

Teaching Our Students to Challenge Assumptions: Six Practices for Surfacing and Exploring Assumptions, and Designing Action

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I. Methodological doubt/methodological belief¹

A. Employ a doubting and believing spectrum derived from an essay by Peter Elbow.²

Elbow proposes that “we can improve our understanding of careful thinking or reasoned inquiry (and therefore improve our practice) if we see it as involving two central ingredients: what I am calling methodological doubt and methodological belief.”³ Elbow is clear that we need BOTH methodological doubt and methodological belief in our thinking.

B. When consciously using methodological doubt, question every statement, every assumption, every inference, every implication of the speaker’s words.

If we examine a client’s account solely intending to refute, to reconstruct, to contradict, we will have found ourselves on the side of pure doubt.

Elbow suggests, rightly, that academic culture is a primarily doubting culture. We pride ourselves on our ability to criticize an argument, and we want our students to develop that skill.

He argues that with our intellectual roots located in Socratic argument and Cartesian skepticism, it’s not surprising that we understand careful thinking as equivalent to critical thinking, that we privilege challenging a claim over “the ability to enter into it and temporarily assent.”⁴ And as Elbow also suggests, “(our) emphasis on learning to be critical helps explain the tendency toward critical warfare in the intellectual and academic world - the fact that intellectuals often find it surprisingly difficult simply to hear and understand positions they disagree with.”⁵

¹ This section relies on material excerpted or summarized from Peters and Weisberg, Experiments in Listening, forthcoming in the Journal on Legal Education.

² *Methodological Doubting and Believing: Contraries in Inquiry*, in PETER ELBOW, EMBRACING CONTRARIES: EXPLORATIONS IN LEARNING AND TEACHING 258 (Oxford: Oxford University Press, 1986). Peter Elbow is a writing teacher and an extraordinarily perceptive essayist on topics related to teaching and learning

³ *Id.* at 255.

⁴ *Id.* at 258.

⁵ *Ibid.*

Here are some examples of methodological doubt in our daily lives:

- law teaching through the Socratic method
- teachers listening to colleagues at a workshop on a paper in progress
- listening to a politician you do not trust
- listening to someone with a credibility problem
- arguing the negative side in a debate tournament
- when a friend comes and asks you specifically to be a reality tester and asks you to find everything wrong with something they're thinking or have written
- cross-examining a witness who is doing you harm
- a harsh moot of a client

C. When consciously using methodological belief, take everything related by the speaker as true, take every assumption, inference and consequence of the speaker's account as true, and without challenging the speaker, sincerely engage the speaker as if everything were completely true.

Methodological belief is “the disciplined procedure of not just listening but actually trying to believe any view or hypothesis that any participant wants to advance,”⁶ you would situate yourself at the believing end of the spectrum. Methodological belief is “the . . . systematic, disciplined, and conscious attempt to believe everything, no matter how unlikely or repellent it might seem – to find virtues or strengths we might otherwise miss.”⁷ It is a process in which “we are not trying to construct or defend an argument, but rather to transmit an experience or enlarge a vision.”⁸

Methodological belief “forc(es) us genuinely to enter into unfamiliar or threatening ideas instead of just arguing against them without experiencing them or feeling their force. It thus carries us further in our developmental journey away from mere credulity.”⁹ Rather than encourage us to accept unquestioningly, to embrace false beliefs, believing helps us examine our beliefs and consequently, become better able to assess what knowledge is trustworthy. As Elbow puts it, “A belief is a lens and one of the best ways to test it is to look through it.”¹⁰

⁶ EMBRACING CONTRARIES, *supra* note 3, at 260.

⁷ *Id.* at 257.

⁸ *Id.* at 261.

⁹ *Id.* at 263.

¹⁰ *Id.* At 283.

Here are some examples of pure belief.

- sympathetic conversations with a grandparent
- listening on a crisis hotline
- listening by a therapist
- early lawyer-client or doctor-patient interviews
- a student attempting to learn a brand new theory or material from a teacher
- a friend listening to another friend in a time of utter distress
- listening to an expert consultant in a field about which you know nothing (e.g., a financial planner, a plumber, etc.)

D. Consciously Experiment with Doubting and Believing

If a teacher concludes that he has been overly skeptical or tends in certain contexts to be more doubting than he wishes, or that his students regularly respond to each other skeptically as doubters, the teacher can consciously experiment with the believing game: taking to be true everything that he and the class hears from someone proposing a thesis or an interpretation, and encouraging the ideas that student proposes to be expanded and taken to their logical conclusions. Similarly, the teacher can expand the believing game to encompass everything said by anyone during a discussion. By contrast, a teacher who decides that she and/or her class has been overly supportive to ideas that needed stricter scrutiny, can decide to play the doubting game with ideas they feel they have been insufficiently probed.

