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## Changing the Field: Recognizing the Importance of Communication Methodology in the 21<sup>st</sup> Century American Law School

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### Summary

Oral communication skills have often been given little focus in the American Law School Classroom; however, more is currently written and considered regarding the value of such skill development. One such institution that intentionally provides a focus on oral communication skills is Elon University School of Law, in Greensboro, North Carolina, USA. At Elon, incoming students are provided a diagnostic opportunity for assessing their speaking proficiencies as well as any deficiencies. They are given both video and written critiques of performance. Oral skills are also developed and encouraged through a focus on questioning and responding techniques. Additionally, four protocols are utilized in the classroom setting to enhance oral communication skills. These protocols include: understanding and sensitivity to the variety of contexts of communication; using narratives in teaching; being aware of the importance and effect of non-verbal communication; and providing transparency in classroom communications. This article

reviews those four protocols as they may affect the oral performance of students as well as the efficacy of teaching.

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## Introduction

American legal education has been tradition bound for more than a century, dominated by a view of law as a special cognitive science accessed primarily through Socratic questioning (Garner 2000). This questioning comprised a dialogue with students led by the professor, the orchestra leader, with appellate case opinions serving as the “sheet music”. The field of vision, or text of the education, tended to be stationary, meaning it has been a classroom-oriented, non-mobile education, where the learning is organized around the dispensation of information from teachers to students in a linear fashion. Contextual matters, such as the nature of the classroom, learning styles of the students and communication methodology, often were left in the background, recognized as relevant, but not significant enough to re-orient the traditional field.

In recent years, a new dynamic within American legal education and in the outside world has spurred interest in substantive and process-oriented changes. One area of change involves the efficacy of legal education-whether the delivery of the education is effective on a local, national, and international platform. With the publication of the Carnegie Report, *Educating Lawyers: Preparation for the Profession of Law* (Sullivan et al 2007), calling for a significant redesign of the education, and the *Best Practices for Legal Education: A Vision and a Roadmap* (Stuckey et al 2007), another work calling for widespread reforms of American legal education, including different forms of instructive methodology with well-articulated goals, effective communication by professors and students as a part of the professional discourse has become more important than ever (Schwartz 2005).<sup>1</sup>

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<sup>1</sup> The focus on how adults learn is becoming more important to how legal education is delivered in American law schools. See generally, M. Schwartz, *Expert Learning for Law Students* (Carolina Academic Press 2005); E. Reilly, “Deposing the ‘Tyranny or Extroverts:’ Collaborative Learning in Traditional Classroom Formats, 50 J. Legal Educ. 593 (2000); G. Hess, “Listening to Our Students: Obstructing and Enhancing Learning in Law School,” 31 U. San Francisco L. Rev. 941 (1991)

The financial turbulence of 2008, continuing into 2009, called into question the culture of “big law,” the massing of big law firms. This culture had spurred the amazing growth and prosperity of huge law firms and was built on the traditional law school model. Communication skills of the best and brightest law students were secondary to a high grade point average and class rank. Yet, with new and experienced lawyers not guaranteed work in today’s market, and many competing for the same clients, the culture has lost its allure. In addition, with many large law firms either laying off attorneys or closing their doors altogether, the need for effective communication skills became increasingly important. According to a recent article in *The American Lawyer*, “Law firms are actually considering the prospects of pay cuts, delayed starting dates, sharply reduced offers, and more layoffs” (The American Lawyer 2009). This need followed the practical observation that enhanced skills are necessary for professional survival, let alone success

In addition, technological advances in recent years, along with the development of the Internet as a business conduit facilitating “the world is flat” idea expressed by the writer Thomas L. Friedman (2005), provide even more incentive to ratchet up competitive advantages through improved communication techniques. Friedman’s conceptual framework asserts that the Internet permits competition across national boundaries and continents. Given the exponential increase in competition, competitive advantage may rest on previously ignored attributes, with communication skill sets being some of the most significant.

