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## ARTICLES

### THE BIKE TOUR LEADER'S DILEMMA: TALKING ABOUT SUPERVISION\*

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#### INTRODUCTION: SUBWAY SCIENCE

During the decade that the senior author was a member of the faculty of Columbia Law School, he would often encounter former students commuting to or from their midtown or Wall Street offices on the platform of the Broadway and 96th Street subway station. Perhaps because many of these recent graduates had studied with him in the then novel environs of a law school clinic,<sup>1</sup> one that consciously focused on questions of how students assimilated professional roles and skills, they were often disposed to bend the professorial ear. The professor, in turn, was intensely curious about how they were faring in practice. Many graffiti-covered trains entered and left the dimly lit station while former teacher and former students talked shop. The subject was usually the student re-

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\* This article is dedicated to Jonathon Chase, Dean of Vermont Law School from 1982 to 1987, whose energy and commitment stimulated our interest in how lawyers learn in practice.

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1. The evolution of the clinic and its teaching methodology is described in Meltsner & Schrag, *Report From a CLEPR Colony*, 76 COLUM. L. REV. 581 (1976) and Meltsner & Schrag, *Scenes from a Clinic*, 127 U. PA. L. REV. 1 (1978).

action to big city practice, and the conversation was dominated by a basic gripe: despite general satisfaction with their law school education, the former students complained that there was much (too much) about the practice of law they had not been told. They conceded that law school could not and should not seek to duplicate the workplace, but they felt there were large gaps in their preparation. They were not getting the help they needed to learn these things at their firms, even though the lawyers with whom they were working were smart and usually interested in them and understood that they did not know everything. The kind of professional knowledge the graduates thought they needed was harder to come by in the firms than they had expected.

Many tunes were played on this theme. Some former students thought they needed more technical knowledge while others needed a better grip on their personal career goals. Some found the training they were seeking available only at the heavy price of rigid specialization. Others wanted a life outside the office as intense as that within and wondered if they would be better off at smaller firms or outside of New York City. Some doubted they could handle the time pressure and competition they had found in the firms over the long haul. But despite such permutations, the disappointment, frustration, and even alienation of the graduates was consistently linked to an absence of guidance. Their former teacher was impressed that the basic gripe was voiced by young lawyers of great, as well as average, promise and by those who showed signs of enjoying legal work as well as those who were deeply troubled. The latter included some who asked the teacher, and themselves, whether they had made a mistake going into law in the first place.<sup>2</sup>

While individual conversations are lost to memory, the teacher remembered best one student he called the Achiever, not because he was more driven to succeed than his peers, but because his clinic semester had been characterized by an intense and unremit-

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2. In reporting the results of a survey of 2800 private firm associates, *The American Lawyer* quoted a despondent Washington lawyer in the same vein: "Although the day-to-day existence is certainly tolerable, I step back sometimes to take a broader view and ask myself, 'How can this add up to make a career?' The answer is that it is not adding up at all." Survey results linked such responses to a variety of factors including that "partners at many firms have failed miserably in their task of building from the bottom because they have not trained their associates well or done what's necessary to encourage the best among them to remain." *Associates Survey*, THE AMERICAN LAWYER, Oct. 1986, at 5-6. See also F. ZEMANS & V. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION (1981); Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264 (1978).

ting rejection of explicit inquiry into how lawyers learned and how they felt about their work.<sup>3</sup> As a student intern, the Achiever demanded clients, not discussion, reflection, or supervision; clients with cases he could deal with himself, free of interference from professors and fellow students. He came to the clinic with an excellent academic record. He had easily made the law review and thought he was quite capable, thank you, of doing what had to be done to advance his clients' interests. He was right. His record in representing low income consumers and public housing tenants was admirable, the envy of his peers. His instructors sought without much success to warn him that in their view he was missing something of importance about how he learned; some lessons about lawyering that might be of importance to his future. Their ideas and suggestions of larger purposes must have seemed incredibly fuzzy at the time, for the message of clinic supervisors was mixed. Their position, that taking on the lawyer's role self consciously "can shape not only what you do, but what and who you become,"<sup>4</sup> was combined with a belief in the individuality of student learning styles. In any event, the Achiever was in too much of a hurry trying out the lawyer's role to hear his instructors. They generally let him be, pleased at least that he did such a good job for the client at hand, if not for himself.

The Achiever loved learning by doing, because he found stimulation and reward striving for his clients' objectives. The work enhanced his self confidence and convinced him that he was growing. For him, the teachers served as little more than quick, convenient research tools because they knew names, phone numbers, and statutory citations. The actions that he took flowed instinctively from his analysis and the results proved the accuracy of his perceptions. However, the entirety of his clinical experience consisted of a series of undigested experiences. Without reflection, no transferable theory of how to act in similar situations emerged; nor was there

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3. When he was a student, the Achiever may have been giving voice to the dangers of a psychological vision of law practice, said by Simon to include creating a "self-contained world of emotional transparency, self-consciousness, and a personal care in which the routine tasks of practice can be invested with sentiment and in which all political considerations are reduced to feeling or treated as hypothetical." Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 554 (1980). Compare Meltzner, *Feeling Like a Lawyer*, 33 J. LEGAL EDUC. 624, 628-29 (1983) (discussing the tension between a lawyer's commitment to getting the job done and a lawyer's fear of becoming too personally involved in a client's affairs).

4. G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* 8 (1978).

any occasion for him to plan to alter his behavior in the future.

When encountered on the subway platform, the Achiever looked deflated. He did not refer to his clinic experience, but his statement of the basic gripe made plain that, despite the views he held as a student, he had absorbed something of the clinic ideology. "I feel like a machine," he lamented, and explained: "For the first time in my life, I'm in over my head. And I'm not getting the help I need. I may not even know how to ask for it. In my firm, you're considered stupid if you ask too many questions."

The data of this subway science<sup>5</sup> often came to the senior author's mind when he served as the dean of the only law school in American legal education that made the successful completion of four quarters of supervised legal work a precondition for graduation.<sup>6</sup> Was the school enhancing the educational opportunities of its students by incorporating actual legal work into its curriculum if the level of supervised learning available at law firms was as inadequate as his former Columbia students reported?<sup>7</sup> When such doubts assailed him, he comforted himself, as deans are wont to do, by pointing to the apparent success of the school's program. Students and employers gave work-study, commonly known as Coop, high marks. The law school's reputation and applicant pool were growing. A first year course in legal practice skills took students through the stages of a law suit. Under faculty and teaching assistant supervision, the students were responsible for client counselling and litigation related decisions.<sup>8</sup> One of the purposes of the course was to train students in giving and getting effective su-

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5. For a description of the "clinical" research methodology employed here, see L. HIRSCHHORN, *THE WORKPLACE WITHIN* 15 (1988).

6. Cooperative education, an educational strategy linking academic study with a work component, was initiated in 1906 at the University of Cincinnati and is currently available in hundreds of undergraduate institutions. See S. Brown, *The Relationship of Cooperative Education to Organizational Socialization and Sense of Power in First Job after College* (1983) (unpublished dissertation, submitted to the Department of Educational Research, Measurement and Evaluation at Boston College). While Northeastern University has made cooperative education available to its undergraduates for over fifty years, its law school only initiated a work-study program for law students in 1968. For a formal description of the inclusion of supervised work experiences into the law curriculum, see Northeastern University School of Law, *Catalog passim*, (Dec. 1986).

7. For a compilation of the risks entailed by externship programs, see Rose, *Legal Externships: Can They Be Valuable Clinical Experiences For Law Students?* 12 *NOVA L.J.* 95, 102-05 (1987).

8. Compare Gross, *California Western Law School's First Year Course in Legal Skills*, 44 *ALB. L. REV.* 369 (1980) (defining skills as legal research, composition, memorandum writing, and course work—that is, conceptual rather than experiential skills).

pervision. But doubts about whether the enormous potential of law office education was being realized,<sup>9</sup> led to a number of interviews with supervisors and supervisees in large and mid-size private practice firms to examine the supervisory process in greater depth. What follows is the record of this journey.<sup>10</sup>

Because so little has been written about supervision of legal work, and because much of what takes place in its name is invisible or unrecorded, Part I of this article contains an extended metaphor in order to evoke the supervisory relationship as it arises outside the law as a way of describing the parameters that shape the discussion. Part II reports the results of a series of open-ended interviews with supervisors and supervisees in private practice. Part III probes available supervisory models, emphasizing the utility of recent thinking in the business world. Part III also examines the implications stemming from supervision of the process of transmitting professional knowledge, and from events taking place in the lawyer-client relationship. Part IV clarifies the relationship between supervision and mentoring and argues for a flexible, interactive, choice-driven approach. Part V emphasizes that building a framework for effective supervision requires attention to the context in which supervision takes place; specifically, to the communication styles of the participants, the configuration of the organiza-

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9. Compare the acid comment of one legal educator:

Many smaller law firms have very little time to train young associates; they consider that to be too much of a luxury. And the larger firms are increasingly becoming cost conscious. Instead of looking upon a new associate as a person to be trained, today they are moving toward the approach of hiring many more new associates than ever before on the calculation that one out of ten will somehow train herself and be selected for partnership whereas the others (the untrained ones) will be dropped so they can go practice law elsewhere.

D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461, 492 n.60 (1987).

10. A preliminary draft of this paper was presented at the UCLA-Warwick International Conference on Clinical Legal Education, Lake Arrowhead, California, October, 1986. The authors are particularly grateful for comments on supervision by Alice Alexander, Holly Hartstone, Lisa Lerman, Elliott Milstein, Beatrice Moulton, Cornelius Moynihan, Jr., Paul Pratt, Karen Sauvigne, Philip Schrag, Nora Singer, James W. Wilson, Harry Subin, and Stanley Fisher, and for the research assistance of Laura Coyne. Valuable comments on a draft of this paper from our colleagues Donna Beaton, Donald Berman, Karl Klare, David Phillips, Daniel Schaffer, and Stephen Subrin helped shape our thinking. Visiting Professor Brook Baker contributed significantly to our understanding of the law student perspective on supervised learning. Special thanks go to the many attorneys who educated us about the ways supervision worked and did not work in their firms and offices. We are particularly grateful to Joanne Cooney for preparation of the manuscript through many drafts.

tion in which it takes place, the attitudes and capacities of the participants, and the developments in the larger professional world. An active role for the supervisee is explored. Part VI presents a scheme for functional supervision in which a central position is given to four elements: goals assessment, discourse or negotiation to advance these goals, a phase for adjustment and fine tuning, and evaluation. Finally, an effort is made to identify a number of both process and content issues that will commonly arise in supervision.

### I. THE BIKE TOUR LEADER'S DILEMMA

Imagine yourself a capable cyclist, with some experience in bike touring, racing and recreational riding, who is also knowledgeable about cycle construction, repair, and maintenance. A friend, who owns a small travel service company, asks you to co-lead a bike tour of the Alps with a dozen or so participants, both men and women. All are in good health but none previously have toured alpine terrain. Group members have a range of abilities; different ages, races, and family backgrounds are represented. As they assemble near Zurich, your friend goes off to check on hotel and restaurant arrangements. He will meet you a week later in Zermatt. Your job is to explain the trip to the group and to lead it safely across the mountains.

How will you approach this task?<sup>11</sup> More particularly, how will you make your knowledge and experience available to a diverse group that shares the general objective of reaching Zermatt but has different goals in making the trip, different levels of experience, endowment, and motivation. Remember, that in addition to shepherding the group in a manner that will be satisfying to the participants, you have goals of your own. They include enjoying what you are doing as well as pleasing your co-leader. You want both to establish your competence doing this sort of work and to attract more tourists to your friend's business in the future. You can also imagine the perspective of a vacationer who arrives for the tour. Having thought about the trip only as a pleasant and healthful way to pass a week, the issues that concern you have not entered the vacationer's mind. As the first day wears on and blends

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11. The sort of information available to vacationing cyclists can be gleaned from BUTTERFIELD & ROBINSON, *BIKING AND WALKING TRIPS IN EUROPE* (1988) (available from Butterfield & Robinson, 70 Bond Street, Toronto, Ontario, Canada, M5B1X3).

into the evening, however, the vacationer becomes aware that she too has choices to make. The kinds of actions that she takes should be suited to the objectives that she has for the trip. To the extent that she fails to define those objectives or to find effective ways to secure them, the vacation may end with a feeling of dissatisfaction.

