

# Lawyering at the Intersection of Mediation and Community Economic Development: Interweaving Inclusive Legal Problem Solving Skills in the Training of Effective Lawyers

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## I. INTERSECTIONALITY: INTRODUCTION TO THE FRAMEWORK

This Article introduces the intersection between the professional practices of Community Economic Development (CED) lawyering and mediation, emphasizing the overlapping skills between these fields. CED provides clients with transactional legal support<sup>1</sup> in

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The collaboration between the Mediation program and the CED program began shortly after the introduction of the CED curriculum at CUNY School of Law. The collaboration grew as a product of the teachers' listening and learning about their respective programs. Discussions between the two teachers about professional practice and skills agenda increased their understanding of what the other does. They developed a growing sense of a significant and substantial overlap between the two fields as well as their teaching goals and methods.

1. Examples of transactional legal work include, but are not limited to, counseling groups on entity formation options and corporate governance and negotiating and drafting contracts and commercial leases. For informative and interesting articles on CED legal practice, see Brian Glick & Matthew J. Rossman, *Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: The East Brooklyn Experience*, 23 N.Y.U. REV. L. & SOC. CHANGE 105 (1997); Scott L. Cummings, *Community Economic Development as Progressive Politics: Towards a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001); Carmen Huertas-Noble, Jessica Rose & Brian Glick, *The Greening of Community Economic Development: Dispatches from New York City*, 31 W. NEW ENG. L. REV. 645 (2009); Alicia Alvarez, *Community Development Clinics: What Does Poverty Law Have to Do with Them?*, 34 FORDHAM URB. L.J. 1269, 1275 (2007); Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 202-07 (1997); Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217, 217-22

creating and sustaining their own development projects, such as creating affordable housing and small businesses, as well as in exercising meaningful control and/or influence over private, for-profit development projects. Mediation is the intervention into the disputes or transactions of others in order to explore the possibility of mutual optimal outcomes.<sup>2</sup> This definition of mediation is at the heart of the legal counselor's role under an empowerment-driven CED approach.<sup>3</sup> Many CED clients are community groups that inherently have multiple and often competing internal interests. An empowerment-driven CED lawyer counsels community groups in a way that maximizes the group's underlying shared interests in order to increase the gains for the entire group as well as the larger community.

This Article is useful to lawyers who, like CED practitioners and mediators, work with community organizations and multiple stakeholders. Mediators and CED lawyers have a similar perspective on the breadth of their professional role. They do not see their role as being limited to legal technical assistance.<sup>4</sup> Progressive attorney-mediators identify a common skill set that they utilize when acting in role both as advocate and as mediator. This Article focuses on the empowerment-driven attorney-mediator's and CED lawyer's views regarding the use of effective legal problem-solving skills that go beyond traditional legal representation.<sup>5</sup> Although this role of a CED

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(1999); Carmen Huertas-Noble, *Promoting Worker-Owned Cooperatives as a CED Empowerment Strategy: A Case Study of COLORS and Lawyering in Support of Participatory Decision-Making and Meaningful Social Change*, 17 CLINICAL L. REV. 255 (2010) [hereinafter Huertas-Noble, *CED Empowerment Lawyering*].

2. Beryl Blaustone, *Mediation: Evidence Issues in Mediation: Implications for the Private and Public Sectors*, in ADR & THE LAW 115, 115 n.1 (21st ed. 2007).

3. "Empowerment driven CED lawyering . . . is an emerging approach to progressive lawyering that fosters the collective action and active democratic participation of low-income and working-class people to reshape our social, economic, and political system." Huertas-Noble, *CED Empowerment Lawyering*, *supra* note 1, at 255. Under this model, CED clients are often organizing groups "composed of many activist members, who individually and collectively need to be meaningfully included as full partners in the decision making" processes of the group. *Id.* at 275 n.9. Ensuring meaningful participation under this model for these clients requires engaging the client not simply as an entity with one point person, but also as a group of individuals that make up its membership and act as decision-makers.

4. Although many mediators are not lawyers, many others are.

5. For a thorough exploration of this perspective on the lawyer's role, see Beryl Blaustone, *To Be of Service: The Lawyer's Aware Use of the Human Skills Associated With the*

lawyer may appear to be novel, it is an established, successful corporate law convention for lawyers to have a more expansive professional role. CED lawyers, like business lawyers, act as strategists, counselors, and facilitators before a variety of involved third parties.<sup>6</sup> Thus, the professional role of the CED lawyer involves more than contract advising and drafting. CED lawyers serve as tacticians and key members of strategy teams, advising clients on how to achieve short-term and long-term objectives while avoiding

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*Perceptive Self*, 15 J. LEGAL PROF. 241 (1990). See generally GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); ELIZABETH DVORKIN ET AL., *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* (1981); DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* (1974); JACK L. SAMMONS, JR., *LAWYER PROFESSIONALISM* (1988); THOMAS L. SHAFFER & JAMES R. ELKINS, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1978); THOMAS L. SHAFFER & ROBERT S. REDMOUNT, *LAWYERS, LAW STUDENTS AND PEOPLE* (1977); John L. Barkai & Virginia O. Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. U. L. REV. 505 (1983); Robert M. Bastress, *Client Centered Counseling and Moral Accountability for Lawyers*, 10 J. LEGAL PROF. 97 (1985); Robert F. Cochran Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990); H. Russell Cort & Jack L. Sammons, *The Search for "Good Lawyering": A Concept and Model of Lawyering Competencies*, 29 CLEV. ST. L. REV. 397 (1980); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); Erwin N. Griswold, *Law Schools and Human Relations*, 37 CHI. B. REC. 199 (1956); Eric Mills Holmes, *Education for Competent Lawyering—Case Method in a Functional Context*, 76 COLUM. L. REV. 535 (1976); Charles D. Kelso & C. Kevin Kelso, *Conflict, Emotion, and Legal Ethics*, 10 PAC. L.J. 69 (1978); Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1979); Peter Margulies, "Who Are You to Tell Me That?": *Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213 (1990); Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 MO. J. DISP. RESOL. 25; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); John O. Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 36 J. LEGAL EDUC. 189 (1986); Howard R. Sacks, *Human-Relations Training for Law Students and Lawyers*, 11 J. LEGAL EDUC. 316 (1959); Jack L. Sammons, *Meaningful Client Participation: An Essay Toward a Moral Understanding of the Practice of Law*, 6 J. L. & RELIGION 61 (1988); Robert F. Seibel et al., *An Integrated Training Program for Law and Counseling*, 35 J. LEGAL EDUC. 208 (1985); Allen E. Smith & Patrick Nester, *Lawyers, Clients, and Communication Skill*, 1977 BYU L. REV. 275; Frank R. Strong, *Pedagogical Implications of Inventorying Legal Capacities*, 3 J. LEGAL EDUC. 555 (1951).

