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THE LAWYERING PROCESS: AN EXAMPLE OF METACOGNITION AT ITS BEST

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This article celebrates the 25th anniversary of the publication of Gary Bellow and Bea Moulton's The Lawyering Process by looking at the work from personal and theoretical perspectives. From the personal perspective, the authors discuss how The Lawyering Process influenced them as teachers and scholars. From the theoretical perspective, the authors show how the book modeled various metacognitive processes. Combining the personal with the theoretical, the article shows how The Lawyering Process challenged lawyers to become aware of their own thinking by demonstrating how it challenged the authors to do so.

INTRODUCTION

For the 25th anniversary of *The Lawyering Process*[1], we honor the work of Gary Bellow and Bea Moulton by reflecting on their influence on us personally and on our work in interviewing and counseling. We reflect on this seminal book through the lens of metacognition,[2] a psychological and learning theory term that describes using critical thinking processes to examine cognitive processes, many of which are habitual or reactive. Metacognition, which has been described as thinking about thinking,[3] engages reflective inspection of thoughts, motivations, and actions, and expands personal awareness of behavioral choices. A prime function of metacognition, particularly for students and educators is increasing awareness of learning processes – our own and other's – and of what we do and do not know. For Flavell metacognition relates to the

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[1] GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY xix (1978) (hereinafter The Lawyering Process).

[2] J.H. FLAVELL, METACOGNITION: ASPECTS OF PROBLEM SOLVING 232 (Lauren B. Resnick ed., 1976). *See also* A. BROWN, METACOGNITION, EXECUTIVE CONTROL, SELF-REGULATION, AND OTHER MYSTERIOUS MECHANISMS 65-116 (F.E. Werinart & R.H. Kluew eds., 1987).

[3] JENNIFER A. LIVINGSTON, METACOGNITION: AN OVERVIEW (1997) *available at* http://www.gse.buffalo.edu/fas/shuell/cep564/Metacog.html.

mental process of becoming aware of thoughts and monitoring them.

Metaknowledge has three aspects: 1) *person* variables, help identify individual patterns of thinking and learning as well as increasing awareness that others may think and learn differently; 2) *task* variables, involve attentiveness and careful, self-questioning about ways the nature of information affects and constrains cognitive responses; and 3) *strategy variables*, approaches for meeting goals, either cognitive, involving a direct purpose for accomplishing an outcome, or metacognitive, a strategy to determine which cognitive strategy is most appropriate for meeting a goal.[4] We have chosen metacognition as a reflective framework because we believe that this concept describes an important aspect of the structure and content of *The Lawyering Process* that contributes to its teaching and learning value, the admonition to think about and reflect on how, why, when, and which skills should be applied in lawyering contexts. With their willingness to examine and question their own thoughts and especially through their emphasis on ethical dimensions of lawyering skills, Bellow and Moulton model the use of metacognition, challenging teachers and readers to become aware of their own thinking. As the learning theory has since revealed, this includes the personal variables, task variables, and strategies.

We postulate that this book's power as a grandmother/father book comes from awakening, stimulating, and validating an approach to teaching and to lawyering that requires metacognition, self-awareness and conscious application of critical cognitive assessment by teachers and their students. We believe that *The Lawyering Process*'s stature rests on the ways it educated and influenced its readers, the clinical teachers who taught from it, students, some of whom then became clinical teachers, who used it to learn and grow, and us.

Clinical teachers were asked not just to improve their skills and those of their students, but also to question, examine, and assess their own cognitive processes, in other words, to develop metacognitive knowledge and awareness. By helping clinical teachers become aware of skills they were already using, of methods to improve those skills, and of multiple approaches to teaching these skills, *The Lawyering Process* reaches the ideal of law school textbooks by teaching readers the necessity of thinking about their own thinking processes, particularly with skills that have become habitual patterns. Teaching and learning from this book requires active self-reflection.

The Lawyering Process assists readers with a breakdown of the

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[4] J. H. FLAVELL *Speculations About the Nature and Development of Metacognition in Metacognition, Motivation, and Understanding* 22-3 (Franz E. Weinert & Rainer H. Kluwe eds., 1987).

components of lawyering skills and provides the broader strategic and moral contexts in which these skills are best understood. Teachers and students thus become aware of their cognitive habits and learn to make informed conscious choices about the components and applications of lawyering skills. This requires utilizing metacognitive functions, processes essential to effective lawyering.

