LEARNING FROM OUR MISTAKES: CONVERSATION ANALYSIS REVEALS BEST PRACTICES FOR A STUDENT-STAFFED PRO BONO PROJECT

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Failure is instructive. The person who really thinks learns quite as much from his failures as from his successes.

– John Dewey

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INTRODUCTION

Law students often volunteer at brief advice projects staffed by volunteer student-attorney teams. However, there has been little scholarly study of how such pro bono projects operate to ensure competent representation for their limited-scope clients and optimal learning for their student volunteers. This Article addresses both issues.

The Article begins by briefly discussing the rise of "pro se" representation and recommended strategies to deal with this challenge. One of the recommended approaches is to have volunteer attorneys and volunteer students provide brief advice to the self-represented individuals. This Part references the few articles that have been written about pro bono law students interacting with clients in brief advice settings.

Then, the Article turns to explain that language science can provide a window to study how a brief advice program operates. This Part reviews various ways in which language science has been used to study legal practice, especially in the courts, where recordings and transcripts are widespread. It explains that language science has been used extensively to study doctor-patient conversations, but very little to study attorney-client or law student-client conversations. It introduces Conversation Analysis as a dominant approach to studying social interaction and explains how Applied Interventionist Conversation Analysis can shed light on the student-client and student-supervisor interaction.

Using Conversation Analysis, the Article considers transcripts of forty-six law student-client interviews and thirty-five student-supervisor consultations to explore "errors and omissions." It sets forth the evidence indicating that mistakes occur when there is inadequate fact-sharing during the student-attorney consultation or erroneous reports about the procedural posture of the case. This inadequate understanding of the clients' lived facts exists despite the clients' fulsome and thorough accounts. In addition, when students volunteered legal advice or information during the interview, clients sometimes went away with mistaken or incomplete advice, perhaps because students failed to check all their advice with the attorneys or anchored on the erroneous information they had conveyed. The final reason clients sometimes received less than thorough, personalized advice was that the attorney supervisors simply conveyed information rather than taking the time to provide personal and strategic advice.

Next the Article surveys the ethical requirements for operating a brief advice program staffed by law students and volunteer attorneys. The bottom line is that the duty of competence owed to clients is not diminished because they are receiving limited-scope services or working directly with law students. Attorneys are responsible for the operation of the project and for any and all advice the students may convey to the clients.

Finally, the Article recommends strategies to enhance the operation of a student-staffed pro bono project serving unrepresented parties.

I. PRO BONO PROGRAMS AND STUDENT INVOLVEMENT

Achieving access to justice is a challenge. Funding for free legal aid is inadequate, having vastly declined since 1980.[1] Beginning in 1994 and continuing to the present, research has demonstrated that over 80% of the legal needs of the poor go unmet.[2] A variety of approaches to these problems have been pursued. The American Bar Association (ABA) has been a leader in studying this problem and promoting innovations to address it. Specifically, the ABA has made the following amendments to the ethical rules in recognition of these problems: (1) advocating that all attorneys perform pro bono work for those of limited means; (2) providing for limited scope or unbundled representation; and (3) loosening conflicts of interest rules for attorneys participating in court-annexed limited legal service programs. The ABA has also required that, in order to be accredited, law schools must offer all students pro bono opportunities.

A. Encouragement of Pro Bono and Limited Scope Representation

The ABA Model Rules of Professional Conduct encourage all attorneys to provide pro bono legal services for the poor.[3] In 2000 the ABA added Rule 6.5 which changed the conflicts of interest

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[1] Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L. J. 1213, 1221-22 (2002) (federal funding in 2001, adjusted for inflation, was only half of what it had been in 1980).

[2] *See* LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 13 (2005); LEGAL SERVICES CORPORATION, THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 14 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/H92D-VUJE]. *See generally* ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994).

[3] *See* MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR ASS'N 2019) ("Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year."). These model rules are not law, but have been largely adopted by all states within the United States as controlling law. *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ [https://perma.cc/TH4T-6S47] (last updated Mar. 28, 2018).

rules so an attorney providing "short-term limited legal services to a client" under "the auspices of a program sponsored by a nonprofit organization or court," is disqualified only if the attorney knows of a conflict.[4] This was done to facilitate and increase participation.[5]

In 1996, the ABA changed its law school accreditation standards to call on law schools to "encourage . . . students to participate in pro bono activities and provide opportunities for them to do so."[6] In 2005, a further amendment required "substantial" pro bono opportunities to be available.[7] The Interpretation to this Standard makes clear that it was intended to "incorporate the priorities established in Model Rule 6.1."[8]

The ABA Center for Pro Bono describes the range of pro bono programs available to law students:

> Here are the most common ways students perform pro bono work:
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> 1. Staffing advice and referral clinics
>
> 2. Targeted direct services in appropriate practice areas
>
> 3. Creating and distributing know your rights brochures/pamphlets

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[4] *See* MODEL RULES OF PROF'L CONDUCT r. 6.5 (AM. BAR ASS'N 2020).

[5] The ABA explained the reason for this change:

> Rule 6.5 is a new Rule in response to the Commission's concern that a strict application of the conflict-of-interest rules may be deterring lawyers from serving as volunteers in programs in which clients are provided short-term limited legal services under the auspices of a nonprofit organization or a court-annexed program. The paradigm is the legal-advice hotline or pro se clinic, the purpose of which is to provide short-term limited legal assistance to persons of limited means who otherwise would go unrepresented.

ABA ETHICS 2000 COMMISSION REPORT, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/e2k_migated/10_85rem.pdf [https://perma.cc/82JN-C8UQ].

[6] STANDARDS FOR APPROVAL OF LAW SCH. & INTERPRETATIONS § 302(e) (AM. BAR ASS'N 1996). *See also* ASS'N OF AM. LAW SCH., LEARNING TO SERVE: THE FINDINGS AND PROPOSALS OF THE AALS COMMISSION ON PRO BONO AND PUBLIC SERVICE OPPORTUNITIES 3 (1999); Linda F. Smith, *Fostering Justice Throughout the Curriculum*, 18 GEO. J. ON POVERTY L. & POL'Y 427, 445 (2011).

[7] STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. § 303(b) (AM. BAR ASS'N 2018). *See also* Smith, *supra* note 6, at 445.

[8] AM. BAR ASS'N, *supra* note 7, at Interpretation 303-3.

4. Conducting know your rights presentations in the community

5. Staffing legal helplines

6. Assisting with client intake

7. Creating pro se materials & *conducting pro se clinics*

8. Providing language translation services

   a. oral translation for clients

   b. written translation of vital forms/documents

9. Research, research, & more research

10. One-to-one attorney match[9]

Note that four of the ten ideas (italicized above) involve students helping with interviewing or with brief advice clinics.

Providing limited scope legal services is similarly the most popular way for attorneys to provide pro bono legal services.[10]

B. Studies of Student-Staffed Brief Advice Projects

Given both the need for and popularity of such limited scope services, it is important that lawyers and law students alike grapple with best practices for delivering these services.

However, there has been very little written about law students—whether clinical or pro bono—participating in brief advice programs.[11]

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[9] AM. BAR ASS'N CTR. FOR PRO BONO, EVERYTHING YOU WANTED TO KNOW ABOUT LAW SCHOOL PRO BONO BUT WERE AFRAID TO ASK . . ., 6 (2010) (emphasis added), https://web.archive.org/web/20160706175546/https://www.americanbar.org/content/dam/aba/images/probono_public_service/ts/everything_you_always_wanted_to_know.pdf [https://perma.cc/V77P-68AM].

[10] *See* AM. BAR ASS'N STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 6 (2018), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_supporting_justice_iv_final.authcheckdam.pdf [https://perma.cc/FZ7Q-VXZV] ("[T]he vast majority of responding attorneys (81.3%) indicated that they had focused their pro bono representation on serving individuals, as opposed to a class of individuals or an organization. And, just over half (54.6%) provided limited scope representation services, as opposed to full representation or mediation.").

In the 1990s, University of Maryland clinical law students provided "legal information and advice to otherwise unrepresented parties in family law cases."[12] The law school "commissioned a formal quantitative and qualitative evaluation of the project."[13] It reports that "[i]nitially, lawyers supervised the students in the courthouses . . . where the students met and assisted the pro se litigants. Later, the lawyers provided off-site supervision by telephone."[14] The description of the students' work makes clear that they provided not only general legal "information" but analytical legal "advice."[15] One of the significant conclusions was that the "[i]nitial [d]iagnostic [i]nterview [i]s [c]ritically [i]mportant[.]"[16] Specifically, "[t]o sort unrepresented people by the types and levels of legal services they require, the diagnostic interviewer must understand the whole body of family law and be good at eliciting facts, evaluating people, and probing for hidden issues."[17]

The Maryland study concluded that the problems clients presented could be put into three categories: "(1) problems that could be resolved in largely mechanical ways; (2) problems that required limited legal discretion and judgment; and (3) problems that required substantial legal discretion and judgment."[18] Students helped clients with all three types of problems, and consumers expressed high levels of satisfaction, but their satisfaction declined as the complexity of the matter increased.[19]

In contrast to the Maryland project, in other settings the "pro se clinic" or "course" has been defined as a place to "provide

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[11] For a review of descriptive and empirical studies about self-represented parties, *see* Linda F. Smith & Barry Stratford, *DIY in Family Law: A Case Study of a Brief Advice Clinic for Pro Se Litigants*, 14 J. L. & FAM. STUD. 167, 172-80 (2012).

[12] Michael Millemann, Nathalie Gilfrich & Richard Granat, *Rethinking the Full-Service Legal Representational Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV. 1178, 1178 (1997).

[13] *Id.* at 1181.

[14] *Id.*

[15] *Id.* at 1182 ("The students helped project consumers identify claims and defenses and plead them in simplified check-the-box forms. They explained the basic procedural rules, including those governing service of process and adjudication. [They] also referred many people to . . . attorneys . . . . and social service agencies . . . .").

[16] *Id.*

[17] *Id.*

[18] *Id.* at 1183.

[19] *Id.* at 1183-86.

general information about the law, procedure, and practice to a group of litigants or prospective litigants who share a common category of legal issues[,]"[20] rather than a project providing individualized legal "advice."

An Australian study described both pro bono programs (focused on community service) and clinical programs (part of the academic curriculum) that included brief advice projects.[21] The Australian report makes the point that in pro bono programs "[s]upervision is important not only for assuring that clients receive competent legal assistance but also for assuring students receive the right messages about the quality of services to which all clients are entitled."[22]

An Australian academic explained that students at the pro bono (not-for-credit) legal programs are "supervised by experienced legal practitioners, as well as academic staff . . ." while they provide brief advice.[23] Pro bono programs, in contrast to clinical programs, have informal feedback and reflective practices, rather than formal assessment procedures.[24] That author found that students participating in pro bono projects gain "practical work experience . . . [and] "acquire fundamental professional values . . . ." as they "meet, observe and work with practicing [sic] lawyers involved in public interest work . . . ."[25] She concluded that "there is merit in both CLE [clinical legal

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[20] Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879, 1883 (1999). *See also* Elizabeth McCulloch, *Let Me Show You How: Pro Se Divorce Courses and Client Power*, 48 FLA. L. REV. 481, 485 (1996) ("[P]ro se courses, where lawyers or other program staff train people to handle their own legal proceedings . . . .").

[21] *See* NAT'L PRO BONO RES. CTR., PRO BONO AND CLINICAL LEGAL EDUCATION PROGRAMS IN AUSTRALIAN LAW SCHOOLS 9-10 (2004), http://www.nationalprobono.org.au/publications/documents/PUBLISHEDVERSION_000.doc [https://perma.cc/SF6K-HRXZ]. Pro bono brief advice occurred at Bond University, Monash University, Murdoch University, and University of Newcastle; and clinic brief advice was available at Australian National University, Griffith University, University of Adelaide, University of New South Wales, and University of Sydney. *Id.* at 17-31.

[22] *Id.* at 13.

[23] *See* Francina Cantatore, *The Impact of Pro Bono Law Clinics on Employability and Work Readiness in Law Students*, 25 INTL' J. CLINICAL LEGAL EDUC. 147, 149-50 (2018).

[24] *Id.*at 151.

[25] *Id.* at 152.

education] and pro bono clinics . . . but that a 'hybrid' model incorporating both pro bono work and specific learning and teaching outcomes provides students with an optimum practice-based learning experience."[26]

C. This Study

This study involved a twice-monthly brief advice project staffed by student and attorney volunteers providing advice in family law matters.[27] Initially, demographic information was collected.[28] Then, clients, students, and attorneys were surveyed about the perceived efficacy of the project.[29] While the clients were largely positive about the assistance they had received, they were less positive during follow-up interviews a few months later.[30] Their satisfaction varied by the type of legal issue. In general, clients were less satisfied with less predictable matters, such as custody and alimony.[31] The follow-up survey identified the most useful service as "general information . . .[,]" placing it ahead of "particular advice about what to do . . ." or instructions about "how to do something . . . ."[32]

In order to drill down into the dynamics of the client-professional consultation, and perhaps learn more than survey data can reveal, the study offered clients the opportunity to have the consultation recorded.[33] We recorded student-client interviews, student-attorney consultations, student-client counseling, and attorney-client interview-counseling sessions. The entire study was approved by the Institutional Review Board,[34]

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[26] *Id.* at 153.

[27] *See* Smith & Stratford, *supra* note 11, at 180.

[28] *Id.* at 183.

[29] *Id* at 184-86.

[30] *Id.* at 192-93. Clients said the clinic has been very (80.7%) and somewhat (15%) helpful for a combined 95.7% positive review upon exiting the clinic. *Id.* at 192. Months later, they were very likely (74.6%) or somewhat likely (13.3%) to return to the same advisor with a new problem and very likely (84.5%) or somewhat likely (7.5%) to recommend the clinic to a friend, for combined positive scores of 87.9% and 92% respectively. *Id*. at 192-93.

[31] *Id.* at 193-94.

[32] *Id.* at 198.

[33] *Id.* at 182.

[34] Linda F. Smith, *Community Based Research: Introducing Students to the Lawyer's Public Citizen Role*, 9 ELON L. REV. 67, 80 (2017).

and client confidentiality and privilege were protected by virtue of the fact that the author was also a volunteer at this brief advice site.[35] If clients were recorded, the author promised to telephone them within two weeks if she found additional advice that they could be given. This benefit no doubt enhanced clients' willingness to participate.

All of the recordings have since been transcribed. This Article focuses on the forty-six (46) transcripts of students interacting with clients and the thirty-five (35) transcripts of students interacting with supervising attorneys.

The protocol was for the students to conduct the client interviews, consult with supervising attorneys, and then typically convey the advice the attorneys had authorized. Occasionally the attorneys provided the counseling. The pro bono students' experience levels ranged from graduating third-year students to first-year students in their second semester. While the students were oriented to their pro bono work in one large group session, they were not generally enrolled in a class designed to instruct them in interviewing or counseling skills or to help them reflect about their pro bono experiences. The upper-division students may have completed or been enrolled in the required Ethics (Legal Profession) class or an elective Lawyering Skills class, but any such enrollment was not linked to their pro bono volunteerism. Similarly, the lawyers were not involved in any instruction about student supervision.