6. See Brian Glick with Matthew J. Rossman, *Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: The East Brooklyn Experience*, 23 N.Y.U. REV. L. & SOC. CHANGE 105, 119–21 (1997).

potential legal pitfalls.<sup>7</sup> Thus, both the mediator and the CED lawyer direct their expertise toward providing the client or party with the information and resources necessary to engage in informed decision-making. The two practitioners identify and tailor their professional roles to the needs of a given situation, both early on and throughout their work with clients and parties. Indeed, because mediation and CED involve helping more than one decision-maker, both practitioners place emphasis on broad problem-solving skills with the goal of surfacing and considering all affected interests.

At the intersection of empowerment-driven mediation practice and CED lawyering is the central use of metacognitive self-awareness, robust information gathering, active listening, language reframing, facilitation, problem-solving, and consensus-building skills. For purposes of this Article, we will label this entire set of overlapping skills “inclusive legal problem-solving skills.” Both fields utilize facilitation skills, which are intended to bridge differences and create common dialogue among those in disagreement. In both contexts, facilitation skills refer to the ability to deliberately choose language with attention to the potential reactions of the intended audience, to elicit the various perspectives, to articulate the common threads, and to identify the differences as common issues to be solved. Reframing skills refer to the ability to neutralize content and evaluate options neutrally.

Mediation Training for Law Practice<sup>8</sup> is premised upon the recognition that this inclusive set of skills is essential for effective problem-solving in all areas of law practice.<sup>9</sup> This is especially true for CED legal practice, which is an inherently transactional practice premised upon the necessity for genuine collaboration among multiple parties, including CED attorneys, client organizations, and other community stakeholders.<sup>10</sup> Thus, CED requires accommodation among multiple decision-makers in order to implement successful development projects.

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7. *Id.*

8. Professor Beryl Blaustone designed this curriculum to address the use of mediation as part of regular law practice.

9. Beryl Blaustone, *Training the Modern Lawyer: Incorporating the Study of Mediation into Required Law School Courses*, 21 SW. U. L. REV. 1317 (1992).

10. See Huertas-Noble, *CED Empowerment Lawyering*, *supra* note 1, at 283–84.

Both empowerment-driven mediation and CED lawyering stress the importance of embracing diverse points of view as a way to generate multiple optimal solutions for the client. The idea that including multiple perspectives ensures a more accurate understanding of the factual matter and provides more material for generating potential options constitutes an essential core belief in both fields. Thus, empowerment-driven CED lawyering and mediation make a conscious effort to include all perspectives in the design of an effective resolution process. Surfacing these differences in perspective contributes to fuller examination of meaning, and together the participants expand their ideas regarding solutions. As a result, the ideas become more fully developed by including the divergent content from many sources.<sup>11</sup>

In this Article, we first review the historical and present-day support for teaching law students to more fully function as professionals. Second, we explore the intersection of CED and mediation by means of a case illustration. We start this coverage by reviewing the legal background and the fact pattern of the scenario. We then discuss how the CED lawyer uses inclusive legal problem-solving skills in this case scenario in order to effectively serve her<sup>12</sup> client community organization. Next, we discuss the component skills of inclusive legal problem-solving that serve as the foundation for our model CED lawyering approach. We separately discuss the three component skill sets of inclusive legal problem-solving, which are: (1) inner negotiation skills-metacognitive self-awareness; (2) information gathering and achieving sustained focus on the client; (3) reframing positions, issue framing, and option generation. We conclude this Article by inviting our colleagues to use and further develop our framework of inclusive legal problem-solving skills in training future community lawyers.<sup>13</sup>

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11. See Blaustone, *supra* note 5; Susan Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 VT. L. REV. 459 (1993) (discussing emergent knowledge).

12. The sole use of “her” is not meant to be exclusive of “his,” but is done for reader ease. Notwithstanding the reader will note that we combine both formats. At times we reference one gender and at other times we reference both (e.g., his or her).

13. We are currently writing an article that examines whether our framework can be used in representing coalitions.

## II. THE HISTORICAL AND PRESENT-DAY SUPPORT FOR TEACHING LAW STUDENTS TO MORE FULLY FUNCTION AS PROFESSIONALS

The MacCrate Report foresaw the type of lawyering that exists at the intersection of empowerment-driven CED lawyering and mediation.<sup>14</sup> The MacCrate Report advances the teaching of lawyering skills as a fully integrated part of law school academic programs and emphasizes teaching the fundamental values of the legal profession.<sup>15</sup> It also contains a comprehensive Statement of Fundamental Lawyering Skills and Professional Values (the “Statement”).<sup>16</sup> The Statement identifies problem-solving as fundamental element of competent lawyering and unpacks the component aspects of legal problem-solving activity.<sup>17</sup> It includes a broader framework for identifying the institutional and personal contexts of the specific problem, the range of the client’s goals, potential courses of action, and alternative solutions.<sup>18</sup> The Statement also elaborates upon the elements of competent factual investigation in lawyering.<sup>19</sup> It emphasizes the requirements for planning and implementing factual investigation, such as the ability to determine the proper scope of the inquiry.<sup>20</sup> The Statement articulates all of the tasks in effective interviewing, with a focus on the necessary communication skills used in evaluating the gathered information with reference to the client’s goals.<sup>21</sup> It lists the factors of effective communication in lawyering as including the ability to view situations from the perspective of the recipient of the communication, the ability to take into account one’s own biases and partisan perspective, and the need to recognize inadequate understanding of

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14. AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) [hereinafter MACCRATE REPORT], available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>.

15. *Id.*

16. AM. BAR ASS’N, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES I (1992) [hereinafter STATEMENT].

17. *Id.* at 5, 15–24.

18. *Id.* at 15–17.

19. *Id.* at 38–46.

