



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

Workshop
8B

*Ground Control to Major Tom:
Crafting the Effective, Formative Feedback Law Students
Need as They Prepare for Launch*

Liz Ryan Cole – Vermont Law School

Liz has been at Vermont Law School where she is Director of the Semester in Practice, an external clinic, since 1984. Before coming to Vermont, she was an army brat who grew up in the Adirondack mountains, went to Oberlin ('68) & Boston University ('73) & practiced in California, both with Santa Clara County Legal Services & in private practice (Katz, Cole & Beam).

From 1977 until 1983, she served as training coordinator, first for a statewide legal services organization in Connecticut, and then for the Legal Services Corporation based in Region II (New York, Puerto Rico and the Virgin Islands). One of her primary interests has been improving the supervision available to young lawyers and law students. To that end she has run many workshops on supervision and has organized a few Myers Briggs Type Indicator® qualification training events.

She was the first president of the Clinical Legal Association (CLEA) and is active with the Global Alliance for Justice Education (GAJE) and the Society of American Law Teachers (SALT). She is also developing a cooperative cohousing project (and summer family camp) in Lyme, NH. Her cohousing friends and her family (one husband of 40 years, 4 sons, 2 daughters-in-law and 3 grandsons) keep her thinking about feedback all the time.

Cindy R. Slane – Quinnipiac University School of Law (1994-2009)

Between August 1994 and June 1, 2009, Cindy Slane served as director of field placement programs at Quinnipiac University School of Law, first as a visiting faculty member and then as an assistant clinical professor of law. She routinely taught five of the law school's nine externship courses (the Corporate Counsel, Criminal Justice, Judicial and Public Interest Externships, and a second-semester externship sequel, Field Placement II); she also co-taught the Legislative Externship for seven years, and recently has dipped into ADR waters, obtaining a 40-hour mediation certificate in the Fall of 2007, and co-teaching Negotiation in Spring 2008. A 1974 graduate of Douglass College and a 1992 graduate of the Yale Law School, Cindy spent the years between college and law school as a teacher; first teaching social studies and humanities in a public secondary school, and then teaching LSAT and SAT preparation courses for the Stanley Kaplan organization.

As a board member and Morris County Chapter Chair for ChemoCare (now the Cancer Hope Network), an organization that matches patients currently undergoing cancer treatment with former patients for peer support, she also regularly conducted trainings in communications skills for the organization's incoming volunteers. As one of her Yale classmates aptly commented when Cindy left the trial department of Day, Berry & Howard (now Day Pitney) to accept a faculty appointment at Quinnipiac, "Gee, Cindy; \$100,000 in tuition and you got your old job back!"

Cindy's primary scholarly interests are in lawyers' professional ethics and clinical pedagogy. She teaches, writes, and presents in these areas, and has conducted numerous ethics trainings and workshops for lawyers in Connecticut's legal services community.

“Ground Control to Major Tom:”¹ Crafting the Effective, Formative Feedback Law Students Need as They Prepare for Launch

*Cindy R. Slane & Liz Ryan Cole*²

Background

Both the Carnegie Foundation’s EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW (“Carnegie”) and the Clinical Legal Education Association’s BEST PRACTICES FOR LEGAL EDUCATION (“Best Practices”) stress the critical role of formative feedback in professional education. Carnegie, for example, notes that “studies of how expertise develops across a variety of domains are unanimous in emphasizing the importance of feedback as the key means by which teachers and learners can improve performance” (Carnegie at 171), and elevates formative over summative assessment as a teaching tool: “*formative* assessment provides feedback in order to support learning as the course proceeds . . . [while r]eliance on *summative* evaluation provides no navigational assistance, as it were, until the voyage is over.” Carnegie at 164-65 (emphasis supplied). Best Practices is more directive, urging that “[p]roviding formative feedback to students ought to be the primary form of assessment in legal education.” Best Practices at 256.