Your first move might be to give group members a route map and to point them in the right direction. Though abrupt, this approach will save time in the beginning and has other advantages; after all, these people know something about biking and they paid good money to take the journey. An assumption that the group members have enough skill to proceed in this manner has obvious risks. You will have to be extremely alert for trouble. For example, annoying delays caused by a cyclist's inability to fix a flat tire could be best avoided if the group spent a little time at the beginning learning how to patch and replace a punctured tube. Tour members will also enjoy the trip more if they have some basic historical and geological facts about the area. You would like the riders to have as much skill and information as possible, but taking the time to instruct them is costly. Some participants will not need or want the information since they came for the scenery, and would prefer to take their chances with disabled cycles, inept riders, or getting lost. Others, however, may conclude that learning some rules and facts at the beginning will help them to perform well and to obtain a personal mastery of a challenging task. Some of your best travellers may just want their anxiety reduced to a manageable level or to receive sufficient information about potential hazards on the route.

You might ask members of the group which approach or mix of approaches they would prefer, but this bow to democracy may produce more confusion than assistance. Even putting aside that this group has no history of making collaborative decisions, some participants will feel that they do not have sufficient information to decide what they need to know and when they need to know it. Some will want you to decide, though it is far from clear that they will not later feel that you have erred, while others will have fixed notions about what to do based on their previous bike tours. You may safely assume that participants will have different views of what they need to know at different times during the trip. And, as if things were not complicated enough, you may be unsure how to describe the choices that the group has without converting everyone's vacation into a seminar that might never leave Zurich.

After pondering such matters, you may conclude that the best approach is to strike a number of balances: between getting on with the trip and training group members, between directives to the group and individual attention, and between your satisfaction and theirs. Tour leaders on trips you have taken have given a brief orientation lecture about what participants can expect along the route, highlighting safety precautions and emergency procedures. A short talk of this sort allows you to identify for the group what you think is most important. The response of the group members may tell you what is foremost in their minds. With that information, you can say more or make a few adjustments if it seems appropriate. Group members are probably more concerned at this point in being assured of your leadership than in learning the specifics. They need to know that you have a plan, a map in your head of what will follow, more than to debate just how you will implement your goal of different interests. A brief dialogue about the trip between you and the group may be the best way to establish your competence and accessibility, as well as to convey useful information. This approach will probably be satisfactory; if so, you can call it common sense. If it is unsatisfactory, for example if your question period uncovers insecurities, ignorance, and confusion that cannot be taken care of easily, then you may decide there is more to leading a bike trip than meets the eye, more to it, that is, than just doing it.

Now take a step back and observe the process that has taken place so far. Several points leap out. You were hired because of what you know about cycling and who you know. While your friend must have had confidence in your leadership, it is unlikely that he considered carefully your ability as a manager, if he thought of it at all. But now, all your knowledge of bikes and the biker's world will be of little consequence if you cannot convert this group of strangers into an effective unit. Furthermore, you have never been formally trained for this part of your job. You have been on bike trips before and have seen how others handled what you are about to do, but you never took a training course or read an article on the subject. You never considered what you are about to do fit for rigorous thinking and, if truth be told, would have regarded such an effort a waste of time. One does not *study* running a bike trip, you would have said, anymore than one studies how to ride a bike.

What stands out most as you reflect on what you must do is the number of variables that you will have to consider if you de-

cide not to rely primarily on trial and error as your method of leadership. Common objectives have brought this group together and, if experience is any guide, they will hold it together despite the vicissitudes of the road. But you want the participants to come out of the trip with more rewards than just simple survival. To move beyond getting everyone to Zermatt without injury requires that you confront the multiple agendas you have identified: interdependent, yet potentially inconsistent, group, individual, and leadership objectives, as well as the impact of different capacities, styles, and communication skills. Consider, for example, each member of the group. While you hardly know them as individuals, you start to take stock—this one looks like he wants to get going and set a record for miles covered in a day, that one looks more interested in her camera than in what you have to say about tire pressure, and a third keeps asking you questions you would rather have him learn the answers to himself. At this point it seems irresistible to mumble a few words of introduction, make sure everyone knows everyone else, give the cycles a fast check, and get moving toward your first day's destination. The sun is rising in the sky. You very much want to give the group a big smile and shout, "Let's do it."

## II. LAWYERS ON SUPERVISION

The story of the bike tour leader's dilemma is, of course, but an imperfect introductory device to generalize the type of supervision issues facing lawyers.<sup>12</sup> Let us, however, stay with the analogy long enough to ask whether our perplexed tour leader would find it easier if he was also a lawyer who had done well in law school and then worked for a medium to large-sized law firm. The chances are that he would have encountered a number of similar situations in the roles of student, research assistant, summer intern, and beginning associate. In these roles, he expected, and was expected, to learn from a supervisor how to complete certain work, how to think about doing certain work, and how to hone particular skills. Depending on his level of experience and the settings in which he worked, he may also have played the role of supervisor—as teaching assistant, moot court advisor, peer, senior associate, or partner.

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12. Despite the similarities revealed by the text, the recreational and time-limited nature of the bike trip present a variety of different barriers to training than those encountered in a hierarchically-driven and career-based law firm.

Would experience of this sort help our tour leader deal with a central trade off he has identified—whether to train or travel; that is, to predict, and perhaps prevent, problems or to wait until they occur so as to save time and gain the rewards of the trip—rewards that also include learning? The young associate at a firm engaged in the private practice of law surely has spent many a billable hour embroiled in accommodating these superficially dichotomous alternatives, even if he or she was not at the time fully aware of the tension. Law firms of any size have a stake in balancing the development of their associates, on which the future of the firm depends as well as the future of the associate, with the firm's primary mission of making money by providing clients with service. Consequently, a lawyer will have some familiarity with the basic problem which the bike tour leader faces. It is translating this experience into action, deciding what to do and then doing it, that presents both lawyers and bike tour leaders with their greatest challenge.

Whether as supervisor or supervisee, lawyers entering a supervisory relationship do not have a body of principles, a generally accepted model, or even a vocabulary to refer to in guiding their efforts.<sup>13</sup> Supervision appears to be one of those activities, like human relations and exercise of good judgment, which many conclude is essential but unteachable. Professional trainers have sought to teach supervision by using concepts from management theory and current psychological thinking, as well as by collecting do's and don'ts.<sup>14</sup> Clinical teachers have also made a few attempts to map the supervisory process and the variables that affect supervision.<sup>15</sup> But these efforts are largely unknown to supervisors and

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13. Whether labelled "quality of feedback," "control over work," "meaningful explanation and criticism" or "learning where he or she stands," the supervisory process plays a central role in the recruitment, retention and satisfaction of associates at both small and large firms. For the view of managers, see Barry, *Reducing Associate Turnover Through Training and Development*, in *LAW OFFICE MANAGEMENT* 511 (1986); Egan, *Reducing Associate Turnover Through an Associate Development Program*, in *LAW OFFICE MANAGEMENT* 505 (1986); Hildebrandt & Miller, *Today's Associate in Today's Law Firm*, in *LAW OFFICE MANAGEMENT* 487 (1986); Trachtman, *Reducing Associate Turnover Through an Associate Development Program*, in *LAW OFFICE MANAGEMENT* 185 (1986). See also *Associates Survey*, *supra* note 2; Hinkel, *Success With Summer Associates*, A.B.A. J., Apr. 1, 1987, at 66; Rust, *Satisfaction, Not Just a Paycheck*, A.B.A. J., May 15, 1987, at 40, 45.

14. Henning, *The Lawyer as Mentor and Supervisor*, *LEGAL ECON.*, Sept.-Oct. 1984, at 20; FRED PRYOR SEMINARS, *HOW TO SUPERVISE PEOPLE* (1987); cf. B. OKUN, *EFFECTIVE HELPING* 22, 23 (1982).

15. G. BELLOW & B. MOULTON, *supra* note 4, at 17-28; Alexander & Smith, *A Practical Guide to Cooperative Supervision for Law Students and Legal Employers*, 29 *L. OFF. ECON. & MGMT.* 207 (1988); Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and*

supervisees in private practice.<sup>16</sup> The style, approach and language that practitioners use to describe the supervisory encounter, comprise a mix of personal experience, case by case pragmatics, and law firm tradition. Interviews suggest, but hardly establish, several propositions representing the general understanding lawyers bring to supervision.<sup>17</sup>

#### A. *Supervision's Limited Impact on Professional Development*

Supervisors and supervisees in private practice define supervision as: (1) overseeing the production of discrete work product, and (2) as the instruction that is a necessary accompaniment of such task completion. It often took leading questions from the interviewer, and in some cases considerable prodding, for lawyers to focus on the extent to which supervision was, or should have been, directed to the supervisees' assimilation of the professional role, his growth and development over time, or general skills acquisition.<sup>18</sup> When asked how these objectives were advanced, attorneys responded with descriptions of firm-sponsored training programs in particular legal specialties, or seminars led by outside experts and subsidized attendance at bar association continuing legal edu-

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*Implementation*, 30 J. LEGAL EDUC. 67 (1979); Conklin, *Socrates New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223 (1981); Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L.J. 277; Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn From Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981); Rose, *supra* note 7.

16. We have restricted this preliminary examination of supervision to private firms because the data was more readily available to us. The extent to which experience in government, corporate and public interest practice diverges from our findings constitutes an important set of future inquiries.

17. Northeastern Law School requires students to spend twelve of their thirty-three months of legal education in law offices. The authors' joint interest in supervision grew in part from collective experience working with students trained in this fashion and discussing the supervisory process with employers. Beginning in 1986, the authors began to interview students and their supervisors upon the students' return from their work-study experience. In July of 1987, support from Northeastern University freed the senior author to conduct interviews with twenty supervisees and supervisors in a dozen large and mid-size firms located in the northeast. The methodology employed here was intentionally unstructured so as to maximize researcher learning about the feelings that interviewees harbor about their work world, and the *intentions* that shape their relationships to co-workers, bosses, and their own ambitions. See L. HIRSCHHORN, *supra* note 5, at 245-46 (describing the strengths and weaknesses of various research strategies when applied to workplace).

18. At times, this attitude approached total resistance, reminiscent of Mr. Gradgrind's injunction in *Hard Times*: "Now, what I want is, Facts. Teach these boys and girls nothing but Facts. Facts alone are wanted in life. You can only form the minds of reasoning animals upon Facts: nothing else will ever be of any service to them." C. DICKENS, *THE OLD CURIOSITY SHOP, HARD TIMES AND THE HOLLY TREE INN* 541 (1880).

cation programs.<sup>19</sup> They did not resist the notion that "professional development" was an important aspect of the supervisory process, but instead indicated that it emerged more often as a by-product of work on a case rather than as an objective which was designed and discussed as a regular part of the supervisory experience.

### B. *The Communication Factor*

When the interviewer directed attention to what steps supervisor and supervisee should take to enhance the prospects for effective supervision, respondents reported that the relationship between the two individuals was critical but was rarely discussed, except when difficulties were encountered. Such difficulties included: a partner who abused associate feelings or who would not spend the time necessary to clarify assignments or critique written work; or an associate who did not know how to handle a partner's request for work.<sup>20</sup> The theme sounded here was that good human relations and clear communication made for effective supervision. When such conditions were present the work dictated the learning. When they were absent, a shift in assignment or intervention by a senior lawyer or firm committee might have been helpful.

### C. *Mentoring Relationships*

When asked what consideration was given to associate needs for professional assimilation and development—in addition to the

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19. The extensive and demanding in-house training program conducted by the firm of Sherman and Sterling is described in Henning, *Training Associates*, LEGAL ECON., Sept.-Oct. 1981, at 17.