20. *Id.*

21. *Id.* at 40–42.

the client's culture and values.<sup>22</sup> The Statement further recognizes that the lawyer must accurately perceive and interpret the communication of others by acting receptively and responding in the same vein.<sup>23</sup> The Statement also devotes an entire section to counseling; this section emphasizes the need to balance conflicting considerations, address options which the client has dismissed or not taken into account, and incorporate the client's views through a detailed analysis of the client's desired outcomes, concerns and judgments.<sup>24</sup> This section of the Statement also elaborates on the lawyer's duty to set forth all available options and assist the client in evaluating the alternatives.<sup>25</sup> Each of these sections is followed by a rich commentary which analyzes the scholarship on the specific skill area.<sup>26</sup> Thus, the Statement is supported by substantial treatment of the literature on point.

*Best Practices for Legal Education* ("Best Practices") builds upon the findings of the MacCrate Report and sets forth specific goals and verifiable assessment methods as an overall approach for correcting the general failure of legal education to produce capable lawyers.<sup>27</sup> One of the goals identified in *Best Practices* as essential is "help[ing] students acquire the attributes of effective, responsible lawyers including self-reflection and lifelong learning skills."<sup>28</sup> *Best Practices* adopts the findings of the Carnegie Foundation's report on legal education ("Carnegie Report") that law schools should "initiate novice practitioners" to function as professionals.<sup>29</sup> *Best Practices* identifies several components of basic lawyering competence that should be used as the desired outcomes for assessing the success of

22. *Id.* at 47.

23. *Id.*

24. *Id.* at 51–59.

25. *Id.* at 54–57. The Statement also devotes an entire section to defining competent representation in negotiation. This section views expansively the tasks of effective lawyering in negotiation, including nuanced client counseling in planning, conducting the negotiation, and evaluating the offers by all sides. *Id.* at 60–66.

26. *See, e.g., id.* at 21–24.

27. Robert MacCrate, *Foreword* to ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION*, at vii–viii (2007) [hereinafter *BEST PRACTICES*]. This report was issued by the Clinical Legal Education Association (CLEA).

28. *BEST PRACTICES*, *supra* note 27, at 8.

29. *Id.* at 19; WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW 22* (2007).

legal education. These outcomes include the capacity to deal sensitively with clients and others from a diverse range of backgrounds, to respond appropriately to a client's cultural issues, to employ responsive communication skills, to effectively deploy problem-solving skills, to reflect on one's professional growth, and to work effectively as a team member.<sup>30</sup>

The Carnegie Report affirms that students should acquire the capacity to make effective judgments in complex and uncertain situations.<sup>31</sup> This report examines the adverse consequences resulting from the case method's predominance in legal instruction.<sup>32</sup> Significantly, the Carnegie Report identifies several negative outcomes, including law students' disconnection from the realities of applying technical expertise to the practice of law.<sup>33</sup> The Carnegie Report includes a discussion about teaching negotiation skills and integrating alternative dispute resolution into law school curricula as a means of developing problem-solving models of lawyering that "enable students to anticipate a wider variety of future professional roles than litigation."<sup>34</sup>

### III. EMBRACING THE CRITICS OF OUR FRAMEWORK ON THE USE OF INCLUSIVE LEGAL PROBLEM-SOLVING SKILLS WHICH WE DEEM AS BEST PRACTICE

This section examines the resistance among practitioners towards including the inclusive legal problem-solving skill set in their definition of a lawyer's professional role. Many colleagues do not see these skills as integral to the practice of law and may actually view these functions as being outside the lawyering role.<sup>35</sup> Discussing some of the beliefs that lawyers use to explain their resistance is helpful. This section encourages lawyers to be more thoughtful in their choices and ensures that their choices are not based on unexamined beliefs. Lawyers accomplish this reflection by

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30. BEST PRACTICES, *supra* note 27, at 54.

31. SULLIVAN ET AL., *supra* note 29, at 98.

32. *Id.* at 75-78.

33. *Id.* at 76.

34. *Id.* at 111.

35. We make this assertion based upon our combined professional practice.

questioning why they exclude certain activities from their role as lawyer.

We are open to this resistance because we understand that legal education has not historically made the teaching of these inclusive problem-solving skills central to the law school curriculum. While efforts to include such instruction are underway, it has not yet been fully integrated into law school curricula. Neither this critical perspective nor our response in this section is novel.<sup>36</sup> Nevertheless, because of the influence of the dominant yet unexamined beliefs in our legal culture, we cannot proceed without validating the existence of other perspectives and presenting our viewpoints on those perspectives.

Here, we focus upon those underlying unexamined beliefs that support the prevailing positions among many lawyers. A predictable reaction of the CED lawyer to organizational conflict among her client's members may be to withdraw entirely from the divisive issue.<sup>37</sup> The CED lawyer is often in the position of politely indicating that the client should first determine a course of action for itself; then, after these decisions are made, the client should contact the lawyer for her technical legal assistance. Often, and for good reasons, the lawyer may believe that addressing the internal conflicts is outside of her professional legal service. This often translates into the lawyer earnestly believing that she offers no concrete benefit and is helping her client by removing herself from the conflict. She does not view herself as capable of lending assistance in navigating conflict and interpersonal dynamics.

The CED lawyer may not automatically see the value in helping her client navigate internal conflict. Assisting a client in such navigation, however, is a concrete demonstration of respect for the client's concerns.<sup>38</sup> The CED lawyer's willingness to engage allows the client to experience its lawyer earnestly trying to understand the

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36. See, e.g., Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 906-12 (2000).

37. See generally William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57, 75-102 (2003) (describing several approaches to dealing with intraclient conflict).

38. See STEPHEN ELLMANN ET AL., *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* 279-318 (2009) (discussing moral dialogue).

depth of its concerns and perspective. Thus, the lawyer's involvement helps establish a necessary trust in the client-attorney relationship.<sup>39</sup> In addition, being part of the internal process to resolve conflict aids the lawyer in gathering more textured information. This deeper understanding gives the CED lawyer a meaningful context within which to evaluate the information she is gathering in order to effectively counsel and advise her client on how to move forward towards its objectives. In fact, the more the CED lawyer understands the problem, the better able she is to identify the legal tasks needed to best help the client.