Metacognition as a frame is both theoretical and personal because to truly understand this theory one must engage in self-examination. What we want to write is theoretical and personal. We move between giving our ideas about the ways this book exemplifies metacognitive theory, applying metacognition to explore our own thoughts, experiences, and memories of *The Lawyering Process*, and reflecting on its value to us.

Using *The Lawyering Process* thoughtfully invites and requires dialogues – with oneself and with others, students, colleagues, and friends. We accordingly share our experiences, reflections, and theoretical connections in a dialogue format.

> **Marty**: John, what was your first experience with *The Lawyering Process*?
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> **John**: I used it when I taught a clinical course as an adjunct professor in 1979. The book was new. I was familiar with the other books in the field but the Bellow and Moulton book was different. What set it apart was the way it not only identified the skills that practicing lawyers needed but also how it placed these skills into a larger, theoretical context. In the first paragraph of the introduction, they ask "lawyers [to] make lawyering a subject of inquiry".[5] This shifts the focus not only to the skills of lawyering but also to the experience of being a lawyer. This places skills education in the larger context of professionalism. Its message is that lawyers do not simply pull skills out of a toolbox and replace them when done. Rather, practicing law is a way of thinking and being. Choosing one skill over another is a choice about which lawyers need to be reflective and deliberate. These choices define a lawyer professionally and personally, adding up to choices about one way of life over another. Quoting Erik Erikson, Bellow and Moulton reminded us that, ". . . the issue is not whether we agree with what we have heard and read and studied . . . the issue is *us*, and what we have become."[6]

I. METACOGNITION VERSUS COGNITION

The differences between metacognitive and cognitive processes

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[5] BELLOW & MOULTON, *supra* note 1, at xix.
[6] *Id.* at 1 (quoting R.COLES & ERIK ERIKSON, THE GROWTH OF HIS WORK 39, 1970).

can be overlapping and confusing.[7] Metacognition generally refers to knowledge about and regulation of one's own cognitive processes.[8] Because these processes are difficult to distinguish at times, there has been criticism of the "meta" term[9]. An example may help. Interviewing clients involves cognitive processes as lawyers ask questions, listen to answers, and notice non-verbal responses. These are just some of the cognitive processes that lawyers use while conducting interviews.

Simply, metacognition involves being self-reflective about each of these processes and being able to regulate, monitor, and evaluate cognitions.[10] For example, formulating a question is a cognitive process, but examining one's purpose in asking the question is metacognitive. Listening to a client's story is cognitive while monitoring one's reaction to thoughts about what one is hearing is metacognitive. Making a judgment may involve a cognitive choice, either habitual or conscious, and it may also employ metacognitive evaluation through an assessment of motivations, ethical considerations, or other criteria that engage the mind in thinking about the decision making process. John Flavell[11] gives a more complex explanation as he subdivides metacognition into metacognitive knowledge,[12] metacognitive experiences or regulation,[13] goals or tasks,[14] and actions or strategies.[15] The lawyer who has acquired knowledge about her own thinking style [metacognitive knowledge] and who can use this knowledge to control her cognitive or mental choices [metacognitive experiences or regulation] uses not just cognitive functioning, but also metacognitive functioning usually to accomplish a goal or specific task.[16] Bellow and Moulton advocate and demonstrate cognitive processes and metacognitive awareness in their descriptions and illustrations of lawyering skills.

> **John**: The book taught me to think about lawyering skills in a systematic fashion. Bellow and Moulton placed their skills into a co-

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[7] ANN BROWN, METACOGNITION AND OTHER MECHANISMS 66-67 (Franz E. Weinert & Rainter H. Kluwe eds., 1987).

[8] *Id.* at 66.

[9] *Id.* at 68.

[10] *Id.* at 68-9.

[11] JOHN H. FLAVELL, METACOGNITION AND COGNITIVE MONITORING: A NEW AREA OF COGNITIVE DEVELOPMENTAL INQUIRY 3-7 (Thomas O. Nelson ed., 1992).

[12] *Id.* at 4.

[13] *Id.*

[14] *Id.* Goals or tasks are the focus or intention of a cognitive process. Metacognition within this context refers to awareness and choice in goals and tasks that are different from habitual or reactive cognitive responses.

