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### **The Drive to Advise: A Study of Law Students at a Pro Bono Brief Advice Project**

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# ARTICLE

## THE DRIVE TO ADVISE: A STUDY OF LAW STUDENTS AT A PRO BONO BRIEF ADVICE PROJECT

LINDA F. SMITH\*

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## INTRODUCTION

While law schools are required to teach legal analysis, research, and writing, law schools may choose what other “skills” to teach. In not requiring that client interviewing be taught, the assumption may be that students will pick up this skill in other ways, perhaps through pro bono or clerkship work. This paper seeks to test that theory by studying student–client consultations at a pro bono brief advice project.

The article begins with an introduction to the literature about client interviewing, relying upon law school texts, which are largely based on theory, as well as medical school texts that are evidence-based. Here, we posit the questions we might ask when studying the student–client consultations.

Next, the article explains how language science can address these questions. This section reviews various ways in which language science has been used to study legal practice, especially in the courts, where recordings

and transcripts of recordings are widespread. It explains that language science has been used extensively to study doctor–patient conversations, but very little to study attorney–client or law student–client conversations. It introduces Conversation Analysis as a dominant approach to studying social interaction while explaining how Applied Conversation Analysis can shed light on law students' interviewing skills in a pro bono brief advice project.

Using the Conversation Analysis framework, the article considers transcripts of forty-six law student–client consultations. While most law students allowed the client to provide an uninterrupted narrative followed by questioning, the majority did not complete the interview before beginning to counsel the client. They provided suggestions, information, assessment, commentary, and even advice during the initial interview without seeking direction from a supervising attorney. Students' premature helpfulness generally resulted in less thorough interviews and less organized, thorough counseling. In a few cases, it resulted in the client leaving with erroneous advice or information. These findings suggest that students do not just “pick up” good interviewing skills—instead, students may very well develop bad habits through their meritorious pro bono work.

The next section considers why students appear to have this drive to advise and how instruction or mentoring might result in better learning for the students and better service for the client. Finally, the article concludes with suggestions for further study.

## I. EFFECTIVE INTERVIEWING

Accreditation standards require that all law schools “establish learning outcomes that shall, at a minimum, include competency in . . . [l]egal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context.”<sup>1</sup> The ABA does not further define what is included in “oral communication in the legal context.” However, the same standard goes on to require law schools to establish learning outcomes that include competency in “other professional skills”<sup>2</sup>—meaning:

For the purposes of Standard 302(d), *other professional skills* are determined by the law school and *may include skills such as, interviewing, counseling, negotiation,*

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1. AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 15 (2018–2019).

2. *Id.*

fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.<sup>3</sup>

Accordingly, the ABA does not require law students to achieve any level of competency in client interviewing and counseling. Law schools may choose to teach and even require competency in these skills. To date, the Holloran Center Learning Outcomes Database lists seventeen schools that include competency in client interviewing as among their learning outcomes and also seventeen schools that include competency in counseling as among their learning outcomes.<sup>4</sup>

Nevertheless, law school clinics have taught law students client interviewing and counseling since their inception;<sup>5</sup> and today, there are many texts that cover these topics in clinics or simulation courses. These texts are grounded in largely similar theories. They emphasize the importance of encouraging and allowing the client to give a narrative at the beginning of the interview.<sup>6</sup> They recommend a fairly consistent structure for the initial interview—a client-directed narrative identifying the client’s

3. *Id.* at 16 (emphasis added).

4. See *Learning Outcomes 302(b) and (d)*, UNIV. ST. THOMAS SCH. LAW HOLLORAN CTR., <https://www.stthomas.edu/hollorancenter/resourcesforlegaleducators/learningoutcomesdatabase/learningoutcomes302b/> [<https://perma.cc/EP95-Z7BP>] (consolidating data from individual law school’s learning outcomes websites).

5. See GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 124–272, 966–1104 (1978) (exploring the skills and ethics of client interviewing at 124–272 and client counseling at 966–1104).

6. See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 86–89 (2d ed. 2004) (discussing effects “preliminary problem identification” has on encouraging clients to “provide personal perspectives on their legal problems”); see also ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 92 (1990) (recommending beginning with client’s “problem identification”); ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 59, 73–74 (2d ed. 2006) (recommending “open question[s] designed to elicit client narrative” followed by hearing “the client’s story or narrative”); STEPHEN ELLMANN ET AL., *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* 20 (2009) (recommending an attorney “allow the client to describe her problem and related concerns”); G. NICHOLAS HERMAN & JEAN M. CARY, *A PRACTICAL APPROACH TO CLIENT INTERVIEWING, COUNSELING AND DECISION-MAKING: FOR THE CLINICAL PROGRAMS AND PRACTICAL SKILLS COURSES* 19–20 (2009) (recommending the attorney first invite “the client to tell his story” and then gain an understanding of the client’s objectives or goals); STEPHAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS*, 97–100 (5th ed. 2015) (recommending the attorney give the client “a full opportunity to tell [the attorney] whatever the client wants to talk about before [the attorney begins] structuring the interview.

concerns, followed by attorney questioning to further explore facts and goals, followed by analysis, and then counseling.<sup>7</sup> These texts also address the importance of establishing rapport with the client through “active listening” or “reflection.”<sup>8</sup>

While these texts regarding interviewing and counseling do not address these skills in the context of a brief advice clinic, legal ethical norms do. Under the Model Rules of Professional Conduct, a supervising lawyer is responsible for ensuring that an assisting law student’s conduct “is compatible with the professional obligations of the lawyer.”<sup>9</sup> This includes ensuring that any advice given by an assisting law student is “competent,” which requires employing the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>10</sup> The ABA has published other “standards” that make clear that a law student who volunteers “may sometimes come close to offering legal advice, which they may only do at the direction of, and with the oversight of an attorney.”<sup>11</sup>

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7. See generally BINDER ET AL., *supra* note 6, at 235 (recommending “preliminary problem identification” followed by a “time line” and “theory development questioning,” and concluding the initial conference by addressing client questions and outlining “next steps”); see BASTRESS & HARBAUGH, *supra* note 6, at 92–108, 235 (recommending after client’s problem identification, the questioning comes attorney gains an “overview” of the problem, followed by verification and closure, and summary before a counseling session); ELLMANN ET AL., *supra* note 6, at 20–22 (recommending the “attorney allow the client to describe her problem and related concerns” followed by “[f]act [e]xploration” where the attorney asks more detailed questions, followed by counseling where attorney and client discuss actions and options, consequences, and choosing); HERMAN & CARY, *supra* note 6, at 19–20, 49, 63 (recommending an attorney first invite “the client to tell his story,” and then gain an understanding of his objectives or goals followed by “exploring legal theories” once the attorney has a “basic understanding” of the client’s objectives. “After you have thoroughly interviewed your client . . . you must analyzed potential courses of action, advise him . . .”); KRIEGER & NEUMANN, JR., *supra* note 6, at 97–100, 102, 108, 239 (recommending the attorney give the client “a full opportunity to tell . . . whatever the client wants to talk about before [the attorney] begins structuring the interview,” followed by “tentative theories” and then “counseling . . . the process in which lawyers help clients reach decisions.”).

8. See BASTRESS & HARBAUGH, *supra* note 6, at 116–26 (recommending expressing empathy through reflection); BINDER ET AL., *supra* note 6, at 48–63 (discussing “active listening”); ELLMANN ET AL., *supra* note 6, at 27–33 (recommending “creating connection” with the client through active listening, reflection, validation, and empathy); HERMAN & CARY, *supra* note 6, at 28–30 (recommending conveying empathic understanding and active listening); KRIEGER & NEUMANN, *supra* note 6, at 97–100 (recommending “active listening”).

9. MODEL RULES OF PROF'L CONDUCT r. 5.3 (AM. BAR ASS'N 2014). Most states, including Utah, have adopted ethical rules consistent with the Model Rules.

10. *Id.* r. 1.

11. AMERICAN BAR ASSOCIATION, STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS 160 (2014); see also ARTHUR GARWIN, THE PARALEGAL'S GUIDE TO PROFESSIONAL RESPONSIBILITY 39 (3d ed. 2012). Law students' ethical

Thus, to employ effective lawyering skills and respect ethical norms, the student should consult with an attorney supervisor before providing information, advice, or counsel to address the client's particular facts and circumstances.

Studies of other brief advice clinics support the importance of a thorough interview first. A Maryland experiment relied on law students to give both information and advice to pro se litigants while obtaining supervision from lawyers, initially in the courthouse and later over the telephone.<sup>12</sup> The authors of this study emphasized the importance of “a thorough intake interview.” They recommended sorting the cases as those needing “largely mechanical justice” as opposed to “limited judgment and discretion” or “substantial legal judgment and discretion.”<sup>13</sup> Clients expressed high levels of satisfaction with student assistance, especially when the task was mostly mechanical or required only limited judgment.<sup>14</sup> Professor Elizabeth McCulloch similarly emphasized the value of “careful interviewing” compared to “routinized screening” offered to pro se parties participating in pro se divorce classes.<sup>15</sup>

In contrast with legal education, since 2002, medical school accrediting bodies have included “interpersonal communication” as one of the six core competencies that all medical school graduates must possess.<sup>16</sup>

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responsibilities can be analogized to that of paralegals. Arthur Garwin's comments are best illustrated in the following, published by the ABA, which states:

The temptation to give legal advice is a challenge that almost every paralegal encounters daily . . . [P]aralegals become quite familiar with certain practice areas. They learn the answers to many common client questions and may have regular interaction with clients for purposes of gathering information on behalf of the lawyer and communicating the lawyer's advice back to the client . . . It can be very tempting to respond to a client's inquiry without first consulting the lawyer when one believes that he or she know the answer . . . . However, the response may amount to giving legal advice, so the paralegal should either let the client know that the question will be passed on to the lawyer for a response or tell the client that the client will have to discuss it with the lawyer.

*Id.*

12. Michael Millemann et al., *Rethinking the Full-Service Legal Representational Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV. 1178, 1181 (1997).

13. *Id.* at 1183–86.

14. *Id.* at 1185–86.

15. Elizabeth McCulloch, *Let Me Show You How: Pro Se Divorce Courses and Client Power*, 48 FLA. L. REV. 481, 500 (1996).

16. See DEBRA L. ROTER & JUDITH A. HALL, DOCTORS TALKING WITH PATIENTS / PATIENTS TALKING WITH DOCTORS: IMPROVING COMMUNICATION IN MEDICAL VISITS, at xi (2d ed. 2006) (crediting the American Association of Medical Colleges (AAMC) and the American College of

Fortunately, medical schools have been able to rely on decades of analysis of doctor–patient conversations, and now teach “patient–centered”<sup>17</sup> interviewing using texts that are “entirely evidence-based.”<sup>18</sup>

Although complete coverage of medical interviewing techniques is not possible here, a brief summary is useful. Medical school texts and guidelines consistently recommend open-ended questions coupled with attentive listening at the outset of doctor–patient meetings to surface all the issues the patient wishes to cover.<sup>19</sup> After agreeing upon the agenda with the patient, the doctor is to solicit the patient’s narrative or history about the current problem, beginning with open and then moving to closed questions.<sup>20</sup> The doctor should use empathy to express an understanding of the patient’s feelings.<sup>21</sup> After sufficient interviewing (and any necessary physical examination), the doctor must “provide the correct amount and type of information,” and then engage in shared planning to deal with the issue.<sup>22</sup> During this phase, the doctor must “explain the diagnosis/prognosis,” incorporating the patient’s informational needs.<sup>23</sup> The structure and techniques for the medical consultation are very similar to the recommendations for a legal consultation.

Over the years, language science has been used to discover problems in doctor–patient consultations. One of the first significant studies showed that doctors frequently interrupted patients’ opening statements—after an average of only eighteen seconds—resulting in patients being unable to share all their issues or concerns.<sup>24</sup> Other studies have shown that while doctors can learn to incorporate empathy into their styles, medical students’ abilities to empathize did not improve without training.<sup>25</sup> Another common problem identified in the medical field is giving advice,

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Graduate Medical Education (ACGME) for adding “interpersonal communication” as a core competency).

17. AUGUSTE H. FORTIN VI ET AL., *SMITH’S PATIENT-CENTERED INTERVIEWING: AN EVIDENCE-BASED METHOD*, at xx (McGraw-Hill Companies 2012) (2002).

18. JONATHAN SILVERMAN ET AL., *SKILLS FOR COMMUNICATING WITH PATIENTS*, at x (3d ed. 2013).

19. FORTIN VI ET AL., *supra* note 17, at 30; SILVERMAN ET AL., *supra* note 18, at 22–25.

20. FORTIN VI ET AL., *supra* note 17, at 30; SILVERMAN ET AL., *supra* note 18, at 22–25.

21. FORTIN VI ET AL., *supra* note 17, at 30; SILVERMAN ET AL., *supra* note 18, at 22–25.

22. SILVERMAN ET AL., *supra* note 18, at 24–25.

23. FORTIN VI ET AL., *supra* note 17, at 134.

24. See Howard B. Beckman & Richard M. Frankel, *The Effect of Physician Behavior on the Collection of Data*, 101 *ANNALS INTERNAL MED.* 692, 693–95 (1984) (summarizing data showing implications of physicians taking “control of the visit” shortly after client discloses first concern).

25. See SILVERMAN ET AL., *supra* note 18, at 137–40.

information, or reassurance prematurely—before completing the information-gathering phase of the consultation.<sup>26</sup>

In studying the transcripts from the student–client interviews, this article will ask whether any of these common problems appear. Do law students interrupt the client narrative so that the client cannot tell her story or state her problem as doctors have been shown to do? Do law students include empathy in their interviews? Do law students begin to give advice, information, or reassurance prematurely?

## II. LAW & LANGUAGE SCIENCE

Before introducing the protocols of this study, it will be useful to provide some background about the rich possibilities of using language science to study the practice of law and the ways lawyers present themselves, the law, and the legal process to the public.

In the 1950s, philosophers of language wrote regarding the ways in which language acquires meaning as it is used.<sup>27</sup> H. Paul Grice proposed that conversation was a cooperative activity in which certain maxims were observed.<sup>28</sup> Erving Goffman proposed that in interacting, people try to present their best faces to one another.<sup>29</sup> Often relying upon ideas proposed by the philosophers of language, and in light of the wide availability of recording devices, social scientists began to study the use of language in the 1970s.<sup>30</sup> These studies of spoken language were anchored in a range of disciplines (e.g., linguistics, anthropology, sociology, psychology) and referred to by various terms (e.g., discourse analysis, sociolinguistics, ethnography, social anthropology, conversation analysis). Initially, the focus of the studies was the way in which spoken language

26. See FORTIN VI ET AL., *supra* note 17, at 133; SILVERMAN ET AL., *supra* note 18, at 133.

27. See DEBORAH CAMERON, WORKING WITH SPOKEN DISCOURSE 48 (2001), (discussing the work of philosophers J.L. Austin, John Searle, and H. Paul Grice).