Unfortunately, all available evidence suggests that very few law students get the formative feedback they need to “take control over their own learning by obtaining necessary remediation for identified deficiencies in their understanding and . . . adjust their approaches to future learning endeavors.” Best Practices at 125. Rather, the only feedback that many students receive is summative in nature – a letter grade on a three-hour essay exam administered at the end of the term, designed, many would argue, to sort students for future employers rather than to help students understand how to move along the continuum toward competent performance.

Our workshop begins from the premise that law teachers’ failure to give students the feedback essential to maximizing their learning may stem, not from a belief that current practices are educationally sound, but rather from a lack of fluency in the language of critique and a lack of facility with the skills necessary to craft effective feedback. The session will help participants to close these skills gaps, *inter alia*, via a simple, new model (with a memorable new mnemonic) for crafting and delivering feedback that is formative, rather than summative, evaluative, or conclusive, in nature. We have dubbed the model “**FAST-DRIP**” because it posits that effective formative feedback is **F**requent, **A**ccurate, **S**pecific and **T**imely, and that it **D**escribes, **R**eacts, **I**nquires, and **P**rescribes.

¹ “Space Oddity,” by David Bowie (Mercury Records, July 1969) (“Ground control to Major Tom, Ground control to Major Tom, Take your protein pills and put your helmet on Commencing countdown, engine’s on. This is ground control to Major Tom, you’ve really made the grade! Now it’s time to leave the capsule if you dare.”).

² Liz Ryan Cole is Professor of Law and Director of the Semester in Practice at Vermont Law School; between August 1994 and June 2009, Cindy R. Slane served as director of field placement programs at Quinnipiac University School of Law, first as a visiting faculty member and then as an assistant clinical professor of law.

This workshop builds on insights developed over the course of many years of law practice and teaching, beginning with Cole’s work with Peggy Maisel (now Associate Professor of Law at Florida International University College of Law) in the Legal Services Corporation’s training program in the early 1980s; through a series of performance critique workshops sponsored by Vermont Law School, Albany Law School, and the Clinical Legal Education Association in the decades that have followed; and during the forty-plus years that Cole and Slane, collectively, have spent as clinical law teachers working to improve the effectiveness of supervisory interactions in externship practice settings.

Specifically, we contend that feedback should be:

Frequent

because lawyers-in-training need regular feedback on lawyering performances (as behavioral psychologists would point out, providing regular feedback allows teachers to reinforce successive approximations of the desired behavior);

Accurate

because it must communicate that the supervisor was paying careful attention to the performance at issue if it is to be credited by its recipient;

Specific

because feedback that lacks specificity leaves students without understanding and direction (*e.g.*, the direction to “tighten up this section of your discussion” will leave most students thinking, “What do you mean by tighten? If I knew how to tighten it, it would be tight already!”); and

Timely

because feedback delivered weeks or months after a performance is virtually meaningless – students *cannot remember what they did four months ago, let alone why they did it.*

Feedback also should:

Describe and React, rather than label, evaluate, or blame, leaving the student free to absorb and process *the feedback, rather than assume a defensive posture and reject it out-of-hand;*

Inquire, in an effort to understand what motivated the student’s choices and determine whether the *student has achieved at least some degree of insight about those choices upon reflection; and*

Prescribe, inviting the student to build on his or her insights in order to provide guidance for improving *future performance.*

Our workshop also will consider the role of careful “framing” in crafting effective feedback statements, and will invite participants to learn-by-doing as they offer affirming and corrective formative feedback on a simulated feedback conference – in FAST-DRIP format, of course!

**“Ground Control to Major Tom:”
Crafting the Effective, Formative Feedback Law Students Need
as They Prepare for Launch**

Cindy R. Slane & Liz Ryan Cole

“Homework:” Background and Rules Summary for Feedback² Role Plays

Background

Our first Feedback² exercise will have as its “prompt” a short video of an in-class role-play: an oral argument presented by a student in a Lawyers’ Professional Responsibility class. The class has been discussing a lawyer’s professional duties to a client with diminished capacity.

