

MORE THAN A FACULTY BLOG

The law, how it works, and how to practice it—students enroll in law school to learn those things. But after they graduate, they live those things: such experiences are invaluable. So each month, an alumnus is invited to be the guest blogger at the faculty blog. Here is a sample of what some of our alumni have offered in recent months. While these posts are abridged, they will give you a taste; the original posts remain available at law.marquette.edu/facultyblog.

Will Financial Regulation Make Us Safe?

Posted by Colin M. Lancaster



First, a bit about me. I have been very fortunate to have had a fantastic 15-year career in the hedge-fund business (which does make me a bit of a dinosaur in the industry). Most recently, I was the president and chief operating officer of Stark Investments, one of the oldest

hedge funds in the world. During my career working in the business, I have done about everything—from providing legal counsel to co-managing a large portfolio to ultimately taking responsibility for the execution of the strategic vision and the overall administration of a large organization. I am a 1993 graduate of Marquette University Law School (and have to say that I am thrilled at all of the very positive developments at the Law School—kudos to Dean Kearney and his team!). All of that said, I have had the fortune (or misfortune as the case may be) of having had a front-row seat throughout this period of financial crises. To boil it all down, the primary

culprit, in my mind, was a simple human behavioral characteristic: Greed.

What is the best way of policing greed and excessive risk-taking? A lot is being tried.

President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act into law on July 21, 2010. Among other things, the law will establish a new council of “systemic risk” regulators to monitor growing risks in the financial system, with the goal of preventing companies from becoming too big to fail and stopping asset bubbles from forming, such as the one that led to the housing crisis.

The new Financial Stability Oversight Council will have an incredibly broad and difficult mandate—essentially, its assignment is to monitor the entire financial landscape for risks that could spark another crisis; identify and supervise firms that could pose those systemic risks; and make sure they never grow so large, complex, and leveraged that their failure can wreak havoc across the globe.

The creation of the council reflects at least one important policy change. The strengths of the Securities and Exchange Commission (SEC) are in the areas of disclosure and antifraud enforcement—but not as a financial regulator that imposes capital requirements or sets leverage restrictions.

So, can the new Financial Stability Oversight Council be more effective in this role and can it effectively play the role as the “voice of reason” that will prevent future crises?



Unfortunately, I believe that the answer is, "No."

There are five key reasons for this:

1. Washington, by its nature, is a reactive and not a proactive type of decision-maker. The creation of the council was a political compromise, and its decision-making structure (representation coming from many different agencies with different agendas) will not provide for an efficient and effective means of decision-making. Greed, at the end of the day, is a very difficult thing to regulate. A council created by political compromise is not likely, in my mind, to be able to effectively control it.
2. Without the ability to influence monetary policy (e.g., interest rates)—a key ingredient in risk taking and overall speculative behavior—the council will be the tail wagging the dog. A better approach, in my mind, would have been to give a single agency—the Fed—the mandate to do the council's job.
3. International competitive pressures will limit effectiveness. Over the next decade (and remember that this new law will not be completely implemented until 2015 or later), some of the largest financial organizations in the world are likely to be outside of the United States. The largest banks will be in Asia or Latin America, where the reach of the new legislative provisions will not apply. This practical reality poses two problems: (a) the council will be under intense pressure to ensure that its requirements do not place U.S. institutions in an anticompetitive posture; and (b) due to the interconnectedness of the world, the next financial crises may be caused by institutions in other regions.
4. Policymakers and regulators will have great difficulty in keeping up with the pace of financial engineering. Notwithstanding the creation of the Office of Financial Research, I have a very hard time believing

that this group will be able to keep pace with Wall Street.

5. The next crisis is likely to look much different from the one we just lived through (we may be prepared for the last one, but we are not likely to be prepared for the next one).

Colin Lancaster, L'93, who lives in Chicago, recently joined Balyasny Asset Management, where he will be working to build a global macro trading business.

Advice on Appeals from Howard Eisenberg

Posted by Mary T. Wagner



Just like the prospect of being hanged in the morning, there's nothing like having 14 people over to Thanksgiving dinner to concentrate the mind. In my case, it's also the galvanizing principle to buckle down and clean house.

Last Thanksgiving, the task was truly daunting—the family room had become nearly impassable, swamped by pile after pile of paper and other detritus related to serial family emergencies and funerals of the past few years.

Much of the “cleaning” involved simply moving assorted stacks and boxes to another room and making more efficient use of vertical placement. But once in a while, curiosity would get the better of me.

