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Ohio Northern University Law Review

Articles

Beyond Aristotle: Alternative Rhetorics and the Conflict Over the U.S. Law Professor Persona(e)

CARLO A. PEDRIOLI*

I. INTRODUCTION

Prior research has sketched out a picture in which, at least since 1960 and continuing to the present, advocates of the differing personae, or roles, of the U.S. law professor have been sharply divided over such personae.¹ Lawyers have advocated two major personae for the law professor to perform. One major persona is that of the scholar, who is a full-time teacher, researcher, and sometimes public servant, but who often has limited practical experience.² The other major persona is that of the practitioner, who has a substantial number of years of practice at the bar and is prepared for hands-on lawyering instruction.³ At stake in this communication is the future of the central figure in the education of prospective lawyers, the one who “convey[s] a sense of what it means to be a lawyer.”⁴

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1. See generally Carlo A. Pedrioli, *Professor Kingsfield in Conflict: Rhetorical Constructions of the U.S. Law Professor Persona(e)*, 38 OHIO N.U. L. REV. 701 (2012).

2. *Id.* at 711.

3. *Id.* at 720.

4. Jason Ostrom, *The Competing Roles of Law Professors*, 42 S. TEX. L. REV. 539, 540 (2001).

The lawyers who have constructed these personae generally have employed traditional Aristotelian rhetoric, or persuasion, a process that has contributed to much rhetorical clash and little rhetorical understanding.⁵ Unfortunately, this conflict has continued to the present time without much improvement in the communication. Indeed, although the lawyers have advanced their own positions, these lawyers generally have not listened to each other carefully to understand the relevant positions in the discourse,⁶ and when the lawyers have listened at all, they have done so to point out why different perspectives are “wrong.” A prediction for the future of such discourse was only “marginal change” at best.⁷ Because to a large extent this is a communication problem, the situation calls for a communication approach.

Sonja K. Foss and Cindy L. Griffin’s *invitational rhetoric*,⁸ an alternative to the millennia-old traditional Western concept of rhetoric as persuasion, is one such approach that should be of value to the lawyers embroiled in the ongoing conflict.⁹ This alternative approach to rhetoric offers the audience of the rhetoric a chance “to enter the rhetor’s world and to see it as the rhetor does” without the necessity of a win-lose decision, such as the one in a political election or a legal trial.¹⁰ Rather than seeking to change other participants, the rhetor, or communicator, seeks to help the other participants in the communication understand the rhetor’s

5. Pedrioli, *supra* note 1, at 704.

6. Douglas D. McFarland, *Students and Practicing Lawyers Identify The Ideal Law Professor*, 36 J. LEGAL EDUC. 93, 106 (1986).

7. *Id.* at 106-07.

8. Sonja K. Foss & Cindy L. Griffin, *Beyond Persuasion: A Proposal for an Invitational Rhetoric*, 62 COMM. MONOGRAPHS 2, 5 (1995).

9. Foss and Griffin’s study has received scholarly attention and become important for a variety of reasons. For example, M. Lane Bruner argued that Foss and Griffin’s study of invitational rhetoric has “played an important role in revealing how women have been excluded from much of traditional rhetorical scholarship.” M. Lane Bruner, *Producing Identities: Gender Problematization and Feminist Argumentation*, 32 ARGUMENTATION & ADVOC. 185, 188 (1996). Bruner added that the study has “contributed substantially to an understanding of the constraining and enabling features of identification practices.” *Id.* Irwin Mallin and Karrin Vasby Anderson observed that the study has revived discussion about how modes of rhetoric can be “most productive” to the parties involved. Irwin Mallin & Karrin Vasby Anderson, *Inviting Constructive Argument*, 36 ARGUMENTATION & ADVOC. 120, 121 (2000). As Mallin and Anderson noted, invitational rhetoric is important “because it offers a new frame of reference for what argument can and should accomplish [and] assigns [communicators] new responsibilities” outside those responsibilities of traditional rhetoric. *Id.* at 124. Because of scholarly responses like these, additional consideration of invitational rhetoric is appropriate for a more thorough understanding of how invitational rhetoric might be of service to human communicators. Jeffrey Thomas Bile, *Communication, Advocacy, Argumentation, and Feminisms: Toward a Dialectical Partnership*, 32 SPEAKER & GAVEL 55, 63 (1995). Such communicators include lawyers who have had a difficult time communicating successfully with each other.

10. Foss & Griffin, *supra* note 8, at 5.

perspective.¹¹ Then the other participants become empowered because they have an opportunity to express themselves while the original rhetor listens.

Although invitational rhetoric should be helpful, invitational rhetoric is one important step in the ultimate suggested approach of this Article, not the ultimate approach itself. In a legal field that assumes traditional rhetoric, invitational rhetoric alone would be inadequate. Invitational rhetoric focuses on the dialogue that has been missing from the communication regarding the construction of the law professor persona(e), but, because the legal field works principally with traditional rhetoric, traditional rhetoric also calls for some consideration. *Cooperative rhetoric*¹² embraces both the dialogue of invitational rhetoric and the argumentation of traditional rhetoric. Invitational rhetoric will help develop the theoretically underdeveloped dialogic dimension of cooperative rhetoric, the dimension of cooperative rhetoric more needed in the ongoing conflict over the law professor persona(e), and cooperative rhetoric, in considering argumentation as well as dialogue, ultimately will be a better fit with the legal field than invitational rhetoric. Invitational and cooperative rhetorics can benefit from each other. Hence, the attention paid to invitational rhetoric will be important because this attention will develop a stronger understanding of cooperative rhetoric.

Accordingly, this Article maintains that alternative rhetorics offer new possibilities to help improve the conflict over the persona(e) of the U.S. law professor. To expand upon this perspective, the Article will begin with a discussion of invitational rhetoric, both defining invitational rhetoric and illustrating how invitational rhetoric can be helpful for lawyers presently involved in the conflict over the rhetorical construction of the law professor persona(e).¹³ The Article then will continue with a discussion of cooperative rhetoric, defining cooperative rhetoric as invitational rhetoric informs it, outlining the form of alternative dispute resolution known as collaborative law as a precedent for the implementation of cooperative rhetoric in the legal field, and illustrating how cooperative rhetoric can work in the conflict over the ideal law professor persona(e).

11. *Id.*

12. Scholars label this concept differently. See *infra* Section III.A. For consistency, this Article will employ the term *cooperative rhetoric*.

13. In presenting an argument for invitational rhetoric as one tool for improving the status of the conflict between two major groups of lawyers, this Article will exemplify the tension between taking a position on invitational rhetoric and communicating in an invitational manner. Such can be the paradoxical, and thus intriguing, nature of rhetoric.

II. INVITATIONAL RHETORIC

A. *Defining Invitational Rhetoric*¹⁴

Invitational rhetoric is very different from traditional Aristotelian rhetoric, and an understanding of the latter helps inform an understanding of the former. Traditional rhetoric involves attempting to persuade an audience to accept an advocate's position. In his fourth century B.C. treatise *On Rhetoric*, Aristotle defined the term *rhetoric* as "an ability, in each [particular] case, to see the available means of persuasion."¹⁵ Hence, in a given situation a skilled advocate endeavors to find multiple modes of persuasion rather than just one.¹⁶ Much more recently, but still in the Aristotelian vein, Michael Leff described the term *rhetoric* as an endeavor whose goal is persuasion.¹⁷ As the reference to Aristotle suggests, the study of traditional rhetoric dates back to the ancient world, specifically to fifth century B.C. Athens, and ever since male Greek citizens of that era called upon rhetoric in the process of bringing and defending legal suits, debating matters of public policy, and speaking on special occasions, rhetoric has been important.¹⁸

Such traditional rhetoric involves justifying why a particular position is appropriate. Today, traditional rhetoric manifests itself in political debates, legal trials and appeals, and advertising.¹⁹ Some traditional rhetorics are more fully supported with evidence than others. In many rhetorical situations,²⁰ advocates seek to change audiences to serve the advocates' own ends. One can think of politicians who want to gain or retain office, lawyers who want to win large contingency fees, and advertisers who seek to sell a seemingly endless stream of consumer products. Not only do such examples of traditional rhetoric often involve justifying why a particular

14. A previous version of this discussion of invitational rhetoric appeared in Carlo A. Pedrioli, *A New Image in the Looking Glass: Faculty Mentoring, Invitational Rhetoric, and the Second-Class Status of Women in U.S. Academia*, 15 HASTINGS WOMEN'S L.J. 185 (2004). The author of that article has retained revision and republication rights to the article.

15. ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 36 (George A. Kennedy trans., 1991).

16. JAMES L. GOLDEN, GOODWIN F. BERQUIST, & WILLIAM E. COLEMAN, THE RHETORIC OF WESTERN THOUGHT 28 (6th ed. 1997).

17. Michael Leff, *The Habitation of Rhetoric*, in ARGUMENT AND CRITICAL PRACTICES: PROCEEDINGS OF THE FIFTH SCA/AFA CONFERENCE ON ARGUMENTATION 1, 6 (Joseph W. Wenzel ed., 1987).

18. GOLDEN, BERQUIST, & COLEMAN, *supra* note 16, at 6, 8.

19. *Id.* at viii; CHARLES U. LARSON, PERSUASION: RECEPTION AND RESPONSIBILITY 5, 8 (7th ed. 1995).

20. For more on the rhetorical situation, see Lloyd F. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1 (1968). For a critique of Bitzer's argument, see Richard E. Vatz, *The Myth of the Rhetorical Situation*, 6 PHIL. & RHETORIC 154 (1973).

position is “right,”²¹ but frequently, by necessity, such examples involve explaining why another position is “wrong.”

In contrast to traditional rhetoric, “[i]nvitational rhetoric is an invitation to understanding as a means to create a relationship rooted in equality, immanent value, and self-determination.”²² Invitational rhetoric offers the audience a chance “to enter the rhetor’s world and to see it as the rhetor does.”²³ When speaking, the rhetor, or communicator, refrains from judging the perspectives of other participants in the communication process, and the other participants attempt to refrain from judging the perspectives of the rhetor.²⁴ Instead of seeking to change other participants, the rhetor tries to help the other participants understand the rhetor’s perspective.²⁵ Then the other participants become empowered because they have a chance to express themselves while the original rhetor listens.