Alternatively, from a client autonomy perspective, the CED lawyer may feel that her clients need to develop these leadership skills without the lawyer's influence so as to advance the principles of self-determination or autonomy. In fact, the authors agree with the CED lawyer's motivation to promote client autonomy. However, we also believe that lawyers can advance client empowerment by providing additional expert guidance on these matters in order to supplement the client's abilities. Providing this assistance fosters the actual development of client autonomy. The lawyer's involvement educates the client on how to approach such matters on their own in the future, especially if the client organization and its members have not acquired these skills in the past. This approach increases the client's decision-making capacity even though future consultation may be necessary. Most importantly, this approach has the potential to empower the client to clearly direct the lawyer in what specific legal service is desired.

Lawyers often prematurely identify the factual context, leading to ineffective legal service.<sup>40</sup> This is because lawyers often fail to account for the negative consequences of freezing facts in legal analysis. Typically, they assume they have enough information to do their job. Lawyers often think that this fuller exploration is outside of

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39. *See id.* at 27–33 (describing techniques for connecting with a client, such as active listening and exhibiting empathy and sympathy).

40. *See, e.g.*, G. NICHOLAS HERMAN & JEAN M. CARY, LEGAL COUNSELING, NEGOTIATING, AND MEDIATING: A PRACTICAL APPROACH 35–36 (2d ed. 2009) (noting that the lawyer must keep an open mind about what is relevant in fact-gathering so as to prevent a premature categorization of the client's legal problem).

the lawyer's scope of information-gathering.<sup>41</sup> Using the inclusive legal problem-solving skill set produces an accurate context for the issues to be solved. Exploring the surrounding context of the issues situates facts within a context that provides more nuanced meaning for interpreting the specific facts. We emphasize rigorous information-gathering because identifying the controlling facts for legal intervention is not a superficial inquiry where the first level of understanding is satisfactory.

Colleagues often comment that this level of responsiveness by the lawyer is about "being nice." We experience this comment as both dismissive and a gendered reaction foreclosing further discussion of our commentary. While it should be noted that "being nice" does have value in and of itself, promoting the use of inclusive legal problem-solving skills is more than "being nice." In reality, serious harm may be done to the client when the lawyer delivers legal service without regard to her methods of delivery. We have intervened in cases where the client came to us after being mistreated by well-intentioned lawyers who did not take responsibility for the impact of how they communicate with their client. We have seen that the result is that the client has become more disempowered and disenfranchised. We think the general negative reaction by the public to lawyers is largely due to these impaired methods of delivery for legal services.

#### IV. INTRODUCTION TO THE HYPOTHETICAL FACT PATTERN OF INCLUSIVE LEGAL PROBLEM-SOLVING SKILLS IN CED

This section provides the very basic substantive legal knowledge necessary to understand the hypothetical that follows. The hypothetical involves a lawyer counseling her client in deciding whether to form a community land trust. A community land trust (CLT) is a specific type of corporation that provides for: (1) land ownership that separates the ownership of the land from the property on top of the land; (2) the land itself to be held in trust by the

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41. However, the exploration of the non-legal ramifications of a client's legal matter is a hallmark of client-centered counseling. DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 8-9 (2d ed. 2004).

corporation for the benefit of a community; and (3) the land and the uses on top of the land to remain available for a specified future community use.<sup>42</sup> In the following hypothetical, a CLT would be organized to ensure the availability of affordable home ownership. A housing CLT provides affordable housing for economically marginalized individuals and/or communities.<sup>43</sup> CLTs achieve affordability by ensuring that the cost of the housing on top of its land remains affordable. The CLT can achieve its housing affordability goals in a number of ways. For example, in providing for home ownership, a CLT can achieve affordability by requiring that: (1) houses be sold below market rate to prospective buyers who would not otherwise be able to afford a home; (2) the equity that can be accrued after purchasing a home is limited; and (3) any ownership transfers (subsequent purchases) provide for continued affordability.<sup>44</sup> This type of community ownership fits within a vision of CED that promotes sustainability for economically marginalized communities.

The next two subsections present a CLT hypothetical and a model CED lawyering approach that addresses the client issues raised in the hypothetical.

#### *A. Our Client: Advocates for Affordable Housing, Inc.*

Advocates for Affordable Housing, Inc. (AAH) is a not-for-profit corporation formed in the 1970s that organizes residents to fight for decent, safe, and affordable housing and to combat displacement caused by gentrification in a historically low-income community of color. The AAH founders were homeowners that lived in the community during the 1970s, which was a period marked by government and private disinvestment. During that time, many buildings were abandoned by landlords and subsequently demolished

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42. See Deborah Kenn, *Paradise Unfound: The American Dream of Housing Justice for All*, 5 B.U. PUB. INT. L.J. 69, 77–81 (1995) (describing the relationship between the land, the CLT and the individual).

43. See *id.* at 69–77 (describing the housing crisis, homelessness epidemic, and benefits that long-term solutions such as CLT could provide).

44. *Id.* at 79–80 (describing affordability mechanisms such as preemptive buy back rights held by CLT and restrictions contained in a ground lease for setting a resale formula).

by the city. However, many homeowners and tenants who either chose to stay or could not afford to move came together to form AAH. At that time, AAH was an advocacy organization dedicated to increasing affordable and habitable housing units in the community. Over the years, the quality of affordable housing has grown appreciably. Within the last decade, the geographic community has grown popular and has attracted diverse groups of people who want to make the community their home. At the same time, pockets of abandoned land still exist. However, with the growth of quality housing and attractive amenities, the community is experiencing signs of gentrification. New residents with higher incomes are moving in and driving up the cost of apartment rentals. AAH is fighting displacement of its low-income residents by creating affordable homeownership programs. They favor homeownership programs because gentrification-driven displacement usually takes place in communities with a high percentage of rental properties. Two years ago, the AAH Board of Directors decided to seek funding to purchase land and, once obtained, to create a CLT.

AAH is a long-standing client of the CED unit of our legal aid office. AAH's executive director recently asked us to help them form a CLT. When we met with the executive director, she gleefully told us that AAH received a multi-million dollar grant from the Ford Foundation, which will allow AAH to purchase vacant land in the community. The executive director explained that AAH wants to own the land in trust for the community and to develop affordable housing. She requested that we attend AAH's Board meeting to discuss how we will work with them. Our office specializes in housing development and has worked with countless clients to set up CLTs, limited equity cooperatives,<sup>45</sup> and revolving loan funds<sup>46</sup> in support of traditional "pure homeownership" programs.<sup>47</sup>

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45. See Jennifer Cohoon McStotts, Note, *Dwelling Together: Using Cooperative Housing to Abate the Affordable Housing Shortage in Canada and the United States*, 32 GA. J. INT'L & COMP. L. 131, 151 (2004) (defining and briefly describing limited equity cooperatives).