E. Make conscious choices about how to listen: as a doubter? as a believer?

Elbow stresses that to be complete thinkers and writers, for our thinking to be trustworthy, we need both doubting and believing. He recommends that each of us aim for balance between them. And he stresses that we should understand doubting and believing as processes that are “methodological: artificial, systematic, and disciplined uses of the mind. As methods they help us see what we would miss if we only used our minds naturally or spontaneously.”¹¹

F. The doubting and believing spectrum can be useful to listening in a clinical legal context, when new law students and supervisors discuss approaches to client interviewing.

1. For example, in initial interviews, rapport building will be enhanced with believing mode and fact gathering will be improved as believing mode gives a better window into clients’ lives, values and perspectives.

2. Doubting mode is useful to begin to assess the client’s story, to confront the client with contradictory evidence or inferences and prepare the client for skeptical fact-finders. A lawyer who failed to make her client aware of the doubting to come while exercising only pure belief would have neglected an important dimension of her job.

¹¹ *Id.* at 258.

3. Lawyers should balance use of doubting and believing modes consciously, adopting these stances intentionally rather than relying on instinctual use of one or the other.

II. Except when/especially when

In their book on fact investigation, David Binder & Paul Bergman identifies a method for explicitly identifying the generalizations that the students are using and exploring the validity of these generalizations.¹²

A. Identify Generalizations

1. Inferential reasoning is used to attribute meaning to a set of facts. Lawyers will tell stories that are legally significant based on facts that are often subject to interpretation as to what the facts prove. (Cross-cultural theorists use similar concepts when they talk about attribution.) For example, assume that a client who is seeking asylum left her children behind when she fled to this country. What might the lawyer and ultimately the fact-finder assume from this fact?

<i>Evidence</i>	<i>Inference</i>	<i>Conclusion</i>
Client Fled without children	People do not leave children in dangerous situations	Client was not in a dangerous situation

2. Inferences come from assumptions¹³ we have about how people or objects generally behave – Binder and Bergman call these generalizations. We often do not identify these assumptions. For example, the lawyer who hears a refugee story like this for the first time one might say, “there was something about this story that made it incredible.” By explicitly exploring why identified facts prove a particular conclusion, lawyers name the assumptions they are operating under when they conclude as the lawyer did here that the story is incredible.

B. Explore The Strength Of The Inference Or Generalization.

1. Is it disputable? Is it almost always true? How do I know this? Where does my knowledge come from? How different is my view of the world, my client’s and the fact-finder’s? What will be the fact-finder’s experience?

2. By articulating the assumptions being made, the lawyer can explore whether there are exceptions to the generalization. Use “except when” to test the generalization. People do not leave their children in a dangerous situation “except when.” The lawyer

¹² Suggested reading, David Binder and Paul Bergman, FACT INVESTIGATION FROM HYPOTHESIS TO PROOF, pp. 82 – 98 (WEST PUBLISHING, 1984).

tries to identify multiple “except when” circumstances. (e.g., people do not leave their children in a dangerous situation except when they believe they have made a safety plan for the children.)

3. Lawyers can also explore when the premise is likely to be true in a particular situation by using “especially when.” For example, People do not leave their children in a dangerous situation “especially when” The lawyer tries to identify multiple “especially when” circumstances. (e.g., people do not leave their children in a dangerous situation especially when the children are adolescents who could be targeted.)

III. Critical Reflection on Disorienting Moments¹⁴

A. Disorienting Moments

1. Adult learners bring with them well-formed schema, or meaning schemes, shaped by their interpretations and understandings of prior life experience. These schema shape expectations of how the world operates and how people behave.

2. The tendency is to assimilate new information into these pre-existing schemas, such that old understandings are either validated or modified in light of new experiences.

3. At times, the adult learner encounters something that is so at odds with her pre-existing schema so as to destabilize a fundamental assumption on which the schema is built. Fran Quigley calls these “disorienting moments.”

4. The disorienting moment holds the potential to both reveal and transform assumptions that constitute our meaning schemes.

5. However, such moments are not self-actualizing. Because schemas are so integral to one’s daily experience of the world, they are not easily disrupted. Instead, the schema might be used to re-characterize the new experience rather than the other way around.

