THE LAW SCHOOL STUDENT-FACULTY CONFERENCE: TOWARDS A TRANSFORMATIVE LEARNING EXPERIENCE

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I.   INTRODUCTION

A fundamental purpose of legal education is to teach students how to "think like lawyers."[1] In legal education today, law students gradually learn these skills through a variety of educational experiences; however, two of the most important such experiences are those offered by legal writing courses and one-on-one exchanges with faculty. Legal writing experiences, whether in the first-year curriculum, upper-level advanced seminars and skills courses, or external education, develop law students' abilities not only to communicate legal analysis and argument, but also to engage in effective and sound legal reasoning itself.[2] In fact, the American Bar Association so values the role of legal writing in the law school curriculum that it added to its Standards for Approval of Law Schools a requirement that law schools provide a rigorous upper-level writing experience in addition to the standard rigorous first-year legal writing program.[3]

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1.   *See Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession—Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR 331 [hereinafter *MacCrate Report*] (arguing that, to be effective, the teaching of lawyering skills should provide an "opportunity for students to perform lawyering tasks with appropriate feedback and self-evaluation" and a "reflective evaluation of the students' performance by a qualified assessor"); David P. Bryden, *What Do Law Students Learn? A Pilot Study*, 34 J. LEGAL EDUC. 479, 479 (1984); Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F.L. REV. 121, 142 (1994); Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57 (1992).

2.   *See* Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 LEG. WRITING: J. LEGAL WRITING INST. 57 (2000); Mary K. Kearney & Mary B. Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 TEMP. L. REV. 885 (1991); Philip C. Kissam, *Thinking (by Writing) About Legal Writing*, 40 VAND. L. REV. 135, 151–70 (1987); Carol M. Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561 (1997); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 79 (1994).

3.   *Standards for Approval of Law Schools, Interpretations Standard*, 2001 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR 24 [hereinafter ABA Standards] (amending

Whether in legal writing courses, doctrinal courses, or upper-level seminars, one-on-one dialogue between a student and a professor— often in the "student-faculty conference"—provides a unique opportunity for focused attention to the student's legal reasoning and analysis and for significant breakthroughs in the student's ability to think like a lawyer.[4] Law professors and law students alike are likely to recall examples from personal experience when an out-of-class conversation between professor and student resulted in a new way of thinking or the identification and elimination of a barrier to understanding—i.e., the proverbial "light bulb" that "came on."

Nonetheless, there is a paucity of legal scholarship on how law professors can make effective use of student conferences to enhance a student's abilities to learn legal reasoning and writing. Much of this understanding must necessarily come from the field of psychology, which offers insights into how people think, learn, communicate, solve problems, and interact with one another.[5] Today, psychology is one of the "hottest" sources of insights in legal scholarship about how

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such standard in 1996 to state: "all students shall receive substantial legal writing instruction, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year"). This new standard was adopted following the recommendations made in the MacCrate Report. *See MacCrate Report, supra* note 1, at 331–32 (emphasizing the importance of legal writing in legal education).

4. *See* SOURCEBOOK ON LEGAL WRITING PROGRAMS, 1997 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR 45 [hereinafter SOURCEBOOK ON LEGAL WRITING PROGRAMS]. In advocating greater individualized instruction for legal research and writing (LRW), Christopher Rideout and Jill Ramsfield note, "Teaching writing has always worked best one-to-one. In that context, student and teacher can discover the means for working on the paper together; the student can actually write; and the teacher can be a direct, personal resource for the student." *See* Rideout & Ramsfield, *supra* note 2, at 79. Other writing scholars argue that "integrating Socratic method with the writing process yields the most productive teacher-student interaction available during law school" because it "allows the teacher to focus on the learning needs of each of those students to a degree that is impossible to achieve in the law classroom." Kearney & Beazley, *supra* note 2, at 889; *see also* Saunders & Levine, *supra* note 1, at 133 (discussing the theory of "mastery learning," which "works on the premise that if the kind and type of education are individualized to each student's needs, the majority of students have the aptitude to achieve mastery of the subject").

5. Psychology offers an understanding of the factors that are likely to bias litigants, attorneys, judges, and juries, and to affect the bargaining position of disputants. It also offers empirical research that can inform our understanding of the disparity between our presumptions about human behavior and reality. *See* Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081 (2003); Donald C. Langevoort, *Behavorial Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998); Mark I. Satin, *Law and Psychology: A Movement Whose Time Has Come*, 1994 ANN. SURV. AM. L. 581 (1995).

systematic biases compromise rational decision-making.[6] Legal scholarship draws on psychology—with its study of cognitive processes, social behavior, and emotions[7]—and psychotherapy—with its insights about communication, self-understanding, and problem-solving[8]—to enrich the legal profession's understanding of the

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6. The number of legal symposia and law review articles devoted to psychology and the law reflects the intense interest the field of psychology has received from legal educators. *See, e.g.,* Jennifer Arlen, *Endowment Effects Within Corporate Agency Relationships,* 31 J. LEGAL STUD. 1 (2002); Craig Anthony (Tony) Arnold, *The Mask of Voter: Deindividuation, Accountability, and Judicial Review of Direct Democracy* (February 2003) (unpublished manuscript, on file with the author) (using deindividuation theory of social psychology to explain voter behavior on ballot measures and to critique judicial deference to direct democracy); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology,* 49 UCLA L. REV. 1241 (2002); William N. Eskridge, Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View,* 87 CORNELL L. REV. 616 (2002); Christine Jolls et al., *A Behavioral Approach to Law and Economics,* 50 STAN. L. REV. 1471 (1998); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation,* 51 STAN. L. REV. 683 (1999); Langevoort, *supra* note 5; Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law,* 43 WM. & MARY L. REV. 1907 (2002); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation,* 70 S. CAL. L. REV. 113 (1996); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design,* 87 CORNELL L. REV. 549 (2002); Satin, *supra* note 5; Cass R. Sunstein et al., *Predictably Incoherent Judgments,* 54 STAN. L. REV. 1153 (2002); Symposium, *Empirical Legal Realism: A New Social Scientific Assessment Of Law And Human Behavior,* 97 NW. U. L. REV. 1081 (2003); Symposium, *Law and Psychology,* 34 CAL. W. L. REV. 1 (1997); Symposium, *Law, Psychology, and the Emotions,* 74 CHI.-KENT L. REV. 1423 (2000); Symposium, *The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law,* 51 VAND. L. REV. 1497 (1998); Symposium, *New and Critical Approaches to Law and Economics (Part I): Behavioral Economics, Law, and Psychology,* 79 OR. L. REV. 1 (2000); Symposium, *Responsibility and Blame: Psychological and Legal Perspectives,* 68 BROOK. L. REV. 925 (2003).

7. *See* BEYOND LITIGATION: CASE STUDIES IN WATER RIGHTS DISPUTES (Craig Anthony (Tony) Arnold & Leigh A. Jewell eds., 2002) (demonstrating the failure of litigation and judicial decisions in landmark water right disputes to resolve the underlying conflicts, and drawing on research in framing, cognitive biases and heuristics, negotiation theory, and collaborative problem-solving); Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations,* 2000 U. ILL. L. REV. 763 (2000) (discussing the cognitive-affective system theory of psychology and using organizational theory to argue that corporations are not merely legal or economic creations but have identities marked by their standard operating procedures and missions); Satin, *supra* note 5, at 581; Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law,* 67 TEX. L. REV. 1195 (1989) (discussing the differences in various cognitive approaches to legal thought and its implications).

8. *See* ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION (Aspen Law & Bus. 1990) (discussing the utility of adapting various psychotherapeutic models for building effective attorney-client relationships as well as exploring social-psychological theories); DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991) (in a seminal textbook, advocating a client-centered counseling approach to the attorney-client relationship and the use of fundamental counseling skills in

complex mix of legal and non-legal problems that confront clients. Likewise, legal scholars have evaluated how cognitive psychology and composition theory can inform and enhance legal pedagogy in general[9] and legal writing pedagogy in particular.[10] However, much of

attorney-client communications); Paul Brest & Linda Krieger, *On Teaching Professional Judgment,* 69 WASH. L. REV. 527 (1994). See also legal scholarship exploring therapeutic jurisprudence and its implications for lawyering and legal education including: WEXLER, STOLLE & WINICK, PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (2000); LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996); THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler· ed., 1990); Pearl Goldman & Leslie Larkin Cooney, *Beyond Core Skills and Values Integrating Therapeutic Jurisprudence and Preventive Law into the Law School Curriculum,* 5 PSYCHOL. PUB. POL'Y L. 1123 (1999); Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering,* 34 CAL. W. L. REV. 15 (1997); Symposium, *Legal Psychology and Therapeutic Jurisprudence,* 37 ST. LOUIS U. L.J. 675 (1993); Symposium, *Therapeutic Jurisprudence,* 41 ARIZ. L. REV. 263 (1999); Symposium, *Therapeutic Jurisprudence and Children,* 71 U. CIN. L. REV. 13 (2002).

9. *See* Craig Anthony (Tony) Arnold, *How Do Law Students Really Learn? Problem-Solving, Modern Pragmatism, and Property Law,* 22 SEATTLE U. L. REV. 891 (1999) (reviewing FUNDAMENTALS OF MODERN REAL PROPERTY LAW); Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning,* 36 ARIZ. L. REV. 287, 293–313 (1994); Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory,* 45 J. LEGAL EDUC. 313, 323–28 (1995) (exploring literature and findings from cognitive science regarding the ways in which people acquire intelligence); Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles,* 62 ALB. L. REV. 213 (1998); B. Glesner Fines, *The Impact of Expectations on Teaching and Learning,* 38 GONZ. L. REV. 89 (2003); Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools,* 20 SEATTLE U. L. REV. 1 (1996) (discussing cognitive and developmental learning theories and how they relate to law school teaching methods); Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School,* 31 U.S.F. L. REV. 941, 943 (1997); Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn,* 48 J. LEGAL EDUC. 402, 412 (1998) [hereinafter Lustbader, *Teach in Context*]; Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students,* 33 WILLAMETTE L. REV. 315 (1997) [hereinafter Lustbader, *Construction Sites*]; John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education,* 39 J. LEGAL EDUC. 275 (1989); Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance,* 26 CUMB. L. REV. 63 (1995); Saunders & Levine, *supra* note 1, at 141; Paul T. Wangerin, *Learning Strategies for Law Students,* 52 ALB. L. REV. 471 (1988); Janet Weinstein & Linda Morton, *Stuck In a Rut: The Role of Creative Thinking in Problem-Solving and Legal Education,* 9 CLINICAL L. REV. 835 (2003).

10. *See* Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique,* 3 LEGAL WRITING: J. LEGAL WRITING INST. 175 (1997) (describing how teachers can help students become more expert at reviewing and revising their written work through the use of guided self-critiques); Berger, *supra* note 2, at 57–64 (tracing the evolution of legal writing theory and New Rhetoric theory and evaluating how New Rhetoric theory informs the nature of feedback professors should provide their students); Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader

the scholarship on pedagogy focuses on the classroom experience, curricular issues, or the law professor's written feedback on student papers, and pays scant attention to the didactic dialogue between law professor and student.[11]

Part II of this article contends that the student conference can be one of the most important learning experiences of a law student's education. With its personalized attention to an individual student's cognitive development, the conference is a forum in which a student can engage in a sustained dialogue with her professor and explore ways of improving her analysis and writing without the pressures of performance in front of peers. In Part III, the article explores the institutional and individual constraints that often prevent the student conference from realizing its full potential. Not only do time and financial constraints impose limits on one-on-one dialogue, but professors are poorly prepared by legal scholarship alone to make the most of the student conference. Even thoughtful and prepared law professors may lack a systematic understanding of what is happening

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and Writer, Text and Context, 49 J. LEGAL EDUC. 155 (1999) (considering how cognitive learning theory and New Rhetoric theory inform the writing process and its implications for law professors); Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719 (1997) (describing how the authors' legal writing program emphasizes the "process" approach to legal writing); Anne Enquist, *Critiquing and Evaluating Law Students' Writing: Advice From Thirty-Five Experts*, 22 SEATTLE U. L. REV. 1119, 1133 (1999) [hereinafter Enquist, *Critiquing and Evaluating*]; Anne Enquist, *Critiquing Law Students' Writing: What the Students Say Is Effective*, 2 LEGAL WRITING: J. LEGAL WRITING INST. 145, 176 n.31 (1996) [hereinafter Enquist, *Critiquing Law Students' Writing*] (evaluating the value of various types of written feedback to law students); Elizabeth Fajans & Mary R. Falk, *Comments Worth Making: Supervising Scholarly Writing in Law School*, 46 J. LEGAL EDUC. 342 (1996) (describing the different types of feedback professors can provide students at various stages of the thinking and writing process); Kearney & Beazley, *supra* note 2, at 885 (describing how teachers can use Socratic dialogue to work with students at various stages in the writing process); Kissam, *supra* note 2, at 151–70; Parker, *supra* note 2, at 561; Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 901-03 (2002) (describing the evolution of legal writing theory); Rideout & Ramsfield, *supra* note 2, at 41–61 (describing the evolution of legal writing theory as evolving from a "formalist" approach to a "process" approach that embraces a "social perspective" theory).

11. The legal scholars who have addressed the didactic dialogue between law professor and student have generally not built on research from other disciplines. *See, e.g.,* Maureen Arrigo-Ward, *How to Please Most of the People Most of the Time: Directing (or Teaching in) A First-Year Legal Writing Program*, 29 VAL. U. L. REV. 557, 586–91 (1995); Philip C. Kissam, *Conferring With Students*, 65 UMKC L. REV. 917 (1997) [hereinafter Kissam, *Conferring with Students*] (discussing the pedagogical value of student conferences in general, and the structural constraints that can thwart successful conferences); Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725 (1989) (examining how Socratic inquiry can be used when working with students to critique their writing); Videotape: Effective Writing Conferences (Univ. of Puget Sound Law School 1983).

(or failing to happen) in the student conference without the benefit of insights from extensive research in the areas of cognitive science, psychology, psychotherapy, composition theory and critical discourse analysis.[12]

The remainder of this article builds on such research to provide a detailed analysis of how law professors can make the student conference an effective and transformative learning experience. Part IV discusses such considerations as the timing of student conferences in the writing curriculum and the advance preparation required of both professor and student prior to the conference. Part V of this article discusses the importance of the relationship between professor and student and considers the characteristics of an interpersonal relationship that would best encourage the law student's cognitive development. In Part VI, this article discusses and evaluates the four phases of the student conference, including the rapport-building phase, the problem-overview phase, the problem-resolution phase, and the closure phase.

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12. *See* Lustbader, *Construction Sites, supra* note 9, at 321. Lustbader observes that law professors often cannot effectively help their students develop mental constructs, or schemata, to solve thinking and writing problems "because those who teach law are also those who excelled in law school. Even when law teachers want to be more explicit, they often cannot break down the reasoning process to the degree necessary to communicate it effectively to some students. As experts, law teachers have internalized so much of the information and process that they are not consciously aware of all that goes into their analysis." *Id.* Philip Kissam describes this problem as "the problem of tacit knowledge"— that is, knowledge of which "we know but cannot speak." Kissam, *Conferring with Students, supra* note 11, at 923. Kissam contends that

> [d]iverse forms of tacit knowledge pervade legal education. These forms include the knowledge of how we read and how we talk about judicial opinions and, most significantly, much of the knowledge that is critical to performing successfully on law school examinations (especially issue spotting). It follows that law professors necessarily will have substantial difficulties trying to tell or instruct individual law students about how to read cases or write examinations successfully, and thus many student-faculty conferences on these subjects place both the student's and the professor's sense of professorial expertise at great risk. It is not surprising that many law professors shy away from these kinds of conversations or adopt rigid, defensive attitudes.

Id. (internal citations omitted).

See also Blasi, *supra* note 9, at 316. Blasi laments the general "lack of scholarly attention to the nature of lawyering expertise in matters beyond doctrine." He suggests that many legal educators mistakenly conclude

> that such things are simply unknowable . . . . Lacking any coherent underlying theory or paradigm with the power to illuminate, sustain, and structure scholarship about lawyering beyond doctrine, we are left to anecdotes, aphorisms, and the lore of practitioners—hardly the stuff of serious intellectual endeavor in a university setting.

Id.

Although this article focuses on student conferences arising in courses involving legal writing, whether first-year courses or upper-level writing seminars and skills courses, many of its points are relevant to any conference between student and law professor. For example, discussion of the participatory, communicative, and interpersonal dynamics between professor and student in a one-on-one setting are relevant to student conferences that arise between a doctrinal professor and a student who are reviewing an exam performance, discussing a point from class, or attempting to improve overall understanding and analysis.

II. IMPORTANCE OF THE STUDENT-FACULTY CONFERENCE

Although conferences are important in any law school course,[13] they are particularly important in a course in which legal writing is a significant component of the curriculum.[14] In fact, the student conference has the potential to be the most effective forum for law professors to help students develop as legal thinkers and writers. Because the process of writing is individual, it demands significant one-on-one interaction between professor and student.[15] Thus, didactic dialogue within a classroom setting cannot adequately address the myriad of problems students experience when attempting to commit to writing their not yet perfectly formed understanding of complex legal issues and drafting schemata.[16] Nor can a professor's

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13. *See* ABA Standards, *supra* note 3 at 404(a) (defining faculty teaching responsibilities to include "being available for student consultation"); Am. Assoc. of Law Schools, *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities*, Part I, Responsibilities to Students, *at* http://www.aals.org/ethic.html (last visited January 14, 2004) (advising that "[l]aw professors should be reasonably available to counsel students about academic matters, career choices, and professional interests").

14. The authors of the *Sourcebook on Legal Writing* observe that "[s]ome of the best learning happens in individual conferences." *See* SOURCEBOOK ON LEGAL WRITING PROGRAMS, *supra* note 4, at 45; Kearney & Beazley, *supra* note 2, at 904; J. Rideout & Ramsfield, *supra* note 2, at 79; Saunders & Levine, *supra* note 1, at 142.

15. *See* Rideout & Ramsfield, *supra* note 2, at 79.

16. Most students need guidance helping them develop schemata that would allow them to integrate and process new ideas. *See* Mitchell, *supra* note 9, at 284–85. *See also* Friedland, *supra* note 9, at 31. Friedland contends that many law teachers mistakenly believe that "once the thinking process was revealed to students, all should have the necessary tools to utilize and incorporate that process." *Id.* He argues that this belief is inconsistent with cognitive learning theory because students "may have different schematas that they use to learn materials. Therefore, a generic approach that lumps all individuals into one group may be less effective." *Id.*

written feedback on student papers provide the valuable exchange of ideas between student and professor that occurs in a one-on-one dialogue.[17]

The process of memorializing one's legal analysis into written form can be both challenging and frustrating. It is a dynamic, recursive process in which "the writer must exercise a number of skills and meet a number of demands—more or less all at once."[18] As New Rhetoric theorists recognize, the act of writing is a process for the construction of meaning itself, progressively altering, deepening, and enriching the student's understanding of the law.[19] As students write, they attempt to recapture and refine their not yet perfectly formed understanding of complex legal issues while simultaneously attempting to express such half-formed ideas into a written form that conforms to the expectations of a legal audience they do not yet understand. In other words, the student writer is "a thinker on a full-time cognitive overload."[20]

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17. Although a professor's written feedback might attempt to offer a hypothetical exchange of ideas, the student has no immediate ability to respond or to ask questions, nor does the professor have an immediate opportunity to respond to the student's concerns and questions. *See generally* DAN KIRBY & TOM LINER, INSIDE OUT: DEVELOPMENTAL STRATEGIES FOR TEACHING WRITING 201 (1981) (stating "I honestly believe that the only consistently helpful and effective evaluation of student writings comes as the two of you sit down with the piece of writing, focusing directly on what's on the page").

18. Linda S. Flower & John R. Hayes, *The Dynamics of Composing: Making Plans and Juggling Constraints*, in COGNITIVE PROCESSES IN WRITING 33 (Lee Gregg & Erwin Steinberg eds. 1980).

19. Legal writing scholars have increasingly embraced New Rhetoric theory "because it explained a phenomenon they had observed in their students: analysis and communication skills develop together in synergy." Parker, *supra* note 2, at 566. As Philip Kissam observes, the writing process encourages the writer "to enter into a sustained and serious dialogue about the subject under consideration. This dialogue can generate a much fuller and richer consideration of contradictory evidence, counterarguments, and the complex elements of a subject than is ever possible in oral communications alone or in a strictly instrumental process of legal writing." Kissam, *supra* note 2, at 140–41. *See also* Berger, *supra* note 2, at 60–63; Pollman, *supra* note 10, at 896–903.

20. Flower & Hayes, *supra* note 18, at 33. *See also* DONALD A. MCANDREW & THOMAS J. REIGSTAD, TUTORING WRITING: A PRACTICAL GUIDE FOR CONFERENCES 22–23 (2001). The authors note that, while engaged in the recursive process of writing,

> the writer's mind is dominated by three cognitive processes— generating, translating, and reviewing—that are separate but entwined. . . . Each of the three processes has three major components – memory, the piece so far, and the rhetorical situation (the interaction of audience and purpose) – that, again, are separate but entwined so all three move into and out of dominance. These three cognitive processes and three components of writing go together in very complex patterns.

Id.

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Because students are novice legal thinkers and writers, the didactic one-on-one dialogue between teacher and student can be instrumental in helping students move from novice to expert.[21] Students are novices at every skill required of them, from evaluating legal issues, to transferring their reasoning into written form, to critically evaluating early drafts to refine their understanding, to evaluating later drafts to ensure that they conform to the expectations of a legal audience.[22] As they learn these new skills, novice students initially "experience a significant breakdown of their existing skills" and lose confidence in their ability to succeed.[23] In a conference, the professor can help students move from novice to expert by modeling expert behavior,[24] by helping students develop mental constructs, or schemata, to bridge the gap between theory and practice,[25] and by collaborating with students to develop and refine their legal thinking

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21. *See* Blasi, *supra* note 9, at 318. Blasi explains that
    the knowledge of experts is organized in ways that permit the expert to recognize patterns that are entirely invisible to novices in complex situations. In routine cases, this organized knowledge permits an expert merely to match a problem situation to a stored "problem schema," and to retrieve from memory the associated solution procedure. In more complex and uncertain situations, the schematic knowledge permits experts to construct mental models that capture much of the complexity of the situation, and to "run" the mental models in simulation in order to evaluate the likely consequences of alternative courses of action.
Id.

    See also Berger, *supra* note 10, at 163. Berger notes that studies indicate that expert readers "formulate better questions and solutions about the unfolding text and continually monitor their success or failure in constructing meaning in or from print." *Id.* She notes that experts also give more attention to rhetorical context than do novices, "imagining audience response, acknowledging context and setting their own purposeful goals." *Id.* Finally, Berger notes that "research suggests, for example, that law students may more quickly become more expert as legal readers if their teachers base some of their instruction on expert behavior." *Id.* at 166. The student conference is an ideal forum for the professor, as expert, to help students critically evaluate their work and, by role-playing the intended audience, help students consider the rhetorical context of their writing.

22. *See* Parker, *supra* note 2, at 585. Parker notes that first-year law students are not only "novice writers in the legal writing genre, they are unaccustomed to revising their writing at all." *Id.* In order to evaluate and revise their writing, students must develop "second order thinking," which is "committed to accuracy and strives for logic and control: we examine our premises and assess the validity of each inference. Second order thinking is what most people have in mind when they talk about 'critical thinking.'" *Id.*

23. Saunders & Levine, *supra* note 1, at 142.

24. *See* Berger, *supra* note 10, at 166; Mitchell, *supra* note 9, at 284–85.

25. *See infra* Part VI.C.1 which discusses the various ways in which the professor can help students develop and strengthen schemata that can serve as useful frameworks for recognizing and resolving the thinking and communication problems reflected in their writing.

and written discourse.[26]

Because the learning that takes place in the classroom is, of necessity, general, that forum cannot adequately address the myriad of thinking and writing problems students face in their writing. "We would be naïve to think we could improve a complex verbal-cognitive-experiential process like composing" by telling students in advance what to avoid.[27] We might be able to discuss general organizational strategies with students in class, but it is far more effective to teach the process of organizing legal analysis by collaborating with a student as she reviews the organization of her own paper.[28] Indeed, the process of writing is individual, demanding significant one-on-one interaction between the professor and the student.[29] A professor cannot address in the classroom the specific problems and issues each student's paper will reflect.[30]

Even with respect to general legal analysis that can be discussed effectively in the classroom, not every student benefits from vicariously observing the Socratic exchange.[31] Not every student observing Socratic dialogue between a classmate and law professor has attained a sufficient depth of understanding of the legal issues to

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26.   *See* Sarah W. Freedman and Anne Marie Katz, *Pedagogical Interacting During the Composing Process: The Writing Conference,* in WRITING IN REAL TIME: MODELING PRODUCTION PROCESSES 61 (Ann Matsuhashi ed., 1987) (by listening to students analyze their own writing, professors help students learn how to react to and critique their own work); Parker, *supra* note 2, at 585 (contending that "one of the most important tasks a law school writing program should undertake is to teach students the recursive process of conceptualizing, drafting, and revising to produce professional-quality documents"); James H. Bell, *Research Report: Better Writers: Writing Center Tutoring and the Revision of Rough Drafts,* 33 J. C. READING & LEARNING 5 (2002). In a study of undergraduate students who used writing center tutors to help them develop transferable writing skills in rhetoric and composition, the author concluded that fully 65% of the changes the students made following the conference were consistent with skills the tutor had attempted to teach during the conference. *Id.*

27.   Charles Cooper, *Responding to Student Writing,* in THE WRITING PROCESSES OF STUDENTS 39 (Walter T. Petty and Patrick J. Finn eds., 1975).

28.   *See* MURIEL HARRIS, TEACHING ONE-TO-ONE: THE WRITING CONFERENCE 9 (1986) [hereinafter HARRIS, TEACHING ONE-TO-ONE].

29.   *See* Rideout & Ramsfield, *supra* note 2, at 79.

30.   *See* Thomas A. Carnicelli, *The Writing Conference: A One-to-One Conversation,* in EIGHT APPROACHES TO TEACHING COMPOSITION 105 (Timothy Donovan & Ben McClelland eds. 1980). Carnicelli noted that, after reviewing 1,800 evaluations of Freshman English program students at the University of New Hampshire, he found that "not one of the 1,800 students found classes as useful as conferences." *See also* LAUREL J. BLACK, BETWEEN TALK AND TEACHING: RECONSIDERING THE WRITING CONFERENCE 152 (1998) (noting that "[s]tudents have told me repeatedly that one reason conferences are so meaningful is that it's only in a conference that a student hears what's really important").