46. A revolving loan fund is pool of funds which provides immediate financing for high priority projects for borrowers who may not otherwise qualify for traditional financing. New loans are made as money cycles back into the fund from repayment of existing loans. See Mary McBryde, Peter R. Stein & Story Clark, *External Revolving Loan Funds: Expanding Interim Financing for Land Conservation*, 2006 EXCHANGE 19-20, available at <http://www.cfinetwork>.

We arrive to the Board meeting early. To our surprise, while sitting at the table with a majority of the Board, two directors began discussing how the Board is divided over creating a CLT. The directors mention that earlier that day there was a planning meeting where there were heated discussions about whether a CLT is the best model to pursue. At that moment, the executive director walks in and starts the meeting. The tension is palpable. All of the directors seem upset and it becomes clear that the Board is truly split on this issue. The Board consists of eight members, and is diverse in terms of ethnic make-up as well as socioeconomic status.<sup>48</sup>

As we learned later from our investigation, four directors strongly favor the CLT model. These directors have been on the Board for the past three years and have lived in the community since the 1970s. They view the CLT as the best model to balance AAH's multiple goals of using the grant to create affordable housing, avoid displacement, and provide opportunities for individuals in the community to build personal wealth and create community assets. They believe that this model ensures that residents will receive most of the benefits of homeownership while also providing for a community asset that provides stability for both current and future low-income residents.

We also learned that four members strongly oppose the CLT model. These directors are new to the Board and just started their term six months ago. They agree with the goals stated above, but not with the decision to form a CLT, which was voted on when they were not yet part of the Board. The new members believe CLTs create a second-class form of ownership. They believe that most

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org/external%20revolving%20loan%20fund.pdf; see also James J. Mikesell & George B. Wallace, *Are Revolving Loan Funds a Better Way to Finance Rural Development?*, AGRIC. INFO. BULLETIN NO. 724-05 (1996), available at <http://www.ers.usda.gov/publications/AIB724/AIB72405.pdf>.

47. Pure homeownership refers to the typical residential real estate transaction wherein an individual homebuyer, often with financial assistance from state or federal programs, takes title to the property and becomes sole owner (and mortgagor) of that property. See, e.g., *HOME Local Program Administrators*, N.Y. ST. DIVISION OF HOUSING & COMMUNITY RENEWAL, [http://www.dhcr.state.ny.us/apps/profiles/profile\\_HOME.asp](http://www.dhcr.state.ny.us/apps/profiles/profile_HOME.asp) (last visited Feb. 20, 2010) (providing a list of organizations which distribute HOME Program funds to low-income homebuyers).

48. We purposely decline to identify the specific ethnic and social economic status of the board members.

homeownership creates the opportunity for economic advancement by allowing homeowners to build equity in their homes, and that the restriction on equity that is characteristic of CLTs denies equity to those most in need.<sup>49</sup> They believe that this approach keeps the poor impoverished. They believe if people own their houses outright, the four goals would still be met, but met differently.

The new members feel that the “Pro CLT” board members just refuse to listen. The “Pro CLT” members feel personally slighted because the new members do not trust them. More specifically, they feel slighted because the new members feel this way even though the “Pro CLT” directors did consider their viewpoints when this matter was originally hashed out by the Board two years ago. At this Board meeting, everybody expresses the shared fear that if they do not come to an agreement soon, they may lose the funding. As we sat listening to the discussion among the directors, the Board unanimously sought our assistance to help them resolve this issue.

What follows is our inclusive legal problem-solving framework for the CED lawyer’s representation of AAH.

### *B. A Model CED Lawyering Approach*

#### 1. Reflecting on Professional Role

The lawyer begins by asking herself preliminary questions about the nature of her professional relationship with her client. The first step in responding to the Board’s request is for the lawyer to ask herself whether she should help the Board navigate this internal conflict. This first step flows from a conceptualization of a CED lawyer’s role which includes helping her institutional client come to a unified position in order to direct its lawyer. In addition, she is ethically obligated to assist her institutional client in reaching a decision that is in the best interest of the organization.<sup>50</sup> The second

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49. See Kenn, *supra* note 42, at 70.

50. In New York, professional conduct rules mandate that when an organization retains an attorney, the attorney’s ethical duties flow to the organizational entity, rather than to its directors or employees individually. N.Y. RULES OF PROF. CONDUCT R. 1.13(a) (2010), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=26092>.

step is that the lawyer asks herself what specific activities she should undertake in her assistance to the Board in navigating this conflict. These initial steps influence her counseling role. Her reflection on her professional role continues throughout all stages of her legal representation. This approach to legal counseling is a product of training in inclusive problem-solving skills.

The subsections that follow track the CED lawyer as she plans her legal counseling, conducts her information gathering and analysis, and leads her client organization in reaching a solution that the client determines is in its best interest.<sup>51</sup>

## 2. The Counseling Plan

The counseling plan first requires the lawyer to identify what information she needs to know and how she will gather that information. The lawyer starts by researching the organization. She reviews the client's website, certificate of incorporation (COI), bylaws, and prior board minutes. This allows her to understand the history and structure of the organization. She then develops a plan for initiating the conversation with the Board about her next steps. She meets with the full Board and asks its permission to speak individually with each of the board members. She explains that individual meetings will allow her to get a better understanding of each member's views and underlying concerns. Before working with the Board as a whole, she further explains that these consultations will help her develop her recommended plan for how to conduct a board meeting to best resolve this issue.