20. Supervisees commonly fail to ask for guidance when they need help. A number of factors were cited as explaining this pattern, including fear on the part of associates that they would be judged poorly by their seniors and by clients for displaying ignorance, and an overriding sense that time pressures made it difficult to discuss fully how to solve research problems. In addition, interviewees pointed to the image of a successful lawyer as someone who gives authoritative answers to legal questions. Law teachers are struck by how early in their careers many students find it difficult to admit to not knowing the answers, as if their concept of law was of words written on tablets—words that ought to be accessible to the initiated. Personal communication from Daniel Schaffer, Professor, Northeastern University School of Law. Law students are also in a hurry to enter the profession, to take on and confirm their role by adopting the language and ways of life that denominate professional identity. Part of this identity is apparently not to appear uncertain. Practitioners shrug with frustration as if to say it is a "necessary evil" when they count the costs of associates denying themselves assistance or getting it from paralegals, secretaries, and equally uncertain peers and friends.

learning imbedded in the particular task—supervisors often described both formal and informal mentoring relationships as an opportunity for associates to get useful advice about professional development. Partners reminded the interviewer that the time pressures of firm life often made attention to individual deficits in analysis, writing, or interpretational skills difficult to confront in a systematic manner. In a number of firms, those partners who had a feel for working with associates were identified as people to whom such issues might be referred. The theory was that a relationship with a sympathetic senior person was the best way to achieve learning goals broader than those involved in getting a piece of work done.

#### *D. Interdependence in Successful Supervision*

Lawyers interviewed both praised and criticized the quality of supervision at their firms.<sup>21</sup> When describing it positively, they pointed to the interdependence of associates and partners as the driving force behind successful supervision. Partners need associates to put out substantial effort on short notice and associates need partners' support for career advancement, as well as guidance. This interdependence was cited as proof that the supervisor and supervisee will devise ways to join together in "getting out the work" and to provide training to the associate. On the other hand, partners conveyed a strong impression that they spent less time on supervision than they should. This was explained as a result of the practical realities of law practice, or because lawyers as a group tend to place a premium on outcome as opposed to process or reflection.

#### *E. The Sink or Swim Mentality*

Many partners believe that young associates come to them

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21. Even successful and reserved practitioners convey doubt that they are educating young lawyers as well as they could. They pointedly lapse into anecdotes which have the flavor of firm mythology—this misunderstanding, that disagreement. Beneath the veneer of civility, much conflict seems to bubble about how professional skills and rewards that flow therefrom are made available. Associates are particularly vivid in their descriptions of the way supervision, which takes little account of stated desires to learn a variety of skills and to remedy a variety of lacks, has affected their careers. The prevailing perception confirms what the absence of an extensive literature of supervision implies: that proper supervision is often the product of ad hoc, fortuitous circumstance rather than a generally understood method.

green and innocent. They expressed dislike of the extent to which firm treatment of associates is dominated by a sink or swim mentality, but feel there is not very much they can do about it. That is, many partners feel that their firms are not organized to provide a systematic curriculum for associate training. The inability of firms to deliver sufficient supervision was cited as one of the reasons that new hires are considered so carefully by some firms and treated as cannon fodder by others.<sup>22</sup> The message seems to be that there is just so much that can be done to educate associates beyond choosing the "best and brightest" that law schools have to offer and working with them to improve performance on assigned tasks.

### F. *The Good Old Days*

Partners, and even some associates, have a vivid image of the good old days; a time before the pressures of deadlines and overhead restricted their opportunity to examine legal issues reflectively and collaboratively.<sup>23</sup> These lawyers expressed this feeling by common complaints about growth in the size of the firm, the consequent anonymity of associates and fragmentation of relationships.<sup>24</sup>

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22. Firms invest so heavily in the recruitment and support of associates that during the first six months, at least, of employment, the firm will suffer a significant loss. See Kelly, *How Much Does it Cost to Employ an Associate*, LEGAL ECON., Mar.-Apr. 1979, at 12. Lateral hires may cost less in supervision but their salary demands are greater. See E. SPANGLER, LAWYERS FOR HIRE 42 (1986).

23. Tales of a golden age of law firms and training resonate discordantly with the memory of one of the authors who worked on Wall Street as a summer intern and as a beginning associate in the early 1960's, when pay was about ten percent of what a new associate makes now. His firm had an educational philosophy similar to certain undergraduate institutions. While no undergraduate (beginning associate) received very much instruction from the famous professors (partners) affiliated with the institution, the students (beginning associates) were thought to be very bright and it was assumed that if they spent enough time with each other, important learning would take place.

24. Developments in the business and organizational world have had, of course, their impact on legal organizations. Today's firms hire managers and administrators. They have committees making personnel policy and setting up programs for recruitment, promotion, out-placement, and compensation as well as supervision and training. Firm employees attend workshops and seminars on managerial issues. They also subscribe to periodicals that report recent thinking. The pressures of expansion and the harsh taskmaster of overhead have required the firms to treat themselves increasingly as the corporate entities which they in fact are. Granting these changes, the firms often reveal approaches and attitudes that hark back to an earlier day. In some respects, the dominant models of firm life remind the observer of simpler organization and traditional modes of behavior. Lawyers sometimes talk and behave as if their business is best conducted on an ad hoc basis, with a minimum of rules and a maximum of face to face encounter—ironically so, one might think, for a profes-

*G. Forbearing Supervision*

Associates do not like to ask questions, which in their view, will make them appear mistaken or uninformed. As a result, they receive considerable covert "supervision" from other associates, paralegals, friends at other firms, but all too frequently, not from someone who knows the answer or can suggest how to find it efficiently. To take an apparently trivial example, new associates often do not know how to use loose leaf services but believe that that is a shortcoming that they alone possess. In the best circumstances, they teach themselves how to use a service. In the worst, they refrain from using it and thus do a less than satisfactory job. Along the same lines, an associate will be asked to draft a lease and be given a form developed by the firm with instructions to adapt it to the client's situation. Many associates will proceed without fully understanding why the model lease has been drafted in that form. This lack of understanding may affect the quality of their work, not to mention their enthusiasm for the task.

The point of view suggested by these responses augurs poorly for any approach that seeks to regulate or systematize the behavior of persons during supervisory encounters, much less for an approach that seeks to broaden the scope of supervision to confront goals of personal growth and development. A colleague with vast experience in practice put it bluntly, "Tell lawyers they have to spend more time on supervision, say to discuss the process of supervision and its educational potential with supervisees, and they will laugh at you. That may work in a law school clinic but not under the conditions that prevail in private practice."<sup>25</sup>

So much then for our bike tour leader's search for analogies in the world of legal practice. He will probably better resolve his problem by relying on wits and experience—a fast phone call to his friend might help—rather than by attempting to discover in legal culture a framework for thinking about supervision. If he fails to lead the group through the best possible vacation, the loss, we may

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sion that is adept at imposing elaborate schema on others. With respect particularly to supervision, one often encounters imagery and ideas that seem more appropriate to a time when apprenticeship meant an intense relationship with a master practitioner, when legal issues were debated inside the firm with deliberation, and when everyone knew everyone else's name. Whether such a time actually existed is beside the point: like Hamlet and Lear in Yeats's poem *Lapis Lazuli*, the story has been frozen, immune to change, even while change swirls around it. THE POEMS OF W.B. YEATS 294 (1983).

25. Personal communication from Stephen Subrin, April 1988.

conclude, is not all that significant. Bike travel in Switzerland has its own rewards and, by definition, these tourists are not, and do not wish to be, professional cyclists. But the losses suffered by lawyers in obtaining less than the best possible supervision are not so easily explained away as the less than inspired leadership of a week-long vacation trip. The supervisory relationship holds enormous potential for improving the process by which lawyers learn their craft. In our view, much of this potential is unrealized. For better or worse, lawyers in practice are supervisors and supervisees—teachers and learners.<sup>26</sup> The law office is a law school whether it seeks the role or not.<sup>27</sup> Growth, both personal and professional, depends upon how well people learn and teach outside the classroom.<sup>28</sup> Because, ultimately, the quality of service to clients and society rests in significant measure upon this education, lawyers may be moved to inquire whether the supervisory process deserves greater attention.

### III. THE PROCESS OF TRANSMITTING PROFESSIONAL KNOWLEDGE

If the legal profession has failed to make available to supervisors and supervisees a framework for thinking about legal supervision, if their situation is much like that of the bike tour leader and his group, does current thinking in the business world offer assistance?<sup>29</sup> In recent years, management theorists have moved from

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26. Given the widespread nature of part-time work and externships during law school, the reality is that practicing lawyers often teach law students. Because such work is so widespread, it is interesting that recent empirical studies suggest that part-time work during law school is not only *not* harmful to a law student's learning, but may in fact be beneficial. Such studies sharply contradict the view that survives from prevalent turn-of-the-century thinking: that part-time work during law school is harmful simply because it absorbs time, effort, and concentration away from a more theoretical examination of the law. For example, Professor Ronald Pipkin concludes that student part-time work does no harm worthy of serious concern. Pipkin, *Moonlighting in Law School: A Multischool Study of Part-Time Employment of Full Time Students*, 1982 AM. B. FOUND. RES. J. 1109, 1162; See also Zillman & Gregory, *Law Student Employment and Legal Education*, 36 J. LEGAL EDUC. 390 (1986). But see Kelso, *The AALS Study of Part-Time Legal Education*, in A. AM. L. SCH. 1972 ANNUAL MEETING PROCEEDINGS, PART ONE, SECTION II, at 171.

27. E. SPANGLER, *supra* note 22, at 39-57.

28. See E. SMIGEL, *THE WALL STREET LAWYER* 62-63 (1964) (firms are becoming "post-graduate vocational schools").

29. In his study of the American workplace, Richard Edwards comments on the vast changes that have taken place in the last hundred years. "Then nearly all employees worked for small firms, while today large numbers toil for the giant corporations. . . . Where once foremen ruled with unconstrained power, there now stands the impersonality (and seeming invincibility) of the organization." R. EDWARDS, *CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY* vii (1979). Law firms have hardly been im-

the view that workplace organizational structure and social processes should be purely instrumental, that is, designed to enhance competitive position or to "fit the requirements of technology," to urging that organizations should be designed to enhance "economic efficiency and the quality of life."<sup>30</sup> Heavily influenced by Japanese and Scandinavian successes, current theory now treats manufacturing as a service, "customizing its offerings to the preferences of special market segments" in the manner of a professional service organization.<sup>31</sup> The need to design and produce results promptly to meet shifting market needs requires "small groups of highly skilled generalists. . . . Old-fashioned, sweat-of-the-brow manufacturing effort is now less important than system design and team organization."<sup>32</sup> Most importantly, "[t]he challenge is to de-

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immune to these changes, but it is only in recent years that the profession has come to be dominated by firms with hundreds of partners and associates, with offices in several cities and foreign countries, supported by small armies of paralegals, researchers, secretaries, and office managers. "Both in absolute terms and relative to the general population growth, the size of the bar has been increasing rapidly. Thus, while the general population grew by 32% between 1951 and 1970," the number of lawyers increased by more than 60%. V. COUNTRYMAN, T. FINMAN & T. SCHNEYER, *THE LAWYER IN MODERN SOCIETY* 1 (2d ed. 1976) [hereinafter V. COUNTRYMAN]. The number of private practitioners continued to grow after 1970, albeit at a slower rate than during the 1960's. There were, however, 130,000 more lawyers in private practice in 1980 than in 1970 and the population/private practice ratio dropped from 850 persons per private practitioner in 1970 to 612 in 1980. By 1980, 51% of all private practitioners worked in firms and 49% in solo practice. In 1960, 64% were in solo practice and 36% worked in firms. B. CURRAN, *THE LAWYER STATISTICAL REPORT 12-15 AM. B. FOUND.* (1985). Increasingly, the larger firms have become employers of recent law graduates. For example, 55% of the practitioners in firms greater than 50 lawyers were 1970-79 graduates. *Id.* at 28. Although firms of 20 or more lawyers constituted less than 3% of all firms, a quarter of all private practitioners were affiliated with such firms. *Id.* at 51. The number of lawyers in large law firms has grown during the 1980's at an annual rate of 8%, while the rate of growth in corporate law departments has been 5%. L. VOGT, *FROM LAW SCHOOL TO CAREER: WHERE DO GRADUATES GO AND WHAT DO THEY DO?* 1 (1986).

