ASPEN COURSEBOOK SERIES

Stefan H. Krieger • Richard K. Neumann Jr. • Renée M. Hutchins

Essential Lawyering Skills

Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis

SIXTH EDITION

Stefan H. Krieger, Hofstra University
Richard K. Neumann Jr., Hofstra University
Renée M. Hutchins, University of the District of Columbia

The **Sixth Edition** of **ESSENTIAL LAWYERING SKILLS: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis** continues to emphasize the role of the lawyer in the attorney-client relationship. Widely respected practitioners and teachers, the authors provide introductions, visual aids, and realistic examples that illuminate the basic mechanics of these key skills. Case situations and problem-solving scenarios engage students in developing essential lawyering skills that mirror legal practice. The topic of professional responsibility is integrated throughout.

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For Mary—My Fellow Traveller
And Gary Palm—My Mentor and Friend
S.H.K.

For Deb, Lill, and Alex, with love
R.K.N.Jr.

For Jay and Julian, always
R.M.H.

You know more than you think you do.
Benjamin Spock

The lyf so short, the craft so long to lerne.
Chaucer

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ESSENTIAL LAWYERING SKILLS

PART I

BECOMING A LAWYER

CHAPTER 1

What This Book Is About

This book explains four skills that nearly every lawyer uses, nearly every day. You are much more likely to be an effective lawyer if you are good at interviewing clients and witnesses, analyzing facts to develop persuasive theories, counseling clients, and negotiating. Because these four skills cut across every specialty and field in which a lawyer might work, they are at the core of the practice of law.

In addition, this book stresses a number of themes, which can be grouped under the headings of professionalism, working with and for the client, problem solving, communications skills, and multicultural skills. Professionalism is a group of characteristics that makes lawyering different from and in many ways more difficult than other lines of work. The attorney-client relationship is, obviously, the heart of lawyering. Problem solving is the art of developing a plan to control events, which is what clients hire lawyers to do. Interviewing, counseling, negotiation, and much of the rest of lawyers' work involves the ability to communicate well orally, and that includes the ability to understand the hidden meanings in what other people say. Multicultural skills add up to the ability to work effectively with people whose cultural norms are different from one's own. These themes are discussed in Chapters 2 through 6.

Lawyers *interview* clients and, separately, witnesses. Client interviewing operates on two levels. On one of them, the lawyer finds out what the client knows of the facts. On the other level, the lawyer and client establish and maintain a professional relationship, not just contractually (the client hiring the lawyer) but also personally (developing trust and respect) and strategically (determining the client's goals and other factors that will influence the lawyer's work). Client interviewing is covered in Chapter 8.

Interviewing witnesses is a way of ascertaining what people other than the client know about the facts. Witness interviewing poses special ethical

problems and requires special skills. It is covered in Chapter 9. In both kinds of interviewing, lawyers face problems created by the frailties of human perception and memory. These problems are discussed in Chapter 7.

Persuasive fact analysis is the critical examination of facts—or what appear to be facts—in pretty much the same way that you have learned to analyze judicial decisions, followed by the development of factual theories through which the client's cause can be explained to judges, juries, bureaucrats, or the public. Facts can be organized in three different ways: according to the legal elements in a rule of law, by chronology, or in the form of a story. Fact analysis is covered in Chapters 10 through 17.

Counseling has two aspects. The first is structuring choices so that a client can select from them and make a decision. That includes identifying options and their advantages and disadvantages, predicting each option's likelihood of success. The second is explaining these choices to the client in a way that helps the client select from the options you have identified. Counseling is covered in Chapters 18 through 22.

Negotiating is the process through which two parties attempt to reach an agreement that reflects their interests, rights, and relative power. Some negotiations are by nature adversarial. Some are by nature a form of collaborative problem solving. And some could be either, depending on how the negotiators approach the problem. Negotiation is covered in Chapters 23 through 28.

Ethical concerns are discussed in connection with each of these skills.

Finally, Chapter 29 offers some thoughts on fulfilling yourself over a lifetime as a lawyer.

Marjorie Shultz and Sheldon Zedeck conducted a research project[1]—which has become known as the "Beyond the LSAT Study" —to develop a law school admissions test that would be more accurate than the LSAT. An admissions test should predict whether an applicant can develop, in law school and through experience, the characteristics that make a lawyer effective. In the first phase of the project, Shultz and Zedeck worked with over 2,000 lawyers to learn what those characteristics are, and they identified 26 effectiveness factors. Only a few of them are measured by the LSAT and are taught in casebook courses in law school.

The book you are holding in your hands teaches or helps to teach 18 of Shultz and Zedeck's 26 effectiveness factors, several of which are also taught elsewhere in the law school curriculum:

1. Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 L. & Soc. Inquiry 620 (2011).

Questioning and Interviewing
Fact Finding
Building Client Relationships and Providing Advice and Counsel
Negotiation Skills
Strategic Planning
Creativity and Innovation
Practical Judgment
Listening
Influencing and Advocating
Speaking
Integrity and Honesty
Analysis and Reasoning
Developing Relationships
Self-Development
Diligence
Passion and Engagement
Ability to See the World Through the Eyes of Others
Problem Solving

The eight remaining factors are Writing; Researching the Law; Networking and Business Development; Stress Management; Community Involvement and Service; Organizing and Managing Your Own Work; Organizing and Managing Others (Staff and Colleagues); and Evaluation, Development, and Mentoring of Others.

CHAPTER 2

Becoming a Professional

§2.1 SOME THINGS EFFECTIVE LAWYERS KNOW[1]

Professionals think differently from the way nonprofessionals think. Experience makes some of a professional's way of thinking so ingrained that it becomes hard-wired knowledge at the core of the professional's way of being.

§2.1.1 Excellent Judgment Is the Most Important Thing That a Lawyer Can Bring to Any Situation

Judgment is knowing what to do and say—and what not to do or say—to improve a situation or prevent it from getting worse. Professionals *decide what to do*, and excellent judgment is the single most important characteristic that separates good decision-making from bad decision-making. When clients rely on you, they are, more than anything else, relying on your judgment.