The process, which is akin to bilateral dialogue,²⁶ is about offering perspectives and not about telling others to take a given action or understand that their ideas are flawed.²⁷ Because this is a process of rhetoric as inquiry,²⁸ any change in perspective that takes place occurs when members of the audience choose to make such change, but do so without the influence of a rhetor who presses for that change.²⁹ No “winner” prevails, and no “loser” feels the sting of defeat. Importantly, invitational rhetoric is about a constructive communication process, not a specific content or a substantive result. Since a prescribed content would violate the invitational spirit of invitational rhetoric, the exact content of the rhetoric is up to the invitational rhetors.

Although invitational rhetoric will not succeed in all cases in which advocates employ it, when invitational rhetoric succeeds, it tends to consist of at least three external conditions: safety, value, and freedom.³⁰ Foss and Griffin have defined these conditions in the following manner: *safety* as “the creation of a feeling of security and [absence of] danger for the

21. JOSINA M. MAKAU & DEBIAN L. MARTY, COOPERATIVE ARGUMENTATION: A MODEL FOR DELIBERATIVE COMMUNITY 84 (2001).

22. Foss & Griffin, *supra* note 8, at 5.

23. *Id.*

24. *Id.*

25. *Id.*

26. Bile, *supra* note 9, at 62.

27. Foss & Griffin, *supra* note 8, at 7, 10; Mallin & Anderson, *supra* note 9, at 130.

28. Irene P. Faass, *Shades of Gray: Alternative Metaphors for Argumentation*, in ARGUING COMMUNICATION & CULTURE: SELECTED PAPERS FROM THE TWELFTH NCA/AFA CONFERENCE ON ARGUMENTATION 219, 220 (G. Thomas Goodnight ed., 2002).

29. SONJA K. FOSS & KAREN A. FOSS, INVITING TRANSFORMATION: PRESENTATIONAL SPEAKING FOR A CHANGING WORLD 13-14 (2003).

30. Foss & Griffin, *supra* note 8, at 10.

audience,” *value* as “the acknowledgment that audience members have intrinsic or immanent worth,” and *freedom* as “the power to choose or decide.”³¹ To the work of Foss and Griffin, Foss and colleague Karen A. Foss have added openness as a fourth condition that helps foster invitational rhetoric.³² Foss and Foss have defined *openness* as the process of “seek[ing] out and consider[ing] as many perspectives as possible.”³³

To help foster the conditions of safety, value, freedom, and openness that can lead to invitational rhetoric, Foss and Foss have suggested the process of re-sourcement, which refers to finding a new source of “energy and inspiration.”³⁴ Re-sourcement involves disengaging oneself from an interaction frame of conquest or conversion of one’s audience and then engaging that audience from a nonconquest and nonconversion interaction frame.³⁵

At this point in the discussion of invitational rhetoric, another consideration becomes appropriate. Although this Article has presented invitational rhetoric in contrast to traditional rhetoric because of a number of differences between the two types of rhetoric, the Article in no way means to imply that invitational rhetoric and traditional rhetoric are binary opposites. Rather, it may be more helpful to think of any given discourse as situated on a continuum that ranges from invitational rhetoric to traditional rhetoric. For instance, discourse may be closer to traditional rhetoric, or discourse may be closer to invitational rhetoric.

In attempting to show how invitational rhetoric can work, Foss and Griffin have offered several examples of successful invitational rhetoric in differing communication situations such as interpersonal communication and public address situations. One such example involved two individuals with drastically opposing perspectives on abortion.³⁶ Encountering each other at an airport in New York, a woman, who favored abortion, and a man, who opposed abortion, began to scream at each other until they almost needed separation.³⁷ One hour later, as the woman boarded a bus, she discovered that the only available seat was next to the man with whom she had just had the verbal altercation.³⁸ Instead of resuming the same type of discourse, the woman began to ask the man about his life, and the man

31. *Id.* at 10-12.

32. Foss & Foss, *supra* note 29, at 39.

33. *Id.*

34. *Id.* at 44.

35. *Id.* at 44-48.

36. Foss & Griffin, *supra* note 8, at 14-15.

37. *Id.* at 14.

38. *Id.*

responded in kind.³⁹ While neither changed perspective, over the course of the dialogue each developed a deeper understanding of and appreciation for the other.⁴⁰ In a case where traditional rhetoric had proved destructive, invitational rhetoric had succeeded in fostering the external conditions of safety, value, freedom,⁴¹ and openness. Each speaker promoted safety by respecting a differing perspective on a highly charged issue, each speaker promoted value by legitimizing a different point of view, and each speaker promoted freedom by allowing the other speaker to continue to feel as she or he chose to feel with regard to this subject. Also, each speaker promoted openness by looking at a different perspective.

Another example of successful invitational rhetoric that Foss and Griffin have offered involved the manner in which poets Adrienne Rich, Alice Walker, and Audre Lorde handled acceptance of the 1974 National Book Award.⁴² Although all three women had received nominations for the award, only Rich received the actual award.⁴³ However, when Rich accepted the award, she did so on behalf of herself, Walker, and Lorde, noting, “We, Audre Lorde, Adrienne Rich, and Alice Walker, together accept this award in the name of all the women whose voices have gone and still go unheard in a patriarchal world.”⁴⁴ In expressing their own perspective in this manner, the poets fostered the external conditions of safety, value, freedom,⁴⁵ and openness. The poets promoted safety by recognizing as legitimate the one-winner approach of the judges of the National Book Awards, the poets promoted the value of the members of the extended audience by noting the personal sacrifices of many audience members, and the poets promoted freedom by allowing the audience to choose its own course of action in response to the speech.⁴⁶ Also, the poets promoted openness by placing their perspective in a communication context of differing perspectives on the matter at hand.

As these two examples suggest, invitational rhetoric can be beneficial for several reasons. For instance, invitational rhetoric is particularly well-suited for fostering “cooperative, nonadversarial, and ethical communication” because invitational rhetoric accepts multiple perspectives as valid.⁴⁷ Invitational rhetoric is especially helpful when one is engaged in

39. *Id.*

40. *Id.* at 14-15.

41. Foss & Griffin, *supra* note 8, at 15.

42. *Id.* at 13-14.

43. *Id.* at 13.

44. *Id.*

45. *Id.*

46. Foss & Griffin, *supra* note 8, at 13-14.

47. *Id.* at 15-16.

discourse with another person with whom one has an ongoing relationship,⁴⁸ although invitational rhetoric is not limited to this type of situation. In contrast, when one goes to court and hopes never to see one's opponent after the trial, then traditional rhetoric may be more appropriate.⁴⁹ Nonetheless, the bus example above indicates that invitational rhetoric can be helpful with strangers, too.⁵⁰

Additionally, invitational rhetoric validates the personal experiences of different individuals.⁵¹ Invitational rhetors do not have to be physicians, scientists, or attorneys to have valuable experiences to share with other invitational rhetors. Common experience, whether from the lives of women or men or from the lives of privileged or less-privileged individuals, can have merit in invitational rhetoric. Invitational rhetors can call upon such experiences to present their own personal truths about life.⁵²

Moreover, invitational rhetoric gives women and other outsiders, as well as individuals empathetic to the situations of such outsiders, a resource to employ in attempting "to transform systems of domination and oppression."⁵³ Foss and Foss have suggested that invitational rhetoric can help a rhetor to understand the positions of individuals, such as neo-Nazis, whose perspectives are hateful to many people.⁵⁴ With a better understanding of such perspectives, the rhetor then can go about attempting to change the conditions that foster hateful perspectives.⁵⁵ Accordingly, invitational rhetoric offers several important benefits to rhetors.

B. Applying Invitational Rhetoric to the Conflict over the Construction of the Law Professor Persona(e)

Although invitational rhetoric might play out successfully in a number of conflicts common in the legal field, this Article focuses on the conflict regarding the rhetorical construction of the law professor persona(e). To sketch out how invitational rhetoric could unfold among lawyers involved in that conflict, this subsection of the Article will consider incentives for, contexts for, a process of, and possible content change of participation in invitational rhetoric. The subsection also will address benefits of and potential concerns with using invitational rhetoric.

48. Mallin & Anderson, *supra* note 9, at 130-31.

49. *Id.* at 130.

50. Foss & Griffin, *supra* note 8, at 14-15.

51. *Id.* at 5-6, 16.

52. Karen A. Foss & Sonja K. Foss, *Personal Experience as Evidence in Feminist Scholarship*, 58 W. J. COMM. 39, 39-40 (1994).

53. Foss & Griffin, *supra* note 8, at 16.

54. FOSS & FOSS, *supra* note 29, at 18.

55. *Id.* at 18-19.

First, for lawyers from the academy and lawyers from the world of practice to participate in invitational rhetoric and foster a better understanding of differing views on the persona(e) of the law professor, the lawyers would need some incentive. This incentive exists in the major goals of legal education. R. Randall Kelso and Charles D. Kelso offered four major goals of legal education that help explain how academic lawyers and practicing lawyers can find the incentive to communicate more effectively about legal education in general and the law professor persona(e) more specifically.⁵⁶ According to Kelso and Kelso, four major goals of legal education are the following: (1) advancing scholarship on the law, (2) graduating students who are able to perform the roles that practicing lawyers perform, (3) developing in law students the skills of legal problem-solving, and (4) motivating law students to enter the ongoing discussion among members of the legal community about what the law is now and should become in the future.⁵⁷

These goals generally have appeal for both academics and practitioners. Although academic lawyers may be more interested in scholarship and practicing lawyers may be more interested in the roles that practicing lawyers perform, these particular goals are important to both groups. For instance, academic lawyers like James Barr Ames have admitted that their scholarship should inform the practice of law,⁵⁸ a prospect that has immediate significance for practicing lawyers who could benefit from pre-existing thinking on important topics. After all, practitioners cannot be experts in all areas of the law.⁵⁹ From this perspective, scholarship needs to do something outside the academy. If scholarship does not, the credibility of academics comes into question. An important relationship exists, then, between scholarship and the roles that lawyers perform in practice.

Furthermore, the skills of legal problem-solving apply to both law school discussions and the everyday world of legal practice. At one level or another, both academics and practitioners deal with legal problems, and both groups would want future lawyers to know how to approach these legal problems. Again, this point gets at the relevance of legal education, but the point also gets at a basic set of professional skills upon which practitioners rely. Thus, legal problem-solving skills are of interest to lawyers of an academic nature as well as lawyers of a more practical nature.