The new communication techniques introduced into the law school classroom are taking many forms. Podcasts which involve auditory recording of classes or supplemental auditory lectures are becoming popular. Podcasts can be uploaded to I-pods and create the kind of mobile learning suited to millennials and others of the newer digitized generations. In fact, “the digital age offers opportunities for a new pedagogy. Teaching and learning are transformed by the intervention of emerging information technologies. We are able to rethink the ways in which we facilitate the learning process” (Emory University 2009). The website YouTube also provides another form of communication modality and has been the subject of numerous academic discussions in law classes all over the United States. Says Kristen Osenga in her posting on ‘Concurring Opinions: Law School Teaching Archives’, “Maybe out of fear that my students won’t find patent law as fantastic as I do, I make a point of telling them at the beginning of the semester that reading patent cases can be fun, exiting, and dramatic” (Concurring Opinions 2008). She then demonstrates by reading dramatically. Education platforms on the World Wide Web, from Blackboard, to West’s TWEN system, provide another method for teachers and students to communicate and for class learning to continue.

Yet law professors typically receive little, if any, formal training in the craft of teaching -- and no training in communication theory and practice. Moreover, professors often are reviewed only once a year, and sometimes in a truncated and holistic fashion. A faculty reviewer might be looking at various objective signposts, determining whether the class started and ended on time and whether the students appeared to be participating, but not directly commenting on the quality of instruction or the skills involved in the teaching process. Recent efforts to ratchet up the quality of teaching reviews by some educators, such as Cindra Smith and Barbara Beno, reflect that “an increase in faculty development activities designed to improve teaching can be evaluated at four (4) levels including: (1) Participant Reaction, (2) Participant Perceived Learning, (3)

Participant Behavior and Attitude Change, and (4) Impact on Organization and Student Learning” (Smith & Beno revised 2003).

Unfortunately, communication skill in teaching often goes overlooked, if only because the culture of “big law” did not understand its importance. Yet, learning how to value communication methods in the law school classroom and elsewhere is possible. According to Detlef R. Prozesky, a Professor of Community Based Education at the University of Pretoria, South Africa, “communication is a skill- and we improve our skills by getting feedback on the way we perform them. We can get such feedback by using an experienced colleague to sit in on our teaching and give us feedback. We can also ask someone to record us on videotape as we teach which we then inspect critically afterwards” (Prozesky 2000). Sadly, students take their teachers as they come and often are just as untrained in determining what constitutes good teaching- such as the notion expressed by Ernest J. Weinrib, Cecil A Wright Professor of Law, University of Toronto, that “teaching requires not merely intellectual dexterity, but also sympathy, human insight, and the capacity to encourage.”(Weinrib 2007) - or good communicating in particular- as compared to people they like in the short –term or who will give them good grades.

## Communication is becoming an increasingly important skill for professors and students

Communication skills are receiving more attention in the legal education process in the United States. According to H. Perritt Jr, of the University of Toledo,

“Legal communication instruction should emphasize teaching of oral communications as much as teaching of written communication. Most lawyers communicate orally more than they communicate in writing. Communication skills training should seek to improve oral communication” (eg Perritt 2001).

While communication methodology received considerable attention for many years in the upper level area of clinical practice, where students had to deal with live clients, it had not yet reached the mainstream of significance in the classroom-based instruction of the first two years of American Law School.

Professors in basic law courses can no longer rely on their expertise alone for conducting classes, particularly in a consumer-oriented society that demands a good product. Further, students are less willing to accept a class that they believe is not being communicated in a sufficiently clear manner, unlike days of old. Thus, the old culture of teachers as experts is giving way to a newer culture of teachers as expert communicators, combining substantive expertise with the associated ability to communicate that expertise to others.

Clarity is only one of the various elements of communication that must be effectively executed. “To express yourself clearly, it’s important to translate ambiguous words into concrete language” (Wood 2001a, p 85). “Because symbols are arbitrary, abstract and ambiguous, the potential for misunderstanding always exists” (Wood 2001b, p 98). Alfred Korzybski, who developed the

principles of general semantics, believed that “many human difficulties arise from careless, imprecise language habits” (Wood 2001c, p 99).