1. This chapter discusses the characteristics of an effective lawyer most germane to the skills explained in this book. For wider discussions, see Robert MacCrate et al., "The Statement of Fundamental Lawyering Skills and Professional Values," in *Legal Education and Professional Development—An Educational Continuum. Report of The Task Force on Law Schools and the Profession: Narrowing the Gap* (the MacCrate Report), 135–222 (1992); *Essential Qualities of the Professional Lawyer* (Paul A. Haskins ed., 2013); Alli Gerkman & Logan Cornett, *Foundations for Practice: The Whole Lawyer and the Character Quotient* (2016); Randall Kiser, Soft Skills for the Effective Lawyer (2017); Randall Kiser, *How Leading Lawyers Think* (2011); Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 L. & Soc. Inquiry 620 (2011); Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. Leg. Educ. 469 (1993); Neil Hamilton, *Changing Markets Create Opportunities: Emphasizing the Competencies Legal Employers Use in Hiring New Lawyers (Including Professional Formation)*, 65 S.C. L. Rev. 567 (2014).

Knowing the law isn't enough. A lawyer who knows the law but lacks good judgment is a lawyer who sounds well informed but makes too many avoidable mistakes.

Judgment is the ability to know what actions and words are most likely to solve problems or, ideally, prevent them. It depends on situation-sense—an instinct for reading between the lines and figuring out what is really going on, without being told explicitly. It operates on several levels at once—the practical, the ethical, and the moral—and it includes "appreciating the hidden complexity in questions that seem easy when they are posed in the abstract."[2]

The phrase *a prudent lawyer* refers to one whose judgment can safely be relied upon. A prudent lawyer foresees risk, makes sure that mistakes don't happen, and, to the extent possible, keeps clients out of trouble.

Suppose you are a novice hiker with a dozen other novice hikers high in the mountains when a sudden and unpredicted blizzard traps all of you in snowdrifts so deep that you can barely walk. Good judgment is what you most hope to find in the guide your group hired to lead you through the mountains. As you glance at this guide and feel cold and hunger, you don't want the guide to make foolish decisions that would make a bad situation much worse, such as by taking you through places where your own movements can set off an avalanche.

Instead, you want a guide who reacts calmly; recognizes the factors, including human nature, that will influence events; foresees the consequences of actions; and then acts decisively. You want this person to get you out. Should you try to hike out, for example, or wait where you are on the theory that movement expends energy you need to survive in the cold? How much food should you eat each day? You need to eat enough to keep from succumbing to the cold but not so much that you run out of food before help arrives—and no one can predict how long it will take for rescuers to find you. Judgment is the ability to make these decisions well. It's more than knowing the mountains' geography and the Forest Service's rescue policies. Judgment is *the ability to make decisions for which there is no script and no formula*.

Because "it is possible to have knowledge but lack judgment,"[3] knowing the law is not enough. Judgment is knowing what to *do*. As Paul Brest has written, "good lawyers bring more to bear on a problem than legal knowledge and lawyering skills. They bring creativity, common sense, practical wisdom, and that most precious of attributes, good judgment."[4]

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2. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 Geo. J. Leg. Ethics 31, 71 (1995).

3. Mark Neal Aaronson, *We Ask You to Consider Learning about Practical Judgment in Lawyering*, 4 Clinical L. Rev. 247, 262 (1998).

4. Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 Law & Contemp. Probs. (Issues 3 & 4) 5, 8 (Summer/Autumn 1995).

§2.1.2 Integrity Is a Lawyer's Most Valuable Asset

Integrity means

- an honesty, authenticity, and reputation for truthfulness so thorough that everyone who knows the lawyer believes and trusts her;
- an instinct for fairness that is so reliable that others respect the lawyer's moral voice;
- a strong feeling of responsibility for the matters entrusted to the lawyer's care;
- an understanding of right and wrong, an "internalized moral core"[5] that prevents the lawyer from crossing over into questionable conduct;
- an inner strength that resists pressure to do the wrong thing;
- humility that leads the lawyer to treat each person with respect, regardless of that person's station in life; and
- empathy that causes the lawyer to understand and value other people's needs and sensibilities.

We are what we do. For example, the manner in which we win a victory becomes a fact that affects the situation that follows, the client's appreciation of it, and—ultimately, after many such victories—the kind of people we are. Victories won by bullying and deceit leave a residue that is very different from victories won with integrity.

§2.1.3 A Lawyer's Job Is to Find a Way for the Client to Gain Control over a Situation

Often, the situation is already out of control when the lawyer is hired, such as when the client is in conflict with somebody else. To an individual or a small business, few things are as frightening as a situation so out of control that lawyers are being called in. To a large business, it might be more routine, but to a large business's employees, their careers might be on the line.

At the opposite extreme, things might be happy now, and the client might want to make sure that they stay that way in the future. For example, the client might want an estate plan that will distribute her assets to her heirs in a way that conforms to her feelings about them. Or the client might be a business that wants to know how it can most inexpensively conform to the regulations of the Environmental Protection Agency.

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5. Neil W. Hamilton, "The Qualities of the Professional Lawyer," in *Essential Qualities of the Professional Lawyer, supra* note 1, at 1, 7.

In all these situations, what the client wants from the lawyer is a method of controlling—to the extent possible—what happens. That requires more than knowing the law. It requires the ability to plan ahead, a refusal to place yourself at the mercy of events, decisiveness, the capacity to act under pressure, and the problem-solving skills explained in Chapter 4.