56. R. RANDALL KELSO & CHARLES D. KELSO, *STUDYING LAW: AN INTRODUCTION* 12-15 (1984).

57. *Id.*

58. *See, e.g.*, James Barr Ames, *The Vocation of the Law Professor*, 48 AM. L. REG. 129, 142-43 (1900).

59. *Id.* at 143.

Additionally, discussion on what the law is and what it should become is another area of overlap. Thoughtful and learned discussions on the role(s) of the law are well-suited to the writing of law review articles, an activity that would appeal to academic lawyers, but these discussions also can have a meaningful impact on the lives of practicing lawyers because those lawyers have to interact with the processes of the law on a daily basis.⁶⁰ Hence, a working understanding of the present and future states of the law should have appeal to both lawyers inside and outside the academy.

Given the general appeal of the noted goals of legal education to both academic lawyers and practicing lawyers, some room for common ground exists. Discussion of this common ground, which essentially gets at the purposes of legal education, provides the incentive for lawyers from the two groups to employ invitational rhetoric regarding legal education. As focused more particularly on the subject matter of the conflict regarding the law professor persona(e), this common ground would urge consideration of the appropriate persona(e) of the law professor in furthering the major goals of legal education. With regard to the overlapping goals considered above, the law professor has, by way of his or her professional status, an important influence on legal scholarship, the skills of legal problem-solving, and the discussion of the role(s) of the law in society. As noted above, legal scholarship can inform the roles that practicing lawyers perform.⁶¹ Accordingly, academic lawyers and practicing lawyers do have an incentive to try to communicate more productively about the role(s) of the law professor in legal education.

Second, lawyers in favor of the scholar persona of the law professor and lawyers in favor of the practitioner persona of the law professor who find such an incentive to communicate invitationally would need to be able to communicate with each other in a context conducive to invitational rhetoric. Such a context would have physical and discursive dimensions. In terms of the physical dimension, lawyers often meet during law school campus lectures, bar association functions, and the day-to-day work of public service functions of the bar.⁶² While law journals could be a forum for addressing the conflict that historically has played out in law journals, encouraging lawyers initially to communicate in person probably would be more effective since casually dismissing the views of someone who is physically present in the same context can be difficult.

60. Robert A. Leflar, *The Law Teacher's Place in the American Legal Profession*, 8 J. SOC'Y PUB. TCHRS. L. 21, 27-28 (1964).

61. *Id.*

62. *Id.* at 22, 24.

In terms of the discursive dimension of the context, lawyers would need to foster the external conditions of safety, value, freedom, and openness.⁶³ To foster safety, or “the creation of a feeling of security and [absence of] danger for the audience,”⁶⁴ lawyers would need to feel free from the courtroom clash that often comes with traditional legal advocacy. When one is in court to try or appeal a case, one functions in a situation in which one’s views on a given matter constantly come under critique. As such, communicating invitationally right after the close of a heated trial or appeal would not be the best approach for fostering safety.

To foster value, or “the acknowledgment that audience members have intrinsic or immanent worth,”⁶⁵ lawyers again would need to avoid the clash of the courtroom or other often hostile environments like a negotiation situation between two divorcing spouses. In environments largely free of this type of clash, such as bar association meetings, award functions, and other civically oriented functions, lawyers more likely would be more open to respect each other as people. In this type of situation, value of other lawyers would be possible.

Moreover, lawyers would want to foster freedom, or “the power to choose or decide.”⁶⁶ For many lawyers, achieving this external condition should not be too difficult, at least in one sense. Many lawyers would not have a difficult time making up their own minds on issues. However, lawyers also would need to learn to respect the rights of others to make up their own minds. Some trial lawyers might have a tendency to expect audiences to accept advocates’ advocacy. Of course, audiences have their own minds. Just as a jury can decide as it wishes, so can other lawyers. Recognizing this point might be a challenge for some lawyers, but sufficient quality communications with other parties as fellow humans, not as opponents, would help in this matter.

In addition to fostering safety, value, and freedom through their discourse, lawyers would want to foster the external condition of openness, or the procedure of “seek[ing] out and consider[ing] as many perspectives as possible.”⁶⁷ Given that the legal field is one of advocacy, this external condition may be a challenge for lawyers to achieve. Again, a trial or appellate lawyer received training in finding the “correct” answer to a legal problem and vigorously advocating that perspective on behalf of a client. Nonetheless, lawyers committed to treating each other respectfully could be

63. Foss & Griffin, *supra* note 8, at 10; Foss & Foss, *supra* note 29, at 39.

64. Foss & Griffin, *supra* note 8, at 10-11.

65. *Id.* at 11-12.

66. *Id.* at 12.

67. Foss & Foss, *supra* note 29, at 39.

willing to listen to each other to understand each other effectively. Acquiring multiple understandings of the ideal law professor persona(e) would be a function of having communicated with various other lawyers in an invitational manner. Thus, while facing a challenge, lawyers willing to listen carefully could achieve openness. In a situation in which lawyers could accomplish the external conditions of safety, value, freedom, and openness, the lawyers would stand a good chance of communicating in an invitational manner.

Third, the process of invitational rhetoric would be an attempt to understand the views of individuals with different perspectives on the law professor persona(e). Change of views would be a possibility that may come from the process, but, in the absence of change, participating lawyers still would have the opportunity to develop positive ongoing professional relationships that they may not have enjoyed to date. At a minimum, willing lawyers would be able to understand more effectively the parties whom they have come to ignore or dismiss with uninformed argument.

While the process of invitational rhetoric is not as precise as a multi-step plan for terminating one's smoking habit or another vice, the following is a suggestion of how the process might unfold between two individuals with different views of the role(s) of the law professor. A communication consultant would lay out this general process for the participating lawyers. As the consultant would explain, the process most likely would begin in an informal manner at a gathering where academic lawyers and practicing lawyers would be present, such as one of the gatherings mentioned above. After the usual pleasantries, the two lawyers, located in a comfortable setting, would take turns explaining their views on the topic, and each lawyer would have the opportunity to enter the other lawyer's world and see it as the other lawyer would see it.⁶⁸ When speaking, one lawyer would refrain from judging the perspective of the other lawyer in the discussion, and the other lawyer would attempt to refrain from judging the perspective of the lawyer who was speaking.⁶⁹ Instead of change, the focus of the communication would be understanding.⁷⁰

The communication consultant would explain that the first lawyer, taking the initiative, could outline the particulars of how she saw the role of the law professor in legal education. Meanwhile, the second lawyer would make the effort to place his own views of the role of the law professor aside and also make an effort to understand the views of the first lawyer, which

68. Foss & Griffin, *supra* note 8, at 5.

69. *Id.*

70. *Id.*

might include the need for the law professor to be a scholar. The second lawyer would have to listen carefully and may even want to take some brief notes. If this were done politely, the second lawyer, almost becoming an active student of the views of the first lawyer, could ask the first lawyer to pause in her discussion and address a few points of clarification. Mallin and Anderson have termed this type of active listening *reflective listening*.⁷¹ The idea is that throughout the process the second lawyer would gain a developing understanding of the first lawyer's explanations. While some points of clarification could be helpful, the second lawyer, upon receiving clarifications, then would need to make sure the first lawyer was able to complete her explanation. Most likely, this step in the process would take more than just a few minutes, especially since the second lawyer would want to allow the first lawyer to explain why she viewed the role of the law professor as she did. At the end of this process, the second lawyer should be able to explain accurately and in some detail the first lawyer's views to the first lawyer.

The communication consultant would note that, after the first lawyer had a chance to explain her view of the law professor and the second lawyer had inquired about any points of clarification, the second lawyer then would have an opportunity to outline the particulars of how he saw the role of the law professor. Meanwhile, the first lawyer would try to place her personal views of the role of the law professor aside and focus on understanding the views of the second lawyer, which might include a need for the law professor to be a practitioner. The first lawyer would have to listen carefully and might desire to take some notes. As before, except with roles reversed, the first lawyer, essentially becoming an active student of the views of the second lawyer, could ask the second lawyer to pause in his explanation and address a few matters of clarification. The idea is that throughout the process the first lawyer would gain a developing understanding of the second lawyer's explanations. Although a few points of clarification could be helpful, the first lawyer, upon receiving clarifications, would need to make sure the second lawyer would be able to complete his explanation. This step in the process probably would take time, especially since the first lawyer would want to allow the second lawyer to explain why he viewed the role of the law professor as he did. At the end of this process, the first lawyer should be able to explain accurately and in some detail the second lawyer's views to the second lawyer. As the consultant would explain to the participating lawyers, during both stages of the process of invitational rhetoric, gaining more than a superficial

71. Mallin & Anderson, *supra* note 9, at 129.

understanding would be important because a deeper understanding can get at interests rather than just at general viewpoints. Interests are concerns that motivate people, and understanding another party's interests can help one connect more effectively with that party.⁷² Asking why a party sees something in a particular manner can be one productive way of understanding that party's interests.⁷³

Looking for underlying interests would be helpful for the two hypothetical lawyers. For example, the second lawyer might ask the first lawyer why the latter feels that the law professor should be a scholar, and the first lawyer might point out that the academy requires that law schools produce scholarship. Also, the first lawyer might ask the second lawyer why the latter feels that the law professor should be a practitioner, and the second lawyer could indicate that future lawyers need to learn from lawyers who have performed the tasks that the future lawyers will perform. In this case, two underlying interests are a requirement of functioning within the present academic system and a need for future lawyers to learn to practice law. Although a deeper understanding might not result in the changing of minds,⁷⁴ because of the knowledge of underlying interests and thus explanations associated with such knowledge, this type of understanding could allow parties to come to respect each other as professionals. In other words, each party would know that the other party's views were not random and devoid of explanation. This result could be an improvement in the communication between academic lawyers and practicing lawyers.

This hypothetical example of invitational rhetoric is just one possibility via which the process might unfold. For instance, the consultant would note that a similar process also could take place in small groups, in which one lawyer would explain his or her views and also address points of clarification. In this scenario, another lawyer then would assume that role. The process would repeat itself until all lawyers in the group had time to express their views. In this manner, each participant would have a chance to speak and carefully listen for understanding. This would not always be an easy task, but if lawyers, knowing that they all would have a chance to talk at some point, were willing to listen to each other, the door to understanding could begin to open.