For example, there was a colorful two-pocket folder sporting a picture of a red-eyed King Kong dunking a basketball with his index finger. There were only a few sheets of paper within. A bright turquoise one caught my eye. On one side was an announcement for a “classroom to courtroom” seminar at the law school dating to my last year as a student. Hoo boy. But on the other side was a set of handwritten notes. As I read, I realized that these were notes I'd taken listening to then-Dean Howard Eisenberg talking about appellate arguments.

As cosmic irony would have it, I was scheduled to speak to Prof. Melissa Greipp's Appellate Advocacy class just two days later. I smiled in gratitude and

recognition. The notes would be coming back to the Law School with me.

I recalled also the advice Howard had given me shortly after I graduated in 1999 when I was crafting my first brief to the Wisconsin Supreme Court and gearing up for my first oral argument. The case was *Sheboygan County DH&HS v. Julie A.B.*

I had not been out of law school all that long—and had been in my job as a prosecutor only nine months—when I drew the assignment of briefing a termination of parental rights case to the Court of Appeals. We had lost the case in the trial court. We followed with a loss in the court of appeals as well, and my boss gave me the green light to file a petition for review with the Wisconsin Supreme Court.

“Overwhelmed” would be too minor a word to describe my state of mind, and I sent an emergency appeal by email to Dean Eisenberg, who had taught my own Appellate Advocacy class. He responded with a cornucopia of assistance. We ended up meeting



face to face at the Law School and talked about the things that mattered in mounting a successful appeal. And when the Wisconsin Supreme Court granted the petition for review and I was quaking in my boots at the thought of stepping up to the podium for the oral argument, he volunteered to put together a moot court for me at the Law School to help me prepare for the big day. He sat on the panel, of course, along with the professor who, at Howard's passing soon after, would become the current dean, Joseph Kearney.

I can still remember the gratitude I felt both for Howard's advice and for the enthusiasm and generosity of spirit that accompanied it. And here, for the record, are some of the things I took to heart from Howard Eisenberg. Take them and use them well! I've followed them religiously in four more cases that made it to the high court.

- Think big. The Court granted your petition for review for a reason, and it's not about the individual merits of your case. It's to make some statement about the law. Try to figure out what it is.

- In the vein of "thinking big," don't be afraid to argue public policy. That can be extremely important.

- But while you're arguing public policy, leave the "I think" and "I believe" and "I feel" statements behind you. Nobody sitting on the bench deciding your case really cares what *you think* in this situation; they want to hear about what *the law requires*.

- Make your case seem as easy to decide as possible. And argue what will give you your best relief first.

- Sarcasm is out . . . and attempts at humor are pretty "iffy," too.

- Think through what the possible holes in your arguments could be and work this in somehow. And don't be afraid to concede what you can't win.

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Time for Baseball to Accept Review of Umpires' Decisions

Posted by Donald W. Layden, Jr.



No one who knows me will be surprised that my first blog post will be about baseball.

The call last night (June 2, 2010) by umpire Jim Joyce denying Detroit Tigers pitcher Armando Galarraga a perfect game is yet the most recent example of the need for baseball

to adapt to the modern era and accept the use of technology in assisting umpires who make tough, close calls. In this case, there is no disputing that Joyce made a horrible call. He admits he blew it. The replays were clear.

Now it is time for Commissioner Bud Selig to demonstrate leadership and move baseball forward.

Holding fast to past practice is not the same as holding on to tradition. I hope that the commissioner is able to distinguish between the two. Baseball tradition was honored by the way that Armando Galarraga accepted the decision of the umpire and the rules under which the game is played. He is a class act. Baseball tradition was honored by the way that Jim Joyce accepted that he is human and acknowledged his mistake. Baseball is bigger than the egos of either one.

Now it is time for the commissioner to get over his misconceived notions of clinging to the past and accept that baseball should be able to adjust to the times and use technology to review calls like the one last night at first base. No fan would object to the delay, and no player or umpire would object to the review. Indeed, in a case such as Galarraga's, the focus would be on getting it right.

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The New Miranda Warning

Posted by Michael D. Cicchini



I never thought the *Miranda* warning was all that useful. In fact, it actually raises more questions than it answers. For example, the warning tells a suspect that anything he says can be used against him in court. But asking for an attorney is saying something, isn't it? Could the prosecutor

later use such a request against the suspect? (After all, television teaches us that only guilty people “lawyer-up.”) And what if the suspect wants to remain silent? Could his silence be used against him in court? The *Miranda* warning fails to answer these and many other questions.