In planning the individual meetings, she reflects upon her own values and beliefs about the options facing the Board. For example, she asks herself if she is in favor of community land trusts or traditional forms of ownership and why. She tests her own assumptions to ensure that they do not inappropriately influence her information gathering. She asks herself whether she assumes that the

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51. We do not address how the CED lawyer memorializes the legal results for her client; this is because in the final stage of legal service, she is implementing all of the techniques described in the model CED lawyering approach that have produced the final results that are to be legally memorialized.

board members from higher socioeconomic backgrounds are the ones who favor pure homeownership and why. The lawyer does this to avoid imposing her own values through her choice of interviewing questions. She wants to ensure that she does not frame her questions in ways that predetermine an answer that is in line with her assumptions.<sup>52</sup>

She also wants to guard against failing to ask probing questions based on her erroneous attribution of the speaker's intent.<sup>53</sup> For example, a wealthy board member may state that she believes a pure homeownership model is the best solution. The lawyer might ask why, and the board member might explain that she believes that pure homeownership provides the best opportunity to gain wealth and that people should not have to remain poor. The lawyer might take note of the board member's reason, but if the lawyer assumes that the board member must favor individualism over collectivism, she might not probe any further. The board member's reasoning, however, might have nothing to do with individual rights versus group benefits. The board member might have a deep appreciation of the tradeoffs, but strongly believe that equity provides a needed vehicle that will allow families to build wealth. The board member might believe that building equity is a way for families to provide for their children's education and to lift their children out of poverty. Alternatively, the board member might believe that building equity will help ensure the families' ability to afford future home improvements or repairs.

The CED lawyer is also reviewing her own thoughts about how the racial composition of the Board may be escalating the divisions among the directors. Furthermore, she proceeds to ask herself whether she has made assumptions about any director's position based upon her affinity or difference with their race. She wonders whether she has assumed that the directors who are people of color are the long-standing members of the community and that the white board members are the newcomers. She reminds herself of previous cases where she erroneously made assumptions based on race as to

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52. See *supra* notes 19–22 and accompanying text.

53. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001) (explaining that lawyers tend not to ask probing questions when the clients' answers are in line with what the lawyer thinks makes sense).

who were the long-standing participants and who were the new forces in those organizations. She ponders whether she is attributing values to certain directors and she questions the consequences of those attributions. For instance, she asks herself whether she is assuming that certain board directors have lived through previous discriminatory history on this issue in this community and thus reactively resist change or feel entitled to deference. She takes a moment to validate these questions and reminds herself to be cautious about making such assumptions. She also summons the courage to speak to this distorting force with objectivity should she see that it is playing a negative role in exacerbating the issue among the directors.

### 3. The Lawyer Conducts Individual Meetings

The lawyer meets with each board member. She explains that the purpose of the meeting is for her to understand each board member's view of the conflict. She pursues this goal by asking open-ended questions. She asks each board member to tell her their understanding of the conflict. She does not interrupt the board member's explanation and allows the board member to fully finish his or her story. The lawyer continues the interview by asking the board member to discuss what he or she believes are the hurdles to a resolution. The lawyer then asks whether the board member can articulate the views of the board members who are in disagreement. She asks the board member to give her the reasons the board member rejects the other viewpoints. The lawyer then elicits the board member's suggestions for finding common ground.

To be effective, the CED lawyer often must reframe a blaming statement into an expression of a broader concern. Explicit reframing allows the directors to hear the content of the contentious issue beyond the preexisting polarized context. For example, an AAH board member angrily states during his consultation with the CED lawyer: "Those board members that disagree with me feel that way because they can afford to pay for their children's private schooling." The CED lawyer immediately restates this comment as: "You are expressing your concern that some homeowners may not be able to use their home equity to pay for their children's education if a CLT

model of homeownership is adopted.” This restatement surfaces the directors’ underlying interest.

#### 4. Full Board Meeting

At the start of the full Board of Directors meeting, the lawyer identifies herself as the organization’s lawyer and briefly reviews the Board’s request that she undertake the activities leading up to facilitating this Board discussion. The lawyer begins with a detailed synthesis of what she has learned from her individual discussions with each board member. First, she identifies the common values among the board members that affirm the organization’s mission. She then focuses her remarks to present the broader portrayal of the issue in a way that develops all the differing points of view. She carefully chooses language that reinforces the personal investment but eliminates the emotional charge previously associated with the differing points of view. She frames her remarks in ways that protect each individual board member from personal attribution. The lawyer finishes her opening remarks by acknowledging the benefits that will result from reaching an agreement on the points now in dispute.

The CED lawyer now leads the Board discussion to elicit each director’s contributions to a list of all the potential options to resolve the issue. The directors are more amenable to brainstorming as a separate activity because the levels of hostility have been lessened. The CED lawyer instructs the directors to brainstorm as many ways to resolve the matter as possible, no matter how unworkable or far-fetched they may be. She asserts that it is important to think in the most unconstructed manner possible because this activity may produce different ways to resolve the points that now block different board members. She explains that this discussion will not involve evaluating or rejecting any of the ideas at this time. She further explains that although this is not a familiar approach, separating brainstorming from the evaluation of the options will generate more possibilities for workable solutions. She indicates that after the option list is flushed out, the directors will evaluate the feasibility of each option.

After the brainstorming session, the CED lawyer leads the Board discussion to test the consequences of each potential decision by

exploring each option in a concrete way. For instance, she states: “Let’s say the Board votes for a community land trust. What are the possible consequences? What would those consequences look like? One consequence could be that in a few years, when the owners want to borrow against the equity to send their children to school, they may not be able to do so because the house has not built enough equity. Are you willing to live with this outcome? Or you may choose a pure ownership model. One consequence of this choice could be that if, in a few years, the market rate of the homes skyrocket and the owners all choose to sell their homes, none of the homes will be affordable to low-income residents. Are you willing to live with this consequence? If the answer to both questions is no, the next question becomes whether there is an acceptable compromise position. For instance, perhaps focusing on the resale policy and creating a formula that would help increase personal equity while also maintaining affordability of the homes is one way to help ease the tension between what otherwise appears to be an either-or scenario.” Her answers to these questions illustrate the specific consequences of a particular action so that the board members move away from abstract and polarized viewpoints.

#### V. UNPACKING THE JOINT CURRICULUM: TEACHING INCLUSIVE LEGAL PROBLEM-SOLVING SKILLS

##### A. *Metacognitive Self-Awareness is the Cornerstone of Inclusive Problem-Solving Skills*

###### 1. What We Do

Metacognitive self-awareness improves the quality of any potential legal problem-solving. Metacognition is a deliberative process where the professional is focused on critically listening to their internal thoughts in order to control the quality of their clinical judgment. Currently, legal education lacks “a consistent rigorous pedagogy for embedding metacognitive self awareness in the law student. Metacognition provides the internal monitor that questions the basic inclination to perceive and gather data that supports one’s

belief structure while neglecting evidence to the contrary and ignoring alternative interpretations.”<sup>54</sup> Essential to the practice of metacognition is “the internal focus on monitoring thoughts for assumptions and language choice. This internal monitoring allows the professional to deliberately choose the best communication approach for every interaction.”<sup>55</sup>

Thinking about the quality of our thought processes makes us accountable for what we say and plan to do. The professional works with his or her internal thoughts in order to understand the emotional content and to question the quality of his or her judgments.<sup>56</sup> The professional identifies his or her internal emotional reactions and questions how these reactions influence his or her reasoning. The professional identifies his or her assumptions and turns them into questions for further inquiry. This process permits the professional to modify his or her assessment before implementing any task in the legal representation. This can be understood as a form of self-editing designed to implement client-centered lawyering. This internal intention guards against automatic reactions.