[15] *Id.* Metacognitive actions or strategies refer to thinking through the reasons and consequences of actions and strategies.

[16] JOHN H. FLAVELL, *supra* note 2, at 232.

herent framework that allowed both teacher and learner to understand why a particular way of performing a specific skill is appropriate. For example, the book begins with two chapters on the "The Lawyer's Experience" before moving on to "The Lawyer's Craft." The first two chapters place the subsequent skills into the overall framework of being a lawyer. In this way, skills can be seen as part and parcel of who a lawyer is and not just what a lawyer does. This organization also helps establish the centrality of ethics in any discussion of skill development.

I have used the book and its lessons repeatedly since then. For example, I used the book's remarks on classical rhetoric to train legal services lawyers in oral advocacy.[17] After laying out the terms of classic rhetoric, Bellow and Moulton caution readers that "rhetorical principles do not provide specific answers in particular circumstances."[18] Rather, rhetorical principles provided "some criteria" for evaluation lawyer's arguments and opened up "a rich body of literature" from which lawyers could learn.[19]

This statement is an example of the book's lasting impact on me and my career. Lawyering skills do not exist in a vacuum. We need to establish baselines on which to evaluate lawyer performance and we can learn from other disciplines. How do we know what makes a "good" argument unless we have some overall, inclusive criteria to measure it against? Lawyers cannot isolate themselves from the larger intellectual and professional world. Rather, there is indeed "a rich body of literature" from other fields that greatly enrich lawyers and legal education.

II.   METACOGNITIVE KNOWLEDGE — PERSON VARIABLES

Within legal education *The Lawyering Process* unified theory and practice, scholarship and teaching. Without using the term metacognition, Bellow and Moulton embraced a metacognitive approach that only later was formally introduced to learning theory.[20] One way that *The Lawyering Process* illustrates metacognitive theory is in the aspect that Flavell[21] described as person variables, one part of metacognitive knowledge. Person variables refer to being aware of

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[17] *See* BELLOW & MOULTON *supra* note 1, pages 844–54. Bellow and Moulton used excerpts from rhetoric textbooks to outline the five "departments" of classical rhetoric: invention, arrangement, style, memory, and delivery. They go on to show how rhetoric contained "much that is useful in beginning to analyze modern argument in the context of law practice." *Id.* at 852.

[18] *Id.* at 854.

[19] *Id.*

[20] Metacognition as a defined process developed around the mid to late 70s the same time that THE LAWYERING PROCESS was being written. John H. Flavell was the first to define and use this term. FLAVELL, *supra* note 2.

[21] FLAVELL, *supra* note 11, at 4.

the ways that people think and learn. For example, being aware of the ways one learns. Awareness of learning processes may involve knowing the importance of writing a summary of a lecture or of interview notes to remember more clearly the context of each learning event.

There are many strategies for enhancing learning; metacognition involves the self-awareness of personal thinking patterns that point to the strategies that work for each person. In addition to being aware of one's own learning process, person variables include awareness that others may think and learn differently. While this will seem basic to those who are sensitive to person variables, it is quite natural for humans to assume that all people think and learn as they do. *The Lawyering Process* provides an important insight for students by showing people thinking and responding differently. In addition, *The Lawyering Process* illustrates awareness of different learning styles, the person variables of metacognitive functioning, through the variety of teaching methods it uses within the text.

> **Marty:** I especially value the ways Bellow and Moulton use a variety of teaching formats to appeal to different learning styles within the population of law students. From working with law students on their study methods over the last twenty years, I have seen a wide range of learning strategies, strengths, and challenges. I appreciate the variety of ways that Bellow and Moulton applied and illustrated concepts within the *The Lawyering Process* text. These diverse approaches provide teaching tools for different learning styles. It is seldom that any one method appeals to all learners and with a variety of methods all learners can find material presented in ways that engage them. Another value of these different approaches is that they model methods for teachers to expand their own teaching strategies.
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> Just looking through the book again, I was struck by the following illustrative examples of different teaching techniques:
> - sections specifically identifying skills[22]
> - specific questions to answer about processes[23]

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[22] The book covered the following skills: Interviewing (Chapter 3), Constructing the Case: Preparation and Investigation (Chapter 4), Negotiation: the Search for Compromise (Chapter 5), Witness Examination: The Case Reconstructed (Chapter 6), Argument: The Turn to Authority (Chapter 7), Counseling: The Circle Closes (Chapter 8). Each skill chapter was further subdivided into three sections: Preliminary Perspectives (which framed the skill into a theoretical and professional context), The Skill Dimension (which first "assessed" the skill and then broke it down into its component parts), and The Ethical Dimension (which examined the skill as practiced in context from an ethical perspective.) BELLOW & MOULTON, *supra* note 1.

