"Thinking like a Lawyer: A Back to the Future Proposal for a Practitioner Based and Taught Pedagogy"

PROFESSOR MICHAEL MASLANKA*

An innocuous title for a radical proposal. A proposal that, to borrow the movie title, will take us *Back to The Future*.[1] This Article proposes that how we currently teach law students to "think like a lawyer," if at all, is not working. And I use this definition of "think": "use one's mind to actively form connected ideas…to direct one's mind towards something."[2] The methodologies used currently in law schools are dissociated from how lawyers truly think in practice, interact with the legal system, serve clients, and persuade judges and juries.[3] Its replacement must be a practice-based pedagogy developed through reverse engineering; namely, identifying how effective lawyers think and funneling that wisdom back into the classroom. The delivery system for this new pedagogy? I propose that we recruit and retain as full-time law professors only those with substantial practice experience; those with this profile have lived and made their living by truly thinking like a lawyer and not merely studying the law in the abstract. As we will see, this model was how law students were taught until the 1870s. It was then that law schools were plucked from the rough and tumble of law and life and wedged into the sterile confines of academia. While the university settings are immutable, how we teach in them is not.

There are two key questions for the legal profession and for legal education. *Question No.1:* What does it mean to "think like a lawyer?" A question that preoccupied me as a 39-year practicing lawyer. *Question No. 2:* How do we teach students to "think like a lawyer?" A question that now

*Assistant Professor of Law at The University of North Texas at Dallas College of Law.

1. BACK TO THE FUTURE (Universal Pictures 1985) (*Back To The Future* is a movie in which the protagonist Marty McFly travels back in time to ensure that his parents, an unlikely couple, fall in love, marry and give birth to Marty.).

2. *Think*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010).

3. As the former managing partner of a Texas office of a national law firm and as an equity partner in several firms, I observed first-hand the overall inability of new lawyers, in both my firms as well as other firms, to think like lawyers. Substantive knowledge was demonstrated but not the ability to use that knowledge on the service of clients. Experienced lawyers and educators share that view. *See for example* Peter Toll Hoffman, *Teaching Theory Versus Practice: Are We Training Lawyers Or Plumbers?*, 2012 MICH. ST. L. REV. 625 (2012); Nancy B. Rapoport, *Is "Thinking Like a Lawyer" Really What We Want to Teach*, J. ASS'N OF LEGAL WRITING DIRECTORS 91 (2002).

preoccupies me as a full-time law professor wrapping up my fourth year of teaching.

QUESTION NO: 1: WHAT DOES IT MEAN TO THINK LIKE A LAWYER?

As I once told juries in opening statements, "let me tell you what my case is not about." Here, I submit things that are *not* the answer to question No.1. It is not about training students to think in terms of "it depends" and the never-ending hypotheticals that flow from that construct or teaching students to examine every angle to legal disputes and the resulting endless nitpicking that this construct entails, nor is it teaching students through the misuse of the Socratic Method to believe that abstract questions are more important than concrete answers and the pointless meandering that ensues. Rather, as I hope to demonstrate, teaching students to think like lawyers involves teaching specific habits of the mind that can be inculcated starting in the 1L year and made stronger though repetition (sort of like developing a muscle), in the upper-class years. I also hope to allay the fears of the law school "academy" that turning over education to former or current practicing lawyers will transform law schools into trade schools devoted exclusively to studying the minutia of pleading affirmative defenses or the drafting of discovery.

Rather, my answer to the first question is based on the context of how this Article defines "thinking." "Thinking" like a lawyer involves finding solutions to a client's problem or dilemma; effectively communicating to courts, clients, and opposing counsel a client's arguments and positions; and isolating the legal arguments necessary to do the latter two. I will explore these ideas at the end of this Article when I set out the framework for a new "thinking" pedagogy.

QUESTION NO.2: HOW DO WE TEACH STUDENTS TO "THINK LIKE A LAWYER?"

Training students to think like a lawyer requires deconstructing how practicing lawyers practice, drawing from them the essence of effective lawyering, and converting that essence into mindsets that can go on autopilot once the student is in practice. The delivery system for this knowledge? Recruit and appoint only experienced practitioners as full-time law professors, relegating inexperienced lawyers to fill the adjunct ranks of specialty topics. Yes, I am talking heresy, turning the existing structure of "The Academy"[4] on its head. Only—and I use "only" quite deliberately—experienced lawyers, whose mindsets are forged in the crucible of practice, know how effective lawyers actually think. They are the ideal delivery system as well, having spent decades educating judges, jurors, clients, and other attorneys. As Jeffery W. Carr, the former General Counsel of FMC

4. David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), https://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html.