Reflection is a metacognitive process. The ability to reflect requires separation from one’s self-concept or ego. This space is separate from one’s sense of personal character. When the individual acknowledges this separate space, the subjective level of vulnerability associated with personal reflection is reduced. Rather, this self-examination is geared towards rigorous internal analysis of why difficulties occur and how to respond differently.

## 2. How We Do It

A major part of our joint curriculum involves training novice student lawyers to develop the capacity for self-awareness. We use

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54. Beryl Blaustone, *Improving Clinical Judgment in Lawyering with Multi-Disciplinary Knowledge About Brain Function and Human Behavior: What Should Law Students Learn About Human Behavior for Effective Lawyering?*, 2010 U. BALT. L. REV. (forthcoming 2010).

55. *Id.* at 16.

56. See generally DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (1999) (stressing the importance of understanding emotional content in communication).

the Myer-Briggs Type Indicator (“MBTI”)<sup>57</sup> as a tool to help students identify their automatic subconscious methods of perception and decision-making.<sup>58</sup> Using the MBTI instrument gives us a vehicle to explore our biases, which is a difficult discussion, particularly when our biases are reinforced by cultural attitudes.<sup>59</sup> We ask students to use the MBTI to think about how they will improve their problem-solving skills with clients or parties who may not share the student’s methods of perception and decision-making. In other words, we ask our law students how they will use their understanding of the differences to work more constructively with others.

We also focus on our students’ interpretations of objective circumstances by trying to surface and test their assumptions. We ask students to articulate their implicit assumptions and then turn them into hypotheses. From that vantage point, we then question the extent to which these hypotheses are shaped by social constructs, such as race, gender, and socioeconomic status. We explicitly explore how these hypotheses influence the students’ actual decision-making process. For example, we ask students to think about how these social constructs impact their choice of words and how they intend to use those precise words. We ask them how their word choice may be understood by a particular client or party who has a different orientation. We observe that these types of discussions help achieve competency in cross-cultural awareness.<sup>60</sup> This improves the students’ ability to provide textured evaluation of issues rather than conclusive positions containing unexamined assumptions.<sup>61</sup> All of the

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57. ISABEL BRIGGS MYERS ET AL., *MBTI MANUAL: A GUIDE TO THE DEVELOPMENT AND USE OF THE MYERS-BRIGGS TYPE INDICATOR* (3d ed. 1998) (explaining MBTI and referring to Jungian theory of personality type and personal preference).

58. Don Peters, *Forever Jung: Psychological Type Theory, the Myers-Briggs Type Indicator and Learning Negotiation*, 42 *DRAKE L. REV.* 1 (1993); Don Peters & Martha M. Peters, *Maybe That’s Why I Do That: Psychological Type Theory, the Myers-Briggs Type Indicator, and Learning Legal Interviewing*, 35 *N.Y.L. SCH. L. REV.* 169, 175 (1990).

59. *Id.*

60. Bryant, *supra* note 53, at 33 (defining cross-cultural competence).

61. Blaustone, *supra* note 9, at 1328–29; *see also* Mark Neal Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 *CLINICAL L. REV.* 247, 276 (1998) (describing “double vision” necessary to uncover one’s assumptions in order to critically reevaluate them).

above builds the capacity to monitor one's own assumptions and thus maintain an objective perspective.<sup>62</sup>

*B. Information Gathering and Achieving Sustained Focus on the Client and Their Issues*

1. What We Do

Our definition of a good listener is never a product of self-assessment by the listener. Rather, it is the speaker who determines whether the listener is a good listener.<sup>63</sup> In other words, the label of a good listener is never self-applied. As teachers, we instruct students to focus on being present in the execution of the task with the client in order to gauge whether the client experiences the lawyer as a good listener. Even the most accomplished fact investigator can be a poor listener at any given moment with any given challenge. We focus on the practitioner's ability to be aware, enabling her to self-assess and self-correct.<sup>64</sup> Active listening entails more than merely hearing what a person is saying.<sup>65</sup> It is a form of engaged listening in which the listener attempts to understand the meaning of what the speaker is saying.<sup>66</sup> The listener seeks to ensure that she correctly interprets the speaker's intended meaning.<sup>67</sup> To do this, the listener must employ a number of skills<sup>68</sup> which are discussed in the following section.

62. We use the exercise of parallel universe thinking to promote this objective perspective. *See also* Bryant, *supra* note 53, at 64–67 (putting forth a framework for students to increase cultural competence during information gathering).

63. Blaustone's definition of a good listener is one who is experienced as a good listener for whoever is the speaker at the moment. *See* Blaustone, *supra* note 5, at 266–68; *see also* Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 402–07 (1997) (noting the dangers of silencing the client through inaccurate understanding of the client's story and the need to teach law students how to be self-aware).

64. *See, e.g.*, ANDREW S. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELLING PROCESS* 154 (1976) (emphasizing that counseling and interviewing require constant self-awareness).

65. *See* BINDER & PRICE, *supra* note 5, at 20–32.