Accordingly, the transcripts of the students' interactions with their clients and their supervising attorneys are largely untutored portraits that reveal the skills and habits the students pick up during the process, as well as those skills and habits that students and attorneys employ in this pro bono work. The Article uses Conversation Analysis to study these interactions, focusing on the instances where mistakes were made and seeking to understand the lessons to be learned from the mistakes.

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[35] *See id.* at 75, 98-113, for a comprehensive discussion of the study, including copies of Informed Consent forms for clients, students, and attorneys.

II. LAW AND LANGUAGE OF SCIENCE

Before introducing the findings of this study, it will be useful to provide some background about the rich possibilities of using language science to study the practice of law.

In the 1950s, philosophers of language wrote regarding the ways in which language acquires meaning as it is used.[36] H. Paul Grice proposed that conversation was a cooperative activity in which certain maxims were observed.[37] Erving Goffman proposed that in interacting, people try to present their best faces to one another.[38] In the 1970s, social scientists began to study language in use in light of the wide availability of recording devices, often relying upon ideas proposed by the philosophers of language.[39] These studies of spoken language were anchored in a range of disciplines (*e.g.*, linguistics, anthropology, sociology, psychology) and referred to by various terms (*e.g.*, discourse analysis, sociolinguistics, ethnography, social anthropology, conversation analysis).[40] Initially, the way in which ordinary conversation worked was the focus of study.[41] But, in many cases, social scientists used language analysis to better understand the institution where the language was produced—from courtrooms, to classrooms, to medical offices.[42]

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[36] *See* DEBORAH CAMERON, WORKING WITH SPOKEN DISCOURSE 48 (2001).

[37] *See* H. P. Grice, *Logic and Conversation*, *in* 3 SYNTAX AND SEMANTICS 41, 45 (Peter Cole & Jerry L. Morgan eds., 1975).

[38] *See* Erving Goffman, *On Face-Work: An Analysis of Ritual Elements in Social Interaction*, *in* INTERACTION RITUAL: ESSAYS IN FACE-TO-FACE BEHAVIOR 5, 11-12 (1967). *See generally* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1956); ERVING GOFFMAN, FORMS OF TALK (1981); Erving Goffman, *Felicity's Condition*, 89 AM. J. SOC. 1 (1983).

[39] Nancy Ainsworth-Vaughn, *The Discourse of Medical Encounters*, *in* THE HANDBOOK OF DISCOURSE ANALYSIS 453 (Deborah Schiffrin, Deborah Tannen & Heidi E. Hamilton eds., 2001). Of course, law and language scholarship has also focused upon written language, from the arcane language of statutes and legal documents, to more recent studies of judicial opinions. *See, e.g.*, DAVID MELLINKOFF, THE LANGUAGE OF THE LAW (1963); LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES , *in* LANGUAGE AND LEGAL DISCOURSE 1 (William M. O'Barr & John M. Conley eds., 1993).

[40] Ainsworth-Vaughn, *supra* note 39.

[41] *See generally* Harvey Sacks, Emanuel A. Schegloff & Gail Jefferson, *A Simplest Systematics for the Organization of Turn-Taking for Conversation*, *in* 50 LANGUAGE 696 (1974).

[42] *See generally* Charles Antaki, *Six Kinds of Applied Conversation Analysis*, *in* APPLIED CONVERSATION ANALYSIS 1 (Charles Antaki ed., 2011); *see also* CAMERON, *supra* note 36, at 100.

A. Language Science in Court Cases

In the legal arena, anthropologist William O'Barr studied language used in the courtroom.[43] He, and collaborator-law professor John Conley, spent decades examining "power relations in the linguistic details of institutional discourse."[44] Their first book was an ethnographic study of language used in small claims courts.[45] Their book *Just Words* contains chapters covering language-based approaches to different experiences in the law—from cross-examination of a rape victim, to mediation in a divorce case, to different argumentation styles (*e.g.*, rule-oriented vs. relational) in court.[46]

More recently, law professor Tonja Jacobi and then-student Dylan Schweers have analyzed Supreme Court arguments; they looked at interruptions and noted that female justices were interrupted at disproportionate rates by male justices and advocates.[47]

Another area of language science that also arose in the 1970's was forensic linguistics; distinguished linguist Roger Shuy has consulted in hundreds of cases and testified in dozens, analyzing, for example, police interviews, FBI recordings, and courtroom testimony.[48] He has also authored over a dozen books that illuminate the ways in which language can be used and misused in criminal and civil trials.[49] In his books Shuy outlines basic

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[43] *See* WILLIAM M. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM 1, 74 (1982) (showing that witnesses who use "powerful" speech are more credible, convincing and trustworthy than those who use "powerless" speech).

[44] Jason Cross, John Conley & William O'Barr, *Language, Power, and Law: An Interview with John Conley and William O'Barr*, 29 POL. AND LEGAL ANTHROPOLOGY REV. 337, 337 (2006).

[45] *See* JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE, *in* LANGUAGE AND LEGAL DISCOURSE, at ix-x (1990).

[46] JOHN M. CONLEY, WILLIAM M. O'BARR & ROBIN CONLEY RINER, JUST WORDS: LAW, LANGUAGE, AND POWER 17-76 (3d ed. 2019).

[47] Tonja Jacobi & Dylan Schweers, *Justice Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379, 1391 (2017).

[48] *See* CONLEY, O'BARR & RINER, *supra* note 46, at 170.

[49] *See, e.g.*, Roger W. Shuy, *Language Crimes: The Use and Abuse of Language Evidence in the Courtroom*, *in* THE LANGUAGE LIBRARY (1993); ROGER W. SHUY, LINGUISTICS IN THE COURT ROOM: A PRACTICAL GUIDE (2006); ROGER W. SHUY, THE

linguistic insights as to how speech acts work and shows how the law can misinterpret what people mean to communicate.[50] Forensic linguists also work within academia, studying how language works in the legal process. For example, law professor Janet Ainsworth and collaborators, sociolinguists Susan Ehrlich and Diana Eades, have compiled a collection of essays that study the meaning of "consent" in a wide variety of legal settings (*e.g.*, police interrogations, sting operations, sexual activity, and contracts) as illuminated through the language used in context.[51]

B. Language Science and Medicine

At the same time that language science was being employed to study legal institutions, social scientists were also studying medical institutions, and particularly, provider-patient conversations. There have been thousands of social science studies of doctor-patient consultations[52] and hundreds more are added each year.[53] Today, medical schools teach patient interviewing and counseling skills based on the evidence derived from these many studies.[54]

LANGUAGE OF SEXUAL MISCONDUCT CASES (2012); ROGER W. SHUY, THE LANGUAGE OF FRAUD CASES (2016); ROGER W. SHUY, DECEPTIVE AMBIGUITY BY POLICE AND PROSECUTORS (2017); SPEAKING OF LANGUAGE AND LAW: CONVERSATIONS ON THE WORK OF PETER TIERSMA (Lawrence M. Solan, Janet Ainsworth & Roger W. Shuy eds., 2015).

[50] *Id.*

[51] *See generally* DISCURSIVE CONSTRUCTIONS OF CONSENT IN THE LEGAL PROCESS (Susan Ehrlich, Diana Eades & Janet Ainsworth eds., 2016).

[52] *See* Ainsworth-Vaughn, *supra* note 39 ("[t]here is a huge cross-disciplinary literature on medical encounters[,]" with over 7,000 titles counted in 1995).

[53] *See* JONATHAN SILVERMAN, SUZANNE KURTZ & JULIET DRAPER, SKILLS FOR COMMUNICATING WITH PATIENTS, at x (3d ed. 2003) [hereinafter SKILLS FOR COMMUNICATING WITH PATIENTS] (stating that there are over "400 papers per year listed on Medline on physician-patient relations and communication").

[54] *Id. See also, e.g.*, AUGUSTE H. FORTIN VI ET AL., SMITH'S PATIENT-CENTERED INTERVIEWING: AN EVIDENCE-BASED METHOD (3d ed. 2012) [hereinafter SMITH'S PATIENT-CENTERED INTERVIEWING]; John Heritage & Douglas W. Maynard, *Problems and Prospects in the Study of Physician-Patient Interaction: 30 Years of Research*, 32 ANN. REV. SOC. 351 (2006); DEBRA L. ROTER & JUDITH A. HALL, DOCTORS TALKING WITH PATIENTS/PATIENTS TALKING WITH DOCTORS: IMPROVING COMMUNICATION IN MEDICAL VISITS (2d ed. 2006); NANCY AINSWORTH-VAUGHN, CLAIMING POWER IN DOCTOR-PATIENT TALK (1998).

C. Language Science and Client Consultations

In contrast, studies of lawyer-client communication have been almost non-existent.[55] From the 1970s to 1980s, there were two studies based on personal observations (without recordings) of attorneys interviewing clients (that highlighted attorneys' excessive control over the relationship and the case)[56] and one conversation analysis of a single recorded interview (similarly showing the attorney controlling the client for bureaucratic benefit of the office).[57] In the 1990s, a law professor-anthropologist team studied students interviewing clients seeking disability benefits[58] and discovered that "clients reveal critical self-information in their opening words," which students often miss.[59] This finding about client presentation of self (and additional findings about the importance of expressing empathy) were confirmed in my recent study of an experienced attorney successfully interviewing a client with disabilities.[60]

The most well-known study of attorney-client conversations was based on audio-recordings of over one hundred divorce cases.[61] The law professor-political scientist team focused on ethnographic insights about the attorney-client relationship and

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[55] *See* Linda F. Smith, *Rx for Teaching Communication Skills: Why and How Clinicians Should Record, Transcribe and Study Actual Client Consultations*, 24 CLINICAL L. REV. 487, 512-19 (2018). For a thorough discussion of the social science studies of attorney-client communication, *see id.*

[56] *See* Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599, 559-601 (1979); Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177, 177-78 (1986).

[57] *See* Bryna Bogoch & Brenda Danet, *Challenge and Control in Lawyer-Client Interaction: A Case Study in an Israeli Legal Aid Office*, 4 TEXT & TALK 249, 250 (1984).

[58] *See* Gay Gellhorn, Lynne Robins & Pat Roth, *Law and Language: An Interdisciplinary Study of Client Interviews*, 1 CLINICAL L. REV. 245, 246, 258-59 (1994).

[59] Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321, 321 (1998).

[60] *See* Linda F. Smith, *Always Judged–Case Study of an Interview Using Conversation Analysis*, 16 CLINICAL L. REV. 423, 441-43 (2010).

[61] Austin Sarat & William L. F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93, 95 (1986); Austin Sarat & William L. F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1669 (1989); AUSTIN SARAT & WILLIAM L. F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS 8 (1995).

the legal process.[62] They saw the attorneys negotiating reality with the clients, trying to move the cases to settlement while often ignoring clients' feelings.[63] The team also observed lawyers describing a chaotic system where it was important for clients to rely on their attorneys because opposing counsel and courts could not be trusted.[64] "Lawyer cynicism and pessimism about legal actors and processes is a means through which they seek to control clients and maintain professional authority."[65]

While these authors used recordings and transcripts to study aspects of legal representation, none of them analyzed the efficacy or competence of the representation.[66] Although social scientists have asserted that there have been so few studies of client consultations due to lawyers' concerns for attorney-client privilege,[67] this lack of data is unfortunate and unnecessary.[68] As a researcher and member of the team of volunteers, I have access to rare and valuable data from which we can learn how to improve competence in a brief advice program.

D. Applied Institutional / Interventionist Conversation Analysis

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

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[62] *See generally id.*

[63] Sarat & Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, *supra* note 61, at 128.

[64] Sarat & Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, *supra* note 61, at 1665.

[65] *Id.*

[66] In contrast, an international team of researchers has studied the efficacy of using "standardized clients" to teach and assess interviewing and counseling skills, and in that context compared clients' and tutors' scores on various factors. The factors relied upon in that study were the basis for the surveys of clients, students, and attorneys used in the first part of this study. *See* Karen Barton et al., *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 CLINICAL L. REV. 1, 3-5 (2006).

[67] *See, e.g.*, Brenda Danet, Kenneth B. Hoffman & Nicole C. Kermish, *Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure*, 14 LAW & SOC'Y REV. 905, 908-09 (1980).

[68] *See* Smith, *supra* note 55, at 526. Here, the clients, students and attorneys were all treated as subjects and signed informed consent documents approved by the Institutional Review Board.

Sociology, Linguistics and Communication."[69] "CA is the close examination of language in interaction."[70] It involves recording, transcribing and carefully studying the conversation to discover how conversation partners take turns and set up normative expectations that conversation partners either follow or flout.[71] "Applied" CA can "shed light on routine 'institutional talk'—the way that the business of the doctor's clinic, the classroom, the interview and so on is carried out."[72] Such "Institutional [A]pplied CA" is often focused on understanding "how the institution manages to carry off its work . . . ."[73] A second type of Applied CA has been termed "Interventionist [A]pplied CA" because it seeks to study problems with the way in which institutional talk is carried out and to propose solutions to those problems.[74]

This Article will incorporate elements of Institutional Applied CA insofar as it reveals how law students and clients interact during the interview and counseling session, and how students and attorneys interact during their consultation. It will also include elements of Interventionist Applied CA as it makes suggestions about better ways for the project to operate.

This Article uses a simplified transcription method, representing talk "as it is produced," though with proper spelling and some punctuation inserted for ease of reading.[75] The transcripts identify overlapping talk with slashes //, passive listening back-channel cues with brackets ["uhhuh"], pauses with a series of periods (one per second) or a note, and actions with chevrons <laughs>. Various other conventions indicating speed, tempo, pitch, etc. were not included as they were not significant for Applied CA here. Bold and italics are occasionally used to draw attention to issues being analyzed, and do not indicate any emphasis in the spoken language.

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[69] JACK SIDNELL & TANYA STIVERS, THE HANDBOOK OF CONVERSATION ANALYSIS 1 (Jack Sidnell & Tanya Stivers eds., 2013).

[70] Antaki, *supra* note 42, at 1-2.

[71] *Id.* at 2.

[72] *Id.* at 6.

[73] *Id.* at 6-7.

[74] *Id.* at 8.

[75] *See generally* Sacks et al., *supra* note 41. *See also* Alexa Hepburn & Galina B. Bolden, *The Conversation Analytic Approach to Transcription*, *in* THE HANDBOOK OF CONVERSATION ANALYSIS 57-58 (Jack Sidnell & Tanya Stivers eds., 2013).

Studies using CA do not employ any interventions or experimental techniques. Rather, the task is to carefully analyze the utterances themselves and see what lessons emerge.

III. LESSONS FROM THE TRANSCRIPTS

This study relies on transcripts of forty-six (46) student-client interviews, and thirty-five (35) consultations between student and supervising attorney, as well as transcripts of client counseling sessions conducted primarily by students (39) and occasionally by the attorneys (7). In fourteen (36%) of the cases the student consulted with supervising attorneys more than once in order to counsel the client.