Technologies in Houston and a consumer of legal services once lamented, "[t]he fundamental issue is that law schools are producing people who are not capable of being counselors. They are lawyers in the sense that they have law degrees, but they aren't ready to be a provider of services."[5]

Before turning to the framework of a proposed new language of how to train, let's look more deeply at the deficiencies of the current teaching pedagogy and set out how we got to where we are now.

WHAT IS FLAWED WITH THE CURRENT TRAINING?

I propose that what now passes for training students to think like lawyers is at best counter-productive and at worst is actually harmful because as it is disassociated from reality. Here are three examples:

1. "It depends"

In August of every year, starting in week one, this phrase is heard echoing in the classrooms of the nation's 203 law schools.[6]

It is uttered to 1L's by professors, some of which never practiced law. This habit of thought is formed early among law students, reinforced in upper-level courses, is incorporated into a student's legal mindset upon graduation, and is then propelled into their practices. It is a misguided mindset. Why? Because students start off law school by thinking that there are no answers to legal questions. So, this short and pernicious phrase is memorable. The student learns to falsely believe that the phrase provides cover for them so they can avoid giving an opinion and a prediction of a client's predicament. The big payoff, especially for Gen Z lawyers is that they won't be subject to criticism for their opinions/predictions.[7] Their egos remain intact.

However, there are answers to a client's legal questions. The answer may or may not solve their problem. The answer may involve an estimation of the probability of success. The answer may fit the situation perfectly or it may not. But what is essential is that there is an answer. We see poorly trained students who, once unleashed into practice, can't seem to choke out an opinion when asked by a client. I know because I was once one. Early

5. *Id*.

6. AMERICAN BAR ASSOCIATION, *ABA-Approved Law Schools*, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/ (last visited Mar. 13, 2020).

7. Laura P. Graham, *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation*, 41 U. ARK. LITTLE ROCK L. REV. 29, 69 (2018) (This insightful article sets out the challenges and rewards of teaching Generation Z students which are those born after 1994. Because they were raised in an uncertain and dangerous world exemplified by 9-11 and broadcast continually on 24/7 news, these students need structure to their law school education from detailed syllabi to constant reassurance on their progress. I argue here that the pedagogy proposed in this article would satisfy these emotional needs which for law schools are transmuted into learning needs. My proposal's underlying structure and constancy across curriculum helps do just that.).

in my career, a client asked if we were going to prevail in a jury trial. I was erudite, articulate, and polished in telling the client that I did not have a clue. After all, there were so many factors to consider that, well, the answer all "depended" upon a constantly shifting miasma of chance and circumstance. There was a long silence on the other end of the phone (no, the client was not, as I had assumed, silent in the face of my wisdom). Rather, the client quietly said, "there are 3,000,000,000 people on earth but there is only one who can come close to giving me an answer and I am talking to him now."

2. "An Asteroid Might Collide with the Earth."

Then there are the ubiquitous issue spotter exams which abet students into believing there is safety in explaining to a client that prediction is impossible because there are so many variables to any legal question. This includes, long fact patterns, embedded with lots of issues, some major but many are minor. No one alive knows how or why this type of exam started nor why it has such staying power. The rationale seems to rest on the premise that thinking like a lawyer requires looking at every conceivable angle of a client problem, as if a multi-faceted diamond was being appraised under a jeweler's eyepiece. This is fine for diamonds but not for teaching how to think like lawyers need to think. Yes, an asteroid might hit the earth tomorrow, but it is very unlikely. I use this extreme example to make an important point: by rewarding test takers who see all angles, we are training students to bill hours and not to solve problems. The student thinks to herself: "I was rewarded in school for this mindset, so I should be rewarded in practice as well." That will not be so. And, the literature supports the criticism of this assessment tool.[8] In short, law schools are training law students to write exam answers that satisfy law professors, not exam answers that would satisfy potential or existing clients. The result: we train law students to think like law professors, not like practicing lawyers, resulting in dissatisfied clients and frustrated lawyers.

3. "Just tell me what you want!!!"