Making matters even worse for the would-be defen-

dant is the Supreme Court's 2010 decision in *Bergbuis v. Thompkins*. In a confidence-inspiring 5–4 split, the Court ruled that a suspect cannot actually exercise the right to remain silent by remaining silent—even if that silence lasts through nearly three hours of interrogation.

In response to all of this chaos, I've drafted a new and improved *Miranda* warning. Granted, this warning would be a bit more cumbersome for police to deliver and still wouldn't answer every possible question. But it would be an improvement. Here it goes:

“I first have to read you these rights before you tell me your side of the story, okay? First, you have the right to remain silent.

1. Actually, you really don't have the right to remain silent, unless you first speak. *Bergbuis v. Thompkins*, 130 S. Ct. 2250 (2010).

2. But if you choose to speak so that you can remain silent, you had better not be ambiguous. If you tell me, for example, ‘I don't got nothing to say,’ that is ambiguous to me, and not because of the double negative. Your ambiguity will be



construed in my favor, and I am allowed to continue my interrogation. *United States v. Banks*, 78 F.3d 1190 (7th Cir. 1996).

3. On the other hand, if I am ambiguous when I read you your rights, my ambiguity will also be construed against you. This is only fair. *Florida v. Powell*, 130 S. Ct. 1195 (2010).

4. If you refused to answer questions posed to you before I began reading you your rights, your pre-*Miranda* silence can be used against you at trial, should you testify in your own defense. So, you might want to talk to me now so you don't look guilty later. *Jenkins v. Anderson*, 447 U.S. 231 (1980).

5. But anything you say to me can be used against you in court. (I'm not sure if this includes the things that you say in order to remain silent.)

6. You have the right to an attorney.

7. But if you choose to exercise your right to an attorney, once again, you had better not be ambiguous about it. Don't ask me, for example, 'Could I get a lawyer?' This might seem like a reasonable request to you, since you're handcuffed and have no other way to actually get the nameless attorney that I just offered you. However, this statement is also ambiguous and is not sufficient to invoke your rights. *United States v. Wesela*, 223 F.3d 656 (7th Cir. 2000).

8. If you can't afford an attorney, one will be appointed for you, unless your income happens to be above the 1980 poverty line. Then you might be on your own.

9. And don't say 'I can't afford a lawyer, but is there any way I can get one?' As you might have guessed by now, that is completely ambiguous and lacks 'the clear implication of a present desire to consult with counsel.' The interrogation, therefore, must go on. *Lord v. Duckworth*, 29 F.3d 1216 (7th Cir. 1994).

Now, do you understand these rights as I have read them to you, and would you like to take this opportunity to help yourself, waive your rights, and tell your side of the story?"

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What Causes People to Be Successful in Their Careers? The Three Essentials of Effective Communication

Posted by Claude L. Kordus



While I started my career as a corporate lawyer with the Miller Brewing Company, I early on moved into the business world, where my law degree proved to be useful. I spent 35 years at Hewitt Associates, helping companies set human-resource objectives and design human-

resource programs, including employee benefits, salary plans, incentive-pay systems, stock-option and stock-ownership schemes, employee-communication materials, and human-resource policies and practices.

In this and my following posts, I will focus on one question: What causes people to be successful in their careers? Whether you pursue a legal career or, like me, make the jump into the "business world," I believe that those who understand and develop their "soft-side skills," not just "technical skills," will be the most successful.

Clear evidence exists that career success stems as much from people skills as from technical skills. Researchers at Harvard, the Carnegie Foundation, and the Stanford Research Center have all concluded that 85 percent of job success comes from people skills—only 15 percent comes from technical skills and knowledge.

Effective communication represents one of the most significant elements in what are called the people skills. One-on-one conversation, coaching and mentoring, team leadership, group discussion, public speaking, persuasive writing, visual communication, and nonverbal body language are just some of the many elements that constitute effective human communication. Recently, the Internet has introduced entirely new forms of communication such as tweeting and blogging.