The analysis focuses on errors and omissions in counseling the client—where the client was given incorrect advice or given only information or partial advice. The counseling was deemed to be "complete personalized advice" when the advice took account of the client's particular circumstances and addressed all the relevant topics raised. In contrast, "partial personalized advice" took account of the client's personal circumstances, but did not address all the topics that the interview allowed the advisor to address. The counseling session was "information only" when the client was given general information without ascertaining or explaining how the information was relevant for the client's particular circumstances.

The chart below represents the range of counseling assistance provided:

	Correct Counseling by Students	Correct Counseling by Attorneys	Counseling Including Wrong Advice by Students	Counseling Including Wrong Advice by Attorneys	Total
Complete Personal Advice	17	4	3	0	24
Partial Personal Advice	10	2	4	0	16
Information	4	1	0	0	5

Only					
Wrong Advice			1		1
TOTALS	31	7	8	0	46

With this data in mind, we turn to the transcripts and CA to explore what led to the wrong advice being given to clients in 8 out of 46 cases (17%). The results of this study raise the question, why were about half (24) of the clients given complete personalized advice, while other clients were given partial advice (16, or 35%) or only information (5 or 11%)? Once this question is answered, we will be able to address how the competence of the brief advice program can be enhanced.

A. Summary of Errors and Omissions in Counseling

The eight errors in client counseling ranged from serious to minor.[76] In order to improve the competency of the clinic, it is useful to try to categorize the nature of the errors and how they came about. The most serious error occurred when a junior student consulted with a senior student rather than with an attorney, which was contrary to clinic protocol.[77] Two errors (one of them serious) began with the student providing erroneous advice during the interview and then not correcting it after the student-attorney consultation. Two minor errors resulted from the student guessing about an answer to a new question that arose during the counseling session. Finally, three errors can be traced to inadequate sharing of procedural information during the student-attorney consultation.

The project promised and aspired to provide personal legal advice to each client and was able to do so competently in over

[76] The protocol for the study provided that the researcher would listen to the recordings and telephone the client if additional advice was called for. In the few cases where there were serious errors in client counseling, the clients were called and given complete, accurate advice.

[77] Because both the cause and correction of this error are obvious—follow the protocol to obtain attorney supervision—no further discussion here is necessary. Suffice it to say that the students possessed neither the legal knowledge, nor the professional judgment necessary to adequately advise a victim of domestic violence facing a volatile post-divorce visitation dispute.

half the cases. However, in other cases where the client received correct advice or information, it was only general information in five (5) cases or partial advice in twelve (12) cases. In most of these cases (10), this occurred because the student did not share all the relevant facts or procedural information with the attorney, and the attorney did not probe to understand enough to render personalized advice. In other cases (3), the students shared relevant facts and correct procedural information, but the attorneys provided only information or partial advice. In a few cases (4), omissions occurred because the student began counseling during the interview.

The chart below summarizes the reasons for both errors[78] and omissions:

Reason	Error	Omission	Total
Inadequate sharing of facts during attorney consult		8	8
Inadequate sharing of procedure during attorney consult	3	2	5
Attorney limits answer		3	3
Student began to advise during interview	2	4	6
Student guessed on new question during counseling	2		2
Student did not consult with attorney	1		1
Total	8	17	25

It is useful to consider some of the actual conversations that brought about these errors. We begin with the most frequent mistakes:

B. Inadequate Sharing of Facts During Student-Attorney Consultation

The most frequent reason clients left with incomplete advice was due to inadequate sharing of substantive facts during the

[78] If a case was assessed to have had an error as well as an omission, it is tabulated in this chart only under the "error" column.

student-attorney consultation. The clients were quite fulsome in the description of their situation and in posing questions. The students were consistently accepting of the client's narrative.[79] However, when it came time for the student to convey the client's situation to the attorney, the following problems occurred. Some students boiled the client's case down to abstractions, rather than sharing sufficient facts to allow the attorney to assess the case. In addition, some attorneys chose to provide general information rather than to probe for facts in order to provide personalized advice.

Comparing the interview dialogue with the student-supervisor dialogue reveals how inadequate sharing of substantive information resulted in less than thorough counseling.

1. "Jason's Taken the Children and Won't Give them Back"

In all cases, the students began to learn about the client from the Intake Form they completed. This client's form read:

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

Jason has taken the children & won't give them back. I need info on what to do next in the divorce.

An open question evoked this compact and action-filled narrative:

Student: Yeah. So that's your copy. And . . . . . so, just tell me briefly what you're working on.

Client: Um, I'm going through a divorce [okay] **dropped the kids off at his house,** Thank– the day after Thanksgiving **and he won't give them back.** . . . He, . uh, he what else?

[79] Law school interviewing texts "emphasize the importance of encouraging and allowing the client to give a narrative at the beginning of the interview" and "recommend a fairly consistent structure for the initial interview—a client-directed narrative identifying the client's concerns, followed by attorney questioning to further explore facts and goals, followed by analysis, and then counseling." Linda F. Smith, *The Drive to Advise: A Study of Law Students at a Pro Bono Brief Advice Project*, 51 ST. MARY'S L.J. 345, 349-350 (2020).

Client's Male Friend: You dropped the kids off at his house to give him visitation. There hasn't been any temporary custody or anything [okay] in the divorce. He is ill, it's a disease. He's got MS or something and he complains a lot that he can't take care of the kids or whatever. Like this is *six* kids. This isn't like one or two kids, this is six kids. And she took the kids over there one day, **dropped them off, kind of for a visitation, and, he just wouldn't give them back.**

Student: So they've been there since the day after Thanksgiving?

Client: Since the day after Thanksgiving. [okay] And I'm sure it has a lot to do with, um he's starting to get billed every month from the state for child support. . Um, anyway, so I'm mainly here to figure out what to do. Because this is his Answer to my, to the divorce, and I don't know what to do from here

The client's explanation of her situation (with her friend's help)[80] followed the form of a "narrative" in conversation: it began with an orientating statement ("I'm going through a divorce"), which was followed by the "complicating action" regarding the children being dropped off and then not returned, and ended with a "coda" and "evaluation" theorizing that the withholding was due to being charged child support. Finally, the client indirectly asked for help ("I don't know what to do from here").[81] This entire narrative was conveyed in just over a minute.

This narrative itself, if accurately conveyed to the supervising attorney, would be sufficient for the attorney to provide advice—the standards for custody determinations and how to seek temporary orders to address the situation of the father withholding the children. However, better counseling would

[80] The presence of a third person during the interview would eliminate the attorney-client privilege protection (though not the obligation for the student to maintain confidentiality). *See* FED. R. EVID. 502 (addressing circumstances constituting waiver of attorney-client privilege). Nevertheless, clients frequently brought such a support person, and the students never addressed the loss of privilege (attorneys rarely did).

[81] *See* Linda F. Smith, *Client-Lawyer Talk: Lessons from Other Disciplines*, 13 CLINICAL L. REV. 505, 511-12 (2006) (citing CAMERON, *supra* note 36, at 152-53).

be achieved with additional interviewing. The student would have been well-advised to ask the client to complete the timeline (*e.g.*, what happened after Jason refused to return the children?). The student might also have questioned on topics that are relevant to a custody determination (caretaking practices and roles). Instead, the student focused on the procedural facts—when was his Answer filed, and was he represented—for the next two minutes of the interview. After less than four minutes interviewing the client, the student turned to an attorney supervisor and the following dialogue ensued:

Student: So, [Mmhm] alright. Good. I think this thing is running. [okay] So we're in the middle of a divorce. [okay] **Tanya filed the divorce, her spouse, answered. Um She's not sure what to do next**.
Attorney: Okay, she's pro se I take it?
Student: Umhm.
Attorney: Is he pro se?
Student: We're not sure. [okay] He did draft the Answer himself, //but he also//
Attorney: //I'd say// that's a pretty good sign.
Student: Yeah, haha.
Attorney: Well the first question I always ask is, is there a counter-claim he attached to his Answer? [okay] Because if there's a counter-claim, then she needs to Answer herself within 20 days. [right] It's rare to see a counter-claim if there isn't another attorney involved but it's always something to check.

How had the student forgotten that "Jason has taken the children and won't give them back"? Perhaps it was the student's focus on the procedural facts rather than the client's lived facts during the interview that made her forget. Why didn't the attorney ask what the issues were in this contested divorce? Why didn't the attorney review the Intake Form? If he had taken either of these steps, he would have been able to provide individually-tailored, strategic advice.

Instead the attorney launched into a major lecture on all the things that can happen once a case in underway:

Attorney: And then second, haha, um [sorry] Basically there's two things to do after this that you want to ask her about. [okay] One is, what's temporary orders. So if there's something she wants immediately, something she needs during the course of the litigation, 'cause it can take a while, can she get that assistance. [okay] Temporary orders. I usually ask is there a custody issue? 'Cause that's usually pretty important, so she's probably going to want temporary orders for custody. [Mnhm] And then that all comes with the child support and likewise, you know like the medical care, all that stuff that comes with. And then they've got those packets for us. [okay] And then you know, alimony is another possibility for temporary um orders. Those are usually the big ones, y'know. [okay] Sometimes taxes and stuff, and trying to figure out what to do with taxes for last year. Anything that needs to be handled on a temporary basis. [right] Like you need to know who's where the kids are going to stay from here on out and how visitations are going to work so [right]—that they call parent time. And then the third one to think about, if you don't have any temporary orders, or even if you do, the court's going to order you to go to mediation, [okay] so explain what mediation is and how to set it up. And the administrative offices of the court has a program I think, as well as Utah Disputes Resolutions, it's a non-profit. [okay] And they both go and try to work everything out.

Student: Okay. Do we have paperwork for that //if the // ?

Attorney: //Mediation?// I don't think, well they might have some pamphlets on mediation down [okay] there, and then, you know, the temporary orders is kind of the biggest question with the counter-claim. Counter-claim's the first check. I don't expect one. But it's easy to Answer if she has to, but—Okay, anything else?

Interestingly the attorney began with "temporary orders . . . if there's something she wants immediately" and "I usually ask if

there's a custody issue." Why didn't this information jog the student's memory that "Jason's taken the children and won't give them back"?

The attorney's almost one-and-a-half-minute lecture was all generic information, none of it targeted to this client's circumstance. He concluded by asking the student if there was "anything else." Again, forgetting that "Jason's taken the children and won't give them back," the student raised another question the client had posed: "she's wondering if she actually needs representation at this point? She doesn't have any money,.//so//." The attorney addressed the pros and cons for proceeding pro se, then turned to suggest questions that would get to the merits of the case and concluded with recommendations for how to proceed.

The consultation was problematic because the student did not share important facts about the client's circumstances, and the attorney did not probe for any facts. The attorney provided a wealth of information about what might be done once a contested divorce is underway and questions to ask to assess the strength of the client's claims. However, none of this general information was targeted to addressing this client's real needs and circumstances. The client walked away with general information only, despite having shared an upsetting situation that called for immediate attention.

2. Custody Question—Go for the Gusto?

Over the course of ten (10) minutes, the client shared detailed facts and raised various questions. Her new husband had a son out of wedlock. Although the father's name was on the birth certificate and he paid an agreed upon (and generous) amount of child support, the mother frequently denied him access to the child. The stepmother client shared her goals:

> *Client:* We're just trying to figure out what steps need to be taken. **We would like to take the custody as far as we could** as far as maybe having joint—I don't know if that's something that's likely or not, but we'd love to try to get it to that point.

She then expanded on her questions sprinkled through a fairly detailed narrative:

Client: Yeah, yeah. It's what we have planned and being newly married and having a house [yeah] and all that sort of a thing. We want him to have his room [Awe]—anyway, so all of that's really exciting. We'd like to establish some guidelines. His ex—actually, you know what, let me revert—let me go to some of my questions. Okay. **What is considered legally established paternity?** I know his name is on the birth certificate. His son does have his last name. He has been paying child support from the day that they split. I don't know if there's other actions that need to be taken before we even get started on any of this or his name being on the birth certificate is enough. We don't know. <laughs>

Student: Ok. I'll have to go ask about that—

Client: Yeah, no problem.

Student: –but keep your questions coming.

Client: All right. Then, the other thing, where my big concern lies, his ex really holds the child hostage, you know. If he don't buy her groceries, he can't see her son for a month. She hasn't worked in a year, neither has her live-in boyfriend. [mmhm] They're in the process of being evicted. They've had the power shut off. They've had the water shut off. They come to us and ask for money when they can't afford groceries. Which, you know, we're happy to provide for our son, or for my stepson, because, obviously, we want him to be in the best situation possible but I'd rather that's with us [Yeah] than us giving money and food to his ex and her live-in—[right]—which is like, come on people, you haven't had a job for three years. Are you kidding me? Go get a job in the (inaudible).

Student: I know.

Client: Anyway, not to mention the fact that I personally—I don't know—it sounds so cliché, I really think she has a drinking problem. She drinks every single night after my stepson's in bed [Mm] to the point of inebriation,

> calling us up, slurring her words, not making sense. [Mm] My big concern is, what if something were to happen in the middle of the night? [Yeah] What if my stepson got sick—I don't know. Anyway, that really scares me. Then, not to mention, not having any guidelines of, you get him this date, I get him this date. It's whenever she says. If we don't do what she says, she won't let us see [ok] him for months at a time. It's just—we both get physically ill. <laughs>
>
> *Student:* Well, of course.
>
> *Client:* We love him. We wanna be with him. We want him to be happy. **Then my other question is, does the child's wishes hold any grounds?** I know that in different states, there's different guidelines on that. [Mm] He's only four years old. He literally breaks down when we tell him we have to take him back to his mom's, [Oh] to the point that he will cry until he makes himself sick and say "I don't wanna go back to Mom. I hate Mom. I wanna live with you and Daddy." It's just like, oh my gosh. What in the heck is going on to make a little boy say, "I hate my Mom. I don't wanna live with her."
>
> *Student:* Yeah. That's heartbreaking

The client also said that the mother would deny visitation if she (the new wife) would be present. She also asked about strategy: "Would it be a good idea to establish even the most basic visitation and then take it up a notch? Or is it better to just get a lawyer right away and go for the gusto? 'cause I don't think it's gonna be pretty."

The student consulted with an attorney supervisor twice and counseled the client twice. During the first consultation, the student shared the client's questions, but shared almost none of the facts:

> *Student*: Okay. I have a woman in here. She just got married. And her new husband has a son from an earlier relationship. The son is four**. Her first question is, what's needed to establish paternity?** I guess—she

> says his name is on the birth certificate and he's been paying child support. Does that basically mean he's the father?

The attorney asked questions about whether the father was paying child support through the Office of Recovery Services, and if he visited the child. The student responded: "That's the thing they want to work on—sometimes the mother will let him see his son, but hardly ever." In reply, the attorney advised: "Then he should file a Petition for Paternity."

