational analysis is not, however, confined to the areas of interviewing, counseling, negotiating, mediating or witness preparation, but is also present in the reality of conducting direct and cross-examination, oral argument, supervising staff and peer collaboration. Not only would the quality of Ebenezer’s fact investigation with Smith be different when paying attention to the perceptive self, but also would be Ebenezer’s ability to formulate and test different legal hypotheses or theories. This is because Ebenezer’s attention has been broadened to examining the underlying issues in the different selves. Ebenezer’s understanding of the facts of the dispute should also be broadened and deepened as a result. Ebenezer’s use of these skills will give him a better understanding of the case and improved communications with the others involved.

Adopting “working with others” as an area belonging to the lawyer’s professional conduct has the potential for empowering both the attorney and client. The attorney should be less confused about content and the client’s objectives, and the client more able to appreciate what is happening. The attorney using the perceptive self in “working with others” will be assisting the client in making choices rather than mindlessly exercising authority in the social dynamic with the client at the expense of the client. Still, the client will seek guidance from the

48. Of course attorneys may decide not to embrace the values associated with “working with others,” but nevertheless improve their lawyering by paying attention to both the perceptive and knowing selves.
lawyer. The reality of the lawyer's social authority and technical expertise will still influence client decision making at both conscious and unconscious levels. There can be, however, a shift in the lawyer's behavior which increases the likelihood of mutual understanding, more effective counseling, and informed active choice.

The expansion of professional conduct to include "working with others" paradoxically leaves many attorneys feeling vulnerable to the needs of the client. Assuming an equal level of authority with the client, rather than a superior level of authority, exposes attorneys to a more equal human dynamic in which they are expected to be responsive to the actual needs and concerns of the client. Although this level of interaction should yield more accurate identification of the client's wishes, attorneys may translate this challenge as requiring the attorney to resolve all of the client's problems. Such a course of action is neither desirable nor appropriate. Rather, the attorney should achieve a fuller understanding of the client's viewpoint and actual circumstances which should inform her decision making with and on behalf of the client. 49

"Working with others" requires that attorneys should not solely control the agendas of substance and process. Attention to one's behavior in interaction with others assists the lawyer in controlling the degree to which she is unconsciously influencing or altering the decisions for the client. 50 Because "working with others" is a client-centered approach to practice, the client has greater opportunity to become educated in the particularities of the case. If one takes the time to develop a deeper understanding of the client which is communicated to the client, and if the attorney uses that understanding to fashion resolution processes, in actuality the client has a greater chance of becoming an active participant in the life of her case because she experiences herself as fully understood and her circumstances as respected. Thus, the attorney who uses the perceptive self in "working with others" increases the possibilities for empowered client involvement. The limitations of empowered client involvement then become more a question of the client's ability to assume responsibility for learning problem-solving skills in jointly exploring her concerns with her attorney.

Thus, "working with others" promotes a focus which can include an examination of the values that underlie one's choices analytically and

behaviorally. Values influence and are part of the rational thinking process and they influence the processes used by the perceptive self. Even when explicit values are excluded from intellectual analysis, hidden values influence the framework, framing of issues, and evaluation in the analytical process. Such inquiry into underlying values is useful for the client in gaining clarity regarding her views of the transaction or dispute. Such inquiry of the lawyer's viewpoint by the lawyer herself is also useful to her because she may uncover the fact that she is operating with bias and unquestioned subjectivity in her analytical process.

VII. CORE RATIONALIZATIONS: UNDERSTANDING THE PERPETUAL RESISTANCE

This section examines existing core rationalizations within the legal profession which account for much of the resistance to focusing upon the use of the perceptive self in "working with others" in lawyering. Core rationalizations are the hidden, generalized, and unquestioned justifications used as support for a position or perspective.\(^{51}\) These thought patterns become imbedded in our thinking over a period of time and function to maintain the status quo in favor of a position or perspective.\(^{52}\) In this section, core rationalizations are identified, categorized, briefly examined for their theoretical premises and discussed in light of this article's framework.

