



Implementing Best Practices & Educating Lawyers: Teaching Skills and Professionalism Across the Curriculum

Workshop
5A

Sneaking Skills and Professionalism into Every
Course, Every Discussion, Every Day

Carolyn Dessin
University of Akron School of Law

Carolyn Dessin received her Bachelor of Music Education degree Magna Cum Laude with a major in piano and voice from Temple University. She went on to receive a Master of Music in Choral Conducting from Westminster Choir College, where she studied with Joseph Flummerfelt. When she got tired of being a semi-employed starving musician, Dessin went on to receive her Juris Doctor Magna Cum Laude from Villanova University School of Law where she served as Editor-in-Chief of the Villanova Law Review and was elected to the Order of the Coif.

Following graduation, she clerked for the Honorable Collins J. Seitz of the United States Court of Appeals for the Third Circuit and practiced in the Personal Law Section of the Philadelphia office of Morgan, Lewis & Bockius. She is currently an Associate Professor of Law at the University of Akron School of Law, teaching in the areas of Taxation, Contracts, Trusts and Estates and Elder Law. Her scholarship is primarily in the area of Elder Law. She is the Chair-Elect of the AALS Section on Aging and the Law and the Treasurer of the Central States Law Schools Association.

As an avocation, Dessin has been a member of the Cleveland Orchestra Chorus for ten seasons, and is currently serving as Chair of the Cleveland Orchestra Chorus Operating Committee and as a Member of the Board of Trustees of the Cleveland Orchestra and the Blossom Music Festival.

**Sneaking Skills and Professionalism
into Every Course, Every Discussion, Every Day
Professor Carolyn Dessin, University of Akron School of Law**

TECHNIQUE 1 – BAD LAWYER OR BAD CLIENT?

Think about whose conduct caused the problem Was it the client or the lawyer or both?

Hypothetical:

An 86-year-old man is in failing health. His wife is gravely ill in a nursing home. He is reaching a point in life where he needs help with his financial affairs. He and his wife have no children or close relatives, but his house is a duplex, and he has become friends with the 27-year-old tenant. He makes an appointment with an attorney who specializes in estate planning. The attorney draws up a will and durable power of attorney for the client. The durable power names the tenant as the man's agent. Within several weeks, the tenant has spent a substantial portion of the man's wealth.

TECHNIQUE 2 – BE NICE TO YOUR NEIGHBOR

Consider whether better behavior by the attorney might have prevented the problem.

Hypothetical: Your client is the husband in a divorce action. He is going to agree to pay his wife significant alimony for a number of years. He plans to pay \$15,000 a month for five years and \$10,000 a month for the next five years. You and he are meeting with his soon-to-be ex-wife and her attorney to offer them this arrangement.

You have correctly explained to your client that the default position under the Internal Revenue Code's provisions dealing with alimony payments is that he will be able to deduct the alimony in the year he pays it and the recipient, his ex-wife, will have to report the alimony payments as income. Because this is a default rule, you have not mentioned taxability of payments in the agreement that you drafted regarding alimony.

At the meeting, you and your client are seated at the table across from his wife and her attorney. She is delighted with the alimony offer, and becomes even more delighted when her attorney says to her: "And it will be tax-free, so that's a comfortable life you'll have." Your client has signed the alimony agreement and his wife is poised to sign it...

TECHNIQUE 3 – RE-DRAFT THE PROBLEM

Rather than simply criticizing the document, re-draft the language to fix the problem.

Jacob & Youngs v. Kent, 129 N.E. 889 (N.Y. 1921)

CARDOZO, J.

The plaintiff built a country residence for the defendant at a cost of upwards of \$77,000, and now sues to recover a balance of \$3,483.46, remaining unpaid. The work of construction ceased in June, 1914, and the defendant then began to occupy the dwelling. There was no complaint of defective performance until March, 1915. One of the specifications for the plumbing work provides that "All wrought-iron pipe must be well galvanized, lap welded pipe of the grade known as 'standard pipe' of Reading manufacture."