Such communication characteristics as stance, posture, and gesture, movements which are labeled kinesics or face and body motion, “communicate a great deal about how we see ourselves” (Wood 2001d, p 111). In American society “meeting another’s eyes is considered appropriate and a demonstration of personal honesty” (Wood 2001e, p 111) and thus is perceived as an essential characteristics for effective communication. The presence of non-fluencies in speaking, such as the use of “uhs, ers, ums, and ums, you know, like, and, I mean,” creates distractions and interrupts the flow of content. Vocal variation, breath control, speaking pace, and volume are all critical communication competencies for effective teaching – and likewise, effective client counseling. Poor execution of any of these characteristics may result in distractions that inhibit student learning.

## Questioning techniques

Since a core component of any basic law school class involves questioning and answering techniques in what has been widely and euphemistically called ‘the Socratic Method,’ it is useful to examine communication in the law school classroom in this context. The questioning methodology can be parsed into two parts- verbal and non-verbal. The verbal questioning in legal education classrooms involves at least three elements: (1) ‘the ask;’ (2) ‘the elaboration’ (if any); and (3) ‘the receipt and reply’. The ask is the actual question posed; that which seeks a reply. The elaboration either precedes or follows the ask and explains the purpose, context, or perspective of the question to assist either the recipient or listeners in understanding the ask. This component may or may not occur. Finally, the receipt and reply evidence whether the question was received and digested and what response, if any, occurred. These elements can be disassembled and studied separately or viewed holistically. For example, questions can be examined specifically for whether they are non-leading and do not suggest an answer or whether they are leading and suggest an answer. An example of such a questioning structure is as follows: The professor might ask, “Who are the parties to a lawsuit?” That is a non-leading question we are calling ‘the ask’. The professor might explain that ‘parties’ refers to ‘named’ parties. That would be ‘the elaboration’. Finally, the professor might then listen to how a student responds. That is the ‘receipt and reply.’

## What expert communicators do - create protocols

Experts create protocols, or maps, for their approach to situations. An airline pilot has a protocol in various emergency situations and an orthopedic surgeon has a protocol for how to operate, generally. Novices, on the other hand, generally do not have protocols. Instead, they devise a strategy on the spur of the moment- or have no strategy at all.

Expert communicators also create protocols and some of these are described below. Expert communicators consider, for example, the context of communication, use the narrative when helpful, understand non-verbal communication competencies and create transparency in questions for ready understanding.

## Novice communicators

Novice communicators often rely on unconscious intuition in their conversation with others and nothing else. While this is not necessarily imprudent, the intuitive approach often leads to less success than otherwise, particularly if there are no feedback and assessment measures built into the process.

When a professor, for example, is not very experienced in teaching, she may proceed to teach solely by lecturing, usually relying on notes, with no provision made for engaging students or for assessing understanding of and ability to apply the content. At the conclusion of the class, the professor has no assurance that any learning has taken place – or that the students even heard what was actually said.

## Expert communicators

Expert communicators do not simply rely on ‘natural intuition’ to communicate. They also consciously use methodological steps and frameworks. In ballroom dancing, participants must follow generally recognized steps for the waltz, tango and other dances- and not just make up everything as they go along. That is, improvisation is a take-off from an established methodology. An expert dancer is cognizant of the required steps, and the deviations taken from those steps. It is the conscious awareness, as well as the conduct, that separates experts from novices.

In the classroom, the expert communicator teaches by following steps and imparting information in frameworks. Knowing the steps and knowing what happens when there are deviations from the steps is the mark of an expert and not a novice communicator.

## Protocols

### *Protocol 1: Communication contexts*

Expert communicators are acutely aware of the different communication contexts in which they act. “The interrelated conditions of communication make up the context . . . [which] combines many ‘strands’ or aspects” (Verderber 2000a, p 4). Rudolph F. Verderber identifies three aspects of context that may affect a communication -- “physical setting, historical setting and psychological setting” (Verderber 2000b, p 5). Using these contextual identifications or markers, the expert communicator will consider such elements as time of day, the temperature in the room, the proximity of speaker to audience, room arrangements, relationship of current communication to previous communications, and how both speaker and listeners perceive themselves and others.