28. H. Paul Grice, *Logic and Conversation*, in 3 SYNTAX AND SEMANTICS 41–45 (Peter Cole & Jerry L. Morgan eds., 1975); see Linda F. Smith, *Client-Lawyer Talk: Lessons from Other Disciplines*, 13 CLINICAL L. REV. 505, 507–08 (2006) (analyzing Grice’s four “maxims”).

29. Erving Goffman, *On Face-Work: An Analysis of Ritual Elements in Social Interaction*, 18 PSYCHIATRY 214 (1955), reprinted in ERVING GOFFMAN, INTERACTION RITUAL 5 (1967); see generally ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 1 (1959) (summarizing behavior in the presence of others); ERVING GOFFMAN, FORMS OF TALK (1981); Erving Goffman, *Felicity’s Conditions*, 89 AM. J. SOC. 1, 28 (1983).

30. See DAVID MELLINKOFF, THE LANGUAGE OF LAW (1963) (discussing how law and language scholarship has historically focused upon written language, from the arcane language of statutes and legal documents); see also LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES (1993) (noting to more recent studies of judicial opinions focus on written language).

occurred in ordinary conversation.<sup>31</sup> However, in many cases, social scientists used language analysis to better understand the institution where the language was produced—ranging from courtrooms, to classrooms, to medical offices.<sup>32</sup> Often the frame of reference was how power generates within the institution or relationship.<sup>33</sup>

#### A. *Language Science in Court Cases*

In the legal arena, anthropologist William O'Barr studied language used in the courtroom.<sup>34</sup> He and his collaborator, law professor John Conley, have spent decades examining “power relations in the linguistic details of institutional discourse.”<sup>35</sup> Their first book was an ethnographic study of language used in small claims courts.<sup>36</sup> Their book, *Just Words*,<sup>37</sup> contains chapters covering language-based approaches to different experiences in the law—ranging from cross-examination of a rape victim, to mediation in a divorce case, to different argumentation styles (rule-oriented vs. relational) in court.

More recently, law professors Jacobi and Schweers have analyzed Supreme Court arguments; they looked at interruptions and noted that female justices were interrupted at disproportionate rates by male justices and by male advocates.<sup>38</sup>

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31. Harvey Sacks et al., *A Simplest Systematics for the Organization of Turn-Taking for Conversation*, 50 LANGUAGE 696, 697 (1974).

32. See Charles Antaki, *Six Kinds of Applied Conversation Analysis*, in APPLIED CONVERSATION ANALYSIS 1, 7 (Charles Antaki ed., 2011) (discussing how the study of language was employed in different mediums); see also CAMERON, *supra* note 27, at 100 (explaining how to properly organize “institutional talk” analysis).

33. See CAMERON, *supra* note 27, at 162 (analyzing the asymmetric speech distribution in the courtroom between judges and defendants and within heterosexual couples); see also NANCY AINSWORTH-VAUGHN, CLAIMING POWER IN DOCTOR-PATIENT TALK 59 (1998) (providing analysis of medical discourse in doctor-patient encounters).

34. See WILLIAM M. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM 74 (1982) (showing that witnesses who use “powerful” speech are more credible, convincing and trustworthy than those who use “powerless” speech).

35. Jason Cross, *Language, Power, and Law: An Interview with John Conley and William O'Barr*, 29 PoLAR 337, 337 (2006).

36. JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990).

37. See JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE AND POWER (2d ed. 2005) (discussing the different language based approaches to clients' varying legal experiences).

38. Tonja Jacobi & Dylan Schweers, *Justice Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379, 1398 (2017).

Another area of language science that also arose in the 1970s was forensic linguistics. Distinguished linguist, Roger Shuy, has consulted in hundreds of cases and has also testified in dozens. His work, for example, includes analyzing police interviews, FBI recordings, and courtroom testimony.<sup>39</sup> He has also authored over a dozen books illuminating ways language can be used and misused in criminal and civil trials.<sup>40</sup> In his books, Shuy outlines fundamental linguistic insights as to how speech acts work and shows how the law can misinterpret what people mean to communicate. Forensic linguists also work within academia, studying how language works in the legal process. For example, law professor Janet Ainsworth, along with sociolinguists Susan Ehrlich and Diana Eades, have compiled a collection of essays that study the meaning of “consent” in a wide variety of legal settings (e.g., police interrogations, sting operations, sexual activity, contracts) as illuminated through the language used in context.<sup>41</sup>

### B. *Language Science and Medicine*

At the same time that language science was being employed to study legal institutions, social scientists were also studying medical institutions—particularly provider–patient conversations. There have been thousands of social science studies of doctor–patient consultations<sup>42</sup> and hundreds more are added each year.<sup>43</sup> Some of these studies have included medical students, interns, residents, and even doctors. Today, as highlighted above,

39. CONLEY & BARR, *supra* note 37, at 170.

40. See ROGER W. SHUY, LANGUAGE CRIMES: THE USE AND ABUSE OF LANGUAGE EVIDENCE IN THE COURTROOM (1993, 1996) (explaining how the deliberately ambiguous language used in “language crime” cases require linguistic analysts to interpret); ROGER W. SHUY, LINGUISTICS IN THE COURT ROOM: A PRACTICAL GUIDE (2006) (examining language evidence in adult-adult sexual misconduct cases); ROGER W. SHUY, THE LANGUAGE OF SEXUAL MISCONDUCT CASES (2012); (providing a guide to forensic analysts on the legal system and working with attorneys); ROGER SHUY, THE LANGUAGE OF FRAUD CASES (2016) (detailing the work a linguistic analyst does on a fraud case); ROGER W. SHUY, DECEPTIVE AMBIGUITY BY POLICE AND PROSECUTORS (2017) (analyzing the deceptive ambiguous language used by police officers, prosecutors, and undercover agents in criminal case); SPEAKING OF LANGUAGE AND LAW (Lawrence M. Solan et al. eds., 2015) (beginning broadly with the history of legal language before narrowing the scope to language analysis of jury instructions and wills).

41. See generally DISCURSIVE CONSTRUCTIONS OF CONSENT IN THE LEGAL PROCESS (Susan Ehrlich et al. eds., 2016) (providing examples of how consent applies in different legal contexts).

42. See Nancy Ainsworth-Vaughn, *The Discourse of Medical Encounters*, in THE HANDBOOK OF DISCOURSE ANALYSIS 453, 453 (Deborah Schiffrin et al. eds., 2003) (stating “[t]here is a huge cross-disciplinary literature on medical encounters” with over 7000 titles published by 2003).

43. SILVERMAN, ET AL., *supra* note 18, at x (showing over “400 papers per year listed on Medline on physician–patient relations and communications.”).

medical school texts teach patient interviewing and counseling skills based on the evidence derived from these many studies.<sup>44</sup> Elsewhere, I have argued that law school clinics should employ the same analytical approaches to record, transcribe, and study client–lawyer or client–student conversations in order to acquire the same evidence about best practices that inform medical education.<sup>45</sup>

### C. *Language Science and Client Consultations*

In comparison, studies of lawyer–client communication that could determine best practices in client interviewing and counseling have been almost non-existent.<sup>46</sup> Lawyer–client communication studies began in the 1970–80s. First, there were two studies based on personal observations of attorneys interviewing clients. Even without recordings, these studies highlighted attorneys' excessive control over the relationship and the case.<sup>47</sup> Another study involved one conversation analysis of a single recorded interview. This study similarly showed the attorney controlling the client for the bureaucratic benefit of the office.<sup>48</sup> In the 1990s, a law professor–anthropologist team studied students interviewing clients seeking disability benefits.<sup>49</sup> They discovered that “clients reveal critical self-information in

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44. *See id.* at x (teaching effective communication techniques for doctor–patient interactions); AINSWORTH-VAUGH, *supra*, note 33, at 3 (studying patients use of power in doctor–patient communication); COMMUNICATION IN MEDICAL CARE: INTERACTION BETWEEN PRIMARY CARE PHYSICIANS AND PATIENTS (John Heritage & Douglas W. Maynard eds., 2006) (chronicling the change in communication analysis of doctor–patient interactions from the original 1970s studies); FORTIN VI ET AL., *supra* note 17, at xvii, xx (3d ed. 2012) (describing a patient-centered approach to doctor–patient interviews); ROTER & HALL, *supra* note 16, at xi (acknowledging the importance of analyzing communication between doctors and patients for more effective treatment).

45. *See* Linda F. Smith, *Rx for Teaching Communication Skills: Why and How Clinicians Should Record, Transcribe and Study Actual Client Consultations* 24 CLINICAL L. REV. 487, 490 (2018) (proposing a method for collecting and analyzing data in client–student conversations at law school clinics).

46. *See id.* at 489 (analyzing the few social science studies on attorney–client communication).

47. Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599, 599 (1979); Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 178, 195, 229 (1986).

48. *See* Bryna Bogoch & Brenda Danet, *Challenge and Control in Lawyer-Client Interaction: A Case Study in an Israeli Legal Aid Office*, 4 TEXT 249 (1984) (criticizing the language used by the lawyer to control clients in attorney–client interactions).

49. *See* Gay Gellhorn et al., *Law and Language: An Interdisciplinary Study of Client Interviews*, 1 CLINICAL L. REV. 245, 258–59 (1994) (describing the composition of the teams and their preparation for the interviews).

their opening words,” which students often miss.<sup>50</sup> This finding, about client presentation of self, was confirmed in my recent study of an experienced attorney successfully interviewing a client with disabilities.<sup>51</sup> This second study also illustrated the importance of permitting a client narrative and expressing empathy for the client.<sup>52</sup>

The most well-known study of attorney–client conversations was based on audio recordings of over one hundred divorce cases.<sup>53</sup> The law professor-political scientist team focused on ethnographic insights about the attorney–client relationship and the legal process. They saw the attorneys negotiating reality with the clients, trying to move the cases to settlement while often ignoring clients’ feelings.<sup>54</sup> They also observed lawyers describing a chaotic system where it was important for clients to rely on their attorneys because opposing counsel and courts could not be trusted.<sup>55</sup> “Lawyer cynicism and pessimism about legal actors and processes is a means through which they seek to control clients and maintain professional authority.”<sup>56</sup> While these authors used recordings and transcripts, they did not analyze them to explore best practices in the skills of interviewing or counseling, as researchers focusing on medical conversations have done.

Why have there been so few studies of attorney–client conversations and student–client conversations in comparison with the thousands of studies of doctor–patient talk? A social science research team shared their inability to recruit study subjects and concluded that lawyers’ concerns for attorney–

50. Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321, 321 (2010).

51. See Linda F. Smith, *Always Judged-Case Study of an Interview Using Conversation Analysis* 16 CLINICAL L. REV. 423, 424 (2010) (describing the key to a successful client interview is a balanced and respectful conversation).

52. *Id.* at 442.

53. Compare Austin Sarat & William L. F. Felstiner, *Law and Strategy in the Divorce Lawyer’s Office*, 20 LAW & SOC’Y REV. 93, 93 (1986) (analyzing the reoccurring themes present within these lawyer–client consultations) [hereinafter Sarat & Felstiner, *Law and Strategy*], with Austin Sarat & William L. F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer’s Office*, 98 YALE L. J. 1663, 1669 (1989) (concluding that despite distant geographic locations, lawyers exhibited a uniformity of “law talk.”) [hereinafter Sarat & Felstiner, *Lawyers and Legal Consciousness*]. For an academic discussion presenting the methodology used for the studies, see generally AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 3, 8–9 (1997).

54. Sarat & Felstiner, *Law and Strategy*, *supra* note 53, at 126, 128, 132.

55. Sarat & Felstiner, *Lawyers and Legal Consciousness*, *supra* note 53, at 1665.

56. *Id.*

client privilege have prevented this research.<sup>57</sup>

As I have argued elsewhere, this lack of data is unfortunate and unnecessary.<sup>58</sup> There is much to be learned from recording, transcribing, and studying client consultations. Much of that work can be accomplished by thoughtful clinical law faculty-practitioners themselves, without worrying about risks to attorney–client privilege. Hopefully this study will convince the reader of the feasibility and utility of studying attorney–client and student–client consultations.

#### D. *This Study*

This article studies forty-six (46) transcripts of students interacting with clients at a pro bono project where the student-lawyer team provided limited legal services. The protocol was for the students to conduct the client interviews, consult with supervising attorneys, and then typically convey the advice the attorneys had authorized. The pro bono students' experience level ranged from graduating third-year students to first-year students in their second semester. While the students were oriented to their pro bono work in one large group session, generally, the students were not enrolled in a class designed to instruct them in interviewing clients, developing counseling skills, or to help them reflect on their pro bono experiences. The upper-division students may have completed or been enrolled in the required "Legal Profession" class or an elective "Lawyering Skills" class, but any such enrollment was not linked to their pro bono volunteerism.

Accordingly, the transcripts of the students' interactions with their clients and their supervising attorneys are largely untutored portraits that provide a window into the interviewing skills and habits the students pick up and employ through their pro bono work. The article uses "Conversation Analysis" to study these interactions.

Conversation Analysis (CA) is the "dominant approach to the study of human social interaction across the disciplines of Sociology, Linguistics and

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57. See Brenda Danet et al., *Obstacles to the Study of Lawyer-Client Interaction: A Biography of a Failure*, 14 LAW & SOC'Y REV. 905, 905 (1980) (placing primary blame on the failure of the study on lawyer concerns for maintaining attorney-client privilege and ethical apprehension with accepting payment for scientific observation).

58. See Smith, *supra* note 45, at 526 (describing a method Law Clinics could use to collect data where clients, students, and attorneys are all treated as subjects and sign informed consent documents approved by the Institutional Review Board).

Communication.”<sup>59</sup> “CA is the close examination of language in interaction.”<sup>60</sup> It involves recording, transcribing, and carefully studying the conversation to discover how conversation partners take turns and set up normative expectations that conversation partners either follow or flout.<sup>61</sup> “Applied CA” can “shed light on routine ‘institutional talk’—the way that the business of [the] doctor’s clinic, the classroom, the interview and so on is carried out.”<sup>62</sup> Such “Institutional Applied CA” is often focused on understanding “how the institution manages to carry off its work . . . .”<sup>63</sup> A second type of Applied CA has been termed “Interventionist Applied CA” because it seeks to study problems with how institutional talk is carried out and proposes solutions to those problems.<sup>64</sup>

This article will incorporate elements of Institutional Applied CA insofar as it reveals how law students and clients interact during an initial interview. It will also include elements of Interventionist Applied CA as it makes suggestions about better ways for lawyers to mentor law students and for law students to interact with clients.