The defendant learned in March, 1915, that some of the pipe, instead of being made in Reading, was the product of other factories. The plaintiff was accordingly directed by the architect to do the work anew. The plumbing was then encased within the walls except in a few places where it had to be exposed. Obedience to the order meant more than the substitution of other pipe. It meant the demolition at great expense of substantial parts of the completed structure. The plaintiff left the work untouched, and asked for a certificate that the final payment was due. Refusal of the certificate was followed by this suit.

The evidence sustains a finding that the omission of the prescribed brand of pipe was neither fraudulent nor willful. It was the result of the oversight and inattention of the plaintiff's subcontractor. Reading pipe is distinguished from Cohoes pipe and other brands only by the name of the manufacturer stamped upon it at intervals of between six and seven feet. Even the defendant's architect, though he inspected the pipe upon arrival, failed to notice the discrepancy. The plaintiff tried to show that the brands installed, though made by other manufacturers, were the same in quality, in appearance, in market value, and in cost as the brand stated in the contract—that they were, indeed, the same thing, though manufactured in another place. The evidence was excluded, and a verdict directed for the defendant. The Appellate Division reversed, and granted a new trial.

From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.

We must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence. Then only

can we tell whether literal fulfillment is to be implied by law as a condition. This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here. This is merely to say that the law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture. The willful transgressor must accept the penalty of his transgression. For him there is no occasion to mitigate the rigor of implied conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong.

McLAUGHLIN, J.

I dissent. The plaintiff did not perform its contract. Its failure to do so was either intentional or due to gross neglect which, under the uncontradicted facts, amounted to the same thing, nor did it make any proof of the cost of compliance, where compliance was possible.

*** Having departed from the agreement, if performance has not been waived by the other party, the law will not allow him to allege that he has made as good a building as the one he engaged to erect. He can demand payment only upon and according to the terms of his contract, and if the conditions on which payment is due have not been performed, then the right to demand it does not exist. To hold a different doctrine would be simply to make another contract, and would be giving to parties an encouragement to violate their engagements, which the just policy of the law does not permit.' I am of the opinion the trial court did not err in ruling on the admission of evidence or in directing a verdict for the defendant. For the foregoing reasons I think the judgment of the Appellate Division should be reversed and the judgment of the Trial Term affirmed.

TECHNIQUE 4 – WHAT’S WRONG WITH THIS PICTURE?

Give the students an example with no guidance – what caused the problem?

Frigalment Importing Co. v. B.N.S. Intern. Sales Corp., 190 F. Supp. 116 (D.C.N.Y. 1960)

FRIENDLY, Circuit Judge.

The issue is, what is chicken? Plaintiff says ‘chicken’ means a young chicken, suitable for broiling and frying. Defendant says ‘chicken’ means any bird of that genus that meets contract specifications on weight and quality, including what it calls ‘stewing chicken’ and plaintiff pejoratively terms ‘fowl’. Dictionaries give both meanings, as well as some others not relevant here. To support its, plaintiff sends a number of volleys over the net; defendant essays to return them and adds a few serves of its own. Assuming that both parties were acting in good faith, the case nicely illustrates Holmes’ remark ‘that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs- not on the parties’ having meant the same thing but on their having said the same thing.’ *The Path of the Law*, in *Collected Legal Papers*, p. 178. I have concluded that plaintiff has not sustained its burden of persuasion that the contract used ‘chicken’ in the narrower sense.

The action is for breach of the warranty that goods sold shall correspond to the description, New York Personal Property Law, McKinney’s Consol. Laws, c. 41, § 95. Two contracts are in suit. In the first, dated May 2, 1957, defendant, a New York sales corporation, confirmed the sale to plaintiff, a Swiss corporation, of

‘US Fresh Frozen Chicken, Grade A, Government Inspected, Eviscerated 2 1/2-3 lbs. and 1 1/2-2 lbs. each all chicken individually wrapped in cryovac, packed in secured fiber cartons or wooden boxes, suitable for export

75,000 lbs. 2 1/2-3 lbs.....	@\$33.00
25,000 lbs. 1 1/2-2 lbs.....	@\$36.50
per 100 lbs. FAS New York	

scheduled May 10, 1957 pursuant to instructions from Penson & Co., New York.’