30. Whyte, *From Human Relations to Organizational Behavior: Reflections on the Changing Scene*, 40 *INDUS. & LAB. REL. REV.* 487, 495 (1987). There is a substantial body of literature about supervision in other disciplines. See, e.g., Sergiovanni, *Landscapes, Mindscapes, and Reflective Practice in Supervision*, 1 *J. CURR. SUPERVISION* 5 (1985) (education). See also W. HOY & P. FORWYTH, *EFFECTIVE SUPERVISION: THEORY INTO PRACTICE* (1986) (supervision of school teachers); D. SCHÖN, *THE REFLECTIVE PRACTITIONER* (1983) (supervision of a variety of professionals, including mental health workers and architects).

31. Jaikumar, *Postindustrial Manufacturing*, *HARV. BUS. REV.*, Nov.-Dec. 1986, at 69, 76.

32. *Id.* In an effort to stem loss of sales, General Motors and the United Auto Workers agreed to introduce teams acting with only one formal job designation into auto production. *N.Y. Times*, Dec. 29, 1987, at D1, col. 2. Instead of workers repeating the same task every day, team members rotate job assignments and even the plant manager works on the factory floor one day a month. One analyst commented that "increasing application of high technology in mass manufacturing will require more worker involvement and higher levels of skills, regardless of management attitudes. *Id.* at D5, col. 1. Ben Fischer, director of the Center for

velop and manage physical and intellectual assets" rather than simply to monitor day-to-day operations.<sup>33</sup>

In industrial relations, traditional assumptions of management control are under attack. Business organizations have shifted decision making power over workers from labor relations professionals, whose primary mode of operation was dealing with and opposing unions, to human relations managers, whose orientation is far more innovative and participatory. New models of job design and work organization in post-industrial societies favor "a participatory management style and a high level of employee involvement."<sup>34</sup> The growing vulnerability of the United States economy in world trade has led many businesses "to develop 'human capital' strategies of work organization, providing, as Karl Klare puts it, 'an opportunity . . . that challenges once-and-for-all the claim of management to sole decision making authority over enterprise strategy and day-to-day operations.'"<sup>35</sup>

It is mildly ironic to read solemnly intoned pleas from management professionals drawing on the flexibility and adaptability of the professions as a proper model for industrial manufacturing, unless they mean professions other than law. Law firms, to be sure, may be said to sell successfully the competence of small groups of highly skilled workers to define and solve the "customized" problems of clients.<sup>36</sup> However, firms produce their service at what

Labor Studies at Carnegie Mellon University, stated that, "[y]ou are simply going to need people who can address technology, who have the training and initiative to make things work right." *Id.*

33. Jaikumar, *supra* note 31, at 76.

34. T. KOCHAN, H. KATZ & R. MCKERSIE, *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 94 (1986). Typical recommendations for improving worker productivity includes giving workers identifiable pieces of work with distinct outcomes, freedom, and discretion in determining how to do their work, and establishing ways people can learn about their improved performance through better feedback channels. Address by Roy W. Walters, *On Linking People and Job Design*, DAILY LAB. REP. (No. 111, June 8, 1983).

35. Address by K. Klare, *The Rothstein/Dickerson Memorial Lectures, Labor Law and Workplace Democracy: Reflections on the Developments of Labor Law and its Implications for Worker Rights and Democratization of the Workplace*, CHI. LAW. 8 (special pullout section May 1987).

36. Workers in automated factories and power plants no longer simply tend machines. They process information, serve as diagnosticians for process failure, and "control the controls." Hirschhorn, *The Post-Industrial Labor Process*, NEW POL. SCI. 16-25 (1981). Managers are more dependent on the worker for technical information and intelligent action. "Watchfulness and attention must be mobilized, because cybernetic-automatic systems bring in their wake new and unexpected ways of failing." *Id.* at 22 (emphasis omitted). The flexibility and attentiveness required of the worker with these functions reminds the authors of the role of a lawyer with a client permanently enmeshed in an on-going regulatory pro-

is generally regarded as a high cost, at the price of great public dismay and until recently, at least, with little attention to management of any kind much less to the systematic management of "intellectual assets." Whatever the ambivalent public attitudes about lawyers prior to Watergate, there has been no lack of evidence since then that the profession is regarded by many as the home of white collar thievery, socially useless proceduralists, and powerful manipulators.<sup>37</sup>

It is, however, a core notion of professional competence that informs the views of the new management theorists, one that pre-dates the vast industrial developments of the last century—"what Everett Hughes has called 'the professions' claim to extraordinary knowledge in matters of great social importance.'" <sup>38</sup> Here is where the irony tells. "Extraordinary knowledge" requires education. In law, that education is not and cannot be the exclusive responsibility of the schools. Because legal acumen is learned and expressed in practice, legal employers must share that educational function if it is to take place.<sup>39</sup>

As legal employers take on the educational function, what is taught and learned will depend on the norms of the lawyer's role that law firms fashion and transmit. In his study of a range of professional behavior, Schön found that the complexity, uncertainty and value conflict of modern practice requires a redefinition of the professional role to what he calls the reflective practitioner:

Here the professional recognizes that his technical expertise is embedded in a context of meanings. He attributes to his cli-

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cess. The lawyer observes this process over time, logs in changes in the process and the regulatory environment, proposes adjustments in light of these changes, and reports back to the client (management) for discussion of policy and structural changes.

37. For the "traditional" understanding of the ethical basis of legal practice and a critique of this understanding, see G. BELLOW & B. MOULTON, *supra* note 4, at 35-121 (1978). See also P. STERN, *LAWYERS ON TRIAL* (1980); Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983); Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982).

38. D. SCHÖN, *supra* note 30, at 4.

39. Even at the turn of the century, when law educators were vehemently arguing that law school should largely supercede apprenticeship, no one seriously contended that completing law school and passing the bar made one competent to practice. Those who strongly opposed the continuation of the apprenticeship system as a substitute for law school also believed that a one or two year apprenticeship at the completion of law school was vital. *Is Apprenticeship in a Law Office Desirable While Pursuing a Course of Study in a Law School?*, 1 AM. L. SCH. REV. 83, 84-86 (1903). Thus, although there was and perhaps continues to be vigorous disagreement about *when* the apprenticeship should take place, there is little or no disagreement that it *must* take place.

ents, as well as to himself, a capacity to mean, know, and plan. He recognizes that his actions may have different meanings for his client than he intends them to have, and he gives himself the task of discovering what these are.<sup>40</sup>

The professional displays competence by combining technical proficiency with a "readiness" to explore the meaning of the situation with the client, and by trying to discover the limits of his expertise with the client.<sup>41</sup> The practitioner does not view professional activity as primarily "instrumental problem solving made vigorous by the application of scientific theory and technique."<sup>42</sup> Instead, the practitioner becomes

a researcher in the practice context. He is not dependent on the categories of established theory and technique, but constructs a new theory about a unique case. . . . He does not keep means and ends separate, but defines them interactively as he frames a problematic situation. He does not separate thinking from doing, ratiocinating his way to a decision which he must later convert into action. Because his experimenting is a kind of action, implementation is built into his inquiry.<sup>43</sup>

Schön's position is a response to a crisis of confidence in the professions, "rooted in a growing skepticism about professional effectiveness in the larger sense, a skeptical reassessment of the professions' actual contribution to society's well-being through the delivery of competent services based on special knowledge."<sup>44</sup> The crisis is bound up with notions of "professional self-interest, bureaucratization, and subordination to the interests of business or government," but it is also dependent on the adequacy of professional knowledge.<sup>45</sup> Schön asks, "Is professional knowledge adequate to fulfill the espoused purposes of the professions? Is it sufficient to meet the societal demands which the professions have helped to create?"<sup>46</sup> The expertise which justifies the privileges of professional status derives from education and training in a body of principles, ethical standards, and a culture of problem defining and solving used by us all, but available only to the chosen few.

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40. D. SCHÖN, *supra* note 30, at 295.

41. *See id.* at 12-13.

42. *Id.* at 21.

43. *Id.* at 68.

44. *Id.* at 13.

45. *Id.*

46. *Id.*

For lawyers, the route to this professional knowledge passes through the law schools with their virtual accrediting monopoly, to state licensure processes which evaluate but a fraction of the skills a professional must possess, and then to the marketplace which further distributes a variety of rewards, one of which is access to knowledge, which in turn can be exchanged for money, status and power. The process by which law schools transmit professional knowledge is well known.<sup>47</sup> What has been poorly illuminated is how lawyers complete their professional education in settings where, in Schön's phrase, they learn to "think in action"—a concept which includes how to do it, how to think about doing it and how to learn about doing it.<sup>48</sup> When we asked serious and successful practitioners about this part of their education, they described how initial ignorance was replaced by learning through hard work, chance or misadventure; how influential role models and mentors set them on course; how much their future careers were affected by crucial experiences with supervisors who took time out or who failed to pay attention when it was needed most.<sup>49</sup> All lawyers apparently have these experiences. Some reflect on them and put them to use in training others or in continuing the learning process, but it is rare to find them translated into a systematic approach guiding this aspect of professional education.<sup>50</sup>

47. A growing body of literature describes the manner in which firms are organized to provide service to clients and rewards to the professional. See, e.g., J. HEINZ & E. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982); E. SPANGLER, *supra* note 22; L. VOGT, *supra* note 29.

48. Drawing on communication theory, Professor Conclin deftly describes "persuasion" and "learning" modes by which communicators explain the inherent ambiguity of the messages they receive. The persuasion mode refers primarily to efforts which engage the individual in asserting or defending his own meanings, whereas the learning mode partakes of interdependent inquiry and testing. Each mode reflects and influences different behaviors and beliefs and each has its characteristic virtues and vices. As described by the lawyers we interviewed, supervision as presently practiced is dominated by "persuasion" thinking and acting. See Conclin, *supra* note 15, at 228-48; Kreiling, *supra* note 15, at 291-96.

49. Schön finds professionals commonly unable to describe or explain what they do and how they learned to do it:

When we go about the spontaneous, intuitive performance of the actions of everyday life, we show ourselves to be knowledgeable in a special way. Often we cannot say what it is that we know. When we try to describe it we find ourselves at a loss, or we produce descriptions that are obviously inappropriate. Our knowing is ordinarily tacit, implicit in our patterns of action and in our feel for the stuff with which we are dealing. It seems right to say that our knowing is *in* our action.

D. SCHÖN, *supra* note 30, at 49.

50. See Kreiling, *supra* note 15, at 295-96.

The supervisory relationship may be viewed usefully as isomorphic to the lawyer-client relationship, with each displaying similar structure, communication and pattern.<sup>51</sup> It is not that the lawyer-client and the supervisor-supervisee dynamics will be identical, but rather that the relationship of senior to junior will often appear to be characterized by types of experience that originated in either the model of client relations held by the lawyer who dealt directly with the client, actual events in the lawyer-client relationship, or both. The question then becomes whether the client is to be protected, consulted, or manipulated? Even if the issue is never discussed between supervisor and supervisee, even if the junior has never had direct contact with the client, we would hypothesize that the shape and look of the supervision that emerges will have much to do with what transpires between lawyer and client—that supervisor and supervisee will encounter the fallout of protection, consultation, or manipulation, as the case may be. This much is, of course, pure speculation. What is more certain is that the stance taken toward the client by the supervisor is a part of the “learning” that takes place in supervision, even if the lawyer-client relationship has never been the subject of discussion. The supervisor’s repertoire is the supervisee’s field of study.

It is only with articulation and planning, however, that the learning potential of supervision can be fully exploited. If the practitioner tries to “discover the limits [and applicability] of his expertise through reflective conversation with the client,”<sup>52</sup> then he or she must develop the aptitude first in supervision. If a measure of an effective lawyer-client relationship is the extent to which underlying complexity, uncertainty, and value conflict are probed and then resolved, then the supervisor-supervisee relationship must be evaluated by similar standards. Because such an approach with clients requires management of the additional time it will take, and the pressures attendant thereto, supervision must include training in how to identify when reflective discourse is appropriate.<sup>53</sup>

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51. The often vivid and powerful link between experience with a client and with a supervisor is a fascinating and controversial issue to both organizational researchers and human services professionals. See L. HIRSCHHORN, *supra* note 5, at 42-49; Berkman & Berkman, *The Supervision of Cotherapist Teams in Family Therapy*, 21 *PSYCHOTHERAPY* 197 (1984); Grey & Fiscalini, *Parallel Process as Transference-Countertransference Interaction*, 4 *PSYCHOANALYTIC PSYCHOLOGY* 131 (1987).