B. Using Critical Reflection to Seize the Learning Opportunities Presented by Disorienting Moments

¹⁴ This section borrows heavily from Jane Harris Aiken, *Striving to Teach “Justice, Fairness, And Morality,”* 4 CLIN. L. REV. 1 (1997) and Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics,* 2 CLIN. L. REV. 37 (1995).

1. Encouraging critical reflection helps to identify disorienting moments, and creates an openness to such moments as opportunities for challenging deeply held assumptions.

2. We can and should ask our students: What makes the moment disorienting? In what ways does the new experience vary from our expectations? On what assumptions are those expectations based? To what extent are those assumptions (about how the world operates, about how people behave) culturally bound? To what extent are they consistent with the lived experiences of our clients? What other information should we explore to see whether it is as you suspect or whether it gives you a new way to look at the world?

3. The critical inquiries are both internal (i.e., exploring the student's assumptions) and external (i.e., considering alternative explanations of how the world works).

4. By measuring the strength of one's assumptions against the lived experience of another, the student might modify, or even radically transform, her system of endowing experiences with meaning.

IV. Narrative Theory

*Engage clients in story telling early and often in attorney-client interactions. Listen mindfully to the story telling. Retell stories to explore whether the lawyer is filling in details.*¹⁵

A. Lawyers Who Encourage Narratives Will Avoid Filling In The Details Of The Story, The Client's Values And Beliefs, The Meaning To Be Derived From The Story, The Wrongs That Occurred And The Relief Expected.

1. Engaging clients in story telling with limited lawyer intervention prevents lawyers from shaping the story based on their assumptions that come from their training as lawyers and their own life experiences. Early questioning changes client narrative to lawyer narrative.

¹⁵ For useful background readings, see, Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 Stan. L. Rev. 1731 (1993); John Mitchell, *Narrative and Client-Centered Representation: What Is A True Believer To Do When His Two Favorite Theories Collide?* 6 Clinical L. Rev. 85 (1999); Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*; Gerald Lopez, *Lay Lawyering*, 32 UCLA L. Rev. 1 (1984); Muneer I. Ahmad, *The Ethics of Narrative*, 11 AMER. U. J. GENDER, SOC. POL'Y & LAW 117 (2002); *Six Practices for Connecting with Clients Across Culture: Habit Four, Working with Interpreters and Other Mindful Approaches*, in *AFFECTIVE ASSISTANCE OF COUNSEL: THE LAW AS A HEALING PROFESSION*, edited by Marjorie Silver.

2. When clients give detailed renditions, the lawyer has less space to fill with assumptions about how the events occurred. Instead of assumptions constructing the story, the client constructs it.

3. By allowing the client to tell a full story, the lawyer can see what is important to the client. The client exposes her values, her sense of right and wrong.

4. Story telling often reveals the meaning behind the client's actions. Why the client did what she did can be misinterpreted by the lawyer based on assumptions but story telling may help the lawyer see the client's approach to the problem.

5. How the story is told can reveal emotional content, structure of communication and thinking. Does the client think linearly, chronologically, interpersonally, or spatially?

6. What clients choose not to talk about also reveal client's values, power?

B. Lawyers Who Listen Mindfully To Client Narratives Will Avoid Imposing Their Assumptions On The Story

1. Lawyers who listen carefully for the clients' frames and avoid an early application of the lawyers' frames of reference will not miss details from the story.

2. Lawyers who avoid judging the story and the client will hear more deeply and learn more from the client. "Out beyond ideas of wrongdoing and rightdoing, there is a field. I'll meet you there." Sufi mystic poet Rumi.

3. Lawyers who have the capacity to observe themselves and remain aware of judgments, attitudes, and inner processes during client encounters can recognize when they are shifting reference frames.

C. Re-Telling and Re-Visualizing Offers Opportunities To Explore Assumptions imbedded in Narrative

1. Ask two people who have heard the same story to re-tell it. Often you will get two different versions, exposing where filling in has occurred.

2. Ask students to draw the events. Ask students to write a screenplay of the events. Often the inability to do so exposes how little detail they know and how they are filling in.

3. Reenact the events and explore what you know and do not know.

D. Exploring Narrative

1. How is the story surprising? How does it conform to stock stories and how does it differ? Where does surprise come from?

2. Does it transcend statistical or generalized propositions? Does it provide a window into systemic? Can you generalize from stories?

V. *Parallel universes*¹⁶

Very plainly, I see cultural analysis as a means of perceiving as “normal” things which initially seem “bizarre” or “strange” among people of a culture different from one’s own. To manage this, I must imagine a universe in which the “shocking” act can take place and seem “normal,” can take on meaning without even being noticed. In other words, I must try to enter, for an instant, the cultural imagination of the other.