This article uses a simplified transcription method, representing talk “as it is produced,” albeit slightly modified with proper spelling and some punctuation inserted for ease of reading.<sup>65</sup> The transcripts identify overlapping talk with slashes [//,] passive listening back-channel cues with brackets [“uhhuh”], pauses with a series of periods (one per second), or a note, and actions with chevrons <laughs>. Various other conventions, such as indicating speed, tempo, and pitch, were not included as they were not significant for Applied CA here. Bold and italics are occasionally used to draw attention to issues being analyzed and do not indicate any emphasis in the spoken language.

Studies using CA do not employ any interventions or experimental techniques. Rather, the task is to analyze the utterances themselves and see what lessons emerge. Of course, it can be useful to have certain theoretical

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59. Tanya Stivers & Jack Sidnell, *Introduction*, in *THE HANDBOOK OF CONVERSATION ANALYSIS 1* (Jack Sidnell & Tanya Stivers eds., 2013).

60. Antaki, *supra* note 32, at 1–2.

61. *Id.* at 2.

62. *Id.* at 6.

63. *Id.* at 6–7.

64. *Id.* at 8.

65. See Alexa Hepburn & Gelina B. Bolden, *The Conversation Analytic Approach to Transcription*, in *THE HANDBOOK OF CONVERSATION ANALYSIS 57–67* (Jack Sidnell & Tanya Stivers eds., 2013); see generally Sacks et. al., *supra* note 31, at 700 (1974) (describing the usefulness of turn-taking in analyzing conversations).

questions in mind. Given consistent instruction about interviewing skills in legal and medical texts, the questions that suggest themselves are whether the student followed the recommended techniques. Did they solicit and permit a client narrative without interrupting it? Did they follow up with relevant questioning? Did they express empathy, and if so, how? Did they follow the interview with analysis, consultation with a supervisor, and then counseling? Whether the students followed or flouted the recommended techniques, what was the result? Do the transcripts confirm the value of the techniques or call them into question?

### III. LESSONS FROM THE TRANSCRIPTS

Law students have interactions with clients in the context of clinical legal education and, increasingly, through pro bono programs. While clinics involve classroom study and faculty supervision, pro bono programs typically do not. Instead, students work with volunteer attorneys, and much of their learning may be informal and on-site. Because pro bono law students are not taught or supervised by an instructor, their behavior can offer insights into how they naturally deploy and acquire legal skills and habits.

Analysis of the transcripts shows that the students often (19/46 or 42%) solicited a client narrative, and the clients almost always (43/46 or 93%) presented a narrative. However, sometimes, the clients needed to assert themselves and volunteer the narrative after the student had already begun to provide help. Unlike their medical counterparts, law students did not frequently interrupt the clients so that they were unable to share their stories. However, students rarely employed empathy, reflection, or active listening.<sup>66</sup>

Similarly, students often did not wait until the interview had concluded and they had met with an attorney supervisor to begin counseling the client. Instead, in twenty-five out of forty-six interviews (54%), students began to counsel during the interview. This surprising and unexpected phenomenon is the focus of the study here. The article categorizes the types of counseling the students provided as suggestions, information, assessment, commentary, and advice. The article shows how premature counseling came about in the course of the client–student conversation. The article

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66. See Linda F. Smith, Comment, *Professional Identity Formation Through Pro Bono Revealed Through Conversation Analysis*, 68 CLEV. ST. L. REV. (forthcoming Aug. 2019) (providing an in-depth analysis of student responses to client emotion and the rare use of empathy in these interactions).

illustrates problems that arose with this departure from good interviewing skills. There are four of twenty-five cases in which premature counseling did not create any problem. However, in four cases, the counseling was more disorganized; in six cases, it wasted time; in seven cases, not all topics were covered; in ten cases, the client received an inadequate explanation; and in four cases, the client went away with erroneous advice or information. (There were four other cases where the student's erroneous or inadequate advice was corrected after consulting with a supervising attorney.) Finally, the article theorizes as to why the students provided premature suggestions, information, assessment, commentary, and advice; and further discusses ways to enhance the students' interviewing abilities and the services of the pro bono project.

#### A. *Announced Protocol*

In a brief-advice clinic staffed by students and attorneys, the optimal plan is for students to interview, then turn to the attorneys for guidance, and then give advice to the clients. In fact, most students described such a protocol to their clients:

<i>Student:</i>	Okay. How about if we just take a seat here. Welcome. Have you been here, to the clinic, before?
<i>Client:</i>	Nope.
<i>Student:</i>	Okay. Well, my name's Nick Kelly, and I'm a second-year law student with the university.
<i>Client:</i>	That's you?
<i>Student:</i>	Uh-huh.
<i>Client:</i>	Okay.
<i>Student:</i>	Typically, as people come into the clinic, one of our volunteers will have a seat with you and ask you questions about what's brought you here. [ok] Look over your forms a little bit and then, take whatever questions you have. <b>We're not allowed to give legal advice but, once we consult with one of the attorneys, we're allowed to pass that information on to you.</b> <sup>67</sup>

67. The use of **bold** typeface does not indicate emphasis in the conversation but is designed to highlight portions of the conversation for analysis.

Of the forty-six (46) transcribed interviews, thirty (30) of them (65%) began with just such a disclaimer or description of the protocol. Nevertheless, over half of the initial interview segments (25 of 46 or 54%) include the student giving suggestions, legal information, apparently expert commentary, or personalized legal advice before consulting with the attorney. Most of these students (17 of 25 or 68%) had begun by setting forth the standard protocol. We can therefore conclude that premature counseling is not because the students do not know the appropriate protocol to follow.

B. *Helpful Suggestions*

Two consultations involved students providing “helpful suggestions” during the interview that did not involve legal advice or legal information. In both cases, the results were primarily that time was wasted. In one case, a client even went away without being advised on all the topics she had sought advice about.

1. Client 284—How to Find Paperwork

This client had recently fled from an abusive husband with her disabled daughter. At the conclusion of the client’s thorough narrative, the student turned to clarify what help the client needed:

<i>Student:</i>	I’m sorry. It just sounds awful. Okay. So you’re looking obviously to get a divorce and to get custody of your child and also alimony. Have you filed any paperwork as of yet?
<i>Client:</i>	No. I’m struggling through the Legal Aid papers, and I don’t know how to answer a lot of ’em because I don’t have the paperwork they’re gonna want. [ok] He has everything. I picked my daughter up, and I gathered what clothes I could grab, and I left with my car. The only thing I really took time to grab was a file I had of papers that I had gathered up, birth certificate, marriage certificate, that type of stuff. I have not got the tax return. I have nothing.

In response to the client’s indirect request for help with the Legal Aid forms, a lengthy discussion ensued about this topic, including this excerpt:

<i>Student:</i>	Perhaps, if you can't print it off—I'm just brainstorming here. So you have your driver's license, right? It shows the Utah address? Just as an idea, you might be able to go to the library, sign up for a library card. They give it to you and just hop online right there. Cuz it's, as long as you have a library card, I mean a—
<i>Daughter:</i>	I believe library cards are free.
<i>Student:</i>	They're free. Just brainstorming, thinking of creative ways, so you can get online. Cuz if you can get online—
<i>Client:</i>	To get a copy of // them?//
<i>Student:</i>	//Right.// If you could just print it off, then all the better.

The interview lasted almost twenty-six minutes, ten minutes of which were devoted to the discussion of how to complete the Legal Aid form and how to get various documents (e.g., tax returns, auto loan documents) necessary for that application. The student's consultation with the attorney was only two minutes long; the attorney recommended the client explain her situation to Legal Aid—that she did not have all the financial documents because she fled the home to avoid abuse—and the student conveyed that advice to the client. The client did not get any advice about alimony as she had hoped, but only encouragement to go to Legal Aid.

## 2. Client 46-3—The Attorneys Probably Won't Be Able to Help You

In this case, the client was concerned about an out-of-state divorce case. He presented a lengthy narrative describing his attempt to work with a “family court facilitator” in that state but having a default judgment entered against him due to some confusion. The client wanted the divorce decree set aside and to litigate some of the issues in the divorce. The student predicted the client could not get an answer from the Utah attorneys, responding:

<i>Client:</i>	[lengthy narrative]. . . So that's where I'm at right now, that's it in a nutshell.
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<i>Student:</i>	Okay. Well, I can go and talk to the attorney, <b>but I'll be frank that they probably won't be able to give you much advice, because Utah family law is going to be procedurally different than the Washington family law, probably.</b>
<i>Client:</i>	Okay. I'm sure it is procedurally.
<i>Student:</i>	Substantively, yeah, you're right, that substantively, we get divorces and you can set them aside, <b>but how you do it and where you go, I don't know how much advice they're gonna be able to give you,</b> but I'm happy to ask. But I'm just letting you know that.

It is unclear why the student felt the need to give this client preemptory bad news about the attorneys' lack of knowledge of Washington law.

The student asked the client what he has been able to discover about the procedural requirements in Washington for a motion to set aside the divorce decree. The client responded by sharing his frustration regarding the aforementioned "family court facilitator." This interaction prompted the student to lecture the client about court clerks:

<i>Student:</i>	The clerk of court is—the judge obviously makes the rulings, but the clerk is basically who runs the courthouse. And the administrative and procedural issues, they're the point of contact. You never contacted the judge—[right]—to appeal anything, directly. Everything's filed with the clerk. The clerk and their office would be the people you'd want to know, "how can I file this?" If they say go to your family law person, then you'd say, "well, I'm not getting them to return my calls and I don't live in Washington. I'm trying to do this over the phone and email. I just need somebody to direct me to website, or explain over the phone where I can find out how to file this appropriately." I guess you have ten days, right?
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When the client continued to express concern with the response he was going to get from the clerk—to return to the family law facilitator—the student suggested new ideas. “You could just say, on Google, ‘filing a motion to set aside a divorce decree in Washington.’” Then, “//Another resource// you could try to pursue is there are multiple law schools in Washington.” After nineteen minutes, the student finally concluded the interview segment to consult with an attorney.

### 3. Summary

In neither case was it particularly efficient or effective to include these “helpful suggestions” in the interviewing phase. Both students spent a good deal of time providing the suggestions, thereby lengthening the interviews to twenty-six and nineteen minutes, respectively. It would have been preferable to delay any helpful suggestions to an organized counseling conversation after the consultation with an attorney.

Why did these students spend so much time giving “helpful suggestions”? The first student began by expressing empathy for the client’s plight, leading to the conclusion that the student may well have had a strong urge to be helpful. The second student began by proffering “bad news”—that the lawyers likely would not be able to help—hence, the student may have tried to be helpful in light of or to counteract that bad news.

### C. *Information*

Eight consultations (17% of all interviews) involved the students sharing legal “information” during the interview stage. This information ranged from explaining how to answer a petition, to how to draft and file a petition, to various other facts about legal processes. In two of the eight cases, the students’ information was complete and accurate. In the remaining six cases, the information was inaccurate, incomplete, or confusing. Although most students were able to clarify, correct, or complete the information after consulting with an attorney, in one case, the client left with inaccurate information that could create significant risk.

#### 1. Correct Information to Achieve Mechanical Justice

##### a. Client 286—Filing an Answer

This client had just been served with a Divorce Petition and wanted to know how to respond. The client arrived just minutes before the Clinic was

to close but began with over five minutes of narrative recounting how he and his children were kicked out of the home with nowhere to go and no money, and his desire for custody. He ended the narrative with an indirect plea for help, and the student turned to focus on how to file an Answer:

<i>Client:</i>	[lengthy narrative] . . . but I don't know how to do this.
<i>Student:</i>	Okay. So- Quick question for ya. The bailiff just came and said that we have about five minutes to wrap everything up. So let me find out a couple of things. It looks like she has filed for divorce already.
<i>Client:</i>	Yeah.
<i>Student:</i>	Okay. She did this through this—the system we were talking about earlier. <b>So now, your question, then, is, how do you respond to this? [yes] Okay.</b>
<i>Client:</i>	She has four other kids by two other different people. They're staying with her ex before me. [ok] She just—she cares more about partyin' and seriously partyin', money and this and that you know. I'm all for family, children, everything. She's not a very affectionate person and this and that, and she's totally—she totally mentally abused my two children. I mean, I got some written stuff and stuff written down, you know what I'm sayin', some pretty—she called him, "You F-in' retard. You guys are morons," I mean, all the time callin' 'em—you know? But what I want is—I need to know how to—I'm not good with doin' all this paperwork and gettin' custody and all that. I could care less if I ever got any child support. I don't need any child support. I haven't got child support in ten years from my ex, [ok] and, like I said, I don't—she can you know see the—I want her to start seein' her, stuff like that, but I want her to know you know I think I deserve custody and all that. Like I said, [ok] I could care less about support by any means, but <b>I don't know how to do this.</b>

<i>Student:</i>	Well, let's talk just really briefly, because they're gonna kick us out pretty soon, what the process is. She has filed a Divorce Petition. You've received service of this Petition. <b>Your job now is to file an Answer.</b> [Yes] Now, that system we showed you at the beginning, at the <a href="http://utcourts.gov">utcourts.gov</a> , that OCAP system, you can get information there about how to file an Answer. But essentially—
<i>Client:</i>	Yeah. See, my problem is I have no—see, I don't have money or anything. I mean, that's why I'm havin' such a hard time gettin' anything done. [ok] I mean, it could be a week just to get my children into another school.

Given the lateness of the hour, the student turned to provide the client with information—rather than personalized advice—about how to draw up an answer. Yet the client continued to insert substantive facts about his circumstances and make direct and indirect pleas for more help. This illustrates a frequent phenomenon where the client seems unable to attend to counseling until he has shared more of his story than the student needs for the mechanical advice (information) the student is prepared to provide.

The student did not address the client's particular facts but discussed the process for responding. When the client complained of a lack of resources, the student gave instrumental instructions—how to access the internet to draft the necessary papers, how to come to the courthouse to access the internet—and ultimately emphasized the need to file an Answer or lose the case. Finally, the client took up the student's suggestions and began to ask about the “best way to go about doin' that” and if the people in W-15 “do they help you?”

Although this client had provided over five minutes of narrative about facts relevant to custody, support, and property, there was no time to do a complete interview and to provide personalized advice, because the courthouse personnel was about to close the Clinic. In the end, the student's counseling was entirely informational—rather than personalized advice—and focused on the one next step that needed to happen: filing a timely Answer. This student's presentation was thorough, concrete, and accurate.