66. *Id.*

67. Bryant, *supra* note 53, at 42–43 (discussing isomorphic attribution).

68. *See generally* Blaustone, *supra* note 5. *See also* Blaustone, *Training the Modern Lawyer*, *supra* note 9, at 1331, 1349–50; HERMAN & CARY, *supra* note 40, at 32–36 (discussing techniques to facilitate communication); BINDER ET AL., *supra* note 41, at 41–63; WATSON, *supra* note 64, at 29–69; STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL*

## 2. How We Do It

We teach this alternate framework by focusing on the law students' specific efforts at listening. Being present requires students to listen in a way that is attentive to clients. This means not being distracted by the substantive agenda.<sup>69</sup> The student should not be thinking about what she plans to say next.<sup>70</sup> The student should use active-listening skills to keep the client in a narrative mode.<sup>71</sup> We instruct the student to provide uninterrupted time for the client or party to fully express their story before the student asks any clarifying open-ended questions.<sup>72</sup> Initially, students are unable to allow more than three minutes of narrative before they interrupt with questions that track their substantive agenda or curiosity.<sup>73</sup> We instruct that, in the beginning, all questions should track the speaker's intention to convey what is important to them.<sup>74</sup> The lawyer's agenda can then be modified and should follow upon where the speaker has started. The repetition of these skills increases the student's ability to develop the client's or speaker's narrative.

One of these skills is the ability to invite further understanding of the speaker's content.<sup>75</sup> The listener must pay attention not only to what the speaker is saying, but also to the speaker's nonverbal communication.<sup>76</sup> Nonverbal communication includes the speaker's body language as well as what the speaker is not saying.<sup>77</sup> The

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LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 45–47 (3d ed. 2007); Barkai & Fine, *supra* note 5, at 507 (asserting that active listening includes listening for the speaker's content and emotional state).

69. See BINDER ET AL., *supra* note 41, at 49 (discussing distractors that inhibit good listening).

70. *Id.*

71. *Id.* at 52–54.

72. See WATSON, *supra* note 64, at 31–33; HERMAN & CARY, *supra* note 40, at 22–23 (providing suggestions for how to elicit your client's story).

73. Larry Farmer, Presentation at the Second UCLA/BYU Conference on Interviewing and Legal Counseling: Neuroscience Implications for Interviewing and Counseling Instruction (Oct. 2009) (transcript on file with author) (indicating that his quantitative study demonstrates that uninterrupted time by the law student is one and a half minutes).

74. See KRIEGER & NEUMANN, *supra* note 68, at 89–91 (discussing the stages of information gathering).

75. Blaustone, *supra* note 5, at 266.

76. See BINDER ET AL., *supra* note 41, at 52–54.

77. *Id.* at 57.

attentive listener uses the speaker's silence, sighs, chuckles, crying, and different intonations as a point of further inquiry.<sup>78</sup> The effective listener deliberately chooses language that facilitates the speaker's narrative and avoids language that inhibits the speaker's narrative.<sup>79</sup> This is a nuanced language choice by the listener within the specific context of the speaker's communication.

In teaching how to self-assess and self-correct in the moment, we ask students to check their own understanding of the client's narrative by paraphrasing for the client what the student has heard. We define paraphrasing as the explicit statement of the client's underlying concerns and emotions at play in their narrative.<sup>80</sup> We also ask students to check their client's understanding of what the student has communicated by asking questions that would reveal whether the student has communicated well for that particular client. The student is checking the client's process of interpreting the student's words and checking to see if she is using effective language to promote mutual understanding. The student also verifies the accuracy of her playback to the client. We ask the students to formulate specific verifying questions that allow the student to check in with the client. For example, the student might inquire whether what has been said makes sense to the client, or ask which topics remain unclear and need to be further explained. We ask the students to be mindful of the client's body language so that the student may self-assess their efficacy and modify what has been communicated accordingly. For instance, when the student sees the client's eyes appear distant, the

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78. *Id.*

79. *See, e.g.,* HERMAN & CARY, *supra* note 40, at 32–35 (identifying factors that facilitate interpersonal communication).

80. Paraphrasing is a tool the listener can use to verify what the speaker has said, both substantively and emotionally, and to show sympathy and respect for the speaker's concerns. *See* Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 758–59 (2004). This can be done by “‘mirroring’ . . . what you have heard said explicitly, and by putting into words the implicit feelings emanating from the speaker.” *Id.* at 759; *see also* BINDER ET AL., *supra* note 41, at 52 (noting that active listening requires the listener to paraphrase what the speaker is communicating, thereby demonstrating both listening and understanding); Jonathan R. Cohen, *When People are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 748–49 (2001) (noting that in negotiation, through the use of active listening, the listener often “reflects to the speaker that he or she has grasped what the speaker says” by either paraphrasing or showing an understanding of what the speaker has communicated).

student should ask where the person is in terms of their understanding of the communication.

### *C. Reframing Positions, Issue Framing, and Option Generation*

#### 1. What We Do

The technique of reframing charged content is an essential tool to foster resolution. Reframing charged content refers to the process of representing multiple interpretations of a situation without inflammatory attribution.<sup>81</sup> The CED lawyer honors the parties' existing interpretations while simultaneously using the tool of framing to assist the parties in developing a more expansive understanding of the facts. A more expansive understanding helps the parties gain clarity of their own views and also helps them explore "different way[s] to make sense of the same circumstances."<sup>82</sup> This is because "in the face of new information . . . or reflection, people can change their frames."<sup>83</sup>

#### 2. How We Do It

During the first month of our respective seminars, we teach the principle that there is more than one correct approach to solving a legal problem, and there is more than one perspective on what is the correct version of truth. Our framework of inclusive legal problem-solving skills is based upon the lawyer's belief that determining the best lawyering approach depends upon the specific needs and concerns of each client. We require our students to articulate all the potential inferences that can be drawn from an individual's behavior or stated position.

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81. Barbara Gray, *Mediation as Framing and Reframing Within Mediation* (June 15, 2005), available at <http://ssrn.com/abstract=729186>.

82. *Id.* at 5; see also Blaustone, *supra* note 9, at 1349–50.

83. Gray, *supra* note 81, at 5.

## VI. CONCLUSION

In the AAH case illustration, the CED lawyer's ability to reframe heated points of contention helped the Directors move beyond impasse. The Directors became more amenable to moving past their individual positions to jointly brainstorming solutions because the levels of hostility were reduced. Once this occurred, the Directors were able to focus their collective attention on generating acceptable approaches to forming a Community Land Trust to provide additional affordable housing while encouraging homeownership among current residents.

The inclusive legal problem solving skills curriculum trains law students to practice the CED-model lawyering approach. The CED lawyer uses this approach to help her client navigate internal disagreements, which makes it more likely that her client will achieve the best possible results. Better results are more likely because she is deliberate in partnering with her client in sorting through these predictable areas of disagreement in advancing community economic development. Any lawyer who represents client organizations can use these skills to foster fuller client engagement in decision-making.