Raymonde Carroll, *Cultural Misunderstandings: The French-American Experience* 2 (1987).

A. *When faced with a client’s behavior, a lawyer should ask himself or herself to brainstorm multiple explanations for the client’s behavior rather than settling on a specific interpretation.*

For example, consider a client who does not show up for an appointment with the lawyer. The lawyer who immediately jumps to the conclusion that the client doesn’t care about his or her case should stop and consider the parallel-universe explanation. “Maybe her worker forgot to pick her up, perhaps they got the time of the meeting wrong, perhaps they’re delayed and still on their way.” The no-show client is a classic example of a situation in which a lawyer has very little information except for the client’s actual absence.

B. *Parallel-universe thinking connects directly to the critical dynamics of 1) non-judgmentalism, in its refusal to prejudge confusing behavior, 2) isomorphic attribution, in its search for the client’s understanding of her own behavior, and 3) daily habit and learnable skill.*

C. *Parallel-universe thinking is especially important when we are feeling judgmental about clients.*

When we are attributing negative meanings to a client’s behavior, we should explore other reasons for the behavior. This reminds us that we must explore with the client the actual reason for the behavior rather than operating on our false assumptions. Our clients may have experienced many events in which they felt wrongly and hastily judged; parallel-universe thinking can prevent us from joining the ranks of those who have betrayed them in this way. By preventing us from acting mistakenly on false judgment, and from lawyering based on a misguided uncertainty about a reality which we do not yet apprehend, parallel-universe thinking is a tremendous ally in our ongoing struggle to understand the client on his or her own terms and not ours.

¹⁶ ¹⁶ This is Habit Three (The Habit of Not Jumping to Conclusions About Behavior) of Sue and Jean’s Five Habits of Cross-Cultural Lawyering. We have written about the Habits in a number of different forums. Jean published materials about the Habits, set in the context of lawyering for children in child protective proceedings, in her book on the subject; this section is adapted from that chapter. See JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001). Sue authored an article for law teachers describing the Habits. See Susan J. Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33 (2001). We have co-authored a chapter, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY & LAW (Kimberly Barret & William George eds., 2005). We have collected materials for students and practitioners wishing to learn the Habits on the CUNY Law School website, available at www.cuny.law.edu under resources for clinical teachers.

D. *Another important trigger for parallel-universe thinking is certainty.*

When a lawyer finds himself or herself thinking “I am sure that my client did that because. . .,” the lawyer should challenge that assumption with a parallel universe. Note also that it is not necessary or even expected that the parallel universes generated include the *actual* explanation for the behavior. Sometimes parallel universes are less important for finding the actual interpretation (the isomorphic attribution) of the client’s behavior, which can best be resolved with the client face-to-face or in some kind of dialogue.

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VI. *Untangling Agendas*

A. *Lawyering Inevitably Involves Multiple and Potentially Conflicting Agendas.*

1. We know that lawyering always involves multiple actors. In the clinic, at a minimum, there is a student-lawyer, a client, and a supervisor. But there might be multiple student-lawyers, clients, or supervisors, as well as co-counsel. Similarly, third parties such as family members or community organizers might be actively involved in the representation.

2. With multiple actors come the likelihood of multiple agendas. For example, a client with a landlord-tenant dispute may wish a speedy resolution of her case. A community organizer might want to elevate the profile of the case in order to make an example of the landlord. The student lawyers might harbor a desire to go to trial. The supervisor might want to ensure meaningful opportunities for the students to engage in client counseling.

3. Without inquiring into these agendas, students might assume an identity of interests, as to goals, means, or both.

B. Untangling Agendas Helps to Identify and Contest Competing Assumptions.

1. Untangling multiple agendas forces a recognition of the differing roles played by multiple actors.

2. It encourages students to consider the same case from multiple perspectives simultaneously. In so doing, it forces students to evaluate potentially competing understandings of: the facts of the case; the role of lawyers and legal process; the political context in which the representation takes place; and the proper role of the client.

3. For example, students might ask: What does each actor think is the value of filing a lawsuit as opposed to pursuing a negotiated settlement? How does each actor feel about the use of the media? Whom does each actor think should be the “face” of the case?”

4. These questions can be explored and mapped through a variety of techniques, such as the use of Venn diagrams, simple charts, or role playing.

5. Posing such questions, and mapping the answers of the different actors, can help identify potential conflicts. It can also help to chart the potential as well as the limitations of multi-actor collaboration.