Fourth, possible content is another part of invitational rhetoric that should receive some attention. As with any type of rhetoric, invitational

72. ROGER FISHER, WILLIAM URY, & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 40-43 (2d ed. 1991).

73. *Id.* at 44.

74. FOSS & FOSS, *supra* note 29, at 13-14.

rhetoric does not always result in change of content,⁷⁵ but, if conducted in a willing and respectful manner, the process can help relationships, professional and otherwise, develop.⁷⁶ While the development of such relationships is often beneficial, in some cases invitational rhetoric can lead to some sort of change of content.⁷⁷

Such potential change may take place if lawyers, upon gaining a deeper understanding of other lawyers' interests, come to see value in some of those interests in relation to their own interests. For example, an academic lawyer might decide that more interaction with the world of practice could make his or her scholarship more accurate and relevant. Also, a practicing lawyer might decide that some legal scholarship could inform the world of legal practice. If enough lawyers in one group begin to see value in the interests of lawyers in the other group and vice versa, openness to some change or modification would become a possibility.

A prescription of the content of invitational rhetoric among lawyers would be inconsistent with the assumptions of invitational rhetoric, which is not a top-down communication approach in which a consultant tells participants at what substantive result they should arrive. Foss and Griffin have described invitational rhetoric, in part, as "an invitation to understanding,"⁷⁸ not a requirement for adopting a message. However, several examples, while not exhaustive, can illustrate the possibilities of invitational rhetoric as a means of fostering constructive communication among lawyers regarding the role(s) of the law professor.

For instance, lawyers might decide to devise a law professor persona based on a hybrid persona. One such approach might be akin to that of Albert M. Kales, who argued for a restricted amount of practical experience for the law professor.⁷⁹ Assuming a distinction between taking care of clients and taking care of cases, such a persona would view client care as more business than law and something that would take a large amount of a lawyer's time.⁸⁰ This possible model could suggest that a law professor should handle cases, not clients, and to such cases the law professor would bring expertise in a given area.⁸¹ By being able to test legal hypotheses, as some might call them, through litigation, the law professor would have a better understanding of the legal world, and such an understanding of the

75. *Id.*

76. Foss & Griffin, *supra* note 8, at 5.

77. FOSS & FOSS, *supra* note 29, at 13-14.

78. Foss & Griffin, *supra* note 8, at 5.

79. Albert M. Kales, *Should the Law Teacher Practice Law?*, 25 HARV. L. REV. 253, 255 (1912).

80. *Id.* at 254.

81. *Id.* at 255.

legal world would allow the law professor to become a better teacher.⁸² Accordingly, this persona would balance scholarly and practical interests.

Another possible hybrid approach might be akin to that of Harlan F. Stone, who insisted that the law professor embrace a persona of both scholar and practitioner.⁸³ This model would note that, because logical and practical considerations are part of practicing law, the law professor should be familiar with both types of considerations.⁸⁴ This persona could embrace Stone's belief that "[t]he law teacher has indeed missed his calling who has nothing to offer his students but the solution of the purely intellectual problems of the law."⁸⁵ In short, this law professor persona could be that of "a well-rounded lawyer,"⁸⁶ or one who has practiced law and now desires to teach law within a university setting.

Besides the hybrid possibilities in which the law professor resides in an academic setting and either continues a limited practice of law or has practiced law extensively in the past, another possibility may emerge from invitational rhetoric regarding the law professor persona(e). For instance, law schools could accept multiple personae simultaneously. The scholar model may become one track to tenure in the law school, while the practitioner model discussed might become another track to tenure. The former model would meet the university's requirement that the law school produce scholarship for the university, and the latter model would meet the bar's need for developing graduates prepared for the world of legal practice. For this model to work on an equitable basis, the lawyers who would develop such an approach may note that, in contrast to many cases in the present system of legal education, both professor models would have equal status within the law school.⁸⁷ Neither scholarship nor skills training would assume higher status, as each would serve an important purpose.

Invitational rhetoric offers several benefits to lawyers who have communicated about the ideal law professor persona(e). These benefits relate to this long-standing conflict but also go beyond the conflict. As

82. *Id.* at 259-60.

83. Harlan F. Stone, *The Importance of Actual Experience at the Bar as a Preparation for Teaching Law*, 3 AM. L. SCH. REV. 205, 207 (1912).

84. *Id.*

85. *Id.* at 208.

86. *Id.* at 210.

87. In legal education, clinical professors often have inferior status to doctrinal professors. Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073, 1074 (2009) (describing clinical education as on "the periphery of legal education" and clinical faculty members as having "a subordinate caste status differentiated by inferior compensation, limited governance, and segregated space"); Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183, 230 (2008) (noting longstanding controversy over ABA attempts to promote treatment of clinical faculty similar to treatment of doctrinal faculty).

suggested above, successful invitational rhetoric would allow lawyers to come to understand each other more thoroughly on legal education topics like the ideal law professor persona(e). With deeper understanding, which has been an important ingredient missing from the communication, at some point in the future lawyers could make more fully-informed decisions about how they want their field, including its educational component, to function. Along with greater understanding come greater possibilities for new approaches to old challenges.

Not only would invitational rhetoric allow lawyers to come to greater understandings of their colleagues' views on legal education, especially with regard to the ideal law professor persona(e), but invitational rhetoric also would offer lawyers the chance to nourish new relationships.⁸⁸ As Foss and Griffin have emphasized, invitational rhetoric can be "a means to create a relationship."⁸⁹ Thus, if lawyers enter other lawyers' worlds deeply enough, the lawyers may find something of value in those communicative interactions and seek to continue the communication. Although ongoing relationships would not develop in every instance, in some instances lawyers might choose to further their communication through ongoing relationships. When lawyers live and work in the same community, whether they work on a university campus or in court downtown, ongoing relationships can be of great value, particularly when lawyers need to work on larger projects like law reform issues or pro bono efforts. Also, lawyers of differing stripes have the future of legal education at stake because academic lawyers work in that environment and the environment is supposed to prepare future lawyers for the world of legal practice. Ideally, lawyers in a particular relationship would not only gain an understanding of other perspectives on the persona(e) at the front of the classroom in legal education, but the lawyers would deepen their interactions on other legal, or even nonlegal, subjects of importance. The implications of invitational rhetoric could be widespread.

Furthermore, because invitational rhetoric accepts multiple perspectives as valid, it is particularly well-suited for fostering "cooperative, nonadversarial, and ethical communication."⁹⁰ In the legal field, which often, although not always, gives pride of place to the more combative manifestations of traditional rhetoric, lawyers could improve by interacting with each other in a different manner on some occasions. Indeed, lawyers

88. Jennifer Emerling Bone, Cindy L. Griffin, & T. M. Linda Scholz, *Beyond Traditional Conceptualizations of Rhetoric: Invitational Rhetoric and a Move Toward Civility*, 72 W. J. COMM. 434, 446 (2008).

89. Foss & Griffin, *supra* note 8, at 5.

90. *Id.* at 15.

have to work with court and office personnel, each other, and sometimes other professionals like expert witnesses. While successful lawyers have to function within an adversarial system, learning to communicate in other ways when possible would add an important humane dimension to legal practice, particularly when listening to the perspectives of others can be helpful to one's work. This point is especially salient when one is communicating with another person with whom one has an ongoing relationship, such as a court clerk or opposing counsel.⁹¹

On a related note, since invitational rhetoric is a process of rhetoric as inquiry,⁹² any change in perspective that takes place occurs when members of the audience choose to make such change, but do so without the influence of a rhetor who presses for that change.⁹³ For many lawyers, this type of communication will not be intuitive. Given the entrenched nature of the processes of the U.S. legal system, traditional rhetoric has its place. However, not all types of communication require that communicators try to change each other. Indeed, a break from the world of persuasion, a world that still calls for "right" and "wrong" answers to often complex problems, would be pleasant for many overworked attorneys. Avoiding the pressure of many types of persuasion would be a healthy change. Instead, when communicating within an invitational paradigm, lawyers would have the chance to make up their minds on matters like the ideal law professor persona(e) free of pressure.

Accordingly, invitational rhetoric offers lawyers several important benefits. This genre of rhetoric offers opportunities for greater understanding of perspectives on legal education, including perspectives regarding the ideal law professor role(s). Moreover, invitational rhetoric also offers chances for relationship building and more humane, relaxed discourse.

Although invitational rhetoric offers several benefits to legal practitioners that would include and go beyond gaining a greater understanding of the various perspectives on the ideal law professor persona(e), one might raise a few concerns regarding the implementation of invitational rhetoric in the suggested manner. Some consideration of such concerns is now appropriate, but the concerns are not obstacles to improving the ongoing conflict in the legal field about the law professor persona(e).

91. Mallin & Anderson, *supra* note 9, at 130-31.

92. Faass, *supra* note 28, at 220.

93. FOSS & FOSS, *supra* note 29, at 13-14.

One potential concern is that, because invitational rhetoric relies upon the willingness of the lawyers involved,⁹⁴ when the lawyers are unwilling to engage in invitational rhetoric, invitational rhetoric would not be helpful. If both parties are unable to make attempts to understand each other, then invitational rhetoric will get them nowhere.

This is a fair point. When two parties do not desire to communicate productively with each other, invitational rhetoric, by definition, is impossible.⁹⁵ Some lawyers, perhaps those deeply entrenched within an adversarial system, will not want to participate in invitational rhetoric. However, different lawyers see the world differently, and other lawyers may choose to participate in invitational rhetoric. The key point here is that lawyers come in many variations. Some lawyers may find invitational rhetoric unappealing, but others may see this genre of rhetoric as a welcome change from the normal discourse of the field.