31.   *See* Kearney & Beazley, *supra* note 2, at 889.

benefit from that dialogue.[32] Nor does every student's learning style preference easily lend itself to the lecture method or to Socratic dialogue,[33] the dominant modes of teaching in the law school classroom.[34] Moreover, many students have not developed schemata that would help them link the abstract ideas discussed in the classroom to the concrete challenges they face in the writing process.[35] Such students might have a theoretical understanding of legal issues but have not yet learned how to apply their theoretical knowledge to the writing process.[36] A writing conference allows the professor to focus on the specific needs of individual students and to work with each student from that student's unique reference point and stage of cognitive development.[37]

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32. *See* Kissam, *supra* note 11, at 918. Kissam notes that: "law students, like other readers, will read complex texts such as casebooks in radically different ways. Although we expect classroom discussions somehow to compensate for this and convey to confused student readers the legal profession's shared understandings of legal doctrine, legal conventions and basic legal skills, we fail to appreciate that classroom discussion is itself another complex text that is likely to be 'read' in radically diverse ways by law students, especially law students in large classes." *See also* Friedland, *supra* note 9, at 21.

33. In a study of student learning preferences, Boyle and Dunn conclude that only twenty-six percent of the first-year law students who were tested had high auditory strengths, a strength that would be most valuable to retaining knowledge gleaned from a lecture-style classroom. Boyle & Dunn, *supra* note 9, at 228. They note that students with high auditory retention will retain about seventy-five percent of what they hear in a typical forty or fifty minute classroom lecture. Students who are not highly auditory will retain significantly less information. Their study also indicated that only sixteen percent of the surveyed students had high kinesthetic strengths, who would thereby learn best through active participation in the learning process. *Id.* at 228. The Socratic classroom would seem to appeal to students with high kinesthetic strengths only if they themselves were actively participating in the process.

34. *See* Friedland, *supra* note 9, at 28–29. Friedland conducted a national survey of teaching methods in law schools. His survey revealed that Socratic dialogue and the lecture methods were the two most predominant methods of teaching in law school. From the law professors responding to the survey, ninety-seven percent reported that they used the Socratic method of teaching at least some of the time, and ninety-four percent reported that they used the lecture method of teaching at least some of the time.

35. The art of "thinking like a lawyer" requires students not only to "identify relationships among ideas on multiple levels of abstraction and use this information to solve problems" but to "build new mental structures to house the new ideas and then organize them in relation to each other." Parker, *supra* note 2, at 569–70. Most students need guidance helping them develop schemata that would help them integrate and process new ideas. *See* Lustbader, *Construction Sites*, *supra* note 9, at 338; Mitchell, *supra* note 9, at 284–85; Friedland, *supra* note 9, at 21.

36. *See* Muriel Harris, *Talking in the Middle: Why Writers Need Writing Tutors*, 57 COLLEGE ENGLISH 27, 33 (1995) [hereinafter Harris, *Talking in the Middle*] (making a similar observation in the undergraduate setting).

37. A writing conference is a better teaching vehicle because the professor can work with each student from that student's level of cognitive development, and can engage the various learning preferences of students. In a conference, auditory learners benefit from

The student conference is also superior to the written feedback and suggestions that a law professor can convey on drafts of student work.[38] Although written feedback has the advantage of being memorialized in writing, written commentary cannot simulate the continuing verbal exchange of ideas that occurs in a didactic dialogue.[39] In a conference, the professor can not only question the student to determine why the student made a misguided or ineffective decision, but both student and professor can discuss any additional questions or concerns either student or professor might have. In contrast, when providing written commentary, the professor responds in a vacuum, not having had an opportunity to discern why the student may have made a particular thinking or drafting mistake.[40] Although a

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the teacher's expertise and guidance while visual learners have the advantage of seeing how abstract concepts are reflected on the written page. Students with high tactual strengths, who comprised twenty-one percent of the student population in Boyle and Dunn's study, benefit from writing as they process information. Boyle & Dunn, *supra* note 9, at 228–29. Tactual learners should be encouraged to take notes in the margins of their papers during the discussion. Students with high kinesthetic strengths, who comprised sixteen percent of the student population in Boyle and Dunn's study, can also benefit from the didactic dialogue between student and teacher, particularly in role-play. *Id.* at 228, 231. For example, the professor can assume the role of the intended reader, such as a senior attorney in a law firm or a judge or client.

The writing conference also appeals to the processing dimensions of the learning styles identified by the Kolb Learning Styles Inventory. The active, collaborative dialogue characterized by an effective conference complements the "accomodator's" and "converger's" desire for active learning. By discussing ideas for problem-solving and then allowing students time to reflect on solutions to their writing problems, the conference also complements the "diverger's" and "assimilators" preference for reflection. *See* David A. Kolb, *The Challenges of Advanced Professional Development, in* ROADS TO THE LEARNING SOCIETY (Lois Lamdin ed., 2d ed. 1991); David A. Kolb, *Disciplinary Inquiry Norms and Student Learning Styles: Diverse Pathways for Growth, in* THE MODERN AMERICAN COLLEGE (Arthur Chickering ed., 1981).

38. *See* KIRBY & LINER, *supra* note 17, at 201.

39. *See id.* (observing that "[e]xtraordinarily successful teachers of writing have one thing in common: they spend very little time in isolation, reading and marking papers, and a great deal of time responding and discussing student writings with the writers themselves."). *See also* HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 18 (acknowledging that conferences are a more efficient, and effective use of time than paper grading, which "is neither particularly efficient nor effective").

40. When providing written feedback, for example, the professor might question why a student omitted an important case. Did the student omit an important case because the student failed to find the case? Or, perhaps, did the student omit the case out of a mistaken belief that only cases with favorable results should be discussed in an office memorandum? These problems can be ameliorated to an extent by requiring students to turn in "private memos" with their papers that would reveal the writer's questions and concerns while drafting the paper. *See* Kearney & Beazley, *supra* note 2, at 894–96 (advocating the use of private memos). However, even with the use of private memos, written communication does not allow continuing discourse that might help the student better understand the problem and range of potential solutions.

professor's written feedback might pose provocative questions designed to compel a student to reconsider his analysis or mode of communication, there is no immediate opportunity for follow-up dialogue.

In addition, written comments are often confusing and susceptible to misinterpretation.[41] The student's role in reviewing written comments is passive; the student has no immediate opportunity to respond or to request clarification. In a student conference, however, students can ask for clarification when they do not understand a professor's critique, and can actively participate in the problem-solving process.

Moreover, even clearly expressed comments and suggestions can, in writing, appear to be directives with which the student must blindly comply in order to achieve a good grade. Thus, written comments can reinforce the misguided presumption that the student is not writing to learn how to think and write effectively, but instead writing to please the professor.[42] In contrast, in a student conference, the professor and student can explore how best to articulate what it is the *student* is trying to express, providing the student with a sense of internal motivation and, ultimately, internal gratification. Students who are driven by internal motivation not only are more motivated to excel but are also more likely to maintain the will to keep trying when confronted with the inevitable challenges and obstacles that face all writers.[43]

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41.   *See* Enquist, *Critiquing Law Students' Writing, supra* note 10, at 176 n.31. Enquist performed a controlled study that evaluated the effectiveness of legal writing professors' comments on student papers by observing students' perceptions of that feedback. In her study, she found that much of what professors write on student papers is either misperceived, unclear or the cause of frustration and anger. For example, one of the students in the study "was so overwhelmed by both the number of comments and by being told again and again that her writing was poor that she initially declined to do the second half of the study," which was to review another writing project. Studies of undergraduate writing students yield similar results. Such studies concluded that "conference comments are clearer than those written on paper." HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 19. Harris notes that students from the State University of New York at Binghamton "reported that they attended only sparingly or not at all to the teacher's corrections. The students appeared to have a limited repertoire of strategies for processing teacher feedback, the most popular being making a mental note of the teacher's comments. Self-rated poorer learners appeared to have an even more limited repertoire of strategies."

42.   *See* Philip C. Kissam, *Seminar Papers*, 40 J. LEGAL EDUC. 339, 346 (1990) [hereinafter Kissam, *Seminar Papers*] (noting how written comments can appear as directives, creating problems in student-centered learning). One way of minimizing this problem is to frame comments as questions designed to stimulate the students' thinking rather than commenting in the form of directives. *See also, e.g.*, Enquist, *Critiquing Law Students' Writing, supra* note 10, at 179–81.

43.   *See* Joseph Lowman, *Promoting Motivation and Learning*, 38 C. TEACHING 136–

The student conference is also an ideal forum in which professors can motivate and encourage students who are defeated by the challenge of the writing process. Particularly in the initial stages of outlining and drafting a document, the challenge of expressing in words a myriad of half-formed ideas can be frustrating. And, after a lifetime of passive learning and rote memorization, the struggle to learn and then convey exacting legal thought can defeat some students.[44] Defeated students do not believe that they have the cognitive ability to succeed. In other words, they experience a loss of hope.

Studies on the psychology of hope suggest that there is a significant correlation between scholastic performance and the strength of underlying hopeful goal-directed thoughts.[45] It is perhaps not surprising that people with a high level of hope achieve higher goals than people who suffer from a low level of hope.[46] Hope is not simply a unidimensional construct involving an overall perception that one can meet specified goals. Rather, the cognitive theory of hope posits that hope consists of two goal-appraisal components: *agency* and *pathways*.[47] The agency component can be characterized as "willpower," or the willful sense of determination and mental energy that, over time, helps drive a person towards a goal. Willpower "is made up of thoughts such as 'I can,' 'I'll try,' 'I'm ready to do this,' and 'I've got what it takes.'"[48]

The pathways component reflects an individual's cognitive capacity to find effective ways to reach a goal.[49] When one pathway to success appears blocked, a person with highly developed pathways thinking has the cognitive ability to find alternate routes to success. The agency and pathways components are both additive and iterative

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39 (1990). Lowman contends that studies consistently reflect this result in many different settings, despite differences in the ages of the subjects.

44.   *See* Lustbader, *Construction Sites, supra* note 9, at 338; Neumann, *supra* note 11, at 738.

45.   C.R. Snyder et al., *Hope Theory: Updating A Common Process for Psychological Change, in* HANDBOOK OF PSYCHOLOGICAL CHANGE: PSYCHOTHERAPY PROCESSES & PRACTICES FOR THE 21ST CENTURY 133 (C.R. Snyder & Rick E. Ingram eds., 2000) [hereinafter Snyder, *Hope Theory*] (describing studies that find that students who scored high on the hope-scale achieved better undergraduate semester grades and higher cumulative grades, even when the influence of ACT scores was statistically controlled).

46.   *Id.* at 132–33.

47.   Michael A. Babyak et al., *Psychometric Properties of the Hope Scale: A Confirmatory Factor Analysis,* 27 J. RESEARCH IN PERSONALITY 154, 155, 164 (1993).

48.   *See* C.R. SNYDER, THE PSYCHOLOGY OF HOPE: YOU CAN GET THERE FROM HERE 6 (1994) [hereinafter SNYDER, THE PSYCHOLOGY OF HOPE].

49.   Babyak, *supra* note 47, at 155.

in nature. They are additive to the extent that neither component, standing alone, will produce successful goal attainment. They are iterative to the extent that strengthening one component typically has the effect of strengthening the other component.[50]

Studies indicate that the mere act of deciding to seek help increases agentic thinking. This phenomenon is separate and apart from the support a student might receive from an encouraging professor, although support from a professor also strengthens agentic thinking.[51] An increase in agentic thinking also helps develop pathways thinking. Again, this phenomenon is separate and apart from the support a student might receive from a capable professor who can help the student develop pathways, or cognitive strategies, to achieve a goal.[52] Thus, the student's decision or willingness to meet with a professor itself enhances agentic and pathways thinking. In addition, the conference provides an ideal setting for professors to help students strengthen both agentic and pathways thinking.[53] A supportive interpersonal relationship nurtured within the writing conference can be an important vehicle to help students maintain "discipline in the shadow of failure."[54]

The student conference is also important because law students in general have far too few opportunities for significant individual contact with their law professors.[55] Law schools differ from most graduate and professional programs in their large class sizes and lack of opportunity for significant individual contact between faculty and students.[56] However, as Part V *infra* discusses in greater detail, law

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50. Snyder, *Hope Theory, supra* note 45, at 130–31.

51. *Id.* at 133.

52. *Id.* at 140–41.

53. This is perhaps the reason why many American graduate schools emphasize the importance of the mentoring relationship between professor and student. In a mentoring relationship, fostered in one-on-one conversations, the graduate school professor guides and assists students in their concerns "about curriculum, career orientations, the psychological stress of graduate study and the development of personal identity." Kissam, *Conferring with Students, supra* note 11, at 919.

54. Neumann, *supra* note 11, at 752, quoting VERA JOHN-STEINER, NOTEBOOKS OF THE MIND: EXPLORATIONS OF THINKING 73 (1985).

55. Limited one-on-one interaction between student and professor may also contribute to law student stress. *See* Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RESEARCH J. 225, 249.

56. *See* Susan B. Apel, *Principle 1: Good Practice Encourages Student-Faculty Contact*, 49 J. LEGAL EDUC. 371, 375–76 (1999). Apel notes that the high ratio of students to faculty in law schools contributes to a "lack of contact and rapport between students and faculty." Talbot D'Alemberte, former law school dean and past president of the ABA contends that:

professors have enormous influence over their students. The dynamics of the dialogue between student and professor will guide a student's behavior when later collaborating with clients and colleagues.[57] The didactic dialogue also affords students the opportunity to begin to participate actively in the discourse of the legal community.[58] The student conference affords students a safety that the large classroom does not offer to practice talking "like a lawyer" and to interact with a lawyer in a collaborative dialogue.[59] In the classroom, the fear of being publicly criticized and humiliated for an incorrect answer can be incapacitating, rendering some students mute or unwilling to take risks in their discourse.[60]

III. BARRIERS TO THE EFFECTIVE USE OF CONFERENCES

A. *Institutional Barriers*

Despite the important role the conference can assume in a law student's cognitive development, institutional considerations impose

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Graduate education in other areas is pretty much the same way—small classes, close contact between students and faculty .... You can't go through a graduate program in English or physics or chemistry without having an enormous amount of contact, criticism, collegiality, everything else .... This should suggest something to us—nobody does things the way we do. We're probably the group that's out of step."
Talbot D'Alemberte on Legal Education, A.B.A. J. 52 (Sept. 1990), *quoted in* Apel.

57. *See* Kissam, *Conferring with Students, supra* note 11, at 919–20. Kissam argues that student conferences provide opportunities for law professors to model lawyer behavior that differs from the courtroom advocacy they tend to model in the classroom. In addition, he notes that conferences can be of "substantial assistance to law students, who will face similar kinds of experience and power imbalances in their one-on-one relationships with law firm interviewers and senior attorneys in their initial practices." *Id.*

58. *See* Berger, *supra* note 10, at 166. Berger discusses the importance of law students learning the conventions of legal discourse communities as an "insider." She posits that to become an insider, students must first acquire the common knowledge of the legal discourse community by reading the law. This is, of course, the central foundation upon which students can begin to become "insiders." Nevertheless, most students are initially confused by much of the language of legal discourse and can use the exchange that occurs in a student conference to test their understanding and to practice using that language as a novice "insider." *See also* Lustbader, *Teach in Context, supra* note 9, at 407–09; Harris, *Talking in the Middle, supra* note 36, at 34.

59. *See* Harris, *Talking in the Middle, supra* note 36, at 31 (noting that student conferences are more exploratory because students are more willing to risk exploring ideas of which they are not certain than in a classroom setting, where they feel compelled "to provide an acceptable performance, a 'right' answer"). *Id.*

60. *See* June Cicero, *Piercing the Socratic Veil: Adding an Active Learning Alternative in Legal Education*, 15 WM. MITCHELL L. REV. 1011, 1014–16 (1989); Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 118–19 (1999).

constraints on their optimal use. First, meeting with students in individual conferences takes time, time that could otherwise be devoted to scholarship. When weighed against the demand for scholarship, many legal educators and institutions simply do not value the time spent with students in one-on-one dialogue.[61] Even those legal educators who value teaching and mentoring caution: "If you spend all your time on your students, you will not publish, you will not be an authority in your field except in your own classroom, and you will be neither tenured nor respected among your peers."[62] Scholarship is admittedly a critically important responsibility: only by researching and writing about a topic does a law professor develop an expertise that can benefit not only the legal academy and other disciplines, but also that professor's teaching.[63] Thus, the answer is not to choose between engaging in one-on-one didactic dialogue with students in conferences and engaging in scholarship. Instead, the answer is to find a balance between the two and to use the time spent with students to maximum efficacy, so that the time a professor

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61. *See* Apel, *supra* note 56, at 380 (pointing out that "the most obvious barrier to faculty-student contact is an educational philosophy in which such contact is seen as having little value"); David M. Becker, *Some Concerns About the Future of Legal Education*, 51 J. LEGAL EDUC. 469 (2001) (expressing concerns about the future of legal education should legal educators continue to devalue one-on-one dialogue with their students).

62. Kent D. Syverud, *Taking Students Seriously: A Guide for New Law Teachers*, 43 J. LEGAL EDUC. 247, 258–59 (1993). However, Syverud also believes that "the biggest impact [a law professor] will make in this world is through the students he teaches." *Id.* He concludes that "[t]he startling truth is that, with the exception of a few dozen law professors, our ideas will improve the world more through our students than through our writing." *Id.* at 259; *see also* Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, The Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 771 (1998). Schiltz notes that students continue to seek him out to discuss decisions that, for them, are:

> extremely personal and important. These entreaties present both a danger and an opportunity to us professors. They are a danger because, if they are not handled carefully, they can eat up a lot of our time, to the detriment of our scholarship and teaching. But they are also an opportunity, because they present us with a chance to influence our students and, through them, the broader profession.

Id.

63. *See* Syverud, *supra* note 62, at 258–59. Syverud argues that a professor's teaching will suffer if that professor fails to spend sufficient time on scholarship. He notes that one has not "truly confronted and come to understand a problem until you have had to write for the world about it." *Id.; see also AALS Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities, Part II, Responsibilities As Scholars*, available at http://www.aals.org/ethic.html (last visited Jan. 19, 2004). The AALS includes scholarship as a "basic responsibility" of law professor. "[L]aw professors share with their colleagues in the other disciplines the obligation to discharge that responsibility. Law schools are required by accreditation standards to limit the burden of teaching so that professors will have the time to do research and to share its results with others." *Id.*

spends one-on-one is well-spent.

Unfortunately, institutional financial constraints often make it difficult for law professors to find that balance.[64] Teaching a writing course is time-consuming and, to be taught effectively, requires a student-faculty ratio that can allow for significant individual interaction. Many professors who teach in first-year legal writing courses in particular teach too many students to offer regular, mandatory student conferences that are of a meaningful length.[65] In a school that does not value its legal writing curriculum enough to impose reasonable limits on the student-faculty ratio, students will not benefit from the important learning opportunity the student conference might otherwise offer.[66]

Institutional financial constraints also require many professors to make less-than-ideal curricular choices as they balance the need both to meet with students individually and to provide students with thoughtful, detailed written critiques. In the 2002–2003 academic year, for example, professors who taught in a required first-year legal writing course reported that they reviewed and commented on an average of 1,558 pages of student work each semester.[67] Such heavy demands on a writing professor's time would frustrate even the most dedicated professor's efforts to schedule regular, intensive writing conferences with each of his or her students.

Despite these constraints, the issue is too important, and the guidance law professors can give one-on-one is too valuable to ignore the transformative potential of the student conference. Student conferences are important enough to merit being woven into the express curriculum of a writing course, even if that means reassessing time invested in other teaching activities.[68] For example, mandatory

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64. *See* John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 159 (1993).

65. For example, in the most recent survey conducted by the Association of Legal Writing Directors and the Legal Writing Institute, legal writing professors reported that they taught an average of forty-four students each semester. This average was achieved only by dropping from the survey results the twelve responses received from schools in which legal writing professors taught in excess of sixty students. Association of Legal Writing Directors & Legal Writing Institute, 2003 Survey Results, Q. 82, *at* http://www.alwd.org (last visited Jan. 19, 2004) [hereinafter ALWD].

66. Professors who teach in such programs cannot even make a pretense of offering regular mandatory conferences in which the professor can "help each student develop reasoning, judgment, 'instinct,' and decision-making skills through a detailed discussion of the student's written work." SOURCEBOOK ON LEGAL WRITING PROGRAMS, *supra* note 4, at 45.

67. ALWD, *supra* note 65.

68. *See* HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 3. Harris argues that

meetings with students can be built into the curriculum by substituting student conferences in lieu of formal classes during conference weeks. In addition, the student conference can take the place of grading and/or providing detailed written comments on a student's draft. Written comments are certainly a valuable means of providing feedback to students during the drafting process. However, if time constraints force one to choose between providing written comments on a student's draft or meeting with that student in a conference, the student conference is more productive and valuable to the student, and more time-efficient for an over-burdened professor.[69] This is not to suggest that writing professors forgo making written comments entirely; written feedback also has enormous value to students, particularly because the feedback is memorialized in writing for students to consider and review later. However, if forced to make this choice, the professor might elect to meet with students during the drafting process and provide extensive written comments on the final paper rather than on the interim draft.[70]

B. The Problem of Tacit Knowledge[71]

Aside from institutional constraints, student conferences also fail to realize their potential when professors lack a systematic understanding of cognitive learning theory, including the means by which novices acquire expertise, or how to collaborate effectively with

"[c]onferences, opportunities for highly productive dialogues between writers and teacher-readers, are or should be an integral part of teaching writing." *Id.* She contends that "[w]orking with individuals in the process of making a piece of writing is the best use of your time and energy. It is also pedagogically sound: the feedback between you and a student is kept close and recurrent. Helpful intervention in another's learning activity is a succinct definition of *teaching.*" (quoting Roger Garrison, cited in CHARLES DAWE & EDWARD DORNAN, INSTRUCTOR'S MANUAL FOR ONE-TO-ONE: RESOURCES FOR CONFERENCE-CENTERED WRITING iii (2d ed., Little, Brown, 1984)).

　　69.　Providing thoughtful written comments on a fifteen-page paper might take one to two hours to prepare. The teacher and student might discuss the same paper, with increased depth of analysis, in an equal or less amount of time.

　　70.　This choice may not be desirable for those professors who find that writing comments on a draft paper is not only a useful, but perhaps even a necessary first-step in establishing a dialogue with the student. Moreover, this choice also has adverse implications on student receptivity to written comments. Students are likely to pay more attention to written comments on a paper they will eventually revise into a graded final version than they are to comments on a final graded paper. However, comments on a final paper still have value for the student, particularly if the student decides to polish the paper into a writing sample or if it is apparent to the student that the comments can be a useful guide on the next writing assignment.

　　71.　Kissam, *Conferring with Students, supra* note 11, at 923 (using this term to define the problem of knowledge of which "we know but cannot speak").

students to help them resolve and ultimately master the analytical and communication problems that are reflected in their writing.[72] Several years ago, as I observed videotapes of myself and my colleagues in student conferences, I saw more conferences that fell short of their potential than conferences that fully succeeded.[73] As I viewed the videotapes, I saw professors who genuinely cared about their students fail in their efforts to convey that regard to their students. I observed many missed opportunities to acknowledge areas in which students succeeded, with the focus instead only on those areas in which students had failed.

As students and professors worked together to resolve the problems the papers presented, I observed professors who became so focused on their own critique that they failed to invite students to explore *their* concerns. I also saw professors whose impatience deprived students of the opportunity to become successful in solving important analytical problems. On occasion, I observed a lack of tolerance for student viewpoints that differed from the professor's, with little or no effort made to explore why the student's viewpoint was off-the-mark, or, perhaps, to explore an aspect of the student's viewpoint that might have been valid.[74] I noticed that almost all of us spent too much time talking during most conferences, subtly thwarting our students' potential to become independent learners and critical self-editors.[75] The least experienced professor, in particular, inhibited

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72.   *See id.*; Lustbader, *Construction Sites, supra* note 9, at 321.

73.   One of my responsibilities as Director of Legal Writing at Washington University was to evaluate the teaching of other teachers in the legal writing program. As part of that evaluation process, and because of a developing interest in how conferences affect student learning, I observed videotapes of approximately ten student conferences, including my own conferences with students.

74.   This tendency was also noted in a study of teachers in an undergraduate setting. The study found that "[t]he majority of the teachers were 'dualistic,'" viewing their task as one of "judges who applied uniform standards for correctness." Berger, *supra* note 2, at 68–69. Berger notes that novice teachers in particular exhibited this tendency to "adopt the current-traditional view and its corresponding dualistic, right or wrong, response style." *Id.* at 73.

75.   This same phenomenon has been observed in student conferences in undergraduate institutions. *See* BLACK, *supra* note 30, at 41. After viewing fourteen student conferences, the author concluded that "overwhelmingly, it is teachers who talk." After studying the word count between teacher and student during the conferences, she concluded that the students talked from a low of 2.3% of the time to a high of 40.2%. *See also* Muriel Harris, *Collaboration Is Not Collaboration Is Not Collaboration: Writing Center Tutorials vs. Peer-Response Groups, in* THE ALLYN AND BACON GUIDE TO WRITING CENTER THEORY AND PRACTICE 283 (Robert W. Barnett & Jacob S. Blumner eds., Allyn & Bacon, 2001) [hereinafter Harris, *Collaboration*]; MCANDREW & REIGSTAD, *supra* note 20, at 11 (observing that studies reflect that conferences fail when "the teacher dominates both time and agenda").

students' cognitive development by focusing on problems of syntax and grammar that were not suitable for the stage of the writing process in which students were then engaged.[76] Such conferences are not only ineffective vehicles for student learning, but have the potential to defeat already discouraged students, encourage a sense of inadequacy, and promote an unhealthy dependence on the professor.[77]

These problems did not go unnoticed by students. As I reviewed my own student evaluations and those of my colleagues, I saw a direct correlation between what I observed in student conferences and common threads of student criticism. I recognized that our ineffectiveness was not caused by apathy or lack of preparation. Rather, we had too many students to address adequately every student's needs, and we lacked a systematic understanding of how to collaborate effectively with students one-on-one.[78] And, to be fair, there was also evidence of where we succeeded in conferences, even wildly succeeded. I saw conferences in which students were actively engaged in learning and excited about collaborating with their professor to learn and ultimately master the art of thinking and writing "like a lawyer." Successful conference experiences received high praise from students; in student evaluations, many students remarked that the student conference was the most successful component of the course curriculum.[79]

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76. This problem has also been observed in the undergraduate setting. *See* Berger, *supra* note 2, at 73 (observing that novice teachers tend to focus "primarily on grammar, usage, and punctuation, where correctness can be objectively judged"); Harris, *Collaboration, supra* note 75, at 283 (noting that inexperienced writing tutors tend to focus on surface errors instead of more substantive issues); MCANDREW & REIGSTAD, *supra* note 20, at 11, 17 (noting that, although this is a not uncommon tendency among tutors, "the effect on the writer may be harmful and adverse to the goals of tutoring").