[23] In connection with formulating questions the authors ask "Consider the words complaint, equity, answer, discovery, damages, estate. Are these everyday or technical terms? Can you think of synonyms? To what degree are these even more confusing?" *Id.* at 207.

- diagrams of processes[24]
- graphic displays of decision trees[25]
- charts[26]
- transcripts of lawyer and client interactions[27]
- examples of skills[28]
- breaking down the steps of a process[29]

III. METACOGNITION, THE VOICE OF ANALYSIS IN SCHOLARSHIP?

If metacognition reflects knowledge about, regulation of, and evaluation relevant to cognitions,[30] it seems to depict the critical thinking process about thinking[31] that is the basis of analytic scholarship. This approach reveals the voice of the scholar that questions, reflects, seeks to identify a process of knowing, and applies strategies and evaluation to theories. *The Lawyering Process* was, in addition to being a teaching text, a work of traditional scholarship. *The Lawyering Process* demonstrated clinical scholarship and, in doing so, broke some of the barriers between the traditional classroom and the clinic. Bellow and Moulton were quite clear that they "envision[ed] an educational process rather 'traditional' in nature. We believe that lawyer work can be analyzed and discussed in much the same way as a piece of literature or an appellate case."[32] By being explicit about the ways that clinical scholarship is consistent with the parameters of general scholarship and, especially, with other legal scholarship, they opened a conversation that continues today.

In this monumental volume, the sources of knowledge extended, in the tradition of scholars, to multiple sources, including the work of scholars both within and outside of legal education. Bringing other disciplines into their book helped extend the body of scholarly knowl-

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[24] The authors include a flow chart showing the general structure of problem solving. *Id.* at 998.

[25] The authors include a diagram of a decision tree involving a plea bargain decision. *Id* at 1013-14.

[26] The authors include a diagram of a decision matrix involving a client's choice of pleading guilty or going to trial. *Id.* at 1010.

[27] The authors included a transcript of a client interview. *Id.* at 240-47; a transcript of a witness interview. *Id.* at 408-12; a transcript of a negotiation between two lawyers. *Id.* at 586-91; a transcript involving an overheard conversation between a lawyer and a client. *Id.* at 799-803. Each of these transcripts examined the ethical dimension of the particular skill.

[28] *See also* the transcript of Bob Woodward's speech at Stanford University in November 1997, *available at* http://knightfellows.stanford.edu/public/lectures/woodwardlecture.html.

[29] The authors include a discussion under case planning that describes the analytical steps to follow in constructing a client's case. BELLOW & MOULTON, *supra* note 1, at 321-24.

[30] FLAVELL, *supra* note 11, at 232.

[31] LIVINGSTON, *supra* note 3, at 1.

[32] BELLOW & MOULTON, *supra* note 1, at xxiii.

edge beyond the confines of legal academia.

> **John**: The book also demonstrated metacognition by recognizing
> the importance of a variety of perspectives from other disciplines.
> The book was one of the first truly interdisciplinary efforts. At that
> time interdisciplinary meant "Law and. . ." It seemed that law was
> always posited as independent and superior and that the something
> else was a curiosity. The extent to which the other disciplines mat-
> tered depended on how well they helped lawyers perform uniquely
> lawyerly tasks. Thus, psychology was helpful to understand the in-
> sanity defense, for example.
>
> Bellow and Moulton went beyond the "law and" model. They
> looked to other disciplines for analogies to lawyering skills and en-
> riched the text by finding illustrations and parallel concepts from
> other disciplines. In the book's introduction, Bellow and Moulton
> remarked that
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>> [R]easoning from analogy offers a useful way to connect theory
>> with practice. The suggested models and analytical frameworks
>> are thus designed to encourage students to compare and con-
>> trast their own experience with what has been said and felt by a
>> variety of observers and commentators. Few of the selections
>> can simply be "applied" to law practice. Nor are all of the
>> readings precisely relevant to lawyer work. They are intended
>> to stimulate discussion of similarities and differences in the ex-
>> pectation that they will be reworked by the student and teacher
>> to make better sense of what lawyering and law are actually
>> about.[33]
>
> This approach opened up an enormous range of material from
> which lawyers could gain insight. Law was not separate from the
> rest of the intellectual or social world. Lawyering could be under-
> stood through a social science lens and lawyers could be trained by
> reference to other disciplines. For example, they used medical liter-
> ature to help understand and teach counseling[34] and classical rheto-
> ric to teach oral advocacy.[35] Since using this book, my thinking has
> been enriched and expanded by their approach. My own work on
> interviewing and counseling borrows heavily from decision counsel-