Additionally, since many lawyers are skillful at speaking, one might ask whether lawyers really can listen well. After all, good listening is a key part of invitational rhetoric.⁹⁶ Despite much of the confrontational communication in the legal field, some lawyers most likely are effective at listening, even if they often listen in potentially confrontational situations. For instance, lawyers have to listen to clients who enter law offices in need of assistance. A client with extensive assets who wants a will needs a lawyer who can carefully listen to that client's needs. Likewise, a client who needs help defending against a negligence suit that stems from a car crash wants a lawyer who can listen carefully to the client's perspective of what happened, as well as to the perspectives of witnesses to the crash. To be effective, each lawyer needs information from other individuals. Also, besides issuing decisions, appellate judges spend time listening to lawyers who argue appeals. These judges do ask questions, but the other side of the coin is that the judges also need to listen to the lawyers to gain information. Indeed, lawyers call upon listening skills in a variety of professional contexts.

As noted above, such listening skills often take place in a potentially adversarial context. However, lawyers could transfer such skills to a nonadversarial context like one open to invitational rhetoric and develop the skills in that context. While lawyers would have no need to find fault with the communication to which they would listen, the need to understand would remain. Lawyers could place additional emphasis on further

94. Foss & Griffin, *supra* note 8, at 15

95. *Id.*

96. *Id.* at 5.

understanding. As such, lawyers could build upon some of their pre-existing skills, even those for which they are often less well known, to communicate in an invitational manner.

Finally, since parties to invitational rhetoric are not advocating the merits of their views, invitational rhetoric is not the most effective type of rhetoric for decision-making. This is an accurate point. In some cases, invitational rhetoric can lead to change because one party may be willing to adopt a view of another party.⁹⁷ However, because invitational rhetoric does not focus on advocacy, the next section of this Article will offer a discussion of cooperative rhetoric, which embraces both understanding and advocacy. Nonetheless, since invitational rhetoric can foster the understanding necessary for improved communication and in turn successful cooperative rhetoric, the general lack of appropriateness of invitational rhetoric for explicit decision-making does not negate the value of invitational rhetoric.

In some cases, invitational rhetoric alone can lead to change, but invitational rhetoric is most likely not the final step in addressing the ongoing conflict among lawyers regarding the construction of the law professor persona(e). Because cooperative rhetoric is a more effective type of rhetoric for decision-making, cooperative rhetoric now calls for attention.

III. COOPERATIVE RHETORIC

A. *Cooperative Rhetoric Defined*

If no decision comes from the process of invitational rhetoric, at some point in time the legal field still would benefit from deciding what kind of law professor persona(e) the field should retain or adopt. Because of the limits of traditional rhetoric in terms of fostering understanding and invitational rhetoric in terms of fostering more structured decision-making, another genre of rhetoric would be of great value to legal decision-makers. *Cooperative rhetoric* combines the best of both traditional and invitational rhetorics. In short, this approach allows rhetors to come to understand the perspectives of each other and also gives the various rhetors the chance to argue the merits of such perspectives to arrive at a decision. In light of the opportunity that cooperative rhetoric presents, this section of the Article explains how cooperative rhetoric can be of value to lawyers who have participated in the ongoing conflict over the rhetorical construction of the law professor persona(e).

97. FOSS & FOSS, *supra* note 29, at 13-14.

Scholars have used a variety of terms to speak of the concept of cooperative rhetoric. For instance, Josina M. Makau and Debián L. Marty have employed *cooperative argumentation*,⁹⁸ Irwin Mallin and Karrin Vasby Anderson have used *constructive argument*,⁹⁹ and Steven E. Daniels and Gregg B. Walker have called upon both *collaborative learning*¹⁰⁰ and *collaborative argument*.¹⁰¹ Despite contemporary interest in this genre of rhetoric, Richard Fulkerson showed that the concept is not entirely new because in the *Topics* Aristotle referenced the idea of common purpose in rhetoric.¹⁰² For the sake of consistency, this Article will call upon the term *cooperative rhetoric*.

Under the paradigm of cooperative rhetoric, rhetors focus on addressing the problem at hand as opposed to “winning” the argument.¹⁰³ Cooperative rhetoric is “a process of reasoned interaction intended to help participants and audiences make the best assessments or the best decisions in any given situation.”¹⁰⁴ In terms of an analogy, one might envision “a group of mountain climbers concerned for their mutual safety” and thus interested in testing “two [or more] ropes in every conceivable way and then select[ing] for their common use the stronger [or strongest] one.”¹⁰⁵ Because parties to the rhetoric are collaborators, not opponents, in addressing problems,¹⁰⁶ the parties see themselves as mutual resources.¹⁰⁷ Through the process of cooperative rhetoric, a cooperative rhetor “offers her [or his] ideas rather than imposing them, and builds upon her [or his] interlocutor’s ideas rather than tearing them down.”¹⁰⁸ Naturally, listening is a key part of this process, too.¹⁰⁹ Accordingly, cooperative rhetoric seeks to offer “constructive and productive modes of communication.”¹¹⁰

98. MAKAU & MARTY, *supra* note 21, at 88.

99. Mallin & Anderson, *supra* note 9, at 127.

100. STEVEN E. DANIELS & GREGG B. WALKER, WORKING THROUGH ENVIRONMENTAL CONFLICT: THE COLLABORATIVE LEARNING APPROACH 55 (2001).

101. Gregg B. Walker & Steven E. Daniels, *Dialogue and Deliberation in Environmental Conflict: Enacting Civic Science*, in ENVTL. COMM. YB. 135, 141-42 (Susan L. Senecah ed., 2004).

102. Richard Fulkerson, *Transcending Our Conception of Argument in Light of Feminist Critiques*, 32 ARGUMENTATION & ADVOC. 199, 212 (1996).

103. Mallin & Anderson, *supra* note 9, at 124.

104. MAKAU & MARTY, *supra* note 21, at 87.

105. DOUGLAS EHNINGER & WAYNE BROCKRIEDE, DECISION BY DEBATE 15 (1978).

106. Mallin & Anderson, *supra* note 9, at 127.

107. MAKAU & MARTY, *supra* note 21, at 88.

108. Mallin & Anderson, *supra* note 9, at 130.

109. Josina M. Makau, *Revisiting the Argumentation Course*, 15 WOMEN’S STUDIES IN COMM. 79, 79 (1992); Mallin & Anderson, *supra* note 9, at 128-29.

110. Mallin & Anderson, *supra* note 9, at 127.

Furthermore, cooperative rhetoric places emphasis on the interdependence of people and ideas.¹¹¹ The cooperative potential of any given group of rhetors is a function of “the significant value that parties place on their relationships with one another, their willingness to trust and share power, their desire for open and constructive communication, and their respect for creative approaches to” addressing problems.¹¹² This type of rhetoric can take place in various communication contexts, including group situations and interpersonal situations.¹¹³

As this description has illustrated, cooperative rhetoric is a combination of the best manifestations of invitational and traditional rhetorics. Because cooperative rhetoric allows both or all parties to explain themselves to their fellow rhetors, it places emphasis on the dialogic focus of invitational rhetoric.¹¹⁴ Additionally, since cooperative rhetoric then allows parties respectfully to advocate their positions to determine the most appropriate option or options for that situation, cooperative rhetoric places emphasis on the deliberative focus of traditional rhetoric.¹¹⁵ However, contrary to many situations in which traditional rhetoric occurs, situations in which cooperative rhetoric succeeds involve a respectful tone and a willingness of the rhetors to yield to positions more conducive to addressing the problems at hand. Convictions matter, but so do relationships.¹¹⁶ In comparing rhetors to lovers, Wayne Brockriede might add that cooperative rhetors value their co-rhetors enough to sacrifice some personal rhetorical gain for the good of “a bilateral relationship.”¹¹⁷

This understanding of cooperative rhetoric envisions a dialectic between dialogue and deliberation. In some cases, dialogue will encourage the communication more toward learning, and in other situations deliberation will encourage the communication more toward decision-making.¹¹⁸ As with most any dialectic, including the dialectic between the constructive abilities of rhetoric and gender, some contradiction or tension exists between the two foci here, yet for cooperative rhetoric to work as a whole rhetorical unit, each focus needs to have a high level of interdependence with the other.¹¹⁹

111. MAKAU & MARTY, *supra* note 21, at 88.

112. DANIELS & WALKER, *supra* note 100, at 63.

113. MAKAU & MARTY, *supra* note 21, at 93-95, 97-100.

114. Walker & Daniels, *supra* note 101, at 140-41; Foss & Griffin, *supra* note 8, at 8.

115. Walker & Daniels, *supra* note 101, at 140-41; Foss & Griffin, *supra* note 8, at 5-6.

116. MAKAU & MARTY, *supra* note 21, at 91.

117. Wayne Brockriede, *Arguers As Lovers*, 5 PHIL. & RHETORIC 1, 5 (1972).

118. Walker & Daniels, *supra* note 101, at 141.

119. Sharon D. Downey, *Rhetoric as Balance: A Dialectical Feminist Perspective*, 20 WOMEN'S STUDIES IN COMM. 137, 143-46 (1997).

Nonetheless, on a critical note, one might query what would happen when some parties to a rhetorical situation fail to cooperate. One option is for a motivated party to set the example for other parties. By way of an analogy, even if oncoming night drivers refuse to dim their headlights, a frustrated driver might dim the lights on his or her own vehicle to try to prevent a major crash.¹²⁰ One can sacrifice one's personal need for vindication and achieve a greater good.¹²¹ This is the spirit of cooperative rhetoric. In addressing how cooperative decision-making could function in a competitive culture, Lani Guinier, a law professor, stated, "I think the best explanation is to model it."¹²²

Even if parties are willing to participate in cooperative rhetoric, at some point they still may reach an impasse. When the parties arrive at such an impasse, they may want to ask what sort of evidence might change someone's view; this inquiry could involve researching new evidence.¹²³ Sometimes thinking out loud can be another option for dealing with blocks in the communicative process.¹²⁴ Because cooperative rhetoric can be an ongoing process that evolves over time,¹²⁵ the impasse-bound parties may want to return to work on their problem with fresh minds at a later date. Such is an understanding of cooperative rhetoric.

Despite the importance of dialogue to the cooperative process, the foregoing synthesized literature has not embraced invitational rhetoric vigorously. Of the major pieces of research on cooperative rhetoric addressed in this subsection, only the Mallin and Anderson article explicitly made an attempt to develop cooperative rhetoric in part based on invitational rhetoric.¹²⁶ While Mallin and Anderson noted that invitational rhetoric has value for understanding cooperative rhetoric,¹²⁷ they included in their study various theories that inform cooperative rhetoric and did not focus specifically on invitational rhetoric. In light of the theoretical discussion of invitational rhetoric above and the potential insights for cooperative rhetoric that such a discussion can provide, invitational rhetoric deserves some additional consideration as a theory that can foster a more developed understanding of the dialogic dimension of cooperative rhetoric.