77. *See* HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 105. Harris notes:

> The individual writing conference is a superb opportunity for learning to take place. However, merely inviting a student into your office does not "automatically result in better teaching and learning. No mystical transformation takes place: ineffective teachers can remain ineffective; recalcitrant, indifferent, or slow learners can remain recalcitrant, indifferent, or slow."

Id.

78. *See* Kissam, *Conferring with Students, supra* note 11, at 923; Lustbader, *Construction Sites, supra* note 9, at 321.

79. This appreciation of the value of student conferences has also been recognized by undergraduate composition students. *See, e.g.*, BLACK, *supra* note 30, at 152; CARNICELLI, *supra* note 30, at 105.

IV. TIMING AND PREPARATION

A. Timing of the Student Conference

The most important time to schedule student conferences is when students are actively engaged in the writing process. As students move back and forth between the stages of thinking, writing, and revising,[80] they are continually forced to reevaluate their not yet perfectly formed understanding of complex legal issues and the written expression of that understanding.[81] This is precisely when students need their professor most—to respond to their concerns and to help them develop and refine their legal thinking and written discourse.[82]

During the writing process, student conferences should ideally be scheduled at regular intervals following each key phase of the thinking and drafting process.[83] For example, in an upper-level writing seminar,

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80.   Although experts define the stages of writing in slightly different ways, they agree on the same basic stages of writing in which the writer moves recursively. *See, e.g.*, Mary B. RAY & JILL RAMSFIELD, LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN 416 (3d ed. 1987) (describing a five-stage recursive process of prewriting, writing, rewriting, revising, and polishing); CARNICELLI, *supra* note 30, at 102 (describing a three-stage process of "prewriting, writing and re-writing."); Freedman & Katz, *supra* note 26, at 59 (describing a recursive three-stage process of "planning," "translating," or writing, and "reviewing"); Kearney & Beazley, *supra* note 2, at 888 (describing a three-stage process of "prewriting," "writing," or "composing," and, finally, "revising," "rewriting," or "editing").

81.   *See* Harris, TEACHING ONE-TO-ONE, *supra* note 28, at 8, quoting James Moffett, *Writing, Inner Speech, and Meditation*, in RHETORIC AND COMPOSITION 65 (Richard Graves ed., rev. ed. 1984). Harris describes the writing process as moving from "inner speech" to the page. Although the stimulus for inner speech "can be the writer's own discovery process . . . it can also be the gentle prodding of questions or suggestions from a teacher. Inner speech, then, is something the teacher can tap when talking with a student during a conference."

82.   *See* CARNICELLI, *supra* note 30, at 103 (suggesting that not only are students highly receptive to mid-process conferences, but that a conference after grading is "an autopsy; it dwells on past failures, not future possibilities"); Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, in WRITING, TEACHING, LEARNING 86 (Richard L. Graves, ed., 4th ed. 1999) (observing that, because writing is a recursive process requiring the clarification of thinking, teachers must intervene during the writing process to help students "generate content and discover purpose"); HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 5–6 (noting that, by meeting with students during the drafting process, the teacher can "help students move through the process of discovery by talking with them, asking questions, and generally keeping up the momentum of exploration"); Freedman & Katz, *supra* note 26, at 60 ("the most effective teaching of writing occurs when the teaching takes place during the writing process and becomes part of that process"); Kearney & Beazley, *supra* note 2, at 904 (arguing that students are most motivated to discuss their work when they are actively engaged in the writing process because that is when feedback is most immediately useful).

83.   *See* Kissam, *Conferring with Students*, *supra* note 11, at 929 (stating that "the key to productive and joyful conferencing in this context has been to establish a series of

it would be useful to schedule conferences to discuss the student's choice of topic, research strategy, outline of the paper, and working and final drafts.[84] A series of conferences that build from a discussion of possible topics, to an outline of a paper's structure, to discussions about students' working drafts "is an excellent way to set timid or deferential law students progressively at ease and to engage in productive discussions of the law and legal theory."[85]

In a first-year legal writing course, where professors typically select a uniform topic for students to address, ideally, a professor would schedule an initial conference after students have drafted a detailed outline or "zero draft,"[86] another conference after they have completed a working draft, and a final conference when students are preparing to edit and revise their final draft. However, if the class size and time constraints permit only one conference during the drafting process, it is more useful to schedule mandatory conferences later in the writing process.[87] Because students are addressing the same topic and legal issues, many early-stage issues involving legal analysis and broad organizational constructs can be addressed in class.[88] However, unlike most early stage thinking and drafting issues, the revision questions students have about their final drafts are very specific and

mandatory conferences with each student"); Jan M. Levine, *Response: "You Can't Please Everyone, So You'd Better Please Yourself": Directing (or Teaching In) in a First-Year Legal Writing Program*, 29 VAL. U. L. REV. 611, 634 (1995) (suggesting that legal writing programs should "schedule early individual conferences with students about the first writing project, and repeat that several times during the semester").

84. *See* Fajans & Falk, *supra* note 10, at 353; Kissam, *Conferring with Students, supra* note 11, at 929.

85. Kissam, *Conferring with Students, supra* note 11, at 929.

86. The term "zero draft" describes a process in which students whose learning styles do not benefit from early outlining can draft a spontaneous, freewheeling exploration of ideas as a means of generating ideas and fleshing out their thinking. See Fajans & Falk, *supra* note 10, at 353, for a more detailed description of this process. *See also* Berger, *supra* note 10, at 178–79. Berger suggests scheduling conferences with students following zero or working drafts to provide another "first reader" "who can offer strategies, techniques, and explanations that grow out of [her] experience writing in the same field."

87. Delaying student conferences until later in the semester does, however, have adverse humanistic implications. Many anxious first-year students in particular do not take advantage of open office hours to discuss their concerns about their writing, waiting instead for the mandatory conference. Thus, delaying conferences until later in the semester postpones the cultivation of the interpersonal relationship between teacher and student that is developed during the student conference. *See, e.g.*, Levine, *supra* note 83, at 634–35. As Levine notes, student conferences scheduled early in the semester provide "a mechanism for stressing the supportive and helpful role of the legal writing teacher," and "emphasize the teacher's human qualities."

88. Those students who experience significant problems transitioning their legal reasoning into a written draft can always schedule an appointment to meet with their professor individually.

individually tailored to their own writing. These concerns can best be resolved working one-on-one with students.

B.   Preparation for the Conference

1.   Preparation by the Law Professor

It is useful to convene a writing conference only after carefully reviewing the student's written outline or draft and considering both the pedagogical purpose of the assignment and the student's relative success in satisfying the purposes of the assignment.[89] The pedagogical purpose of the assignment is important because writers focus on different concerns during different stages of the drafting process. The professor can be most effective by restricting comments and didactic discussion to those issues with which a writer at a particular developmental stage would be concerned. Limiting conferences to specific pedagogical goals is also time efficient; both professor and student are spared the time it would take to comment on a myriad of details that would be neither relevant nor helpful to the critique.

Thus, if the purpose of the conference is to review an early working draft of a paper, the professor should consider the quality and development of the legal analysis and the effectiveness of the large-scale organizational structure of the draft.[90] At that early stage of the drafting process, students should not have begun to consider how they might polish their writing to satisfy the intended reader's expectations. Feedback on writing style would be counter-productive at that stage; faced with a myriad of criticism, students would easily lose sight of the more important analytical and organizational problems that exist in the working draft.[91] Moreover, because premature editing can impede a writer's early progress,[92] the

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89.   See Neumann, supra note 11, at 763.

90.   See Berger, supra note 2, at 78 (suggesting that professors restrict comments on early drafts to the "development of meaning (analysis of the student's subject or content), with comments that raise questions or point to 'breaks in logic, disruptions in meaning, or missing information' as well as comments that mark strong insights, well developed arguments, and thorough explanations").

91.   See CARNICELLI, supra note 30, at 105 (contending that the conference is "far more useful if the teacher focuses on one or two of the most important matters;" and suggesting that to do otherwise results in a confused and discouraged student); Kearney & Beazley, supra note 2, at 892–93 (arguing that to avoid information overload, the teacher and student should focus their attention only on the legal analysis and substance of the paper during the early stages of the writing process rather than on how effectively that analysis is communicated).

92.   See HARRIS, TEACHING ONE-TO-ONE, supra note 28, at 85–87; MCANDREW &

professor's emphasis on writing style could thwart a student's progress. In contrast, when reviewing a student's final draft prior to a conference, the professor would focus on how the student might clarify the draft to satisfy reader expectations. Thus, the professor might help the student consider such issues as the structure of each paragraph, syntax, word choice, and the paper's persuasive appeal.[93]

While reviewing a student's paper, the professor should also consider the student's relative success in satisfying the purposes of the assignment and prioritize the importance of the issues and problems confronting that student. The delivery of too much information, or the delivery of information beyond the present capabilities of the student, would obscure the more important issues with which the student must contend. Studies in the field of cognitive science suggest that people can realistically absorb no more than about five to seven "chunks" of new information at a time.[94] Experienced legal writing professors agree, cautioning that too much criticism can not only be discouraging but can also overwhelm a student.[95] A student who receives too much information can neither retain it all in short-term memory nor identify from the myriad of criticism that which is most important to recall.

Therefore, while reviewing a student's paper, the professor should consider how he or she might effectively address the areas in which the student most needs guidance.[96] For example, a student whose "final" draft suffers from faulty analysis and gross organizational problems would not benefit from a detailed discussion of the paper's grammatical and stylistic problems; nor would such a student benefit from a discussion of highly sophisticated nuances in analysis that a more capable student might welcome. In contrast, a more capable student might benefit most from a discussion of sophisticated nuances in analysis or argument, or of persuasive writing style issues. Thus, the professor should prepare for the conference by

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REIGSTAD, *supra* note 20, at 41 (noting that "blocked writers often interrupt the flow of their writing by fussing too early with elements like comma placement or spelling").

93.   *See* Berger, *supra* note 2, at 78, 91.

94.   *See* Blasi, *supra* note 9, at 343. Blasi cites a well-known early study that supports this theory: G.A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 PSYCH. REV. 81–97 (1956). The "chunks" refer to groupings of new information. Thus, an expert might retain memory of significantly more information than a novice because the expert has developed a schema to group together into a single "chunk" various pieces of information that would, to a novice, appear unrelated.

95.   *See* Enquist, *Critiquing and Evaluating*, *supra* note 10, at 1130–32.

96.   *Id.* at 1133 (emphasizing the "importance of the legal writing professor having a clear sense of his or her priorities and conveying these priorities to the students").

carefully considering each student's capabilities and identifying the few areas that would be most important for each student to reevaluate.

Although reviewing papers in advance of the conference is ideal, time and curricular constraints often require legal writing professors to make difficult choices and to prioritize how to make the most effective use of their time. If time and curricular constraints pose a problem, the professor might eliminate the early review process entirely and review the draft for the first time during the student conference. Under this approach, the professor would spend the first few minutes of the conference quickly reviewing the paper and evaluating how he or she could be most helpful to the student. Again, the professor would consider both the pedagogical purpose of the assignment and the student's present capabilities.

Although this option might initially appear to be far less desirable than carefully reviewing each paper in advance, it does have several advantages for experienced professors in particular. First, it has the obvious advantage of eliminating the time-consuming process of reviewing and remarking on student papers. If a professor must make a choice between the two, the student conference is a more effective use of time than providing written comments on papers.[97] Second, some professors prefer this approach because it allows students to gain better insight into a reader's responses when initially reviewing their work.[98] In a first-year writing course, where students learn to draft documents that will prepare them for legal practice, the professor reviewing an argument for the first time need not review again a paper he or she may have reviewed days earlier and attempt to recreate the detailed thoughts and questions he or she had on first review. Instead, the professor would have the same fresh perspective and questions as the intended reader. Finally, failing to provide the student with written comments in advance of the conference may provide the student with a greater sense of control and autonomy over the paper. Providing written comments in advance has the potential to lull the student into believing that the student and professor will

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97. Not only does the conference allow for extended dialogue about the concerns expressed by teacher and student, but a comment that might take a teacher five minutes to express in writing might be verbalized in thirty seconds.

98. *See* HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 5 (noting that, because the teacher's reaction as a reader is crucial for the student to experience, some teachers prefer this approach as it gives students an opportunity to witness "a more immediate, fresh reader response").

discuss only those issues that concern the professor.[99]

However, this approach also has several drawbacks. Attempting to review and absorb a paper at the beginning of the conference increases the potential for the professor to become sidetracked by minor issues that could serve to detract from the more important issues the student faces.[100] In addition, a professor must guard against the appeal of filling up the silence by engaging in a reader's monologue while reviewing the student's paper. To minimize that potential, the professor might ask students to simultaneously review another copy of the paper so that they might refresh their recollection of the issues and their concerns and questions.

Finally, of particular significance to novice professors, it takes experience to be able to review a paper, quickly determine which aspects of the student's paper are most deserving of attention, and decide how to address these topics in a manner that would be most easily understood by the student. A novice professor would have considerable difficulty accomplishing these tasks without the luxury of more time to reflect and deliberate.

An option that falls between the two extremes would be for the professor to review papers in advance of the writing conference but decline to provide students with detailed written comments. Instead, the professor might make a few private notes to use as discussion points during the conference. These private discussion points could serve as helpful reminders about the issues the professor would like to discuss later in the conference without consuming the significant amount of time it takes to provide detailed comments for student consumption.

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99. Because of the inherent hierarchical nature of the student-teacher relationship, it is easy for students to slip into a dependent, passive role during the conference rather than the collaborative role this article suggests is more valuable to students. *See* CARNICELLI, *supra* note 30, at 116. In arguing that it is not ideal for a writing teacher to review and comment on a paper ahead of time, he notes:

> A teacher who has solved all the problems in the paper ahead of time is more than likely to dominate the conference, either through direct statements or leading, manipulative questions. Student comments identify the pitfall here. 'He has really read my papers and knows what he wants to say.' . . . Such extensive prior preparation may awe students but, by effectively excluding them from the critical process, it deprives the conference of much of its special educational value.

Id.

100.   *Id.* at 112 (cautioning that "[t]his kind of random and superficial sniping is always a danger").

2. Preparation by the Student

If the professor has provided written comments on student drafts prior to the conference, the professor should return the marked drafts to the students in advance of the conference to provide students with an opportunity to review and thoughtfully consider those comments prior to the conference.[101] Whether or not the professor has provided written commentary to students in advance of the conference, students should also be prepared to discuss any concerns or questions they have about their papers. Requiring students to come to the conference prepared to discuss specific questions and concerns helps promote self-sufficiency and independence.[102]

However, because students are novice legal thinkers and editors, they often lack focus when evaluating their own work. Therefore, the professor might also consider assigning students the task of completing a self-edit to bring to the conference. By requiring students to respond to focused questions when evaluating their work, the professor can help students begin assuming the role of a critical self-editor prior to the conference.[103] For example, because there are predictable "intellectual locations" within legal documents, students could be required to locate, highlight, and review those aspects of the paper prior to the conference.[104] With narrowly-tailored questions, the

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101.   See Kearney & Beazley, supra note 2, at 905 (suggesting that the teacher provide a final comment that would help the student prepare for the conference by proposing additional revisions or tasks the student can consider prior to the conference); Neumann, supra note 11, at 905.

102.   See CARNICELLI, supra note 30, at 109. Carnicelli contends that freshman student evaluations reflect students' "clear willingness to accept some responsibility for their own learning." Id. For example, one student commented: "She is always willing to give suggestions for a new way to present a paper as long as we show that we are thinking too. She's not about to do all the work for us." Id. at 110.

103.   See Beazley, supra note 10, at 180. Beazley suggests that the professor can address the students' lack of focus

> by concentrating the writer's attention on various parts of the document and then asking focused questions. For example, instead of looking at a sentence and asking "Is this okay?" the writer completing a self-grading exercise is looking at the application of law to facts within a particular section and asking: "Did I echo the key terms from the rule when I applied law to facts? Did I include the legally significant facts?" This improvement in focus cannot help but improve the writer's ability to self-edit.

Id.

104.   As Beazley notes,

> legal documents usually follow prescribed formats. For example, most courts require that appellate briefs contain the following substantive components: a question presented, a statement of the case, a summary of the argument, an argument (divided into point heading sections),

self-edit might ask students to consider how effectively they explained certain aspects of the analysis.[105] Thus, the self-edit helps students become adept at assuming the role of an expert editor before they arrive at the writing conference. If the professor has reviewed papers in advance of the conference, the professor might also consider assigning each student a "revision task" to be completed before the conference. In the revision task, the professor would identify a significant weakness in the paper the professor believes the student has the capability of improving further before the conference.[106]

V. THE STUDENT-TEACHER RELATIONSHIP

A. The Importance of the Relationship

Research from cognitive scientists can provide guidance about how law professors can best work with students in conference to maximize each student's potential to process information and to learn. The brain is a complex structure that functions as an interconnected system. Neuroscientists posit that the lower structures of the brain, including the brain stem, mediate the physiological state of the body, regulating heart rate, temperature and respiration.[107] The higher

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and a conclusion. Each of these components usually contains certain agreed-upon analytical elements. For example, when making a legal argument, it is expected that 1) the writer will articulate a rule for the court to apply, 2) the writer will cite to the best possible authority for that rule, 3) the writer will explain any ambiguities in the rule, usually by illustrating how the rule has been applied in the past, and 4) the writer will explain how the rule should be applied in the pending action.

Beazley, *supra* note 10, at 178.

105. Thus, the self-edit could

ask the writer to scrutinize each point heading section or sub-section within a brief and highlight the rule that is being discussed and/or applied. If the writer finds a rule, the guidelines can ask whether the rule is 1) so abstract and/or controversial that it needs thorough explanation or illustration or 2) so concrete and/or non-controversial that it needs little explanation or illustration.

Beazley, *supra* note 10, at 179. This article would be a valuable resource to a professor who is considering assigning self-edits to students. The article discusses how a professor might draft self-edits to help students assume the role of a critical self-editor at various stages of the drafting process.

106. *See* Parker, *supra* note 2, at 587 (advocating the use of revision tasks prior to student conferences).

107. *See* LOUIS COZOLINO, THE NEUROSCIENCE OF PSYCHOTHERAPY: BUILDING AND REBUILDING THE HUMAN BRAIN 70 (2002); DANIEL J. SIEGEL, THE DEVELOPING MIND: HOW RELATIONSHIPS AND THE BRAIN INTERACT TO SHAPE WHO WE ARE 10

structures of the brain, including the cerebral cortex located at the top of the brain, "mediate the more complex information-processing functions such as perception, thinking, and reasoning."[108] From an evolutionary perspective, neuroscientists consider the cortex not only to be the most recently evolved area of the brain, but also the most advanced, as it directs all of the abstract representations involved in thinking.[109] The centrally located limbic system mediates emotion and goal-directed behavior, including motivation, and assumes an important role in coordinating the activities of the upper and lower regions of the brain.[110]

Although mild to moderate stress can stimulate neural growth and trigger the release of neurohormones that enhance new learning within the cerebral cortex, heightened levels of stress or perceptions of threat can inhibit new learning.[111] Neuroscientists believe that when the limbic system interprets stimuli as posing a threat, that system signals the lower regions of the brain to activate pre-programmed survival processes. This activation of survival processes engages the body via the sympathetic branch of the autonomic nervous system, placing the body in a heightened state of readiness for "fight or flight."[112]

In addition to redirecting the energy flow to the lower processing centers of the brainstem, biochemical changes caused by high stress or threat disrupt the limbic system's integrative functions.[113] Thus, in such a state, the limbic system also shuts down the circuits to the "higher" structures of the cortex.[114] Neurologically, this heightened state of readiness for fight or flight results in the inhibition of complex perceptions and thinking and the "dominance of more basic somatic

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(1999).

108.   SIEGEL, *supra* note 107, at 10; *see also* COZOLINO, *supra* note 107, at 70–71.

109.   SIEGEL, *supra* note 107, at 10.

110.   *Id.*; COZOLINO, *supra* note 107, at 70–71.

111.   *See* COZOLINO, *supra* note 107, at 23–24; Irwin G. Sarason, *Stress, Anxiety, and Cognitive Interference: Reactions to Tests*, 46 J. PERSONALITY & SOC. PSYCH. 929, 933–34 (1984).

112.   *See* COZOLINO, *supra* note 107, at 23–25; PIERCE J. HOWARD, THE OWNER'S MANUAL FOR THE BRAIN: EVERYDAY APPLICATIONS FROM MIND-BRAIN RESEARCH 39 (2d ed. 2000).

113.   *See* COZOLINO, *supra* note 107, at 23–25; RENATE N. CAINE & GEOFFREY CAINE, MAKING CONNECTIONS: TEACHING AND THE BRAIN 71 (1994). Caine and Caine posit that "the body creates the hormone cortisol in direct response to certain types of stress." *Id.* at 71. They refer to studies that suggest that "under stress the indexing capacities of the brain are reduced and the brain's short-term memory and ability to form permanent new memories are inhibited." *Id.*

114.   *See* Howard, *supra* note 112, at 39; SIEGEL, *supra* note 107, at 259.

and sensory input."[115] In other words, while in this state the individual's reflexive responses to physiological states and "primitive sensory input" dominate the processing of information and "the learner becomes less flexible and reverts to automatic and often more primitive routine behaviors."[116]

Empirical studies from cognitive psychologists support these findings. Such studies suggest that mild to moderate stress provides the type of challenge and resolution that motivates people to achieve.[117] In contrast, when an individual perceives an experience as threatening, the resulting stress narrows that individual's perceptual field. Perceptual psychologists label this perceptual narrowing as "downshifting," defining it as a psychophysiological response to a perceived threat that is accompanied by "a sense of helplessness and lack of self-efficacy."[118] In a state of "downshift," empirical studies suggest that highly anxious learners are unable to perform "complex intellectual, problem solving, achievement and learning activities."[119] Unhealthy levels of anxiety limit the "capacity to perceive and generate new meaning" and limit "creativity and constructive imagination."[120] Psychologists also conclude that anxious people exhibit increased "cautiousness, perseveration, rigidity, and stereotyped thinking and behavior, as well as reduced responsiveness to the environment."[121]

Cognitive psychologists' research into intelligence testing also supports these findings. In a textbook of psychological assessment, Gary Groth-Marnat describes numerous studies evaluating intelligence testing. He notes that enhanced rapport with older children that involved "verbal reinforcement and friendly

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115. SIEGEL, *supra* note 107, at 259.
116. CAINE & CAINE, *supra* note 113, at 95.
117. *Id.* at 71.
118. *Id.* at 69–70.
119. *Id.* at 76 (citing to studies that revealed these behavioral and cognitive characteristics of anxious people). Other studies suggest that when subjects are familiar with an examiner, the subjects' ability to respond to tasks requiring complex reasoning is enhanced. However, such familiarity does not affect the subjects' ability to perform tasks requiring simplistic reasoning. Cognitive psychologists posit that unfamiliarity with the examiner engenders anxiety in the subjects. Although this anxiety might increase the subjects' motivation to perform well on simple tasks, the anxiety interferes with the higher order thinking required to perform complex tasks. *See* Douglas Fuchs & Lynn S. Fuchs, *Test Procedure Bias: A Meta-Analysis of Examiner Familiarity Effects*, 56 REVIEW OF EDUC. RESEARCH 243, 256 (1986), citing ROBERT ROSENTHAL, EXPERIMENTER EFFECTS IN BEHAVIORAL RESEARCH (1980).
120. CAINE & CAINE, *supra* note 113, at 140.
121. *Id.* at 76.

conversation" increased their WISC-R (Wechsler Intelligence Scale for Children) scores "by an average of 13 IQ points compared with an administration involving more neutral interactions. This is a difference of nearly one full standard deviation."[122] The author also notes that "mildly disapproving comments such as 'I thought you could do better than that' resulted in significantly lowered performance when compared with either neutral or approving ones."[123] In a meta-analysis of twenty-two studies, other researchers concluded that IQ scores were positively affected merely by the child's familiarity with the examiner.[124] The disparity was most pronounced for lower socioeconomic status children, who scored eight points higher on IQ scores when they were familiar with the examiner than when they did not know the examiner.[125] When children in this group were encouraged with culturally relevant comments, another study showed a remarkable 17.6-point increase in their IQ scores.[126]

These findings from cognitive science have significance to the relationship between professor and student in a law school setting. The heightened level of stress many law students experience is well-documented.[127] One empirical study indicated that up to forty percent of law students experience significant elevations of such symptoms as depression, anxiety, social alienation and isolation, to name but a few.[128] To many students, the law school experience magnifies

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122. GARY GROTH-MARNAT, HANDBOOK OF PSYCHOLOGICAL ASSESSMENT 47 (3d ed. 1999) (citing S.E. Feldman & D.S. Sullivan, *Factors Mediating the Efforts of Enhanced Rapport on Children's Performance*, 36 J. CONSULTING AND CLINICAL PSYCH. 302 (1971)).

123. *Id.* at 47 (citing J.M. Witmer, A.V. Bornstein & R.M. Dunham, *The Effects of Verbal Approval and Disapproval Upon the Performance of Third and Fourth Grade Children of Four Sub-Tests of the Wechsler Intelligence Scale for Children*, 9 J. SCHOOL PSYCH. 347–56 (1971)).

124. Fuchs & Fuchs, *supra* note 119, at 257.

125. *Id.*

126. GROTH-MARNAT, *supra* note 122, at 47 (citing F. Terrell, J. Taylor & S.L. Terrell, *Effects of Types of Social Reinforcement on the Intelligence Test Performance of Lower-Class Black Children*, 46 J. CONSULTING AND CLINICAL PSYCH. 1538–39 (1978)).

127. *See* Benjamin, *supra* note 55 at 246; Cathaleen A. Roach, *A River Runs Through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 670 (1986) ("There is widespread, well-documented evidence of acute psychological distress among many of our law students (majority students as well as minority and other non-traditional students)"); Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 424–26 (1971).