The student went to the next questions, again without sharing the client's narrative or questions about strategy:

Student: Okay. If she decides she wants-, do you think she needs counsel for that or will it be pretty easy to do on her own?
Attorney: They should be able to do it, I think.
Student: Okay. **Her final question is, she wants to know if the child's wishes—how important they are**. I guess the son really wants to spend a lot of time with the father.
Attorney: How old is he? //[inaudible]//
Student: //Four. Doesn't matter? //All right. That's everything.

Here the student asked abstract questions and shared minimal information, and the attorney did not probe for any facts. As a result, the attorney proffered advice that was accurate regarding the process (bring a paternity case) but devoid of any strategic advice or case assessment. Despite sharing upsetting and relevant facts, his client never received an assessment of the strength of her case or advice on the well-focused, strategic question—is it best to establish visitation or "go for the gusto" of custody—that she had posed.

3. Custody Question—"New" Unwed Father

Over a 22-minute interview, including client narrative and student questioning, this client told an unusual story: a child support case had been brought against him for a nine-year-old child he never knew about. Genetic testing determined the client

was the father and he began paying child support; he also began to have the child to his home for visits. However, after a few successful visits the mother cut off all contact. The client had prepared court papers to address custody and was asking for sole custody because the mother was "crazy" and "unstable" and is attempting to "work the system" for support. After telling this extended narrative, the client presented his draft Petition.

The student spent almost three minutes with two attorney supervisors and during that entire time the only discussion concerned the court forms and process. The student never shared any of the unusual facts about the client's circumstances or goals. The attorneys told the student that he could give the client clerical assistance to complete the court forms, that it would be too time-consuming to review all of the documents, but the client should draw the student's attention to the parts of the documents he had questions about. One attorney directed he should "have a plan for service" and explained the rationale for a "military affidavit."

The student returned to counsel the client and spent five minutes describing various documents and their function, such as a military affidavit and a default judgment, but, naturally was unable to give the client any personal, strategic advice about the client's desire for contact with his new-found child or his claim for custody under these facts. This is a stark failure to provide meaningful legal advice when the client had provided ample factual information that would enable an experienced attorney to provide strategic guidance.

This case, as well as the prior unwed father case, stand in stark factual context, yet both clients received the same minimalist help—information about what forms to fill out and file.

4. Adoption Recommended, Guardianship Not Explored

The client explained that she planned to adopt her 20-month old great nephew who was born in the U.S. Virgin Islands. She originally had a power of attorney, but that had expired. The client did not have a social security number for the child or the ability to claim the child on her taxes or health insurance. The student accurately reported the situation, though without mentioning the taxes or health insurance.

Not knowing that health insurance and taxes were an immediate need (which guardianship could address), the attorney advised the client should pursue an adoption:[82]

> *Attorney*: Yeah. Maybe—well, the surest thing to do is to go get—well, the surest thing to do is get the adoption finalized. That's kind of—yeah. Adoption is gonna be the best way. She's in American Virgin Islands, so it's an American protectorate, so it's under—I mean, they're under federal law.

The student passed along the advice to hire an adoption attorney, but the client again raised the immediate problems: "Because I'm running into the problem now with the little boy, insurance, can't file tax" and mentioned concern about the complications of adoption as compared to guardianship. But where the student had not shared the client's concerns about health insurance or tax deductions with the attorney, the student's counseling continued to focus on hiring an adoption lawyer as the best solution. The client never received counseling that addressed a simpler option—guardianship—since the student had not shared all the client's goals and the attorney did not ask.

5. Property Division in Divorce Explored, But Not Alimony, Support, or Custody

Another client had begun to draft divorce papers for herself using the court's online program. She explained that she was asking for custody and child support but had a question about how to handle the marital home that was in the husband's sole name.

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[82] Texts in interviewing and counseling recommend that the counselor describe all the options available to the client, predict the outcome for each option, and help the client weigh the options. *See, e.g.*, DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 291 (4th ed. 2019); STEPHEN ELLMANN ET AL., LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 72 (2009); G. NICHOLAS HERMAN & JEAN M. CARY, A PRACTICAL APPROACH TO CLIENT INTERVIEWING, COUNSELING, AND DECISION-MAKING: FOR CLINICAL PROGRAMS AND PRACTICAL-SKILLS COURSES 63 (2009). Client counseling often did not involve a description of options because there was only one approach to achieve the client's goals. Here, however, the option of guardianship should have been explored.

She also stated that her husband was self-employed and had told her the amount he had agreed to pay her. When the student consulted with the attorney, he asked only about the marital home and how to find out if the husband had already filed for divorce. The attorney did not probe for other topics, so the client received no advice about how child support was calculated, whether she might be eligible for alimony, or how custody was determined.

6. Imminent Eviction Not Mentioned

A protective order had been entered against another client, ordering him out of the apartment he shared with a roommate. The client wanted to know if he could continue to work for the landlord, doing maintenance at the apartment complex. A police officer had told him to ask the court about that, and the client had been rebuffed when he tried to meet with the judge.[83] Here is how the client framed his goal:

Client: The reason I'm here is because the landlord is desperately needin' me to do work there and **can I get Judge Lincoln to clarify if I'm supposed to stay away from apartment two or the entire apartment complex**?
Student: Oh, okay. //Okay. //
Client: //He doesn't give// a footage on here.
Student: The order requires you to stay away from that apartment. You're wondering if that means you can still do the work—
Client: At the apartment complex. //Mow the yard// and do maintenance in—
Student: //At the apartment// Okay. Is that your source of income; that job?

The interviewing student also asked the client about his ideal outcome, if he would want to move back into the apartment, and the client shared this:

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[83] It would have violated applicable ethical rules for the judge to meet *ex parte* (alone, without the other party present) with this client. *See* UTAH R. PROF'L CONDUCT 3.5(b); *see also* UTAH CODE OF JUDICIAL CONDUCT R. 1.2, 2.9.

Client: –the **landlord has served eviction papers on him** 'cause he hasn't paid rent for the month of May 'cause he says the court ordered me to do it and they didn't.
Student: As part of the protective order //he claims that?//
Client: //Yeah Yeah.// He said, "I'm not paying your rent."
Student: We'll have to look that's—let's see. Okay. Interesting.
Client: **He served eviction papers which he said may have got served yesterday or today**.

When the student and attorney met, the student explained both the client's desire to get the judge to clarify the order and the client's desire to continue working at the apartment complex. The attorney advised that the order did not prevent the client from working at the complex, just from going to apartment number two. The student failed to tell the attorney about the roommate facing eviction, so the attorney also advised that there was no way the client could move back into his apartment and that he should negotiate with the landlord to cancel the lease. Because the imminent eviction was not discussed, the client was not advised how he could seek to have the Protective Order amended once the roommate was evicted.

7. Partial Advice About Divorce

During a twenty-five-minute interview, another client (a victim of domestic violence) explained she had a temporary protective order, but was seeking advice about obtaining a divorce–including custody, limited visitation, permission to leave the state with her child, and alimony–and help with completing an application for Legal Aid to represent her. In the two-minute consultation between student and attorney, the student explained about the protective order and asked about the forms to apply for Legal Aid, if Legal Aid would help her apply for alimony, and if she should delay leaving the state until the divorce was final. The attorney advised about completing the Legal Aid forms, agreed that Legal Aid would help with alimony, and advised that the client should not leave the state "until she's got court approval."

The student accurately conveyed the advice the attorney had recommended to the client. However, as a result of the limited

exchange between student and attorney, the client's questions about custody and limiting visitation were not addressed.

8. Two Different Lawyers Counsel Differently

This case did not involve miscommunication between student and attorney, but inadequate interviewing by the second attorney the client consulted. At the beginning of the interview the client and student interrupted an attorney for "a quick question" about a non-family law issue:

Client:	Because, in this case, I owe on my rent office thing, but he gave me few—
Attorney:	Okay. Is this your apartment or is this—
Client:	No, it's a business.
Attorney:	—a business. Okay.
Client:	Yeah. I have a small office [ok] and then I don't [ok] think this is about the monthly *[Inaudible 05:41]*.[yeah] He wants me to pay by the 20th or I have to leave the place. He don't want to negotiate with me [yeah] and he asked me to pay him by the end of the month.
Attorney:	Okay. Yeah. This is a landlord/tenant matter. Absolutely. We don't specialize in landlord/tenant matters. But you understand what the document says?
Client:	Uh-huh.
Attorney:	Okay. So, when is the three days?
Client:	He use a residential. This is not a residential matter. This is a business matter.
Attorney:	Right. Right Yeah. Yeah. And so you just were served these papers today?
Client:	Yeah.
Attorney:	Yeah. It says if you don't pay in three days—
Client:	My question is if he has a right to do this because I ask him for negotiation but he says about one month behind so he just don't give me any time to—
Attorney:	Well, I think, again, we're not landlord/tenant experts but I think typically if they post the bond and it's for non-payment of rent they can do this within three

days. Now, after the three days to enforce this, he would have to go to court but look at your rental agreement. Do you have your rental agreement with you?

Client: Uh-huh.

Attorney: Read it because you may owe triple damages if you don't—if you stay past the time. And you may owe attorney's fees if you stay past the time. So one option is leave by three days or pay up by three days. Does that make sense?

Client: Mm-hmm.

Attorney: So this is a business? I think you may want to hire an attorney to advise you.

Student: Canterbury Fiscal Services. Is that the name?

Attorney: Yeah, that's the landlord.

Client: Yeah. This is the landlord. I'm the Canterbury.

Attorney: Oh, you're Canterbury. Okay. All right. Okay. I think most of the lawyers that do landlord/tenant law represent tenant—represent landlords. If you go on the bar's website under property or landlord-tenant law you'll find lawyers that are willing to do those kind of cases and I think given your income you probably should talk to somebody and hire them for an opinion 'cause we do family law we don't do landlord/tenant law here.

The interrupted attorney interviewed and counseled the client, giving her correct advice that if she did not pay the rent due within three days she could be evicted and owe treble damages and attorney's fees. The attorney then assessed her income (listed on the intake sheet) and advised her how to seek legal representation. However, in this case the client was counseled about her family law matter by a different attorney. At the conclusion of that conference the client sought a second opinion on her landlord-tenant matter:

Student: Oh, rent. I think we kind of covered that with *[inaudible 23:24]*.

Client: Oh, yeah. The landlord wanted to give me three

days to pay or leave. He don't want to negotiate *[Inaudible 23:34]* behind for one month and he added fees and he said, "Or you pay me by the 20."

Student: Do you wanna show him the form?

Attorney 2: **I'll just tell you who to call. Utah Legal Services.**

Student: Okay.

Attorney 2: Let me write it down.

Student: Also, we have the Street Law clinic.

Attorney 2: This is gonna be quicker.

Student: Okay. The Street clinic is good, if you ever have other issues that are not family law.

Client: Mm-hmm.

Student: The Street law clinic is—they can do that sort of thing.

Attorney 2: Okay. They're open between 10:00 and 2:00. Call this number between 10:00 and 2:00.

Client: Okay.

Attorney 2: Okay. Tell them what's going on with the landlord and they'll tell you what you can do.

Client: Okay.

Attorney 2: Okay. Call them tomorrow 'cause you've got very limited time.

This second attorney did not interview the client about the problem or look at the paperwork. Instead, he gave her a referral that would prove to be useless (while Utah Legal Services represents individuals who are facing eviction, they do not represent businesses facing eviction). The student sought to help by referring the client to a different brief advice site, but not sharing what the first attorney had learned and correctly advised. The mistake was that the second attorney turned too quickly to give advice without first understanding the facts. This example also illustrates the fact that the student may not interrupt the attorney to provide conflicting (although useful) information.

C. Erroneous Sharing of Procedural Facts During Student-Attorney Consultation

A second reason clients frequently left with incomplete or erroneous advice was due to erroneous sharing of procedural facts during the student-attorney consultation. The clients were quite fulsome in the description of their situation, usually sharing the correct procedure. However, some students incorrectly reported the procedural posture; and the attorneys did not probe to clarify, even when there was evidence of an error.

Comparing the interview dialogue with the student-supervisor dialogue reveals how erroneous sharing of procedural information resulted in erroneous advice or insufficient advice.

1. Confusion Over Procedural Posture –Temporary Order Not Divorce

In this case the client wanted to alter temporary orders that were entered after mediation and brought in a draft motion for approval. Although the client was clear that these were temporary orders he wished to modify, the student assumed that these were the orders entered in the divorce decree and reported that to the supervising attorney. Accordingly, the attorney passed on advice that the client needed to file a Petition to Modify and could not proceed with the Motion for Temporary Orders that the client had completed.

The inconsistent dialogues are below:

Client: Okay. So what I'm basically trying to do is, and I think this is the right paperwork, I guess, just wanna make sure I have that correctly, but—

Student: Yeah, it is.

Client: —my ex and I, we went to mediation a year ago, [uhhuh] and we both had our—we both had attorneys. We went to mediation. We both worked something out to where we had the **temporary order,** and we were gonna meet back in a few months, so that would have been July or August. We just never have during that time, **so it's been over a year now**. What they've granted me, as far as

> percentage-wise for the kids, of like 35 percent, I've been watching them well over 50 percent. And the only thing that would keep me from 50 percent is, there's an over—there's a Thursday I have. I have 'em every Thursday 'til 8:30 at night. If I would just have them sleep over every Thursday, that would make it—we're completely equal in time. [mmhm] Well, in the last year, I've had them so many Thursdays, and then the last couple months, I've been having them every Thursday. [Ok] She wants me to have them every Thursday. I'm supposed to—**it's temporary anyway,** so I just wanna show the judge that, hey, you know she wants me to have 'em. I'm taking 'em. I have records. I've been keeping a lot of notes and everything, [great] and so I just wanna fill it out.

The student then wisely asked to see the paper with the order, but it does not seem that she was able to; the student did not take any paperwork to the attorney. Instead, their dialogue began as follows:

Student: Okay. **He and his wife got divorced**. As far as custody's split up, he gets 35 percent. She's supposed to get the rest. However, she's been having him watch the kids about 50/50, more than that, probably. He wants to make that a permanent thing. She doesn't wanna make it like official, but she still wants him to watch the kids about 50/50. So he wants to fill these out. He just doesn't know exactly if he needs to fill out both or if one will suffice. He was told, for sure, he needed to do this, but is this—

Attorney: **They've already been divorced?**

Student: **Yes.**

Attorney: Did he bring the divorce decree with him?

Student: No.

A few seconds later the attorney advised the student:

Attorney:	So If there's been a divorce, he needs to file a Petition For Modification.
Student:	Okay.
Attorney:	It's a new court case with new service and everything. Served by the sheriff.
Student:	Okay, and it's not this document?
Attorney:	No, it's this document. It's the—

The attorney continued to explain to the student the need for a Petition to Modify packet and that it would be unlikely that the court would approve a Motion to temporarily modify the Decree, referencing the paperwork the client had presented. They also had a very nuanced discussion about confirming the current practice through email and going to mediation to attempt to make the current practice the order of the court.

The student returned to advise the client and conveyed much of the nuanced advice, but ultimately told the client that he needed to complete the Petition to Modify but could also file the Motion that he had drafted if he wished. This was incorrect. As there had been no divorce yet, a Petition to Modify was not the correct paperwork at all.