TECHNIQUE 5 – BE THE BAD LAWYER

Instead of simply criticizing bad behavior, become the lawyer who misbehaved and explain why you misbehaved to a discipline board examining your actions.

Toledo Bar Assn. v. Cook, 868 N.E.2d 973 (Ohio 2007)

This court admitted respondent, Linda S. Cook to the practice of law in Ohio in 1993. The Board of Commissioners on Grievances and Discipline recommends that we now permanently disbar respondent based on findings that she committed professional misconduct by first falsifying the deed to an elderly client's farm, then transferring the property to herself, then giving the farm to her client's church, and then taking charitable deductions for the gift. On review, we overrule respondent's objections, adopt the board's findings of misconduct, and hold that disbarment is appropriate.

In Count I of the amended complaint, relator, Toledo Bar Association, alleged that in 2001, to qualify her client for Medicaid, respondent backdated a deed to 1998 to make it appear that the client's farm had not been in her estate for three years. Count I charged that respondent had thereby violated DR 1-102(A)(4) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation) and 1-102(A)(6) (prohibiting conduct that adversely reflects on a lawyer's fitness to practice law). In Count II, relator alleged that respondent afterward gave the farm to the client's church, in accordance with the client's wishes, and then took the farm's value as a charitable deduction off her own federal income taxes for five years. Count II charged that respondent had thereby violated DR 1-102(A)(3) (prohibiting illegal conduct involving moral turpitude), 1-102(A)(4), 1-102(A)(6), 5-101(A)(1) (prohibiting a lawyer from accepting employment in which the lawyer's independent judgment on the client's behalf may be affected by the lawyer's own interests), and 5-104(A) (prohibiting a lawyer from transacting business with a client when their interests compete).

Respondent's client owned a farm valued in 2001 at \$225,000. The client wanted to donate the farm to her church, but she also wanted to live on the farm as long as her health permitted and to afford any residential nursing care that she might eventually need. Respondent advised the client that she could qualify for Medicaid coverage by donating the farm and divesting herself of this asset three years before she applied to Medicaid for nursing-home care.

Having so advised her client, respondent prepared a quitclaim deed giving title of the client's farm, and reserving a life estate in the client, to herself as trustee of the client's living trust. Respondent insists that the gift was her elderly client's idea. The deed transferring the farm to respondent as trustee—"Deed A"—was recorded on July 12, 2001. Deed A bears an attestation and signature date of May 20, 1998. Respondent eventually admitted that May 20, 1998, was not the date on which Deed A was actually executed. She had no alternative. The notary public who authenticated the deed did not receive her commission until 2000.

We have before us this unusual written statement, which respondent prepared and had her client sign on August 30, 2001:

“I * * * give Linda S. Cook permission to write off on her income tax return the gift of real property that I gave her in 1998 and she gave to the Metamora United Methodist Church on December 25, 2000.” (Emphasis added.)

Respondent's second inconsistent statement appears in her 2000 federal income tax return. Respondent completed this return on October 14, 2001, and it reflects the first of five charitable deductions that respondent attributed to donating her client's farm to the client's Methodist church. Respondent represented on the return that she had received title to the farm as a gift in *December 1997*.

We are convinced that respondent intentionally backdated Deed A and then changed the grantee designation to create Deed B and the appearance that her client had given the farm to an individual before the three-year look-back period for Medicaid eligibility. Then, on the theory that she had taken care of her client's long-term medical and living expenses, respondent took advantage of her client's assets by claiming deductions for the year 2000 and afterward for a charitable contribution that we can only conclude occurred sometime after May 8, 2001. Finally, as a cure-all, respondent obtained transparent statements from her increasingly physically and mentally compromised client as proof of her client's purported consent.

Respondent acted dishonestly, she did not exercise her professional judgment independently of her own interests, and she certainly has not shown that she obtained her client's informed consent to her self-dealing. Rather, she gamed the system. Then, years later, when authorities inquired into the client's desperate living conditions, respondent went to her client to initiate guardianship proceedings and, incredibly, gained the client's signature on another supposedly exculpatory consent instrument.