The study of our legal culture's core rationalizations about self awareness and human skills assists lawyers in exploring their own boundaries as to what behavior they include within their concept of the "professional conduct" of lawyers. Contemplating core rationalizations helps us to integrate consciously human skills into the practice of law because these rationalizations disclose the ways in which lawyers resist attention to the practice of human skills. My objective is to articulate the theoretical perspective which supports the rationalization because it is that perspective with its inherent values which is responsible for many of our professional choices, actions, and behaviors.

These core rationalizations are so deeply embedded that some are

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51. I selected the term "core rationalization" rather than the term "perception" in describing this type of thought. Although these statements are bedrock views which commonly affect lawyers' actions, these statements are forms of empirical observation. This is not to say that there are not deeper or truer motives behind these statements. Rather, my "underlying premises" serve as the hidden and perhaps unconscious foundation from which these rationalizations spring.

52. See W. LEHMAN, HOW WE MAKE DECISIONS, supra note 4, at 45-65. In Lehman's examination of the self in lawyering, he is quick to point out that we hide our real reasons in decision making behind rationalizations.
implicitly rather than overtly expressed. These are rationalizations that I regularly encounter both verbally and behaviorally among lawyers and law students. 53 Although, in the past, legal authors have acknowledged some of these core rationalizations, few of them have been examined seriously. 54

I have developed five major underlying premises as a result of my focus on common themes. They are:

1. Adversarial outlook and/or behavior in problem solving activity generally produces the desired results.
2. The individual attorney bears minimal responsibility for the quality of human interaction in lawyering.
3. The lawyering process is not fundamentally affected by the quality of human interaction.
4. Human skills are specialized knowledge external to the study and acquisition of lawyering skills.
5. Personality style and preference are private matters of the self and are therefore not matters meriting attention in professional development.
6. Conclusion.

The following is a discussion of the above-stated premises:

1. Adversarial outlook and/or behavior in problem solving activity generally produces the desired results for client and for society.—I doubt that many of us will disavow adherence to this premise stated as starkly as it is. However, this unstated belief nurtures the first two core rationalizations which are described below. Because these two rationalizations appeal to what is familiar as well as to what may be proper in a given situation, it is easy to neglect their contribution to our resistance to the use of the human skills associated with the perceptive self when "working with others" in lawyering.

   a. Core Rationalization—"Advocacy and rigorous dialogue re-

53. I have distilled thirteen core rationalizations which explain the perpetual resistance to paying attention to the perceptive self in working with others that predominate among lawyers. Although there may be many more that I have not identified, these thirteen gave me the basis for examining their theoretical content. I categorized these rationalizations into like groups and then I searched for the common theme or premise within each group. Each group is, however, not exclusive of the others. A rationalization may have elements of more than one of these themes. I distilled what was the principle theme for me in these rationalizations in order to provide organization for this inquiry into our professional attitudes towards human skills in lawyering.

54. See, e.g., Pepper, supra note 47. See also D. LUBAN. LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988) (serious examination of rationalizations in a philosophical context of dominant and alternative professional visions).
quire adversarial behavior and point/counter-point argument."—This implicit belief is deeply held among many colleagues in the legal profession because it tightly captures an important perspective in legal theory.55 This rationalization has an absolutist character which justifies primary reliance on positional dialogue without regard to circumstance. Social policy analysis is given only narrow room for critique within a perspective devoted to judicial decision and precedent as the method for preserving order and for responding to pressures for social change. This theoretical approach is therefore understandably applied in forming the adversarial method of intellectual dialogue which, in fact, has become the very hallmark of Anglo-American judicial and legal decision making. As a result, this behavior is often presumptively regarded as the principal effective form of thinking in problem solving in all legal functions. Notice that this core rationalization eliminates the opportunity to engage in creative thinking because it denies the value of brainstorming and nonlinear thinking.