It is a prime example of the student providing what the Maryland researchers called “largely mechanical justice.”<sup>68</sup>

b. Client 334—Filing the Petition

This client had two related issues involving her child in the care of a relative, and a divorce petition that she had drafted, using the court’s on-line program. She combined a narrative regarding both issues, the student asked some follow-up questions, and the client concluded with a question:

<i>Client:</i>	//I changed// my whole life. It made me really mad. And um What was I gonna—I asked her, oh, my rights really as a mother. I’ve been an absent mother. [mm] Circumstances led to what it did and I don’t even know—I mean in the beginning, when my daughter was younger and I was trying to make arrangements to see her and talk to her with the aunt and uncle that she’s been with, they refused it. [mm] Neil, the father, was gone. I was 20. It was really complicated. They really just pushed me out of their lives. What are my rights anyway //as far as that goes?//
<i>Student:</i>	//As far as the divorce goes,// it sounds to me like it’ll be very quick. You can find the husband, your estranged husband, and have him served in the prison. It shouldn’t be a problem, so that—

Although the client’s question referenced rights regarding her child, the student immediately turned to provide information about the divorce. This included walking the client, step-by-step, through the process of filing and serving the divorce petition; describing the location of the clerk’s office; instructing the client to bring three copies and have them stamped and to give one copy to constables for service; the ease of serving a person in prison, the need to return the certificate of service; and the process for seeking a default judgment. The student successfully conveyed the information needed for “largely mechanical justice” lecturing on these

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68. See Millemann et al., *supra* note 12, at 1181 (defining “mechanical justice” and the role it plays in legal aid client interactions).

processes for almost four minutes before turning to interview about the other topic.<sup>69</sup>

While there were no errors in the information provided here, it is of note that the student responded to the client's question about her rights to her child by providing the information he had—the process for filing a divorce. This shows the student's desire to be helpful or expound on the knowledge he possesses.

## 2. Mistakes That Mattered: Mechanical Justice Confused, Judgment Missing

### a. Client 362—File the Answer in 20 Days . . . . Whenever That Is

In this case, after two minutes of client narrative, the students turned to tell the client he must file a timely answer to the petition—but without looking to see when an Answer would be due:

<i>Student 1:</i>	When was this served to you? When did you get it?
<i>Client:</i>	I've had it for about two, three weeks now.
<i>Student 1:</i>	Ok. <b>There is this time—amount of time that you do have to answer. You have to make sure that you answer—I think it's 20 days. You don't wanna go past that.</b> Let's see here.
<i>Client:</i>	Is there a date on there?
<i>Student 1:</i>	Let's—let me see. I don't see a date. Did she not file it with the—
<i>Client:</i>	She said she paid money and had it filed with a clerk and that we needed to do it—[/It's usually/] like sign—she wanted me to come over and sign it that night. I was like “no.” I read through most of it, and some of it I don't agree with. She wrote it up and used this program, I don't know what it was. Some of the language in here is—I feel is somewhat derogatory.

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69. The student did discuss custody of the child with the client, sought attorney guidance on the matter, and advised the client based on guidance of the attorney thereafter.

<i>Student 1:</i>	Well the thing is that <b>usually there should be a stamp if—</b>
<i>Client:</i>	<phone rings> I need to take this. It's my daughter.
[Extraneous conversation 05:02-05:32]	
<i>Student 1:</i>	<b>There is usually a stamp if it has been filed. But I don't see a stamp.</b>
<i>Client:</i>	Sorry about that.
<i>Student 1:</i>	That's okay. <b>You basically wanna answer this and say I don't agree with this. This is what I think I want,</b> [ok] is that what you're wanting?

Fortunately, in the counseling session following the attorney–client consultation, the client insisted on figuring out exactly when the answer was due, and together they discovered it was already overdue:

<i>Client:</i>	When—I mean <b>it looks like the 21st is when these copies were made, of May.</b>
<i>Student 1:</i>	21st of May.
<i>Student 2:</i>	We're right there.
<i>Student 1:</i>	We're getting close. You're gonna have to answer. I can get you started on those forms. I can show you how to—show you the forms that you need to do. The attorney was suggesting that maybe you also get some legal help, especially if your house is worth what it is, like maybe it will be good for you to get some limited legal help maybe. Not to do your whole divorce, but someone that can look over the forms once you finish them. She gave a few options. There's an attorney called Winnona Tudbury.
<i>Client:</i>	Where are you gonna write this stuff down for me?
<i>Student 1:</i>	Sure, do you have a—
<i>Client:</i>	I have a piece of paper here.
<i>Student 2:</i>	You can go to the Utah State Bar, is that—
<i>Student 1:</i>	That's the other option. You can go to the Utah State Bar website and then they have a place where you can click on limited—

<i>Client:</i>	<b>Am I already past the time? Is it 16th—</b>
<i>Student 1:</i>	I don't have a calendar on me.
<i>Student 2:</i>	Okay, today is the 16th.
<i>Client:</i>	There's 21, that's—there would only be four more days then. I'm already past it.
<i>Student 2:</i>	Four more days, so definitely tomorrow. Wait, today is the 16th. You are—I'm just thinking, I'm sorry.
<i>Client:</i>	<b>It's 20 days is what it is. The 21st was Friday, there's seven—</b>
<i>Student 1:</i>	We're past?
<i>Student 2:</i>	<b>We're at 26.</b>

At that point, one student quickly consulted a second attorney and passed on the additional advice that “as long as the court hasn't filed—put in a default judgment, go ahead and file it. The quicker the better.”

Obviously, it would have been better had the students and client discovered that the answer was late during the interview. In that way, the counseling session could have focused on that problem. The students' premature “drive to advise” resulted in less efficiently and less effectively focused advice. It might also have limited the advice the client received. While they did provide advice about how support was calculated and how the client should respond about the support issue, they did not provide individualized advice as to the standards for awarding custody or how the client should respond to the custody requests. For example, despite the student's initial commentary regarding the client's concern over the need for a stamp, the student did not return to the issue after the lawyer explained that the papers showed the client had been lawfully served.

The students' desire to expound upon their knowledge about how to achieve mechanical justice by filing an answer prevented them from fully understanding the client's circumstances and prevented the client from getting all the discretionary advice he sought.

b. Client 313-2—Help Completing Papers: The Wrong Papers

This client arrived seeking help completing a court form, but it was the wrong form. After reading the intake form, the student began describing how to complete the petition form:

<i>Student:</i>	Okay, perfect. Let me just look this over. Okay, so how many children—okay, so you have five children, and you just want help filling out the paperwork?
<i>Client:</i>	Yeah.
<i>Student:</i>	Okay, so let me see what paperwork you have to—
<i>Client:</i>	This is what they gave me.
<i>Student:</i>	Okay, and this is the beginning child custody—
<i>Client:</i>	Well I mean—He has custody of the children—I just wanna be able to see if I could get custody—well, at least some kinda partial custody that I could get.
<i>Student:</i>	Okay, perfect. So let me look through this and see. <b>I'm assuming you already have a custody agreement, an order from the court?</b>
<i>Client:</i>	Mm-hmm.
<i>Student:</i>	Okay, so basically <b>what you're gonna do here is you'll fill out all your information here. The petitioner would be you because you're petitioning for custody. You'll be the petitioner on every page.</b> I don't think you'll need a case—they'll give you. I'll go double check with the attorney and just see if there's anything different about these.

While providing clerical assistance to a person completing a court form is not the practice of law,<sup>70</sup> this student was relying on the client to have properly selected the correct form to complete. Here, this selection was incorrect. Because the client indicated that there was already an order in place, she should be completing a petition for modification rather than the form she had. Further, she would be the “Petitioner” on the form only if she had been the “Petitioner” in the original action.

The client continued to express confusion, which the student took as an indirect request for help. As a result, the student provided information that was both incomplete and partially incorrect:

<i>Client:</i>	Because I don't even know from even point A to point B to even how to fill those out.
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70. UTAH SUP. CT. RULES OF PROF'L PRAC. r. 14-802(d)(3) (West 2019).

<i>Student:</i>	Okay. Pretty much, you fill in all the information on here, and then you take it to the court, and they'll file it, <b>and then it'll go from there. They'll give you a court date and all that.</b>
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The student's statement that "it'll go from there" was not informative; the court will not "give you a court date" just because you have filed a Petition.

A few minutes later, the client interjected with a related question and provided a short narrative:

<i>Client:</i>	Okay. Well, there's one question that I wanna see. <b>There was a paper that I kinda signed</b> [Uhhuh] for child support. [ok] <b>I signed some papers stating that I didn't want any kind of child support</b> whatsoever with him anymore. I just was gonna cut the whole child support. [Um] <b>Would there be any way at all that I could reopen that again since the children live with me now, and I'm tryin' to get custody of them?</b>
<i>Student:</i>	<b>I believe so.</b> Let me talk to the attorney on that as well. I'll write that down and he or she will come back. Let's see.

In response to the client's direct question, the student guessed that what the client wanted was possible and promised to check with an attorney. But first, the student did a little bit of interviewing and was rewarded with a narrative:

<i>Student:</i>	Okay. How long have they been living with you?
<i>Client:</i>	You could probably say the whole time.
<i>Student:</i>	Okay, so he—

<i>Client:</i>	I mean he got custody, but they only stayed out there, maybe, about a period of three to six months, and then they just came and stayed with me, [ok] and so they've been with me. [ok] In the time that they've been with me, with the agreement that I signed with the child support, that I wouldn't ask for anything if I got my children back—it was that kind of a situation. And I got my children back, but, yet, I'm still wasn't gettin' any kind of help [ok] at all with child support.
<i>Student:</i>	Okay, perfect. <b>I believe there is a way to reverse that so you can start getting child support again. It'll probably just be in one of these packets.</b> I'll go talk to the attorney, and I'll be right back.

This little bit of narrative provided sufficient information to identify that the client needed to file a Petition to Modify (not the form she had been given) and that she had significant grounds for this action—the children whose custody she sought were already living with her—and for receiving child support.

This case nicely illustrates the benefit of allowing the client to give a narrative and share all her questions at the outset. While the student's quick turn to help the client with the form she had been given was well-intended, the primary effect it had was delaying hearing the client's narrative about her actual situation. Most of the student's information—from implying the client had the right form; to telling her she was the petitioner and that the court will "give you a court date"—was wrong. Fortunately, the student repeated the narrative to a supervising attorney and experienced law student. They recognized the need for the client to file a Petition to Modify, and the experienced student correctly counseled the client about the standards for a Modification and how to complete that different form. In the end, the client received complete and personalized legal advice.

c. Client 61-32—Premature Counseling Is Wrong and Never Corrected

In this case, the student gave the client reassurance immediately after the client's narrative, which is misplaced. Although the student appears to have asked a supervisor about the topic, the inaccurate information was not corrected.

This client had recently given birth to a child, and because Medicaid paid for the hospital bills, she was told she needed to file for Paternity. She wanted to know how to do this and how to limit the father’s rights:

<p><i>Client:</i></p>	<p>. . . . I just got Medicaid for me and my son, and part of that is that I had to file paternity. I received in the mail that paternity needs to be filed, and so my question is what that really, what rights that gives the father? . . . The father, he’s told me like a month ago that he was going to ORS coz he’s been trying to see—[Mm]—our son without supporting anything and like, just—what is that word called—manipulate his way in there but he still hasn’t and he is just throwing a fit about it. He has said that he’s seen ORS and a lawyer but it’s been a month since then and nothing has happened. I haven’t received any calls or information, so I don’t think he has ’cause—[Mm]—if he was going to try and file paternity, then I think I would have received //a call—//</p>
<p><i>Student:</i></p>	<p>//Well, //ORS is kind of slow but you would have been served with something by now. [Mmhm] You would have gotten a certified letter probably or a constable would have shown up. You would have been seen something—[Yeah]—so he may have talked to ORS but he hasn’t filed anything you need to worry about yet. [Mmhm] You would be served with process had it happened; had it gone that far. . . .</p>

The client’s sharing her fears and thoughts was heard by the student as a question. The student volunteered information for the client—that she would have been “served” with something (via certified mail or a constable) had the father taken any legal action, and that he had not filed “anything you need to worry about yet.”

In fact, the father may well have received papers from the Office of Recovery Services to establish his paternity through an administrative procedure all the while without the client having been served at all.<sup>71</sup> The

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71. See UTAH CODE ANN. § 78B-15-104 (West 2019) (giving jurisdiction to adjudicate paternity to the “Office of Recovery Services in accordance with Section 62A-11-304.2 and Title 63G, Chapter 4, Administrative Procedures Act.”); see UTAH CODE ANN. § 62A-11-304.1(2)(a) (West 2019) (providing

student's initial reassurance that the client "would have been served with something" or a "constable would have shown up" was inaccurate. The father may have already agreed to his paternity and obtained rights equal to the client's rights. This situation, if it exists, will prevail until the client pursues a parentage case to have custody adjudicated.

Although the student-attorney consultation was unfortunately not recorded, they certainly dealt with the topic since the student returned to it during the counseling session:

<i>Student:</i>	Okay. Have you filed anything with ORS?
<i>Client:</i>	No.
<i>Student:</i>	Okay. Have you filed any paperwork whatsoever besides— with Medicare or anything else?
<i>Client:</i>	No. Not—like the birth certificate and <b>just getting Medicaid</b> and that's it.
<i>Student:</i>	Okay, so as far as—at this point in time, there's nothing that says he's the father, that has been filed formally?
<i>Client:</i>	Right.
<i>Student:</i>	Then he is a stranger to the child and he has no rights at this point.

We can speculate that the student did not accurately convey the situation to the attorney (perhaps because she did not correctly understand it). Perhaps the student's drive to provide reassurance to the client resulted in "confirmation bias"<sup>72</sup> and may have prevented the student from hearing conflicting information about the law from the attorney. The attorney may well have told the student what would happen if the client sought Medicaid

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that the Office shall send notice "to the person or entity who is required to comply with the action if not a party to a case receiving IV-D services."). As the client would have been receiving IV-D services—or "child support services" as defined in UTAH CODE ANN. § 62A-11-103 (West 2019)—she might well have received no notice of the paternity action ORS initiated against the father. Moreover, the Office of Recovery Services administrative adjudicative proceeding is commenced by mailing a notice to the alleged obligor in accordance with UTAH CODE ANN. § 63G-4-201(b)(i) (West 2019).