§2.1.4 An Effective Lawyer Works to Achieve Specific Goals

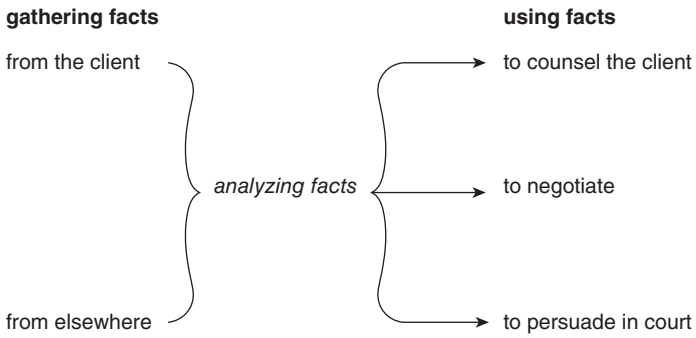
The client wants something, and that is the overall or ultimate goal. To achieve it, the lawyer must do a number of specific things along the way—develop evidence that justifies a motion for summary judgment, for example, or persuade an adversary to stipulate to certain facts, reducing your proof burdens at trial. Those are interim, strategic, or tactical goals.

An effective lawyer doesn't just work aimlessly on whatever is in the office's client file. Instead the lawyer knows exactly what the goals are and focuses work on accomplishing them.

§2.1.5 Everything Revolves Around Facts

Law school can mislead you. You are spending so much time learning law and how to analyze it that you might get the impression that factual issues are easy. They are not easy, and they are not marginal, either. Fact analysis permeates this book because it permeates the practice of law.

Lawyers practice facts as much as they practice law.



§2.1.6 Lawyering Includes Finding a Good Story and Telling It Well

The Universe is made of stories, not of atoms.

—Muriel Rukeyser

> *Well, when I was an attorney, a long time ago, I realized after much trial and error, that in the courtroom, whoever tells the best story wins.*
>
> —John Quincy Adams (*fictionally*) in the movie *Amistad*

Every judicial opinion is a story combined with logical analysis. In the trial court, the winning lawyer tells the story in pleadings and motions and through stagecraft at trial with witnesses and exhibits. On appeal, the story is told again in appellate briefs and oral argument. In its opinion the court tells the story yet again and explains why it rejects the losing lawyer's story. Even a transactional lawyer might tell a story when trying to persuade the other party to add a clause to a contract or take another clause out. A good story has power.

A lawyer must find the winning story in the facts. Many facts are part of a situation but not part of a story. The story facts might be scattered around and might at first glance seem unconnected to each other. The nonstory facts might vastly outnumber and thus hide the story facts. Analyzing the facts includes ***finding*** the story. Chapters 5 and 13 explain how.

§2.1.7 Empathy and Understanding Human Nature Are Essential

Empathy is the capacity to sense another person's experience and feel a situation the way the other person feels it. In *To Kill a Mockingbird*, the lawyer Atticus Finch tells his daughter, "You never really understand a person until you consider things from his point of view—until you climb into his skin and walk around in it."[6]

Every client needs an empathetic lawyer. After a conversation with the lawyer, the client should be able to feel completely heard and understood. First, the client is entitled to that. It's a basic human right. Second, every client is unique, and the lawyer can't do a good job without a deep sense of how the client, in the client's own way, has experienced what has already happened and will experience future events.

Empathy is essential whenever a lawyer deals with another person.[7] Witnesses being interviewed by a lawyer will often tell much more when they realize that the lawyer is genuinely curious about their own experience in the disputed situation. One of the most powerful forces in life is the feeling a person has when truly heard and understood. In negotiation,

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6. Harper Lee, *To Kill a Mockingbird,* Ch. 3 (1962).

7. See Lauren A. Newell, *Rebooting Empathy for the Digital Generation Lawyer,* 34 Ohio St. J. on Disp. Resol. 1 (2019) and Ian Gallacher, *Thinking Like Nonlawyers: Why Empathy Is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance,* 8 Leg. Comm. & Rhetoric: JALWD 109 (2011).

a lawyer can do a better job by understanding how the other lawyer, the one on the other side of the table, is experiencing what is happening. When arguing in court, a lawyer capable of empathy for the bench can understand the difficulty of judging and help a judge make the right decision.

Empathy and compassion are not the same thing. Empathy is seeing the situation through another person's eyes and feeling vicariously what another person feels. A lawyer gives many people, especially clients, both empathy and compassion. But for some people, a lawyer gives only empathy.

§2.1.8 Assumptions Can Sabotage Good Lawyering

Suppose you need to make a decision soon. You realize that you need to know six things to make this decision. You already know five of them. You have made a guess about the sixth thing, and you are confident that your guess is accurate. You could rely on your guess (make an assumption), or you could devote some effort to finding out what the truth is.

When lawyers make assumptions, they and their clients can get hurt. That's because our guesses turn out to be wrong surprisingly often. It's also because clients hire lawyers for important matters, where mistakes cause real harm.

Not all assumptions are bad. Sometimes, a lawyer will properly make a *temporary* assumption because the truth cannot yet be ascertained and work must proceed in the meantime. Sometimes a lawyer will balance risks and make an assumption because the decision involved is small and the cost of learning the truth is too large. And sometimes a lawyer will have to make an assumption because the truth cannot be learned.

But many assumptions should not be made. As a general rule, if you don't know whether something is true, find out. And if you must make an assumption, do it explicitly so that you and the people who rely on you know what is happening.

An *unconscious assumption* in one you do not realize you are making. Suppose that you're chatting with someone in a social situation. Some of the things the other person says are derived from matters that you don't fully know. You might ask a few questions, but for the most part you assume underlying facts without even realizing that you are doing it. You make these assumptions for three reasons. You don't want to appear dumb. You don't want to be a pest, constantly interrupting with questions. And most subjects of social conversations aren't important enough to merit the kind of thorough exploration that would have to be undertaken if we made no assumptions.

In lawyering, an unconscious assumption is especially dangerous because you don't realize that you are making it and therefore you cannot control it. You cannot gauge the risk posed by an unconscious assumption, for example, and you cannot commit yourself to learning the truth as soon as possible. Effective lawyers are very aware of what they do *not* know. They understand the difference between *knowing* something and having *an opinion* about it. And they understand the difference between *knowing* something and having a *hypothesis* that has not yet been tested for accuracy.