It is a mistake to conclude that communication effectiveness is of interest to businesses alone. Here

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are some subjects featured in the recent *Law Practice* periodical of the ABA:

- “Law Firm Marketing Today: Moving Full Speed Ahead”
- “How to Use Social Media to Network and Build Relationships”
- “A Business-Minded Approach to Business Development: Targeting the Superstar Clients”
- “Marketing Resources”
- “Does Your Law Firm Need a Marketing Director?”
- “Essential Guide Unlocks the Secrets of Selling”
- “How to ‘Package’ Yourself in Job Search Documents and Interviews”

Researchers in the behavioral sciences, as well as communication educators, often suggest three fundamental characteristics that provide a foundation for communication: genuineness, respect, and empathy.

Genuineness is often considered synonymous with transparency. Jack Welch, the storied CEO of General Electric, says that holding a leadership position often becomes a power trip. People in management and executive positions believe that being a boss means exerting control over people and information, that keeping secrets enhances power. In reality, the more successful leader exhibits openness. Transparency is the basis for trust and the key to long-term organizational success.

A genuine or transparent person allows everyone to know what he or she is thinking and feeling. Being genuine provides the avenue for being viewed as a trustworthy person. Interaction, whether as coworkers, as manager and subordinate, or otherwise, will be smoother if the persons involved are open.

The need for transparency or authenticity in one-on-one relationships seems fairly obvious. But consider the importance of being genuine in delivering a speech. Studies have shown that people express who they are when making a public speech. Words, voice tone and rate, facial expressions, gestures—all send signals that

an audience picks up. How often have we listened to a speech and come to the conclusion that the person was genuine or, on the other hand, devious?

Respect is the second key to effective communication; this characteristic may also be labeled caring, acceptance, or people regard. The noted psychotherapist, Karl Menninger, talks of this quality as a person’s “patience, his fairness, his consistency, his rationality, his kindness, in short—his real love.” Theologians use the word *agape* or “concern for the well-being of others.” Respect stands as a core belief in many cultures and religions.

Unfortunately, many people in management don’t understand that a positive organizational culture is a climate in which all have respect for all. This comment is as true for the managing executive of a law firm as for an executive of a corporation. Demonstrating respect, caring for others, sharing kindnesses, and acting humbly will move an organization and a career forward far faster than being focused strictly on efficiency, task correctness, and personal achievement. In the world of work, people who are respectful of others generally receive the same treatment in return. Ralph Waldo Emerson said it well: “The only way to have a friend is to be one.”

Empathy is the final quality in the triad of essentials for effective communication. Achieving empathy is more difficult than becoming genuine and conveying respect. The first two qualities are behavioral. We can talk about our feelings. We can thank people for extra effort. We can show respect for people through active listening. Empathy, however, involves more heart, more intuition. Empathy is not feeling for someone but feeling with someone. Milton Mayeroff, in his book *On Caring*, notes: “To care for another person, I must be able to understand him [or her] and his [or her] world as if I were inside it. I must be able to see, as it were, with his [or her] eyes what his [or her] world is like . . . and how he [or she] sees himself [or herself].”

Empathy stems from deep psychological habits, attitudes, and beliefs. We can cognitively work on being more empathetic, but significantly shifting our feelings about ourselves and others is no small task. A friend, mentor, or coach can be useful for this undertaking. For example, ask a friend how you came across when he or she has been talking about a serious personal issue. The listening habits of a person impact greatly on a person's ability to feel and express empathy.

While the art of empathy is a difficult personal characteristic to improve on, we do get help from one source—our human nature. Neuroscientists have discovered “mirror neurons” that reproduce in our minds the actions of other people. If you watch a person writing on a pad of paper, mirror neurons light up, reproducing the feeling of writing within you. This reproduction provides a foundation for learning. When you watch the action of a top golf pro moving through his swing in slow motion, you are learning how to better swing a club. There is no guarantee you will eventually be a scratch golfer, but it is the basis for improving performance.

Unfortunately, in our culture many people do not effectively use the tools of communication. We read about these tools but find it difficult to apply them. Our education system, from grade school all the way

through college and post-college, spends little time teaching the methods by which we are able to talk and write more effectively with each other.

In the practice of law, there are many situations in which communication effectiveness is driven by much more than intellectual content. This includes, for example, law firm marketing, staff management and motivation, and internal personal relationships. One of the greatest challenges within any organization is getting all employees to focus on the same goals, the same strategies, and the activities that support these goals and strategies.

These qualities—genuineness, respect, and empathy—are foundations for effective communication and the foundations for being an effective participant in family, work, and the community.

Once a human being has arrived on this earth, communication is the largest single factor determining what kinds of relationships he makes with others and what happens to him.

— Virginia Satir, 1916–88,
U.S. psychoanalyst and therapist

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