72. See PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS 277–89 (2010) (describing confirmation bias and its impact on conversations in a professional setting).

or public benefits, but the student had not told the attorney that the client had already received Medicaid, and the attorney did not ask. In the end, the client was misled by this student's premature and incorrect information, and this erroneous advice was not corrected after the student-attorney consultation.

### 3. Minor Mistakes

#### a. Case 134—Client Questions, Student's Tentative Answers

In this case, the student regularly guessed about answers to the client's questions, providing less than clear and accurate answers, and wasting time, but then noting down the question, and later getting the correct and complete advice.

At the outset, the client asked the student to address two questions: 1) how can she ensure her ex-husband complies with the Decree's order to provide her with a property settlement, and 2) how the forms are to be completed if she and her husband stipulate to the terms of the Divorce. The student shared the information he did know about both issues, while being imprecise and including details that were not relevant.

The interview began with the student confirming a question on the Intake Form and the client launching into a narrative. Then the client directly asked about enforcement:

<i>Client:</i>	No problem. I'm going to go with a property settlement rather than a monthly alimony. [okay] Because that way I'm free from having to pay income tax. [okay] Um uh . . . And I'm fine with that . . . Uh my question is, I jotted these down. [Okay good.] Okay once the divorce is has been finalized and say he doesn't give me what, you know, in the settlement. [okay] <b>How can I enforce, what process do I have to go through to enforce?</b> . . . What's the legal term of the other //party?//
<i>Student:</i>	//Enforcing// the divorce decree?
<i>Client:</i>	Right.

<i>Student:</i>	Um Yeah well we can tell you. We'll talk a little bit more about the process of how that works. <b>Essentially you would um talk to the court um and get them to, seek enforcement um through the court system. So. There is a process for that.</b> And I will speak with one of the attorneys and pass on additional information for you from that. Essentially it's, um well let me speak with one of our attorneys just to make sure all of my information is accurate. And then I'm allowed to pass that on to you.
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The student began by promising to “tell” the client and to “talk a little bit more” about the process, but then answered the question in a less than satisfactory way. The client would not “talk” to the court system but would file and serve papers and attend a hearing to enforce the decree.

This client then posed direct questions about papers she completed and about the court processes for a stipulated settlement. The student guessed (correctly) that the form was an official form and then held forth about the time to respond to a petition in order to contest it—which would not be germane if the client and her spouse had an agreement. Although he first explained the process for a contested case and then guessed about the process for a settled case, the student promised to “find out the process” for an uncontested case:

<i>Client:</i>	And then when that's submitted to the court, um <b>it's reviewed by a judge to make sure that it's legal and it uh?</b>
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<i>Student:</i>	<p><b>Right</b>, so the court receives, typically the court is going to receive the divorce petition from whoever's filing the divorce. That person is called a petitioner. And then the other person has um I believe it's 20 days to respond to the divorce. So that would be if you were contesting anything in the divorce. Um if that's, if that so typically at that point, a person would submit their own papers to the court contesting whatever issues. And then the court would order mediation. In a case like yours where you're filing, the two of you are filing and you're <i>not</i> disagreeing over any of these issues (and I'm assuming here that things you've added are things that ultimately he will agree to) if that's the case, again this would be entirely uncontested. Um, then <b>I'll find out about the specifics of how that process works differently. My understanding is that the two of you can go to the court together, file it together and that may simplify the process somewhat. So let me find out the process for uncontested.</b></p>
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Here again, the student's guessed "understanding" that "the two of you can go to the court together, file it together" is not an accurate description of how a settled case would be processed.

The interview continued in that vein with the client asking many direct questions, the student providing the information he knew—whether or not it was relevant to the client's particular situation—and then promising to get more precise answers.

This student did note down all the client's questions and reviewed them, one by one, with a supervising attorney. As a result, after the student-attorney conference, the student conveyed complete and accurate answers to all the client's questions. Given the ultimate success of the counseling, one would suggest that the student could conduct a more efficient and effective interview and counseling session by leaving the guessed-at advice out of the interview segment.

b. Client 264—When the Automated Forms Are Wrong: More Tentative Guesses

This client prepared a Petition using the court's on-line program and was concerned that the forms identified a court district and address in a different city:

<i>Client:</i>	I'm thinking regardless, whether it's this county or not I should still file these here.
<i>Student:</i>	<b>That's my understanding.</b> I can confirm that. I'm not sure why it would come up to tell you to do it in the second district, but yeah.
<i>Client's Mother:</i>	[Inaudible 07:14] Can't we just cross that out and put the other address or whatever?
<i>Student:</i>	Yeah. <b>That's my understanding.</b> I'll double check on it to just make sure. Is she making any claims that this isn't your child?

Here the student was faced with an implied question followed by a direct question. In both circumstances the student asserted her "understanding," even while agreeing to check with a supervising attorney.

During the counseling session, the client's mother re-asked if "this court is this where we take it to?" and the student replied, "Yeah. Sorry, yeah." However, the student did not confirm they should just cross out the wrong court and address and write in the correct one.

Here, because the clients re-raised the issue of where to file the case, that issue was addressed during counseling. However, it is impossible to know if the student would have independently re-raised the issue if the clients had not.

It may be that providing an answer during an interview "anchors"<sup>73</sup> the student to that answer, thus limiting a more thorough review with a supervising attorney. If so, it would be better practice to note down the question rather than to guess at an answer, thus making it more likely that it will be reviewed with an attorney supervisor.

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73. See *id.* (explaining the anchoring as activation theory in the confirmation bias context).

c. Client 518-1—Publication Is Affordable: Incomplete Information/Advice

In this case, the client filed for divorce but did not know how to serve his wife, who had moved out of state. The client commented: “I just found out that I can place an ad but- in the paper- which I don’t have any way to pay for that either quite yet.” The student responded: “Okay. The good thing is I don’t believe it is much.”

Here, the student conveyed information that was correct, but incomplete. If the client had sought a waiver of fees, the publication of the notice would be free. However, if the client obtained service by publication, he would not be entitled to child support. The student did not process these concerns with the attorney, and thus the client never was fully counseled about the alternative methods of serving the wife, such as publication or about fee waivers.

D. *Assessment and Commentary*

Another surprising thing that happened during the interview stage was that students provided (apparently) expert commentary on the case or assessment. This occurred in seven separate instances. Most of these comments appear to have arisen out of the student’s desire to express empathy for the client.

1. Client 259—Commenting on the Judge’s Behavior

Here, the student provided (apparently) expert commentary on what a judge “should” do or not do. The student’s motivation appears to be to show empathy. But as a result, the student misled the client about how judges deal with pro se cases.

In this case, the client was frustrated about a recent hearing and was trying to prepare for the next hearing.

<i>Student:</i>	An attorney would probably help with some of //those— //
<i>Grma:</i>	//Issues.//
<i>Student:</i>	//—issues// like instead of you just bickering. <b>The judge should—</b>
<i>Client:</i>	He let him say it though. That’s what I’m—
<i>Student:</i>	<b>That’s strange.</b>

<i>Grma:</i>	//He was annoyed with him—//
<i>Student:</i>	<b>//You think that he would be able to handle it.// If it's going off in a different direction, you'd be like, "Wait a minute. We need to stop. This is irrelevant. This has nothing to do with the protective order. //Let's go this way."//</b>
<i>Grma:</i>	//[Mmhm] Yeah, but he made it// like it was—
<i>Student:</i>	<b>That's surprising that he lets someone ramble on like that.</b>
<i>Client:</i>	I didn't understand it either 'cuz if the other party would've been listening—I know he's doing it pro se, too, [Mm-hm] but if he would've been listening he clearly would've heard me state and of course the judge could've confirmed that it was just a cycle that happened. [right] The abuse got reported to the counselor not by me—from the children to the counselor. The counselor, 'cuz I'm the custodial parent, says, "You need to contact CPS." [right] Then it went from there. He's saying in front of the judge, "She's just doing this so I can't see my kids. These are her allegations and she's made 'em up."
<i>Student:</i>	You know, honestly, <b>he's on the losing side if he has all these past protective orders against him—</b>
<i>Client:</i>	Yeah, you know
<i>Student:</i>	<b>—that shows that he's not that credible</b> when he—
<i>Client:</i>	Yeah.

This student commented on the judge's actions ("strange . . . surprising") and on the other party's credibility. This seemed to be empathically in line with the client's and her mother's feelings about the hearing. However, her opinions were not approved by any experienced attorney and are questionable at best. (My experience is that judges often let pro se parties have their say.) The comments could mislead the client. The comments critical of the judge could also make this client less trustful of this judge and the court process.

In sum, this volunteered commentary appears to be unhelpful and motivated by the student's desire to empathize with the client, despite the student's lack of expertise on the topic.

### 2. Client 518-3—Too Busy for Face-Time: More Comments on Judicial Behavior

This client had a Protective Order placed against him but needed it clarified. He explained he had attempted to get his question addressed by returning to court to ask the judge:

<i>Client:</i>	She {the court clerk} said, "You can't talk to Judge Lincoln." I said, "Well, I just need to understand what I need to do." She said, "You have to get an attorney." And I said, "Well, for what?"
<i>Student:</i>	<b>Unfortunately, judges are extremely busy; too busy, too overbooked and they just can't allow anyone face time directly. //You have to go through the system—//</b>
<i>Client:</i>	//I understand that.//
<i>Student:</i>	//— <b>which I know can be frustrating.</b> //

Here, the student's explanation was inaccurate. The situation was not a problem of judges being too busy, but a problem of forbidden ex parte communication and rules of procedure.

Again, it appears that the student offered an explanation in an attempt to empathize with the client. However, this student had the skills to express empathy directly ("which I know can be frustrating") and did not need to make up rationales about court processes to develop rapport with this client. As with the prior case, the student's comments may result in the client forming an undeserved negative opinion of the courts.

### 3. Client 305—There Are Motions to Modify: Information Not Empathy

This client presented an unusual story about her divorce process and expressed a good deal of frustration. After almost twelve minutes of interviewing, this exchange occurred:

<i>Client:</i>	. . . he's gonna keep taking me back to court [mmhm] to change some of the documentation.
<i>Student:</i>	<b>It can get difficult.</b>
<i>Client:</i>	Can it?
<i>Student:</i>	It can. I mean, //there's//
<i>Client:</i>	//Even though// there's a permanent decree, he can still—
<i>Student:</i>	<b>There are motions to modify. They won't always be granted, but potentially that could be the case.</b> Do you have a copy of your separation decree?

It seems that in saying, “It can get difficult,” the student was attempting to empathize with the client. However, that reply is not active listening or reflection (“you sound frustrated”), letting the client know that her feelings are understood. Rather, it is a literal statement of fact, which the client took as a statement about her case.

The client then began to pose a direct question about why the opposing party can continue to take her back to court, and the student moved from attempted empathy to give the client legal information about the possibility of “motions to modify.” This response went to the heart of the client’s case. It seems unwise for the student to address this in an off-hand way during the interview. To avoid this, students must acquire appropriate skills in expressing empathy.

#### 4. Client 518-2—Comments About Prior Attorneys

Here, the student opined about what the opposing party and prior counsel had done wrong.

This client presented a complicated case of attempting to enforce unpaid support orders and concluded with a direct question:

<i>Client:</i>	What is it where they're capable of making this, but just because they're found, now they're gonna say they make this?
<i>Student:</i>	<b>Yeah, the word could be fraud, or perjury.</b> I don't know.

The lengthy narrative also included the client’s complaints about her prior attorneys, to which the student responded: “**He might have some duty to**

help you . . .” and “If anything, **it doesn’t seem like you should have to pay those people for poorly representing you.**”

None of these opinions were raised with a supervising attorney. Instead, they seemed to be intended to be statements of empathy for the client.

5. Client 46-5—Emancipation Is Easy: Accepting the Client’s Prescribed Solution

In this case, the student affirmed the client’s prescribed solution without knowing sufficient facts to analyze the case.

This client’s Intake Form indicated that she was interested in “emancipation.” The student began by confirming the issue and immediately responding with an assessment and information: “Okay. That looks like it could be pretty simple. We have an online court document system that helps you fill out forms yourself . . .” The client then inserted her narrative explanation about her situation—she was an eighteen-year-old alienated from her parents and wanted financial aid without FAFSA taking her parents’ income into account.

After consultation with a supervising attorney, alternative solutions to this financial aid problem were explored.

This stands as an example of the student moving to provide the client’s proposed solution without hearing the narrative and analyzing the actual problem.

6. Client 403—Bad-Mouthing Not Allowed: Opinion in Place of Empathy

Here, the student expressed an opinion about the behavior of another party.

This client and her new husband had a custody-visitation dispute with the mother of her husband’s child. The client explained the situation, and the student commented about it:

<i>Client:</i>	Yeah. You know, and um this woman hasn’t really had much interaction with me. She tries to manipulate the situation in that way. She would say, well, if your new wife’s gonna be there, then you don’t get to see your daughter. It’s like, well, I’m his wife. What do you want me to do? Leave?
<i>Student:</i>	Yeah, <b>I’m pretty sure she’s not allowed to say things like that.</b>

<i>Client:</i>	I'm pretty sure she is not as well. . . .
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This commentary did not result in any advice but served mostly to develop rapport in this interaction.

#### 7. Client 168—He Could Have Come Here for Advice!

Here, in discussing whether the opposing party was represented, the student commented on the possibility of the opposing party using the same pro bono project.

3:33 - 3:45	12	<i>Student:</i>	<b>Yeah, I mean, he may have come in here. Haha. Who would know? &lt;chuckles&gt; Don't worry. At this point, nobody would have any idea, [okay] if he had been. Or if they did, they just wouldn't talk to you.</b>
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It is unclear why that was helpful information for the client to have. While the student was correct that the ethical rules permit different individuals staffing a court-sponsored clinic to represent opposing parties,<sup>74</sup> it is doubtful that the client understood the student's comment or felt reassured by it.

#### 8. Summary

These comments or assessments did not suggest any course of action for the client to take, and as such, can hardly be considered legal advice. Nor did they waste much time. However, some of the comments did portray a particular image of the justice system—one in which clients should not have to pay for lawyers who do a bad job, pro se clinics help both sides of a case, judges do not let opposing parties rattle on about irrelevant things, and judges are too busy to give pro se parties “face time.” Is it good for law students to be sharing such off-the-cuff “insights” with pro se parties? Might it diminish their confidence in the justice system if judges continue to do things that a law student said they should not?

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74. *Cf.* MODEL RULES OF PROF'L CONDUCT r. 6.5(a) (AM. BAR ASS'N 2019) (authorizing “short-term limited legal services” under a nonprofit program).

In most cases, including the comments about judges, these comments were not reported to an attorney supervisor and thus were not corrected or clarified.