The Socratic Method, as now misused, is clung to by professors without practical experience, who replicate what they went through in law school. It rests upon excellent logic of the bootstrap variety: "the Socratic Method was good for me, I ended up teaching future lawyers, so it must be good for my students." Its current use is completely divorced from the reality of practice and does nothing to train students to think like lawyers. In this regard, as in many others, *The Paper Chase* damaged legal education. Here is Professor Kingsfield explaining the Socratic Method in the movie, *The Paper Chase*: "In my classroom there is always another question. Another question to follow your answer. You're on a treadmill…My little questions are like

8. *See generally* Norman Redlich & Steve Friedland, *Challenging Tradition: Using Objective Questions in Law School Examinations*, 43 DEPAUL L. REV. 143 (1991).

fingers probing your brain. We do brain surgery here. You come in with a brain full of mush and you leave thinking like a lawyer."[9]

We are practicing law not playing with Russian Nesting Dolls. An effective lawyer knows how to ask the right question at the right time in order to mine the raw materials necessary to assemble a case for a client. Law professors must model this type of questioning, not model the type of questioning that drives students to tears (i.e., "I don't know what you are asking!" or "I thought I answered your question!" or the occasional "what the F--- do you want?").

The Method is coupled with the practice of "cold-calling" in which, say, ten cases are assigned for a class and the students are not told when—if at all—they will be called upon. The purpose is supposedly to train students to be always on the ready because, well, you may never know when an asteroid will hit the earth. Its actual effect is to confer a sense of relief upon the students not called upon, who relax for a bit, and then tense up yet again once the questioning of their less fortunate colleague is winding down. In practice, a lawyer knows when he will be called upon: hearings are set, preparations are made, arguments given.

Just these three examples demonstrate some the flaws of the current pedagogy. This interpretation is a generous one because it assumes that there is an intentional effort made by law schools to train students to even think like lawyers. Next, I turn to how practitioners were driven from law schools. The story explains why it will be difficult – but doable – to reclaim our rightful role.

WHERE DID THE TRAINING TO THINK LIKE A LAWYER GO WRONG?

Once upon a time, law professors were practicing lawyers who taught on the side or full-time law professors with previous substantial experience. From these instructors, law students were taught both theory and practice. This virtuous duo of educators and substance produced practice ready lawyers. Into this garden came Christopher Columbus Langdell, inventor of the case method of teaching, who was appointed Dean of Harvard Law

9. THE PAPER CHASE (Twentieth Century Fox 1973) (Sadly, this movie and its apparent timeless attraction for would be lawyers, as discussed infra, did more to harm legal education from both the perspective of faculty as well as from the perspective of students. The movie follows a group of 1L students as they begin their study of the law. Professor Charles Kingsfield puts the students through humiliations all in the name of shaping their minds to think like lawyers as if he is the priest who knows the mysteries of a sacrament of which all others are ignorant. I imagine faculty look at the movie as an idealized version of the wonderful lives and look at it (at least in 1L year) as a rite of passage not unlike military boot camp. An empirical survey, albeit somewhat dated, supports the view that The Socratic Method is the dominant pedagogy among law professors); *See generally* Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques In American Law Schools*, 20 SEATTLE U. L. REV. 1, (1996) (Given the lack of turnover in law school faculty, and the inbred resistance to change, this finding is likely to continue to be accurate.).

School in 1870.[10] Langdell was appointed by then Harvard University President Charles William Elliott.[11] It was Elliott who ushered in the new regime that:

> [T]here will be produced in this country a body of men who have never been on the bench or at the bar, but who nevertheless hold positions of great weight and influence as teachers of the law…This, I venture to predict, is one of the most far reaching changes in the organization of the profession…[12]

Langdell was an acolyte and made this chilling prediction: "what qualifies a person, therefore, to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law, but experience in learning law."[13] There were two new sheriffs in town. Thus, was born the academic as law professor. And once legal education became part of a university, law professors were then required to conform to the model of a university professor, such as a chemistry or English professor. The latter would not sully their hands or engage in intercourse with those who were mere trade school teachers but only with those also engaged in the lofty pursuit of learning. This disdain remains to this day. Professor W. Bradley Wendel of Cornell University School of Law cuts to the heart of the matter:

> People who teach at law school are part of a profession *and* part of a university. So we're always worried that other parts of the academy are going to look down on us and say: 'You're just a trade school, like those schools on late night TV. You don't write dissertations. You don't write articles that nobody reads.' And the response of the law school professor is to say: 'That's not true. We do all of that. We're scholars just like you.'[14]

And the incumbent law professors want to keep it just that way: As Professor Peter T. Hoffman stated,

---

10. Hoffman, *supra* note 3 (Professor Hoffman's article provides an interesting and informative summary of Langdell and the revolution he wrought. And, once upon a time, lawyers were versed in many disciples and its literature such as the Bible and Shakespeare).

11. *Id*. at 630.