The external conditions that invitational rhetoric considers can help illustrate the environment in which cooperative rhetors are supposed to be

120. MAKAU & MARTY, *supra* note 21, at 90.

121. *Id.*

122. *Id.* at 105.

123. Walker & Daniels, *supra* note 101, at 143.

124. *Id.*

125. DANIELS & WALKER, *supra* note 100, at 63.

126. Mallin & Anderson, *supra* note 9, at 121.

127. *Id.*

able to explain themselves and listen to others, eventually to make informed decisions. Mallin and Anderson noted this point in passing,¹²⁸ but this insight calls for more than brief attention. In their theory of invitational rhetoric, Foss and Griffin have maintained that safety, value, and freedom are three important external conditions.¹²⁹ Foss and Griffin have defined these conditions in this way: *safety* as “the creation of a feeling of security and [absence of] danger for the audience,” *value* as “the acknowledgment that audience members have intrinsic or immanent worth,” and *freedom* as “the power to choose or decide.”¹³⁰ To the work of Foss and Griffin, Foss and colleague Karen A. Foss have added openness as a fourth condition that helps foster the type of climate desired for invitational rhetoric or cooperative rhetoric.¹³¹ Foss and Foss have defined *openness* as the process of “seek[ing] out and consider[ing] as many perspectives as possible.”¹³²

The external condition of openness, which Mallin and Anderson did not address in light of invitational rhetoric,¹³³ is especially important to cooperative rhetoric. While a party to cooperative rhetoric needs to feel safe in the communication situation, of some value to the process, and free to choose for himself or herself, the party also has to remain open to new ideas. If a party is closed to new ideas, the result can become traditional rhetoric, in which the rhetors, unyielding to each other, try to persuade the audience of the “correctness” of the rhetors’ views. In this scenario, only the audience remains open to change; the rhetors do not. This process, by itself, can be quite uninformed for the parties, and thus counterproductive. No openness means no cooperative rhetoric. However, with openness, the parties develop the spirit of cooperative rhetoric, which is oriented toward informed decision-making, not just decision-making in general.¹³⁴ Openness, then, is an important external condition needed in creating a climate for cooperative rhetoric.

Overall, an understanding of the conditions of safety, value, freedom, and openness, which, as Foss and Griffin explained with the interpersonal and public address examples above, can produce the type of communication climate that encourages dialogue.¹³⁵ When individuals feel unsafe, devalued, and constrained regarding decision-making and are close-minded, they are unlikely to enter the process of dialogue. Without that dialogue,

128. *Id.* at 124.

129. Foss & Griffin, *supra* note 8, at 10.

130. *Id.* at 10-12.

131. FOSS & FOSS, *supra* note 29, at 39.

132. *Id.*

133. Mallin & Anderson, *supra* note 9, at 124.

134. MAKAU & MARTY, *supra* note 21, at 87.

135. FOSS & FOSS, *supra* note 29, at 35-39; Foss & Griffin, *supra* note 8, at 13-15.

cooperative rhetoric fails.¹³⁶ Thus, an understanding of these conditions, especially the condition of openness, can help establish a climate in which the understanding needed in cooperative rhetoric is likely to take place.

To foster these conditions of safety, value, freedom, and openness that can lead to invitational rhetoric, Foss and Foss have suggested the process of re-sourcement, which refers to finding a new source of “energy and inspiration” for one’s communication.¹³⁷ Re-sourcement involves disengaging oneself from an interaction frame of conquest or conversion of one’s audience and then engaging that audience from a nonconquest and nonconversion interaction frame.¹³⁸ In other words, participants in the communication move away from trying to prove others “wrong” and focus on opening themselves up to comprehending others’ views. In cooperative rhetoric, when one is temporarily focused on another party’s understanding of a matter, one is necessarily less focused on advancing one’s own understanding and can learn from one’s fellow cooperative rhetor. This type of understanding can suggest new insight that leads one to change and, ideally, improve one’s own understanding of the problem at hand. With more information, decision-making should improve.¹³⁹ As such, the notion of re-sourcement from invitational rhetoric enriches an understanding of cooperative rhetoric.

In addition to offering both the specific external conditions that can establish a climate for cooperative rhetoric and the concept of re-sourcement that helps bring about the needed external conditions, invitational rhetoric also validates the personal experiences of different individuals,¹⁴⁰ not just of traditional experts such as physicians, scientists, or attorneys. This approach can lead to new insights from unexpected sources. Foss and Foss have pointed out that one’s personal experience often functions as one’s personal truth,¹⁴¹ and such experience comes from individuals of varying types. When foregrounded in a discussion, personal experience from individuals gives voice to a variety of perspectives and, in a cooperative rhetoric situation, can enrich decision-making. The more relevant information the decision-makers have, the more informed the decisions should be.¹⁴²

136. MAKAU & MARTY, *supra* note 21, at 87.

137. FOSS & FOSS, *supra* note 29, at 44.

138. *Id.* at 44-48.

139. MAKAU & MARTY, *supra* note 21, at 87.

140. FOSS & GRIFFIN, *supra* note 8, at 5-6, 16.

141. FOSS & FOSS, *supra* note 52, at 39-40.

142. MAKAU & MARTY, *supra* note 21, at 87.

While not necessarily of prominent value to the conflict over the law professor persona(e), in which the immediate parties are all lawyers, and thus traditional experts, giving voice to nontraditional experts in other law-related conflicts can provide for a more informed decision-making process. For instance, in a legal conflict over logging in a particular forest, hearing from experts well-versed in the law and environmental science is not enough because nontraditional experts may live near the area in question. These nontraditional experts have much to say about environmental policies that directly will impact the lifestyles of those who live in the area. Not only is this process one of validating communication for the nontraditional experts in the situation, but the communication can provide more information regarding parties' experiences upon which decision-makers can make informed decisions. This is another aspect of invitational rhetoric that can help develop a theory of cooperative rhetoric.

The last few pages of this subsection have identified some aspects of invitational rhetoric that can provide for a richer understanding of the dialogic dimension of cooperative rhetoric. A better understanding of the external factors that give rise to invitational rhetoric provides a deeper understanding of the how those factors can foster dialogue within a cooperative rhetoric context. Re-sourcement adds to an understanding of refocusing on other parties to the communication, necessary for cooperative rhetoric to flourish. Also, the importance of voices of many backgrounds, valued in invitational rhetoric, demonstrates that, as relevant, many voices should speak in a cooperative rhetoric situation so that the decision-makers can make more knowledgeable decisions. Viewed through an invitational lens, the dialogic dimension of cooperative rhetoric becomes clearer.

B. Collaborative Law as Precedent for Employing Cooperative Rhetoric

Because the legal field in the United States, as well as in other common law jurisdictions, places great value upon precedent, having a precedent for the implementation of cooperative rhetoric in a law-related conflict like the conflict over the construction of the law professor persona(e) is helpful. The notion of collaborative law, upon which this subsection of the Article elaborates, provides such a precedent to suggest that cooperative rhetoric can function well within some law-related conflicts.

Collaborative law, a type of alternative dispute resolution,¹⁴³ is a relatively new approach to law that has developed since the early 1990s,¹⁴⁴

143. Harry L. Tindall & Jennie R. Smith, *The Uniform Collaborative Law Act As a Teaching Tool*, 38 HOFSTRA L. REV. 685, 690 (2009).

and this approach focuses on “offering ‘kinder and gentler’ ways of helping parties resolve their differences.”¹⁴⁵ Most often used in family law cases such as divorce cases,¹⁴⁶ the process of collaborative law encourages parties to opt for nonlitigation alternatives to resolve their disputes.¹⁴⁷ In agreeing not to litigate, parties sit down with each other and their lawyers to work out the best solution given the circumstances,¹⁴⁸ and the parties aim to do so without court intervention.¹⁴⁹ The idea is to work together toward a settlement of the relevant issues¹⁵⁰ and give the parties more control over, and thus more satisfaction regarding, the outcome of the process.¹⁵¹ Parties who have contributed more to the process are more likely to comply with the final product.¹⁵² The process of collaborative law is confidential¹⁵³ and involves “full and timely disclosure of all relevant information.”¹⁵⁴ The lawyers often act more as counselors than as advocates.¹⁵⁵ If litigation results, the lawyers, by way of a pre-existing agreement with the clients typically called a collaborative law participation agreement, have to withdraw from the situation, so the litigation incentive for lawyers is absent.¹⁵⁶ Likewise, each attorney promises to withdraw from the case if the attorney learns his or her client has undermined the collaborative process.¹⁵⁷

In a brief hypothetical example, two collaborative lawyers and their clients would sit down for a four-way meeting¹⁵⁸ that would address possible approaches to managing a divorce. In advance, the wife and the husband would have expressed their desires to their respective lawyers. Also in advance, the lawyers would have reviewed the available documents,

144. William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 354-55 (2004).

145. Stu Webb, *Collaborative Law Introduction*, 4 PEPP. DISP. RESOL. L.J. 315, 315 (2004).

146. Schwab, *supra* note 144, at 354.

147. Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 180 (2004).

148. John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1320-21 (2003).

149. Yishai Boyarin, *Generating “Win-Win” Results: Negotiating Contracts in the Drafting Process of the Uniform Collaborative Law Act*, 38 HOFSTRA L. REV. 495, 500 (2009).

150. Diane Curtis, *Collaborative law - solving disputes the friendly way*, CAL. B.J. (Jan. 2005), <http://archive.calbar.ca.gov/Archive.aspx?articleId=60136&categoryId=60037&month=1&year=2005>.

151. Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer’s Toolkit*, 20 U. FLA. J.L. & PUB. POL’Y 113, 131 (2009).

152. *Id.* at 132.

153. Boyarin, *supra* note 149, at 505.

154. Douglas C. Reynolds & Doris F. Tennant, *Collaborative Law: An Emerging Practice*, BOSTON B.J., Nov.-Dec. 2001, at 12.

155. Boyarin, *supra* note 149, at 506.

156. *Id.* at 495; Schwab, *supra* note 144, at 358.