The only way to overcome this problem is to learn to *recognize what you do not know* and consciously decide what to do about it.

§2.1.9 Curiosity Matters

Appearances deceive. What you see is almost never all there is.

What's missing? The only way to find out is to be curious—with a curiosity that gnaws at you until you satisfy it.

When a newspaper publishes a series of stories about corrupt politicians or a polluted water supply or pedophile priests or a wealthy person who is really an unpunished criminal, those stories are usually written by investigative reporters who spend an enormous amount of time researching the facts by doing some of what lawyers do—finding and reading documents and interviewing witnesses. Only the best reporters are assigned to these stories.

In one of his first jobs out of college, Robert Caro was a very junior reporter at a newspaper where the managing editor disliked him intensely. Almost by accident, Caro discovered evidence that some influential people were on the verge of benefiting from political favoritism. He wrote a story based on that evidence. The next morning, on Caro's day off, the editor's secretary telephoned and told Caro to come into the office immediately because the editor wanted to see him. Caro was convinced he was about to be fired. He sat in the editor's office. The editor looked at him and said, "From now on, you do investigative work." Caro, astounded, said that he didn't know how. "Just remember," said the editor, "Turn every page. Never assume anything. Turn every goddamn page." Caro remembered those words for decades, every time he opened a file full of papers that powerful people didn't want him to see.[8]

And ask every question—*every* question—when you speak with anyone who might know something useful. Curiosity matters.

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8. Robert A. Caro, *Working: Researching, Interviewing, Writing* 7–11 (2019).

§2.1.10 Reflecting in Action Can Make the Difference Between Success and Failure

You go to a doctor and describe the symptoms that bother you. After examining you and perhaps detecting a few symptoms that you had not noticed before, the doctor names a disease, writes a prescription, tells you how many days it should take for the medication to work, and asks you to telephone by then if it has not. Does the doctor know for certain that you have this disease? Probably not.

Donald Schön did the leading research on how professionals in general think. Among many things, he asked doctors to estimate the proportion of their patients who present problems that "are not in the book" in the sense that the doctor needs to "invent and experiment on the spot" to figure out what treatment will work.[9] The estimates he received ranged from 30% to 80%, and he said that the 80% estimate came from "someone whom I regard as a very good doctor."[10]

This is typical of the problems faced by a professional in any field, whether medicine or architecture or law. To a layperson, it seems that the distinguishing mark of a professional is knowledge that other people do not have—almost like a sorcerer's secret book of magical formulas. Certainly, professionals do have specialized knowledge. But in professional work there are very few, if any, cookbook answers. Instead, what really distinguishes a professional is *a way of thinking* that enables the professional to solve problems even when a situation is wrapped in a fog of "uncertainty, uniqueness, and conflict."[11]

People who have not practiced law underestimate the amount of uncertainty inherent in nearly every situation presented to a lawyer for solution. The law may be unclear. The facts may be difficult to ascertain. And most often, it is hard to make precise predictions about how judges, juries, administrative officials, adversaries, and opposing parties will react to evidence and arguments. None of that is an excuse for the lawyer to say, "We'll try the first thing that looks good and hope for the best." Professionalism means, among other things, finding a solution that is hidden inside all that uncertainty and conflict.

Schön used the term "reflection-in-action"[12] to describe the process through which professionals unravel problems and solve them. This is not the kind of abstract and academic reflection that you went through when

9. Donald A. Schön, *Educating the Reflective Legal Practitioner,* 2 Clinical L. Rev. 231, 239 (1995).

10. *Id.*

11. Donald A. Schön, *Educating the Reflective Practitioner* xi (1987).

12. *Id.* at 22.

you wrote a term paper in college. Instead, it is a silent dialog between the professional and the problem to be solved. In that dialog, the professional uses what is already known in order to learn what is not yet known, through experimentation or some other form of investigation, until a solution is found. (Remember the doctor who does not know for certain what is making you feel sick. If the medication prescribed works, the doctor has solved the problem. If not, the doctor will experiment with something else.)

The reflective practitioner is one who can reflect *while acting*. To do that well we need "the ability to think about what we are doing while we are doing it, to turn our thought back on itself in the surprising situation."[13] We need to examine our own conduct, self-critically. Effective professionals never stop doing that, no matter how experienced they become.

§2.1.11 Thorough Preparation and Efficient Work Habits Are Essential

Thorough preparation. "Winging it" is sloppy and dangerous lawyering. Many lawyering tasks are like icebergs: What the bystander sees (the tip of the iceberg, or the visible part of the lawyer's performance) is a tiny fraction of what supports it (the undersea part of the iceberg, or the preparation for the performance). In lawyering, the ratio of preparation to performance can easily reach 15 or 20 to 1. It might take 5 hours to prepare for a half-hour counseling session with a client, and it might take 15 hours to prepare for a negotiating meeting that lasts 2 hours. That is why this book devotes entire chapters to preparing to counsel and preparing to negotiate.

In preparation, resourcefulness counts more than brilliance does. Few legal problems are solved by astute insights that no one has thought of before. Most legal problems are solved by diligently learning the details that matter and putting them together into a package that gets results.

Efficient work habits. Efficiency is getting the best results from a unit of effort, such as a billable hour. It is a ratio between work and gain. A lawyer is more efficient than others if she gets more results from a billable hour or if she gets the same results in less than a billable hour.

The efficient lawyer prospers while the inefficient lawyer works hard without having much to show for it. Many business clients now audit their own law firms' bills to figure out whether the lawyers have used the most cost-effective ways of solving problems. Law firms that fail this scrutiny lose

13. Schön, *supra* note 9, at 244.

clients. It is difficult to be efficient without working hard, but hard work is not the same as efficiency. Many inefficient lawyers work long hours without serving their clients well—and they lose clients who figure that out.