b. Core Rationalization—"Adhering to principle requires adversarial dialogue." Often adversarial dialogue is justified by assuming that such a form of discussion is appropriate because the interaction is one where the participants are adhering to their particular principles. That is to say that out of respect for their respective principles, participants engage in adversarial dialogue. This form of interaction is part of the means by which we publicly show respect for our principles. Correlatively, this is also taken to mean that if one does not engage in adversarial dialogue on an issue of principle, then such a participant is engaging in the dialogue without adherence to a principle at issue. Furthermore, it is often assumed that there is a difference of principle when actually it is misperception or misinformation that is at issue and not a difference in values.

The rationalization that adherence to principle requires adversarial dialogue reflects a blending of different perspectives. One perspective is captured by the bold, unsupported and unquestioned assertion that this method of dialogue achieves the validation of principle. The contribution to this thinking by another approach to legal theory is more subtle. The assertion of an unquestioned link between clarification of principle and adversarial dialogue is fashioned as an objective statement of fact, and passes as a mere description of present conditions. This

55. For examples of this rationalization operating in legal jurisprudence, see Fiss, Against Settlement, 93 YALE L.J. 1073 (1984); Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353 (1979).
approach further discourages questioning that would expose and explore alternative modes for clarifying principle because it parades this rationalization as being value-free.

2. The attorney has minimal responsibility for the quality of human interaction in lawyering. - When taken to this level of abstraction, very few lawyers would align themselves rhetorically with this attitude. However, this attitude is deeply set within our professional behavior and our expressed opinions which deny the role of human skills and the participation of the perceptive self when working with others in lawyering.\(^\text{56}\) Although some of these rationalizations are acknowledged, we continue to be faced with the challenge of transforming within ourselves behavior relating to human interaction as a component of professional conduct.

   a. Core Rationalization — "My opinions in general, and about the issues of this paper in particular, have very little to do with how I lawyer." — This rationalization contains the premise that the lawyer’s attitudes do not affect how the lawyer interprets the law nor how the lawyer chooses behavior in conducting legal activity. In essence, this rationalization disembodies law from its human and social origins, which by their very nature, contain subjective historical experience. This same perspective views the correct interpretation of law as limited to the actual language of the law. By eliminating historical context, economic and social facts, judges limit the scope of their decisions to literal application which permits unreviewable hidden personal discretion in interpretation. Under this view, judges are admonished that they are barred from interpreting law as a product of social history and are instructed not to adjudicate in ways which seek to reconcile law to present conditions.

   b. Core Rationalization — "It is not my responsibility if I am misinterpreted or if I misinterpret the other. This is not my problem." The lawyer’s actual understanding of the client’s communications and the verifying of the client’s understanding of the lawyer’s communications are areas of practice which receive little instruction in law school and little supervision in practice. These abilities require consistent self-awareness and reflection. The professional obligation of the lawyer to acquire self-knowledge regarding her abilities as a lawyer to work with others is yet to become a seriously discussed legal premise. Although

\(^{56}\) "The professional codes both reflect and reinforce an attitude, common among attorneys, that conflict with clients should be denied, rather than acknowledged and explored." Burt, supra note 23, at 1015.
there is an emerging trend in legal education which addresses the need for broader problem solving skills in lawyering tasks, attention to the development of the perceptive self is uncommon. In other words, the abilities to reflect upon one's behavior, to examine the effects of one's behavior on others, and to explore the perspectives of others nonjudgmentally receive serious attention neither in the education of lawyers nor from organized legal professional associations. Even lawyers who extol the need for clarity in communication are frequently unaware of the complexity of the processes that generate misinterpretation.