52. D. SCHÖN, *supra* note 30, at 296.

53. Schön points out that in times of crisis, or when a client wants a simple ministerial task completed, “conversation, reflective or otherwise, would be irrelevant.” *Id.* at 298.

Additionally, so long as the dominant model of professional action conceives of practice as the application of a definable theory and technique to settled sets of facts or "problems," then lawyers and supervisors, as opposed to clients and supervisees, will be the virtually unquestioned shapers of the work process. Their accumulated experience and expertise will govern without serious question. But to the extent that the work is viewed as "the basis for job-holders to define their own identities in terms of their particular occupation"<sup>54</sup> or as including what Schön calls "problem setting"—where debatable issues and strategies are "constructed from the materials of problematic situations which are puzzling, troubling, and uncertain"<sup>55</sup>—a shift is required in modes of professional service and, therefore, modes of professional learning.

In his pathbreaking study of the lawyer-client relationship, Rosenthal emphasizes one aspect of such a shift, the domain of control.<sup>56</sup> He asks whether the lawyer-client relationship works "better when there is primarily professional control or when there is a partnership of control between professional and client?"<sup>57</sup> After examining case studies drawn from personal injury litigation, Rosenthal finds much to support a "norm of collaboration, with shared responsibility and control" with neither party holding a monopoly over decision making.<sup>58</sup> A participatory model promotes client satisfaction and fosters greater contact between lawyer and client by reducing the "excessive anxieties which are the product of uninformed fears and unexpected stress" and by giving the client "a measure of control over [his] life."<sup>59</sup> By catching mistakes, filling gaps, and sharing information, full client participation promotes "effective problem solving."<sup>60</sup> It lightens the burdens of a paternal role which assumes lawyers always treat client interests as their own, and actually increases the satisfaction of professional practice by freeing lawyers "both from impossible standards which are bound to be undershot, . . . and from the excessive burdens of full responsibility for the solving of the personal problems of individuals."<sup>61</sup>

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54. R. EDWARDS, *supra* note 29, at 177.

55. D. SCHÖN, *supra* note 30, at 40.

56. See D. ROSENTHAL, *LAWYERS AND CLIENT: WHO'S IN CHARGE?* 173 (1974).

57. *Id.* at 12.

58. *Id.* at 168.

59. *Id.*

60. *Id.* at 169.

61. *Id.* at 170.

Rosenthal calls for a professional relationship involving an active, skeptical effort to be informed and to share responsibility, making mutually agreeable choices to replace what he calls the "traditional model."<sup>62</sup> The traditional model describes a relationship where the client makes little effort at understanding, is passive, totally trusts the delegation of responsibility, and follows instructions on faith.<sup>63</sup> But a participatory relationship comes at a price. Clients do not always want to confront "complex and uncertain problems";<sup>64</sup> "[t]hey both want and don't want to be dependent."<sup>65</sup> Some lawyers may need to dominate; others may feel high professional standards are inextricably linked to being in charge. "The traditional model [of lawyer control] serves the function of a professional ideology, justifying the control the lawyer wants, affirming his status and competence, and defining as legitimate a role of client passivity and uncritical trust."<sup>66</sup>

Rosenthal's vision of client participation partakes of both the pragmatic and the ethical; he makes both instrumental and normative claims. In essence, he argues that a less passive relationship will produce more competent lawyering as well as opportunities for greater satisfaction, learning, and self realization.<sup>67</sup> We proceed on the premise that greater participation, and the discourse that necessarily goes with it, is also an appropriate model for supervision.

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62. *Id.* at 168.

63. *Id.* at 168-78.

64. *Id.* at 170.

65. *Id.* at 171.

66. *Id.* at 174. Many lawyers will resist Rosenthal's call for change. They have the knowledge. The client wants that knowledge put at his or her service, not a lesson in collaboration. Participation will take time and time is, of course, money—big money. The present allocation of decisional responsibility between lawyers and clients can hardly be assumed to be the product of accident. Why fiddle with it, especially when lawyers believe they presently welcome a client's contribution of information and perspective to professional problem identification and solving when clients are capable of doing so? Rosenthal answers that the traditional norm too often causes mischief. Lawyers are angered by critical, uncooperative and deceitful clients; clients are angered by lawyers when paternalism falls short of their expectations; and the public is disenchanted with the legal profession's manipulation and domination. Skilled disclosure of decisional criteria, he asserts, need not be unduly time consuming if done selectively. A participatory model adds "to the repertory of possible responses by a layman to his personal problems, the response of active participation." *Id.* at 177.

67. In medicine, "the traditional rationale of exclusive professional control" has been challenged as not "necessarily the best basis for all therapeutic situations. . . . While the extent of client control remains at issue, psychoanalytically-oriented psychiatrists tend to agree that client participation per se is constructive rather than harmful." *Id.* at 10-11. Similar developments have been voiced across the spectrum of contemporary professional life. See D. SCHÖN, *supra* note 30, at 293-96.

Work should be “a locus of opportunities for learning, self-discovery, growth, and expression—as well as a means to achieve economic benefits, respect, and immediate psychic satisfactions.”<sup>68</sup> Supervision introduces a mechanism into the work relationship intended to improve the quality of the work as well as the satisfaction of the worker—meeting human needs that are essential for loyalty to the organization *and* personal growth. It provides a forum for coordination of task constraints and human needs so that these needs will not be ignored in the service of short-term goals. Put otherwise, providing for professional development is more than a costly method of making workers feel good. It is the very life blood of the organizational strength.

#### IV. TOWARD EFFECTIVE SUPERVISION

To supervise is “to direct and inspect the performance (of workers and work); oversee, superintend.”<sup>69</sup> The word derives from the Latin words *super* meaning over, and *videre*, to see, confirming the sense of authority to inspect, direct, manage, or guide towards a particular result. Synonyms in English include: conduct, direct, manage, control, handle, and oversee. All contain slightly different connotations concerning the authority of the supervisor in relation to the supervisee, but all suggest leader and follower roles and imply action that produces a work-related result. Thus, by definition, power imbalances between participants characterize aspects of the supervisory relationship. The Labor Management Relations Act of 1947, for example, defines a supervisor as one with the authority to use independent judgment to hire or fire, and to reward or discipline other employees in the interest of the employer.<sup>70</sup>

In contrast to the common workplace understanding of supervision that stresses power, control and hierarchy are the educational and psychological connotations of the word mentor, derived from Mentor, Odysseus’ trusted advisor in Greek mythology.<sup>71</sup> A mentor is defined as a “wise and trusted counselor or teacher.”<sup>72</sup> A

68. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39, 50 (1988).

69. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1292 (1978).

70. 29 U.S.C. § 152(11) (1982). Cf. NLRB v. Yeshiva Univ., 444 U.S. 672, 679-91 (1980) (holding that university’s full time faculty members occupy managerial roles that exclude them from the protections of federal collective bargaining statutes).

71. HOMER, THE ODYSSEY (R. Fitzgerald trans. 1963).

72. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 820 (1978).

teacher imparts knowledge, aimed at a more generally applicable and less result-oriented form of learning, rather than the transmission of a skill that flows from task supervision.<sup>73</sup> Mentoring partakes of identification. The mentor helps the mentee by presenting in his or her person a model of how environmental conditions are confronted. In addition, the mentor imparts knowledge of how one copes with internal conditions such as feelings, interpersonal stress, and long term development, as well as with external constraints.<sup>74</sup> The mentor expects and plans for the success of the mentee in adopting a role. The focus remains on the person advised rather than on the task.

The tension between supervision and mentoring, of course, is merely a point of emphasis. Any rigorous effort at professional training must include attention to the internal conditions of the supervisor and supervisee as well as the way they deal with environmental and interpersonal constraints and opportunities. Though in practice supervisors may act as if they are only concerned with a narrow task and mentors may proceed as if their attention is directed to growth and development, we believe the two concepts must travel together.<sup>75</sup> Supervision without mentoring soon becomes mechanical; mentoring without supervision quickly loses sight of the task and may verge on therapy. In short, mentoring and supervision are complementary; both concepts ulti-

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73. In law, we often talk about supervision when we wish to signal a relationship where learning is confined to the acquisition of skills necessary to complete a particular task, and where completing the task itself is the paramount interest. While a supervisory relationship may include mentoring or teaching in a broad sense, the mentoring-teaching component is often thought to be peripheral, a potential by-product of supervision rather than the core of the relationship itself.

74. Commentators employ the terms "supervisor" and "mentor" in a variety of ways. For example, mentoring in this article involves more than "loosely structured supervision" as discussed in E. SPANGLER, *supra* note 22, at 44. For an elaboration of the mentor as a "wise and trusted counsel or teacher" see D. LEVINSON, *THE SEASONS OF A MAN'S LIFE* 98-99 (1978); Meltsner, *Healing the Breach: Harmonizing Legal Practice and Education*, 11 VT. L. REV. 377, 386-87 (1986). The mentor in an educational setting is described by Kernberg as a "spiritual guide." Kernberg, *Institutional Problems of Psychoanalytic Education*, 34 J. AM. PSYCHOANALYTIC A. 799, 810 (1986).

75. Henning argues the necessity of splitting functions of supervision and mentoring between two persons: "If you are assigning, criticizing and evaluating as a supervisor, you probably can't expect your supervisee to seek you out for wisdom and counsel." Henning, *The Lawyer as Mentor and Supervisor*, LEGAL ECON., Sept.-Oct. 1984, at 20, 21. We think that this view fails to take account of the value of counsel that builds on actual work experience and of work experience that is informed by the developmental needs of the supervisees. Even putting aside the significant transactional costs of such a split, Henning seems to assume unjustifiably that all "criticism" is alienating.

mately concern themselves with learning.

We will use the term supervision hereafter to include mentoring. Our focus is on how bringing these two together will facilitate learning in a work-related context; learning which is not limited to assistance in completing a discrete task, but which impacts on what the learner does, feels, and thinks.<sup>76</sup> We propose a framework in which supervisor and supervisee contribute jointly to define the supervisory process in which they wish to engage, the goals they seek to advance, and the opportunities and constraints present that bear upon the attainment of these goals. This process can be conceived narrowly or broadly, as a hurried "checking in" or "checking out," a dialogue involving give and take, or even as a full-scale negotiation. It can be thought of as a formal process involving an agreement,<sup>77</sup> a more casual working through between co-workers subject to alteration and adjustment, or even as a sort of contract of adhesion, where a superior tells a subordinate what is expected and gives the subordinate no opportunity to respond and to suggest changes.

One can easily imagine effective supervision taking a variety of forms that look very different from each other except that they each work. These forms will respond to the different characteristics of the parties: their capacities, objectives and personalities; the setting in which they work, including their formal relationship in organizational terms; and the influence of the wider environment of professional culture, client interests, and even current political, social, and economic factors. Our approach does not emphasize particular principles that will facilitate effective supervision, but rather a process of exploration sufficient to enlarge "the repertory"<sup>78</sup> of choices available to the parties to the supervisory encounter.

## V. THE SUPERVISORY CONTEXT

Given the issues outlined above, how can one support efforts to improve supervision? Two approaches suggest themselves: (1)

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76. An associate who needs "supervision" will be frustrated, if all she gets is "mentoring"; an associate who wants help in deciding whether to specialize in litigation will not be satisfied by a learned discourse on cross-examination techniques.

77. See Aiken, Koplou, Lerman, Ogilvy & Schrag, *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047 (1985) [hereinafter Aiken].

78. D. ROSENTHAL, *supra* note 56, at 177.

greater clarity about the range of variables that condition, if not determine, the sort of supervisory experience available to young lawyers in practice; and (2) exposure to the functional choices that might be made by supervisors and supervisees—choices often now made without consideration or articulation—so as to advance the acquisition of “extraordinary knowledge.”

Much like the bike tour leader, supervisors and supervisees in a law firm confront an enormous range of variables that might be considered in gauging how best to proceed. Workplace identification of the full range of contextual factors that influence any particular supervision would be an ambitious and a largely impractical undertaking. But denial of the multiple and often clashing goals, opportunities and constraints that influence supervision is hardly a recipe for promoting greater effectiveness.