Time—including other people's time—is a resource to be used efficiently. A 20-minute conversation with a partner or a client wastes everyone's time if it covers only 5 minutes of content. The client or partner will assume that the lawyer who has wasted their time uses her own time inefficiently in other respects as well. The client will think about that when deciding whether to pay all or only part of the lawyer's bill. The supervising partner will think about it when deciding whether the lawyer's salary is being used efficiently.

§2.1.12 Inquiring Mode and Persuasion Mode Have Different Uses

Persuasion mode[14] is the thinking and talking that manipulates a situation. Persuasion is one of the cores of lawyers' work, and the persuasion mode obviously is valuable to lawyers. But it also has disadvantages. A person in persuasion mode tends to argue in ways that are subtle but "needlessly stylized and hyperbolic,"[15] and to treat others as objects and as types, rather than as individually unique. When a person in persuasion mode listens, it is less out of curiosity than out of a search for ammunition that can be used to gain or maintain control. Other people see it as manipulative and controlling.

> [T]he persuasion mode is not always associated with bad, unpleasant, aggressive behavior. The mode is just as often a low-visibility, indirect, and even cordial method of manipulating others. . . . The persuasion mode is used among friends as well as enemies and people feel good about it as often as they feel resentful. . . . [T]he true test of persuasion-mode behavior is in what it seeks to accomplish (e.g., victory rather than understanding or uncoerced agreement) and by what strategies

14. Lawyers don't use the term *persuasion mode*. Persuasion-mode behavior was first described by Chris Argyris & Donald Schön, *Theory in Practice: Increasing Professional Effectiveness* (1974), although Argyris and Schön used different terminology to describe it. Robert Condlin was the first to discuss it in the legal literature. See Condlin, *The Moral Failure of Clinical Legal Education*, in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* 318 (D. Luban ed., 1983) and Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 Md. L. Rev. 223 (1981). Schön later explored the subject in further detail. See Donald Schön, *Educating the Reflective Practitioner* (1987).

15. Condlin, *Moral Failure*, *supra* note 14, at 326.

(e.g., private, unilateral, competitive, and self-sealing actions rather than public, bilateral, cooperative, and self-reflective ones).[16]

The opposite pattern of behavior might be called the ***inquiring mode***: open-ended curiosity and an interest in exploring things regardless of the consequences. A person in inquiring mode isn't trying to accomplish anything except learning. The following illustrates the difference. In each column, a lawyer is asking questions.

Persuasion mode	***Inquiring mode***
Q: Didn't your company's lab tests show that this tire disintegrates at 90 miles per hour?	***Q:*** Could you tell me everything you know about how this tire was tested in the lab?
Q: And didn't your company advertise this tire as suitable for use on police cars?	***Q:*** What were the results of those tests?
Q: Police sometimes have to chase criminals at high speeds, don't they?	***Q:*** What did the advertisements say about using the tire on police cars?
	Q: Where were the advertisements placed?
(Are you persuaded that the tire manufacturer did something wrong?)	***Q:*** How was the decision made to advertise the tire that way?
	Q: Could you tell me everything you know about the stresses tires are subjected to when used on police cars?
	(Would you learn more from the answers to these inquiring-mode questions than from the answers to the persuasion-mode questions?)

Although the answers are omitted here, you can easily imagine what they might look like. The answers to the persuasion-mode questions would typically be short and perhaps defensive. At trial, those answers might persuade an objective fact-finder to agree with the lawyer. The answers to the inquiring-mode questions would typically be longer and include much more information. From the answers to the inquiring-mode questions, you would know much more about what really happened than you would from the answers to the persuasion-mode questions.

The persuasion mode and the inquiring mode both have their uses in the practice of law. To be an effective lawyer, you need to know how to

16. *Id.* at 328.

function well in both modes. A problem is that some lawyers are so locked into persuasion mode that they don't know when or how to switch into inquiring mode.

In the skills covered in this book, the inquiring mode is more valuable than you might think. Most of what a lawyer does in interviewing and counseling is best done in inquiring mode. In those and similar situations, the very qualities many lawyers use to project forcefulness can inhibit open-ended inquiry. Negotiation is often primarily persuasion. But even in negotiation, there are times when it is best to stop trying to persuade and instead to switch into the inquiring mode—for example, in information bargaining.

§2.1.13 Representing Clients in Disputes Is Only Part of What Lawyers Do—the Rest Is Transactional

Movies and television almost always portray lawyers litigating—cross-examining witnesses, making arguments to judges and juries, and doing other things in courtrooms. In law school, law is taught through cases—judicial opinions that resolve litigation. But many lawyers never go near a courtroom.

The practice of law is divided into two parts. One is the resolution of disputes, often through litigation. The other is transactional: advising and representing clients in situations where there is no dispute. Sometimes the situation is contractual: Two companies have agreed to do business with each other, for example, and the lawyer will turn the agreement into a contract. Sometimes, it involves noncontractual transfers, such as will drafting and other forms of estate planning. And sometimes it involves advising the client on how to avoid liability of some kind. Some lawyers do only dispute work. Some do only transactional work. And some do both.

Dispute lawyers and transactional lawyers approach legal problems differently and in some respects see the world differently. Most fundamentally, dispute lawyers fight to protect clients who are already in conflict with somebody else. Transactional lawyers plan and draft documents to achieve the client's goals while minimizing the risk of conflict because conflict could prevent or make more expensive the accomplishment of those goals. Dispute lawyers try to beat the other side through public performances in courtrooms. Or they negotiate settlements in which one side takes something from the other (though perhaps not as much as the taker had hoped to get).

A dispute is what social scientists call a *zero-sum game*: What one side gains is what the other side loses, averaging out to zero. If a plaintiff gains $100,000, the defendant loses $100,000. Actually, the average is less than zero because each side has to pay its lawyers and other expenses to resolve the conflict.