128. Benjamin, *supra* note 55, at 246 (explaining that data reflects that law students experience heightened elevations of "obsessive-compulsive behavior, interpersonal sensitivity, depression, anxiety, hostility, phobic anxiety, paranoid ideation, and psychoticism (social alienation and isolation)").

underlying anxieties about self-worth and intellectual ability.[129]

The Langdellian classroom in particular is so focused on revealing to students what they do *not* know, as opposed to what they *do* know, "that students tend to leave a traditional Langdellian classroom with a sense of failure, rather than a Socratic sense of accomplishment."[130] To first-year law students in particular, the dynamics of the typical Langdellian classroom reinforces a sense of intellectual inferiority and hopelessness, as students believe that they will never be as smart or as wise as their law professors, or begin to understand the rudiments of legal analysis as well as their less timid classmates who enjoy the rigors of the classroom dialogue.[131]

A student's perceived failure to "have what it takes" is particularly acute in a writing course, in which the student must struggle with the challenge and inherent messiness of drafting legal analysis and argument.[132] Protocol studies suggest what most writers know from personal experience—the act of writing "is messy, recursive, convoluted, and uneven."[133] The student conference itself can be threatening to a student's ego-identification, as the professor's questions expose the student's ignorance.[134] The student conference can also be discouraging, particularly when the dialogue reveals that

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129. *See* Becker, *supra* note 61, at 478 (noting that "the law school experience can be overwhelming and filled with an unrelenting sense of confusion, ineptitude, and angst"); *see also* Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 HARV. L. REV. 2027 (1998) (commenting that even at Harvard, considered by many to be the "pinnacle of legal education," "[f]ar from brimming over with personal and intellectual self-confidence, by the second (2L) year, a surprising number of Harvard Law students come to resemble what one professor has called 'the walking wounded': demoralized, dispirited, and profoundly disengaged from the law school experience").

130. Neumann, *supra* note 11, at 739. Neumann argues that the Langdellian method of dialogue typical in law school classrooms differs from true Socratic dialogue because many law professors use Socratic questioning to show students what they do not know, but fail to lead them to a new understanding. *Id.* Neumann also notes that Langdellian professors are permitted to "abandon students whose answers are unsatisfactory," while the Socratic method does not permit that approach. *Id.*

131. *See, e.g.*, Benjamin, *supra* note 55, at 247; Parker, *supra* note 2, at 571 (observing the "great discomfort and angst" suffered by students' inability to articulate analysis when, in the past, they were often "accustomed to understanding things immediately and intuitively grasping 'what the teacher wants'").

132. HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 8. Harris points out that:
   [w]riters also need another kind of help when revising—some support and encouragement—because the messiness of working and reworking a paper can lead to surprise and dismay as a topic falls apart or changes direction during writing. Novice writers need to learn how to persist, and they need some encouragement to do so.
Id.

133. Hairston, *supra* note 82, at 85.

134. *See* Neumann, *supra* note 11, at 738–39.

the student must rethink and revise significant portions of his paper.[135]

The anxiety that many students experience during law school is sufficiently heightened to have an adverse impact on their cognitive performance. In heightened levels of anxiety or fear, students can be expected to have difficulty grasping new ideas and to be "unwilling to explore patterns that conflict with what they already know, that require them to think in totally new and therefore potentially threatening ways."[136] Students in such a state have little tolerance for ambiguity and uncertainty.[137] Yet law school prevails upon students to do exactly what highly anxious students seem incapable of doing—to creatively explore new avenues of thinking and to tolerate ambiguity and uncertainty.

Thus, if a law professor is to work effectively with a student in conference, exploring the myriad of ways in which he might better evaluate the law and communicate that analysis, the student's anxiety level must be reduced to what might be called a state of "relaxed alertness."[138] In other words, the professor must foster interpersonal relationships with students, and a learning environment, in which students are motivated and challenged, but not threatened or plagued by a sense of helplessness or lack of self-efficacy. A professor can help students achieve a state of relaxed alertness by developing interpersonal relationships with students that are supportive, encouraging, and non-threatening within the construct of a challenging curriculum that will motivate students to succeed.[139]

The studies conducted by cognitive scientists and psychologists directly conflict with the traditional law school mentality that the best professors are somehow "natural master[s] of human deflation."[140] Although few law professors today would adopt that extreme viewpoint, some might question whether a law professor can be both caring and intellectually rigorous at the same time.[141] I am not only

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135.   *See* Kissam, *Seminar Papers, supra* note 42, at 47.
136.   CAINE & CAINE, *supra* note 113, at 74.
137.   *Id.* at 74.
138.   *Id.*
139.   *Id.* at 94–95.
140.   Peairs, *Essay on the Teaching of Law*, 12 J. LEGAL EDUC. 323, 369–70 (1960).
141.   *See id.* Peairs suggests that
      [c]lose distinctions cannot be learnt by approximate thinking; and the law does
      not pay off on near misses. Hence, I believe a Draconian law-school atmosphere
      is desirable, with this as its theme: "To make our law program so that you will be
      glad you came, we must make it so that you will be glad when it is over."
Id.
See also Paul T. Wangerin, *Skills Training in Legal Analysis: A Systematic Approach*, 40 U.
MIAMI L. REV. 409, 477 (1986). Wangerin poses the following question: "What should the

suggesting that a professor can be both affiliative and intellectually rigorous, but also that intellectual rigor offered within an environment of trust and respect affords students greater ability to attain their full potential.[142]

Other law professors might question whether an intellectually rigorous inquiry from a caring and affiliative professor would adequately prepare students for the rigors of hostile, combative questioning from senior partners, professional colleagues, and judges. Whether legal educators should subject law students to hostility or combativeness as a means of preparing students for the rigors of legal practice is beyond the scope of this article. However, the one-on-one dialogue between professor and student in a conference setting should at least be one arena in law school in which students can engage in didactic dialogue without fear of being belittled or humiliated. Indeed, in such a setting, fear, belittlement, and humiliation compromise the student's ability to learn legal reasoning and legal writing.[143]

The interpersonal relationship between professor and student also has implications that extend beyond the student's law school career. Whether we consciously try to or not, we have enormous influence over our students.[144] For many students fresh out of undergraduate school, we are the students' first experience with lawyers. "They walk into the classroom knowing virtually nothing about the profession in which they will likely spend the rest of their

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teacher, the master chef, do when students fail to work carefully, when students do sloppy or otherwise poor work? Should the teacher play the role of Julia Child, kindly and frazzled? Or should some other role be considered?" *Id.* He responds by suggesting that law professors might "best serve their students by moving back and forth between two roles, one of relentless demands [when discussing skills exercises], the other of caring thoughtfulness." *Id.*

142.   *See* CAINE & CAINE, *supra* note 113, at 74; Arrigo-Ward, *supra* note 11, at 589 (arguing that "the effective teacher, like the coach, maintains discipline and sets high standards-but does so within an environment of mutual understanding and respect"); Fines, *supra* note 9, at 121 (arguing that not only are lowered standards not the necessary result of a respectful and supportive relationship, but that "such a relationship is crucial to student willingness to engage in dialogue").

143.   *See* CAINE & CAINE, *supra* note 113, at 76; COZOLINO, *supra* note 107, at 23–24; HOWARD, *supra* note 112, at 39; SEIGEL, *supra* note 107, at 259; Sarason, *supra* note 111, at 933–34.

144.   *See* Apel, *supra* note 56, at 379. Apel observes that:
   [v]alues are difficult if not impossible to teach in the abstract. Individual contact with faculty not only allows for more intimate discussion of these issues, it also provides the student with a positive model (let us hope) of the values that the law professes: 'our students watch us to see whether we mean what we say.'
Id. (quoting Roger C. Cramton & Susan P. Koniak, *The Teaching of Legal Ethics: Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 193 (1996)).

lives. Law School will represent the 'most formative and intensive stage' of their legal careers; it will be where 'their professional self-conception first takes shape.'"[145]

The modeling role that we assume as law professors is particularly important because it helps prepare students for the role we are training them to assume after graduation. As attorneys, our students will be advising clients who will present problems that can be resolved only by considering the human context as well as the legal context.[146] Clients' legal problems often inflame a wide range of emotions that not only cause clients considerable pain but that also interfere with their ability to make effective decisions.[147] To help clients find acceptable solutions that are in the clients' best interests over time, students must not only know how to evaluate the law and their clients' legal options but also know how to listen to and empathize with their clients and work collaboratively with them.[148] Studies reflect that clients give the highest rating to attorneys who have excellent relational skills. "Indeed, clients consider the interpersonal skills of a lawyer as being a more important measure of lawyer effectiveness than knowledge of the law, advocacy skills, or even the results of the representation."[149]

Unfortunately, many students' formal training in law school is focused almost exclusively on learning legal doctrine and developing analytical skills.[150] Although important, these skills alone will not

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145. Schiltz, *supra* note 62, at 777 (quoting Robert MacCrate, Keynote Address—*The 21st Century Lawyer: Is There a Gap to Be Narrowed?*, 69 WASH. L. REV. 517, 524, n.147 (1994); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 267 (1993)).

146. *See* G. NICHOLAS HERMAN ET AL., LEGAL COUNSELING AND NEGOTIATING: A PRACTICAL APPROACH 71–72 (2001); BINDER, *supra* note 8, at 65; Carrie Menkel-Meadow, *Symposium on the 21st Century Lawyer: Narrowing the Gap by Narrowing the Field: What's Missing From the MacCrate Report—of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 620 (1994); Schultz, *supra* note 1, at 65.

147. Binder, *supra* note 8, at 98–99.

148. *See* Fines, *supra* note 9, at 113. Fines notes that "[t]eachers who are inattentive to the emotional climate of their classes are modeling the emotionally impervious stance for which attorneys are often criticized." *See also* Schultz, *supra* note 1, at 65 (contending that, "[i]f law school represents our best chance to shape the future of law practice, why do we not want to have a hand in guiding how our students will conduct themselves, not just through analytical skills but through communications and interpersonal skills as well?").

149. HERMAN, *supra* note 146, at 9 (citing studies conducted by Stephen Feldman & Kent Wilson, *The Value of Interpersonal Skills in Lawyering*, 5 LAW & HUM. BEHAV. 311 (1981)).

150. *See* Bryant C. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 478–81 (1993). In a 1993 survey of young attorneys in urban and rural settings, Garth and Martin found that although such attorneys believed that learning counseling skills was important, less than 10% of them indicated that they

prepare our students to be effective attorneys.[151] In fact, a limited training in analytical skills leads to unintended consequences, as students learn to depend on these skills to provide solutions to problems without considering the human dimension.[152] "[T]his emotionally isolating analytical process makes attorneys 'less skillful in dealing with the emotional tensions which are so much a part of the lawyer-client relationship.'"[153] Thus, by building positive, encouraging, and collaborative relationships with students, the law professor models for students how to create such relationships later with their own clients.[154] Perhaps more than what we teach, but who we are, will shape the manner in which students will counsel and advise their clients in the future.[155]

Finally, the relationships a professor fosters with students can be rewarding and enriching. To share in a student's successes, to help a struggling student find her wings—this is the true joy of teaching.[156]

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learned these skills through their training in law school. *Id.* Although schools are increasingly offering courses in client interviewing and counseling, many students fail to take advantage of these courses. *Id. See also* Menkel-Meadow, *supra* note 146, at 619 (1994) (noting that law school programs themselves give inadequate training to students in how to interact with others).

151. *See* Menkel-Meadow, *supra* note 146, at 620. As Menkel-Meadow points out, an attorney "who hopes to effectuate a successful transaction or settle a lawsuit or amend an administrative regulation needs to understand what the goals and feelings of the other are, if only to effectuate the needs and goals of the client." *Id.* An attorney can do this only by connecting empathically with the client, so that the attorney experiences the client from the values the client holds. *Id.; see also MacCrate Report, supra* note 1, at 142, 178–79; Schultz, *supra* note 1, at 63–65; Benjamin, *supra* note 55, at 250–51.

152. *See* Benjamin, *supra* note 55, at 250–51.

153. *Id.* at 251 (quoting A.S. WATSON, SOME FACTORS IN THE CONTEMPORARY REGULATION OF THE AMERICAN LEGAL AND MEDICAL PROFESSIONS 9 (Isaac Ray Lecture, U. C. Berkeley, 1979)).

154. *See* Garth & Martin, *supra* note 150, at 483 T.6. Garth and Martin's survey supports the notion that modeling such behavior is an important and valuable way in which students can learn this skill. *Id.* In their survey, almost half of the young urban lawyers indicated that the most important source for learning counseling skills was by observing and seeking advice from other lawyers in their office. *Id.* This supports the notion that modeling and mentoring can assume an important role in a student's training. *Id.* Although only twenty-five percent of the young rural lawyers responded similarly, this discrepancy can be accounted for by the fact that the urban attorneys are more likely to have other lawyers in the office to observe. *Id.* at 482, 487 T.7.

155. *See* Schiltz, *supra* note 62, at 777–78. Schiltz contends that the example we provide our students is even more important than our formal teaching, and cites Stephen L. Carter, INTEGRITY 241 (1996): "[T]he principal education for character that we do, we do by example."

156. *See* Apel, *supra* note 56, at 380. Apel's study of law school professors suggests that those professors who frequently interact with their students report greater satisfaction from teaching and more positive stimulation from their students. *Id.* She also notes that teachers who report a high incidence of interaction with students believe that their

B. Defining the Relationship

1. The Collaborative Nature of the Relationship

In attempting to define the type of relationship between student and professor that might best produce an optimal learning environment, some professors have analogized their relationship to students as that of a coach.[157] The professor as coach helps students develop their talents and abilities by evaluating the creative process itself, and not just the completed performance.[158] The professor as an ideal coach has high and exacting standards that students would be encouraged to attain,[159] and inspires students to continue striving to succeed in the face of inevitable challenges.[160]

However, although the professor as coach analogy can be useful, the analogy is also potentially dangerous. First, the term itself can conjure images of widely divergent coaching styles, from arguably abusive and intolerant styles to those that are supportive and encouraging.[161] Moreover, the dynamics of the coaching relationship

teaching is enhanced by that interaction. *Id.* In fact, such teachers believe "that their students would rank them as among the best teachers." *Id.; see also* Becker, *supra* note 61, at 483. Becker argues that the one-on-one dialogue between student and teacher that occurs outside the classroom is "the true joy of teaching." *Id.* To underscore the importance of the student-teacher relationship, Becker refers to a remark made by Justice Scalia at a Washington University luncheon (that I also attended). *Id.* During that luncheon, Justice Scalia "observed that the shelf life of any law review article is brief—a few years at best—but the impact of a good teacher upon a student is endless." *Id.; see also* Syverud, *supra* note 62, at 258 (noting that when a student seeks the advice of a law professor on a personal decision, that student "has trusted you with the most important and in some ways the most personal decision in her life, which is what to do with that life"); Schiltz, *supra* note 62, at 772 n.273.

157.   *See, e.g.*, Arrigo-Ward, *supra* note 11, at 588; Kissam, *Seminar Papers, supra* note 42, at 342–43; Neumann, *supra* note 11, at 750.

158.   *See* Neumann, *supra* note 11, at 750 (contending that the teacher as critiquer benefits from a coaching analogy because, as coach, the critiquer evaluates the student's creative process rather than emphasizing only the completed performance).

159.   *See* Kissam, *Seminar Papers, supra* note 42, at 342–43 (arguing that the role of coach is best suited to working with students on writing because the coach has critical standards and provides instruction and directions while also allowing students adequate discretion).

160.   *See* Arrigo-Ward, *supra* note 11, at 588 (noting that, like a good coach, a writing teacher is supportive, has a "genuine liking for students," and "honors the differences in each student's writing background and patiently understands that there are differences in each student's ability to acquire the skill of analytical writing").

161.   For example, Bobby Knight is the notoriously bad-tempered former basketball coach of the University of Indiana and current coach at Texas Tech University. Although his teams achieved great success, he has been portrayed in the press as being a bully who uses aggression, intimidation, and anger to motivate his players. In contrast, Phil Jackson

varies widely depending upon the particular sport or discipline and the degree of creative independent thought that players or students within that discipline are encouraged to exercise.[162] Thus, the term is sufficiently ambiguous as to lend itself to a wide range of coaching styles, some of which would not translate well to the relationship between law professor and student.

More troubling, the analogy might serve to reinforce a teacher-dominated mode of discourse that I suspect is all too common in many writing conferences between law professor and student.[163] The popular image of a coach suggests a rigidity in communication, expectations, and performance that would not be effective components of the relationship and discourse between law professor and student in a conference. Athletic coaches, for example, typically have a pre-conceived formulaic system for success in which they attempt to mold their athletes. The system is not designed to help athletes be creative or to exercise independent judgment. Thus, the popular image of a coach does not adequately allow for the richness of expression in legal discourse or for the creative thought underlying the cognitive skills of problem-solving and analysis.[164]

A law professor must, of course, have objectively conceptualized standards for assessing student work, and must train students to learn such standards and to differentiate between the quality of different arguments and styles of discourse.[165] With respect to those aspects of a

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coaches the Los Angeles Lakers, and is known as the Zen master, who motivates his players by offering them inspiring books on how they can become the best players they can be.

162. For example, track and field coaches, swimming coaches, and diving coaches examine closely the mechanics of the respective sports and train their athletes to perform in compliance with exacting mechanics of movement. Although football coaches train their players to execute well-defined moves that are carefully prescribed for each play, football quarterbacks are encouraged to exercise greater independence and to think on their feet. At the other end of the spectrum, the relationship between professional musicians and vocalists and their coaches is generally more collaborative in nature.

163. A faculty-dominated mode of discourse was all too evident in my observations of videotapes of student conferences. *See also* BLACK, *supra* note 30, at 162. After studying fourteen student conferences, Black concluded that, although both students and teachers agree that successful conferences involve active, mutual learning, her observations of office conferences reflected that "passive learning is the norm and opportunities for active learning are rare, requiring the cooperation of both teacher and student." *Id.*

164. *See* Harris, *Talking in the Middle, supra* note 36, at 30–31. In studying student evaluations of college writing tutorials, Harris notes a common thread: students want to be active participants "in the learning process and being led to think, rather than simply being told what to do." *Id.* She concludes that, "from the students' perspectives, the more highly satisfactory tutorials were those in which the students were active participants in finding their own criteria and solutions." *Id.*

165. *See* Neumann, *supra* note 11, at 766.

student's paper that are clearly ineffective and can be remedied only in a fixed number of ways, the professor must so inform the student.[166] However, many aspects of written analysis or argument can be handled quite effectively in a number of different ways. For such matters, it is important that the professor not only allows but encourages each student to make her own choices and to help the student evaluate the effectiveness of various options under consideration.[167]

Thus, the professor's objective in didactic dialogue should not be to force students to make the same drafting choices the professor would make under the circumstances, nor should it be to force students to comply with the professor's personal style preferences.[168] Rather, in a collaborative dialogue, the professor should encourage students to explore and clarify their thinking and to consider how they might best communicate their analysis within acceptable constructs of legal discourse.[169] In such a dialogue, there is a mutual understanding that it is the student's and not the professor's work, and that the professor is lending his or her expertise to the collaboration to help the student become more expert at legal thinking and writing.

However, there are inherent tensions in the idea of a collaborative relationship between law professor and student that should be recognized. Both student and professor recognize that the professor is not only the expert, but the grade-giver. In a law school setting, the extreme deference with which students view their law professors can also inhibit the development of a collaborative relationship.[170] Thus, the idea of collaborative dialogue within the

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166. *See id.* at 766–67.

167. *Id.*

168. *Id.*; *see also* BARBARA G. DAVIS, TOOLS FOR TEACHING 195–96 (2001). Davis contends that professors should "avoid messages that reinforce [their] power as an instructor or that emphasize extrinsic rewards. Instead of saying 'I require,' 'you must,' or 'you should,' stress 'I think you will find . . .' or 'I will be interested in your reaction.'" *Id.* This style of communication is more reflective of collaborative dialogue. *Id.*

169. Scholars in the fields of critical discourse analysis, linguistics, and critical pedagogy are increasingly embracing the notion of collaborative learning. Numerous studies indicate that the collaborative approach is the best means of helping students sharpen and deepen analytical thinking and problem-solving. *See, e.g.*, Andrea Lunsford, *Collaboration, Control, and the Idea of a Writing Center, in* THE ALLYN AND BACON GUIDE TO WRITING CENTER THEORY AND PRACTICE 93–94 (Robert W. Barnett & Jacob S. Blumner eds., 2001). Lunsford "reluctantly" became a convert to collaborative learning after evaluating numerous studies that indicated the superiority of this approach. *Id.*; *see also* Harris, *Collaboration, supra* note 75, at 273. Harris notes that undergraduate writing centers, which involve one-on-one tutoring, are increasingly advocating collaborative learning as the best means of helping writers improve their analysis and writing. *Id.*

170. *See* Kissam, *Conferring with Students, supra* note 11, at 923. Kissam notes that the

inherently hierarchical nature of the teacher-student relationship can send mixed messages to students, and might appear to be offering only a pretense of collaboration.[171] Despite this inherent tension, the collaborative relationship can be successful if the professor exhibits respect and high regard for students as individuals. When students know that they are respected and valued as individuals, and the didactic dialogue reflects that respect, collaboration can occur even within the hierarchical relationship of law professor and student.

In addition, the unequal knowledge base between professor and student encourages some students to resist collaborative dialogue, demanding instead that the professor simply tell them "what to do."[172] This type of verbal exchange does not serve students, as it cripples their ability to learn analytical thinking and problem-solving and encourages an unhealthy dependence on the professor.[173] However, a professor already inclined to view the professor's role as more directive and dominant than that of a collaborator would be even more susceptible to acceding to such student demands. A professor who consciously encourages student independence is more likely to be successful in efforts to persuade students to assume responsibility for their learning process.[174]

Finally, true collaborative dialogue may be jeopardized when the professor and student have different goals in mind. For example, the student may want the professor to give her feedback on virtually every aspect of her paper. However, the professor might conclude that the type and degree of feedback the student requests would be counter-productive given the student's level of competence and the stage of writing in which she is then engaged. Again, this tension would exist

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ethos of perfectionism

> may encourage idealization of law professors by their students, particularly in the context of student-faculty conferences. Perfectionism may also breed arrogance among those who perceive themselves as approximating the ideal, and neither arrogance nor extreme deference nor idealization seem conducive to open-ended, risk taking conversations in which two persons must work together towards the discovery of what in the end are probably at best only limited insights or limited solutions to frustrating problems.

Id.

171.   *See* Harris, *Talking in the Middle, supra* note 36, at 28 (making similar arguments regarding the relationship between student and tutor or teacher in undergraduate writing centers); Lunsford, *supra* note 169, at 96.

172.   *See* Harris, *Collaboration, supra* note 75, at 282 (discussing a similar tension in undergraduate writing centers and warning that the collaborative relationship can break down under such tension).

173.   *See* Neumann, *supra* note 11, at 756–57.

174.   Part VI.C.3.c *infra* discusses in greater detail how a professor can help an overly-dependent student assume responsibility for learning within a conference setting.

even in a more professor-dominated conference. Professors can encourage successful collaborative dialogue by communicating in advance clear guidelines and expectations about the conference itself. In addition, should it become clear during a conference that the student's and professor's goals differ, the professor can best handle the disparity by addressing the differing goals directly and by explaining why the student's expectations of detailed, directive comments would be counterproductive to that student.[175]

2. Qualities of the Collaborative Working Alliance

Although a law professor's goals are more directive than that of a psychotherapist, the field of psychotherapy nevertheless offers a rich body of scholarship that can inform our understanding of the qualities of a collaborative relationship that would both encourage and empower students.[176] Psychotherapists commonly use the term "working alliance" or "collaborative relationship" to describe the client-therapist relationship.[177] A hybrid term, the collaborative working alliance, emphasizes the collaborative and mutuality aspects of the relationship between professor and student.[178] A collaborative

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175. Part VI.B.2 discusses this topic in greater detail.

176. Indeed, legal scholars have adapted literature from the field of psychotherapy to inform the attorney-client relationship. For an overview of the student-teacher relationship in clinical teaching see BASTRESS & HARBAUGH, *supra* note 8, at 19–57; Binder, *supra* note 8. For a review of the student-teacher relationship in clinical teaching, see Nina Tarr, *The Skill of Evaluation as an Explicit Goal of Clinical Teaching*, 21 PAC. L.J. 967, 974 (1990). To explore the moral dimension of the relationship between student and teacher, see Robert S. Redmount, *Law Learning, Teacher-Student Relations, and the Legal Profession*, 59 WASH. U. L.Q. 853, 869 (1982) (characterizing the conditions of the Rogerian therapeutic model for the teacher-learner relationship as "essential to effective learning"). *See also* Christina Murphy, *Freud in the Writing Center: The Psychoanalytics of Tutoring Well*, in THE ALLYN AND BACON GUIDE TO WRITING CENTER THEORY AND PRACTICE 296–97 (Robert W. Barnett & Jacob S. Blumner eds., 2001).

177. *See* Edward Teyber & Faith McClure, *Therapist Variables*, in HANDBOOK OF PSYCHOLOGICAL CHANGE: PSYCHOTHERAPY PROCESSES & PRACTICES FOR THE 21ˢᵀ CENTURY 70 (Charles R. Snyder & Rick E. Ingram eds., 2000) [hereinafter Teyber & McClure]. The authors describe the working alliance as "perhaps the most important variable in predicting effective treatment outcomes." They describe the relationship as a "robust and effective ingredient common to all psychotherapies" across the spectrum of therapeutic approaches. *See also* EDWARD TEYBER, INTERPERSONAL PROCESS IN PSYCHOTHERAPY: A RELATIONAL APPROACH 31(4th ed. 2000) [hereinafter TEYBER] (noting, "the strongest finding in the psychotherapy outcome literature is that the most common feature of effective therapists, across different theoretical approaches, is the therapist's ability to establish a strong working alliance early in treatment"); Charles J. Gelso & Jean A. Carter, *Components of the Psychotherapy Relationship: Their Interaction and Unfolding During Treatment*, 41 J. COUNSELING PSYCH. 306 (1994).

178. The collaborative working alliance as a relationship modality has been embraced

working alliance might best be defined as one in which the student perceives the professor "as a capable and trustworthy ally" in the student's struggle to succeed.[179] The collaborative working alliance avoids the problems inherent in either a professor-dominated relationship, in which the student passively listens to the professor's critique, or in a student-dominated relationship, in which students are abandoned to their own confusion and direction.[180] Within the construct of the collaborative working alliance, the student experiences himself as a full working partner with the professor, working together to answer questions and solve problems.[181] In order for the collaborative working alliance to be successful, there must be a congruency of purpose, with the professor and student sharing a common understanding of the student's goals and thinking.[182] A professor cannot begin to help a student find clarity from confusion without first understanding what it is the student is attempting to communicate.

The collaborative working alliance requires not just that the student and professor have a congruency of purpose, but also that the student experiences the professor as genuinely empathetic.[183] In the psychotherapeutic field, a renowned psychologist, Carl Rogers, is credited with first understanding the importance of empathy to building successful interpersonal relationships.[184] Empathy goes

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by numerous modern therapists. They note that the collaboration and mutuality reflective of a working alliance move beyond the traditional Rogerian client-centered therapeutic model. In contrast to the Rogerian model, in which the therapist mirrors back to the client that which the client is expressing, the therapist in a collaborative working alliance collaborates with the client to effect positive change. *See, e.g.*, Teyber & McClure, *supra* note 177, at 71.