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[33] *Id.*

[34] *Id.* at 140 (using medical diagnosis as the organizing concept for client interviewing
and citing medical literature). *See also* Gay Gellhorn, *Law and Language: An Empirically
Based Model for the Opening Moments of the Client Interview*, 4 CLINICAL L. REV. 321
(1998); Linda F. Smith, *Medical Paradigms for Counseling: Giving Clients Bad News*, 4
CLINICAL L. REV. 391 (1998). We borrowed from them in our interviewing and counseling
work. *See, e.g,* ROBERT F. COCHRAN, JOHN M. A. DIPIPPA, & MARTHA M. PETERS, THE
COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND
COUNSELING 66 (Gellhorn), 157 (Smith) (1999). We are all BELLOW & MOULTON's prog-
eny in this regard.

[35] BELLOW & MOULTON, *supra* note 1, at 844.

ing literature.[36]

They were pioneers in this effort that today has reached beyond the skills fields into the more traditional forms of scholarship. For example, many scholars have used the insights of cognitive psychology to examine a variety of issues[37] ranging from settlement preferences[38] to legal ethics[39] to corporate governance[40] to employment discrimination[41] to governmental decision-making[42] the first amendment.[43]

Marty: This book's referencing of other disciplines was personally important to me as I began to be involved with legal education. I was aware of the "law and" perspective, but I felt that there were many ways that what I had studied in psychology and educational psychology related to lawyering skills. The interdisciplinary sources in *The Lawyering Process* validated my perception and provided an inclusion and somewhat of a legitimization of my participation in legal education. Finding references to my academic fields helped me see how my background in psychological counseling and educational psychology might mesh with learning and helping others learn about legal interviewing and counseling. To find references to people within my own field helped give me confidence that the principles of relating to people, gathering information from clients, and counseling people who were in conflict, applied to legal counseling in much the same way as in personal counseling, though with some differences of focus. Building trusting relationships is a dynamic process needed in both law and counseling. The differences in focus lead to different paths of expertise, but *The Lawyering Process* helped validate for me that the basic relationships and processes of

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[36] COCHRAN, DiPIPPA, & PETERS, *supra* note 34 , at 109-29 (discussing the literature on decision making under uncertainty); John M. A. DiPippa, *How Prospect Theory Can Improve Legal Counseling,* 24 UALR L. REV. 81 (2001)

[37] *See generally,* STEVEN L. WINTER, A CLEARING IN THE FOREST; LAW, LIFE, AND MIND, (2001); ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000); Cass R. Sunstein, *Behavioral Analysis of Law,* 64 U. CHI. L. REV. 1175, 1189-90 (1997); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review,* 51 VAND. L. REV. 1499, 1505 (1998).

[38] Russel Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer,* 76 TEX. L. REV. 77 (1997).

[39] Richard W. Painter, *Lawyer's Rules, Auditor's Rules and the Psychology of Concealment,* 84 MINN. L. REV. 1399 (2000); Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory,* 67 U. CHI. L. REV. 163 (2000).

[40] Erica Beecher-Monas, *Corporate Governance In The Wake Of Enron: An Examination Of The Audit Committee Solution To Corporate Fraud,* 55 ADMIN. L. REV. 357 (2003); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyer's Responsibility for Client Fraud,* 46 VAND. L. REV. 75 (1993).

[41] Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity,* 47 STAN. L. REV. 1161 (1995).

[42] Jeffrey Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design,* 87 CORNELL L. REV. 549, 551-52, 562-63 (2002).

[43] Jeffrey Paul Horwitz, *Free Speech as Risk Analysis,* 76 TEMP. L. REV. 1 (2003).

gathering information and counseling about decisions are more similar than different.