Transactional work, however, usually is not a zero-sum game. If two parties do a deal—agree to trade money for property, services, or something else of value—each of them anticipates becoming better off as a result. If the deal works as planned, it's a win-win situation. A transactional lawyer's job is to plan and draft to increase the odds that the deal will work as the client had planned. The parties' lawyers struggle for control and advantage, but a client who considers a proposed deal a loss can simply walk away and deal with someone else.

§2.1.14 Numbers Matter

A great deal of what lawyers do involves reallocating money. In counseling, you develop a list of options from which the client will choose. If money is a significant part of the decision, each option can be valued in money terms. Suppose that Option A offers a 50% chance of getting $100,000, while Option B offers a 75% chance of getting $50,000. If you dislike numbers, you might describe the options only in words and never do the math. But that would be an incomplete job of counseling. Without the numbers, the client cannot decide. (By the way, the expected value of Option A is $50,000 because the client has a 50% expectation of getting $100,000, and the expected value of Option B is $37,500 because the client has a 75% expectation of getting $50,000. For why, see Chapter 20.)

In negotiation, you might be taken advantage of if you are bargaining about money and if the other lawyer is better at numbers than you are. Suppose you represent a plaintiff and have reached a tentative agreement with the defendant that will produce $500,000 for your client. The defendant's lawyer proposes that the money be paid out in five annual installments of $100,000. Why should you consider resisting this proposal? Money paid out over time is worth less than the same amount paid soon in one lump sum. Wherever the money is, it can grow because it can earn interest. While the defendant keeps some of the money, it earns interest for the defendant and not for your client. This is called the time value of money, which Chapter 20 explains.

Except in a few fields where money is usually not the focus, an effective lawyer knows how to work out the numbers and how to present and explain numbers to other people.

§2.1.15 Taxes Matter

Whenever money changes hands, the transaction might have tax consequences. You cannot counsel or negotiate effectively without knowing what those consequences are.

Suppose you represent a plaintiff who has pleaded claims of wrongful discharge and battery. The defendant offers to settle by paying an amount of money that your client finds satisfactory, and the defendant prefers to pay the money entirely as back pay. He would rather be thought of as someone who fires an employee illegally than as someone who swings a tire iron at an employee while screaming "You're fired!" "It's a good amount of money," your client tells you. "Does it matter whether we call it back pay or damages for battery?"

"Yes," you reply. "It does matter. The $100,000 they are offering is worth only $65,000 to you because you'll pay federal and state income tax on it. But $100,000 in damages for battery is $100,000 because it's not taxed." If you fail to tell your client that, you have committed malpractice. And when you do say it, your client will probably send you back to tell the defendant's lawyer that the money will be acceptable only as damages for battery.

You don't need to know the tax code from end to end. But you do need to know how tax law affects the issues you deal with frequently. A personal injury lawyer, for example, would know how tort recoveries are taxed. If you are inexperienced in the type of transaction you are doing, you should be able to recognize *potential* tax issues and know when to get answers from a professional who specializes in tax.

§2.1.16 Overlawyering Can Be as Damaging as Underlawyering

Underlawyering is doing a cursory or half-hearted job. Overlawyering is making an issue out of everything, whether it really matters or not.

Business people use the term "deal killers" to refer to lawyers who regularly overlawyer. Suppose that Dynamo Electric, Inc., a chain of retail stores, wants to rent a warehouse to store household appliances such as refrigerators and stereos. The most suitable warehouse is owned by Belinsky Properties, Inc. Dynamo talks to Belinsky, and they agree on how much rent Belinsky will receive and how many years Dynamo will occupy the building. Because a lease must be drawn up, each company calls in its lawyer. The lawyers start by arguing with each other over who will bear the risk of loss to Dynamo's merchandise if the warehouse burns down. This is a useful argument. Lawyers are paid to identify potential problems like that and then make sure that harm is minimized.

But we are long past the point of diminishing returns when Belinsky's lawyer demands that Dynamo post a bond to indemnify Belinsky in case Belinsky is ever named as a defendant in a products liability suit concerning an appliance stored in the warehouse by Dynamo. When the clients learn of this, Dynamo will think that if Belinsky is this unreasonable now, things will only get worse later. So Dynamo will instead rent a different warehouse from Franken & Partners. And Belinsky will want to know what went wrong.

"It isn't that the lawyers are actually trying to kill the deal. They just want to . . . dot the 'i's [and] cross the 't's. . . . And they love to 'one-up' the other party's lawyers; in this game, being the last one to add a clause gains them great face."[17] This can get so bad that "some business people . . . never allow[] their own lawyer to talk to someone else's without supervision—the goal is to keep the lawyers from arguing back and forth until the contract is [too] long and the deal is dead."[18] "Friends who practice law in Canada have commented that 'American lawyers do seem to try and squeeze every drop out of a deal.'"[19] From the client's point of view, the last few drops are rarely cost-efficient: They cost too much in legal fees, in deal-killing risk, and in damage to the ongoing relationship between the parties (if there is one).

Focus on what is really needed to accomplish the client's goals. Provide just the right amount of lawyering to do that—not more and not less.

§2.1.17 Collaboration Skills Are Essential

Most lawyers work in organizations such as law firms and government agencies, where a significant amount of the effort involves collaboration with other lawyers representing the same client or groups of clients. This requires that each lawyer work well with others as members of a team. Collaboration skills[20] include

- building and maintaining constructive relationships with colleagues;
- planning work collectively and dividing responsibilities in ways that take advantage of each lawyer's strengths;
- coordinating work with others;
- usefully sharing information with colleagues and seeking their views;
- working efficiently in meetings (getting the most done in the shortest time);
- making group decisions; and
- handling disagreements constructively.

17. Nicholas Carroll, *Dancing with Lawyers: How to Take Charge and Get Results* 60 (1992).
18. *Id*. at 61.
19. *Id*. at 60.
20. See Eileen Scallen et al., *Working Together in Law*: *Teamwork and Small Group Skills for Legal Professionals* (2014); Janet Weinstein & Linda Morton, *Collaboration and Teamwork* in *Learning from Practice: A Text for Experiential Legal Education* 427–445 (3d ed. 2016); Neil Hamilton, *Fostering and Assessing Law Student Teamwork and Team Leadership Skills*, 48 Hofstra L. Rev. (2019).