157. Reynolds & Tennant, *supra* note 154, at 12.

158. Gary L. Voegele, Linda K. Wray, & Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 984 (2007).

such as deeds, mortgages, car payments, and records of credit card debt, to determine if their clients' desires had factual support. If possible, the attorneys would have tried to establish a collaborative relationship before the first four-way meeting.¹⁵⁹ To the first four-way meeting, which would help lay an important foundation for the overall process,¹⁶⁰ the parties would bring the supporting documents. At the meetings, the parties would aim to follow previously agreed upon agendas.¹⁶¹ While each lawyer would know his or her client's interests in advance, at the first meeting the lawyers and the parties would need to clarify each party's interests. This process calls for the type of active listening, reflective listening, described in the discussion of invitational rhetoric above.¹⁶² The parties would need to be open with each other about their interests.¹⁶³ Specifically, the wife might want to keep a sports car; the husband might want to make sure he has custody of the children. Different options for addressing these issues would receive attention.

In addition to dialogue, some well-mannered advocacy of options would be necessary to the process. One lawyer could argue that, given her daily commute, the wife would need an automobile, while the other lawyer might argue that, based on prior parenting experiences, the father should have custody of the children. If some type of resolution is possible for certain issues, those issues would be off the table. If not, those issues may require additional consideration after the parties and lawyers have had a chance to take a break and think more carefully about each party's interests. In this case, subsequent meetings would be helpful. Either way, the parties and the lawyers would have to be willing to adjust their contentions throughout the process. For example, adjustments could include accepting a different family car that would meet the needs of a commute and having partial custody of children.

Again, in the process of working toward a resolution of some sort, the dialectic of understanding and advocacy would play out. Since the process is problem-solving oriented, rather than adversarial in nature, the parties, who have opted for collaborative law instead of the expensive and combative traditional option of litigation, would focus on how they could both find a reasonable end to their marriage. This process would not be for individuals who seek the most personally lucrative or vengeful end to a marriage.

159. *Id.* at 990.

160. *Id.* at 991.

161. *Id.* at 993.

162. Mallin & Anderson, *supra* note 9, at 129.

163. Voegelé, Wray, & Ousky, *supra* note 158, at 994.

The practice of collaborative law has received formal recognition, including in the curricula at some law schools.¹⁶⁴ Various law schools now cover collaborative law in seminars on dispute resolution systems, professional ethics classes, and advanced classes on domestic relations law.¹⁶⁵ Santa Clara University has offered a class specifically in collaborative law,¹⁶⁶ and Loyola University of New Orleans developed a year-long interdisciplinary course on collaborative practice that aimed to bring together graduate students in fields like law, psychology, social work, and business.¹⁶⁷ Courses like the one at Loyola University have both theoretical and practical dimensions because students study why collaborative practice can be effective and then apply that understanding to working on collaborative cases from the perspectives of the students' various disciplines.¹⁶⁸

Beyond the law school context, many legal communities and some states have recognized collaborative law in one manner or another. Attorneys practice collaborative law across the United States, as well as in Canada, Europe, and Australia.¹⁶⁹ In the United States, training for collaborative practice often takes place locally and thus is readily available.¹⁷⁰ On a more formal level, Texas was the first state to adopt a collaborative law statute.¹⁷¹ North Carolina and California soon followed the Texas example with their own collaborative law statutes.¹⁷² More recently, states such as Utah, Nevada, Texas, and Hawaii, as well as the District of Columbia, adopted the Uniform Collaborative Law Act (UCLA), a model statute designed to bring uniformity to the area of collaborative law.¹⁷³

164. Elizabeth K. Strickland, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 994 (2006).

165. Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 333 (2004). For an argument for the expanded use of collaborative law in the law school curriculum, see Jill C. Engle, *Collaborative Law in Legal Education: No Time Like the Present*, 2 YB. ARB. & MEDIATION 65 (2010).

166. *SCU School of Law Offers Exciting New Course*, SANTA CLARA UNIVERSITY SCHOOL OF LAW (Jan. 12, 2003), <http://law.scu.edu/news/pr/scu-school-of-law-offers-exciting-new-course.cfm>.

167. Tesler, *supra* note 165, at 333.

168. *Id.*

169. David A. Hoffman, *A healing approach to the law: Collaborative law doesn't have to be an oxymoron*, THE CHRISTIAN SCIENCE MONITOR (Oct. 9, 2007), <http://www.csmonitor.com/2007/1009/p09s01-coop.html>; Voegelé, Wray, & Ousky, *supra* note 158, at 975 n.15.

170. Daicoff, *supra* note 151, at 129.

171. Tesler, *supra* note 165, at 334. See TEX. FAM. CODE ANN. §§ 6.603, 153.0072 (West 2005) (repealed 2011); TEX. FAM. CODE ANN. §§ 15.001 – 15.116 (West 2012).

172. Diana M. Comes, *Meet Me in the Middle: The Time Is Ripe for Tennessee to Adopt the Uniform Collaborative Law Act*, 41 U. MEM. L. REV. 551, 572, 573 (2011). See N.C. GEN. STAT. ANN. §§ 50-70 – 50-79 (West 2012); CAL. FAM. CODE § 2013 (West 2012).

173. *Collaborative Law Act*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?>

As an interdisciplinary process, collaborative law involves various fields like psychology, social work, and business,¹⁷⁴ but collaborative law also involves the field of communication. The description of collaborative law in the preceding pages suggests that collaborative law as an alternative legal process relates closely to cooperative rhetoric. Indeed, collaborative law is an example of how cooperative rhetoric can play out in a given field, here the legal field. In general, cooperative rhetoric explains how both understanding and advocacy are key ingredients in collaborative law. In the manner noted above, participants in collaborative law work to develop understanding of the interests of fellow participants and also employ advocacy to test ideas and move toward resolutions.

More specifically, in terms of the dialogic dimension of collaborative law, cooperative rhetoric, as invitational rhetoric informs it, has much to offer. Indeed, cooperative rhetoric addresses the external conditions of safety, value, freedom, and openness necessary for collaborative law to occur successfully. For instance, parties to collaborative law need to feel safe enough that they are willing to disclose documents and other information that normally would remain closely held before, and sometimes even during, the cat-and-mouse process of civil discovery. Conflicts notwithstanding, the parties also have to be able to see some human value in each other because, without recognizing that each party has importance, the parties can allow their frustrations and grudges to take over. Under these conditions, collaborative law would revert back to a more hostile and clash-oriented process that would not be collaborative in nature.

Another external condition, freedom, also explains the climate necessary for collaborative law. When parties to collaborative law try to force resolutions on each other, the process becomes more akin to some types of traditional civil litigation, in which parties, through their attorneys, try to force each other into a corner. For example, in civil litigation an attorney might claim that her opponent's case would be without value at trial and that the opponent should counsel his client to take a minor settlement at once or risk getting nothing. Instead of cornering each other, parties in a collaborative process should recognize that both parties have the freedom to make personal choices, given the constraints of the situation. A collaborative process involves at least two parties empowered to make decisions.

title=Collaborative%20Law%20Act (last visited Oct. 10, 2012). See UTAH CODE ANN. §§ 78B-19-101 – 78B-19-116 (West 2012); NEV. REV. STAT. §§ 38.400 – 38.575 (West 2012) (effective Jan. 1, 2013); TEX. FAM. CODE ANN. §§ 15.001 – 15.116 (West 2012); Hawaii Uniform Collaborative Law Act, No. 207 (July 3, 2012); and D.C. CODE §§ 16-4001 – 16-4022 (West 2012).

174. Tesler, *supra* note 165, at 330-33.

The final external condition relevant to a productive climate for collaborative law is openness. When parties are open to new suggestions, the process can move forward. If a party rigidly insists that, due to transportation needs, the party must get a specific vehicle after a divorce, the process may go nowhere. However, if the first party is open to receiving a cash payment from the second party that will address the transportation needs, the process can move forward in a productive manner.

Just as the external conditions needed for cooperative rhetoric help explain the conditions needed for collaborative law, so does the concept of re-sourcing. Parties who wish to avoid the hostile confrontation common in traditional divorce or child custody proceedings need to be able to move their goals away from conquest and focus initially on understanding. Conquest does not address the potentially unknown needs of other parties, nor does it give one a chance to explain one's own needs. When parties find a new source of focus for the communication process they can move away from traditional litigation models and toward less destructive models.

Additionally, the importance of giving voice to nontraditional experts that is a part of the dialogic dimension of cooperative rhetoric is instructive in explaining collaborative law. In a traditional child custody case, the voices of the children easily might receive inadequate attention because the lawyers are zealously representing the parties and the parents are full of hate for each other. However, in a collaborative law situation, in which the parties have agreed to try to work out a nonlitigation resolution to the situation, the parties will arrive at a more informed decision if they give voice to all individuals with a stake in the outcome. Such individuals would include children.¹⁷⁵ Just as the parents need a say, so do the other individuals whose futures are at stake in the decision-making process of collaborative law. Despite these insights that cooperative rhetoric offers the communication aspect, particularly the dialogic dimension of the communication aspect, of collaborative law, lawyers have much to learn about how communication theory can inform collaborative law. A LexisNexis search of fifty-eight law review articles and other articles with the term *collaborative law* in the titles revealed that, while forty-five articles at least contained the term *communication*, only one article contained the term *communication theory*, which was in a footnote that appropriately

175. Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 150-51 (2002); Robert E. Emery, *Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation -- Comments on Kelly's "Resolving Child Custody Disputes,"* 10 VA. J. SOC. POL'Y & L. 164, 170 (2002).

pointed to the lack of communication theory in legal education.¹⁷⁶ No articles contained the term *rhetorical theory* or the term *cooperative rhetoric*. Because fields other than psychology, business, and social work can contribute to a richer understanding of the process of collaborative law, lawyers would benefit from considering what communication theories like cooperative rhetoric have to say about collaborative law.