A law school professor must do the same to maximize communication in the classroom. This means being aware of the physical layout, the acoustics and who is in the audience and how they are reacting to the questions. Law professors should be aware of how their voices carry, whether the room is configured for maximum communication, whether technology reaches all students and whether the audience can listen without distractions, among other things. These structural basics in the classroom require that the law professor thinks about where people sit, who gets called upon, how many people are in the class, how long the classes are and where she stands in

relation to the students. Teaching realities such as whether to use lecture or discussion format are also contextual considerations.

### *Protocol 2: The use of narrative*

The narrative technique is an ancient one, rooted in oral histories, song and inculcation in community values. The narrative permitted the community to educate its youth on a grand and memorable scale. Conversation through storytelling is a common form of expression, pervasive throughout society. We grew up on it and it is a welcoming means of communication between individuals, including teachers and students. In fact, using the ‘he said, she said’ of a typical conversation is a dialogically powerful form of communication – both inside of and outside a law school classroom.

The use of narrative is popular in American law opinions, often in an extremely sanitized form. Another way of stating that storytelling is relevant to law is that facts matter. The understanding of facts is woven into the construction and application of the legal doctrine to give the doctrine life. In the words of the cultural anthropologist, Clifford Geertz “It is this complex of characterizations and imaginings, stories about events cast in imagery about principles, that [is]. . . a legal sensibility”(Geertz 1983).

Jim Holbrook, a clinical Professor of Law at the University of Utah S.J. Quinney College of Law teaches a course for 1L students called Law and Storytelling. Holbrook was “struck by the realization that a course on law and storytelling would be useful to law students who are often immersed in studying legal doctrine” (Holbrook 2007).

For its Applied Storytelling Conference, Lewis and Clark Law School asked for proposals “that fostered collaboration and dialogue about the skills of storytelling in law and about teaching storytelling and other skills to law students and practitioners.”(Lewis & Clark Law School 2009a, p 1)

Among the topics reflecting the role of narrative in legal practice were:

- Using storytelling in litigation or transactional work or in legislative processes
- Creating compelling legal stories as part of best practices
- The place of storytelling in legal reasoning
- Differentiating between stories and narratives and the use of each
- The ethical limits of storytelling whether with clients, lawyers or judges (Lewis & Clark Law School 2009b, p2).

### *Protocol 3: Non-verbal communication*

Non-verbal competencies, such as eye contact, inflection, body movement, physiology, are critical to effective communication. Almost 90% of all communication depends on the non-verbal components of the communication- the voice inflection, volume, emphasis and cadence, to name a few significant characteristics<sup>2</sup>.

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<sup>2</sup> It would be useful, for example, to practice telling the same story of worst/best moments with conscious use of different types of non-verbal communication.

Even considering eyes alone, there are a number of movements that communicate: closing and opening the eyes, raising and lowering lids and eyebrows, winking, blinking, and looking up and to the left. Add to that the movement of the 80 facial muscles, and the movement of body through stance, posture, walk and gesture, and it becomes even more apparent that: “non-verbal communication itself carries the impact of a message. No one signal carries much meaning. Instead, such factors as gesture, posture, eye contact, clothing styles, and movement must be regarded together” (Berko et al 2001). Rudolph F. Verderber reinforces this notion by saying that “Listeners interpret messages more accurately when they observe the non-verbal behaviors accompanying the words”(Verderbeer 2000, p 40). As far as function in a classroom, “a non-verbal message can repeat, substitute for, complement, contradict, or regulate the verbal message” (Cooper, Simonds 1999).

Expert communicators are well aware of the power and influence of the non-verbal portion of every communication and evidence that in the conduction of their interactions.