12. *Id*.; Nancy L. Schultz, How Do Lawyers Really Think? 42 J. LEGAL EDUC. 37, 65–66 (1992) (Nancy L. Schultz makes this point in a cogent way when she writes that "We must also offer a broader perspective of the world in which lawyers operate. Legal principles did not develop and do not exist in a vacuum—they are meaningless unless viewed and applied in context. …The need for an understanding of other disciplines—history, psychology, sociology, and economics—becomes plain after even the most cursory examination of the range of problems lawyers and judges face….Legal philosophy is likely to be of greater benefit to all—practitioners, clients, and judges alike —-if it can be incorporated into and expressed as part of everyday practice.").

13. Hoffman, *supra* note 3, at 630.

14. Segal, *supra* note 4.

> … discussions with faculty members at a wide range of schools confirm it is generally accepted that a potential faculty candidate's extensive practice experience is considered by many law schools to be a negative factor in hiring new faculty. Too much practice… is believed to reflect a lack of commitment by the candidate to scholarly production.[15]

No wonder then that incumbent law professors thus seek to preserve the current non-functioning way or teaching students to "think like a lawyer." One 2010 study of hiring at top-tier law schools since 2000 found that professors had one year of practical experience, and that almost 50% of faculty members had never practiced law, not even for a day.[16] Would you want a doctor who had never stepped one foot inside a hospital?

The status quo is very good for the incumbent law professors and so they perpetuate it.[17] After all, they have nothing with which to replace it with, even if they had the desire. Here, then, is a proposal to substitute what is not working with what I hope will start a conversation on what will work.

TOWARDS A NEW PEDAGOGY OF LEARNING TO THINK LIKE A LAWYER

To be pellucid, let me explain what I am not talking about. I am not talking about placing students into niche practice areas and overloading them with courses in that area. Nor am I talking about mandating that all law students work in a law school legal clinic. Rather, I am talking about a new language of instruction that cuts across all courses, one derived from the wisdom of those who have actually practiced law. As Nancy L. Schultz astutely observed, "[t]eaching Students to think like lawyers loses much of its meaning if that thinking is not placed in the context of what lawyers actually do."[18] Which is a great way to introduce what's next; namely, a new pedagogy based on practice. Here, are eight Mindsets that educators an teach and incorporate and that students can learn and internalize.[19] Mindsets that

---

15. Hoffman, *supra* note 3, at 639.

16. Segal, *supra* note 4.

17. *Id*; Rapoport, *supra* note 3 at 105 (Nancy Rapoport writes that law professors do not change pedagogy because of the fear of having to revise well thought courses to add new teaching components. All of us are, after all, only human and prefer comfortable stasis to sometimes painful growth. And as Professor Rapoport points out if a professor works at a school that prize scholarship then there is no incentive to improve or change teaching methods. She scores though a penetrating point when she writes that change does not come to law schools because law professors fear of not knowing what it is that lawyers do and being found out as frauds. More than anything, it is likely that this motivation is the driving force behind the resistance); Alexander Winton, *Get A Horse! America's Skepticism Toward the First Automobiles*, THE SATURDAY EVENING POST (Jan. 9, 2017) (I suppose an historical analog might be "Why do we need a car, our horse and buggy get us from point A to Point B as well.).

18. Schultz, *supra* note 12.

19 BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 42 (The University of Chicago Press, 2012) (Professor Tamanaha, a law professor himself, provides, in his book, a scathing critique of law professors. He writes that teaching loads at all law school are at historic lows and that at the ten highest ranked law schools in U.S. News and World Reports the average annual

students will use as lawyers. A mindset is something that is so ingrained in a person, that it is essentially a switch this is flipped on without even thinking. It comes easily and without thought, not unlike breathing. Here are some mindsets that I learned from my thirty-nine years of practice and how I am funneling them back into the classroom:[20]

MINDSET NO. 1: "THE DIFFERENCE BETWEEN THE RIGHT WORD AND THE ALMOST RIGHT WORD IS THE DIFFERENCE BETWEEN A LIGHTNING BOLT AND A LIGHTNING BUG."