The conditions for facilitating supervision mingle an awareness of choice—what one wants to accomplish—with a ruthless pragmatism—what one can and cannot do to change the situation, if one would like to do so. Neither an approach that requires a comprehensive listing of contextual influences nor a shutting down of inquiry seems necessary or desirable. The model we suggest engages the give and take of professionals working within a bounded tradition of knowledge and assumption. There is nothing mysterious about the process. It is what effective supervisors and supervisees now do intuitively, schematized below so as to make it more explicit.

### A. *Communication*

Some people learn better when they are told, crisply and clearly, what to do. Others need to know more about why the person with whom, or for whom, they are working wants certain information or tasks accomplished. Still others need a model of how someone else did it. Some learn under time pressure while others find it a burden. Some need only to hear, others to see.<sup>79</sup> Talking about communication and about styles by which individuals learn is bound to improve capacity to send messages that are actually

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79. R. BANDLER & W. GRINDLER, *FROGS INTO PRINCES* (1979). A central concept for the adherents of a communication theory called Neuro Linguistic Programming is rapport—the ability to secure another’s attention and to assist him in a way he will accept and value. Rapport is facilitated by detecting and matching the primary communication pattern employed, whether it be visual, auditory, or kinesthetic.

received and to receive the messages that are sent.<sup>80</sup> Co-workers who explore how they each learn best will be in a better position to bring into play their preferred means of communication than those who do not give the matter any thought. This is true even in light of a professional culture that selects and self-selects certain styles of communication for particular professional settings.

The quality of supervision will often reflect the interpersonal relationship between supervisor and supervisee. If they do not work well together, if they, for example, hold inconsistent goals or want conflicting types of supervision, then of course the product of their relationship will tell the tale. A supervisor who cares exclusively about the particular case at hand, working with a supervisee who has a developmental or general skills problem that influences his or her response to the particular issue in a case before them, are obviously on a collision course, unless they find a way to deal with what concerns them both. An example is the supervisee who must decide to reveal or own up to a weakness in conference with a supervisor and who fears that an admission of error will be held against him when it comes time for institutional evaluation. Here the incentive system of the firm, the hierarchical nature of its supervisory structure, and the participants' notions of what constitutes "success," may all conspire to defeat opportunities for learning. Such tensions in the supervisory relationship may, if left unresolved, defeat the effectiveness of the finest communication skills.<sup>81</sup>

### *B. Organization*<sup>82</sup>

Supervision takes place under terms and conditions set by,

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80. L. HUDSON, *CONTRARY IMAGINATIONS* (1966) (reporting a study of English school boys who, Hudson suggested, could be classified as convergers or divergers). *See also* G. LAWRENCE, *PEOPLE TYPES AND TIGER STRIPES: A PRACTICAL GUIDE TO LEARNING STYLES* (2d ed. 1982) (reporting on experience with the Myers-Briggs Type Indicator as a measurement of learning preferences); A. SMITH, *COGNITIVE STYLES IN LAW SCHOOLS* (1979).

81. Some firms regard their investment in recruiting, training, and nurturing associates as a source of great future profit. Others, despite lip service to supervision, cultivate a competitive, even cutthroat, atmosphere where the best associate is the one who asks the fewest questions. There are firms driven by the number of billable hours and others where concerns about the quality of professional life dominates. Many individual attorneys have been attracted to the practice of law by the opportunity to discuss and debate legal issues, while others are obsessed by the clock. Given the complexities of modern practice, financial, and otherwise, it is easy to conclude that effective supervision is a scarce resource.

82. These variables are, of course, interdependent. Extolling the virtues of effective communication will do little to bring it about if the way the organization responds is to

and then adjusted by, the institution which authorizes it. Is the organization clear about the relationship of the supervisory process to its institutional goals? How large is the gap between what the organization espouses about supervision and what it actually does? More particularly, what sort of supervision does the organization actually reward? And what sort of lawyering? Plainly, a law firm which slights, at profit division time, a partner who has spent proportionately more time than others supervising associates, is stacking the deck. A firm that does not solicit the views of associates or report fully the results of institutional decision making, may render associates voiceless, unable to raise issues about supervision, because it is not their "place" to direct discussion.<sup>83</sup> Because effective supervision is an educational investment in the future productivity of the supervisee, it will almost always stand in some conflict with immediate consumption. A supervisee who puts a document through another draft not because the first draft fails to pass muster, but because a second draft will improve writing skills, lowers present productivity in the service of professional development. How the organization views such choices and resolves conflicts between them is critical to the kind of supervision the organization will deliver.<sup>84</sup>

Other influences on the supervisory process derive from organizational structure. Take the deceptively simple question a supervisor may ask of a supervisee: "What is the law?"<sup>85</sup> Both the meaning of the question and the potential answers take wing in radically different directions, depending on the context in which the question is asked and the answer sought. An associate in a three-person

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punish effective communication. Take, for example, the common experience where persons who raise doubts (whistleblowers) are, in some organizations, demoted because they have done so.

83. Letter from Lisa Lerman, Visiting Assistant Professor, Catholic University of America, The Columbus School of Law, to Michael Meltsner (Mar. 7, 1988) (commenting on draft of *The Bike Tour Leader's Dilemma: Talking About Supervision*).

84. Organizations receive the quality of supervision for which they plan and upon which they insist. A successful supervision team can accomplish much and show the way to others, but to survive and thrive organizational support is necessary: staff development is supported by quality supervision in a carefully designed structure. Structure is necessary within a supervisory system to ensure general uniformity of practice and to provide the discipline necessary to control, monitor, and direct staff development toward the accomplishment of organizational objectives. See generally North, "The Supervisor as Teacher," Legal Services Corporation, Office of Program Support (1979).

85. One common pattern that fits this description is the young lawyer who is assigned to master a technical body of law, while his senior knows only the general rules governing the area.

suburban firm, working for a middle income client will, we may suppose, be expected to look for the answer in a place where it can be found readily. A published digest or summary of state law, as supplemented by a recent court decision in the jurisdiction, may constitute the latest word and thus the best guide. In contrast, an associate in a large "downtown" firm working with a team of lawyers for an affluent corporate client may regard the case as an opportunity to search the literature of national, federal, and even comparative jurisdictions, looking for trends and underlying meanings in dissents, scholarly journals, and model legislation. Just as the contours of legal problem definition and solving are different in these two settings, so also are the opportunities for supervision.

### *C. Attitude and Capacity*

The quality and character of supervision also depends on the capacities and attitudes of the parties to the supervisory encounter. The endowment, skills, and personalities of supervisor and supervisee may be such as to convert even the most hostile organizational environment into an educational setting. On the other hand, organizational policy supportive of effective supervision may come to nothing if implemented by a partner who antagonizes young associates or by a supervisee who will not admit what he does not know. A disorganized thinker will find it difficult to supervise clear writing. An employee who has been dealt a serious blow to self esteem by a recent adverse salary decision that he has been unable to resolve, may find it difficult to focus on long-term goals. A blaming, labelling supervisor is not likely to receive a free flow of information from a defensive supervisee. A supervisor who cherishes her guidance of the inexperienced may have a hard time with a junior who is eager to be responsible for his own work product.

It will take an organization committed to effective supervision to overcome barriers set by attitude and capacity. For example, the chief litigation partner may have earned his position by virtue of his courtroom success, rather than teaching skill. To overcome this lack of teaching skill, a firm that values effective supervision will have to take it into account when assigning roles to its personnel.

Another factor that affects the supervisory relationship concerns the participants' sense of who possesses valuable knowledge and professional skill. A common image is a supervisor who is

thought to be the repository of special knowledge or experience not possessed by the supervisee. The status of the supervisor is confirmed by the organization and is often linked with authority. Examples of such authority are: assigning a piece of work, approving of an action, or evaluating the supervisee. As accurate as this image of the supervisory expertise may be, it is never the whole picture. It is well for both parties to remember that the supervisee has knowledge of her own that the supervisor does not possess, regardless of how knowledgeable the supervisor is or how familiar with the problem.<sup>86</sup> This knowledge comes from the supervisee's work on the case, issue, or problem as well as from her unique personal experience. Through this work, the supervisee has information and a way of looking at that information that the supervisor rarely possesses in equal measure. When a supervisee brings the case or problem to the supervisor, and on the basis of her research presents a theory of how to proceed, the initial definition of the task thus invests the supervisee with a measure of control and power. In short, both participants need skill in presenting information, listening or digesting, formulating issues, considering general goals and specific options and their interrelationship, evaluating what has been done and what could be done, agreeing on a course of action, and deploying resources to accomplish a result.<sup>87</sup>

#### D. *External Influences*

Finally, the supervisory relationship will be affected by a range of influences from outside the firm and its staff. What sort of demands do clients make on the firm? Is their connection to the firm longstanding and likely to continue, or is this a firm threatened by a lack of new business? How do the firm's clients view the associates in doing their legal work? How do law graduates regard the firm? Do its reputation and locale, as well as the

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86. The degree of confidence in the skills and knowledge of the parties to the supervisory relationship will have a dramatic impact on the way that relationship is structured. If the parties agree implicitly or explicitly that the skills and knowledge reside substantially or exclusively with the supervisor, the relationship will tend to be hierarchical and will involve substantial dependency on choices made by the supervisor. Such a structure may be especially appropriate when new skills are being learned. But even the neophyte should be recognized as likely to have unique and valuable information and insight gained from other related experiences.

87. For the value of focusing on the supervisee's agenda in training mental health clinicians, see Hess, *Growth in Supervision: Stages of Supervisee and Supervisor Development*, 4 CLINICAL SUPERVISOR 51, 64-65 (1986).

demographics of legal education, promise a shortage of capable new associates? Competition for highly qualified associates has led many firms to alter their operations to make their working environment more "humane," to hire recruiters, and to raise salaries precipitously.<sup>88</sup> Legal periodicals now rate firms on the basis of the supposed quality of their summer programs and treatment of new hires. Thus, to the extent that supervision becomes an important factor in evaluating a firm, we can expect a greater willingness to examine the changes that will be necessary to make it effective.

The place of supervision in professional culture will exert a powerful influence on the resources and attention devoted to it. One bar association president has called attention to growing "dissatisfaction and burnout . . . [and] declining competence and ethical standards."<sup>89</sup> She has commented, in a bar journal devoted to such issues, on the impact of "pressures of competition, heavy and increasingly complex workloads, staggering hours, threatened loss of control over our practices, and inadequate time for leisure and family."<sup>90</sup> The extent to which the profession is willing to identify such factors, and to deal with the symptoms they are likely to breed, may play a critical role in determining the place of supervision in law firm life and the means by which effective supervision is delivered. The sense of competence that effective supervision aims to achieve is not the only means of professional satisfaction, but it may go a long way towards ameliorating the driven, instrumental, and stratified qualities of the profession that many associate with the "stress and disillusionment" that plague contemporary lawyers.<sup>91</sup>

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88. For the costs associated with recruitment, see Mara, *Techniques for Successful Entry-Level Recruiting*, LEGAL ECON., Mar.-Apr. 1986, at 22; White, *Recruiting: How to Make it More Cost Effective Without Sacrificing Quality*, LEGAL ECON., Mar.-Apr. 1984, at 45.

89. Dahmen, *The President's Page*, BOSTON BAR J., Nov.-Dec., 1987, at 2. See also Meltsner, *Whither Legal Education*, 30 N.Y.L. SCH. L. REV. 579, 585 (1985). For a review of the literature discussing lawyers' vulnerability to stress-related medical and psychological conditions such as hypertension, alcoholism, heart disease, depression, irritability, insomnia, and others, see Shrager, *The Human Problems in Practicing Law*, LEGAL ECON. Jan.-Feb., 1984, at 20.

90. Dahmen, *supra* note 89, at 2.

91. *Id.* See also Kelly, *The Maryland Lawyer Counseling Program*, BOSTON BAR J., Nov.-Dec. 1987, at 27; Munter, *A Psychiatrist Looks at Stress in the Legal Profession*, BOSTON BAR J., Nov.-Dec. 1987, at 9.