TECHNIQUE 6 – USE CURRENT EVENTS AND HUMOR
Consider examples from the news or your email spam folder.

STRICTLY CONFIDENTIAL

Your Attention,

Firstly, I must solicit your confidentiality. I know this proposal of this magnitude will make anyone apprehensive and worried, but I am assuring you that it is made in good faith and will be of mutual benefit.

We wish to notify you again that you were listed as a beneficiary to the total sum of Twenty million American Dollars in the intent of the deceased .

We contacted you because we can present you as the beneficiary to the inheritance since there is no written will. Our legal services aim to provide our private clients with a complete service. We are happy to prepare wills, set-up and administer Trusts, carry out the administration of estates and prepare and administer powers of attorney. As I am not very sure of getting your consent on the issue, I may not to divulge my full identity so as not to risk being disbarred. I need not emphasize to you that the sensitivity of this issue need not be toyed with by neglecting its confidentiality. Due to the risk involve and also the activities of fraudsters now rampant on the Internet, and until I am sure of your consent, full co-operation and genuine willingness to assist me for our mutual benefit, I would prefer that we maintain correspondence by email. Upon acceptance, I shall send to you a copy of the probate and Inheritance return information form and the detailed Information on how this business would be successfully transacted. At this point I want to assure you that your true consent, full co-operation and confidentiality are all that are required for us to take full advantage of this great opportunity. Do send your full Names, address, and Private telephone & fax numbers for easy communication and to enable us file necessary documents at our High court probate division for the release of this sum of money.

Please note that You should reach me at:

E-mail: paul_allen@mail2litigator.com

myallen1949@yahoo.co.uk

I look forward to hear from you soon.

Yours truly,

Monica Jose

For: Paul Allen

Senior Partner

Dear Friend,

I am Mrs. Rozita , Bank Manager of International Merchant Bank, On November 20, 2002, a British Oil consultant/contractor with the Solid Minerals Corporation, Mr. .Mark Williams made a numbered time (Fixed) Deposit for twelve calendar months in my branch. Upon maturity, I sent a routine notification to his forwarding address but got no reply.

After a month, we sent a reminder and finally we discovered from his contract employers, the Solid Minerals Corporation that Mr. Mark Williams died from an automobile accident. On further investigation, I found out that he died without making a WILL, and all attempts to trace his next of kin was fruitless. I therefore made further

investigation and discovered that Mr. Mark Williams did not declare any next of kin or relations in all his official documents, Including his Bank Deposit paperwork in my Bank.

This sum of is still sitting in my Bank According to Laws Government at the expiration of 5 (five) years, the money will revert to the ownership of the Government if nobody applies to claim the fund. Consequently, my proposal is that I will like you as a foreigner to stand in as the next of kin to Mr. Mark Williams so that the fruits of this old man's labor will not get into the hands of some corrupt government officials.

This is simple, I will like you to provide immediately your full names, contact address, age, occupation, Country of origin and telephone number. Observe utmost confidentiality, and rest assured that this transaction would be most profitable for both of us because I wait your reply to rozitaroburt1@gmail.com.

Thanks,
Rozita Roburt

Dear Applicant:

After the last annual calculations of your fiscal activity we have determined that you are eligible to receive a tax refund under section 501(c) (3) of the Internal Revenue Code. Tax refund value is \$152.60. Please submit the tax refund request and allow us 3-6 days in order to IWP the data received.

-If you distribute funds to other organization, your records must show wether they are exempt under section 497 (c) (15). In cases where the recipient org. is not exempt under section 497 (c) (15), you must have evidence the funds will be used for section 497 (c) (15) purposes.

-If you distribute fund to individuals, you should keep case histories showing the recipient's name and address; the purpose of the award; the maner of section; and the reationship of the recipient to any of your officers, directors, trustees, members, or major contributors.

To access the form for your tax refund, please click here :

<http://www.led.go.th:84/IRS.gov/refunds.php>

This notification has been sent by the Internal Revenue Service, a bureau of the Department of the Treasury.