My final exam in Professional Responsibility consists of one hundred multiple choice questions over the course of three hours. While almost all are substantive, I occasionally toss in one based solely on a mindset pedagogy. Here is one:

Lawyers have words and doctors have
(a) White coats
(b) Stethoscopes
(c) Prescription Pads
(d) Scalpels

Yes, the answer is (d) and 100% of the students get this right because I use this phrase in almost every class. I explain that the difference between winning and losing often boils down to what words are used, in what order, and to what purpose. Here is an exercise we do in class. I put Model Rule of Professional Responsibility 1.6 dealing with Confidentiality (MR 1.6) on a Docucam. Here is what the students see: "(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (1) (which sets out exceptions)"[21]

---

teaching load is a mere 7.94 hours and even at third and fourth tier law school it is only 11.13 hours. And he writes that the tens is continuing to spiral down. Moreover, compensation levels have been and continue to spiral upward. In short more money for less flight time in the classroom. The art of law school teaching is honored, as the expression goes, in the breach.); CAROL S. DWECK, MINDSET THE NEW PSYCHOLOGY OF SUCCESS 6 (Penguin Random House 2016) (Carol S. Dweck is the Lewis and Virginia Eaton Professor of Psychology at Stanford University. She has researched and written extensively on cognitive theory and human motivation. She popularized the term "mindset" in her bestseller. In essence, she argues that who we become is a function of how we think. The article's proposed pedagogy is really an argument that to become an effective lawyer we must think like effective lawyers.).

20. I use my course in Professional Responsibility as a model, but the following mindsets are portable to all other courses. I am sure there are other mindsets as well.

21. AMERICAN BAR ASSOCIATION, *Rule 1.6: Confidentiality of Information*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/ (last visited Mar. 19, 2020).

I ask two questions, each with two subparts, of the class:

Question No. 1

a. What is the single most important word in this rule as quoted and

b. Why is it the single most important word (in case they simply stumble onto the right answer)?

And the winner is: "relating." It is the most important word because it is the operative action verb. It is the star actor so to speak. All the other words, such as "shall," are simply supporting actors.

Question No. 2:

a. What other word(s) could have been used? Students offer contenders such as "involving" or "dealing with" or "concerning".

b. Why? These other contenders were not picked by the drafters. Because good writing is a matter of intent, the class discussed why not. Ultimately, they come to the realization that the drafters wanted a word that was broad and expansive and that would encompass matters unrelated to the actual underlying representation. (Say you defend Lola for murdering Ed and she tells you that she also killed two people ten years ago in an unrelated killing to the one in which you are providing representation. The other word choices do not do the trick of covering these other two murders.) Moreover, the drafters likely wanted a word flexible enough to protect both conversations and information "related" during the actual engagement as well as after the engagement is completed. (Joe comes to Gabby Lawyer and says "thanks for beating my aunt in the probate of my mother's will. I will now get all of mom's money, but I do not like to take chances, so I murdered her on the way over here to your office to say thanks for a job well done.")

Or take Model Rule 1.2 (a) on the allocation of authority between client and lawyer. Same questions as above. Rule 1.2 states:

> (A) lawyer shall abide by a client's decision concerning his objectives of representation and…shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of a client as is impliedly authorized to carry out the representation. A lawyer must abide by a client's decision whether to settle a matter….22

22. AMERICAN BAR ASSOCIATION, *Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer/ (last visited Mar. 19, 2020).

And the winner is the word: "abide." "Abide" is again the operative verb (that verbs matter a lot is a subsidiary lesson of this Mindset). Other contenders? Well, there is "agree" or "acquiesce" or "acknowledge". But "abide" (which means "to bear patiently" or, more colloquially, means you can live with something.[23] Abide envisions this: a lawyer disagrees with a client's decision, will not surrender her own firmly held opinion, but will "abide" by the decision of the client.

The Pedagogy Take Away: *This Mindset is how a lawyer must think in practice. It teaches students that opposing counsel and judges and even clients will use words with intention and purpose and nuance and so should they once in practice.*

MINDSET NO. 2: KNOWING THE RULE VS. KNOWING THE RULE AND THE REASON FOR THE RULE

One of my Professional Responsibility students taught me how to express this lesson to law students. I asked her during office hours if she liked class (I sincerely wanted to know but, yes, I was also fishing for a compliment). She carefully remarked "Well, I like it, but you are sort of philosophical." Feathers ruffled, I asked what she meant. She remarked, "Well you spend a lot of time on the history of the rule and the reasons for it." Wham! I realized that I was not correctly framing my point which was to come across as actionable advice from a seasoned lawyer and not a useless platitude from an inexperienced law professor. My reframe to her and then later to the class:

You will be in thousands of legal firefights in your career. The lawyer who knows the rule's reasons will always have a competitive advantage over the lawyer who knows only the rule. This has nothing to do with philosophy and everything to do with winning and losing at the courthouse. In thirty-nine years of practice, I have won and I have lost. Winning is better.