IV. GOAL OR TASK VARIABLES

Another aspect of metacognition is becoming aware of goal or task variables,[44] what is necessary to perform a particular skill. For example, learning that attending to a client in an interview involves ethical dimensions for the lawyer, learning what these dynamics are, and knowing why they constitute important consideration helps define the variables in the interviewing task.[45] Developing an awareness of the overarching context and the needs of the particular individual heightens the learner's understanding well beyond the skill.

> **Marty**: John, not only did Bellow and Moulton develop specific task variables or components of skills, but they seem to have included more abstract variables as illustrated by their focus on the ethics of tasks. What influence did this have on you as a teacher?
>
> **John**: It was profound. Their book showed that every lawyering skill has a moral dimension. Skills cannot be understood outside of their moral context. The book challenged its users to examine each skill for its compatibility with lawyers' ethics and the users' morality. In *The Lawyering Process* morality always trumps technique. Technique always must yield to overriding moral concerns.

V. STRATEGIC VARIABLES

Metacognition also focuses on the development and use of strategic variables,[46] including an awareness of why and how these strategies influence tasks, situations, and events. Once understood, the learner can determine when and where to use these strategies.

> **Marty**: John, as a reader and teacher using this book, did you find that the book stimulated the development of mental strategies and their appropriate uses as part of your own metacognitive learning?
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> **John**: I know that it had that effect on me. That is, it helped me think about what skills and strategies lawyers use and how they ap-

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[44] FLAVELL, *supra* note 4. For a comprehensive analysis of Flavell's principles, *see also* Greg Gay, *Learning to Learn: Modules: Metacognition: the Nature of Metacognition, at* <http://snow.utoronto.ca/Learn2/mod2/metacognition.html>. Gay details that "the concept of metacognition entered the field of cognitive psychology with John Flavell. For Flavell metacognition includes knowledge and regulation of cognition. Knowledge about cognition consisted of: 1) *person* variables, or knowledge about one's self, and others' thinking; 2) *task* variables, or knowledge that different types of tasks exert different types of cognitive demands; and 3) *strategy variables*, or knowledge about cognitive and metacognitive strategies for enhancing learning and performance."

[45] BELLOW & MOULTON, *supra* note 1, at 90.

[46] FLAVELL, *supra* note 2.

ply them. But not in the usual way, it gave me a way to see the elements of each skill and think about each element in isolation and in combination. For example, interviewing was first placed within a larger, theoretical context and then broken down into "Choosing and Sequencing Topics," "Framing Questions," "Responses and Leads," and "Understanding."[47] In addition, it was helpful to think specifically about when and how to apply individual elements and the combination of skill sets strategically. For example, Bellow and Moulton explore topic choice in client interviewing by showing a hypothetical client's statements down one column, the lawyer's questions down the middle column, and the possible purposes behind the questions down a third column.[48] The following notes then ask the student to evaluate the lawyer's choices, to imagine alternative questions, and to continue the interview from its stopping point.[49]

Marty: Knowing when and how to apply strategies seems to require an appreciation for the context in which the skills will be used. How did *The Lawyering Process* help you understand and teach about the importance of this context?

John: This book taught me to test the theoretical in real life. For example, Bellow and Moulton use an excerpt from Woodward and Bernstein's Watergate investigation to illustrate interviewing techniques.[50] This and other examples show the theory they are teaching being used in real life. It provided a kind of mental laboratory to examine the usefulness of their theoretical approaches.

Bellow and Moulton seemed pragmatic, they looked for what worked from other disciplines without imposing an ideological litmus test (or at least much of one.) They also seemed very willing to examine and question their own suppositions. For example, they qualified their advice on questioning techniques by saying that a lawyer's effectiveness depended on "the personal strengths, vulnerabilities, and perceptions of the client."[51] They then added that reflection on technique may do nothing more than encourage lawyers to use careful language, avoid interruptions, be honest with clients, and help clarify what the client wanted to say but "even if focusing on question form is only a roundabout way to develop these general, rather obvious orientations, if it does that much – for many of

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[47] BELLOW & MOULTON, *supra* note 1.

[48] *Id.* at 192-95.

[49] *Id.* at 195.