## VI. FUNCTION AND SEQUENCE

The supervisory process has an obvious temporal dimension. A supervisory approach worked out for the planning stage of a project may be significantly altered when putting a draft in final form. Supervision between a partner and a newly hired associate looks very different from the arrangement the same parties will employ several years later or from the situation where a newly hired associate is supervised by another associate. It might be supposed, therefore, that the goal of effective supervision would be advanced by identifying stages of supervision—the idea being that task performance and learning will be improved if the parties develop a sequence of functions for their work. Kreiling, for example, has described a “supervisory cycle” based on a model developed at the Harvard Graduate School of Education for training teachers.<sup>92</sup> The cycle includes six stages, some of them repeated several times during any particular supervision: (1) initial conference, (2) pre-performance conference, (3) observation, (4) pre-conference analysis and strategy, (5) post-performance conference, and (6) final evaluation and termination.<sup>93</sup>

Is the quality of the supervision likely to be improved by conceiving of the process in this way? On the one hand, supervision has escaped serious scrutiny and remains difficult to discuss in part because of its ad hoc, unsystematized character. The number of variables influencing a supervisory encounter and the fluidity of supervisory contexts has an intimidating quality, making efforts to systematize it seem imposing.<sup>94</sup> Supervision can be regarded narrowly as “how to do it” or broadly as an examination into the adoption of a professional role and culture. Any effort to sequence supervision, therefore, may have the virtue of providing a potential for organizing thoughts and actions that have previously been random.

On the other hand, it would be misleading to imagine the supervisory process as if it were a series of numbered directions for assembling a child’s toy or a piece of furniture, where fitting a par-

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92. Kreiling, *supra* note 15, at 318-19. As he puts it, “The cycle is presented not as a rigid prescription but as a suggestion for properly structured sequence of the major tasks of supervision and as a device to emphasize important aspects of and insights into the supervision process.” *Id.* at 318.

93. *Id.*

94. See *supra* text accompanying notes 69-91.

ticular screw or joint out of order might prove fatal to the enterprise. Nothing would more quickly retard the efforts of those who believe in the promise that the supervisory relationship holds for better training and greater satisfaction of lawyers than defining that process as necessarily containing a series of linear steps. There is no practical, "properly structured sequence of major tasks";<sup>95</sup> few legal organizations would be able to afford high quality supervision if it were purchased at the price of a series of schematic, controlled encounters, and interactions.

These problems are eased by recognizing that a progression of supervisory stages is only a useful convention. The cycle of supervision actually involves working back and forth through assigned functions over time. These functions overlap, appear in differing orders and, most important, affect each other. For example, a necessary "early" stage in the cycle, the supervisee's initial assessment of a need, a stage not present in Kreiling's cycle, will continually be fashioned and newly understood by the parties as they experience "later" stages. In short, we doubt if any supervision chronologically follows or should follow the line of development set forth below. However, awareness of functional events typical of supervision contributes to participants creating a framework that enhances opportunities to set goals, make distinctions and evaluate results. Our cycle consists of four stages.

#### A. *Stage One: Assessment*

If in any particular supervisory situation goals are set for learning more than the simplest rote tasks, the supervision will have to involve an assessment of need. On the personal level, participants assess their current level of competence,<sup>96</sup> point to techniques and perspectives they wish to acquire, and develop ways to improve performance. On the organizational level, learning in supervision proceeds from an assessment of the constraints and opportunities presented to the supervisory process by its organizational setting. What resources, for example, will the organization devote to the supervisory process and to the accomplishment of its task?

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95. Kreiling, *supra* note 15, at 318.

96. Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 36 J. LEGAL EDUC. 189, 206-08 (1986) (collecting a number of the efforts to set out criteria for lawyer competency).

The organization itself, of course, is set in a series of larger systems which may in particular instances change the supervisors' and supervisees' sense of what is possible. The overriding point here is that work performance and satisfaction, not to mention learning, will be advanced if the parties to the supervisory arrangement have given some thought to what they want to get out of supervision and how they would like to get it. In the rush to produce a satisfactory work product, supervisors and supervisees often overlook what in most instances they would regard as simple truth—that “*whether* an individual sets a goal for himself and *what* he sets as his goal can greatly influence his learning and achievement.”<sup>97</sup>

The notion that problem solving and skill acquisition are advanced by a process of assessing needs, setting goals, and selecting priorities among goals will hardly be news to lawyers. What will be less appreciated, however, are the difficulties in choosing meaningful goals. A young lawyer might have the general goal of gaining the oral competencies involved in trying a civil case to verdict. To translate this goal into a needs assessment that governs skill acquisition, however, requires an initial effort to break down the tasks involved in trying a civil case to verdict into discrete parts and then making a judgment as to each part about one's present level of skill in performing such tasks.

Cort and Sammons have designed a model for competent lawyering that identifies major competencies such as oral and written communication, legal analysis, and problem solving.<sup>98</sup> The model also identifies specific competencies which set out the kind and range of observable behavior that make up the general competencies.<sup>99</sup> For example, under the heading of oral competency the authors list specifics such as the “[a]bility to express a thought with preciseness, clarity and economy,” the “[a]bility to express thoughts in an organized manner” and the “[a]bility to use the mechanics of language (*e.g.*, grammar, syntax, articulation).”<sup>100</sup>

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97. W. TORBERT, *LEARNING FROM EXPERIENCE* 42 (1972).

98. Cort & Sammons, *The Search for “Good Lawyering”*: A Concept and Model of Lawyering Competencies, 29 CLEV. ST. L. REV. 397, 406, 439-44 (1980).

99. *Id.* at 407, 439-44.

100. *Id.* at 439-44. See also Holmes, *Education for Competent Lawyering*, 76 COLUM. L. REV. 535, 578-80 (1976); ABA SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979).

Although the Cort and Sammons model strikes us as too mechanistic, identifying lawyering functions and their criteria can give the neophyte a start in determining his or her needs. At the very least, such a scheme conveys a vocabulary of skills definitions to draw upon in recognizing deficiencies and in calling for help. Using such a taxonomy of competencies, a supervisee can engage in a self-evaluative process which attempts to frame both strengths and weaknesses in relation to overall goals. For example, a supervisee might conclude, on the basis of self-assessment and earlier feedback, that his or her ability to formulate an effective research strategy is deficient and would be an appropriate subject for supervision. The concern about the deficiency might arise from a number of causes. For example, experience may have shown that the supervisee takes longer to finish similar tasks than most of his or her peers. Or, the supervisee's final products may omit critically relevant material. Or, the concern might come from an experience of floundering about in the early stages of a research task.

Another level of assessment might be called "purpose" or "integrity."<sup>101</sup> Learning theorists have attempted with only partial success to chart the relationship of goal achievement to the search for goals. Some theorists contend that goals are shaped by a recognition of "what one is."<sup>102</sup> Thus, the learner asks, "Why and for whom am I doing these tasks?" and answers, "I do them because another wants them to be done," or "I get specific rewards when I do them," or "I do them because I want to do them—say because the good things in life involve doing things with others."<sup>103</sup> Torbert concludes that goal setting depends on the learner's awareness of a broader context, "*recognition of what one is* rather than *achievement of some goal*."<sup>104</sup> Much of the discourse of lawyers is ill suited to an assessment of such larger and higher purpose. The consequent disconnection between work and motivation for work

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101. As Karl Klare puts it:

Where once work was seen as a religious duty, a fate to be endured, or a mere means to the end of acquiring income, it is now increasingly understood as one of the central opportunities in life to grow, to experience autonomy from and connectedness with others, and to acquire respect.

Klare, *supra* note 68, at 44. See also E. DVORKIN, J. HIMMELSTEIN & H. LESNICK, *BECOMING A LAWYER* (1981); Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555 (1980).

102. See W. TORBERT, *supra* note 97, at 44-46.

103. *Id.*

104. *Id.* at 46. For the classic description of the manner in which institutions strip an individual of his identity and substitute a role in its place, see E. GOFFMAN, *ASYLUMS* (1961).

can turn a potentially exciting or even mildly rewarding task into drudgery. The young associate may wish to improve her competence in trying civil jury trials because she feels she must do so in order to advance in the firm or to qualify eventually for a judgeship. She may wish to improve her competence because she likes herself better when she performs well in public or because she wants to please her spouse or to look good for her children. Perhaps she enjoys a sense of mastery. Whatever the answers, and there are answers, not *an* answer, the better able she is to recognize who she is and is likely to be; the better able she will be to set goals and to advance toward their attainment.

### B. Stage Two: Discourse

Once needs are identified, they must be incorporated into the supervisory process. Here, the allocation of decisional power between participants comes into play. When educational goals and "getting the job done" clash, which needs will they attend to, in what order, and how fully? In formal organizational terms it is the supervisor who decides ultimately how to define issues that surface in supervision, how to resolve them and whether a particular solution is satisfactory. Despite all the power of their stratification, law firms are not military organizations. Discourse between the participants plays a significant role in determining how decisions are made. Ideas, closeness to the material, an individual lawyer's reputation and intensity of concern, time available, and a host of factors affect the result.<sup>105</sup> The interpersonal process by which choices are made may closely resemble a negotiation,<sup>106</sup> where information, non-monetary rewards and threats of loss of status are exchanged. Like many negotiators, the interests of supervisors and supervisees overlap more than they diverge. This overlap is hardly surprising, given that they must produce work acceptable to outsiders. It is in the discourse of supervision that participants guide their relationship "toward a resolution of mutual gain for which power alone is not the criterion."<sup>107</sup>

In the search for a viable working arrangement, the parties en-

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105. Bruner identifies the significance of respect for three aspects of an educational discourse that maximize learning potential: (1) multiple perspectives rather than insistence on a single point of view, (2) implicit rather than explicit meanings, and (3) reality as seen through the eye of the beholder. J. BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* 24-26 (1986).

106. Cf. R. FISHER & W. URY, *GETTING TO YES* (1981).

107. J. FOLBERG & A. TAYLOR, *MEDIATION* 30-31 (1984).

counter a series of case-related and learning-related issues as to which they either agree, agree to disagree, or fail to confront. If they fail to confront these issues, they may nonetheless be influenced by what they have not articulated. In calling attention to the importance of supervisory discourse, we should not be understood as urging the need to discuss a laundry list of potentially relevant questions. Many of these questions will be settled by known organizational practice or personal preference of the parties. Recall that our bike tour leader recognized that there was a limit to what he could talk about during the initial phase of the tour, lest he end up leading a seminar in bike touring rather than a bike tour. Likewise, lawyers would get little work done if they were to insist on a protocol defining their relationship. In the circumstances of modern practice, however, there is little likelihood of formalities so extended that they swallow up time needed for task accomplishment.

A far greater danger resides in the parties discussing nothing but the bare bones of the assignment or, worse, feeling less than free to discuss elements of the joint work process and underlying needs for skill and role acquisition. Our emphasis is on the parties' access to a model of work that permits them to consider the supervisee's needs, to settle on learning objectives, and to work through the terms of supervision. In most circumstances the agreement that emerges will be informal, tentative, and implicit. Rarely will a full-dress discussion be desirable or necessary.<sup>108</sup> Sometimes the agreement will be little more than a contract of adhesion—with the parties recognizing and not altering "How we do it around here." But even such an arrangement is preferable to an unreflective supervision—where no thought has been given to fixing basic objectives, responsibilities, and expectations, and where supervisor and supervisee do not feel free to talk about what they want, what they need, and what they are willing to give.

At this point, a busy supervisor working for a demanding client might say something like this: "She is a bright associate and I told her the document we needed. We talked about the client's business and the federal regulatory presence. I asked her if she had any questions. She said, 'No!' That was it. What more should I have done?" Maybe nothing. Our point is not to impose drills on supervisors and supervisees, but to ask whether the parties are

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108. Aiken, *supra* note 77, at 1080 (describing case team discussions where the parties have entered into a learning contract).

able to explore the possibilities and to advance a range of concerns.

These concerns might include *Focus of Supervision*, that is, the recognition and selection of an emphasis between highly task-related, often client-centered work, and the development of skills, growth potential and professionalism of the supervisee. A discourse on when, how and how much to deal with the case, and when, how and how much to deal with the development of the lawyer on the case, might yield a response of, "There isn't time for you now." But it also might produce discussion of underlying skills needs of the supervisee and communication problems between supervisor and supervisee. Exposure of the values that a supervisor brings to representing a particular client or clients in general, access to deeper issues of professionalization that have troubled the associate, and any number of other questions, the exploration of which would convert this supervision into more than a drafting exercise, might also arise.