By way of example, a theme that runs through the Model Rules of Professional Responsibility is that lawyers are trained persuaders, what the public might call possessed of the "gift of gab." And while lawyers may have a generally bad reputation among the public, a person loves and trusts and depends upon her own lawyer. So, "Model Rule 1.8(a): Conflicts Of Interest: Current Clients; Specific Rules" places severe restrictions on lawyers who go into business with a client (especially if the lawyer also does the legal work to set up the business), and "Model Rule 7.3: Solicitation" prohibits real time solicitation of many prospective clients for the same reasons. Regardless of the argument you as a lawyer are making, knowing rationales for rules or case decisions or statutes makes a lawyer a more

23. *Abide*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11d ed. 2007).

fearsome opponent.[24] I learned this mindset in practice from, as my father would say, "The school of hard knocks."[25]

The Pedagogy Takeaway: *This Mindset shows that persuasion rests upon rationales, and not the bar room generality of a conclusion.*

MINDSET NO. 3: "GET ME TO THE JURY (OR NOT)"

Let's stay with winning or losing. If we ask a law student why we study case law, the answer will be a fairly uniform one—inspired no doubt by a non-or never practitioner channeling Langdell—"so we can learn legal principles." Practitioners do not read cases for the principal purpose of learning the law. No, practitioners read cases to figure out (if you are the plaintiff) how to defeat a motion for summary judgment or a motion to dismiss on the pleadings or (if you are the defendant) how to win a motion for summary judgment or a motion to dismiss on the pleadings. Look at *Togstad v. Vesely, Otto, Miller & Keefe*.[26] Mrs. Togstad's husband was allegedly severely injured as a result of medical negligence. She went to see a lawyer named Miller for advice. Miller told her she did not have a case, but he would think about doing some more investigating that he never apparently did. She left, never went back, and later learned—from a different lawyer—that she did have a case but that limitations had run. Miller is sued by her for malpractice. She gets to the jury because she had one recollection of the conversation, essentially "I hired a lawyer", and versus Miller's recollection essentially "I met with her as a favor to a friend and never intended to form an attorney-client relationship." Because there was an actual factual dispute on an issue that made a material difference, she got to a jury and won. Extracting the legal point is important (more on that in the next Mindset) of what constitutes the formation of an attorney-client relationship but what is more important is the context and explanation for the effect of the holding. Teaching students to read and understand the case as a legal abstract fails to impart and inculcate the advocate's mindset and a trial's dynamics. But if you've never litigated and tried a lawsuit how would you ever know?

Pedagogy Takeaway: *Study a case as a weapon with which to win a case, not merely as a tool with which to learn an abstract principle.*

---

24. AMERICAN BAR ASSOCIATION, *Rule 1.8: Current Clients: Specific Rules*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_8_current_clients_specific_rules/ (Aug. 16, 2008); AMERICAN BAR ASSOCIATION, *Rule 7.3 Solicitation of Clients*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_3_direct_contact_with_prospective_clients/ (Nov. 8, 2019).

25. Wikipedia, https://en.wikipedia.org/wiki/School_of_Hard_Knocks (last visited Mar. 19, 2020) (According to Wikipedia, the school of hard knocks is the sometimes painful education one gets from life's usually negative experiences often contrasted with formal education. Or as Mark Twain once put it, more or less," never confuse your schooling with your education.").

26. Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W. 2d 686, 689–693 (Minn. 1980).

MINDSET NO. 4: ALWAYS ASK THRESHOLD QUESTIONS

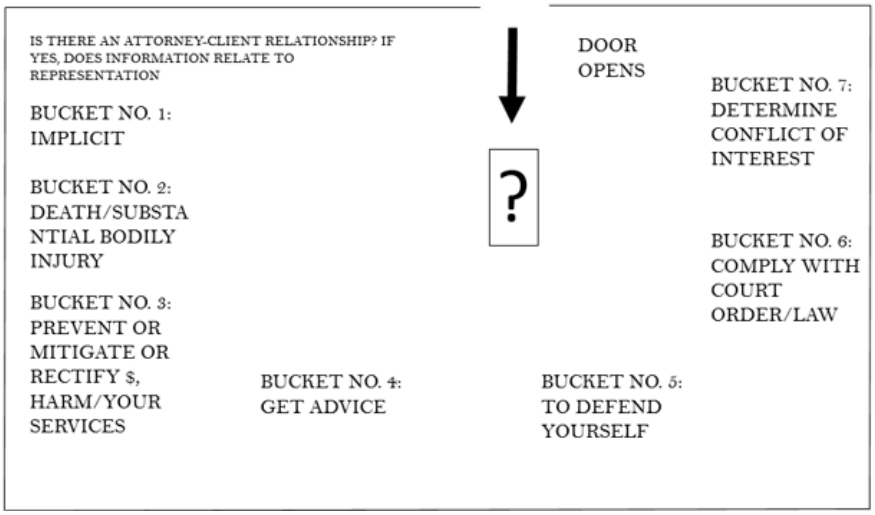
In practice, clients often start in the middle of their story. A lawyer must be patient and rewind back to the beginning. And at the beginning is the threshold question. It must always be front and center. Asking a threshold question orients a lawyer as to what fact or issue comes next. It is an idea built into flowcharts and helps develop a logical progression to an answer. In Professional Responsibility, by way of example, before delving into Model Rule 1.6, the rule on what a lawyer must keep confidential, the threshold question is whether an attorney-client relationship has been formed and, if so, does what is told to the lawyer by the client "relates" to the representation. In employment law, my specialty, my new casebook will start with a series of threshold questions, each of which must be answered in the affirmative before a claim gains traction, no matter how appealing sounding the case. So, the putative employer must have a minimum of fifteen employees; the potential client must have suffered an adverse employment action; and only employees, not independent contractors, enjoy the protections of our anti-discrimination laws. Practicing lawyers understand the essential nature of a threshold question because, if we do not ask initially, we will waste time (which translates to wasting money) and we will not be in practice for long.