179. TEYBER, *supra* note 177, at 32.
180. *See* Lunsford, *supra* note 169, at 94; TEYBER, *supra* note 177, at 101.
181. *See, e.g.*, TEYBER, *supra* note 177, at 32–33.
182. *See, e.g.*, ALLEN E. IVEY & MARY B. IVEY, INTENTIONAL INTERVIEWING AND COUNSELING: FACILITATING CLIENT DEVELOPMENT IN A MULTICULTURAL SOCIETY 187–88 (5th ed. 2003) [hereinafter IVEY & IVEY].
183. *See* Teyber & McClure, *supra* note 177, at 70–71; TEYBER, *supra* note 177, at 32–33.
184. *See* IVEY & IVEY, *supra* note 182, at 186, citing the following sources that have followed and elaborated on Carl Roger's definition of empathy: ROBERT R. CARKHUFF, THE ART OF HELPING IN THE 21ˢᵀ CENTURY (8th ed. 2000); GERARD EGAN, THE SKILLED HELPER: A PROBLEM-MANAGEMENT AND OPPORTUNITY-DEVELOPMENT APPROACH TO HELPING (7th ed. 2002); ALLEN E. IVEY ET AL., THEORIES OF COUNSELING AND PSYCHOTHERAPY: A MULTICULTURAL PERSPECTIVE (5th ed. 2002). Although many psychotherapists have more recently adopted a more collaborative, relational approach to therapy than the Rogerian therapeutic model, they still recognize the importance of empathy within the therapeutic relationship. *See, e.g.*, Teyber & McClure, *supra* note 177, at 70–71; TEYBER, *supra* note 177, at 32.

beyond merely understanding what another is experiencing. Empathy is the ability to enter another's world and somehow convey that we understand that world *as if we were ourselves experiencing it.*[185] Empathy is essential to creating trust.

Other qualities that are implicit in empathic understanding are unconditional positive regard, warmth, and authenticity.[186] Unconditional positive regard can be defined as one in which the professor accepts and respects each student as a worthy human being. Positive regard is particularly important in a writing course, where students' underlying fears about their intellectual inferiority are magnified as they expose their assumptions, ignorance, and inner thoughts to a law professor.[187] Of course, the professor's respect and high regard for the student must be genuine and authentic for the relationship to be successful.

VI. THE STUDENT AND PROFESSOR CONFERENCE

An effective student conference can be viewed as progressing in four phases.[188] In the first phase, the *rapport-building phase*, the professor begins to build the rapport and trust that are instrumental in helping students become receptive to evaluating and critiquing their own writing.[189] In the *problem overview phase*, the professor elicits

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185. IVEY & IVEY, *supra* note 182, at 186.

186. *Id.* at 187.

187. Studies have found that the therapist's ability to establish a collaborative alliance is particularly critical when the parties must deal with crises in the relationship. Gelso & Carter, *supra* note 177, at 296–306. This finding is meaningful to the teacher-student relationship in a writing course because the novice writer often experiences a feeling of crisis when engaged in the recursive process of writing.

188. *Cf.* Neumann, *supra* note 11, at 762–63. Neumann suggests a three-phase approach. He envisions the conference as including an "opening phase," in which the student and teacher discuss the themes of the critique, an "interpretation phase," in which the student and teacher discuss and critique the student's performance, and a "closure phase," in which the student and teacher summarize the discussion and discuss the student's goals.

  However, I believe it is important to add a separate rapport-building phase to help make conscious and explicit the importance of the student-teacher relationship in a critique. Like the psychotherapeutic relationship and the attorney-client relationship, the relationship between professor and student is an important foundation on which the didactic exchange builds. Nonetheless, because of the overriding importance of the cognitive exchange itself, some law professors might otherwise neglect this important component of the conference. *See generally* Harris, *supra* note 28, at 41–42 (suggesting a similar phase in undergraduate writing conferences).

189. *See* Carnicelli, *supra* note 30, at 114. While remarking on the importance of the teacher-student relationship, Carnicelli reproduced excerpts from student evaluations. One such student's comment was telling. That student commented that after the professor had developed a relationship with students "we had realized that she cared about us, and her

from the student those issues the student has defined as important to the critique and articulates the issues the professor has identified as important. In the *problem resolution phase*, which constitutes most of the writing conference, the professor and student evaluate and resolve those problems that both student and professor have identified as meriting discussion. In the *closure phase*, the student and professor conclude the conference by summarizing the important themes of the conference and discussing the student's action plan. Although envisioning the conference process in distinct phases is helpful, the reality is that conferences usually move back and forth between phases as the professor and student explore emerging issues.[190]

A. *Phase One: Rapport-Building*

Research in critical discourse analysis and nonverbal communication suggests that no more than thirty to thirty-five percent of meaning is conveyed through language itself.[191] Fully sixty-five to seventy percent of the meaning conveyed in conversation is transmitted through nonverbal[192] and paralinguistic[193] communication. Participants in a dialogue implicitly recognize and interpret meaning by drawing from "repertoires of behavioral practices (units of language, gesture, orientation, posture and spacing, and the like) that are widely shared" by members of a discourse community.[194] Certain nonverbal behaviors are widely interpreted as conveying warmth and regard while other behaviors are widely interpreted as conveying dislike or the desire for distance. Nonverbal messages can either "add

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criticism was worth much more." *See generally* BASTRESS & HARBAUGH, *supra* note 8 (discussing the importance of the rapport-building phase in the relationship between attorney and client); HERMAN, *supra* note 146, at 21; Binder, *supra* note 8.

190. *See* HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 45.

191. PETER A. ANDERSEN, NONVERBAL COMMUNICATION: FORMS AND FUNCTIONS 1–2 (1999) (citing a number of studies that support this conclusion).

192. Nonverbal communication includes such kinesic behaviors as "facial expressions, gestures, posture, head movements, gaze, and position." Susan Jenkins & Isabel Parra, *Multiple Layers of Meaning in an Oral Proficiency Test: The Complementary Roles of Nonverbal, Paralinguistic, and Verbal Behaviors in Assessment Decisions*, 87 MODERN LANG. J. 90, 91 (2003). *But see* ANDERSEN, *supra* note 191, at 6–7. The author contends that nonverbal communication should be more narrowly defined to include only those behaviors that are both analogic (bearing a direct, intrinsic relationship to the thing it represents) and nonlinguistic. Thus, while eye contact would be a form of nonverbal communication that is analogic and nonlinguistic, the author contends that a head nod is not—although a head nod is a kinesic gesture, it is linguistic in nature.

193. Paralinguistic features include such subtle aspects of speech as "prosody, pauses, voice quality, and speech rate." Jenkins & Parra, *supra* note 192, at 91.

194. *Id.*

value" to the cognitive exchange or, where the nonverbal messages are negative, can "reduce value."[195] As professors, we can build more effective relationships with our students by thoughtfully considering our own behavior and what it might convey to our students.

Nonverbal behaviors that interact with speech to convey meaning include such affect displays as gestures and facial expressions that connote a range of emotions from interest, liking, and positive regard to disinterest, dislike and detachment.[196] For example, by facing the other participant in a dyadic dialogue while leaning forward, one conveys interest and active involvement with the other participant.[197] In contrast, a backward body lean can convey detachment and disinterest.[198] Numerous studies also suggest that "[s]miling or positive facial affect is part of a cluster of nonverbal behaviors linked to attraction, liking, trust, and intimacy."[199] In contrast, the combination of a non-smiling mouth and lowered brow can increase perceptions of dominance and distance.[200] In several studies, undergraduate students viewed those supervisors or teaching assistants who exhibited behavior characteristics of dominance as being less trustworthy and effective than those whose behavior was more affiliative, or more connected.[201]

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195. Jon Nichol & Kate Watson, *Videotutoring, Non-verbal Communication and Initial Teacher Training*, 31 BRIT. J. EDUC. TECH. 135, 140 (2000).

196. *See* Jenkins & Parra, *supra* note 192, at 91.

197. *Id.* at 92 (citing numerous studies that indicate the role of body lean in developing rapport); ANDERSEN, *supra* note 191, at 194 (citing studies that suggest that "interactants typically feel more warmth and friendship for people who lean forward slightly during conversations").

198. *See* Jenkins & Parra, *supra* note 192, at 92; ANDERSEN, *supra* note 191, at 194. However, a backward body lean, if used momentarily to ponder a point while thinking, would not necessarily convey this message but could instead convey the movement of discourse between conversation and reflection.

199. *See* Jenkins & Parra, *supra* note 192, at 92 (citing numerous studies supporting this proposition); ANDERSEN, *supra* note 191, at 198. Andersen suggests that "no expression communicates as much warmth or provides such a strong invitation to interact as does the smile." He cites to several studies examining the interactions of therapists and patients. The studies suggest that "the more frequently the therapists smiled, the greater their patients' perceptions were of their expertise, trustworthiness, and interpersonal acceptance."

200. *See* Herman Aguinis et al., *Effects of Nonverbal Behavior on Perceptions of Power Bases*, 138 J. SOCIAL PSYCH. 455, 459 (1998).

201. *See* Kathleen M. Bailey, *A Typology of Teaching Assistants, in* FOREIGN TEACHING ASSISTANTS IN U.S. UNIVERSITIES 110, 122–23 (Kathleen M. Bailey et al., eds. 1984). In this study, one key distinction between highly-rated teaching assistants and those who were rated by students as less effective was the ability of the highly-rated teaching assistants to develop rapport with their students. The highly rated teaching assistants established positive rapport with their students by conveying a personal interest in their students as people. They conveyed this interest in part through regular use of eye contact,

Like smiling, numerous studies in critical discourse analysis indicate that eye contact is another important affect behavior. Such studies suggest that eye contact conveys positive feelings in a social interaction, and has been associated with "liking, intimacy, attraction, and trust,[202] as well as credibility.[203] Studies also conclude that participants who are fully and actively engaged in discourse maintain sustained gaze.[204] This is particularly true of the communication patterns of North Americans of European descent.[205] In contrast, researchers have identified low levels of eye contact as suggestive of a desire for psychological distance and lack of involvement.[206]

Other studies suggest that people who have rapport exhibit congruency in their nonverbal behavior.[207] Psychotherapists call this phenomenon "movement synchrony."[208] Scholars who study communication accommodation theory posit that behavioral congruence, or movement synchrony, conveys greater rapport, closeness and affiliation than discongruent behavior.[209] Another form of mirroring is called "movement complementarity," in which harmonious, although not identical, movements are used to strengthen a sense of connection. For example, as one participant talks, the other might nod in agreement; or, as one participant

humor, and animated facial expressions. *See also* Carla R. Chamberlin, *TESL Degree Candidates' Perceptions of Trust in Supervisors*, 34 TESOL QUARTERLY 653, 664 (2000) (reaching the same conclusion from a study of teachers' impressions of the trustworthiness of their supervisors).

202.   Jenkins & Parra, *supra* note 192, at 92; ANDERSEN, *supra* note 191, at 191–92. However, sustained gaze, when accompanied by an angry facial expression, is perceived as a "threat display." *Id.* at 192.

203.   *See* Aguinis, *supra* note 200, at 463.

204.   *See* Nichol & Watson, *supra* note 195, at 141. However, long periods of gaze are more common while listening than while talking, in part because the speaker often looks away while in thought. The authors observed this phenomenon in their own studies as well as reporting similar studies of other researchers. They note one study that suggests that, in dyadic conversation, the listener gazes about seventy-five percent of the time, while the speaker gazes about forty-one percent of the time.

205.   *See* IVEY & IVEY, *supra* note 182, at 43. However, the authors caution that some Native American and Latin groups may avoid eye contact, particularly when discussing serious subjects, and consider eye contact by the young to be a sign of disrespect.

206.   ANDERSEN, *supra* note 191, at 191(noting that "general gaze aversion communicates negative relational messages, including dissimilarity, superficiality, nonaffection, nonreceptivity, lack of trust, and nonimmediacy"); Bailey, *supra* note 201, at 122–23; Jenkins & Parra, *supra* note 192, at 92.

207.   *See* Kory Floyd, *To Match or Not to Match: Effects of Behavioral Congruence on Interpersonal Connectedness*, 139 J. SOCIAL PSYCH. 309–10 (1999).

208.   Psychotherapists suggest that two people who are experiencing rapport unconsciously mirror each other's body language, even making "complex hand movements together as if in a ballet." IVEY & IVEY, *supra* note 182, at 104.

209.   *See* Floyd, *supra* note 207, at 309–10.

completes a statement, the other might answer by a corresponding hand movement to take the conversational "ball."[210]

One recent study suggests that greater liking and desire for affiliation can develop even when one of the participants in a dyad has been instructed to deliberately "echo" the partner's movements or to exhibit a positive demeanor.[211] In other words, even when participants are, in a sense, "faking" a positive affect and congruent behavior, both participants in such dyads later revealed that they had a greater desire for affiliation than those dyadic pairings in which one participant consciously strove to exhibit incongruent behavior.[212] Moreover, in those dyadic pairings in which a participant "faked" a positive demeanor, both participants later reported a greater liking for the other participant than in those pairings in which a participant "faked" a negative demeanor.[213]

These studies have implications for professors in dyadic dialogue with their students.[214] They suggest that smiling, leaning forward towards the student, and maintaining eye contact are affect displays that help convey the professor's interest and regard for the student.[215] In fact, the controlled study of dyadic pairings suggests that such positive affect displays might actually foster greater liking and a greater desire for affiliation by both student and professor. In contrast, a professor with a non-smiling affect who maintains minimal eye contact and leans away from the student risks sending a subtle message that he or she is disinterested and detached.[216]

These studies also suggest that professors can encourage a student's desire for greater affiliation and collaboration by echoing a

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210.　*See* IVEY & IVEY, *supra* note 182, at 104.

211.　Floyd, *supra* note 207, at 317–19. In a controlled study, Floyd placed ninety-six unacquainted undergraduate students into forty-eight dyads. In certain dyads, one member of the dyad was asked to mirror his or her partner's posture, movements and seating position, while in other dyads one member was asked to maintain postures and movements distinctly different from the partner. The other member of each dyad was either told to exhibit a very positive demeanor during the conversation or a negative demeanor.

212.　*Id.*

213.　*Id.*

214.　Similarly, psychotherapists view the skills of recognizing and using nonverbal behavior as central to developing trust and rapport, irrespective of the theoretical approach used by the psychotherapist. *See* IVEY & IVEY, *supra* note 182, at 25–26.

215.　*See* MCANDREW & REIGSTAD, *supra* note 20, at 29. While emphasizing the importance of eye contact and a smiling affect, the authors observe that the teacher's "gestures are constantly assessed by the writer." Facing the student and maintaining eye contact during the initial phase of the conference is particularly important in a writing conference because it is virtually impossible to maintain significant eye contact while simultaneously reviewing a student's written work product.

216.　*See* IVEY & IVEY, *supra* note 182, at 37, 43.

student's kinetic behavior from time to time. Such parallel mannerisms might include crossing legs at the knee or the ankle, gesturing with the right hand at the same time, or resting both elbows on the table. Although these nonverbal affect displays are not likely to create rapport unless the professor also has a genuine interest in the student, they can help convey to the student the professor's regard and interest.

While communicating with students in dyadic dialogue, it is important that the professor attend to the student's affective behavior as well. For example, in some cultures, sustained eye contact is deemed inappropriate, especially when discussing serious topics.[217] Particularly shy students might well be intimidated by a professor's attempt to maintain sustained eye contact.[218] Students who are discomfited or intimidated by sustained eye contact signal their discomfort by lowering their gaze and declining to make eye contact.[219] As another example, a physical distance that might be comfortable for many North Americans might be uncomfortably close for an English student, or too distant for a student raised in a Latin or Middle Eastern culture.[220] Thus, the professor must be attuned to the student's affect when attempting to build rapport.

The physical arrangement of the professor's office is another form of nonverbal communication that can affect the working relationship between professor and student. A professor who faces students from behind a desk subtly reinforces the traditional hierarchy of control between student and law professor that is not conducive to building a collaborative working alliance.[221] Moreover, this structure makes it difficult for both student and professor to view and discuss the student's work product simultaneously. By taking a chair next to the student, the professor de-emphasizes the traditional hierarchical relationship and invites the student to explore a more collaborative one.[222]

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217.   *Id.*
218.   *See* ANDERSEN, *supra* note 191, at 167 (citing numerous studies suggesting that anxious people avoid eye contact).
219.   *Id.*
220.   *See* IVEY & IVEY, *supra* note 182, at 46.
221.   *See* HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 73; EUGENE KENNEDY & SARA C. CHARLES, ON BECOMING A COUNSELOR: A BASIC GUIDE FOR NONPROFESSIONAL COUNSELORS & OTHER HELPERS 91 (3d ed. 2001).
222.   Due to the logistical considerations of communicating with a student about a written work product, a professor might sit to the side of a student rather than face the student. However, when building rapport and trust with a student during the initial phase of the student conference, the professor might adjust his or her chair so that the professor

Theorists who study discourse and the psychotherapeutic process also emphasize the importance of active listening in dyadic discourse. Active listening not only reflects that the listener respects the speaker and is interested in greater affiliation, but is also a necessary precursor to the development of empathy.[223] Active listening refers to a set of communication skills that not only signal the listener is interested in hearing what the speaker has to communicate, but that also encourage the speaker to continue speaking.

The use of active listening to encourage student participation in dyadic dialogue has particular significance to the student conference because of the power imbalance in the relationship between professor and student. As critical discourse analysts suggest, most student-teacher dialogues are controlled by the professor, who is used to being cast in the role of expert imparting wisdom to the novice student.[224] Protocol studies of undergraduate student conferences reveal that, "in sheer volume, talk is distributed in a radically uneven manner, one which falls along the lines of status, generally reproducing in the conference the kind of teacher control that characterizes most classrooms."[225] The potential for true conversation between student and professor is further frustrated by the extreme deference most law students accord their law professors.[226] Many students are uncomfortable engaging in dyadic dialogue with a law professor, even to discuss the cognitive aspects of their learning experience. Unless encouraged to do so, most students are even more reluctant to risk revealing who they are to a professor.[227]

Although the professor, as expert, may control significant aspects of the critique itself, the initial phase of the conference, in which student and professor are developing rapport, presents an opportunity

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is directly facing the student rather than the desk or table.

223.   Empathy goes beyond merely understanding what another is experiencing to an ability to enter another's world as if the listener is himself experiencing it. IVEY & IVEY, *supra* note 182, at 186. A listener cannot achieve this level of understanding without being actively engaged in the listening process.

224.   *See* BLACK, *supra* note 30, at 39–53. As Black notes, even the writing conference itself is controlled by the professor, who assigns the writing projects and requests or requires students to come to the conference at scheduled times. Even during Socratic dialogue, when students are active participants in the discourse, the dialogue itself is controlled and manipulated by the professor.

225.   *Id.* at 42. This finding is not inconsistent with my own observations of videotapes of law school conferences.

226.   *See* Kissam, *Conferring with Students, supra* note 11, at 923.

227.   *See* BLACK, *supra* note 30, at 41. As Black notes: "There is a great deal at stake for a student: don't speak enough, speak at the wrong time, talk too much, and you can be negatively evaluated. Say the 'wrong thing,' and there is nowhere to hide."

for the professor to invite the student to dominate the discourse. Providing an environment in which the student experiences himself as an active participant in dyadic dialogue, one whose perspective is valued, encourages the student to relax into the state of "relaxed alertness" that is most conducive to learning.

Because students have had a lifelong exposure to teacher-dominated discourse, a shift in dominance of the dyadic dialogue is not likely to occur unless the professor consciously uses active listening skills to encourage students to participate in a true conversation. Active listening includes the use of open and closed questions, nonverbal and verbal "reinforcers," restatements, limited self-disclosure, and "reflection statements" that encourage students to express themselves.

Questions provide the framework for the conference and direct the student's discourse. In the rapport-building phase of the conference, open questions are the most effective means of shifting the power dynamics from a professor-dominated discourse to one dominated by the student. Open questions about the student's interests, professional goals and concerns give the student permission to talk freely and openly.[228] They also signal that the professor is interested in the student as a person.[229] For example, during the initial conference with a first-year law student, a professor might ask how the student is experiencing law school. After the professor has developed a relationship with a student, the professor might begin by asking an open question that reflects the professor's recollection of a prior meeting or conversation. Thus, the professor might ask: "Last time we met, you were feeling a bit anxious about this paper. How did it go this week?"

Like open questions, closed questions are also familiar terrain to attorneys and law professors. However, in the initial phase of a conference, closed questions should be used sparingly to clarify a student's response to an open question or to encourage a more complete response to an open question.[230] Closed questions can also be an effective means of conveying to students with whom the professor has an ongoing relationship that he or she remembers the student from prior conversations and the student's concerns. For example, a professor might ask the student: "Last time we met, we

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228. *See* BINDER, *supra* note 8, at 73; HERMAN, *supra* note 146, at 22–23 (advising this approach within the initial phase of the attorney-client interview).
229. *See* IVEY & IVEY, *supra* note 182, at 76–78.
230. *Id.*

talked about how you were feeling a bit anxious about this paper. We discussed how you might try drafting a more detailed outline to help you overcome writer's block. Did that help?" Finally, closed questions can be used to encourage dialogue from a particularly shy or introverted student who has difficulty responding to open questions. Giving such a student more structure from which to frame a response can encourage that student to express himself more fully.[231]

Steeped in a law school culture that idealizes law professors, some students do not find it easy to engage in a conversation with a law professor. Thus, the use of open questions and intermittent closed questions will not alone shift the power imbalance in student-teacher discourse. Research in critical discourse analysis suggests that listeners subtly give speakers permission to continue speaking by using verbal and nonverbal reinforcers that signal their continued interest in listening.[232] Common reinforcers include such verbal prompts as "Uh huh," "OK," or "Ummm," and such nonverbal reinforcers as the head nod, which serves as the equivalent of a verbal prompt.[233] Psychotherapists call these prompts "encouragers," because they encourage the speaker to continue talking.[234]

Critical discourse analysts contend that brief restatements are another form of signal that encourages speakers to continue speaking.[235] In a brief restatement, the listener influences the direction of the conversation by repeating a key word on which the listener would like the speaker to expand. For example, suppose a student states that she is dejected because of her failure to make progress on the paper, remarking that "every time I sit down at the computer, I keep getting stuck." By restating the phrase "getting stuck," the professor encourages the student to expand further on that topic. Thus, the professor might respond by asking: "Getting stuck?"

These communication skills can help a professor develop a supportive, collaborative relationship with the typical student. However, from time to time every professor faces students who appear at the office door in an obvious state of anxiety, fear, or distress. Many of us have likely questioned exactly what it is we should do under such circumstances. Law professors are not

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231. *Id.* at 81–82.
232. *See* Jenkins & Parra, *supra* note 192, at 92.
233. *Id.*; ANDERSEN, *supra* note 191, at 199, 201 (noting that nodding not only serves as a backchannel behavior, reinforcing the listener's response, but also conveys warmth, rapport and agreement).
234. *See* IVEY & IVEY, *supra* note 182, at 139.
235. *See* Jenkins & Parra, *supra* note 192, at 92.

psychotherapists; yet it is also clear that the student's state of distress would interfere with any productive cognitive exchange. An obviously distressed student is not likely to have the internal resources to will the feeling away and fully attend to a didactic dialogue about her paper. And, although such students might like to discuss their anxiety,[236] some students will not do so absent a specific invitation.[237] Immersed in a law school culture that does not value the expression of feelings, some law students would believe that a discussion of feelings would neither be appropriate nor welcomed.[238]

The psychotherapeutic field posits that efforts to ignore a student's distress or to talk the student out of the feeling only deepen the sense of distress and isolation.[239] Instead, encouraging the student to discuss openly what is troubling her can help the student shift into an emotional and cognitive state more conducive to learning.[240] "Reflection" statements are an effective means of inviting students to express uncomfortable feelings. In a reflection statement, the

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236. *See* BLACK, *supra* note 30, at 160. In an undergraduate setting, Black conducted a student survey in which she asked students to identify what they wanted to accomplish from conferences. One significant strand running through the responses was affective: "students are afraid, nervous, excited, or uncertain of themselves and want to talk about those feelings, want some reassurance." *Id.* They "ask that teachers acknowledge their feelings." *Id.*

237. Studies suggest that people are more likely to discuss their feelings when asked directly about them. *See* Clara E. Hill & Karen M. O'Brien, HELPING SKILLS: FACILITATING EXPLORATION, INSIGHT, AND ACTION 113 (1999), cited in IVEY & IVEY, *supra* note 182, at 76; K. Tamase, *Factors Which Influence the Response to Open and Closed Questions: Intimacy in Dyad and Listener's Self-Disclosure,* 24 JAPANESE J. COUNSELING SCIENCE 111–122 (1991).

238. This phenomenon has been noticed even in the undergraduate setting. After examining the dialogue between teacher and student in fourteen conferences, one expert concluded both students and teachers had difficulty talking about feelings. "When students did offer up their feelings as possible topics, teachers found it difficult to respond to them, to help students articulate or explore those feelings." BLACK, *supra* note 30, at 124. Black poses a provocative question:

> If students feel insecure, afraid, unable to make the adjustment we assume they will make and let those feelings out in conferences, what does it say to them when we ignore their concerns? . . . Imagine our anger and frustration if a department chair or a dean responded to fears, insecurity, concerns about teaching or tenure . . . by saying, 'Thanks for sharing. It was good to talk with you. You have to go now. Goodbye.'

Id. at 131.

239. *See* TEYBER, *supra* note 177, at 40–46.

240. *Id.* When I began teaching, I feared that if I encouraged students to express feelings of anxiety or depression, their emotionality might subsume the conference. However, my experience suggests that once students have had the opportunity to reveal what is troubling them, they relax and are then ready to discuss other issues that initially brought them to the conference.

professor would take a sentence stem from the student's statement and attach a feeling label to it.[241] For a reflection statement to reflect true empathy, rather than rote parroting, the professor should go beyond what the student actually said to capture the underlying meaning. In essence, the communication should reflect that the professor "understands the core message, registers the emotional meaning, or distills what is most important in the [student's] experience."[242] By capturing the central meaning of what the student has said, the professor demonstrates true understanding. The following example illustrates this technique.