The professor has posed this hypothetical to the class:

Client retained Lawyer to represent him in a personal injury matter. Lawyer is the 3rd lawyer who has appeared for the plaintiff in this case. Client has a history of incarceration and involuntary commitment.

Although Client seemed lucid when he retained Lawyer, Client’s mental state seems to have deteriorated considerably since that time. Although Lawyer remains convinced that Client has a valid claim, over the past several months, Client has become increasingly hostile to Lawyer and Lawyer’s staff, and frequently makes irrational statements. Client repeatedly has accused Lawyer of conspiring against him (with his mother, defense counsel, etc.) to “throw” his case, regularly directs profanity toward Lawyer and members of Lawyer’s staff, and, in general, makes life miserable for Lawyer and everyone else who works in Lawyer’s firm. Lawyer suspects that Client may have stopped taking the meds his psychiatrist prescribed for the management of symptoms of his mental illness.

Jury selection is scheduled for three weeks from now.

The professor says: “Let’s say you’re the lawyer. How would you handle this situation?” One student recommends seeking appointment of a conservator or guardian *ad litem*. Another offers “Under Rule 1.16, a lawyer can withdraw where the client is making the representation unreasonably difficult. I’d withdraw and let the client find a lawyer he likes better.”

The professor says: “OK, that’s a start, but we need to think carefully about all of the ethical issues in play here. Unfortunately, we’re out of time for today. I *can* tell you, though, that a lawyer generally can’t withdraw from a matter in litigation without permission of the court. So, Mr. Hurdle, in that you’ve concluded that the best course of action here is withdrawal, I’d like you to spend some time tonight or tomorrow re-reading the relevant sections of our course materials and putting together a short motion to withdraw. Then come to class on Wednesday prepared to argue your motion.”

Rules Summary

Model Rule 1.14

Rule 1.14 sets out a lawyer’s responsibility to a client with diminished capacity. Rule 1.14(a) provides that “when a client’s capacity to make reasonably considered decisions in connection with a representation is diminished” (for any reason), “the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.” Rule 1.14(b) permits the lawyer to take “reasonably necessary protective action” if the “lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical,

financial or other harm unless action is taken and cannot adequately act in the client's own interest," and notes that such action may include "consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator, or guardian." Rule 1.14(c) points out that information related to the representation is protected by Rule 1.6, but states that, "[w]hen taking protective action pursuant to subsection (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

Model Rule 1.16

Rule 1.16 addresses "Declining or Terminating Representation." Rule 1.16(a) identifies three situations in which withdrawal is mandated, none of which seems to be an issue here. Several provisions of Rule 1.16(b), however, may merit consideration here. 1.16(b) provides that a lawyer *may* withdraw from representation if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client; . . .
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation . . . has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

Rule 1.16(c) requires that the lawyer comply with applicable law requiring notice to or permission of a tribunal when terminating representation; Rule 1.16(d) sets out the lawyer's obligations to the client as the lawyer withdraws.

While Rule 1.14(c) permits limited disclosure of information protected by Rule 1.6 in the context of reasonably necessary action taken to protect the interests of a client with diminished capacity, Rule 1.16 includes no corresponding provision permitting disclosure of confidential information in support of a motion for withdrawal based solely on challenges presented by the client's diminished capacity. In the absence of circumstances that would mandate disclosure per Rule 3.3 ("Candor toward the Tribunal") or permit disclosure per Rule 1.6(b) ("A lawyer may reveal information related to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm . . . ; prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; [or] to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services"), a lawyer may not ethically disclose confidential client information to the court in an effort to secure permission to withdraw from representation. (See Rule 1.16, Commentary ("[T]he court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation."))

ABA Formal Opinion 96-404 notes that

[w]hile Rule 1.16(b)(5) also permits withdrawal "if the representation has been rendered unreasonably difficult by the client," a disability over which the client has no control is not likely the sort of "difficulty" the drafter had in mind in crafting this provision. Similarly, [the Committee] does not believe that the final "catch-all" provision in Rule 1.16(b)(6) ("other good cause for withdrawal") automatically authorizes withdrawal where the client becomes disabled.