The weaknesses here were that the client did not bring the existing order for the student and attorney to review, and the student misheard, misunderstood, or misremembered the client's account of the procedural posture of the case. The student also did not tell the attorney that the client had been given the motion paperwork by a Legal Aid paralegal, which might have made the attorney question the procedural posture of the case. In addition, the attorney did not independently question why the client had been given the wrong paperwork.

2. Confusion Over Procedural Posture–Signed Document Not Petition

In this case the client told a narrative that did not make sense under the law. She explained that she and her husband had a legal separation that "left it in her hands" whether to get a divorce. She believed her husband's attorney had "changed the Decree of Separation" so there would be a divorce. She wanted to stop the divorce so that she could remain on her husband's health

insurance given that she had some medical procedures scheduled. She had been in court the week before and described the hearing before the court Commissioner:

Client:	. . . . My questions are, what do I do at this point? **I did send in the document**—what do we call it?
Student:	The motion?
Client:	Motion. **Saying, let's go ahead and get divorced**, then. [ok] She asked me if I still had done that, and I said yes, I had, but I need to have medical treatment now. [ok] **I don't know what to do. Do I sign, send in another motion to stop my request? The commissioner said all that needs be done is send in a motion [ok] on the correct paper. [ok] So I need to cover that**, plus . . .

After an extended and confusing narrative, the student summarized: "I think I got it. You filed a motion agreeing to a divorce, but you want to stop that because you need the health insurance . . ." to which the client said "Yeah."

In describing the matter to the attorney, the student began with the client's claim that her Separation Decree entitled her to decide if there would be a divorce, and the attorney immediately latched onto the impossibility of such a decree.

Student:	She said she's sure she has a legal separation. [ok] She says in the legal separation doc, which she didn't bring with her—she has the final say on whether or not they can have a divorce to terminate the marriage.
Attorney:	That's illegal. [ok] The man can file the divorce if he wants, but the agreement says he can or can't. [oh, ok] He's a U.S. citizen. He could.
Student:	She said it's due to health reasons, so her husband's trying to file a motion for divorce now, and she says—
Attorney:	File a divorce. There's not a motion.

Student: File a divorce. All right.
Attorney: She can't really stop him. She's wasting her money on lawyers if she tries.

Although the student did try to discuss the ongoing case, she never stated the essence of the question that she had correctly summarized above nor that the client had spoken to the Commissioner about what to do next. The attorney did not probe to understand the procedural posture of the case.

The student went back and advised the client that the husband was entitled to seek a divorce. After many minutes of arguing about the justness of this situation, the client again brought up the paper she had signed and whether she could change it:

Client: **—even if I rescind what I had sent in because my medical situation has changed? Can I do that? Did you ask about that?**
Student: I didn't. I'll go double-check on that with you and find another attorney.

The student consulted with a second attorney, but that consultation was not recorded. When the student met with the client for the second counseling session, they both further discussed the hearing before the Commissioner and the client's conversation with the husband's attorney after that hearing regarding the document he was writing up for her approval. However, the student did not say whether the client could, or how the client should, "rescind what [she] had sent in."

The client then asked about how long she has to object to the paper the lawyer was drafting based on the hearing before the Commissioner. Here, the student misunderstood the nature of the document. Assuming it was a Petition that would call for an Answer as the attorneys had suggested, the student gave the client erroneous information:

Client: Okay. Well, my concern is once—say they file—do you know this? Say this week he'll file something *[fading voice]*. How long do I have before the judge

can just write on it and write it off and say, "We're done with this"?

Student: The answer, I believe, needs to—might say in here. I believe it needs to be filed within—

Client: Five days, isn't it?

Student: I believe it's 20 or 30 days. It's not five days. It's 20 or 30 days.

Client: The attorney told me five days.

Student: They might want the answer in five days, but I believe it's 20 or 30 days.

Client: Is in there, then.

Student: It's not saying it. It says on the Web site. I don't remember. I don't remember. I always get that question. I always forget the dates. It's either 20 or 30 days. Let me find *[cross talk]*, so I'll double-check that.

[Break in counseling. Consult with an attorney not recorded.]

Student: You have to answer within 20 days, and it starts the day after you're served. The day you're served is Day 0. The next day is Day 1. You have 20 days to file your answer.

Client: Well, the attorney put in his documents that I didn't respond to the January thing, that I didn't respond within the five days.

Student: Well, in Utah law it's 20 days. I'm not sure what they're referring to with 5 days, but it's 20 days.

Client: Okay. I have 20 days to respond, and—

Student: Yes. He's in-state, correct?

Client: Pardon?

Student: Is he in-state or out of—

Client: In.

Student: Okay, it's 20 days.

Client: Okay. Well, thank you for your time and effort. I'm glad you do let women know.

The client went away with mistaken information about how long she had to act because the student did not understand or communicate the nature of the proceedings, and the three attorneys with whom she consulted did not probe to find out the

correct procedural posture. In the end, the student contradicted and overwhelmed what the client had been told by the opposing attorney without, it seems, any attempt to explore this discrepancy with a supervisor.

3. Confusion Over Procedural Posture—ORS Paternity Not Parentage Court Order

This client presented a case regarding access to his children from a prior unmarried relationship. The client had explained his desire to have regular visitation with his children and the student pursued relevant questions:

Student: As far as the other three kids, **did you ever have Parentage actions filed?** Do you know?
Client: Paternity?
Student: Yes.
Client: Yes.
Student: Same thing.
Client: Paternity—
Student: For all three?
Client: Yep. **Paternity's been done for all three and–**
Student: Okay.
Client: **—I'm the father. That was through Office of Recovery Services.**

The client provided the information he had of the topic of "paternity"—that his paternity had been established "through the Office of Recovery Services." Gricean cooperative principles lead speakers to be relevant and to say as much but no more than is required.[84] Speakers do this by adhering to the topic raised rather than being constrained by the form of the question (yes/no) or slavishly answering the precise question posed.[85] Unfortunately,

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[84] *See* Grice, *supra* note 37, at 45. *See also* Smith, *supra* note 81, at 507.

[85] *See* Smith, *supra* note 81, at 530-31. *See also* Seung-Hee Lee, *Response Design in Conversation*, *in* THE HANDBOOK OF CONVERSATION ANALYSIS 415, 429 (Jack Sidnell & Tanya Stivers eds., 2013) (discussing "transformative responses" to questions that do not answer the precise question posed); Wallace Chafe, *The Analysis of Discourse Flow*, *in* THE HANDBOOK OF DISCOURSE ANALYSIS 673, 674-75 (Deborah Schriffrin, Deborah

the student did not understand what this information meant, and presumed the client had answered his question about having "parentage actions filed." Accordingly, the student passed on erroneous information to the attorney:

Student: **He does have Parentage, Paternity orders, Parentage actions for all three of the kids**.

. . .

Attorney: Then **another thing you could do is file a Motion for an Order to Show Cause**, and what's that—even though it should be a petition, in the Third District Court, they call it a Motion. [mmhm] This is all in the Third District—

Student: Okay.

Attorney: —here, in Salt Lake? Is it?

Student: Yes.

Attorney: **The Motion for an Order to Show Cause says, "She's in violation of the Order, haul her into court and hold her in contempt and order her to let me see my kids."**

The student conveyed this advice to the client:

Student: Okay. One thing that the attorney recommended you start doing is start sending letters to her, asking for all of that. Saying you know, "I want to see my kids. I realize that we can start out in baby steps"—like what you told me, that a couple hours here and there, and go from there—and really just start keeping a paper trail that you've tried. You've tried to do so nicely, you wrote letters like you were supposed to and she just didn't respond. She recommended that you send those to her and if she continues to not respond, not let you see your kids, **then there's a Motion for an Order to Show Cause that you can file on the court**. Do you need me to repeat anything?

Tannen & Heidi E. Hamilton eds., 2003) (discussing the importance of "topics" in conversation).

Client: No, I think—
Student: Sorry, I'm rattling it off at you.
Client: –as long as I keep little notes,
// I can pretty much—//
Student: //Okay. Perfect, // and if it gets to the point of filing that, then you essentially say that she's in violation of the parentage orders—
Client: Okay.
Student: —and that she hasn't been working with you and that you have a right to see your kids.
Client: Okay.

In this case, the client, student, and attorney have not distinguished between the client having had his paternity established and his having obtained a particular order for parent-time in a Parentage action. The client's statement that "paternity's been done for all three . . . through the Office of Recovery Services" indicates that he was declared the legal father in an administrative proceeding and may have a support order entered against him.[86] However, this would not have resulted in an order for parent-time. Accordingly, the advice that he could pursue an Order to Show Cause for violation of his rights to parent-time was wrong.

4. How to do a Motion to Set Aside a Divorce Decree

In this case the client received incomplete rather than inaccurate advice due to the student and attorney not discussing the procedural problems that the client had clearly outlined for the student. This client had a default entered against him in an out-of-state divorce and wanted help drafting documents to get the default judgment set aside. During the interview, the client explained how the problem arose—the court's family law

[86] Parentage can be established by a court or by the Office of Recovery Services through an administrative procedure. *See* UTAH CODE ANN. § 78B-15-104 (West 2020). However, only courts enter custody orders. *See Child Custody and Parent-Time*, UTAH COURTS, https://www.utcourts.gov/howto/divorce/custody.html#:~:text=Parent%2Dtime%2C%20also%20known%20as,Section%2030%2D3%2D35) [https://perma.cc/33QE-UX7H] (last visited Sept. 1, 2020).

facilitator failed to respond to the client even while telling the client that they would get back to him.

When the student met with the supervising attorney, he failed to share any of the relevant information about the reason for the default:

Student: He had a divorce decree in default, back in Washington. He says, "They didn't give me notice, or they did, but then they didn't help me out." Anyway, bottom line, he got a divorce decree there, he's trying to set a motion for set aside.

Most of the student-attorney consultation dealt with the fact that this was an out-of-state matter and no one was licensed in that state; therefore, getting forms from that state's website would be the best approach. However, the attorney did enunciate the general standard for setting aside a default decree:

Attorney: That's all he can do really. If he's got a judgment entered against him, **he's got to give good reason why it should be set aside,** if there was fraud or neglect or something on their part, and it was entered against him, then he's gonna have a good justification for it. If he knew about it, and he just failed to respond to it and it was entered against him, then—

Student: Probably not as much.

Attorney: No.

Student: Okay.

Attorney: Cuz if he knew about it and knew that he should have responded and he didn't respond, he missed a court date or whatever it was, then he's screwed.

Student: Word for word. Thanks.

Ultimately, the student passed on the attorney's suggestions about getting forms from the other state's website, and commented: "He says if you have a good claim, it should be pretty simple to satisfy but he doesn't want to tell you exactly what to do because that may not satisfy their peculiar rules." The client

responded: "I think the claim, the particular basis for my petition or my motion, the motion is I think it would be substantial. I think it would be significant enough to warrant a motion." Ultimately, the client and student concluded their counseling on a sour note:

Student: So sorry we couldn't give you more direct answers.
Client: I'm sorry, too. I really think it was pretty basic, and pretty straightforward, you know.

This client was disappointed and rightly so. The student's failure to share the facts that the client had painstakingly shared with him, and the lawyer's failure to ask for them, left them addressing an abstract question rather than the client's concrete problem.

5. "I Give It to Him" is Not the Same as "I Served Him"

In this case, the client wanted a divorce and had questions about her stalled process:

Student: What's the family law question?
Client: I did sign—I did **sign a divorce paper to give it to my husband**. I'm then- separated a year ago **so I give it to him.** I went online and filled that out the divorce application and then //notarized.//
Student: //Okay. You did it online?//
Client: Online. **I notarized it and signed it and gave it to him to sign it but he never signed.** [ok] This has been over five or six months.
Student: Okay. You want to know what to do about that?
Client: Uh-huh and then I want to know how I can be legally separated if he don't, don't sign the divorce?
Student: Okay. Okay. I can ask an attorney about that. Is there any other questions?

In explaining the case to the attorney, the student erroneously converted the client's story into legalese, saying the client "served" the husband:

Student: I have a question, yes. Um **when you serve**

someone with divorce papers but they haven't signed in a really long time—they haven't signed. What can you do about that?

Attorney: What was that?

Student: Okay. You serve someone with divorce papers—Alright she served him with papers and he hasn't signed 'em.

Attorney: //What do you mean he hasn't signed them?//

Student: //He hasn't signed them?//

Attorney: He doesn't have to sign them. As long as you get him personally served, I mean, he's supposed to do his answer within 20 days and if he doesn't do his answer within 20 days then you'll request a default. And then, in the default, you'll request that all the relief you requested in your application would be granted.

Student: Maybe she needs to request a default?

Attorney: Yeah.

The attorney immediately noted the mistaken assumption—that the opposing party had to sign something in order to be served—but didn't question the student or ask the student to clarify with the client. Instead, the attorney shared information about general divorce procedure that was not actually relevant to this case. The student asked the client's follow-up question and learned about a procedure (separate maintenance) that, likewise, the client would not want.

Fortunately, the student returned to the client to further interview and inform:

Student: **So you served him with papers**, right? **You served him with the divorce papers**. That's correct?

Client: **I gave on him. I gave it to him**, on him.

Student: Okay. And did you get a certificate of service? Okay. All right. I might have to ask you about that. But basically, when you serve someone with the papers, they have 20 days to do something about it essentially, and if they don't, then you can file a default. File a—

Client: Yeah, but **because I give on hand, I can't prove**. You know what I mean?

Student: Mm-hmm. Okay. So what you might have to do is you might have to do it again and serve him, and then if he doesn't respond, then you would get to file a default.

The two spent additional time discussing a separate maintenance action (which the client really didn't want) because the client was concerned about being liable for the husband's financial dealings. Ultimately, a different attorney came to counsel the client, clarified matters, and gave thorough advice about beginning the case:

Client: Hello.

Attorney: My name is Tim. So, Maggie was talking to me about your case. Did you file your divorce papers with the court?

Client: Online I did, I did online. I filled that out. I print it out and then give it to him. I signed it and notarized it and give it to him in person.

Attorney: Okay, but did you //file the papers with the court?//

Client: //No.//

Attorney: Okay.

Client: He never gave it back [ok] to me [ok] so I was thinking to do the petition of separation.

Attorney: Okay. There are some reasons that you would want to file a separate maintenance but it's very specific. It's only if you need to stay on his insurance or for religious reasons but other than that there's not many good reasons that you'd want to do a separate maintenance rather than a divorce.

Client: Oh, really?

Attorney: Yeah.

Client: Because he's tough to deal and I, on the other hand, I don't like to be liable for anything happening with him if he be in debt or do any other things then I can be responsible.

Attorney: Well, that that's even more reason to get divorced. So

you gave him the paperwork and he's not signed off on it. Okay, I understand that. What you need to do is take the paperwork to the court, file it and then give it to the Sheriff's office to serve on him and then he only has 20 days to respond.

Client: Okay.

Attorney: If he doesn't answer then you get the divorce by default.