§2.1.18 Effective Lawyers Know How to Learn from Experience—and Are Thus Lifetime Learners

Students often ask themselves and their teachers things that could be categorized as either mastery questions or performance questions. Here are some examples:

Mastery questions	What can I learn from this experience? How can I master this skill?
Performance questions	How did I do? What grade am I headed for? Where am I in the class compared with other students?

Some students ask primarily mastery questions. Others ask mostly performance questions. Still others ask both.

Research has shown that, when learning skills, people who focus on mastery issues learn much more than people who focus on performance.[21] This is true in school. And it continues to be true afterward for decades over the course of a career. Lawyers with a mastery focus analyze their own mistakes and learn from them. They look at each mistake as an opportunity to learn and become better professionals. They are grateful rather than defensive when their mistakes are pointed out to them. They self-critique, analyzing their own work. And they learn from what they see other lawyers doing, both good examples and bad ones. Lawyers who do these things become more and more effective as each year goes by. Lawyers who don't do them improve less and sometimes not at all.

§2.1.19 For Most Lawyers, It's a Struggle to Lead a Balanced Life, but It's a Struggle You Can Win

A study by Lawrence Krieger and Kennon Sheldon[22] of thousands of lawyers showed that happiness—both in a job and generally—is most strongly correlated with the extent to which a lawyer has autonomy, such as the freedom to choose how to do one's work; competence; relatedness, such as meaningful interaction with clients, colleagues, friends, and family;

21. Sarah J. Adams-Schoen, *Old Dogs & New Tricks—Can Law Schools Really Fix Students' Fixed Mindsets?*, 19 J. Leg. Wtg. Inst. 3 (2014); Carrie Sperling & Susan Shapcott, Fixing Students' *Fixed Mindsets: Paving the Way for Meaningful Assessment*, 18 J. Leg. Wtg. Inst. 39 (2012); Corie Rose, *The Method and the Message*, 12 Nev. L.J. 160 (2011).

22. Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 G.W. L. Rev. 554 (2015).

and internally motivated fulfillment, such as enjoyment in doing one's work and awareness that the work furthers one's values. Happiness comes in part from how you experience a job and in part from the life you lead away from the job. A healthy relationship between a job and the rest of life is called *balance*.

Your family and the other people you care about are *not* less important than lawyering. Each day that you don't spend time with them is a day you can't recover later, no matter how much you might want to. Do some things that have nothing to do with law—sports, cooking for the pleasure of it, gardening, something artistic or spiritual. Not only will they refresh you, but they will also help you become a happier and more complete person.

Integrity plays a special role in this. It is both a professional asset and one of the keys to happiness generally. If you know that you have acted with integrity, you can have more respect for yourself and know that you have truly earned the love, affection, and respect of others.

§2.2 PROFESSIONALISM IS A WAY OF BEING

Becoming a professional is a long and gradual process, beginning in law school and continuing for years afterward. Throughout that time, you make choices about the kind of professional you will be. Some of those choices are made in many small steps—so many and so small that you might not realize that they add up to important decisions. You have been making these choices since the first day of law school when teachers began to pressure you to speak and listen—and to read and eventually write—with more precision than had ever been expected of you before. If you have met that challenge, you have made some choices about the kind of lawyer you want to be, and you have probably become stronger for it and learned to see many things around you with greater clarity.

As you become a professional—an effective problem solver, with excellent judgment and integrity, who communicates precisely, produces high-quality work reliably and efficiently, and accomplishes client goals with a minimum of supervision—you are becoming a different person. In their path-breaking lawyering skills textbook, Gary Bellow and Bea Moulton began with this quote from Coles' biography of Erik Erikson:

> In this life we prepare for things, for moments and events and situations. . . . We worry about things, think about injustices, read what Tolstoi or Ruskin . . . has to say. . . . Then, all of a sudden, the issue is

> not whether we agree with what we have heard and read and studied. . . . The issue is *us*, and what we have become.[23]

This is true for every lawyer, doctor, therapist, architect, or other professional. It's not merely that a professional knows things that other people don't know. It's also that a professional thinks differently and sees the world differently. This issue is every one of us—what kind of lawyer each has become or is becoming.

23. Gary Bellow & Bea Moulton, *The Lawyering Process: Materials for Clinical Instruction in Advocacy* 1 (1978), quoting from Robert Coles, *Erik H. Erikson, The Growth of His Work* 39 (1970).

CHAPTER 3

Lawyering for and with the Client

§3.1 CLIENT-CENTERED LAWYERING

One lawyer had this to say about legal representation:

> I represent people, not cases. . . . [W]hen I did criminal defense work[, c]lients came to me with more than just their criminal case. Their families were on welfare, or they'd lose their job if they couldn't make bail. There are drug problems which affect whole families. . . . One time, my client came to court with her three-year-old child, and the judge rolled her up into jail on some technicality. We [later] got her out on a writ, but I couldn't leave the child there [in the courtroom], so I took her with me.
>
> You've got to go the whole nine yards for your clients. If you don't, you're really not meeting their needs. I had a poor client with a big products liability case. She had almost no clothes and had never been in a courthouse, so we went out and bought her a whole wardrobe for trial. When we won big, we [counseled her to] put money in trust for the kids, and buy a nice home but pay in cash so you don't have monthly payments. Otherwise, the money could have been gone in a year. . . .
>
> I don't want to take over their lives or force them to do something they don't want, but I never want to abandon my clients at the courthouse door. I guess that means getting emotionally involved in your clients' lives. . . . [T]hat's a price I'll gladly pay to try to help the *person*, not just the case.[1]

1. An anonymous lawyer quoted at Richard A. Zitrin & Carol M. Langford, *Legal Ethics in the Practice of Law* 230 (1995).