c. Core Rationalization—"The client can get another lawyer if she/he doesn't like my style, which has nothing to do with how good a lawyer I am."57 This statement is uttered frequently. In essence, it trivializes the quality of the human skills by characterizing them as a matter of individual "style." The public purpose of lawyering is dismissed by this perspective. If there are public functions associated with the role of lawyer then one would favor a higher standard of behavior because the lawyer's acts are public acts with public consequences. This is not simply a private matter involving the client's individual preferences. Less apparent, this rationalization embodies many different rationales. First, this statement reflects a belief in the existence of unspoken, unverifiable values which give inherent definition to lawyering as excluding the competent practice of human skills associated with the perceptive self. Secondly, these values are regarded as so globally acknowledged that there is no need for proof or explicit support. Thirdly, this theory of lawyering assumes the existence of only one correct perspective on the particular interaction, that of the lawyer. Choices in communication and behavior are separated from the individual's practice of law. This rationalization embodies the view that ideas alone constitute the whole substance of the matter. Ideas are not viewed, in whole or in part, as

57. One makes the assumption in using this rationalization that the client may easily obtain a lawyer who is self aware in the use of human skills when working with others in lawyering. This may not reflect reality. Law schools may attract people whose profile is inadequate in these abilities. Most law schools admissions criteria do not include the abilities of the perceptive self. Instead, the focus of the admissions process is generally limited to factors such as grade point averages and LSAT scores. In addition, law school may exacerbate such inadequacies. See Benjamin, Kaszniaik, Sales, & Shanfield, The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers, 1986 A. B. F. RES. J. 225. Thus, the client may not have a meaningful choice in the matter. See Goodrich, A Problematic Profession, THE NATION, Feb. 12, 1990, at 205; Gutierrez, Counseling Law Students, 64 J. COUNS. & DEV. 130 (1985); Miller, Personality Differences and Student Survival in Law School, 19 J. LEGAL EDUC. 460 (1967).
the product of social interaction.

3. The lawyering process is not fundamentally affected by the quality of human interaction. — This premise is superficially less distasteful than the foregoing premises for many lawyers. This is because jurisprudence has developed in such a way as to buttress legal structures which boldly uphold the truth of this premise. 58 This premise goes to the heart of the predominant historical definition of the lawyer's professional role. The view that substantive expertise far overshadows other concerns is key to this premise. The emphasis on substance explains why we often encounter, either in words or deeds, the following core rationalizations among lawyers regarding the expansion of professional conduct to include the aware use of perceptive self in working with others.

   a. Core Rationalization — "I am an expert. These concerns do not affect my lawyering." — Here again, the lawyer is acknowledging the gap between the meaning of legal rules and the actual manipulation of the legal system by human forces. The professional obligation is so narrowly drawn that a function which does not directly lead to the intellectual clarification of law or its application is deemed beyond the lawyering role. One way to justify this narrow classification is to relegate human skills to the exclusive professional domain of disciplines other than law. In addition, it is often stated as an objective fact that many of these skills cannot be competently performed in ordinary law practice. It is further claimed that these same skills come into play only for the rare, and horrendously difficult human interactions which a fortiori require the attention of other disciplines. Again, the human skills associated with the perceptive self are neglected as central to law practice and are excluded from the range of skills defined as within the lawyer's expertise. This attitude is easily demonstrated by the regular placement of ordinary human behavior which we encounter in our work such as anger, confusion, misinterpretation, misperception and sadness into the category of rare, and horrendously difficult human interactions which the lawyer is not competent to handle.

   b. Core Rationalization — "I am just like a brain surgeon. Lawyering requires technical know-how and not bed side manner." — Again, this rationalization is the product of a particular lawyering perspective. The emphasis in this statement is on the nature of lawyering. Lawyering is conceived as the technical manipulation of legal rules enforced by

58. For a discussion of this jurisprudence, see Brennan, supra note 9; Wald, Disembodied Voices - An Appellate Judge's Response, 66 TEX. L. REV. 623 (1988).
state power. The human element is stripped away from law practice in order to abstract and then isolate the legal issues for treatment. Those who hold this perspective understand the function of law as separate from the course of human events. By focusing on the mechanical, literal tools of analysis utilized in the interpretation of law, the articulation of legal rules occurs without any contextual analysis. Thus, the practitioner is viewed as the technician in a process unaffected by the technician's lack of effective human skills.