[50] See BELLOW & MOULTON, *supra* note 1, at 281 where the authors used an excerpt from Bernstein and Woodward's Watergate book, ALL THE PRESIDENT'S MEN, to illustrate an approach to gathering information about a case. CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN (1974).

[51] BELLOW & MOULTON, *supra* note 1, at 211.

us – it has done a great deal."[52]

Marty: This reminds me of ways that I think metacognition ties to interviewing and counseling. In interviewing clients, lawyers must stay alert to their own mental patterns and ways they might distort clients' information through their own biases and expectations. By accessing the metacognitive process one can monitor one's own tendencies to prematurely diagnose clients' issues, to come to conclusions about facts or legal options because they start to fall into a familiar pattern, and to stay alert to the ways one's values may interpret a client's story. These are very important ways in which the   · interviewer increases accuracy in gathering information and evaluating options and becomes more aware of clients' interests and needs.

In applying this theory to counseling, lawyers encourage metacognitive processing in their clients by making transparent their own thinking as they describe to clients their own reasoning processes.[53] In collaborative decision-making, lawyers model an open communication process through presenting and describing choice processes and potential outcomes. By making their own thinking processes transparent to clients, lawyers challenge clients to exercise the same process of becoming conscious of the mental, emotional, values, and ethical interests that weigh into the client's own decision-making. This form of counseling pushes clients to understand their own mental processes, their ways of evaluating the situation, the tasks required of them with each potential choices, and the strategies inherent in different choices. Lawyers are likely to find that some of their clients interests and needs become clearer as a result of this type of mental evaluation. They may also encounter mental patterns that are reactive and habitual. By encouraging clients to become more aware of their own metacognitive functions, decisions are likely to reflect the clients' true interests more fully and provide collaboration that is both clear and productive. This is not a new idea. It is a lesson from *The Lawyering Process*.

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[52] BELLOW & MOULTON, *supra* note 1, at 212. *See also* COCHRAN, DiPIPPA, & PETERS, *supra* note 34, at 55 where I relied on this quote to support the advice to "Be wary of prescriptions (even the ones in this book) about the right and 'wrong' ways to ask questions." This is another example of how their insight blossomed in my work.

[53] Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent*, 13 OHIO ST. J. ON DISP. RESOL. 1 (1997). Transparency refers to exposing thought processes that underlie communication choices and actions. *Id.* at 2.

VI. REFLECTIONS ON THE INFLUENCES OF *THE LAWYERING PROCESS* ON THE DEVELOPMENT OF *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING*

Marty: *The Lawyering Process* certainly affected our work. How did it influence your conceptualization of the *Counselor-at-Law*[54]?

John: It directly influenced my conceptual framework for the book. My perspective emulates Bellow and Moulton. I, too, look for what works with people and I was also convinced that other disciplines could provide models. For example, I used communication theory to organize the section on interviewing the client[55] and decision theory to organize the section on counseling.[56] This approach avoids the problem that I see in other theories of interviewing and counseling. They begin with an ideological commitment to a certain conception of the lawyer, the client, or both and then deduce interviewing and counseling practices from that commitment.[57] But reality is always more complex than ideology. Bellow and Moulton began with a commitment to the client but suggested that there would not be one single approach that worked for each client. Rather, the technique that respected the client AND served to advance the representation was the right choice.[58] This puts a great deal more responsibility on the lawyer because the lawyer cannot proceed from a set script. Rather, the lawyer must have a wide variety of skills and approaches and be aware of a wide range of techniques borrowed from other disciplines.

Marty: Bellow and Moulton's emphasis on lawyers becoming aware of their own interests to avoid conflicts of interest helped me see the importance of including material to challenge our readers to become more aware of their own thinking processes and of the variety of ways people gather information and make decisions. Including the theory of personality type as described by Myers' in her development of the Myers-Briggs Type Indicator (hereinafter MBTI)[59] was one way to encourage self-awareness and the awareness of others' learning and thinking differences. With its emphasis on a positive interpretation of differences, the MBTI provides theory to stimulate metacognitive strategies as readers think about their own mental processes and those of their classmates and clients. Similarly, our chapter on cultural differences intended to enhance the

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[54] COCHRAN, DIPIPPA, AND PETERS, *supra* note 34.

[55] COCHRAN, DIPIPPA & PETERS, *supra* note 34, at 31-55.

[56] *Id.* at 109-29.