The Pedagogy Takeaway: *Students must learn to think in a logical sequence.*

MINDSET 5: BE VIVID SO AS TO BE MEMORABLE

Students look to us as role models, not just for content but for how to explain concepts, enlighten others, and persuade to win. Experienced lawyers grasp that persuasion is often visual, a matter of summarizing in one place. They struggle constantly with fashioning an argument or explanation that is memorable. We want the recipient of the message to remember it, internalize it, and then act upon it. Experienced lawyers strive to show and not merely to tell. Success for a client is often riding on how well we do. Here's a simple example. Let's go back to MR 1.6 and the word "relates". In class, before we discuss MR 1.6 (although the students have read the rule and the commentary), I say: "now let's discuss the most important idea behind MR 1.6. "I then put a picture of a powerful commercial vacuum cleaner on the Docucam. I ask, "What does this photo have to do with MR 1.6?" We work through the photo's meaning and conclude that it is a powerful piece of industrial equipment that sucks in all that is around it. We then tether the image to the word "relates." Staying with MR 1.6, here is a

chart I use in class in explaining the complexities of MR 1.6 on Confidential Information.[27]



Let's place the chart in context. What approach, (a) or (b), achieves the show and not tell goal.

a. Not disclosing Confidential Information is a fundamental duty of a lawyer. A lawyer must not divulge what a client tells the lawyer if what is told relates to the representation. There are exceptions such as disclosing information to prevent death or financial harm if the lawyer's services were used to create a fraudulent scheme. There are several others.[28]

b. Pop the chart on the Docucam. Tell the students that the box represents the universe of confidential information under MR 1.6. I ask what threshold questions are needed to be asked and answered to enter the universe: (a) Is there an attorney client relationship and (b) Does the information "relate" in any way to the representation, no matter if provided during the representation or after it ends? If so, the 1.6 universe can be entered; if not, entry is denied. There are several buckets (I would draw an actual bucket, but my poor powers of drawing make it impossible) that are exceptions to not revealing a client's confidential information. The question mark is the key to the

27. AMERICAN BAR ASSOCIATION, *Rule 1.6: Confidentiality of Information*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/ (last visited Mar. 19, 2020).

28. *Id*.

lesson. If the information does not fall within one of the buckets, then that information MUST be kept confidential by the lawyer.

Or consider this principle that threads through the Model Rules. What a lawyer cannot do directly, she cannot do indirectly. What works better (a) traditional explanation or (b) a word picture?

a. The Rules prohibit a lawyer from utilizing another person or entity to do what a lawyer is directly forbidden to do. By way of example, a lawyer is forbidden from directly contacting a represented party and thus is equally forbidden form, say, using a private investigator to contact a represented party. OR

b. A lawyer must not contact an opposing party that is represented by a lawyer. Just as she can't do it directly, he can't do it indirectly. Bottom line: if you as a lawyer can't walk through the front door, you can't crawl through the back window. (This analogy lends itself to a simple drawing of a front door and a back window. Repeat exercise with the vacuum cleaner.)

The Pedagogy Takeaway. *Students, just like a jury, will remember and act upon images long after the words dim and fade away.*

MINDSET NO 6: "IF WE DID NOT HAVE THIS RULE (OR CASE) WHAT WOULD BE THE EFFECT?"