Verbal Exchange	*Process Comments*
Student: Well, I just got my grade on my last paper. I worked so hard. I have never worked that hard on a paper before, and yet I got the worst grade I have ever received in my life.	*Student walks into the office looking discouraged and unhappy.*
Professor: You worked so hard, but your grade doesn't reflect it. Sounds like you're feeling pretty discouraged.	*Sentence Stem.* *Feeling Label.*

The use of limited self-disclosure is another means by which a professor can build rapport as well as help a student work through feelings of distress or anxiety.[243] This technique is particularly helpful for extremely shy students and for those students who are experiencing feelings of defeat. From a student's nonverbal or verbal responses to the professor's open questions, the professor can often begin to sense the source of the student's discomfort. If the professor has experienced something akin to that discomfort before, and can share a success about it, disclosing that story to the student can foster a sense of connection and help ease the student's anxiety. It is important, however, not to let a personal story detract from the student or the issues the student is facing; rather, effective self-

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241. *See* IVEY & IVEY, *supra* note 182, at 148–52.
242. TEYBER, *supra* note 177, at 42.
243. *See* IVEY & IVEY, *supra* note 182, at 335.

disclosures are honest and relatively brief.[244] After self-disclosing, the professor should allow the student time to respond and to share his thoughts or feelings. In the following example, the professor senses that a new first-year student is extremely anxious and intimidated by talking to the professor one-on-one.

Verbal Exchange	*Process Comments*
Professor: Hi. How are you doing?	*Open question.*
Student: Okay, I guess.	*Student has a nervous twitch and has difficulty making eye contact.*
Professor: Is law school turning out to be what you expected?	*Closed question designed to elicit a more verbal response.*
Student: I don't know. I guess.	*Student mumbles and looks at the floor; appears intimidated.*
Professor: I remember the first time I got called on in class, my hand was shaking so hard that the pen I was holding started rattling the paper on my desk. It was really obvious how nervous I was, and I was pretty embarrassed. The neat thing was that after class several students came up to me to commiserate, and I discovered that that was one of the bonding experiences of law school.	*Because nervousness appeared to be the source of the student's discomfort, the professor relays a personal experience of law school anxiety to help alleviate the student's anxiety and fear of the professor.*

B. Phase Two: Problem Overview

Prior to a scheduled writing conference in which the professor has already reviewed and critiqued the student's paper, the professor has already identified the most significant problems the paper reflects. However, the student also arrives at the conference with concerns and

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244.   *Id.*

questions about the paper. Within the unfolding conference, both the professor's and the student's concerns must be addressed and discussed. In this phase of the conference, the professor should first solicit from the student those concerns and questions that are troubling the student.[245] This intention should be communicated in advance to students so that they arrive with an agenda or with a self-edit to discuss. Following the student's assessment, the professor should then provide an overview of the issues the professor has identified as important to discuss.[246]

1. Importance of Student Role as Self-Editor

For a number of reasons, it is important for students to share their questions and concerns before the professor begins to convey the professor's diagnosis. Perhaps most importantly, this approach encourages students to begin to assume responsibility for critiquing their own work, a role they will be required to undertake following graduation.[247] The art of thoughtful critique is new for most students; undergraduate training simply has not prepared most students to review their writing critically and to continue to revise and edit their work until it is of professional quality. Therefore, the conference can provide an opportunity for students to begin to assume the role of a critical self-editor while, at the same time, allow the professor to provide expert support as students learn this new skill.[248] When a professor continues to assume this role with students throughout the academic term, they develop confidence as writers and critical editors; students begin to realize that mistakes and unrefined thinking are a

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245. *See* BLACK, *supra* note 30, at 42; HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 33; Durako, *supra* note 10, at 733 (describing a program that shifts the emphasis from a "traditional professor-centered conference, where the professor determines the agenda," to one in which students are required "to come to the conference prepared with questions and an agenda for the discussion").

246. Neumann, *supra* note 11, at 764 (noting that, "[f]or the student, it is a psychological imperative: without any sense of the teacher's ultimate judgment, a discussion of the performance can cause the student nearly unbearable anxiety, and the benefits of the discussion will be lost on the student.").

247. *See* CARNICELLI, *supra* note 30, at 109. Carnicelli argues that when students are allowed to initiate and lead the writing conferences, conferences "are an ideal way to promote self-sufficiency and self-learning in students." *See also* Neumann, *supra* note 11, at 765–66.

248. FREEDMAN & KATZ, *supra* note 26, at 61 (pointing out that the conference is a training ground for self-evaluative responses because students are learning to react to their own work); HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 22 (remarking that the writing conference "encourages writers to practice actually being critics, to hear themselves offering opinions").

component of every writer's drafts and that they are developing the capability of refining their thinking.[249]

Explicitly encouraging students to share in the responsibility of evaluating their work also strengthens their intrinsic motivation to excel because students are thereby more inclined to internalize their role as the ultimate owner of the work product. In contrast, when students perceive their role as passive, they tend to view the conference experience as one in which they must learn what the professor "wants," and what they must do to satisfy the professor's idiosyncrasies. This emphasis not only misleads students as to the pedagogical purpose of the conference,[250] but does not serve as an effective motivator.

Studies consistently show that learners who are intrinsically motivated devote more time and energy to a task than when they are working for extrinsic rewards.[251] Other studies indicate that low-hope people, who meet with significantly less success in achieving goals than high-hope people, tend to define themselves by such external motivators as social expectations rather than by internal motivators.[252] Such students' fear of failure impedes their efforts to succeed. Thus, encouraging students to share responsibility for critically evaluating their work not only motivates students but also helps sustain them when they face the inevitable challenges that are an integral part of the writing process.

Encouraging students to express their questions and concerns also reinforces the collaborative working alliance relationship.[253] When students seek a professor's guidance about their own questions and concerns, they are more inclined to view the professor as a resource and an ally rather than as an autocratic authority figure or mere

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249.   *See* CARNICELLI, *supra* note 30, at 102, 115.
250.   *See* Neumann, *supra* note 11, at 756–57.
251.   *See* Lowman, *supra* note 43; DAVIS, *supra* note 168.
252.   *See* SNYDER, THE PSYCHOLOGY OF HOPE, *supra* note 48, at 230.
253.   *See* Kearney & Beazley, *supra* note 2, at 896. The authors note that requiring students to draft a private memo outlining the questions they would like to discuss with the professor provides similar results. They observe that:

> Most teachers find that students who write private memos are receptive not only to feedback to private memo questions, but also to the teacher's other comments and criticisms. The student and teacher are allies in helping the student to formulate and express his or her thoughts. In this way, they become collaborators in the writing process.

Id.

　　　　See also TEYBER, *supra* note 177, at 36. Teyber notes that, within the therapeutic relationship, allowing the client to assume the lead role strengthens the client's view that the therapist is participating with the client as a supportive ally.

grade-giver.[254]

In addition, some of a student's concerns are likely to overlap with the professor's own concerns about the student's paper. Because students are more receptive to critiquing their own work when they have initiated the questions that inspire the critique, it is far more effective to discuss these issues in response to a student's question rather than forcing the student to defend his reasoning in response to the professor's critique.[255] Allowing students to express their concerns at the outset of the conference can also clarify the genesis of certain drafting errors the professor has previously diagnosed and allow the professor to provide an appropriate response without having to ask students to explain or justify their ineffective decisions.[256]

There are also several practical reasons why the student should begin the diagnostic dialogue. Because of the inherent hierarchical nature of the student-teacher relationship, many students find it difficult to disrupt a professor's narrative, in part because they have had little experience in significantly reshaping academic discourse.[257] Moreover, after struggling with a paper, students often have pressing questions and concerns they would like to discuss. If a student has a concern that is not being addressed because the professor elects first to pursue another line of inquiry, the student is less likely to be fully

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254.   *See* CARNICELLI, *supra* note 30, at 115; TEYBER, *supra* note 177, at 99. Teyber makes some interesting observations that can be analogized to the teacher-student relationship in a law school setting. He notes that because the client-therapist relationship is inherently hierarchical in nature, most clients believe that the therapist really wants them to follow the therapist's lead, even when the therapist specifically expresses a desire to enter into a collaborative relationship. He notes that clients who passively seek direction from a therapist will eventually experience feelings of anger towards the therapist, although most will not even be aware of it. He concludes that such an interpersonal process prevents clients from fully utilizing the therapist's help or from making progress. The analogy is also apt in the law school setting. Students who assume responsibility for their own learning not only make more progress but also become more engaged and motivated during the writing process.

255.   *See* RICHARD K. NEUMANN, TEACHER'S MANUAL, LEGAL REASONING & LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 222–23 (4th ed. 2001) [hereinafter NEUMANN, TEACHER'S MANUAL] (observing that, rather than a "coldly delivered diagnosis, a more effective approach is to ask the student to help develop the agenda," thereby minimizing the potential for confrontation).

256.   For example, suppose a student failed to disclose an important adverse case in an office memorandum. The professor might tentatively diagnosis the problem as either being a research problem or an analytical problem. However, if during the conference the student voiced a concern about how to handle the case because it was adverse, the dialogue would inform the teacher that the student has neither a research nor an analytical problem but, rather, a misunderstanding as to the type of information a senior attorney would want to review in an office memo.

257.   *See* BLACK, *supra* note 30, at 141.

attentive to that dialogue. "We cannot proceed in one direction when the student is only waiting for a lull in order to turn the conversation down a different path. Our success in achieving our goals is likely to increase in direct proportion to our ability to recognize the student's goals."[258]

2. Importance of Professor Exercising Judgment as to Topics to be Critiqued

Although there are valid reasons for expressly inviting students to cultivate their role as critical self-editor during the conference, there are times when the professor should not agree to discuss the issues that are troubling a student. Because students are novice thinkers, writers, and editors they sometimes become caught up with insignificant issues and fail to appreciate the far more significant problems reflected in their work. For example, a student who is concerned with such final phase editing issues as sentence structure and word choice would not be well-served by discussing such issues when the paper reflects significant analytical or large-scale organizational problems more typical of an early draft. A detailed exploration of the issues with which the student is concerned would obscure the more significant problems requiring the student's attention.[259] Under these circumstances, the professor should acknowledge the student's concerns as valid, but then make explicit why such a discussion would not be productive at that time. For example, the professor might state:

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258. HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 33.

259. *See* CARNICELLI, *supra* note 30, at 105; Berger, *supra* note 2, at 78; Blasi, *supra* note 9, at 343; Enquist, *Critiquing and Evaluating, supra* note 10, at 1130–32; Kearney & Beazley, *supra* note 2, at 892–93.

Professor: You know I appreciate your concern about sentence structure and word choice; this is something that all writers face when editing their work. However, there are some larger-scale issues that really should be considered first. Ultimately, focusing our attention on the large-scale issues first will save you time in the end. Imagine spending an hour reconstructing the sentences in a paragraph that you might ultimately decide does not belong in the paper at all. So I am going to ask you to table your concerns about sentence structure and writing style for the time being so that we can more effectively focus on some larger-scale issues. After you have had an opportunity to consider how these larger-scale issues might be incorporated into your paper, and have redrafted your paper into a more final version, that would be an ideal time to discuss the fine-tuning points with which you are appropriately concerned.

3. The Process

During this phase of the conference, it is important to make conscious and deliberate the goal of actively listening to students as they share their concerns and questions.[260] When listening, it is helpful to shift one's internal perspective from "I understand" to "help me understand."[261] As professors, we often mistakenly assume we know what our students are attempting to convey.[262] However, from the perspective of "help me understand," the professor naturally asks questions, listens for, and acknowledges the meaning underlying the spoken word, and paraphrases to make sure that he or she truly understands.[263] This process is deceptively challenging, because it

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260. *See* Lustbader, *Teach in Context, supra* note 9, at 416 (arguing that listening to students establishes a better learning environment).

261. DOUGLAS STONE ET AL., DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST 167 (Harvard Negotiation Project ed., 1999).

262. *See* CARNICELLI, *supra* note 30, at 118. Carnicelli observes that failing to listen is one of the easiest, and most harmful, mistakes to make in a conference. He excerpts the following student evaluation, which reflects that the teacher was more intent on formulating her own ideas than she was on listening to the student: "In conferences, which are so important, she doesn't seem to always concentrate on you. She seems rather to be thinking of her next question instead of listening to the student comment about the writing."

263. STONE, *supra* note 261, at 167. This approach is used both by psychotherapists and by legal educators who train law students to become attorneys. *See, e.g.,* BASTRESS & HARBAUGH, *supra* note 8, at 19–57; BINDER, *supra* note 8, at 88-97 (advocating the

requires the professor to give up some control over the direction of the conference and over the timing with which some issues might be discussed.[264]

To begin this phase of the conference within the context of an unscheduled conference, the professor might ask a simple open question, such as: "What's on your mind?" or "What brings you here today?" Within the context of a scheduled conference to discuss a draft of a paper, the professor might ask: "With this paper, what are you happy about, and what concerns or reservations do you have?"[265] This type of inquiry communicates to the student that the professor is open and willing to listen, and also conveys that the student's concerns are important to the professor. This type of question also signals that the dialogue will be collaborative rather than professor-dominated.

The professor can strengthen the collaborative working alliance by making the alliance explicit.[266] For example, assuming the student has appropriately identified and defined several valid issues that are troubling her, the professor might respond by stating: "You've raised some excellent questions and are really developing your skills as a critical self-editor. Nice job. I also have a couple of additional concerns I would like to share with you that I see as impeding your ability to get your message across. Let me summarize for you these thoughts so that we can then work together to find solutions to the issues that you and I have identified."

C. Phase Three: Problem-Resolution

1. Effective Teaching Practices

The field of cognitive psychology offers an extensive body of scholarship that can inform our understanding of effective teaching practices within a conference setting. Specifically, cognitive

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attorney's use of such fundamental counseling skills as active listening, open-ended questions and summarization to identify the issues and problems as the client sees them); IVEY & IVEY, *supra* note 182, at 194 (discussing the importance of the active listening sequence to identifying the client's issues within the therapeutic relationship).

264. *See* TEYBER, *supra* note 177, at 46 (making a similar assessment within the context of the therapeutic relationship).

265. *See* NEUMANN, TEACHER'S MANUAL, *supra* note 255, at 223 (advocating a similar style of questioning); MCANDREW & REIGSTAD, *supra* note 20, at 103. The authors quote Donald M. Murray, the "apostle of conferencing," as suggesting a similar style of questioning. Donald Murray states that "these rather open-ended questions force them to make a commitment before I do." *Id.*

266. *See* TEYBER, *supra* note 177, at 36.

psychologists posit that human beings need schemata, or interpretive mental frameworks, in order to integrate and process new information and to think creatively and predictively.[267] Because novices' schemata are undeveloped, they often have difficulty bridging the gap between understanding the process of legal reasoning and writing in *theory* and actually *applying* their theoretical understanding to a concrete writing assignment.[268] Such students have not developed schemata that would help them recognize how concepts and constructs addressed in class or in their textbook relate to the specific thinking and drafting problems they are experiencing within the context of a specific legal problem.[269]

In the student conference, the professor can help students develop and strengthen schemata that would help bridge that gap by making explicit the link between problems that appear in the students' writing and the concepts that are discussed in the students' textbook and in class.[270] When linking specific problems and solutions to general concepts, the professor should adopt the language used in the textbook and in class.[271] Just as attorneys assign specific language with legal significance, so, too, do learners. Using the same language in different contexts helps students more easily adapt schemata from the textbook to identify problems in their writing and to discover solutions. Moreover, using the same language helps students more easily identify the "chunk" of information to which the thinking or

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267.   *See* Blasi, *supra* note 9, at 337 (positing that "[i]nformation is understood, or an interpretation of it is developed, if it can be matched to a schema or a configuration of schemata."); Friedland, *supra* note 9, at 6; Saunders & Levine, *supra* note 1, at 141.

268.   Cognitive scientists suggest that, although novices can learn and recall rules, terms, and structures, their schemata are insufficiently developed to help them transfer and apply this knowledge to a concrete setting. Saunders & Levine, *supra* note 1, at 141.

269.   Cognitive scientists posit that "[r]outine problem solving consists of three processes: selecting a schema, adapting (instantiating) it to the problem, and executing its solution procedure." Blasi, *supra* note 9, at 338. A novice who is still developing a schema with which to process information may not be capable of adapting it to a specific problem. *See* Lustbader, *Construction Sites, supra* note 9, at 338; Mitchell, *supra* note 9, at 283; Saunders & Levine, *supra* note 1, at 141. *See also* Harris, *Talking in the Middle, supra* note 36, at 36. Harris describes the problem as one in which students lack the "metaknowledge" or "metalanguage" to bridge the gap between theory and the composition process.

270.   This approach has also been advocated with respect to the professor's written comments on papers. *See* Enquist, *Critiquing and Evaluating, supra* note 10, at 1141. Enquist notes that using explicit "links between a student's paper and all the other components of the course—textbooks, class discussions, individual conferences—helps students make connections and see how to apply what they are learning in their own writing."

271.   By adopting the same language used in the textbook, students can immediately associate the problem with a concept the class has been studying. For example, using the term "thesis paragraph" or "rule explanation" or "rule application" helps the student fit new information into a pre-existing schema.

writing problem applies, thereby increasing the potential for students to retain that information in long-term memory.[272]

The professor can also help students develop and strengthen schemata by using sample legal documents as heuristic devices.[273] For example, common legal documents illustrated in legal writing textbooks can be used as templates to help students structure their own legal analysis.[274] And, because novices do not recognize underlying patterns of logic that are clear to experts,[275] the professor can help students move beyond the novice's superficial understanding of sample documents by discussing with them the underlying analysis, logic, and choices that influenced the drafting decisions in such documents.[276] A deeper appreciation of the underlying logic and reasoning in such documents allows students to make more reflective and thoughtful drafting decisions in their own writing.

As an example, suppose a student's analysis was difficult to

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272. Because learners can realistically absorb no more than about five to seven "chunks" of information at a time, linking specific problems and solutions to larger "chunks" of understanding makes it easier for students to retain the new information. *See* Blasi, *supra* note 9, at 343.

273. For certain types of learners, this type of heuristic device is essential. Hess, *supra* note 9, at 955–56. Hess asked students to identify teaching techniques that both "interfered" with their ability to learn and that "enhanced" their learning. After evaluating student responses, Hess notes that "[l]earning is especially difficult when the teacher fails to place individual concepts in the overall structure in which they belong." *Id.* He cites a student comment as an example:

> [T]hey don't set out a framework so that people who learn like I do from looking at the big picture of things and seeing, this is where we are and this is where we're going to go and this is where this information or this concept fits in . . . . I need a map and if you don't give me the map I don't know where we're going . . . . [W]hen professors just throw things at you without any type of interconnection then you just go . . . "where's that going to fit in?"

Id.

274. *See* Fajans & Falk, *supra* note 10, at 358–62 (discussing the traditional structure of a law review article and comparative paradigms within that structure); Beazley, *supra* note 10, at 179.

275. *See* Blasi, *supra* note 9, at 318.

276. When novices only have a superficial understanding of sample documents, their undeveloped schemata cause them to mimic those characteristics of the sample documents they recognize, even when those characteristics would not be appropriate within the context of their writing problem.

> [N]ovices simply lack sufficient knowledge to build very complex situation models in the first place. Metaphorically, having fewer schematic building blocks to work with, the novice quickly finishes construction of a simple situation model, while the expert struggles to construct a much more complex edifice. Obviously, one need not attend to details of which one knows nothing. A novice writes fiction as fast as her hand will move; the expert writer struggles more slowly over issues of structure, theme, and motivation.

Blasi, *supra* note 9, at 345; *see also* Lustbader, *Construction Sites, supra* note 9, at 343–44.

comprehend because each paragraph followed an inductive rather than a deductive writing pattern.[277] Thus, the premise, or thesis, of each paragraph did not lead the paragraph but was instead buried somewhere towards the end of the paragraph.[278] A student would not learn anything of value simply by being told repeatedly that various paragraphs were unclear because specific sentences within each paragraph might be more appropriate as thesis sentences. Without a schema, or mental construct, to process *why* the paragraphs were unclear, the student would be ill-equipped later to re-evaluate any paragraphs other than those discussed in the conference.[279] The following illustration reflects how a professor might help the student strengthen a drafting schema.

Verbal Exchange	*Process Comments*
Student: I can see how these paragraphs are confusing, but I don't know how to fix the problem.	
Professor: Well, as I review your paragraphs, what I see is your thinking process. Let's look at this particular paragraph—it begins by describing various facts and comparing them to the *Morina* case. And then the paragraph	*The professor helps the student understand the cause of the drafting problem.* *Focusing the student on a specific paragraph to review and consider.*

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277. Inductive writing begins with specific details and builds towards a broad conclusion. In contrast, deductive writing begins with a broad conclusion and then illustrates with specific details why that conclusion is sound. *See* ROBIN S. WELLFORD, LEGAL REASONING, WRITING & PERSUASIVE ARGUMENT 128–30 (2002).

278. This problem is fairly typical of novice writers because the inductive reasoning process, leading from specific information to a general premise, is how we reason during the pre-drafting stages of legal analysis. The drafting process requires that the writer reverse the inductive thinking process into a deductive drafting pattern, flowing from a general premise or thesis, to specific ideas that illustrate the premise. *See id.* at 128.

279. *See* Kearney & Beazley, *supra* note 2, at 901–02. Kearney and Beazley note:
> Teachers who dictate specific revisions may believe that their students are learning how to revise their writing because these teachers receive "good" second drafts from their students. In creating these second drafts, however, the students do not take responsibility for their own revisions; they merely manufacture the teacher's dictated revision.

Id.

builds to the conclusion you drew from thinking about those facts. Do you see that? *Student:* Yes, yes, that's exactly what I did. *Professor:* Well, it might help to know that what you have done is logical—you drafted the analysis in the same way you thought about it. We reason by considering specific ideas and then drawing a broad conclusion from those ideas. However, the drafting process requires writers to flip-flop their thinking; instead of building from specific ideas to a broad conclusion, like we do when we think, the writer has to reverse the process, beginning with a broad conclusion, or premise, and then proving why the premise is sound by parading out all of the details that serve as evidence. Does that make sense to you? *Student:* Okay, okay, I think I get it. So writers start with broad premises and then prove them with details. *Professor:* Yes. That's exactly it. That's called the "deductive writing pattern," because writers follow a deductive pattern, beginning with a broad premise, and then proving it. I think it might be valuable to	 *Reinforcing to student that this is a common problem that has a logical basis.* *Helping student become more aware of the reasoning process, and then clarifying the steps a writer must take to transition from thinking to drafting.* *Reinforcing terminology used in the textbook to describe the writing process.*

you to see what this writing pattern looks like within an office memo. So let's take a look at Sample Memo A in the appendix and look specifically at what the deductive writing pattern actually looks like in a rule application paragraph, which is where you are having some difficulty.	*Using a sample legal document as a heuristic device.* *Reinforcing textbook terminology by using the language "rule application."*
As student and professor look at the example in the textbook: Here, with this specific paragraph, can you identify the premise of the paragraph? *Student:* Yes, it's in the first sentence.	*Rather than giving the student additional information, the professor engages the student by asking him to identify the components of the paragraph.*
Professor: Yes, good, the thesis sentence. Now take a look at the remainder of the paragraph	*Professor gives praise and then reinforces the idea of the "thesis sentence" by rephrasing student's language.* *Student and professor continue to evaluate the paragraph and how the body of the paragraph proves the premise set forth in the thesis sentence.*
Professor: Let's take a look at how this would relate to your paper. (*Turning back to the student's paper.*) This paragraph here, can you identify the premise of this paragraph?	*After student has had an opportunity to identify the drafting pattern within a sample document, the professor asks the student to apply the same skill to the student's own paper.*

Student: Yes, it's down here towards the end of the paragraph. Oh, I get it; so I would move that sentence up and make it a thesis sentence, right? *Professor:* Yes, that's exactly what you would do	

When working with students to resolve the thinking and writing problems that appear in their writing, it is also useful for the professor to adopt the perspective of the intended reader. Adopting the perspective of the intended reader reinforces the collaborative relationship between student and professor, emphasizing that the purpose of the conference is not to satisfy the professor's hyper-critical idiosyncrasies but to empower the student to be a more effective legal thinker and writer.[280]

As importantly, by adopting the perspective of the intended reader, the professor provides students with a rhetorical context that can enhance the quality of their thinking and writing.[281] To produce a legal document of professional quality, students must understand the attributes of the target audience as well as the document's intended purpose. Because "[n]either of these requirements is likely to be intuitively obvious to the novice legal writer,"[282] the professor can help students begin to appreciate the intended reader's expectations and better understand why they have failed to satisfy the expectations of that reader.[283] Thus, while commenting on an undeveloped argument,

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280.   *See* Neumann, *supra* note 11, at 768 (noting that "[s]tudents begin resisting when a teacher talks about personal preferences ('I don't like . . . .')"). Adopting the perspective of the intended reader also encourages students to internalize their role as the ultimate owner of their work product, subtly strengthening their intrinsic motivation to excel. *See* Lowman, *supra* note 43, at 136–39; Davis, *supra* note 168, at 195–96.

281.   Some cognitive learning theorists suggest that the quality of one's thinking depends as much on the learner's familiarity with the domain, or context, as it is with the quality of the learner's thinking in a generic sense. *See* Friedland, *supra* note 9, at 6 (discussing the differences between domain-specific thinking and generic-thinking); *see also* Lustbader, *Teach in Context, supra* note 9, at 409 (arguing that students need explicit context in order to understand fully their thinking and writing process).

282.   Parker, *supra* note 2, at 581.

283.   *See* Kearney & Beazley, *supra* note 2, at 900–01. Kearney and Beazley note that, by commenting on student writing, teachers "dramatize the presence of a reader." They

rather than stating that "you did not fully develop this argument," the professor might instead let the student recognize how she has failed to satisfy the reader's expectations by failing to develop the argument.[284]

Literature and studies from the fields of cognitive psychology[285] and composition theory[286] also suggest that professors not simply discuss the weaknesses in students' writing but also note where students have succeeded.[287] Because the process of writing can be discouraging, frustrating, and sometimes defeating,[288] students need praise and encouragement to help them develop the will to continue striving to refine and polish the initially awkward and confusing written embodiment of their ideas.[289] Although false praise for inferior work is not effective,[290] a professor can always find something of value in a student's paper, even if it is only within the germ of a valid idea that might not be effectively communicated.

Recognizing where a student has succeeded also serves an

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suggest that, "[w]ithout comments from readers, students assume that their writing has communicated their meaning and perceive no need for revising the substance of their text." *Id.*

284.   This technique is illustrated *infra* Part III.C.2.

285.   *See* Snyder, *Hope Theory, supra* note 45, at 133 (describing studies finding that higher hope predicts better undergraduate semester grades and higher cumulative grades, even when the influence of ACT scores was statistically controlled); SNYDER, THE PSYCHOLOGY OF HOPE, *supra* note 48, at 6.

286.   *See* CARNICELLI, *supra* note 30, at 113 (observing that "writing is an area where encouragement is particularly necessary").