Client: Okay.

Attorney: But you know sometimes you can do the paperwork like you did and take it to your spouse and have him sign the necessary documents. It's Acceptance of Service, Consent, and Waiver. If he signs that, great, then you take all that to the court and then you're done. But if he's not going to cooperate, then you have to do it-plan B. Okay?

Client: Okay.

Attorney: You take the paperwork that you've done online. You take that to the court and you file it and you get a case number. Then, it has instructions in that packet. You make copies for him, take it to the Sherriff or a Constable. I usually recommend that people just go to the Sherriff's office 'cause they're usually cheaper.

Client: Okay.

Attorney: Okay. Then you can ask the court clerk how to do that. Okay?

This serves as an excellent illustration of the benefit of students being precise in reporting the client's case to the attorneys and the attorneys querying the student's account rather than launching into a lecture. Here the student converted the client's account (she "gave" her husband papers) into formal legal terms that were inaccurate. Ultimately, and fortunately, the attorney advisor was able to clarify exactly what the client had done procedurally and give accurate and thorough procedural instructions. However, so much effort had been expended on figuring out the procedural posture, the client was offered no substantive advice about the issues in her divorce case or the merits of her requests.

6. Possible Reasons for These Errors

The problems here resulted from client-student-attorney communications involving mistaken assumptions and understandings. The precise nature of many procedures is not clear to clients or to students. Clients may use accurate or inaccurate expressions. Students often suggest formal legal terms to clients and clients may agree with them. But both clients and students are often uncertain about the procedural terms. In these cases, the students misheard or misreported the procedural posture ("temporary orders" v. "divorce decree"; no mention of the document the client signed agreeing to a divorce; "paternity through ORS" vs. "parent-time orders in a paternity case.") None of the attorneys probed to be certain of the procedural posture, even when presented with conflicting evidence (*e.g.*, client had completed a motion form).

The solution is for attorneys to fully listen to the student's entire account of the client's matter, and not interrupt to begin to give advice. They must take account of the variety of procedural postures and factual circumstances that may exist and confirm the actual situation. This can be done by reviewing documents the client has brought or by checking on-line information about the case. The attorney might also explain to the student the different procedural postures that might exist (*e.g.*, the three ways an unwed father can become the legal father of a child) and then ask if the student knows which process was used. The attorney might also speak directly with the client or send the student back to inquire further into the procedural posture. What is not effective is for the attorney to rely on the student's oral report, particularly where there is conflicting information.

D. Students Counsel During Interview, Guess During Counseling

While omissions and errors were more frequently traced to problems with the student-attorney consultation, mistakes also arose when students seized control and began to advise the client during the interview or provided an answer to a client's new question during counseling without checking with an attorney. Premature counseling results in both erroneous and incomplete

legal advice. Here, too, consideration of the transcripts provides a window into these problems.

1. Students Misadvise During the Interview and Advice Is Not Corrected

Of course, students should not be giving clients legal advice during the interview itself. They should consult with an attorney and then convey the advice the attorney has approved.[87] Nevertheless, in over half of the interviews (25 of 46 or 54%) students did provide advice, information or commentary about the client's matter during the interview.

In most cases, students' premature advice-giving did not create permanent problems;[88] but occasionally it did. Here are two cases where initial erroneous advice during the interview was not corrected; instead the mistake was confirmed in the counseling session.

a. Medicaid Mistake

The client, concerned about establishing paternity and limiting the rights of the biological father, included this in her opening narrative:

> *Client:* . . . . I just got Medicaid for me and my son, and part of that is that I had to file paternity. I received in the mail that paternity needs to be filed, and so my question is what that really, what rights that gives the father? . . . The father, he's told me like a month ago that he was going to ORS 'cause he's been trying to see—[Mm]—our son without supporting anything and like, just—what is that word called—manipulate his way in there but he still hasn't and he is just throwing a fit about it. He

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[87] *See* text *infra* with notes 100-115.

[88] We do not include as "errors" here any advice given during the interview that was ultimately corrected during the counseling session after consulting with the attorney. Nevertheless, the propensity for students to volunteer advice and information during the interview is itself a concern, dealt with at length in a related Article. *See* Smith, *supra* note 79, at 395-404.

has said that he's seen ORS and a lawyer but it's been a month since then and nothing has happened. I haven't received any calls or information, so I don't think he has 'cause—[Mm]—if he was going to try and file paternity, then I think I would have received //a call—//

Student: //Well, //ORS is kind of slow but **you would have been served with something by now.** [Mmhm] **You would have gotten a certified letter probably or a constable would have shown up. You would have been seen something**–[Yeah]—so he may have talked to ORS but **he hasn't filed anything you need to worry about yet.** [Mmhm] You would be served with process had it happened; had it gone that far. . . .

The student interrupted to volunteer information to agree with the client's theory and in response to the client's implicit question about the status of any paternity case. However, the student's reassurance that the client would have been "served" with something and the father had not "filed anything you need to worry about yet" was misplaced. In fact, the father may well have received papers from the Office of Recovery Services to establish his paternity through an administrative procedure and without the client having been served at all.[89] The father may have already agreed to his paternity and obtained rights equal to the client's rights, unless or until the client pursued a parentage case to have custody adjudicated.

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[89] *See* UTAH CODE ANN. § 78B-15-104 (West 2020) (granting jurisdiction to adjudicate paternity to the "Office of Recovery Services in accordance with Section 62A-11-304.2 and Title 63G, Chapter 4, Administrative Procedures Act . . ."). *See also* UTAH CODE ANN. § 62A-11-304.1(2)(a) (providing that "the office shall send notice . . . to the person or entity who is required to comply with the action if not *a* party to *a* case receiving IV-D services."). Thus, as the client would have been receiving IV-D services—or "child support services" as defined in section 62A-11-103—she might well have received no notice of the paternity action the Office of Recovery Services (ORS) initiated against the father. *See* UTAH CODE ANN. § 62A-11-103(3) (West 2020). Moreover, the ORS administrative adjudicative proceeding is commenced by mailing a notice to the alleged obligor in accordance with section 63G-4-201(2)(b)(I) of the Utah Code Annotated.

Unfortunately, the student-attorney consultation was not recorded, so it is impossible to know whether the student reported what she had told the client. However, it is clear that the student and supervisor discussed the issue, as the student returned to ask the client if she had taken any action that would establish paternity:

Student:	Okay. Have you filed anything with ORS?
Client:	No.
Student:	Okay. Have you filed any paperwork whatsoever besides—with Medicare or anything else?
Client:	No. Not—like the birth certificate and **just getting Medicaid** and that's it.
Student:	Okay, so as far as—at this point in time, there's nothing that says he's the father, that has been filed formally?
Client:	Right.
Student:	Then he is a stranger to the child and he has no rights at this point.
Client:	Mm-hmm.
Student:	If you file this paternity thing, he will have equal rights with you to the child. Meaning, if you, if he—he is allowed to go get the child and he doesn't necessarily have to give him back. [ok] Which could be a problem for you. At this point, since he is still a stranger to the child and he doesn't have any rights, **you may not want to file for Medicare or Medicaid** at this point because it doesn't give him any rights. If we do file for Medicare and Medicaid and we have to establish paternity, we need to set up a parentage case immediately afterwards to establish who has what rights, and that's //when—//

Although the client had been clear during the interview that "I just got Medicaid for me and my son, and part of that is that I had to file paternity" and she reiterated during the counseling

that they were "just getting Medicaid," the student didn't understand the importance of this. Because the child's birth had been paid for by Medicaid, ORS would proceed to establish paternity in order to get reimbursed from the father. Instead, the student assumed the client had a choice of whether to seek Medicaid and establish paternity or avoid dealing with the father altogether.

The student did advise about the nuances of a parentage case, asking for supervised visits, and evidence that might be relevant to that issue. However, the client left with the mistaken notion that the father would not gain any rights until she had taken affirmative steps, when ORS may well have already processed an administrative case that had declared him the father and accorded him rights equal to those of the client.

b. What "Underemployed" Means

In this case, the client sought to modify her Divorce Decree that gave the husband sole custody, because the children were now living with her. She had shared that her ex-husband "knows that I have no job because I'm taking care of the kids," and she sought help in completing the forms with respect to child support:

Client: **And what does "underemployed" mean**, and "not underemployed" or "underemployed and blank per month should be imputed as the moving party's earnings." I don't know what that means.

Student: Um, Underemployed generally means that like you don't have a full-time job. Like basically, it's you have money, but it's not enough to live on kind of thing. You have a job that pays you such minimal amounts that it's not really like employment.

Client: Right, okay.

Student: **So do you have any other income?**

Client: **Just the stuff that I was selling but I, I don't have anything more to sell.**

Student: Yeah, you're fine then.

Client: Do I say that—

Student: **You're not underemployed then, yeah**.

The student (incorrectly) answered the client's implied questions during the interview. In fact, where the client was not working or earning any income, she would be considered "underemployed" and imputed an income under the child support guidelines unless the cost of necessary childcare would approach or equal the income she could earn.[90]

The student's meeting with a supervising attorney was unfortunately not recorded, but probably touched upon the issue of underemployment as the student returned to the topic during the counseling session.

Student: Okay so your—okay, It is basically what I was saying to you before. So say you have a—the example I was given, you have a law degree, and you're choosing not to exercise your skill set and so you're making $5.00 an hour or something like that, you're underemployed at that point because you could be getting more income than you are.
Client: Okay.
Student: So if that's the case then—
Client: Okay, and with that what is that? Which one applies to him? I mean obviously he makes 40,000 a year, so I mean—
Student: He is employed?
Client: Right.
Student: Then he is not underemployed.
Client: Okay.
Student: Unless he's choosing to be in this crappy job for this, to be a jerk or //because or whatever.//
Client: **//Okay, so with me//—right, so with me I'm not underemployed?**
Student: **Right.**

Unfortunately, the student confirmed the erroneous advice she had initially given the client.

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[90] *See* UTAH CODE ANN. § 78B-12-203(8) (West 2020).

c. Possible Reasons for These Errors

These errors may have occurred for a combination of reasons. In the Medicaid case, the client presented a dense narrative while indirectly asking for reassurance ("I think I would have received //a call//"). The student interrupted the client's flood of information to provide her with the reassurance she sought. No doubt the student wanted to be helpful and responsive and thought she understood the procedure for beginning a case. In the "Underemployed" case the client asked the student a direct question ("what does underemployed mean?") then followed with an indirect plea for help ("I don't know what that means"). Here, too, the student was no doubt motivated by the desire to be helpful. She was also responding to the conversational convention of answering a question.[91]

Once these students had independently proffered advice during the interview, "confirmation bias"[92] may have prevented them from hearing conflicting information about the law. The attorney may well have told the student what would happen if the client sought Medicaid or public benefits, but the student had not told the attorney that the client had already received Medicaid and the attorney did not ask. Similarly, the second student may have asked what "underemployed" was, but not shared that the client was not working but selling household items to support herself. The attorneys no doubt told the students the correct legal standards; however, given the operation of confirmation bias, the student misapplied the standards to the facts. In addition, the students likely did not share the relevant facts to allow the attorneys to diagnose the situations themselves. This propensity for students to under-report relevant facts and attorneys to not ask for them has already been established above.

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[91] *See* INSUP TAYLOR, PSYCHOLINGUISTS: LEARNING AND USING LANGUAGE 36-37 (1990) ("[A]djacency pair[s] [—] two strongly linked utterances . . . [with] the first speaker initiating and the second [speaker] responding . . ."—include question-answer because the fact that a question is asked implies that the second speaker should provide an answer. *Id.*

[92] *See* PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS 277-89 (2010).

2. Students Advise During Interview and Provide Less than Complete Advice

There were four cases where the clients did not get complete, personal advice because the student interviewer seized control—either giving advice during the interview, which limited the matters discussed in the attorney-student consultation, or deciding how to respond to new questions raised during the counseling session.

a. Novel Custody Requests Not Addressed

The client, a respondent in a divorce, had both procedural questions (did he have to appear at a temporary hearing before the 20 days to file an Answer had elapsed) and substantive disputes (in his draft Answer he asked "that when the children reach a mature enough age they can choose which parents they would like to live with") and asked for 50/50 custody during the summer. The student addressed both substantive issues during the interview, first describing the "best interests of the children" standard and stating, "I'm not gonna say no, you can't put that in" regarding the request that the children decide custody. The student did not raise the request that the children decide with the supervising attorney, so the client never got candid advice about this issue. No court would enter such an order.

During the interview, the student also addressed the request for 50/50 custody:

Client: No, but see in the summertime, I want 'em every other week. She's not willing to give up that. . . . .

Student: Well the courts can step in, they'll try and figure out—you can try and convince the courts, you know what, this in the best interest of the kids because when—they'll be with me more, give them more opportunity to be with me and then it's obviously—

Client: That's the way I feel. I feel like you know they need a dad in their life too, not just a weekend.

Student: Yeah, you can convince the—you can tell the courts that.

The student shared the client's desire for 50/50 custody with the attorney, but framed only as a procedural question: "Does that mean he has to file a parenting plan?"

The attorney provided procedural advice—how to file an objection to delay the hearing and a parenting plan to ask for 50/50 custody during the summer. Neither student nor attorney discussed why 50/50 custody during the summer would be a good plan or how the client should advocate for it. In the end, the client went away with advice about how to procedurally approach his concerns, but not personal advice about his two substantive requests.

During the counseling session, this client raised a new issue—that his wife had filed her tax return as "married filing separately" and claimed the children as dependents. The student began to argue with this client that this wasn't possible, but the client told him that he had checked with the IRS and it was. However, the student did not seek guidance about how the client could address this problem. It could be addressed in a motion for temporary orders. The client got no advice about this issue.

b. How to Deal with Warrant Not Addressed

Two clients were seeking grandparent visitation rights and presented the question of how to serve the child's mother. During the counseling session, the students suggested that the clients' best avenue would be for their son to exercise visitation rights as a father and to see the children during his parent-time. In response, the clients explained that the son had a warrant out for his arrest related to a domestic dispute and was afraid to go to court: "He's afraid when he goes into court, they're going to arrest him. I think, if he goes into court under his own free will, that they'll listen to him first, won't they, and not arrest him?" To this, the student replied: "I'm not sure about how it would go." While it is good that the students recognized they did not know the answer, they could have sought further guidance from the supervising attorney. They did meet with an attorney for a second time, but only discussed temporary motions, not the clients' question about how the warrant could be handled so that the most viable approach to securing visits could be pursued.

c. How to Stop the Sale of the Marital Home Not Fully Addressed

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

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

Domesict [sic] violence—separation

Divorce, preservation of my home

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

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

This student did not ask for a narrative, but asked two narrow questions about the client's lack of employment and then turned to immediately provide a referral:

Student: Okay. I'm, I'm sorry that I have to ask that. The reason is is that, um, **it looks like you qualify for Legal Aid**, um—what that is is it's, um, uh well, well **where there's domestic violence it may be, all the fees may be waived. Um and they may represent you in your divorce, because you make less than 125% of the poverty line. [okay] And because there's domestic violence.** [okay] So um, remind me to give you that information before you leave.