c. Core Rationalization—"These concerns have nothing to do with the substance of law." This belief denies the relational quality of meaning of any law to experience. In other words, this belief denies the role of one's social experience in influencing one's interpretation of law and surrounding matters. Simplistically, I remind the reader that although we may view conditions similarly, we view them differently in that our views can never entirely overlap. However, the isolation of substance reflects a specific approach to understanding law and society. In essence, this statement expresses the belief that the realities in the application of law to a client's circumstances do not fundamentally affect the interpretation of the law itself. This view separates the organizational analysis of the raw sovereign law from its surrounding realities and thereby denies the interwoven existence of both the norm and its connection to life's experience. Within this perspective it would logically follow that human behavior, including one's own behavior, does not affect how one interprets or applies legal rules.

4. Human skills are specialized knowledge external to the study and acquisition of lawyering skills.—Historically, this premise has been greatly influential in the development of the legal profession because it has been assumed by lawyers that professional competency in human skills requires an intensive level of psychoanalytic or psychodynamic process. This view is often articulated in reaction to the view that lawyers should become aware of the role that human skills associated with the perceptive self play in their work. In other words, the use of human skills has been viewed as specialized technical expertise appropriate to a different profession, rather than the basic skills in communication and self awareness associated with healthy interaction, which are easily incorporated into our own professional skills development. This theme, therefore, creates resistance because lawyers are socialized to believe that this broader definition of professional conduct sets standards for lawyers which only those who have practiced or undergone extensive psychotherapy could achieve.

In the alternative, there also exists a strong premise which is inde-
pendently relied upon in support of this rationalization. Many colleagues assert that the levels of human skills I am addressing should independently exist in the individual as a product of the ordinary development from childhood to adulthood. This assumption bears little resemblance to reality. The human skills associated with the perceptive self and which contribute to reflection, self-concept, self-esteem, and critical self-examination are not the typical focus within our educational systems. Nor is there widespread consistent attention to these areas among family units. The differences in family experience is vast and extends beyond differences in education, class, and race. Whether human skills are characterized as the specialized knowledge of a different profession, or alternatively as a natural by-product of human development, these skills are treated as unteachable and not learnable in a curriculum devoted to lawyering. In contrast, the levels of sensitivity and integration of skills I advocate are the ones generally associated with basic problem solving activity and basic effective communication skills. Nevertheless, this premise continues to spawn a plethora of core rationalizations of which the following are examples.

a. Core Rationalization — "I agree that these concerns are important in lawyering but none of us have the luxury of having the time needed to focus on these issues." — This rationalization oddly appears to blend two contradictory approaches to legal thought. First, it is assumed that the lawyer's principle work, by and large, excludes the practice of human skills or that the lawyer's principle work mostly includes the technical analysis of legal rules which is significantly unaffected by social interaction. Nevertheless, embedded in this rationalization, there is the awareness that human interaction influences the practice of law. However, it is also perceived that this influence cannot be appropriately addressed by the practitioner because time must be devoted to the tasks of technical legal analysis and formal legal discourse. In actuality, the attorney's pragmatism stops short of seeing that if the quality of human interaction were seriously addressed in lawyering tasks the practitioner might become more efficient.

b. Core rationalization — "Human skills are generally too subtle for scrutiny and thus I am not sufficiently competent to pay attention to them in my practice." — Subtlety suggests that we are dealing with fine distinctions in communication and behavior which are difficult to analyze. Ordinarily just the opposite occurs; the behavior and communication affected by the skills of the perceptive self are readily apparent once the individual identifies such issues as relevant to his or her practice. The underlying concern in finding this material elusive is the belief
that experience itself is a matter which is not subject to serious intellectual inquiry. This underlying belief has also been responsible in part for the resistance to fully embracing the value of clinical legal education.