Additionally, what was the function of this commentary? Although a couple appear to share information the student thought was relevant, most of them seem simply to express empathy for the client. If so, there are better ways for law students to express empathy and develop rapport without risking inaccurate commentary about the justice system.

#### E. *Legal Advice*

In eight cases, the law students did convey legal advice—recommendations for actions the clients should take—during the interviewing stage of the consultation. Often this legal advice was combined with legal information. Depending upon the experience of the law student, the advice ranged from one narrow recommendation to a full-range counseling session.

##### 1. Answering a Divorce Petition

There were four cases where the client sought help in responding to a petition. These clients sought more than “largely mechanical justice,” and during the interview, the students endeavored to use “limited judgment and discretion” to provide both information and advice.

##### a. Client 135—You Can Talk to the Other Party

During the interview, in response to the client’s express frustration, the student provided a great deal of information and advice about how to respond to a divorce petition:

<i>Client:</i>	’Cause I know I shouldn’t be callin’ her or nothin’ like that, not that I wanna talk to her but, normally, the type a person I am, I would call her and say, “Are you up in the night? Do you expect me to pay for this house?” ’Cause the page prior to this one, page number two, it’s showin’ that the mobile home and all the liens, fines, penalties, assets, everything that goes with the mobile home is on my side, [ok] and that’s not right. [ok] I don’t agree with that at all.
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<i>Student:</i>	Okay. Well, <b>I don't know that there's anything, legally, that would stop you from talking to her should you choose to.</b> Obviously—
<i>Client:</i>	Well, I think that if I started callin' her, she would probably call the police and say, "He's harassing me," and then, I'd get in trouble that way. [Mm] It's pretty messy. [ok] We've been together 20—we've been together probably longer than you've been alive. You're pretty young.

A bit later, the student returned to the issues and suggested some options with the opposing party:

<i>Student:</i>	All right. <b>A couple of options here. Number one, clarify from her. Talk to her. I know that's not desirable, but you might clarify from her what is it she's asking for,</b> so you know whether to dispute that or not or, if you don't wanna—if that's not an option for you, then, right here, <b>this third paragraph, "I neither agree nor disagree with the following because I don't have enough information,"</b> and you would specify—
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The interview lasted for over twenty-seven minutes with the client continuing to ask various direct questions and the student alternating between giving his "understanding" (e.g., about division of debts, and titles to vehicles), volunteering to ask for further clarification (e.g., about the possibility of bankruptcy), and lecturing on aspects of the law and procedure he thought he knew (e.g., filing an answer, proceeding to mediation, presenting his case at trial, and possibly applying to Legal Aid for representation). Some of the student's utterances consisted of legal information, such as describing the requirement to answer within twenty days and to proceed to mediation. However, the student also gave particularized advice—to contact the wife to clarify what she was requesting.

This client seemed hesitant to contact his wife to clarify an issue (baby clothes), and the student raised this with the attorney, who then suggested the client contact the wife's attorney instead. The student did convey that approach to the client. Thus, it might have been better if the student consulted with the attorney first and then conveyed the information and advice in an organized way.

## b. Client 296—You Can Ask for Joint Custody

This student independently advised the client about a contested custody matter, but the advice was not thorough.

This client had been served a divorce petition and brought a draft answer for the student to review. The student commented, “So far it looks pretty good,” then turned to address the custody request:

<i>Student:</i>	Um, What—sort of. I mean the court’s not gonna say no. It’s kinda—um the—so you’ve written here “I would also like the courts to enter in that when the kids reach a mature enough age, they can choose which parents they would like to live with.”
<i>Client:</i>	Right.
<i>Student:</i>	<b>Usually the courts do what’s called a best interests test,</b> meaning it’s not necessarily what the kids want, but it’s what’s in the best interest of the children. If the kids wanna live with you because you’re the party animal, you’ll let them have all sorts of fun and stuff like that, the courts don’t wanna do that. But if the kids want to live with you because they’ve matured and they feel like you’re gonna teach them how to drive and you’re gonna be the one who takes them to sports or those type of things, mature, reasonable reasons. Then the courts a lot of times will give added weight to what the kids want. And sometimes that can be very determinant, it in fact can be the factor that says yes, they should go and live with dad now. Like I said, <b>I’m not gonna say no, you can’t put that in.</b>

Here, the student implied that the client’s request was not likely to be granted. He explained what legal standard would apply and illustrated when the children’s preferences might be considered. However, he did not candidly explain that the court would not enter such an order, nor did he explain the standard for modifying a custody order “when the kids reach a mature age.”

They then turned to consider the current custody requested.

<i>Client:</i>	No, but see in the summertime, I want 'em every other week. She's not willing to give up that.
<i>Student:</i>	Ok, ok. All right, well your custody plan can mention that. During the week, I'll take them Friday through Sunday, every other weekend.
<i>Client:</i>	Well, she won't agree to it.
<i>Student:</i>	Well the courts can step in, they'll try and figure out— <b>you can try and convince the courts, you know what, this is in the best interest of the kids</b> because when— <b>they'll be with me more, give them more opportunity to be with me</b> and then it's obviously—
<i>Client:</i>	That's the way I feel. I feel like you know they need a dad in their life too, not just a weekend.
<i>Student:</i>	Yeah, you can convince the—you can tell the courts that.

The student again referenced the legal standard—best interest of the child—but failed to explain how the statute and the courts define that standard. The argument that the children will have “more opportunity to be with me” does not address any of the relevant factors for determining custody. The student twice edited himself so as not to predict an outcome; “you can try and convince the courts” and “you can convince them—you can tell the courts that.” In fact, the student’s interview was insufficient to advise the client how he could go about arguing that it would be best for the children to be with him every other week during the summer.

The student did not review these issues with the supervising attorney in order to more fully advise the client. Regarding the client’s desire to have the children half of the summer, the student only asked the attorney if the client needed to file a parenting plan. As a result, the client never was advised how best to argue for the summer custodial situation he wanted or about the higher standard for future custody modification in the future. This situation went beyond one needing “mechanical justice” to one needing “limited discretion.” It would have been better had the student conducted further interviewing and then had a lawyer’s assistance in exercising that discretion.

c. Client 318—Not Paying Child Support: That’s Not Accepted

This student also provided information and advice about a contested custody child support matter, but the advice was not thorough.

This client had been served with divorce papers and sought guidance in answering them. The student provided information about the “need to answer within twenty days . . . [or] they could get a default judgment,” but did not explain a “default judgment.” The student explained the need to say “I agree” or “I disagree” with each claim in the answer. The student described the possibility of a counterclaim and “affirmative defenses,” but did not explain when a counterclaim would be useful. (If the other party might not press the matter forward to trial, the respondent will need to have a counterclaim to do so.) Accordingly, this additional information served to make the student appear knowledgeable but did not serve to inform the client.

The client then turned to discuss child support.

<i>Client:</i>	You know, no. I mean the only thing is I wanna ask that it be suspended until I’m back to work. I mean I still have my job. I’m taking a leave of absence, [Mm] so I’ll be able to do that. [ok] I just want it suspended so that I don’t have—
<i>Student:</i>	Well, I mean you can request that. <b>They’re gonna file something for—they’re gonna file an order for child support—[right]—even if you don’t have work, or even if you’re currently not working.</b> [right] That might be something you need to work out with your wife as to how long you’re gonna wait until you give her money again. [yeah] Potentially, she could go to ORS—[right]—and they would try to collect from you, <b>but as far as a temporary—you know a few months of not paying child support, that’s generally not looked—that’s not accepted.</b> Especially right now, where a lot of men are losing their jobs, or a lot of women are losing their jobs, they still have their child-support obligations. There’s no temporary relief for that, unfortunately. And let’s see what else. So your last question is about cost for an answer?

The student ventured beyond giving information to predicting an outcome. While the student is correct that a court could enter an order even

if the client was unemployed, she did not explain that having no current income would make the order quite low. Here the advice was a bit too cut and dried and not usefully conveyed at this early point in the interview.

The student then interviewed about whether the client was visiting with his child, and the client asked about the custody provisions:

<i>Client:</i>	She's been—one of the things that I don't see any purpose in her having sole legal. I think that joint would be fair.
<i>Student:</i>	Mm <b>That's definitely something you can ask for.</b>
<i>Client:</i>	Yeah. Yeah.
<i>Student:</i>	I mean <b>you can try to get joint custody.</b>

The student informed the client that he could ask for joint custody without providing the legal standards for custody or predicting whether the client would be successful. The student then returned to the client's current experience and asked: "Are you seeing your child?" The client replied that he was. This evoked more case-specific assessment from the student:

<i>Student:</i>	Great. <b>That sets a precedent, too. I mean once the court sees that you're really being a father to your child, they don't to—they're—[right] you know—more inclined to give you more rights—[right, ok]—to see your child.</b>
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This was reassuring, but not put in any context. The statute presumes a minimum amount of "parent time," which was not explained.

While the discussion about how to file an answer contained mostly information regarding child support, custody, and visitation, the student went further and provided advice. Yet, this advice never included a legal standard or an explanation as to how the legal standard would apply to the client's situation.

#### d. Case 140—Amend Your Answer and Seek Sanctions

In this unusual case, the client had just been served with a petition raising claims that had already been disposed of in an earlier case dismissed with prejudice. There were many complicated questions, all of which the student addressed. The first dealt with the fact that the client had not been properly served. The student commented: "You're right that that was inappropriate

but the fact that you answered it makes it just a real annoyance. Not something that you can really do something about. You could go complain to the judge and the judge would tell her that she just needs to re-file it, but it wouldn't get you anywhere. It would be more headache than it's worth."

Regarding the case itself, the student and client discussed the client's desire to amend the answer. In the course of the conversation, the student opined that the client had "a very strong case":

<i>Student:</i>	Okay. Oh, you'll be out of here in plenty of time. <b>This is a little phrase that can come in handy</b> maybe it doesn't but it definitely doesn't hurt. So, the phrase is, <b>"The petitioner has failed to state a claim upon which relief can be granted."</b> <b>That's a phrase that you'll use when you're getting ready to ask the judge to dismiss the case.</b> You're saying, even if you look at everything that she's saying, there's no way that you can do anything for her even if it's true.
<i>Client:</i>	The fact that both cases that she's //bringing already has been dismissed—//
<i>Student:</i>	//Yeah. That's exactly right. // <b>That's a principle we call <i>res judicata</i>. For the most part, all you'll have to do is tell the judge, "Look, judge this has been"—and you've got the cases, bring the cases with you—"this has been dismissed before, I don't know why she's bringing this up again."</b> I don't know what she's going to say but there you go. Bring this with you.
<i>Client:</i>	[Inaudible 14:38].
<i>Student:</i>	Mm-hmm. <b>You have a very strong case.</b> I'm gonna go talk to an attorney and see if there's anything else you need to do to make sure it gets dismissed quickly. <b>It looks like you have a really strong case</b> and it shouldn't take you very long to—

The client continued, expanding his goals to have the "harassments" by the petitioner stopped, and the student counseled about the possibility of seeking sanctions:

<i>Client:</i>	I just want these //harassments to be stopped.//
<i>Student:</i>	// <b>Now there is a way</b> // that I was thinking that may be possible. Under Rule 11 of the Utah Rule of Civil Procedure, there's a—it's a rule that says—how do I phrase it? Basically, it says <b>that if you file something in bad faith, then you can be sanctioned for it by the court.</b>
<i>Client:</i>	That's what she's done.
<i>Student:</i>	<b>And so you can ask the judge under your—</b>
<i>Client:</i>	<i>I can do that now?</i>
<i>Student:</i>	<b>Yes.</b> Yes. What I'm gonna say is that "I respectfully request that the petition be denied, Oops, not denied, dismissed with prejudice and that the petitioner be sanctioned in accordance with Utah Rules of Civil Procedure"—I spelled procedure wrong. I'm sorry.
<i>Client:</i>	I think you're right.
<i>Student:</i>	I forgot the C. Eleven.
<i>Client:</i>	That's the Procedure 11? [Mmhm] That's exactly what she keeps on doing for the last year and a half.
<i>Student:</i>	I'm gonna go talk to an attorney about this, but my hope is that what will happen is he'll say, "You need to pay him for the time that you've caused him to do this." <b>If she doesn't pay you, then the judge can say you're not allowed to file any more actions against him until you pay those fines.</b>

Indeed, the student did consult with an attorney about amending the answer, and the attorney advised that the client could, instead, file a motion to dismiss. That corrected advice was then conveyed to the client. However, the student and attorney did not discuss the issue of sanctions, and sanctions were not re-discussed with the client.

In this case, the experienced student was right about the strength of the client's claims and the approaches that would be viable. However, the fact that all advice was not checked with the attorney, and that some advice was altered suggests that even experienced students should consult, plan, and then present an organized counseling session.

## 2. Strategies

There were four cases—each of which was fairly challenging—where the student undertook to provide strategic advice during the interviewing stage.

### a. Client 263—Reclaiming Child Support

In this complicated case, the client sought to modify the divorce decree to claim custody and to receive child support. The student gave the client advice that was not entirely accurate about child support (that child support is based “on his income” and “it’s your decision ultimately” to claim the full amount of child support.) In that context, the client also wanted to know if, in the child support calculation, she should list herself as “underemployed” and “impute” income to herself:

<i>Client:</i>	And what does underemployed mean, “and not unemployed, or underemployed and blank per month should be imputed as the moving party’s earnings.” I don’t know what that means.
<i>Student:</i>	Um, <b>Underemployed generally means that like you don’t have a full-time job. Like basically, it’s you have money, but it’s not enough to live on kind of thing. You have a job that pays you such minimal amounts that it’s not really like employment.</b>
<i>Client:</i>	Right, okay.
<i>Student:</i>	So do you have any other income?
<i>Client:</i>	Just the stuff that I was selling but I, I don’t have anything more to sell.
<i>Student:</i>	Yeah, you’re fine then.
<i>Client:</i>	Do I say that—
<i>Student:</i>	<b>You’re not underemployed then, yeah.</b>

Here, the student got it exactly wrong. When the client performs the child support calculation, she may need to impute minimum wage to herself given that she is not working but apparently has the mental and physical ability to be employed. The client re-raised this question after the student had consulted with an attorney supervisor, and the student again (erroneously) affirmed that the client was not “underemployed.” Because

the attorney–student consultation was not recorded, it is not possible to know whether the student failed to raise this issue, or whether the student was suffering from “confirmation bias” in failing to hear an answer different than the one she proffered.

b. Client 518-5—It’s Not Really Strong, Legally, Right Now

Here, the student provided a premature but insightful and accurate assessment of the client’s case during the interview.