#### *Protocol 4: transparency in communication*

It is rare in legal education that the rationale for questions, and specifically articulated goals, are communicated expressly to students, especially if offered to meet different learning styles. In years past, it was assumed that questioning, legal education, and law school goals were clear – or at least clear enough to forsake direct explanation. The evolutionary idea of “the survival of the fittest” seems to have been the dominant means of explaining law school purposes and objectives in past decades. In recent times, however, the use of meta-cognition and the question, “Are they really learning and, if so, what?” has changed the understanding of why transparency in questioning is so important. The notion of transparency is supported by meta-cognition, the understanding of how people learn. J.H. Flavell asserts that “Learner meta-cognition is defined and investigated by examining their person knowledge, task knowledge, and strategy knowledge” (Flavell 1976, p 231). Brown suggests that “Meta-cognition is knowledge (i.e. awareness) of one’s own cognitive processes and the efficient use of this self-awareness to self-regulate these cognitive processes (Brown 1987). Thus, transparency is furthered by creating an express scaffolding which frames the learning- including an express statement of long- term and shorter term objectives<sup>3</sup> (Friedland 2009). This conceptualization of express framing is designed to enhance the utility of the class and to get “on board” as many students as possible- without ‘hiding the ball’ as is so often the case in traditional legal education (Sparrow 2004).

In communicating goals and outcomes, it is important again to reach the whole class by communicating in different forms. The communication can occur on the syllabus, orally in class, in emails, and through a Web site. Significantly, in this age of enhanced communication tools, such as the Internet, it may be necessary to use most, if not all of these forms of communication synchronously - and not just one of them.

With respect to questioning methods in a class, it can be useful to expressly explore with students why a general style of questioning, such as the Socratic approach, will be used, as well as why particular question types (“Why?” “What?”) or specific questions will be asked. Giving students the rationale or context for teaching facilitates the learning process.

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<sup>3</sup> For example, law professors can be asked, “What would you use to offer students more transparency about why you are asking questions and conducting your course in the way that you are?”



## Case Study: Elon University School of Law

A nascent law school such as Elon University School of Law can afford to create new approaches. This young North Carolina school has focused on skills such as communication by including an expert in communications on the law faculty<sup>4</sup>. This inclusion of non-lawyers with specific skill sets is based on a dual recognition- that law professors have not been trained to obtain, maintain, and archive the pedagogical skills of teaching and that law schools do not necessarily teach communication skills in a maximally proficient manner (Strong 1973).

To enhance communication skills at Elon, each 1L student is given a diagnostic evaluation of their speaking ability at the very start of the year. The diagnostic allows them to speak, and provides them both videotape feedback and professional feedback from the Executive Coach in Residence. As the 1Ls move into their oral arguments, they are invited to deliver a practice argument to the coach and receive critiquing and suggestions for reconstructing if necessary. Moot Court efforts are monitored by the Executive Coach and presentation issues are addressed and corrected. Trial Advocacy students are offered the same opportunity for support and development. At any point during their law school career, Elon students may have access to professional coaching as a means of enhancing their communication skills. The offer is available for times when students are called upon to introduce outside speakers; when students are preparing and engaging in job interviews; or when students are working interpersonally in small groups for classes. These services are made available to faculty and staff for their development of communication skills as well.

## Conclusion

Rarely have professors of law been specifically trained to teach. Their career path is likely to have been Law School, then law practice, and then the classroom with no specific attention to the pedagogical skills of teaching. It was enough for them to know their area of discipline and to impart it to their students. Little attention was given to whether or not they were effective and often the only way level of effectiveness was revealed was through student evaluations.

To be effective professional law instructors in an increasingly competitive environment, it behoves teachers to be sensitive to the changes in the world and the students, and it becomes necessary to look for new ways to teach law. If law teachers are to be expert and effective communicators, we need to incorporate protocols, such as those described above, as we teach. When we direct questions, consider the effectiveness of narrative, the power of non-verbal communication, and the need for transparency, law professors become vehicles for establishing a healthy and efficacious culture in the law classroom.

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<sup>4</sup> Professor Bonnie McAlister was hired by Elon University School of Law to teach both students and faculty members communication skills. Professor McAlister has degrees in Communications and has taught at the Center for Creative Leadership, Davidson College, and the University of North Carolina at Greensboro. Her role at Elon is to develop and enhance the communication skills of both students and faculty.

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