Client: Appreciate that.

Given that the client's Intake Form stated: "Need attorney to be provided to me pro bono," this referral to the Legal Aid Society seems responsive. Nevertheless, one might question whether such referrals might be better deferred to the counseling session after conferring with a supervising attorney.

The student then referenced the client's concern with domestic violence and asked whether she had a "protective order." This was not a goal listed by the client, but an appropriate topic to explore in light of the Intake Form having identified "domestic

violence" as part of "what happened." Here again, however, it would have been better to allow a client narrative first rather than redefining the case as being about domestic violence and the need for a protective order. For over four minutes during the Interview segment, the law student, client, and the client's sister explored the idea of a protective order.

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

Student: Ok. And you would you would probably know. Um, And preservation of your home is a concern. What kind of assets do you guys have together? There's your home obviously. Cars?
Client: Yeah that, that's no big deal, I have my car.
Student: You both have your own cars? Retirement accounts? Bank accounts?
Client: I've already signed for him to have his and I have mine which is very limited.
Student: Is he going to agree to you having the home?
Client: Um no, he, I got word from my son that he sold it. He had somebody walk through it. I had my name taken off of the mortgage 8 years after we bought the home [mhm?] because my credit was bad and he wanted to refinance. I just felt that it was better if my name was off. //And he said he'd put it back on bu//

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

Student: //So// what are you trying to preserve in the home?
Client: I wanted to see if what if he just out—it may just be

hearsay—[mhm] he's really—says a lot but does very little. But um, when my son called me he said "Dad sold the house today." [okay] And he owed like $70,000 left on the house. // And//

Student: //So// there was some equity?

Client: He he needs to put about $40,000 of repairs into the house but it last appraised for $175,000 so //[inaudible]//

Student: //Ok there's some equity// So you're interested in the equity that is or was in the house?

Client: Yeah!

Student: Okay and that, that makes sense.

Client: I would have liked the opportunity to stay keep the house [MmHm] if he don't want the darn thing. [<ha>] you know?

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

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

The student advised the client about seeking assistance from Legal Aid or using the court's website to file pro se, then asked "What questions do you have?" The client raised a new, though related, concern about the threatened sale of the house:

Client: It's just that my son called me two days ago, probably three days ago and said that he had somebody walkthrough and sold the house to him. And that I had 30 days to get anything I wanted out of the house, out. So there's no, I don't know if I can get all of my furniture and stuff. I mean //we've been in that house

for years.//

Student: //Well Depending on //what's happened, you know **if he's actually sold the house, if they signed papers, the executory contracts and they haven't closed, maybe the courts can do something. If they have closed, I doubt the courts can do much. If they just said "yeah I'll take it" but they haven't signed anything, then the courts can do a whole lot.** It all depends on what the actual status is um

Client's Sister: That's why I brought her here. I says if that's happening you've got to get you in here and get paper rolling. Cause he, other than beating her to death half the time, he's just a big bag of wind [mhm], he talks and says a bunch of stuff. But this is serious enough [Yeah] that I finally got her out of the home. So it's like, you know what, we've got to move on. It's time to take your life in your hands and move and we're gonna protect the little bit you've got, which is //almost nothing//.

Student: //A protective// order, **a protective order is really going to be helpful** [Sister: mhm], um because it can give you peace of mind that the police are behind you if he comes around and you don't want him to. Okay? Um, uh so **you may want to um go to the county, the county recorder's and find out what the title, what the status of the title is,** whether you're on the title or not. [Client: mhm] Um //cuz there's a//

Rather than grappling with the client's concern about losing her home and all her belongings, the student turned to counsel the client. Even after the sister interjected that "if that's happening" (appearing to allude to the sale of the home), "you've got to get you in here and get paper rolling" and "protect the little bit you've got," the student ignored the focus on the home and interrupted to assert that "a protective order will be helpful."

Moments later the student asked if there were "any other questions" and the sister again focused on the house, leading the client to lament having "lost everything":

Client's Sister: //We were// mostly concerned about, you know, having attorneys help her [Okay] you know, to proceed and get everything going faster, and what were his rights to be able to sell the house, you know.

Client: 30 days—30 years of accumulation that I just lost everything, everything.

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

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

After 17:46 of the "interview" segment—mostly taken up by the student giving advice—the 3L law student went to consult with an attorney.

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

Attorney: //You know //But sounds like she needs to, if she's got the house issue, sounds like she needs to get it sorted out, does she own it and get into court. 'Cause they're not, I mean they could in a protective order, order him not to sell property, but that would be really unusual. They mostly just order I think possession [yeah] not ownership so [yeah] I think she needs the divorce

Student: Oh she definitely does, I I agree.
Attorney: I mean I think divorce is the only procedure // that's really gonna//
Student: //I I'm// just a little worried that, you know her sister is here with her and her sister is talking about how she's really taken a beating in the past. [yeah] And I'm worried that that might happen. [yeah] That's what I'm worried about.
Attorney: Yeah, talk a little bit about what's been going on between her and her husband in the last few months, [okay] and since Christmas and
Student: Okay. Alright.
Attorney: I mean, she's always entitled to go there but she ought to be thinking of the most recent bad thing that's happened between her and him when she goes there. [okay] Because they'll turn her down if she doesn't have [inaudible]
Student: Alright
Attorney: Cool.

The student interrupted the attorney's advice about the procedure needed to save the home with his focus on a protective order, and this topic held sway over the issue of the marital home and furnishing. In the end, the student's drive to advise overwhelmed the interview and consultation, and the client did not get the clear advice she sought about what to do to prevent the sale of the marital home.

d. Procedural Information Only Due to Time Constraints

Finally, a client received procedural advice about how to answer a divorce petition from an experienced student because the clinic was closing and there was no time to consult with an attorney or to provide individualized advice.

3. Students Guess During Counseling

There are two instances in which the clients asked new questions during the counseling sessions and the students

answered incorrectly and without checking to be certain of the answer.

a. The Cost of a Counterclaim

The client sought help responding to a Petition for Divorce. During the student-attorney consultation, the attorney described filing an Answer and, possibly, a Counterclaim. After the student conveyed this advice, the client raised a question:

Student:	Mm-hmm. This is in Answer to hers. You're answering her Complaint. She's—she says this is what I want and you say well, I don't agree with this, I agree with this, or I think this should change. This is what—like here.
Client:	Does it cost any money to file this?
Student:	No, because you are responding to her.
Client:	Okay.
Student:	Since you're responding, it doesn't cost for you to respond. Everybody has a right to defend themselves.
Client:	Then to enter my—what do you call this?
Student:	You would file this—so when you do yours—
Client:	My Petition for Divorce.
Student:	File it with this, file it together. You would—this would be your Counterclaim when you write yours up and this would be in answer to the Complaint. You'd put it together and then file it.
Client:	**It wouldn't cost me anything to submit that as—**
Student:	**You are counterclaiming what she—yeah, you're responding to her**.

The student's advice focused on the instrumentals—how to attach a web-produced Petition to an Answer to serve as a Counterclaim. However, the student had not been prepared to respond to the client's questions as to costs. The student was correct that an Answer carries no cost, but the court will charge a

party to file a Counterclaim.[93] This is something that the student should have gone back to confirm with the attorney.

Moreover, the attorney had not prepared the student to discuss the pros and cons of filing a Counterclaim in addition to the Answer.[94] In this instance, the client has been misled about the costs of filing a Counterclaim and advised how to do something—file a Counterclaim—without understanding why he might want to do it.

b. Unwed Father Asserting Rights

This client was seeking to assert his parental rights to a child not yet born to his estranged girlfriend. The advice the student conveyed after the (unrecorded) attorney-client conference was accurate:

Client: I'm pretty sure she's not gonna adopt my child out, but—

Student: Okay. Just so you know, you wanna get moving on it just because that's a possibility. Then you'll want to offer her supports in some way. I know you mentioned that you had and she refused it. You just want to do that in writing somehow, like over email, or text message, or something that you can have and show court that I offered and she said no.

Client: Right now she has put a no call alert on me.

Student: Okay, there is that? The other thing you can do is when you serve her, or when the constable serves her, rather, if you attach just a letter on there. I'm offering support. Contact me. Tell her how to contact you if she wants it. That way there's a record that that happened, also.

. . .

Client: I offered help, **but why is it mandatory?**

Student: **It's not mandatory. It's just important** that you've

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[93] *See* UTAH CODE ANN. § 78A-2-301(d)(iv) (West 2020) (providing for civil filing fees of $130 for a counterclaim to a divorce).

[94] Typically, an Answer is sufficient for a respondent to assert all his claims. However, if the petitioner does not move the case forward, the respondent will not be able to have the case heard unless he has filed a Counterclaim.

demonstrated that support in establishing parentage.

Client: Here's my proof in that regard.

Student: Well, yeah. Then it's a—it's better to have written something rather than a well, my mom said I did it, because just like her friend who witnessed the domestic violence's bias, your mom's bias. You know? Just the most factual way you can prove it is the best.

However, when the client asked "Why is it mandatory [to offer the mother support]?", the student incorrectly stated that, "It's not mandatory."[95] While in this case the student had already told him to offer the support, the client appeared to protest the advice (asking "why"), and the student immediately did the "polite" thing and agreed with the client's assessment. Sociolinguists have analyzed "politeness" strategies in conversation to include avoiding disagreement through token agreement such as occurred here—agreeing overtly with the client's statement, but then augmenting it with information that is inconsistent with agreement. [96] It would have been preferable for the student to have done the accurate and candid thing and said, "I don't know" and checked with the attorney so the advice could be more thoroughly explained.

c. Possible Reasons for These Errors

In both cases, the students should have realized that they were not prepared to answer the question the client posed, said as much, and sought further guidance from an attorney. However, there are various reasons that students may guess at an answer instead. As volunteers, they may wish to be helpful. As law

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[95] *See* UTAH CODE ANN. § 78B-6-121(3) (West 2020) (providing that the consent of an unwed biological father to the adoption of his infant child is only required if the father has, among other things, "offered to pay and paid, during the pregnancy and after the child's birth, a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, . . . unless . . . the mother refused to accept the . . . offer to pay. . . .").

[96] *See* Goffman, *On Face-Work: An Analysis of Ritual Elements in Social Interaction*, *supra* note 38, at 11-12 (proposing that in interacting, people try to save face and help their conversation partner save face); *see also* PENELOPE BROWN & STEPHEN C. LEVINSON, POLITENESS: SOME UNIVERSALS IN LANGUAGE USAGE 113-14 (1987).

students, often feeling disempowered in the Socratic classroom, they may wish to display their knowledge. Moreover, conversational conventions dictate that a question calls for an answer[97] and that speakers should help one another save face by politely avoiding disagreement.[98] Students have not yet internalized the different conversational conventions appropriate for professional or institutional discourse that permit professionals to decline to answer questions until they have checked for the answer or to explain when a client is mistaken.

E. Attorneys Limit the Focus

As we saw above with the case where "Jason's taken the children and won't give them back," a secondary reason that the client received only information and not personalized advice was that the attorney decided to hold forth with general information that the student could convey to the client. While that attorney acquired almost no relevant factual information, other attorneys who are given important facts limited their guidance by telling the student only limited information to convey to the client. Three other cases showed this pattern despite the students' accurate summary of the facts and questions.

1. Out-of-State Divorce?

The student conducted a seven-minute interview about the client's desire for a divorce. When consulting with the attorney, the student shared a great amount of factual detail:

> *Student:* So this is—This gentleman is in the military. He was married out—his family's from here. He and his wife were married out in Alabama. They moved here in December, 2015 and then she took off—oh, yeah, thanks. She took off in December of this year [2016—almost 6 months ago] and went back to Alabama. (pause 6 sec.)
>
> They have two kids. One's four years old and one's three months. Let's see. They don't really have any

[97] *See* TAYLOR, *supra* note 91, at 36-38.

[98] *See* BROWN & LEVINSON, *supra* note 96, at 113-14.

> assets. She totaled the car they had and then he has a motorcycle worth a thousand. The older child has a medical problem, so she claims that she can't work because she needs to—I don't know, she has to administer medication every six to eight hours, or not a medication. There's some kind of procedure. [ok] **So she won't let him talk to the kids. She won't even talk to him. The only reason his family has her new phone number is 'cause she made them promise that they wouldn't give it to him. Kinda weird. But I guess their questions are regarding custody and child support**, just you know her residency, if she's a resident of Alabama.

The attorney probed about the facts that related to jurisdiction, then gave a partially correct answer[99] on that point to pass on to the client:

Attorney:	They got married in Alabama. She's in Alabama with the kids?
Student:	Yes.
Attorney:	Okay. So and he's living here now?
Student:	Yes.
Attorney:	Okay. He can file for a divorce here, but he can't deal with any of the children's issues here because Alabama has jurisdiction over the children. [ok] The better option for him is to file for divorce in Alabama.
Student:	Even though it's a really high retainer? Can he do it pro se?
Attorney:	You can file pro se in any state, whether they have good forms or good processes to do that. He certainly can. He may want to contact the version of Alabama legal services to find out what services

[99] Apparently, the attorney misheard the student's account, because Utah would have had jurisdiction to determine the custody of the four-year-old child as long as the client filed before the child had been in Alabama for six months. But Utah would not have had jurisdiction over custody of the three-month-old, so the attorney's suggestion to file in Alabama turned out to be correct.

are available there.

The student conveyed the lawyer's advice to the client (and his accompanying parents), and they objected that others had told them they could file in Utah and that the Alabama attorney they met with was too expensive. This led to two additional attorney consultations and two additional client counseling sessions, all focused on jurisdiction and how to find a good attorney. After a total of nineteen minutes, the student concluded with the same advice—"They should have the equivalent of Utah Legal Services there. They should have someone who can work with y'all like Pro Se essentially."

While the issue of jurisdiction and further legal help was certainly relevant, it did not address the substantive concerns the client clearly expressed during the initial interview. During the interview, the client's final comment to the student was:

Client: **I, for one, would like to know if what she's doing with not letting me be able to contact my kids, anything legally I can do about that?**

The student had told the attorney that "She won't let him talk to the kids," but the attorney did not focus on the remedies that could be available. The client could file a divorce petition and a motion seeking temporary orders; any judge would enter an order that would give the father parent-time with, and appropriate access to, the children. The final divorce decree would award the client time with the children, though exactly what the order would be, given the distance, is less clear. Why did the attorney not provide advice about the legal standards for custody and visitation? Why did the attorney not ask the student to inquire about what plans the client would propose for custody or visitation given the distance and the age of the children? Had the lawyer and student addressed the legal standards and remedies the law would afford the client, the client might have been more willing to explore the Alabama pro se option.