This client presented a lengthy narrative detailing custody and visitation disputes over many years, involving reports to the Division of Child and Family Services (DCFS), custody evaluations, protective orders, and the involvement of multiple Guardians ad Litem. Despite the client recently being released from jail for contempt of court for violating the joint custody decree, the client was seeking a modification to gain sole custody. The students interviewing her began to advise against proceeding with a custody case after over eighteen minutes of interviewing:

<i>Student:</i>	What is the legal issue here? You want full custody of your daughter without her having to do anything with your ex-husband?
<i>Client:</i>	Well he doesn’t take care of her. The judge said he was supposed to have—
<i>Student:</i>	I think what needs to happen is one of these DCFS workers, all you need to—
<i>Client:</i>	My therapist has written letters.
<i>Student:</i>	<b>—encourage them to investigate your ex-husband as well. Because unfortunately, the record here shows you in contempt. We have DCFS in the home visit with you. We don’t have the data to show that there’s abuse happening.</b>
<i>Client:</i>	No, but they have the data of him having anger issues and not going to get help. He’s got letters from her therapist.
<i>Student:</i>	<b>I guess what I’m saying is, to proceed now with a change in the custody, I don’t think that it’s really strong, legally, right now, for that.</b> If you continue to use the resources like DCFS—

<i>Client:</i>	DCFS will no longer help us.
<i>Student:</i>	Have you gone straight to the police and asked them to do a welfare check?
<i>Client:</i>	Yes. They wouldn't do it.
<i>Student:</i>	Let's go talk to an attorney about—

Interestingly, the student's assessment comported with the attorney's assessment as told to the student: "I'm actually worried we—you can say that—I wouldn't advise her to file a Petition to Modify. The way to change orders is a Petition to Modify. The reason is that she's filed so much stuff I don't know if a Petition to Modify is going to get her in more trouble."

After the student-attorney consultation, the attorney returned to advise the client personally. However, rather than candidly explaining why a Petition to Modify was a poor strategic decision, the attorney emphasized the need to report any abuse to the police or DCFS. The client told the attorney that the police and DCFS ignore any reports she makes and proceeded to ask about how to obtain a change of venue. In the end, the client left with a Petition to Modify packet and a Motion form she could use to ask to change venue.

This was a particularly challenging case, and the student's premature advice was perhaps the least of the problems. However, one can speculate that had the student strongly expressed her opinion to the attorney rather than prematurely to the client, and the student-attorney team consulted about how best to advise this client, the ultimate counseling might have been more candid and more useful.

### c. Client 285—Lectures About Court Processes

This client's divorce had been pending for a long time, and she had recently attended an "order to show cause" hearing to ask the court not to dismiss the case for lack of prosecution. Paralegals at Legal Aid had told her to complete a court form (Certificate of Readiness for Trial) so that the court would not dismiss the case, and that the form needed to be filed promptly. The initial information the student gave centered on completing this "Certificate of Readiness" form that the client presented:

<i>Student:</i>	Okay, to fill this out, this is pretty simple. The legal system is this tremendous process. As a process it generates lots of paperwork. In order to actually have a trial—on TV, it looks like it's really easy. You just walk into the courtroom, and you have the trial.
<i>Client:</i>	Yeah, 60 minutes, mm-hmm.
<i>Student:</i>	In order to actually have a trial, you have to—what this says is, “We’re ready to have a trial.” In order to actually have a trial, you have to do a whole bunch of stuff beforehand. The reason is cuz, if we just let anybody get into the courtroom at any time they wanted to—
<i>Client:</i>	[ <i>Background noise 08:06</i> ], yeah.
<i>Student:</i>	Yeah, exactly, and so we say—you have to go through all these different steps in order to have a trial. You have to try this. You have to try that. You have to do this. You have to do that. You have to say this. You have to say that. This is saying, “I’ve done all those steps. I’m ready to have a trial. Get me in front of a judge. I’m ready to go [ <i>inaudible 08:19</i> ].” All you have to do is read through these things. “All required pleadings,” so you have to do—let’s see if there’s a list of all the required pleadings. There’s not. Usually, it’s pretty simple. I’ll have to make sure, though. It’s usually just what you’ve already got, the petition or the complaint, the answer, and then a financial affidavit. I don’t know if you’ve already filed a financial affidavit or not.

This student was obviously enjoying the opportunity to lecture about how actual legal processes differed from TV as he went on about “all these different steps.”

The client responded by explaining that many changes had occurred while the case was dormant, and the student began to advise whether she needed to amend any documents before asserting the case was ready for trial. This is a question that requires a fair amount of discretion, and one for which an attorney’s participation would have been helpful.

The student correctly analyzed that the client would need to file an updated financial affidavit. But then the student held forth that a scheduling order would not be germane and mentioned that “discovery” might be; the

client heard definitions she didn't need to know and got inadequate information to go forward with discovery that she might need to do. In response to the client's questions, the student continued to advise the client on a wide range of issues.

After over twenty minutes, the student sought an attorney's involvement. The attorney provided the client with some advice that was different from the student's advice (the client should amend the pleadings) but did not advise about many of the topics the student had covered. Ultimately, the attorney and student together strongly suggested that the client return to the Legal Aid Society that had previously represented her. Neither provided more personalized advice about how to achieve any particular outcome but focused instead on what to file and when to file in order to avoid having the case dismissed.

This student knew a good deal of law and shared his knowledge when it was, and even if it was not, germane to the client's situation. One might wonder that if the student had delayed his expansive lectures on the justice system, he and the supervisor might have been able to give the client more personalized advice on some of the contested issues—division of property and debts, collection of unpaid child support.

d. Case 174 Protective Order v. Stop Immediate Sale of Family Home

In this case, the student did not permit the client to form a narrative but began to advise based on the client's Intake Form. The result was a focus on the topic of the student's choice and inadequate advice on the issue that the client continued to press through mini narratives.

This client's Intake Form raised issues of domestic violence, divorce, and the client's desire to stop the sale of the marital home:

- What Happened? Briefly describe what has happened that brings you to the Clinic:

*Domes[ti]c violence—separation  
Divorce, preservation of my home*

- How can we help? Briefly describe what questions you have and/or the help you think you want:

*Information on my rights through divorce. Need attorney provided for me pro bono. Do I need to file something to stop immediate sale of home by husband by end of next month.*

This student asked two narrow questions about the client's lack of employment and then turned to immediately provide a referral to the Legal Aid Society.

The student then referenced the client's concern with domestic violence and asked whether she had a "protective order." This was not a goal listed by the client, but an appropriate topic to explore in light of the Intake Form having identified "domestic violence" as part of "what happened." For over four minutes during the interview segment, the law student, client, and the client's sister explored the idea of a protective order.

The student, apparently referencing the Intake Form, then turned to ask about the divorce, beginning with whether papers had been filed, whether the husband had a lawyer, then about assets and the home:

<i>Student:</i>	<b>Is he going to agree to you having the home?</b>
<i>Client:</i>	Um <b>no, he, I got word from my son that he sold it.</b> He had somebody walk through it. I had my name taken off of the mortgage 8 years after we bought the home [mhm?] because my credit was bad and he wanted to refinance. I just felt that it was better if my name was off. //And he said he'd put it back on bu//

It appears the student had forgotten the client's precise question on the Intake Form: "Do I need to file something to stop immediate sale of home by husband by end of next month?" Accordingly, the client inserted a short narrative about this problem. The student finally focused on this primary goal, and the client continued to volunteer short narratives about the threatened sale of the home.

<i>Student:</i>	//So// what are you trying to preserve in the home?
<i>Client:</i>	I wanted to see if what if he just out—it may just be hearsay—[mhm] he's really—says a lot but does very little. But um, when my son called me he said "Dad sold the house today." [okay] And he owed like \$70,000 left on the house. //And//
<i>Student:</i>	//So// there was some equity?

<i>Client:</i>	He needs to put about \$40,000 of repairs into the house but it last appraised for \$175,000 so //[inaudible]//
<i>Student:</i>	//Ok there's some equity// So you're interested in the equity that is or was in the house?
<i>Client:</i>	Yeah!
<i>Student:</i>	Okay and that, that makes sense.
<i>Client:</i>	<b>I would have liked the opportunity to stay keep the house [MmHm] if he don't want the darn thing. [&lt;ha&gt;]</b> you know?

The client's sister interjected a question about the husband's right to sell the home, and the student advised that it would depend upon whether the wife's name was on the deed. The rest (eight minutes) of the "interview" segment primarily involved the three exploring how to discover if the client's name was on the deed, and the student setting out a plan of action that included going to Legal Aid for a protective order and divorce.

This quest to find out about the deed led the conversation away from the client's interest in living in the home. The student did not question the client as to how she would be able to pay the mortgage or to determine whether she might be entitled to sufficient alimony to keep the home.

Almost sixteen minutes into the interview, the student asked: "What questions do you have?". The client then raised a new, though related concern about the threatened sale of the house:

<i>Client:</i>	It's just that my son called me two days ago, probably three days ago and said that he had somebody walk through and sold the house to him. And that I had 30 days to get anything I wanted out of the house, out. So there's no, I don't know if I can get all of my furniture and stuff. I mean //we've been in that house for years.//
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<i>Student:</i>	//Well Depending on// what's happened, you know <b>if he's actually sold the house, if they signed papers, the executory contracts and they haven't closed, maybe the courts can do something. If they have closed, I doubt the courts can do much. If they just said "yeah I'll take it" but they haven't signed anything, then the courts can do a whole lot.</b> It all depends on what the actual status is um
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The student's response outlined the possible situations that could exist but did not tell the client what to do. In response, the client's sister focused on the need for action:

<i>Sister:</i>	That's why I brought her here. I says <b>if that's happening you've got to get you in here and get paper rolling.</b> Cause he, other than beating her to death half the time, he's just a big bag of wind [mhm], he talks and says a bunch of stuff. But this is serious enough [Yeah] that I finally got her out of the home. So it's like, you know what, we've got to move on. It's time to take your life in your hands and move and <b>we're gonna protect the little bit you've got,</b> which is //almost nothing//.
<i>Student:</i>	//A protective// order, <b>a protective order is really going to be helpful</b> [Sister: mhm], um because it can give you peace of mind that the police are behind you if he comes around and you don't want him to. Okay? Um, uh so <b>you may want to um go to the county, the county recorder's and find out what the title, what the status of the title is,</b> whether you're on the title or not. [Client: mhm] Um //cuz there's a//

Even after the sister interjected that "if that's happening" (appearing to allude to the sale of the home), "you've got to get you in here and get paper rolling" and "protect the little bit you've got," the student ignored the focus on the home and interrupted to assert that "a protective order will be helpful."

Less than a minute later, the student again asked if there were “any other questions” and the sister again focused on the house, leading the client to lament having “lost everything”:

<i>Sister:</i>	//We were// mostly concerned about, you know, having attorneys help her [Okay] you know, to proceed and get everything going faster, and <b>what were his rights to be able to sell the house</b> , you know.
<i>Client:</i>	30 days— <b>30 years of accumulation that I just lost everything, everything.</b>

This lament from the client brought forth reassurance from the law student (“Well, you haven’t lost it, you have a right to it, and that’s what the divorce will help you to, to do is to access that right”), but no concrete advice about promptly filing a Divorce and a Motion for Temporary Orders to address possession of the house and the furniture.

This interview would have been improved had the student asked for a narrative at the outset and respected the client’s focus upon retaining her home rather than the student’s idea that a protective order should be sought.

After 17:46 of the “interview” segment—mostly taken up by the student giving advice—the student went to get advice from an attorney.

In consulting with the attorney, the student focused on the benefits of a protective order and the client’s desire to prevent the sale of the home but did not share the client’s desire to keep the home and its contents. The attorney advised that unless the abuse was recent, an ex parte protective order might not be possible and that a protective order proceeding would likely not cover the threatened sale of the house. The attorney and student interrupted one another and never got to the clear advice that the client needed—to file a divorce and **seek temporary orders to stop the sale of the house:**

<i>Attorney:</i>	//You know//But sounds like she needs to, if she’s got this house issue, sounds like she needs to get it sorted out, does she own it and get into court. ’Cause they’re not, I mean they could in a protective order, order him not to sell property, but that would be really unusual. They mostly just order I think possession [yeah] not ownership so [yeah] I think she needs the divorce.
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<i>Student:</i>	Oh she definitely does, I I agree.
<i>Attorney:</i>	I mean I think divorce is the only procedure //that's really gonna//
<i>Student:</i>	//I I'm// just a little worried that, you know her sister is here with her and her sister is talking about how she's really taken a beating in the past. [yeah] And I'm worried that that might happen. [yeah] That's what I'm worried about.
<i>Attorney:</i>	Yeah, talk a little bit about what's been going on between her and her husband in the last few months, [okay] and since Christmas and
<i>Student:</i>	Okay. Alright.
<i>Attorney:</i>	I mean, she's always entitled to go there but she ought to be thinking of the most recent bad thing that's happened between her and him when she goes there. [okay] Because they'll turn her down if she doesn't have [inaudible]

The student interrupted the attorney's advice about the procedure necessary to save the home, with his focus on a protective order, and this topic held sway over the issue of the marital home and furnishing. In the end, the attorney did not tell the student to advise the client about filing for divorce and a motion for temporary orders in the divorce. Consequently, the client did not get this clear advice about how to prevent the sale of the marital home.

#### IV. CONCLUSION AND RECOMMENDATIONS

This study demonstrates that law students do not simply "pick up" good client communication skills through pro bono work, an outside clinic, or a simulation class. Instead, over half of the time, students began to counsel their clients before concluding a complete interview. Usually, this resulted in a less than an ideal consultation.

##### A. *The Problems with Premature Counseling*

The transcripts demonstrate that various problems occurred when students turned to provide suggestions, information, assessments, commentary, or advice during the interview phase of the consultation. First, the students' premature counseling was sometimes unfocused and

inefficient. Time was wasted while students shared the knowledge they had, even though sometimes their knowledge was not directly relevant or necessary once the attorney provided a clearer direction. A related problem with premature counseling was that the counseling was not presented in an organized way.

A third problem was that the counseling privileged the knowledge the student had over a thorough interview and more personalized counseling on all the issues the client faced. In four cases, the student's turn to provide information based on the Intake Form avoiding a client narrative, and the client had to insist on telling a truncated narrative at various points throughout the interview to get the student to understand the circumstances. In eight other cases, the students' choice to provide information or advice during the interview resulted in counseling that failed to address all of the issues that should have been addressed.