Other concerns that increase the learning potential of the supervisory relationship include a discussion of: (1) *initiative*, the extent to which each participant is responsible for raising issues, doing work, planning for meetings, setting time boundaries, seeking feedback, and ensuring the quality of supervision; (2) *specificity*, the extent to which greater particularity of instructions are necessary or desirable when work is assigned; (3) *planning*, the extent to which the task is one of considering or designing long-term strategy in contrast to producing a specific work product; (4) *organizational context*, the extent to which firm policies or structures which govern the operation of the supervisory relationship can be altered. Some firms are extremely flexible in adjusting the work setting to meet the personal preferences of supervisory process participants; others insist that preferences be put to one side in service of "Time is money," "Getting the job done," or "This is the way things are done." And lastly, (5) *learning agenda*, the extent to which the parties can distinguish needs by emphasizing thought, action, or feelings on a particular project and subparts of projects. Is the focus of attention on the way a problem has been conceptualized (thought out)? Or the way it has been applied (acted out)? Or the way it is experienced (felt)?<sup>109</sup>

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109. Supervisor and supervisee often discuss learning under the heading of particular legal skills or competencies. For example, an associate may be said to be an inexperienced draftsman. Then, more specifically, to have difficulty organizing a written document so that its structure expresses a desired series of logical steps or connections. And even more specif-

### C. Stage Three: Checking In, Checking Out

Interim task supervision covers the range of supervisory interaction which occurs between task definition and task execution. In this stage, the parties to the relationship seek help, clarification, reassurance, or relief. Redefinition of the task is common as participants gather information and gain a more precise understanding of the context in which their problem solving takes place.<sup>110</sup> For example, a collegial, non-directive relationship with a substantial emphasis on personal growth may be modified when the supervisee requests specific guidance or when a supervisor imposes a rigid deadline. Similarly, a directive, task-oriented relationship may partake of a more collaborative spirit if during this phase both supervisor and supervisee are actively searching for a workable solution to a difficult problem which eluded earlier definition.

### D. Stage Four: Evaluation

At the completion of a project or at specified points along the road to completion, the parties will convey their impressions about performance. This type of evaluation, which serves as a summing up, is a familiar attribute of our educational system in the form of grades and particularly characterizes legal education with its reliance on final examinations as an index of performance. In work life in general, and supervision in particular, such evaluations are far less important to learning than is feedback—the “information from the environment which tells a system whether it is moving towards its goal effectively or not.”<sup>111</sup> Without feedback, we cannot

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ically, that the drafter failed to sufficiently elaborate thought A before moving on to state and consider thought B. This common and useful skills-based approach to supervision will be enriched by an effort to break down points of emphasis along a thinking, feeling, and doing continuum to take account of the behavioral, affective, and cognitive components of learning. A supervisor and supervisee, for example, might focus on how a strategy for taking a deposition has been conceptualized, but they may also consider how that thinking was applied or whether the supervisee was comfortable while asking questions to extract the desired information.

110. Since interactions during this phase are frequently marked by informality and brevity, the importance of these exchanges can be easily overlooked. But an argument can be made that these interactions are frequently a microcosmic example of the entire relationship; that those seeking to improve a supervisory relationship might be well advised to focus attention on the dynamics of the relationship as evidenced in these brief exchanges. The careful recording of what happens when one party to the supervisory dyad checks in, for whatever purpose, with the other, along with attention to the feelings that interaction engenders, can provide a rich source of data for reflection.

111. W. TORBERT, *supra* note 97, at 8.

effectively evaluate and change behavior to bring it closer to our goals. We operate in the dark. A person, as well as an organization, who cannot obtain or receive undistorted messages about how he is doing, or the state of his own "organism and his relationship to the environment . . . is viewed as rigid, insensitive, closed, sick."<sup>112</sup> The purpose of feedback is to provide an opportunity to assess whether: (1) enunciated goals served to define appropriate issues, (2) actions suited the goals, and (3) there are lessons to be learned from the experience.<sup>113</sup>

From such methodological premises it is a short step to approving the forms of feedback recommended by communication theorists and human potential movement trainers. Feedback should be: (1) *invited*, because if we think we want something we are more likely to attend to it; (2) *objective*, because we will regard it as more significant than simply representing the interests of another person; (3) *positive*, rather than negative, because we are more likely to want to be appreciated than disparaged; (4) *detailed*, so we can more easily know the specific and convert it to behavior; (5) *immediate*, so we can recognize its content; and (6) *nonjudgmental*, so that we can hear it without feeling inadequate or blamed.<sup>114</sup> At first blush, these prescriptions seem a necessary and uncontroversial component of effective supervision, the only problem being how to bring busy, result-oriented, and aggressive attorneys around to the collaborative-supportive view of the world that the prescriptions imply.

There is much to support the view that learning requires information that can be assimilated to the learner's purposes. Learning a profession involves acquiring the discretion to use that information. While soldiers may learn to kill or football players to block by conditioning their reflexes so that they operate without cognition or feeling, norms of professional competence should not be the result of training acquired from the *imposed, subjective, negative, summarized, delayed, and judgmental* perspective of a powerful other. The kind of lawyering we have come to appreciate most does not thrive under regimes of such persistent educational autocracy.

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112. *Id.*

113. Experiential learning begins with concrete experience that is described and reflected upon with an eye towards making generalizations which are tested again in new experiences. D. Kolb & R. Fry, *Towards An Applied Theory of Experiential Learning*, in THEORIES OF GROUP PROCESSES 33 (C. Cooper ed. 1975).

114. See W. TORBERT, *supra* note 97, at 8-16.

The archetypical Professor Kingsfield should be viewed as the mentor of a rite of passage, his message softened in the second and third year of law school, and beyond.<sup>115</sup>

But if the benefits of such "humane" or "open" feedback in "any goal-oriented enterprise" are so great "that one would expect to find" it "a common personal and interpersonal process, a process eagerly adopted by persons or organizations when they become familiar with it,"<sup>116</sup> then why is it so rare? Torbert has gathered explanations from students of learning and organizational theory. The explanations include the human capacity to distort messages that individuals do not want to hear and the prevalence in social process of "mystery-mastery." "Mystery-mastery" is an attitude discouraging the "sharing of feelings, motives, and goals with others (the element of mystery)", and encouraging people to "gain control over a situation in order to influence others if necessary without themselves being influenced (the mastery element)."<sup>117</sup> Whatever the general application of such observations, "mystery-mastery" is a common characteristic of lawyering, which many would define as effective lawyering. Familiar models of lawyer as negotiator, persuader, and cross-examiner evoke "mystery-mastery" as the very essence of success. It would be surprising if the learning styles acquired by supervisees through supervision did not partake of a model that seemed so linked to competent dealing in a lawyerly way with the outside world of clients, adversaries, government, and courts. Again, to evoke the Kingsfieldian archetype, learning the adversary system easily slips into learning adversarially.

Rather than making "rules" about feedback, it may be best to recognize the choices involved in selecting modes of feedback and to empower supervisors and supervisees to determine what works for them. The first, or "humane," model of feedback often does not serve the needs of lawyers who face immediate deadlines or those whose attention is directed exclusively to completion of the task at hand. Imposed or delayed feedback may be the only form in which a particular supervisee can receive it. A young associate might be better motivated to work on his writing style by learning that a trusted mentor disliked a recent memo, than by a lecture on his

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115. J. OSBORN, JR., *THE PAPER CHASE* (1971).

116. W. TORBERT, *supra* note 97, at 9.

117. *Id.* at 12.

misuse of grammar from a more "objective" senior partner. Fear in the form of negative criticism may be the only thing that will create the crisis an associate needs to get her research skills in order. On the other hand, it seems obvious that in many legal settings a more open flow of information and an enlarged sense of what is relevant to legal problem solving and professional satisfaction will ultimately reduce anxiety, foster needs assessment, and facilitate attainment of competence-related goals.

### CONCLUSION

We have emphasized that effective supervision involves a functional discourse that takes account of a complex interplay of environmental, personal, and interpersonal forces over time. While many features of a given supervisory experience may be beyond the control of either the supervisor or the supervisee, supervision may nevertheless be viewed as the product of a series of critical choices made by the participants. Thus, it is essential that the supervisee as well as the supervisor take an active role in structuring the supervisory experience to ensure that the tasks of supervision do in fact get accomplished.

Given the enormous investment in recruiting, wooing, and supporting new lawyers, it is surprising that more law firms have not paid significant attention to the process by which new lawyers learn on the job.<sup>118</sup> This same lack of attention appears characteristic of most law offices and not just large firms, but the contrast between the commitment to aggressive and expensive recruiting, and the lack of commitment to the supervisory process, is particularly striking in the latter case. Multiple explanations suggest themselves. The organization and incentives of law firm practice lead the parade. If an individual lawyer regularly must work long hours and weekends to get the work out consistently, spending significant time in a day discussing learning objectives or even review-

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118. Recent years have witnessed an enormous growth in the number of lawyers and the number of huge law firms, as well as an intense competition for clients which that growth either fueled, responded to or coincided with. Many firms have gone from enjoying a secure client base and a surplus of job seekers, to experiencing instability with both. One gets the sense that firms find it more convenient to use money to solve the problem of recruiting human capital than to respond to the problem by creating a more humane, or at least more instructive, work environment. Viewing the life of the new associate in a large firm today, it may not be just nostalgia that leads people to believe that it was better to be an associate years ago. This, however, may be because the demands on associates were a bit less, rather than because the supervision was any better.

ing the written work of new lawyers may be regarded as unproductive or counter-productive. Moreover, the cost and pace of much of legal practice cuts against reflective supervision: many lawyers frequently do not think of what they need from a novice until it "feels" as though it is too late to do anything but give the assignment and hope that the product meets the immediate need. Finally, there may be a tendency on the part of busy lawyers to export anxiety: if one does not know what to do with a particular task through uncertainty or overload, assigning it to someone else may seem an attractive solution. Perhaps this explains why even those offices that do not worship at the altar of the billable hour still provide poor supervision.<sup>119</sup>

While not diminishing the weight of these explanations, we suggest that some of the reluctance of lawyers to take supervision seriously flows from the failure of legal education to identify it as a matter that belongs in the curriculum.<sup>120</sup> Everyone learns to do legal research and to write a legal document; few are encouraged to think self-consciously, critically, and rigorously about how to teach and learn. For all the average law student learns about supervision, this undertaking is a branch of law office management and will be "learned" at the same time and in about the same way—haphazardly, if at all. If one believes, moreover, that supervision can exist only if the supervisor and supervisee go through structured steps together in a pre-ordained order, and one works in a setting in which such a drill goes unrewarded, then it may appear pointless even to make the effort.

The moral, then, is obvious. We need to pay attention to the supervisory relationship from the beginning of the process of creating lawyers, and we need to understand that supervision is a fluid, complex, and interactive process which is subject to design and shaping by the supervisor and supervisee.

We have no way of knowing, of course, whether subjecting su-

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119. L. HIRSCHHORN, *supra* note 5, at 37-39, 42-47.

120.

Schooling is for the young. Education comes later, usually much later. . . . In their obsession with covering ground and in the way in which they test or examine their students, [teachers] certainly do not act as if they understood that they were only preparing their students for education in later life rather than trying to complete it within the precincts of their institutions.

Adler, *Schooling is Not Education*, N.Y. Times, Dec. 2, 1986, at A35, col. 1. See also Cahn, *Clinical Legal Education from a Systems Perspective*, 29 CLEV. ST. L. REV. 451 (1980).

pervision to a framework of the sort we propose will prove successful without trying it under actual conditions. Regulation of previously random or seemingly random experience is often resisted by those who should stop and consider, instead of simply continuing, what they have been doing. Such resistance is surely not foreign to lawyers, who are often professionally in the position of imposing or suggesting the imposition of "rational" standards or rules on others. The contribution made by the framework we propose consists of identification of choices that are not now articulated and the opportunity to refine what is now left global. The dominant style of legal supervision—task limited, hierarchical, abrupt, cognitive, and confined in purpose—works well in many situations; it is absolutely necessary in others. But it is not God given. Practical considerations speak loudly in any legal setting—just as they do when one is leading a bike tour—but they are not the only voices that should be heard.