287.   *See* Fines, *supra* note 9, at 116–17. Fines argues that "[a]ppropriate feedback means positive reinforcement for successful work and judicious criticism for mistakes. To communicate high expectations, teachers should publicly and privately call attention to excellent student work as well as to work that reflects a very good effort to achieve a high standard." She concludes that "this positive feedback is powerful and meaningful." *Id.*

288.   "When a student leaves a conference feeling that the writing was pure failure, the student will believe that improvement is so unlikely that it is not worth looking for." NEUMANN, TEACHER'S MANUAL, *supra* note 255, at 227.

289.   Genuine praise is an important means of helping students strengthen the agency component of hopeful thinking. As Part II *supra* discusses in greater detail, there is a significant correlation between scholastic performance and the strength of underlying hopeful goal-directed thoughts. The agency component of hopeful thinking "is made up of thoughts such as 'I can,' 'I'll try,' 'I'm ready to do this,' and 'I've got what it takes.'" SNYDER, THE PSYCHOLOGY OF HOPE, *supra* note 48, at 6. By encouraging students to identify where they have succeeded, the professor helps students strengthen the agency component of hopeful thinking. Recognizing where they have succeeded, students begin to develop a belief that they "have what it takes" to succeed. *See also* DAVIS, *supra* note 168, at 193 (advocating the use of frequent and early positive feedback to support "students' beliefs that they can do well").

290.   "Writers, like other human beings, see through false praise—but writers are particularly sensitive and suspicious when tutors give them a steady stream of positive comments about their work. Writers need honest feedback, not empty flattery." MCANDREW & REIGSTAD, *supra* note 20, at 17.

important motivational role. Although both negative and positive feedback can motivate students, positive feedback is a more potent motivator for low-hope students, who also tend to have significant anxiety when striving to achieve goals.[291] Positive feedback helps build self-confidence and self-esteem,[292] characteristics of hopeful people, who perform better and attain higher goals than low-hope people.[293] Moreover, as discussed in Part V *supra* in greater detail, a singular focus on negative feedback can impede learning for students who are already experiencing moderate degrees of stress. Undue emphasis on negative feedback can itself generate an unhealthy degree of anxiety, inhibiting such students' ability to perform "complex intellectual, problem solving, achievement and learning activities."[294] However, even students who are experiencing only mild to moderate levels of anxiety benefit from praise. Students benefit from identifying where they are succeeding just as they benefit from recognizing where they are failing.[295]

Finally, praise can alter the professor's perception of the student's writing as well, indirectly enhancing student performance. As professors, we may find it all too easy to focus on the myriad of reasons why a student's writing has not succeeded and to overlook the areas in which the student has succeeded.[296] This intense focus on

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291. *See* SNYDER, THE PSYCHOLOGY OF HOPE, *supra* note 48, at 247. Snyder cites a number of studies that support the hypothesis that low-hope people are more anxious. He notes that "part of the debilitating effect of anxiety is that it is fueled by doubts about one's ability to respond adequately to given goal pursuits. Relatedly, low-hope people concentrate more on potential failure than success, which is similar to the thoughts of highly anxious people." *Id.* (internal citations omitted); *see also* Snyder, *Hope Theory*, *supra* note 45, at 132.

292. *See* Hess, *supra* note 9, at 950. After evaluating student survey responses that identified how professors might better encourage students to participate in their own education, Hess concludes that "teachers should create a safe learning environment by using positive reinforcement when students participate appropriately;" *see also* DAVIS, *supra* note 168, at 198, citing A.F. Lucas, *Using Psychological Models to Understand Student Motivation*, *in* THE CHANGING FACE OF COLLEGE TEACHING, 42 NEW DIRECTIONS FOR TEACHING AND LEARNING (M.D. Svinicki ed., 1990); W.E. Cashin, *Motivating Students*, Idea Paper, no. 1 (Center for Faculty Eval. and Development in Higher Educ. ed., 1979).

293. *See* Snyder, *Hope Theory*, *supra* note 45, at 132–33. The qualities of high-hope people are more fully discussed in Part II *supra*.

294. CAINE & CAINE, *supra* note 113, at 76 (citing to studies that revealed these behavioral and cognitive characteristics of anxious people); Fuchs & Fuchs, *supra* note 119, at 256.

295. *See* Neumann, *supra* note 11, at 768.

296. *See* David D. Walter, *Student Evaluations – A Tool for Advancing Law Teacher Professionalism and Respect for Students*, 6 LEG. WRITING: J. LEGAL WRITING INST. 177, 215 (2000). Walter's review of student evaluations illustrates this problem. In their

areas of weakness can negatively affect a professor's expectations of students' capabilities. Empirical studies suggest that a teacher's expectations of how well students will perform are self-fulfilling to a significant extent.[297] Making praise a conscious and deliberate part of the critique can subtly heighten the professor's expectations of a student's potential, indirectly enhancing the student's ultimate performance.

2. Addressing Student Questions and Writing Problems

As the professor considers how best to help students resolve the problems reflected in their papers, the professor should approach this phase of the conference as a form of triage.[298] Time constraints usually do not permit a thorough explanation of every issue and problem presented by each paper, nor would such thoroughness be effective. The delivery of too much information,[299] or the delivery of information beyond the present capabilities of the student,[300] would obscure the more important issues with which the student must contend.

Because both student and professor actively participate in this phase of the conference, discussion topics will be generated by both student and professor. With respect to professor-generated concerns, it is important that the professor avoid the temptation to leap to premature conclusions as to why a student made ineffective drafting decisions and to begin the discussion from the professor's speculative reference point.[301] Instead, effective dialogue can begin only when the

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evaluations, students conveyed their discouragement when professors focused only on what was wrong with their writing. Students complained that "[f]eedback was depressing, knowing that no matter how good you did, it was going to get butchered;" and "a little human compassion for extreme circumstances would be appropriate." *Id.* In contrast, the evaluations of students who were gratified by their professors' feedback contained an implicit recognition that such professors were able to recognize what was good in their writing as well as what was wrong with it. For example, students commented: "Very good ability to make constructive comments and still make the writer feel good about what has been written;" and "My other classes left me scared to death to write and confused about how to do legal analysis. Finally, I feel confident and knowledgeable on legal writing." *Id.*

297.   *See* GROTH-MARNAT, *supra* note 122, at 48; SNYDER, THE PSYCHOLOGY OF HOPE, *supra* note 48, at 271; Fines, *supra* note 9, at 96.

298.   *See* Neumann, *supra* note 11, at 736.

299.   *See* Blasi, *supra* note 9, at 343.

300.   *See* Enquist, *Critiquing and Evaluating*, *supra* note 10, at 1130-32.

301.   *See* Neumann, *supra* note 11, at 737, n.42. Neumann observes that "the teacher often does not know the student's purpose, analysis, or strategy—or even all of the underlying truths toward which the critique is headed." *Id.* He contends

> [i]t takes confidence and good will to say, "I don't understand so-and-
> so," rather than, belligerently, "So-and-so makes no sense." . . . . The

professor has identified the true genesis of the problem.[302] By listening to the student, the professor can begin to identify whether the problem is a thinking problem or a communication problem, and where in the process the student has been led astray.[303]

With respect to both student- and professor-generated concerns, the professor must identify those questions and concerns that can be treated more summarily and those concerns that would benefit from a more thorough exploration.[304] Some drafting problems identified by the student or professor reflect a failure to understand rhetorical context, legal practices, or trial procedures. As to these concerns, the professor can simply provide the necessary information without extended dialogue or inquiry.[305] Socratic dialogue under these circumstances would be ineffectual, as the student would not have the knowledge base to respond to such questions.[306]

Other areas of inquiry might concern the student's poor execution of technical skills that impede clarity or persuasive appeal, such as the use of confusing syntax, ineffective persuasive writing style, or confusing organization of ideas within a paragraph. As to these issues, the professor might point out the problem generally and then work with the student on a sentence or paragraph that reflects such technical problems. With respect to a select few sentences, the professor might ask questions designed to help the student recognize the existence of such technical problems and to develop skills to correct such problems. The professor would then suggest that, following the conference, the student apply the same skills to the remainder of the paper.

Many student papers also reflect ineffective or faulty decision-making. Because students are novice legal thinkers, they often make ineffective decisions, either because they do not grasp all of the relevant factors that must be considered when making such decisions

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> wise admit their puzzlement ... and when the problem material is explained they either laugh at themselves for failing to see it or they explain why they couldn't reasonably be expected to understand, thus enabling the author to see why he didn't get his point across.

Id. (quoting JOHN GARDNER, ON BECOMING A NOVELIST 81 (1983)).

302. *See* Neumann, *supra* note 11, at 735.
303. *See* Lustbader, *Teach in Context, supra* note 9, at 416.
304. Neumann, *supra* note 11, at 736.
305. *See id.*
306. Moreover, Socratic dialogue designed only to illustrate what the student does not know creates an adversarial relationship between student and teacher, causing many students to withdraw from active participation in further dialogue. *See* Hess, *supra* note 9, at 947.

or because they lose sight of how a specific decision affects the larger scheme.[307] For example, a student might have elected not to disclose a potentially adverse case in a persuasive argument when a better solution would have been to include that case in the argument and distinguish it on factual grounds. Rather than deprive the student of the experience of making the decision by telling the student what to do, the professor can instead inform the student of the relevant ethical and pragmatic considerations experienced advocates weigh when making such a decision. After describing the relevant factors effective attorneys would consider, the professor can invite the student to weigh such factors within the context of the student's legal problem.[308]

Other student papers reflect a fundamental failure to grasp the purpose of the assignment. These students have somehow failed to bridge the gap between a theoretical understanding of the law and the specific purpose of the assignment. For example, in a persuasive argument, the ultimate purpose is to persuade the reader of the soundness of the writer's interpretation of the law. Rather than persuading the reader, these students' drafts often resemble a disorganized collection of ideas that do not build on any perceivable premise or lead to any discernable conclusion. Such students have not learned how to apply the structural schema of a persuasive argument to the specific assignment with which they are struggling.

Such issues merit extended dialogue in which the professor can help such a student develop a schema for drafting a legal discussion or argument. The didactic dialogue is often more successful when the student can avoid the distraction of the paper by turning it face-down on the desk.[309] The rambling nature of the prose itself can prove to be distracting to a student combing through the paper in a futile effort to piece together an effective argument or analysis.

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307.   *See* Blasi, *supra* note 9, at 331. Blasi notes that experts have "a superior ability to consider the 'global' effects of potential 'local' decisions as their consequences are carried forward through time and in interconnection with other decisions." *Id.* Novices, in contrast, often cannot perceive the global effects of individual decisions. *Id.* Should a student fail to consider the more global consequences of a specific decision, the professor can use Socratic inquiry to help the student comprehend the global consequences and make a wiser decision based on that understanding. *See* Neumann, *supra* note 11, at 735.

308.   *See* Neumann, *supra* note 11, at 767.

309.   *See* Freedman & Katz, *supra* note 26, at 58. The authors cite studies suggesting "that the continual rereading or rescanning of basic writers seems to inhibit evaluations of anything but the current grammatical, mechanical, or lexical problems." They cite a study in which graduate students were invited to discuss their papers without reviewing the text itself. That study concluded that that the "absence of visual feedback from the text they were producing actually sharpened [the students'] concentration ... enhanced their fluency, and yielded texts that were more rather than less cohesive." *Id.*

To help a student develop a schema for a persuasive argument or other analytical construct, the professor's questions should parallel the manner in which an expert would construct the argument or analysis. Thus, because a persuasive argument begins by identifying a desired conclusion, the professor should initially ask the student to clarify the ultimate conclusion she would like to prove. For example, the professor might ask, "I'm the judge. How do you want me to rule for your client?" The professor would then help the student begin to build the argument by next asking the student how she is going to convince the professor, as judge, to adopt that conclusion. When the student identifies a premise that leads to the desired conclusion, the professor would next ask the student to provide evidence that illustrates why that premise is sound. With each question building on the previous question, the professor thus helps the student develop and prove each prong of the argument that would convince a judge to adopt the desired conclusion.

Finally, student papers commonly reflect inadequately developed or faulty legal analysis. These areas are important enough to merit extended didactic dialogue or Socratic inquiry as a means of helping students develop and clarify their thinking.[310] Here, the professor's role should be to facilitate the student's ability to resolve the questions rather than simply to give the student the answers.[311]

When a student has failed to develop the analysis sufficiently, the professor can help the student develop the analysis by giving the student a clearer appreciation of the questions that would occur to the intended reader upon reading the analysis.[312] For example, suppose a student has attempted to construct an argument that the client was justified in killing another person, but the argument is conclusory and not fully developed. The following dialogue illustrates how a professor might work with such a student.

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310. Merely providing the student with the teacher's response would deprive the student of the experience of learning how to evaluate the law. *See* Neumann, *supra* note 11, at 727, 767–68; Kearney & Beazley, *supra* note 2, at 890.

311. When a "critique consists solely of pointing out all the student's errors and telling the student how to do the job in a way the teacher considers 'right,' it leads to empty mimicry, rather than mastery." Neumann, *supra* note 11, at 727. *See also* Becker, *supra* note 61, at 478–79 (noting that "immediate answers teach students where to go for solutions, but not how to solve problems for themselves"); Mitchell M. Simon et al., *Herding Cats: Improving Law School Teaching*, 49 J. LEGAL EDUC. 256, 266 (1999) (concluding that "that students learn little when you tell them" but "[t]hey learn a lot when they are challenged by a good question").

312. *See* HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 112.

Verbal Dialogue	*Process Comments*
Professor: As a reader, or a senior attorney reading this analysis, I'm not sure I know what you mean here. You state that the client feared for his life, but I don't understand how or why he feared for his life. What facts support this conclusion?	*Explicitly assuming the role of the intended reader.* *Helping the student understand the questions that would occur to the intended reader and helping the student develop the analysis.*
Student: Oh, I see where you're going. The decedent threatened him.	
Professor: Okay. I am beginning to get the picture. But there are many ways to threaten someone. Now I'm wondering how he threatened him. Did he threaten him verbally, or was the threat implied from his physical actions?	*Because the student is still failing to develop the argument, the professor again helps the student recognize the intended reader's bewilderment, and asks another question that encourages the student to develop the argument.*
Student: Oh, I guess I just assumed . . . Okay, he said that he would kill him.	
Professor: Good, now you're beginning to provide the kind of details a senior attorney, or judge, would be looking for. But you can give this even more detail; as the reader, I wouldn't be convinced yet. There are many kinds of threats, some more ominous than others.	*Reinforcing a more specific answer, while also encouraging the student to continue developing the argument.*

> What were his exact words and what was he doing when he threatened your client? I still need to be convinced. *And so on . . .*

Other writing problems reflect faulty legal analysis, as where for example, a student has misunderstood the significance of a precedent case's holding and rationale. As to these issues, the professor should use Socratic dialogue to help the student better understand the analysis.[313] As the professor works with the student, the professor should begin the dialogue from the student's reference point to discover the origin of the student's misunderstanding.[314] This requires that the professor avoid speculating why the student is mistaken, and, instead, listen attentively to what the student is attempting to communicate.[315] Once the professor identifies the flaw in the student's thinking, the professor should then ask questions designed to show the student that he does not truly understand a concept that a moment ago seemed so clear.[316]

After the student recognizes the flaw in his thinking, the professor should again begin with what the student already knows[317] and then gradually lead the student to a new understanding of the law.[318] During this dialogue, the professor should never ask any

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313.   *See* Neumann, *supra* note 11, at 727, 767–68; Kearney & Beazley, *supra* note 2, at 890.

314.   *See* Neumann, *supra* note 11, at 735; Lustbader, *Teach in Context, supra* note 9, at 416.

315.   *See* Becker, *supra* note 61, at 479. Becker notes that "[t]he teacher must first determine what the student comprehends and what she does not. This may require some backtracking to assure she understands important principles or concepts that will allow her to clearly identify the problem and then build a solution." *Id.* He concludes that "[t]his requires careful listening, experimentation, and innovation, and above all else it demands patience." *Id.*

Many novice teachers fail to listen attentively to the student and leap to a premature, and inaccurate, diagnosis of the student's problem. *See* Neumann, *supra* note 11, at 738. Unfortunately, an inaccurate diagnosis is not only time inefficient but can increase the student's frustration, as the student senses that the teacher does not truly understand him. *See id.*

316.   *See* Neumann, *supra* note 11, at 735.

317.   If the teacher does not begin with what the student already knows, the resulting dialogue can become frustrating for both student and professor as the professor asks similar questions repetitiously in an ineffectual attempt to lead the student towards new understanding. *See* Neumann, *supra* note 11, at 738.

318.   *See id.* at 735. Neumann explores in detail the paradigmatic structure of Socratic dialogue, exploring its origins in the Meno. *Id.* at 732. He notes that in the "elenchus"

question that forces the student to guess.[319] Instead, each question should build on a previous answer and lay the groundwork for new understanding.[320] Thus, Socratic inquiry is consistent with cognitive learning theory; in effect, the professor gradually leads the student from a known, inadequately developed schema to the development of a richer, more complex schema from which the student can effectively evaluate the law.[321]

For example, suppose a student erroneously contends that a precedent case would control the result in a hypothetical client's factual situation. Upon questioning, the student might reveal that he reached that conclusion by focusing on a single statement within the precedent court's rationale that emphasized a particular fact that was similar to the hypothetical client's situation. That response would be revealing, alerting the professor to the fact that the student leapt to a premature conclusion without thoroughly evaluating the remainder of the court's rationale. After leading the student to a recognition that his analysis of the court's rationale was too superficial, the professor would begin from that reference point and ask a series of questions designed to compel the student to consider other rationale within the case. After attaining a more accurate evaluation of the case, the professor might then use Socratic dialogue to lead the student to a more accurate and complete understanding of how the case affects the client's hypothetical factual situation.

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phase of a true Socratic dialogue, "the teacher's questions guide the student to an understanding of the nature and extent of his or her ignorance." *Id.* He also notes that "[t]he elenchus ends when the student reaches aporia, a state of new-found perplexity. *Id.* In the psychagogia (literally, the leading of a soul), the questions help the student construct the knowledge that the elenchus showed was lacking." *Id.* at 730.

319. *See id.* at 736. Neumann observes that new law professors often ask "the ultimate question before other questions have caused the student to develop the ideas needed to answer the ultimate question . . . ." *Id.* at 738. This can fuel frustration and a sense of helplessness as students begin to believe that they do not have "what it takes" to understand. *Id.* It can also fuel anger in some students, as they speculate that the professor is somehow deliberately asking questions to make them feel inadequate and stupid. *Id.* at 738–39.

320. *See id.* at 735. Newmann contends that it is in this sense that true Socratic dialogue differs from the Langdellian dialogue that dominates many law school classrooms. *Id.* at 739. He notes that true Socratic dialogue not only helps "guide the student to an understanding of the nature and extent of his or her ignorance" but also leads the student to a new-found understanding. *Id.* at 730.

321. *See* Blasi, *supra* note 9, at 329; Neumann, *supra* note 11, at 735.

3. *Student Issues That Interfere with Effective Problem Resolution*

a. The Defeated, Unprepared Student

Occasionally a student arrives for a scheduled writing conference without having completed the assignment that is to be the topic of the conference. Under such circumstances, the professor must determine how, and whether, to continue the scheduled conference with that student. The professor might ask an open question to determine the cause of the problem before concluding that a conference would not be worthwhile. The student's response to the question might reveal that the student has not truly struggled enough with the drafting process to have reached an impasse. For such students, extended dialogue with the professor might be ineffectual at that point in time.

However, some students who arrive without a completed draft are truly defeated by the drafting process. Withholding a writing conference from such a student imposes an undesirable form of punishment that does not serve any pedagogical purpose. To the contrary, collaboration with a professor at this stage in the drafting process can be invaluable for such a student.[322] For such students, the professor would best serve the student by adjusting any prior expectations of how the conference would proceed and collaborating with the student to identify solutions to the obstacles that are confounding that student.

Before attempting to engage a defeated student in a solution-oriented dialogue, the professor can best help the student by encouraging the student to express the feelings of defeat she is experiencing. The professor can invite disclosure through the use of open and closed questions, verbal and nonverbal reinforcers, restatements, and reflection statements.[323] By suggesting that professors invite students to express underlying feelings of despair, I am not proposing that the professor assume a therapeutic role or that the entire conference be devoted to attending to a student's feelings. However, providing a safe harbor for a student to express such feelings can help ease the student's initial distress sufficiently for the student to then be able to participate actively in a didactic dialogue.[324]

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322. *See* Fajans & Falk, *supra* note 10, at 369 (defining the stages of pre-writing and writing-as-learning as "crucial" stages for the teacher to become involved in the student's process).

323. *See supra* Part VI.A for a more thorough discussion of these active listening skills.

324. *See* TEYBER, *supra* note 177, at 39–40. The author concludes that, "[o]ne of the most effective ways therapists can help their clients change is to affirm their subjective

After the student has revealed the feelings of despair that are preventing her from completing the assignment, the professor can help the student become conscious of the disparity between her thoughts that she cannot succeed and the reality that she can in fact be successful. As studies on the psychology of hope suggest, a low-hope student will not be successful in achieving high goals.[325] When a low-hope student encounters obstacles while drafting a paper, the student concludes that she does not "have what it takes" to produce a high-quality paper (the "agency" component of hope), and/or that she can not find alternative pathways to achieve that goal (the "pathways" component of hope).[326] Because both components are necessary to produce successful goal attainment, a defeated student lacks sufficient agentic and/or pathways thinking to solve the problems that are interfering with her ability to attain her goals.[327] The student conference provides an ideal forum for the professor to help a defeated student strengthen both agentic and pathways thinking.

An internal dialogue consisting of messages of "what's the use?" or "nothing I try seems to work" only promotes inaction and a loss of hope.[328] When discouraged, students tend to focus on their problems and what they believe they cannot change or accomplish. Thus, a professor can strengthen a student's agentic thinking by asking the student to identify past challenging experiences in which the student ultimately succeeded.[329] Asking the student to identify concrete steps she took to achieve success in the past also helps strengthen pathways thinking, as the student recalls pathways she used in the past that were successful in overcoming obstacles to a goal. Notice that the professor is not telling the student what she should or could be doing to succeed.

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experience." He notes that "people stop feeling 'crazy' when their subjective experience is validated." *Id.* at 40.

325. Snyder, *Hope Theory, supra* note 45, at 132–33.

326. *See* SNYDER, THE PSYCHOLOGY OF HOPE, *supra* note 48, at 53–56. Snyder conducted a study of undergraduate students to find out what students would do if they received a "D" on the first examination for a course in which they had set a grade goal of "B". When given this negative feedback, students who scored high on the hope scale had "much higher hope" than the low-hope students. The high-hope students considered various options they could pursue to turn the failure into a success, while the low-hope students did not employ such strategies.

327. *See* Snyder, *Hope Theory, supra* note 45, at 132–33.

328. SNYDER, THE PSYCHOLOGY OF HOPE, *supra* note 48, at 224.

329. *Id.* at 225–26. Snyder posits that memories of previous successes activate agentic thinking in the present situation. *See also* IVEY & IVEY, *supra* note 182, at 80. In the psychotherapeutic field, Ivey and Ivey suggest that helping clients recall past successes helps them move from a mindset that focuses on what they cannot accomplish to one that focuses on what they are capable of accomplishing.

Rather, the professor is helping the student strengthen that student's agentic and pathways thinking by asking the *student* to identify past successes and steps she took to overcome obstacles to a goal.

The professor can also help the student strengthen agentic thinking by identifying personal strengths and positive assets. Students who have attained sufficient academic recognition to have been accepted to law school certainly have any number of strengths on which they drew to attain that goal.[330] With probing, a student should be able to identify at least some strengths that helped that student excel academically in the past. If a student is reluctant to verbalize his personal strengths, the professor can help the student by making his or her own observations.[331] For example, the professor might have observed that the student is always prepared for class and has thoughtful contributions to make. Consciously focusing on the student's strengths enhances agentic thinking, as the student is made conscious of the disparity between such low-hope thoughts as "I don't have what it takes" and the reality that he does indeed have what it takes.[332]

Another way to strengthen agentic thinking is by reframing statements about obstacles. High-hope people appraise their goals by framing them in terms of "challenges" rather than "difficulties" or "obstacles."[333] Professors can help students reframe their perception of such challenges by consciously using such language themselves and by inviting students to use such vocabulary.[334] Finally, humor can be an effective way to help a student find the absurdity in the situation the student faces. As long as the humor is not at the student's expense, it

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330. *See* IVEY & IVEY, *supra* note 182, at 195. Ivey and Ivey label this therapeutic process the "positive asset search." They argue that the positive asset search is essential to a client's success because people grow from strength, not from weakness.

331. Many of us have been taught that it is impolite to discuss personal strengths and are reluctant to break that social barrier. When the professor directly opens the door by making his or her own observations, the professor implicitly gives the student permission to consider personal strengths.

332. Studies in expectation theory suggest that a teacher's expectations as to whether a student will succeed or fail also have a powerful influence on the student's ability to succeed. Thus, asking students to discuss their strengths also helps the teacher develop, maintain and communicate high expectations to students. Robert Rosenthal, *Covert Communications in Classrooms, Clinics, and Courtrooms*, 3 EYE ON PSI CHI 18 (1998) (after conducting a controlled study, concluding that "the children from whom the teachers had been led to expect greater intellectual gain showed a significantly greater gain than did the children of the control group"); *see also* Fines, *supra* note 9, at 109; GROTH-MARNAT, *supra* note 122, at 48 (citing similar studies that reflect this phenomenon).

333. *See* SYNDER, THE PSYCHOLOGY OF HOPE, *supra* note 48, at 225.

334. This reformulation is called cognitive restructuring in the field of psychotherapy. *See id.*

can be an effective coping mechanism that can help the student move through feelings of despair.[335]

In a didactic dialogue, the professor can also help a defeated student explore different cognitive paths to goal accomplishment, thereby strengthening that student's pathways thinking. Any number of different causes can create writer's block.[336] For each cause of writer's block, there are alternative cognitive pathways that can help the student achieve success. Some students struggle because they do not have a successful strategy to transition successfully from research notes to a rough draft. Other students are so afraid of failure that their fear literally paralyzes their efforts to commit their pre-drafting analysis to writing. Thus, the professor should first help the student identify the underlying cause of the problem and then help the student design successful strategies for overcoming the problem.

The professor can help a student identify and then resolve the problem that is causing writer's block by asking questions designed to identify the source of the problem. In the following example, the professor uses a combination of reflection statements, restatements, open and closed questions, and paraphrasing to listen to the student and to begin to identify the student's problem:

Verbal Exchange	*Process Comments*
Student: I need to tell you that I don't have a draft of the paper to show you. I'm sorry.	*Student looks discouraged and embarrassed.*
Professor: Oh I see. What's going on with you?	*Open question designed to indicate the teacher's interest in learning more.*
Student: I know I should have a completed draft done by now, but I just can't seem to go anywhere. Every time I sat down at the computer, I just got stuck. I honestly don't know what to do anymore; I have tried everything and	*Student appears dejected and defeated and is visibly fighting tears.*

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335. *See id.* at 226.