In six cases, the student either forgot to review the advice on an issue with an attorney or forgot to follow up with the client. (In one of those cases, the client remembered to probe the student about the matter, and it was addressed.) In most of the cases where the students provided commentary about the justice system, they failed to report their commentary to an attorney for correction or clarification. Thus, the danger that the student will forget the advice given and never check with an attorney appears to be particularly likely when the student is merely commenting about the justice system (judges are too busy for face-time; judges shouldn't let parties "ramble on") intending to empathize with the client. Clients may leave with a mistaken impression about the justice system or bad feelings about the judge in their case.

Finally, the information, assessment, or advice was sometimes incorrect. In six of these interviews, students gave the client incorrect information or advice during the initial interview. In two cases, the attorney corrected the information after the student-attorney consultation. However, in four cases, the client went away with a mistaken understanding of the law, the case, or the legal process. This occurred even when the student and a supervising attorney had discussed the topic. In both cases ("what does underemployment mean" and "you would have been served by someone"), the students returned to the topic after consulting with an attorney but failed to correct the erroneous advice initially conveyed. This suggests that students may have difficulty hearing advice from the attorney that may be different from the advice they had already conveyed.

Indeed, confirmation bias<sup>75</sup> or anchoring may explain not only the failure to correct erroneous advice after consulting with an attorney but the failure to provide full, personalized advice if one has provided some general information during the interview. Confirmation bias involves “a pervasive tendency to seek evidence supporting . . . prior beliefs or hypotheses, and to ignore or denigrate evidence opposing them.”<sup>76</sup> Thus, the student who has told her client she would be “served with something” or that she is not “underemployed” may not correctly process the attorney’s advice that suggests the student has misunderstood or made a mistake. Instead, confirmation bias will cause the student to hear and give credence to information that tends to confirm that she has already gotten it right. Similarly, when a student provides some information to a client (“you can ask for joint custody”), confirmation bias may disincline the student to consider that he should provide more personalized advice (such as providing the standards are for joint custody, and how the client’s factual circumstances align with those standards.) Confirmation bias may convince the student that he has fully advised the client on a topic when, in fact, he has not.

While there were five cases where no problems were found as a result of counseling during the interview, in the other twenty cases (80%), there were problems of wasted time and disorganized, incomplete, confusing, or incorrect advice. Waiting to advise until a complete interview has been conducted and the student and attorney can plan together how best to advise the client, should result in more comprehensive, organized, accurate, and personalized advice.

#### B. *Why the Drive to Advise?*

Why do so many students include information, advice, and commentary during the interviewing phase of a consultation? Clearly it is not because the students do not know best practices, since the majority explain the correct protocol at the outset. Other possible reasons for this pattern include the student’s desire to be helpful and appear knowledgeable, their reliance upon attorney models, natural responses to conversational conventions, and the failure to learn and develop alternative responses to client questions and indirect requests. By considering these possible

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75. BREST & KRIEGER, *supra* note 73, at 277–89.

76. *Id.* at 278 (citing Joshua Klayman, *Varieties of Confirmation Bias*, 32 PSYCHOL. LEARNING & MOTIVATION 385 (1995)).

motivations, we may be able to develop techniques to help students avoid premature counseling.

### 1. Personal Motivations

We should begin by recognizing that the students' drive to advise these pro se parties, with family law problems, originates from a desire to be helpful. The students were all volunteers, seeking to "do good" through pro bono work. Often the clients were needy, expressed frustration, and upset about their circumstances. Accordingly, it seems only natural that the students' drive to advise was, at least in part, motivated by an honorable desire to help someone in need.

At the same time, the law students were no doubt proud of their evolving knowledge and eager to appear professional. Law school and the Socratic classroom dialogue have been criticized for being demoralizing experiences in which students become convinced of their own inadequacies.<sup>77</sup> All year long professors have asked students questions they find hard to answer; it must be affirming to have clients asking questions they know how to answer.<sup>78</sup> The pro se clinic was a forum in which students could be empowered, appear knowledgeable, and garner trust and respect. Autonomy is an important value that enhances well-being. Knowing what a client needs to know and feeling empowered to provide that advice is no doubt a life-enhancing experience for the student. It is perhaps not surprising that they should feel a "drive to advise."

Another reason for students' drive to advise may be the modeling that attorneys had provided. Most of the law student volunteers had first observed attorneys conducting consultations before beginning to do their own independent interviews. Sadly, the attorneys themselves often began

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77. See Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883, 893–94 (2007) (showing broad negative psychological effects occurring during law school, resulting from decreases in satisfaction of the fundamental needs for autonomy, competence, and relatedness to others); see also *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 HARV. L. REV. 2027, 2027 (1998) (arguing that many students have become "demoralized, dispirited, and profoundly disengaged" by the beginning of the second year); see also Peggy Cooper Davis & Elizabeth Ehrenfest Steinglass, *A Dialogue About Socratic Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 249, 270 (1997) (analyzing the Socratic and Landellian methods of instruction, suggesting this dialogue can become problematic by leaving respondents "feeling passive, powerless and unknowing").

78. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* (2007).

to convey advice and information before conducting a thorough interview.<sup>79</sup>

## 2. Conversation Conventions

Another reason for the students' early advice-giving may relate to psycholinguistics and common conversation conventions.<sup>80</sup> Conversation is fundamentally a cooperative activity.<sup>81</sup> Conversation between two individuals often includes "adjacency pairs . . . two strongly linked utterances with the first speaker initiating and the second one responding."<sup>82</sup> Examples of adjacency pairs include greeting-greeting, invitation-acceptance/refusal, question-answer (counter-question), and request-compliance/noncompliance.<sup>83</sup>

While analysts of speech have not agreed on a complete categorization of speech acts, one relevant speech act—the request—has received a great deal of study.<sup>84</sup> Requests call for action (compliance or noncompliance) rather than a verbal response.<sup>85</sup> Requests can be made directly or indirectly; English speakers make 90% of their requests indirectly.<sup>86</sup> Indirect requests are more "polite" as "the more deniable they are by the speaker, and the more options they give to the hearer."<sup>87</sup>

At the outset, all of the clients had completed the Intake Form that asked, "How can we help?" thus making direct requests for help. Often students referenced the Intake Form and confirmed the request for help. In four cases, this led to the students immediately turning to counsel the clients rather than listening to a narrative.

Clients also made indirect verbal requests for help:

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79. Linda F. Smith, *Drinking from a Firehose: Conversation Analysis of Consultations in a Brief Advice Clinic*, 43 OHIO N.U. L. REV. 63, 143 (2017).

80. For an introduction to social science insights about conversation that should inform legal interviewing and counseling, see *Client-Lawyer Talk*, *supra* note 28, at 505.

81. *Id.* at 506 (citing H. PAUL GRICE, LOGIC AND CONVERSATION, 45–46 (1975)).

82. INSUP TAYLOR, PSYCHOLINGUISTS: LEARNING AND USING LANGUAGE 36–37 (1990) ("The concept of adjacency pair is proposed by sociologists, of exchange IR [initiation-response] by linguists, and of illocutionary acts by philosophers, but all three concepts are merged here . . .").

83. *Id.*

84. *Id.* at 33–36.

85. *Id.* at 35.

86. *Id.* at 35–36.

87. *Id.* at 36 (quoting MICHAEL STUBBS, DISCOURSE ANALYSIS: THE SOCIOLINGUISTIC ANALYSIS OF NATURAL LANGUAGE 174 (1983)).

- I got this check list, here, for filing an Answer, and that's what the lady over at Legal Aid said I needed to do [right] because that, there, says I've got 20 days [exactly] from the date I received it.
- I just want these harassments to be stopped.
- Because I don't even know from even point A to point B to even how to fill those out.

These are just a few examples from the interviews discussed above to illustrate how the clients' direct and indirect requests may have led the students to provide advice and information.<sup>88</sup>

The question is another speech act and part of an adjacency pair—a question calls for an answer.<sup>89</sup> When the client poses a direct question to the student, the most natural thing is to answer the question. In nine of twenty-five interviews, students' advice, assessment, or information followed a direct question from the client. (There were many other questions that did not lead to an answer, probably because the student did not know the answer.) For example:

- And what does underemployed mean? “and not unemployed or underemployed and blank per month should be imputed as the moving party's earnings.” I don't know what that means.
- My questions are, what do I do at this point?
- What are my rights anyway as far as that goes?

The final reason students may give advice prematurely, therefore, is because they have not learned alternative interactional and conversational skills that allow them to delay counseling until it can be organized, complete, and accurate. Beyond convincing them that the advice might be better framed, organized, and understood if it follows a complete interview and consultation with an attorney, we should offer the students the

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88. On eleven occasions the student conveyed advice, information, or assessment in response to the client's statement of a problem and on three occasions to the client's stated need. The Intake Form itself asked the client “How can we help?” and on six occasions the student began giving information or advice in response to reading the Intake Form. On three occasions the student began to provide advice or information following the client's narrative.

89. TAYLOR, *supra* note 82 at 36–37.

conversational and relationship building tools that will allow them to feel helpful and appear professional when proceeding in that way.

Indeed, by asking students to do a complete interview before consulting with an attorney supervisor and then to return to provide complete counseling to the client, we are asking the students to resist their desire to be helpful and to display their knowledge, to ignore attorney models they may have observed, and not to respond to conversational moves in the typically accepted ways.

### C. *Recommendations*

While a few of the students at the pro se clinic may have taken a class in attorney-client interviewing and counseling, that class was not required for this pro bono volunteer work. In order to provide the best legal services and to instill best practices in lawyering, perhaps a class or comparable instruction should be provided to the student volunteers.

Such instruction should cover the recommended structure for an interview—a client-directed narrative identifying the client's concerns, followed by questioning to further explore facts and goals, followed by consulting with an attorney and then thorough counseling<sup>90</sup>—and the reasons for this structure. Preparatory instruction should also cover the rapport building skill of “[a]ctive listening [which] is the most effective talk tool that exists for demonstrating understanding and reducing misunderstanding.”<sup>91</sup> Instruction could also address related techniques of “validation”—stating one’s “ability to share or understand some portion of” the client’s feelings or emotions<sup>92</sup>—and conveying empathy or support for the client through direct assertion (“I’m sorry to hear about the distressing circumstances of your divorce.”)<sup>93</sup> Just as the ABA requires experiential

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90. See BINDER, *supra* note 6, 86–89 (discussing “preliminary problem identification” encouraging clients to “provide personal perspectives on their legal problems”); COCHRAN, JR, *supra* note 6, at 73–74 (recommending “open questions designed to elicit client narrative” followed by “hearing the client’s story or narrative”); ELLMANN, *supra* note 6, at 20 (recommending an attorney allow the client “to describe her problem and related concerns”); HERMAN & CARY, *supra* note 6, at 19–20 (recommending the attorney first invite “the client to tell his story” and then gain an understanding of his objectives or goals); KRIEGER & NEUMANN, JR., *supra* note 6, at 97–100 (recommending the attorney give the client “a full opportunity to tell [the attorney] whatever the client wants to talk about before [the attorney begins] structuring the interview”); BASTRESS & HARBAUGH, *supra* note 6, at 92 (recommending to begin with client’s “problem identification”).

91. BINDER, *supra* note 6, at 48 (quoting GERALD GOODMAN, THE TALK BOOK 38 (1988)).

92. ELLMANN, *supra* note 6, at 19.

93. *Id.* at 33–36.

courses to “integrate doctrine, theory, skills and legal ethics” and “develop concepts underlying the professional skills,”<sup>94</sup> preparation for this valuable experiential pro bono work should do likewise.

Instruction could be tailored to the brief advice setting where the urge to be helpful and the press of clients might overwhelm good intentions to follow best practices. For example, in some cases students began the interview by confirming questions or requests on the Intake Form, which led to premature counseling. Medical texts warn against beginning the interview with confirmatory questions referencing information from the screening or referral because it can prevent the patient from raising all the concerns and limit the patient’s narrative about the concerns.<sup>95</sup>

Students should also have opportunities for guided reflection about their pro bono work. A bedrock principle of experiential learning is that reflection is necessary to enhance learning from experience. Accordingly, the ABA Standards require that experiential courses include “on-going, contemporaneous, faculty-guided reflection.”<sup>96</sup> Providing opportunities for guided reflection will enhance the students’ learning from their pro bono experiences.

These protocols for client interviews and for conveying empathy are not simply best practices. They are the tools needed to avoid the very natural tendency to immediately answer the question the client poses or instantly give the client the requested help. Students should learn to respond to a client’s indirect request for help by reflecting that need. Similarly, they should be taught to confirm the client’s direct question rather than answer it, or to interview about the question to understand the reason for it. These active listening responses tell the client she has been heard and understood. In order to empower students to organize their consultations in the most effective way, we need to give them the necessary interviewing, rapport-building, and empathy-displaying skills. Then, the students will be able to give an empathic active listening response rather than feeling compelled to immediately answer the client’s direct question or provide the guidance the client says she needs.

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94. AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOL 2019–2020, at 17 (2018).

95. SILVERMAN, *supra* note 17, at 45 (citing John Heritage & J. D. Robinson, *The Structure of Patients’ Presenting Concerns: Physicians’ Opening Questions*, 19(2) HEALTH COMM. 89–102 (2006)) (3d ed. 2013).

96. AM. BAR ASS’N, *supra* note 94, at 15–16.

D. *Suggestions for Further Study*

This was a study of only one pro bono brief advice project staffed by law student and lawyer volunteers. While the “drive to advise” was on strong display in this setting, it bears asking whether other brief advice pro bono projects find similar tendencies. In this or other pro bono projects, it might be beneficial to survey the volunteer law students about their experiences. Are students aware of giving advice or information during the interview? Do students believe that advice during the interview is effective? If so, why? Do they feel adequately supported and guided by the volunteer attorneys? How are the students able to effectively interact with supervising attorneys who may not know their level of skills or knowledge?

Some students may develop the bad habit of premature counseling from pro bono work in a brief advice setting. Do those habits carry over to other practice settings? If so, it may be incumbent upon law schools to require instruction in the relevant lawyering skills that pro bono students employ, as they must do with respect to clinic or field placement students.

This study should also raise questions about students who are enrolled in clinics or externships. These students have enrolled in an educational program and have classroom preparation, dedicated supervisors, and guided reflection. Does the availability of a dedicated attorney-mentor alter their feelings about seeking guidance before providing advice to clients? Alternatively, does the clinical ethos that these are the students' clients and cases inspire clinic students similarly to provide advice during the interview and before debriefing with a supervisor? How can the student-attorney supervisory relationship be structured so that the student feels supported rather than constrained, and so that effective teamwork enhances both the services to clients and the educational benefit to the student?