c. Core Rationalization—"The necessary professional level of human skills associated with the perceptive self will be acquired adequately by the law student in his or her future practice after law school."—This rationalization justifies the lack of attention to the skills of the perceptive self in legal education and clinical supervision. Several underlying beliefs fuel this rationalization. Here, the matter is summarily addressed by stating that such lessons will naturally occur in the future professional experience of the student. Those who express this view assume that the skills associated with the perceptive self in lawyering will develop naturally as a product of undirected work which is never supervised with attention to this agenda. Conversely, it is assumed that attention will be given to this agenda in future professional work. Either way, this perspective overlooks the potential injury to clients and others by the lack of any conscious use by the new lawyer of the skills associated with the perceptive self.

Prioritizing the objectives in legal education so as to reduce the significance of teaching human skills in the curriculum directly justifies the limited distribution of educational resources to this matter. Teaching these skills may be simply defined as external to the law school’s responsibilities in educating lawyers.

5. Personality, style and preference are private matters of the self and are therefore not matters meriting attention in professional development.

a. Core Rationalization—"I am the way I am. You cannot teach an old dog new tricks. Take it or leave it (take me or leave me)."—This rationalization is similar to, but different from, the rationalization which treats the issues as a matter of style and client choice in representation. There, the emphasis was on the nature of the lawyer’s role. Here the emphasis is on the nature of the self. Here, the self is viewed as a separate and distinct concept from the use of the self in professional service.

It is an understandable human reaction in encountering an unknown challenge and electing either through fear or preference not to

59. There is a possible alternative assumption at play here. This is the premise that students come to law school having already adequately learned these skills. There are, of course, many sub-premises behind this belief, including assumptions about society, family and prior education. See supra pp. 279-281.

60. See supra Core Rationalization 2c, p. 277.
accept the challenge. Here, the lawyer silently admits the gap between the pronounced legal rules and the actualities of a legal system affected by a host of social pressures. However, the limits of this admission are quite narrow in that it does not compel incorporation of this concern into how the attorney functions as part of the legal system. Nor would the lawyer here advocate that the concern for the competent practice of human skills associated with the perceptive self be placed within the domain of jurisprudential concerns.

b. Core Rationalization—"Human skills are personal attributes (a matter of personality) which cannot be taught or learned." — This statement rests on organic theory which posits that the individual is inherently functional or deficient in the use of these abilities. This rationalization is based on the premise that human skills are part of the organic personality and are not learned by the individual. This belief assumes the pre-existence of these abilities in individuals and also assumes a certain level of ability in these skills. Professional training in these skills is either regarded as redundant or they are not viewed as amenable to professional instruction.

Because exploration of the individual's beliefs, values and assumptions in the decision making process is a part of acquiring human skills, and because this inquiry is regarded as fundamentally private, such inquiry is viewed as inappropriate in law school instruction and in any legal work environment. In this rationalization, self-awareness in the exercise of these abilities associated with the perceptive self is regarded as belonging to the private domain of the individual. Particular choices in communication and behavior are viewed as personal choices of the professional when lawyering.

6. Conclusion.—As the above survey demonstrates, we have insulated ourselves from growth as responsive, effective problem solvers and communicators by our uncritical adherence to many core rationalizations which justify our choices in behavior and communications when lawyering. I hope this closer look at the underlying premises, assumptions and values provides the reflective lawyer with the opportunity to reconsider those choices in future behavior. Perhaps then, the reflective lawyer may choose to further develop her abilities to use the human skills of the perceptive self in lawyering and to place greater emphasis on her working with others. Perhaps this reflection also will

61. The acquisition of human skills involves the exploration of one's values, beliefs and assumptions. See J. Himmelstein, HUMANISTIC EDUCATION IN LAW (Monograph III, 1982); Himmelstein & Lesnick, supra note 21.
encourage revision of the lawyering curriculum in law schools to include instruction in these neglected human skills which affect the quality of both traditional and nontraditional lawyering tasks.