[57] For an expanded discussion of this point, see DiPippa, *supra* note 34, at 106-11.

[58] *See, e.g*, BELLOW & MOULTON *supra* note 1, at 211-12 (technique is secondary if lawyer learns to respect and help the client).

[59] ISABEL BRIGGS MYERS (WITH PETER B. MYERS), GIFTS DIFFERING (1980).

awareness of personal and client interests that are easily overlooked
when people respond habitually or without the intentional reflec-
tion encouraged by metacognitive knowledge and strategies that
Bellow and Moulton encourage. How did *The Lawyering Process*
influence your writing style for the *Counselor at Law?*

John: I think it influenced my style in that I tried to break down
each skill into component parts and then use a systematic frame-
work to explore each component. For example, I broke down the
client interview into three components and then devoted one chap-
ter to each component.[60] I then broke down each component into
smaller steps.[61] As I think about this, I realize that I was mirroring
The Lawyering Process's organization and approach, filtered
through my own experience and study.

Marty: The ethical process emphasized throughout *The Lawyering
Process* reflects a number of my personal values, particularly the
importance of being respectful and genuine with clients. Bellow
and Moulton embraced collaboration. The important roots of the
collaborative process are clear in the ethical considerations, espe-
cially regarding shared decision-making and respect for client
choices. I believe that people's ethical considerations become ever
more pronounced as people hone their metacognitive awareness.

    Similarly, the message from Bellow and Moulton that respect-
ful, genuine interactions, even when inartfully phrased are more im-
portant than well constructed questions that do not reflect well on
the clients interests or on the relationship of trust and respect be-
tween the lawyer and the client. They embrace a value that I also
prize, preferring genuine relationships over technique.

    Bellow and Moulton insisted that technique had a moral and
ethical dimension. Each skill was first explained as technique and
then examined ethically, in context. For example, Bellow and
Moulton present interviewing techniques in great detail.[62] Once
they established these techniques, they then showed the techniques
in action and explored their use from an ethical perspective.[63] They
presented a transcript of a lawyer/client session,[64] followed by a se-
ries of notes and questions that explored the ethical issues the tran-
script raised.[65] They were not the first to do this but their examples

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[60] Our book divides the client interview into three segments: Beginning the Interview,
Hearing the Client's Story and Developing the Client's Story. *See* COCHRAN, DIPIPPA, &
PETERS, *supra* note 34 at 57-108.

[61] Hearing the Client's Story which is sub-divided into five parts. *Id* at 75-93.

[62] BELLOW & MOULTON, *supra* note 1, at 156-239.

[63] *Id.* at 240-72 exploring the ethical dimension of client interviewing by analyzing the
transcript of client interview.

[64] *Id.* at 240-47.

[65] *Id.* at 247-72. In these pages, Bellow and Moulton consider the following ethical
issues: conflicts of interests, confidentiality, fee arrangements, illegal conduct by the attor-
ney, the problems of a government attorney, refusing representation, and the relationship

may have been the most vivid. They demonstrated how ethics and morality emerged through the resolution of the day-to-day interactions between lawyers and clients. By showing how each skill also had a moral dimension, Bellow and Moulton both exhibited and transcended metacognition. Metacognition is fundamentally about thinking about the skill in all dimensions. Their insight, to me, was that morality was one of those dimensions. A skill was not competently practiced if it was not also practiced ethically.

At the same time, Bellow and Moulton's method required reflection on the context in which skills were performed. This not only included the individual moral dimension but the social moral dimension as well. Lawyers could not divorce themselves from the system in which they operated. That system generated its own moral norms, often unspoken and unwritten, but effective nonetheless. By placing moral reflection within the framework of clinical teaching, Bellow and Moulton opened up the legal system to examination as well. They removed the excuse that lawyers were just "doing their jobs." Doing their jobs placed lawyers squarely in the middle of moral and ethical problems that were both personal and systemic. There could be no hiding behind the impersonal legal system. Rather, "[l]awyering is, whatever else, a very personal experience. Sometimes in the course of practice we "become" lawyers, in that complex sense in which what we do becomes a part of who we are."[66]

John and Marty: Thank you Gary and Bea! As you can see from these reflections, your work helped us become who we are.

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of the lawyer's role and client's autonomy. It was, and still is, one of the best and most thorough examinations of the ethics of client representation.

  [66] *Id.* at 2.