2. Client Who Should Not File a Case

A client presented a very complicated and convoluted case involving numerous court hearings about custody/visitation. Her goal was to modify custody so that she gained sole custody. The student proffered her own advice during the interview:

Student: I think what needs to happen is one of these DCFS workers, all you need to—
Client: My therapist has written letters.
Student: —encourage them to investigate your ex-husband as well. Because unfortunately, **the record here shows you in contempt**. We have DCFS in the home visit with you. We don't have the data to show that there's abuse happening.
Client: No, but they have the data of him having anger issues and not going to get help. She's got letters from her therapist.
Student: I guess what I'm saying is, **to proceed now with a change in the custody, I don't think that it's really strong, legally, right now, for that.** If you continue to use the resources like DCFS—

The student and attorney spent a fair amount of time, with the attorney skimming through the case file and other documents the client brought. The attorney confided to the student:

Attorney: This is all—I'm actually worried we—you can say that—**I wouldn't advise her to file a petition to modify. The way to change orders is a petition to modify. The reason is that she's filed so much stuff I don't know if a petition to modify is going to get her in more trouble.**
Student: If she has legitimate concerns for the safety of her daughter? Or she's just cried wolf too long to be heard?
Attorney: Well, maybe. The important bit here is that—oh, Lynn represented her for a bit. The important thing is that she contacts the authorities. That's who can handle it. Cops, DCFS, they have a duty to investigate.

In the end, the attorney wisely decided to provide the counseling himself. However, he only addressed how the client could proceed by calling DCFS or the police if she suspected abuse. He never gave the client the candid opinion he and the student shared—that it was probably a bad idea to file for a change of custody at this juncture.

This was not the result of inadequate sharing of facts, but rather, of the attorney's ultimate decision not to share that candid opinion.

3. Client Seeking a Protective Order but Needing a Modification

The client reported he had been advised by the Division of Family and Children's Services that he should seek a "child protective order" over his children because his ex-wife's home was filthy and the children had contracted lice numerous times; he added that there was verbal and physical abuse as well. The student conveyed this information to an unidentified advisor, perhaps a paralegal—or social worker-attorney team. The advisor told the student where the client should go for help with a protective order. The attorney mentioned that a protective order "is because someone is in danger" but did not explain that the client should also file a Petition to Modify the Divorce Decree in order to seek custody.

According to the client, the social workers had originally told him that they "put the kids with kin first and you would be the first one" and "What we would do is if you had a protective order, you would take the children, we'd go with you and look at your home to make sure it's a safe environment for them to be in. Then they would be with you until this whole thing gets resolved." Accordingly, the client was concerned about the children possibly being placed in foster care. The client and student had this exchange during the counseling session:

> *Student:* . . . . And as far as the outcome, they are reluctant to say as confidently as this person as where the kids will go and what will happen because too many things need to be determined as to what's suitable and are they in danger et cetera.

Client: That's the scary part for me. I mean yes, I wanna protect my kids, but it's taking them out of the home and then going to foster parents, [right] the best thing for them?

Student: **I guess in theory anything's possible**, but they the attorneys don't really know until you start really filling out and they can look at all the details. Then they can come into your home and look at those alternatives and weigh all of it. A lot of law is weighing. Weighing this versus that. That's what this process is. They are gonna try and weigh everything to see is there a danger and if there is a danger, how can we get them out with the least damage to the children. Because the children are what's most interested in this kind of an order.

While the advisor had said "there's no real way that he can rely on an outcome until he starts the process," she had not been suggesting that the children may end up in foster care.[100] Rather, she was suggesting that the evidence may not support the notion that the children had been abused and qualified for a child protection order. The student, relying on the social workers' and client's presumptions, assumed that the chance of a foster-care placement was real. The student had not raised this concern with the supervising team. Therefore, it was not addressed, and the advisor was not clear about what risks or uncertainties existed. The client left the clinic without the legal advice and information that he should have received.

IV. ETHICAL ANALYSIS

Above, we have explored cases where some clients received inaccurate advice and other clients received incomplete advice. What should we make of this from an ethical perspective? What

[100] A fit father would have a constitutional right to custody of his children over any foster care placement. *See* Stanley v. Illinois, 405 U.S. 645, 651-52 (1972). The social workers who had spoken to the father were oriented to the typical child protective case and not focusing on the rights of a fit father.

are the ethical requirements for operating a brief advice pro bono project using student and attorney volunteers?

A. Standards for Limited Scope Representation

The ABA Model Rules permit lawyers to limit the scope of services they provide their clients, as was done in this project: "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[101]

Comments to that Model Rule state:

> Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances.
>
> . . .
>
> Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge skill, thoroughness and preparation reasonably necessary for the representation.[102]

B. Standards for Competence

The ABA Model Rules address "competence" as follows:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[103]

The Comments make clear that during an emergency the competence requirement for limited scope representation may be different:

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily

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[101] MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 2020).

[102] *Id.* r. 1.2 cmt.

[103] *Id.* r. 1.1.

required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.[104]

However, while some of the clients may have faced emergency situations, limited scope representation does not, of itself, constitute an emergency.

C. Standards Regarding Duties to Clients

The ABA Model Rules emphasize the important duties owed in advising clients. They provide that the attorney must "reasonably consult with the client about the means by which the client's objectives are to be accomplished[.]"[105] As an "advisor," the "lawyer shall exercise independent professional judgment and render candid advice[,]"[106] but "shall abide by a client's decisions concerning the objectives of representation . . . ."[107] Perhaps most importantly, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[108]

D. Standards for Supervision of Law Students

The ABA Model Rules address a lawyer's responsibility with respect to a "nonlawyer" assistant in two ways: a) a partner or comparable manager must "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;" and b) a lawyer "having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer[.]"[109]

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[104] *Id.* r. 1.1. cmt.
[105] *Id.* r. 1.4(a)(2).
[106] *Id.* r. 2.1.
[107] *Id.* r. 1.2(a).
[108] *Id.* r. 1.4(b).
[109] *Id.* r. 5.3.

The Model Rules further prohibit attorneys from assisting another person in the unauthorized practice of law.[110] Utah court rules prohibit anyone from practicing law without a license[111] and define the "[p]ractice of [l]aw" to include representing "the interests of another person by informing, counseling, advising, assisting, advocating for or drafting documents for that person through application of the law and associated legal principles to that person's facts and circumstances."[112]

Beyond regulations, the ABA published *The Paralegal's Guide to Professional Responsibility*, which addresses how the paralegal should conduct client interviews and avoid the unauthorized practice of law:

> **The temptation to give legal advice is a challenge that almost every paralegal encounters daily**. . . . [P]aralegals become quite familiar with certain practice areas. They learn the answers to many common client questions and may have regular interaction with clients for purposes of gathering information on behalf of the lawyer and communicating the lawyer's advice back to the client. . . . It can be very tempting to respond to a client's inquiry without first consulting the lawyer when one believes that he or she knows the answer. . . . However, the response may amount to giving legal advice, so the paralegal should either let the client know that the question will be passed on to the lawyer for a response or tell the client that the client will have to discuss it with the lawyer.[113]

Similarly, the ABA published Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means, which states:

> [N]on-attorney volunteers (including law students . . .) can be effective and valuable members of the pro bono team. Programs should ensure, however, that these volunteers have attorney supervision throughout their contact with clients

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[110] *Id.* r. 5.5.

[111] UTAH SUP. CT. RULES OF PROF'L PRACTICE 14-111 (2018).

[112] *Id.* 14-701(hh).

[113] ARTHUR GARWIN, THE PARALEGAL'S GUIDE TO PROFESSIONAL RESPONSIBILITY 39 (3rd ed., 2012) (emphasis added).

> and prospective clients. Such **volunteers may sometimes come close to offering legal advice, which they may only do at the direction of, and with the oversight of, an attorney**.[114]

Ethics opinions[115] and disciplinary cases[116] also establish that it is unethical for attorneys to permit law students to give unsupervised legal advice.

Thus, the rules and commentary put the full responsibility for ethical conduct squarely on the shoulders of the attorney supervising the student and prohibit the assisting student from independently providing "legal advice" prior to the supervising attorney's authorization.

E. Conclusion Regarding Ethical Standards

Even though the Model Rules expressly permit limited scope and court-annexed representation, they do not provide for a lesser standard of competency in such settings. Similarly, no ethical standard provides for a different measure of competence when law students are part of the legal team. All the standards recognize the client's right to make informed decisions. Accordingly, where a brief advice program staffed by supervised students promises to give legal "advice," that advice needs to be accurate, appropriate, and sufficient for the client to make informed decisions about the matter. That advice should not be provided by a student during the interview, but only after consultation with an attorney. It is the responsibility of the attorney directing the project and the attorneys supervising the students to ensure this occurs.

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[114] AM. BAR ASS'N, STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS 160 (2014) (emphasis added).

[115] NEB. ETHICS ADVISORY OP. 94-2 (operating a pay-per-call 900 line staffed by law students giving advice to callers about their legal rights and possible actions is unethical as assisting in the unauthorized practice of law); PA. BAR ASS'N COMM. ON LEG. ETHICS AND PROF. RESP., PA. ETH. OP. 2006-04, 2006 WL 2669665 (law student interns may provide assistance to clients in custody matters only if appropriately supervised by a lawyer).

[116] In re Sekerez, 458 N.E.2d 229 (Ind. 1984) (attorney guilty of aiding in the unauthorized practice of law where law students in attorney's "legal clinic" answered client telephone inquiries; holding any delegation of duties to a nonlawyer is conditioned on the lawyer supervising the delegated work).

The lawyers can exercise this responsibility primarily by improving the student-attorney consultation—ensuring a correct understanding of the procedural posture, eliciting an adequate factual account from the student, and thoroughly explaining the law and what the student must convey to the client. To do this, the attorneys will need to spend more than the two or three minutes some of the advisors spent with the students. The attorneys can also enhance the operation of the project by providing support and guidance to the students as they exercise their lawyering skills for the first time–encouraging students to provide empathy rather than answers during the interview and supporting the students to feel competent by conducting a thorough interview.

CONCLUSION

What can we conclude about competently operating a pro bono brief advice program by learning from our mistakes and considering errors and omissions in the advice and information provided? One possible, though unfortunate conclusion, may be that the nature of a brief advice program is such that mistakes will happen. After all, 87.9 - 92% of the clients were satisfied when surveyed some months afterwards. However, this Article has been written with the hope of finding better ways for the unsatisfied clients (8 - 12% of the respondents) to be served.

Considering the cases where clients were given inaccurate advice or less than complete personalized advice, these errors and omissions occurred not only in cases that required "substantial legal discretion and judgment" but also in simple cases where the client needed only "mechanical" help and in cases requiring "limited legal discretion and judgment."[117]

The most frequent reason for these problems was that the student-attorney consultation failed to share complete and accurate information. In some cases, the students did not share the client's lived facts, in other cases the student was confused about the procedural facts from the client's case. In both

[117] See the categories of help needed described in Millemann et al., *supra* note 12, at 1183-85.

instances, the attorneys failed to probe for lived facts or to check for procedural facts.

The obvious solution is for the supervising attorneys to inquire about clients' lived facts and check documents or court files to confirm procedural facts. While students and clients may continue to be unclear about procedural facts, the attorneys should be able to insist that the procedural posture of the case is confirmed before launching in to giving advice. Likewise, the students should be encouraged to confirm the factual and procedural posture of the case with the clients before turning to seek the advice form the attorneys. Such confirming questions may be an important interviewing technique for students to learn.

The second most frequent reason for errors or omissions was that the students gave advice during the interview or in response to new questions during the counseling session. This was in violation of the unauthorized practice of law rule, and something that the students should be mentored to avoid. It may be that frequent student volunteers thought they were only conveying general information rather than personal "advice" applicable to the client's "facts and circumstances" that constituted the practice of law. But these transcripts make clear that the students did convey such personal advice. It may also be that students thought they were operating within ethical limits because they checked the advice they had given with an attorney after the interview. However, the transcripts demonstrate that, at times, the students did *not* check the advice or information they conveyed to the clients with an attorney, and some clients went away without an attorney's considered opinion. In other cases, the student consulted with an attorney, but may have "anchored" on the already-conveyed advice and been unable to hear the attorney's counsel that suggested the student needed to correct erroneous advice that had already been conveyed. Here, too, the student-attorney consultation may have been a problem with the attorney turning, too quickly, to hold forth about the law without ascertaining the facts.

Correcting this problem should begin by exploring best practices in student interviews. They should be taught how to conduct a complete interview without providing information or answering questions, a protocol that may cut against their natural

desires to be helpful, appear knowledgeable, and answer questions when they are posed. However, it is important the students learn best practices in interviewing, since premature advice can be incorrect, or not correctly remembered when consulting with an attorney.

The third explanation for less than thorough advice was that the attorneys simply limited the advice they gave the students to convey to the clients. While the students shared thorough factual and procedural information, the attorneys focused only on the "how" to do the process, treating the case as one that could be resolved in "largely mechanical ways" when the facts called for employing substantial judgment. In the student-attorney consultation the attorneys sometimes lectured on a plethora of topics, overwhelming the students' ability to understand and remember all the information. Sometimes the supervisors did not provide adequate guidance or talking points for the students, asking the student to "explain x" without providing the explanation to convey. This was ameliorated when a student asked for clarification or direction, but few students did so. When supervisors failed in clearly communicating what advice the client needed, the students' explanations were not focused or sufficiently informative.

This problem can be addressed by achieving an agreement amongst the attorneys that the project will endeavor to determine what category of advice is called for in each case, and to provide personalized advice that includes substantial legal discretion and judgment when appropriate. Because this pro bono project is hosted by a law school, instructing these volunteer attorneys in best practices for student supervision and mentoring them in this role would also be desirable.

One possible reason for clients receiving only information or partial advice—that the clients provided too little factual information to the volunteers—was not a problem. Typically, the clients told a narrative that would enable advisors to provide thorough, personal counseling. Accordingly, the focus for improvement should be with the attorney-student consultation and with law students' interviewing techniques.

All the ethical authorities make clear that it is the supervising attorney's responsibility to oversee the legal services

provided to the client. Accordingly, the best way to improve the services of this project is for the attorneys to be more proactive. They should ask about the client's individual circumstances. They should request that the student return to ask some follow-up questions so that the advice can be as individualized as possible. They should review the Intake Forms and the client's court documents to ensure the account they are hearing from the student is consistent with the client's documents. Then, the attorneys should clearly articulate what advice each client should be given and ensure the student understands and can explain that advice.

Pro se clients have various ways to get mechanical information about court processes and forms; the court clerks and Self Help Center, as well as the state law library all give legal information to pro se parties. This pro bono project, staffed by volunteer attorneys with expertise in family law, is one of the few places these parties can get actual legal advice. Provided there is sufficient fact sharing, the attorney-student team can provide individualized and strategic advice to these clients. It should endeavor to do so in all cases.

An Australian author noted "there is merit in both CLE [clinical legal education] and pro bono clinics . . . a 'hybrid' model incorporating both pro bono work and specific learning and teaching outcomes provides students with an optimum practice-based learning experience."[118] As long as pro bono projects are sponsored by law schools and required by the ABA standards, legal educators should ensure that students come away from their laudatory volunteer work with enhanced knowledge and legal skills as well.

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[118] Cantatore, *supra* note 23, at 153.