A client is not an item of work. You probably dislike it when a doctor treats you as a case of flu rather than as a human being who has the flu. And the problem is more than unpleasantness: A doctor who treats you as a human being with symptoms of the flu might spend enough time with you to learn that you also have other symptoms, and that you therefore do not have the flu, but instead have another disease, which should be treated differently. You can imagine much of how a client experiences an interview with a lawyer simply by remembering how you have experienced contact with doctors.

The opposite of treating the client as an item of work is "client-centered lawyering," a phrase that originated in a groundbreaking book by David Binder and Susan Price.[2] It means focusing our efforts around what the client hopes for (rather than what we think the client needs) and treating the client as an effective collaborator (rather than as a helpless person we will rescue). We have no special wisdom about what clients should want, and each client has to live with the results of our work long after the case has faded into the back of our memory. Clients are not helpless, and even if they were, only rarely could we rescue them. A better view is this: The client is a capable person who has hired us to help the client accomplish a particular goal.

The client who is not experienced at hiring lawyers is very different from the client (usually a business person) who hires lawyers routinely. The inexperienced client might have more anxiety and understand less about how lawyers work. The experienced client might have more sharply defined goals and think of hiring a lawyer as bringing in a professional to perform an already defined task.

The client who wants help with a lawsuit or other dispute can be very different from the client who wants assistance completing a transaction (such as negotiating a contract). If the transaction is important, the client might be experiencing some stress, which might be replaced with happiness if the transaction is successful. But a dispute client has a greater chance of feeling stress, trauma, and anger.

§3.2 THE CLIENT AS A COLLEAGUE AND COLLABORATOR

Consider two scenes in two very different lawyers' offices.

In one scene, the lawyer sits behind a large desk, and the client sits in a chair on the opposite side of the desk. When the client speaks, it's to supply

2. David A. Binder & Susan M. Price, *Legal Interviewing and Counseling: A Client-Centered Approach* (1977). A recent version is David A. Binder et al., *Lawyers as Counselors: A Client-Centered Approach* (4th ed. 2019).

facts the lawyer has asked for. When the lawyer speaks, it's to provide professional advice and judgment. This is often called the *traditional model* of the attorney-client relationship: the passive client protected by the powerful professional.

In the other scene, the lawyer and client sit together, perhaps at a conference table. They brainstorm, go over documents, and talk about which of several possible strategies would best accomplish the client's goals—and in doing so, they're both active. This has been called the *participatory model* of the attorney-client relationship: The lawyer assumes that she doesn't have all the answers, and the client is enlisted to supply an added measure of creativity and an often superior knowledge of the facts.

Most clients today want lawyers who know how to use the participatory model, although a significant minority of clients still prefer the traditional model. (The reverse was probably true 50 years ago.)

In a pioneering study, Douglas Rosenthal studied a number of personal injury cases to determine whether—personal preferences aside—one model produces better outcomes than the other.[3] Rosenthal examined a number of personal injury cases, categorized the plaintiff's attorney-client relationship in each case as either traditional or participatory, and compared the result in each case with an independent evaluation of what the plaintiff's claim was worth. On average, the participatory plaintiff's lawyers got better results. The gap between the participatory and the traditional results wasn't huge, and Rosenthal's sample was relatively small. But since then, the impression has become widespread that participatory relationships with clients produce better and more satisfying results than traditional relationships do.

Why does the participatory model seem to work better and satisfy more clients and lawyers?

First, lawyers, being human, can make mistakes, and an actively involved client might catch at least some of the mistakes before they cause harm. Second, many clients understand a lot about how to solve their problems, and most clients know at least as much or even more about their own needs than a lawyer will. The lawyer and client working together will come up with more and better solutions than the lawyer working alone.

Third, "[t]he participatory model promotes the dignity of clients" because it "makes the client a doer, responsible for his choices."[4] Fourth, it reduces the client's anxiety because the client is not kept in the dark about what is happening. Fifth, it protects "the integrity of professionals by liberating them from . . . the burdens imposed [by a] paternal role" and from

3. Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* (1974).
4. *Id.* at 168.

client suspicion caused by client ignorance.[5] And sixth, it "invites personal contact in a society becoming increasingly impersonal."[6]

How can you tell which type of relationship a client prefers? It does no good to ask in the initial interview, "Would you rather have a traditional or a participatory relationship?" Only a rare client would be able to answer that question well, even if you were to explain what the terms mean. A better method is to start on a participatory basis and switch to a traditional relationship if you learn along the way that the client would be happier that way. And remember that there's a middle ground—a relationship that could be traditional in some respects and participatory in others.

Are some types of clients more likely to prefer one type of relationship to the other? It's a commonly held view that the more educated a client is, the more likely the client will feel comfortable working with a professional. If that's true, a well-educated client might readily acclimate to, or even demand, a participatory relationship, while a less educated client might prefer a more traditional one.

But this question is a minefield in which generalizations can be both true and outrageously false at the same time. Every poverty lawyer can describe wonderful participatory relationships with clients who had little formal education. And Rosenthal found some very well-educated clients who preferred a traditional relationship.[7] A busy and well-educated client might have little time to spare for a participatory relationship. Where the client might want involvement but not full participation in decision-making, the lawyer should differentiate between those situations where the client would want to be consulted or must by law be consulted, and those where the client would prefer that the lawyer simply exercise her expertise.

§3.3 WHO DECIDES WHAT

The law of agency, professional responsibility, malpractice, and constitutional criminal procedure requires that certain decisions be reserved to the client and may not be made by the lawyer. The law of agency matters because the client is a principal whose agent is the lawyer. If the lawyer makes decisions reserved to the client, the lawyer can be disciplined under the rules of professional responsibility, held liable in malpractice, or both.

The client defines the goals of the representation. The client decides whether to accept an adversary's offer of a negotiated settlement,[8] although

5. *Id.* at 169.
6. *Id.* at 170.
7. *Id.* at 171.
8. Rule 1.2(a) of the Model Rules of Professional Conduct.