There is a name for this mindset: prospective hindsight.[29] It's a powerful teaching device because it asks: let's image XYZ is true, and then ask ourselves what would the result then be? Prospective hindsight slices through the white noise, isolates the pertinent from the fluff, and brings clarity. In Professional Responsibility I teach the mindset in discussing Model Rule 1.9: Duties to Former Client.[30] Here's a summary of the rule: a lawyer represents Client A and completes the representation (Alert: threshold question time!) but Prospective Client B then comes along and asks the lawyer will you represent me in a lawsuit against Client A? The answer is "yes" if (threshold alert again!) there was nothing the lawyer learned in representing Client A that would put Client B at a material advantage. But

29. Gary Klein, *Performing a Project Premortem*, HARVARD BUSINESS REVIEW (Sep. 2007) (This concept is courtesy of the business world. It is often called a premortem. It is designed as an exercise as to what might go wrong before a project is started. That is, rather than wait until a project crashes and burns, and then figuring out why, the analysis proceeds from a candid discussion of why the project could crash and burn before it is launched. It has application to the drafting of rules and an understanding of why rules were drafted in certain way in the first place.).

30. AMERICAN BAR ASSOCIATION, *Rule 1.9: Duties to Former Clients*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_9_duties_of_former_clients/ (Jan. 11, 2019).

asking what the result would be if this MR 1.9 was not the rule crystalizes the lesson. Oh, the result I want students to conclude on their own: if you could not represent anyone that you once represented, such preclusion results in an increasingly smaller and smaller client base for the lawyer (especially in a small town) and the lawyer goes broke. No esoteric legal theory needs to be explained or expounded upon.

The Pedagogy Takeaway: *Experienced lawyers are often paid to explain. This mindset develops the muscle of persuasion.*

MINDSET NO.7: PRAISE QUESTIONS, NOT ANSWERS

The Socratic Method—as now practiced—is counter-productive. Rather, the true role is for the professor to transmit a timeless value of effective lawyering to their students; namely, the value of asking a good question. I ask students: where do you go for a useful and viable answer? Ultimately, the wisdom of the crowd comes down to Google. I then ask "where do you go for a solid question?" The students usually pause, look a bit confused, and then come to the sweetness of self-realization: themselves and the lawyers they aspire to be.

Pedagogy Take Away: To paraphrase a famous Chinese saying: "Give a person fish, and the person will eat for a day. Teach a person to fish, and the person will eat for a lifetime." Let's apply that to the subject at hand: Instill the value of a question and the student will be able to always fend for themselves as lawyers for life. Just give an answer and they can fend themselves as lawyers for a day.

MINDSET NO. 8: WHAT IS THE FACTUAL BASIS FOR YOUR BELIEF?

Effective lawyers traffic in facts, not surmise, conjecture, or guesswork. Stated differently, poorly trained students become ineffective lawyers because they traffic in conclusions. Law professors will have opportunities to implant this mindset throughout a course. In Professional Responsibility I use, among other cases, *Spaulding v. Zimmerman* to inculcate this mindset.[31] A young man is injured in a traffic accident. He brings a lawsuit against the driver who collided into his car. Turns out the young man has an aneurysm that the defense lawyer is aware of but not the young man or his lawyer. Does the defense lawyer tell the plaintiff's lawyer? Students go to the Model Rule 1.6 (b) (1). Here it is:

"A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonable believes necessary: (a) to prevent reasonably certain death or substantial bodily harm."[32]

---

31. Spaulding v. Zimmerman, 116 N. W 2d 704, 708 (Minn. 1962).

32. AMERICAN BAR ASSOCIATION, *Rule 1.6: Confidentiality of Information*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/ (last visited Mar. 19, 2020).

The students flail around until one of them realizes they need an answer to this question: what is the likelihood that the aneurysm will pop? Most students do not. They simply presume an answer without knowing the answer.

The Pedagogy Takeaway: *Application of a rule, without knowing the facts through which the rule must be contextualized, is an all too human dynamic. But it is one we can transform and re-shape in law school with the proper training.*

BACK TO THE FUTURE

Adopting practice-oriented mindsets (not practice mandated courses or mandated clinic experiences)—based on how students must think when dealing with courts, colleagues, and clients—will not transform law schools into trade schools. There will never be ads on late night television, blaring a message to urging application to law schools ("Yes, you too can have 'Esquire' by your name!") squeezed in between schools promising a commercial truck driving license and the Academy for Acupuncturist Training. There are other mindsets than these, generated by other experienced lawyers that can be reversed engineered as well and funneled into every one of the courses offered by a law school. This proposed pedagogy—once inculcated into law students—will stay with them long after they graduate and enter the real time, real life, and real consequences of the practice of law. It is a gift of education, not merely of schooling, that keeps on giving.