336. *See* HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 85–87 (discussing protocol studies that reveal various underlying problems that cause writer's block).

nothing seems to work.	
Professor: You sound pretty discouraged. *Pauses.*	*Reflection statement designed to mirror the feeling underlying the student's words. The pause acts as an encourager.*
Student: Yeah. I am beginning to wonder whether I even belong in law school. I try so hard and nothing seems to work.	
Professor: Well, that does sound pretty discouraging. I don't know if this helps, but I think most law students feel that way at one time or another.	*Reflection statement.*
Student: You think so?	
Professor: I know so. I recall feeling that way a time or two myself when I was in law school. I know that doesn't necessarily make it any easier, but know that you are not alone in that feeling.	*Limited self-disclosure that both strengthens the student-teacher connection and helps give the student hope.*
Student: Well, actually, that does make me feel a little better. But I am really at a loss. I don't know how to get myself unstuck.	
Professor: Why don't we work together and brainstorm some ways to help you get "unstuck." Will you tell me more about the process you	*"Working together" makes explicit the collaborative working alliance.* *Restatement of key word ("unstuck"), together with an open*

are using to get started?	*question, encourage the student to explore where in the drafting process the student is experiencing difficulties.*
Student: I have all of these cases and notes and I just couldn't figure out how I could fit all of this information into an outline, beyond the two major issues—I could figure out that much, like which cases go with which issues, but beyond that I got kind of stuck.	*Student identifies difficulty transitioning from pre-drafting analysis to outlining and drafting. The student may or may not have difficulty understanding the underlying legal issues, although the student believes at this point that his analysis is not the problem.*
Professor: So it sounds like you're feeling stuck because you haven't been able to figure out how to take all of your research and put it together in an outline. And because you don't have a workable outline, you're having a lot of difficulty writing a first draft. Does that sound about right?	*Paraphrasing designed to summarize the student's key concerns. The paraphrase sets the stage for the student and professor to address and resolve the problems that are preventing the student from drafting the written assignment. Checking to verify that the paraphrase is accurate.*
Student: Yes, that's it.	

By asking questions designed to discover the origin of a student's difficulties, the professor is better able to help the student find alternative pathways to success. Thus, if such questioning reveals that a student is paralyzed by the transition process from pre-drafting analysis to writing, the professor can help the student explore various means of navigating through that process. The professor might invite the student to think out-loud by describing outlining and drafting strategies that have been successful or unsuccessful for the student in the past. The professor might also ask the student to consider whether she finds it useful or necessary to have a broad cognitive map of the

issues and major points of analysis before exploring the details of that analysis,[337] or whether she finds meaning through the exploration process itself.[338] Finally, the professor should invite the student to consider whether she gravitates more towards linear thinking processes or towards such visual processes as charts and graphs.[339] The professor can then help the student develop successful strategies that build on the student's learning preferences.[340]

Other students arrive at the conference with a workable outline but are defeated by the drafting process itself. Writer speaking-aloud protocols suggest that a fear of failure, of not writing the "perfect" paper, is the source of many causes of writing paralysis.[341] For example, premature self-editing is a common self-defeating mechanism that impedes the drafting process.[342] Other students'

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337. For students who require a broad cognitive map before they can process information, outlining would be an essential first step in the drafting process. *See* Fajans & Falk, *supra* note 10, at 356.

338. Students who do not need a broad cognitive map before exploring their analysis might benefit from drafting a "zero draft," or a spontaneous, freewheeling exploration of ideas before attempting to outline the analysis. *Id.* at 353. For these students, the act of outlining itself can cause writer's block. *Id.* Fajans and Falk note that, for some students, "the most destructive advice you can give is 'Think before you write.'" *Id.*

339. Because a defeated student may not be at the stage where he can realistically achieve a workable outline, the professor might encourage highly visual students to work towards building an outline by first creating a "cluster diagram," then an "issue tree," and then a more formal outline. *Id.* at 356–58. The professor could encourage non-visual learners to create a "dump list" of every idea they have that relates to a specific argument. *Id.* After listing every idea, such students would group related ideas, and then separate the primary from secondary ideas. *Id.* From this step, such students should be in a position to experiment with the order of the ideas and to create a more formal outline. *Id.* at 358–62. In their article, Fajans and Falk discuss and demonstrate ways in which a professor can help students work through each stage of the drafting process. *Id.* The authors not only describe but illustrate cluster diagrams, issue trees, dump lists and other strategies that help students transition between pre-drafting thinking and the drafting process. *See id. passim.*

340. *See generally* Hess, *supra* note 9, at 954. Hess notes that in a student survey, students responded that differences in learning styles between the professor and student could impede learning. *Id.* For example, one student indicated that he has "to walk around the problem 16 times and look at it from every particular view before it starts falling into place for [him]." *Id.* That student complained that he is "lost" when a professor who is a more linear thinker attempts to help him learn in that manner. *Id.* Thus, it is important that the professor approach problem-solving from a perspective that works for the student-learner. *Id.*

341. HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 85–87 (discussing various causes of writer's block as revealed by speaking-aloud protocols); *see* MICHAEL ROSE, WRITER'S BLOCK: THE COGNITIVE DIMENSION (1984).

342. *See* MCANDREW & REIGSTAD, *supra* note 20, at 41 (noting that "blocked writers often interrupt the flow of their writing by fussing too early with elements like comma placement or spelling"); *see also* HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 85–87; ROSE, *supra* note 341, at 72–73.

indecisiveness creates writing paralysis; faced with numerous options for content and word choice, such students agonize over making the "wrong" choice.[343] The professor can encourage such students to reframe the writing process itself, consciously giving themselves permission to create a messy, relatively inarticulate first draft. Experimenting with language and choices, discarding some, and refining others, is a necessary part of the process of finding meaning through writing.[344] Recognizing that language and choices that are ultimately discarded do not reflect poorly on the writers' abilities but are instead an integral part of the writing process can help free such students from writer's block.[345] To appease the harsh inner critic, students might deliberately circle or bracket words or sentences they will revise and polish in a later draft.[346]

b. The Argumentative Student: The Power Struggle

The teacher-student power struggle has been defined as a dialogue in which each participant is operating from a persuasion mode of discourse, rather than from an inquiring, or learning mode.[347] The power struggle is potentially one of the most destructive barriers to effective didactic dialogue.[348] A power struggle arises when a student processes the professor's suggestion as criticism rather than helpful guidance, and begins to feel powerless against the force of the professor's will.[349] Fighting for more power, the student begins to

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343. HARRIS, TEACHING ONE-TO-ONE, *supra* note 28, at 87.

344. Indeed, writers who do not suffer from writer's block seem to recognize that writing is a recursive process in which language and thoughts will not be perfectly formed in the early drafting stages. In a study of writers, Michael Rose found that students who did not suffer from writer's block used strategies that helped them move through the drafting process. For example, they stated: "When stuck, write a few words," or "I just really want to get the idea out." In contrast, students who suffered from writer's block held rigid views on writing that impeded their progress, stating: "You're not supposed to have passive verbs." ROSE, *supra* note 341, at 71–72.

345. Inviting the student to reframe the writing process can shift the student's self-defeating inner voice into a more hopeful one. Studies in the psychology of hope suggest that low-hope people believe that mistakes reflect an "inherent, personal flaw." SYNDER, THE PSYCHOLOGY OF HOPE, *supra* note 48, at 247–48. After using an unsuccessful strategy, the low-hope person quits or lowers her goal expectations, believing that she does not "have what it takes to succeed." *Id.* In contrast, high-hope people view mistakes as an integral part of the learning process. In other words, they do not attribute the mistake to a personal defect but to an external process. *See id.*

346. *See* Freedman & Katz, *supra* note 26, at 58; ROSE, *supra* note 341, at 73.

347. *See* Neumann, *supra* note 11, at 760–61.

348. *See id.* at 760.

349. Rudolph Dreikurs, an important figure in the psychotherapeutic field, refined Alfred Adler's early work with family dynamics and behavior and delineated the goals of children's misbehavior and their redirection, including the power struggle. *See* GERALD

defend his choices and becomes more committed to winning than to learning or understanding.[350] Reacting to the student's unwillingness to listen to the professor's guidance, the professor also participates in the power-struggle.[351] However, by participating in this dialogue, the professor encourages a counter-response rather than open dialogue and has very limited ability to reach the student.[352]

The existence of a strong collaborative working alliance minimizes the potential for power struggles.[353] A student who views the professor as a supportive ally rather than as an autocratic authority figure is unlikely to experience the degree of powerlessness that would provoke a power struggle.[354] Nonetheless, most professors occasionally encounter a student who is resistant to reflective self-inquiry.

It is not always easy to identify when a student has begun to shift into a persuasion mode because not every argumentative student is openly contentious; a student more intent on persuasion than learning can just as often be polite and even deferential.[355] However, a professor can identify the persuasion mode by paying attention to his or her own behavior.[356] If the professor begins to notice that he or she is expending energy trying to persuade the student to listen, and is fighting the desire to argue with the student, then it is likely that both student and professor have shifted into a power struggle.[357]

COREY, THEORY AND PRACTICE OF COUNSELING AND PSYCHOTHERAPY 391–95 (2001). Dreikurs suggested that these goals of misbehavior can also be observed in adults. *See* Heinz L. Ansbacher, *Dreikur's Four Goals of Children's Disturbing Behavior and Adler's Social Interest – Activity Typology*, 44 INDIV. PSYCH. 282, 288 (1988). Dreikurs' theory posits that people who are raised in non-democratic families may not have received appropriate recognition and encouragement and may therefore become stalled developmentally and preoccupied with attaining the basic needs for attention and control. *See* Roger A. Ballou, *Adlerian-Based Responses for the Mental Health Counselor to the Challenging Behavior of Teens*, 24 J. MENTAL HEALTH COUNSELING 154, 156 (2002).

350.   *See* COREY, *supra* note 349, at 391–95. The firm attachment to a pre-existing belief or thought construct is consistent with empirical studies conducted by cognitive psychologists. CAINE & CAINE, *supra* note 113, at 73. Such studies posit that "the more threatened and helpless students feel," the more such students rely on "deeply entrenched programming" and the less willing they are to explore new ideas or patterns of thought. *Id.*

351.   *See* Neumann, *supra* note 11, at 760.

352.   *See id.*

353.   *See id.* at 760–61.

354.   *See id.* at 761.

355.   *Id.* at 760.

356.   *Id.* at 761.

357.   *See* Ballou, *supra* note 349, at 156–57. Ballou notes that Dreikurs-based therapists suggest that examining one's own emotional responses to a student's behavior can help identify the student's hidden goal. When a student is driven by an inappropriate need for control, the teacher might well feel angry, challenged, provoked, threatened, or defeated,

A power struggle cannot exist without both parties' participation.[358] Thus, once the professor recognizes that the didactic dialogue has erupted into a power struggle, the professor has the ability to shift the dialogue back into the inquiring, or learning mode.[359] Although this may be difficult to do if the professor has already become entrenched in the argument, the professor should pause and then shift the focus from "How can I maintain control of this conference?" to "How can I give this student more power?"[360] Although this approach might appear radical, it is the most effective way to end a power struggle.[361] The student initially shifted into persuasion mode because he felt powerless against the teacher's will. Deliberately giving the student more power reduces the student's sense of powerlessness and allows the student the freedom to shift into an inquiring mode without fearing loss of power.[362]

Giving a student power in the relationship requires first that the professor listen intently to determine what it is the student ultimately wants to accomplish. Listening with genuine curiosity opens the possibility for both parties to engage in a dialogue of inquiry rather than a dialogue of persuasion. In his book on communication, psychologist Douglas Stone states: "Find the most stubborn person you know, the person who never seems to take in anything you say, the person who repeats himself or herself in every conversation you ever have—and listen to them. Especially, listen for feelings, like frustration or pride or fear, and acknowledge those feelings. See whether that person doesn't become a better listener after all."[363] In other words, it is difficult to maintain an argumentative stance when the other participant in the dialogue is listening and genuinely attempting to understand.[364] Thus, once a student senses that the professor values him enough to listen attentively, the student begins to

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and prompted to argue with the student, to be "right," or to overpower the student. The teacher might have such thoughts as, "You can't get away with that. I'll make you." *Id.; see also* COREY, *supra* note 349, at 397 (noting that one's own "feelings and reactions are often the most reliable clue to mistaken goals in both children and adults").

358. *See* Neumann, *supra* note 11, at 760–61.

359. *See id.*

360. *See generally* KATHRYN J. KVOLS, REDIRECTING CHILDREN'S BEHAVIOR 92 (3d ed. 1998). Kvols book is based on the Adlerian model of psychology as interpreted by Rudolf Dreikurs.

361. Ballou, *supra* note 349, at 157 (suggesting that an Adlerian teacher try to resolve the struggle by giving the student limited choices, being respectful and encouraging, and trying to redirect the student into attaining positive power).

362. *See generally* Neumann, *supra* note 11, at 761.

363. STONE, *supra* note 261, at 167.

364. *See id.*

drop his resistance to exploring issues and concerns collaboratively.[365]

From listening to the student, the professor should be able to identify the valid concern or objective that prompted the ineffective written discourse, and where the student's mistaken thinking has interfered with the student's ability to achieve her ultimate goal, i.e., to construct an effective argument or analysis. The professor should begin the dialogue by validating the valid concern or objective that prompted the written discourse. Such validation helps the student to be more receptive to the criticism that will follow. The professor would then help the student realize the error in his thinking and explore with the student more effective ways to achieve the valid goal or to address the valid concern. As an example, assume that a student is defending why she failed to disclose an important adverse case in an office memorandum. The professor immediately recognizes that the student is suffering from a fundamental misunderstanding about the nature of an office memorandum. Rather than dictating that the student must disclose the case, the professor would be more effective by validating the student's concern, explaining the problem, and then helping the student explore options. The following dialogue illustrates this process.

Verbal Exchange	*Process Comments*
Professor: I notice you didn't disclose the *Hopkins* case?	
Student: Well, you told us in class that we had to be advocates for our clients so I was just doing what you told us to do. The *Hopkins* case is a terrible case for our client and as an advocate for my client I want to emphasize the cases that favor our side.	*The student's voice rises as she defends her decision. Using the teacher's own advice to bolster a defense is another indicator that the student is in a persuasion mode rather than a learning mode.*

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365.   *See* TEYBER, *supra* note 177, at 39. Within the therapeutic context, Teyber observes that when the therapist has "the cognitive flexibility to de-center, enter into the client's subjective experience, and appreciate the meaning that this particular issue holds for the client," this not only strengthens the therapeutic alliance but encourages clients to explore their problems more fully.

At this point, the professor recognizes that the student is more intent on defending her position than on engaging in a collaborative dialogue. The professor correctly assumes that what the professor did or did not say in class is merely a rationalization to bolster the student's position and not itself the cause of the problem. Therefore, in the following dialogue the professor avoids a potential conflict by declining to defend the statements made in class or to attack the student. Instead, the professor helps the student shift from a defensive posture to one of open inquiry.

Verbal Exchange	*Process Comments*
Professor: Okay, now I understand. You are concerned because the case is adverse to the client's interests.	*The professor finds that aspect of the student's concern that is valid.*
Student: Yes.	
Professor: Well, you know, I like your grasp of the case, that it presents a problem for the client, and I agree that the case is problematic. *Pause.*	*The professor affirms and acknowledges the student's analytical thinking.*
However, a senior attorney in a law firm would want to be apprised of the case, even though it is adverse to the client. Otherwise, imagine the senior attorney being caught by surprise if the opposing attorney later relied on the case in an argument before a trial judge. At that stage, the attorney wouldn't have had a chance to consider how he or she could potentially defuse the unfavorable impact of that case.	*The teacher pauses to allow the praise to register.*
	The professor corrects the misunderstanding from the perspective of a senior attorney, the intended reader. This technique helps the student assume the role she is being asked to play, and also distances the professor from the critique, reinforcing the connection as ally rather than autocratic authority figure.

Student: Okay. I guess I can see why the senior attorney would want to know about the case.	*Student reluctantly begins to let go of her need to defend herself.*
Professor: But you are nevertheless right to be concerned about the negative impact of the case. Recall that we talked in class about ways to defuse the adverse impact of an unfavorable case. Why don't we talk about other options you might have in trying to defuse the adverse impact of this case?	*Again affirming and acknowledging the student's concerns.* *The professor links the solution to concepts discussed in class, and explicitly invites the student to explore other options that would satisfy her initial concern.*

In the above illustration, the student's misunderstanding is one reflective of a novice who is unfamiliar with the customs of legal practice. Such a misunderstanding can easily be corrected by the professor without Socratic inquiry. However, should the student's misunderstanding instead be symptomatic of ineffectual thinking, the professor might decide instead to use Socratic dialogue to lead the student to an awareness that her thinking is faulty and, ultimately, to lead the student to an exploration of more effective options.[366]

c.   The Student Who Resists Independent Thought

Some students are reluctant to assume responsibility for their learning experience. Instead, these students want the professor to give them an exact prescription for the problems reflected in their papers and to correct the problems for them.[367] When asked to participate in the discussion, these students typically respond with a shrug and disclaimer of any independent thoughts. Instead, they ask the professor: "What do *you* think?" or "What would you like to see here?"[368] The resulting dialogue would not only create an unhealthy

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366.   *See supra* Part VI.C.2 for a more detailed discussion of this type of dialogue.

367.   *See* Neumann, *supra* note 11, at 738. Neumann notes that "independence itself is frightening to most people. As much as law students may have chosen to study law for the independence, power, and prestige of a profession, many students are more interested in conforming to an easily defined standard, if only they can find it." *See id.*

368.   *See id.* at 756.

dependence on the professor but would subvert the learning process.[369] Under this scenario, the student would merely be paying lip service to true learning.[370]

The most effective way to handle this situation is to make explicit the role the student is asking the professor to assume, and to explain why that role would not be of value to the student.[371] In some cases, this may mean re-educating the student about the learning process itself. Some students have a shortsighted view of the learning process, viewing it as a game they will win if they can only learn the magic formula that will please the professor.[372] Their primary motivation is to earn a high grade rather than to learn the skills of effective legal reasoning and discourse.[373] Other students lack confidence in their skills and are intimidated at the responsibility involved in becoming an independent decision-maker. They are misguided in their belief that they can master legal analysis and discourse by blindly following and applying a set of well-defined, precise rules that the professor will mete out to those students who ask.[374]

In a conference, the professor might reinforce to such students that the professional skills they are learning are not susceptible to learning by rote memorization or by complying with well-defined, precise rules. The professor might even acknowledge that learning such new thinking and communication skills can be intimidating and even frightening. Learning how to evaluate the law and convey that analysis to clients and other attorneys is a challenging process that requires students to be willing to experiment and to make the mistakes that will inevitably be made as students discover meaning through writing. In fact, "the magical and mysterious process"[375] through which the written product is created is more important than the finished product itself—as students become attorneys they will take with them not their finished work products but their knowledge

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369.   *See id.*
370.   *See id.* at 757.
371.   *See id.*
372.   *See id.* at 756.
373.   Extrinsic motivation never motivates students as well as intrinsic motivation. *See* Lowman, *supra* note 43, at 136–39.
374.   *See* Neumann, *supra* note 11, at 756–57. Neumann observes that the student's fear of independence might "be a more or less natural reaction to the paradox of the way professional thinking must be learned. If professional thinking cannot be explained fully, a student can almost be forgiven for assuming that 'lawyerliness' is acquired by imitating the outward appearance—the 'moves'—that are empty unless they result from professional analysis." *Id.* at 757.
375.   *See id.*

of how to evaluate and convey legal analysis and argument. Professor-instilled directives deprive students of learning the very skills they will need to master as attorneys.[376] Thus, the professor might remind such students that their ultimate goal is to become independent of the professor and that the professor can best help students by being a collaborator and coach, not by encouraging them to follow the professor's rote instructions.[377]

In a student conference, the professor can help shift a student into a more appropriate space of learning whenever the student begins to slide into the role of passive learner or mimic.[378] As an example, should the student ask, "What do you want here?," the professor might redirect the student's attention to the legitimate goal of the inquiry by replying, "What is important is what you are trying to accomplish, and how you can effectively accomplish that goal. Let's approach it from that angle."[379]

D. Phase Four: Closure

Because students and professors address a range of topics during the conference, it is important that the conference have a formal closure phase. In this phase of the conference, the student should summarize the important themes of the conference and his immediate goals following the conference.[380] By verbally summarizing the most important conference topics and the goals the student has set for the next phase of the drafting process, the student solidifies his understanding, increasing the likelihood that he will later recall that information.[381] Summarizing the important themes and goals also provides the professor with an opportunity to ensure that there have been no miscues in communication and to correct any misunderstandings.[382]

Finally, summarizing the important themes and goals allows the professor to reinforce schemata that will be valuable to the student when engaging in other writing projects. For example, should the student describe a goal too narrowly, having failed to grasp its more

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376. *See id.* at 758.
377. *See id.* at 757.
378. *See id.*
379. *See* NEUMANN, TEACHER'S MANUAL, *supra* note 255, at 234.
380. *See* Neumann, *supra* note 11, at 769; LAUREL C. OATES & ANNE ENQUIST, TEACHER'S MANUAL, THE LEGAL WRITING HANDBOOK 46 (3d ed. 2002).
381. *See* OATES & ENQUIST, *supra* note 380, at 46.
382. *See id. See generally* BINDER, *supra* note 8, at 225–26 (advocating a similar approach within the context of the attorney-client meeting).

general significance, the professor can reframe the goal for the student. Thus, should the student state that he will reorganize a specific paragraph, the professor might respond by noting that the student will reorganize the paragraph to follow a deductive writing pattern, beginning from a premise, or thesis, and then illustrating why that premise is sound. By more broadly reframing the goal, the professor helps reinforce an important drafting schema the student can employ not only in revising the present paper but also in later writing projects.

The professor might also help the student set up an action plan that breaks down the ultimate goal of completing the paper into smaller intermediate goals.[383] As is true elsewhere in the conference, it is important that the student be an active, rather than passive, participant in setting up the plan. The student's personal investment in the plan increases the likelihood that the student will successfully meet his goals.[384] Because vague, ill-defined goals can thwart successful goal accomplishment, each intermediate goal should be clear and concrete, with clearly delineated steps towards intermediate goal attainment.[385] Thus, an action plan might separately identify the research, thinking, outlining, drafting, and revising processes and designate the specific aspects of the project that will be completed by specific dates.

In a writing course in which student and professor meet at designated intervals during the semester, the student and professor can conclude each conference by discussing the specific steps the student will complete during the next phase of the drafting process. Even if the curriculum does not accommodate regular student conferences with all students, the professor might wish to work with select students to create action plans.[386] For example, a defeated student who is struggling with writer's block would benefit from a well-designed action plan.[387]

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383.   *See* Snyder, *Hope Theory, supra* note 45, at 138.

384.   *See* SNYDER, THE PSYCHOLOGY OF HOPE, *supra* note 48, at 214 (noting that, to be more successful at achieving goals, it is important that "we author our own decisions rather than merely adopting the desires of important other people").

385.   *See id.* at 219; Arthur Nezu & Thomas J. D'Zurilla, *Effects of Problem Definition and Formulation on Decision Making in the Social Problem-Solving Process*, 12 BEHAV. THERAPY 100, 105 (1981).

386.   *See* NEUMANN, TEACHER'S MANUAL, *supra* note 255, at 230.

387.   Cognitive psychologists posit that one of the adaptive characteristics of people who successfully achieve goals "is that they tend to break down complex long-term goals into several smaller substeps." *See* Snyder, *Hope Theory, supra* note 45, at 138.

VII. CONCLUSION

As legal educators, one of our fundamental missions is to teach students such basic lawyering skills as legal analysis and writing. In this article, I have argued that the one-on-one didactic dialogue between law professor and student in a conference setting has the potential to be one of the most effective means by which students can learn such skills. Although student-faculty conferences are important in all law school courses, they are essential in courses in which writing is a meaningful component of the curriculum. With its unique opportunity for personalized attention to an individual student's cognitive development, the conference can, for many students, be a catalyst for significant breakthroughs in their ability to learn these fundamental lawyering skills.

One purpose in writing this article was to inspire a renewed emphasis on the one-on-one teaching experience. I have argued why it is important to include mandatory conferences within the curriculum of any course in which writing is an important component. In addition, I have offered some suggestions as to how faculty might facilitate its inclusion into the curriculum.

The thrust of this article, however, is aimed at dissolving another barrier to effective student conferences—the lack of an interdisciplinary understanding of how law professor and student can work collaboratively to empower the student to learn the fundamental lawyering skills of legal analysis and writing. Merely conferring with a student in one's office does not automatically result in better, or even effective, learning. However, despite evidence that much of what actually occurs in one-on-one conferences falls short of the conference's optimal potential,[388] legal educators have paid scant attention to this important topic.[389]

In order to evaluate the topic in a thoughtful and reflective manner, legal educators must consider not just the cognitive process of learning but also how the psychology of human behavior and the dynamics of the student-teacher relationship affect the learning process. Not surprisingly, legal scholarship alone does not provide a satisfactory answer to these important questions. Thus, this article has relied extensively on research and scholarship from the fields of cognitive science, psychology, psychotherapy, composition theory, and

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388. *See supra* Part III.B.

389. *But see generally* Neumann, *supra* note 11 (engaging in an in-depth evaluation of Socratic dialogue within the conference setting).

critical discourse analysis to consider how law professors can work more effectively with students in a conference setting.

Specifically, this article has considered how composition and cognitive learning theories can inform the manner in which law professors work with students in a one-on-one setting to help them develop the cognitive skills of legal reasoning and writing. Building on research from the fields of cognitive science and psychology, this article has also explored how law professors can motivate students to succeed, and how professors can help sustain the motivation of defeated students who do not believe they are capable of overcoming the challenges of the law school curriculum. This article has also relied on such research to consider how law professors can work effectively with students who challenge our ability to engage them in effective didactic dialogue. Adapting research from the fields of cognitive psychology, psychotherapy, and critical discourse analysis, this article has also explored the characteristics of a student-teacher relationship that offer the greatest potential for learning and the nonverbal and verbal signals and patterns of discourse that law professors can employ to develop such a relationship.

Finally, by adapting research and scholarship from other disciplines to enrich our understanding of the characteristics of effective student conferences and the subtleties of effective didactic dialogue, this article has attempted to inspire law professors not just to re-evaluate their use of student-faculty conferences but also to re-evaluate their own teaching methods in the conference setting.