C. Applying Cooperative Rhetoric to the Conflict over the Construction of the Law Professor Persona(e)

In light of collaborative law as a precedent for the implementation of cooperative rhetoric in certain law-related conflicts, lawyers involved in the ongoing conflict over the rhetorical construction of the law professor persona(e) ultimately would stand to gain from employing cooperative rhetoric. To date, lawyers have filled volumes deliberating over law professor personae, but, because of the existing problem with understanding, lawyers initially would benefit from gaining a more complete comprehension of differing perspectives on law professor personae by focusing on dialogue for a period of time. In short, at this point traditional rhetoric has had its time, and invitational rhetoric still awaits its time. Given its focus on understanding, invitational rhetoric is a medicinal genre of rhetoric appropriate for the immediate future. However, at some point in the future, when willing lawyers have listened for understanding through invitational rhetoric and if invitational rhetoric alone has not provided for sufficient decision-making, a need for some deliberation and decision-making still would remain. At that future moment, cooperative rhetoric, which collaborative law precedents, would come into play.

As the preceding discussion of invitational rhetoric suggested, an important incentive for parties to participate in this cooperative process is common ground regarding the goals for legal education. Indeed, some of the major goals of legal education, including producing legal scholarship, addressing the roles of practicing lawyers, developing the skills of legal problem-solving, and discussing what law is and should be,¹⁷⁷ speak to the needs of both academic lawyers and practicing lawyers. By way of his or her professional status, the law professor has an important influence on the furtherance of these goals. Accordingly, academic lawyers and practicing lawyers have an incentive to try to communicate more productively about the role(s) of the law professor in legal education.

176. Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 971 n.14 (1999).

177. KELSO & KELSO, *supra* note 56, at 12-15.

Given this incentive for lawyers to participate in a cooperative process, a communication consultant would explain an overview of that process to the participating lawyers in this manner. As noted above, lawyers often meet during law school campus lectures, bar association functions, and the day-to-day work of public service functions of the bar.¹⁷⁸ With the general presence of safety, value, freedom, and openness, these situations offer the chance for invitational rhetoric to take place. Because of the constructive nature of these situations, the situations also offer the chance for cooperative rhetoric to transpire. In such a cooperative situation, lawyers would be able to focus on dialogue as well as respectful advocacy. This type of advocacy, informed through dialogue, could spill over from these situations into written fora like law journals and legal magazines, which then would spread the argumentation to a nationwide legal audience. A special symposium, later published in a law journal, would be another option.

The communication consultant would note that, through this procedure, willing lawyers would focus on effective approaches to the persona(e) most appropriate for current legal education, rather than on personal egos and reputations. Given the long-standing Aristotelian assumptions of the legal system in the United States, spirited argumentation most likely would result at some point, but lawyers would do well to view their colleagues as resources rather than opponents.¹⁷⁹ Rather than promoting hostile advocacy, the goal would be promoting an effective approach or effective approaches to legal education, specifically with regard to the law professor role(s). Lawyers and their ideas would interact, but in a constructive manner.

More specifically, the process between the two hypothetical lawyers noted above could look something like this. The communication consultant would explain that, one at a time, the lawyers would outline the particulars of how they saw the role(s) of the law professor in legal education. While one lawyer spoke, the other lawyer would try to put aside his or her views and instead focus on understanding the other lawyer, which might include asking some questions, and then the roles would reverse. The active listening needed for this process is the reflective listening that Mallin and Anderson described.¹⁸⁰ This part of the process would be akin to the part of a collaborative law process in which parties to a child custody matter offer their understandings, needs, and suggested approaches to addressing the situation, except in the former situation the lawyers would not have their

178. Leflar, *supra* note 60, at 22, 24.

179. MAKAU & MARTY, *supra* note 21, at 88; Mallin & Anderson, *supra* note 9, at 127.

180. Mallin & Anderson, *supra* note 9, at 129.

own counsel as the parties in the child custody matter would. Much like the parties to a collaborative law process, the parties to cooperative rhetoric would assume an approach that seeks to avoid the type of destructive rhetoric often found in litigation. Re-sourcement would be helpful here, too. At the end of this dialogic part in the process, the lawyers ideally should be able to explain accurately and in some detail the views they have come to understand via this portion of the process.

Subsequently, either on the same occasion or on another one, the lawyers would proceed to argue over the merits of the perspectives on the table. As the consultant would note, this process would involve attempts to further the merits of the models placed on the table, but, in contrast to the process of argumentation that has been underway in the ongoing communication regarding the law professor persona(e), the cooperative process would involve two parties who have agreed to remain open to change in order to make an effective decision. For instance, the first lawyer might realize that the second lawyer has made a good point about the need for law schools to graduate practice-ready students, and the first lawyer may want to modify, but not abandon, her own model. Likewise, the second lawyer might realize that, given that the current law school exists within the university system, the first lawyer has made a strong point that scholarship is important to the law professor persona and accordingly modify, but not abandon, his model. This part of the process would be akin to the part of a collaborative law process in which the lawyers and parties evaluate differing possible approaches to the situation. Just as in collaborative law, the parties in the conflict over the law professor persona(e) would need to keep in mind the commitment to work on the problem and avoid threatening to take a more verbally hostile approach to the situation. In the case studied here, the cooperative lawyers could go back and forth working out which points had some merit and which were baseless.

Although one party could completely abandon a model in favor of another model, in light of the longstanding and entrenched views in the conflict over the law professor persona(e), this would be unlikely. However, as the two lawyers make strong points about the relative merits of their preferred models, the parties, now more informed about the models on the table, might be willing to accept some changes based on the reasoning process. Much the same as in a collaborative law situation, but with different content, such a reasoning process that involves some give and take could help foster a workable model of the law professor that speaks to the various needs, practical and scholarly, of the two major groups in this

conflict. Eventually, at some point in the future and as a function of having participated in cooperative rhetoric, lawyers would retain, alter, or even abandon the current law professor persona, that of the scholar.¹⁸¹ Quite predictably, not all lawyers would be willing to participate in cooperative rhetoric, but some probably would be. Some of the lawyers who practice collaborative law, who now can be found across the United States,¹⁸² would be good ambassadors for cooperative rhetoric as a means of improving communication regarding the ongoing conflict over the law professor persona(e), as well communication regarding other important issues in the legal world. Such lawyers could set the example and perhaps encourage more skeptical lawyers to try cooperative rhetoric on this issue or others of importance.

In picking up on differing concerns, lawyers might decide cooperatively to devise any of several possible law professor persona(e). For instance, lawyers might opt for a model in which the law professor would continue to practice while teaching and thus be able to test legal hypotheses,¹⁸³ or lawyers could opt for a model in which a lawyer with great practical experience would become a full-time professor.¹⁸⁴ Alternatively, lawyers could find that the two different major law professor personae, the scholar and the practitioner, together meet the expectations of the university and the bar. Since one persona would be appropriate for producing scholarship and the other persona would be appropriate for developing hands-on skills in law students, the personae together would be available to meet the different demands placed on law schools.

Various decisions regarding the law professor persona(e) could result from this cooperative approach to rhetoric. Because a cooperative approach does not prescribe substantive decisions but rather suggests a process for communication and leaves content up to the parties to the communication, these potential results are merely illustrations of what content that might develop, not necessarily what has to develop. The purpose of the illustrations is to make the cooperative process more concrete at this point. Again, these are only some conceivable results that could stem from cooperative rhetoric, but they begin to illustrate how this type of process might generate results.

Supported by collaborative lawyers and other open-minded lawyers, cooperative rhetoric would come with several benefits. For instance, some

181. For recognition that the current law professor persona is that of the scholar, *see* Pedrioli, *supra* note 1, at 725.

182. Hoffman, *supra* note 169.

183. Kales, *supra* note 79, at 259-60.

184. Stone, *supra* note 83, at 210-11.

lawyers would develop a greater appreciation for listening and understanding, which can be helpful in dealing with people in many contexts. At the same time, lawyers would be able to call upon their existing skills of persuasion, ideally in a way that focuses more on the messages than on the messengers. Additionally, as a function of the communication, a well-thought-out decision regarding the ideal role(s) of the law professor would be a real possibility, and lawyers would not simply be talking past each other as they have been for ages. This prospect is the key benefit that this research offers in addressing the conflict over the rhetorical construction of the law professor persona(e). Finally, as the practice of collaborative law suggests, this cooperative approach to rhetoric would be one that lawyers could rely upon in other situations in their professional lives, including negotiation situations.

IV. CONCLUSION

This Article has explained how alternative rhetorics can offer new possibilities for helping to improve the ongoing conflict over the rhetorical persona(e) of the U.S. law professor. To do so, the Article addressed invitational rhetoric at the levels of theory and application. Moving forward but still drawing upon invitational rhetoric, the Article addressed cooperative rhetoric at a level of theory, as having precedent in collaborative law, and at a level of application in the specific conflict.

The many lawyers whose rhetoric received consideration in the precursor to this Article¹⁸⁵ have illustrated how communication is not a perfect idea. As John Durham Peters envisioned the concept, communication is “the project of reconciling self and other.”¹⁸⁶ Communication usually involves two or more parties, the self and other(s), who often have differing views of the world. Because life is complex, thinking that better communicating will resolve communication problems is problematic.¹⁸⁷ Indeed, a standard of perfection is too high because humans “can never communicate like the angels.”¹⁸⁸

Nonetheless, human communicators do not have to be “lonely zombies searching for soul mates,”¹⁸⁹ nor do they have to be over-zealous advocates who refuse to listen to each other. The prospect of imperfect

185. See generally Pedrioli, *supra* note 1.

186. JOHN DURHAM PETERS, SPEAKING INTO THE AIR: A HISTORY OF THE IDEA OF COMMUNICATION 9 (1999).

187. *Id.*

188. *Id.* at 29.

189. *Id.*

communication, which often involves relying on “faith and risk,”¹⁹⁰ is still a possibility. Alternative approaches to communication like cooperative rhetoric are examples of this. Part of cooperative rhetoric is invitational rhetoric, through which rhetors take the risk that co-rhetors may decline invitations. However, another possibility of invitational rhetoric is that rhetors take the chance that co-rhetors may accept invitations and new relationships may develop. Viewpoints may be different and even hard to understand, yet the opportunity for positive communication remains. This possibility is an important promise of invitational rhetoric. Placed in conversation with a respectful version of the more traditional Aristotelian understanding of rhetoric, invitational rhetoric can function within a dynamic dialectic that becomes cooperative rhetoric. Individuals can take the chance that cooperative rhetoric will open new doors to imperfect, but positive, communication. At a minimum, the persona(e) of the law professor and the legal field may be healthier for the risk.

190. *Id.* at 30.