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Client Problem-Solving: Where ADR and Lawyering Skills Meet

Abstract

Influenced by critiques of legal education, law schools are scrambling to offer more and better opportunities for experiential education. To fulfill the new demands for experiential education, one obvious place to turn is clinic pedagogy, which has developed methodologies for teaching students in the real-practice settings of in-house clinics and externships. As the interest in experiential education broadens, a wider spectrum of teaching methodologies comes under the experiential tent, creating opportunities to tap new sources of guidance for reshaping legal education.

This article turns the spotlight on one of these other, less obvious resources within legal education: the alternative dispute resolution (ADR) movement. Like the lawyering skills movement in clinical legal education, the ADR movement has drawn from the wisdom of other disciplines to explain and theorize the practice of specific dispute resolution processes like mediation and negotiation. Perhaps more importantly, the ADR movement has provided important justification and elaboration of the underlying commitment to client-centered problem solving, which also animates much of the lawyering skills literature that has arisen from clinical pedagogy.

This article traces the problem-solving focus through its development in the ADR movement and demonstrates the similarities between some of the key components of the ADR movement and clinical pedagogy. Finally, it explains how a law school can build on the synergies between these two fields to craft an experiential education program that uses client problem solving as its unifying theme, using the ongoing curricular reforms at Hamline University School of Law as an example.

Keywords

Experiential learning, Legal education, Clinical legal education, ADR, Dispute resolution, Pedagogy

Disciplines

Dispute Resolution and Arbitration

CLIENT PROBLEM SOLVING: WHERE ADR AND
LAWYERING SKILLS MEET

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The experiential education movement is sweeping through law schools. Influenced by critiques that legal education is overly focused on teaching students to “think like lawyers”¹ and impelled by market forces to take those critiques seriously,² law schools are scrambling to offer more and better opportunities for interactive, reflective, role-based, hands-on learning. Law schools have created experiential education dean or director positions dedicated to coordinating experiential education across the curriculum; schools have added a clinic requirement or guarantee; and innovative experiential third year, semester-in-practice, lab, and practicum courses abound.³

Regulators are also responding to the growing trend toward experiential education in law school. The American Bar Association (“ABA”) recently amended its professional skills requirement to require that all graduates from ABA-accredited law schools receive at least six credits in experiential courses as a condition of graduation.⁴

¹ See, e.g., WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 77 (2007) (describing the overuse of the Socratic case dialogue method and its diminishing returns).

² Karen Sloan, *Law School Enrollment Slump Continues*, NAT’L L.J. (July 21, 2014), <http://www.nationallawjournal.com/id=1202663837843/Law-School-Enrollment-Slump-Continues?mcode=1202615496822&curindex=0&curpage=ALL&slreturn=20140810114752>.

³ See Myra Berman et al., Working Grp. on Creative Initiatives, Alliance for Experiential Learning in Law, *Creative Initiatives at U.S. Law Schools*, in *Experience the Future: Papers from the Second National Symposium on Experiential Education in Law*, 7 ELON L. REV. 1, 57, Part V.A. at 59 (2015).

⁴ See ABA STAND. & R. P. APPROVAL L. SCH. 2013–2014 16, available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014

And the California State Bar is in the process of implementing a requirement that all applicants for admission demonstrate that they have either received fifteen credits of experience-based learning in law school or participated in a state bar-approved clerkship or apprenticeship program.⁵

To fulfill the new demands for experiential education, one obvious place to turn is clinic pedagogy, which has developed methodologies for teaching students in the real-practice settings of in-house clinics and externships.⁶ In its early years, clinic pedagogy theorized practice, breaking the lawyering process down into its component parts—interviewing, counseling, negotiation, fact investigation, and advocacy—and drawing from other disciplines to develop vocabularies and frameworks for teaching the skills associated with these tasks.⁷ As clinicians have become more integrated into the legal academy, they have developed a body of clinical scholarship that explicates, debates, and critiques the underlying values of client-centered representation and social justice lawyering on which client advocacy is based.⁸

As the interest in experiential education broadens, however, a wider spectrum of teaching methodologies comes under the experiential tent, creating opportunities to tap new sources of guidance for reshaping legal education. This article turns the spotlight on one of

_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_book marked.authcheckdam.pdf. The new accreditation standard specifies:

To satisfy this requirement, a course must be primarily experiential in nature and must:

- (i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302;
- (ii) develop the concepts underlying the professional skills being taught;
- (iii) provide multiple opportunities for performance; and
- (iv) provide opportunities for self-evaluation.

Id.

⁵ See materials from the California Task Force on Admissions Regulation Reform. *Task Force on Admissions Regulation Reform (TFARR)*, ST. B. CAL., <http://www.calbar.ca.gov/AboutUs/BoardofTrustees/TaskForceonAdmissionsRegulationReform.aspx> (last visited Nov. 11, 2014).

⁶ See *infra* Part II.A; ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 165–166; 179–85 (2007), available at http://www.cleaweb.org/Resources/Documents/best_practices-05.pdf.

⁷ See Susan Bryant & Elliot S. Milstein, *Reflections Upon the 25th Anniversary of The Lawyering Process: An Introduction to the Symposium*, 10 CLINICAL L. REV. 1, 11–19 (2003) (describing the influence of the early development of skills education in clinical legal education).

⁸ Margaret Martin Barry et al., *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 16–18 (2000).

these other, less obvious resources within legal education: the alternative dispute resolution (ADR) movement. Like the lawyering skills movement in legal education, the ADR movement has drawn from the wisdom of other disciplines to explain and theorize the practice of specific dispute resolution processes like mediation and negotiation.⁹ Perhaps more importantly, the ADR movement has provided important justification and elaboration of the underlying commitment to client-centered problem solving, which also animates much of the lawyering skills literature that has arisen from clinical pedagogy.

The experiential program at Hamline University School of Law has built on the natural synergies between clinical pedagogy and dispute resolution to develop an experiential education program focused on client problem solving as the basic task of lawyering.¹⁰ The problem-solving focus views the non-legal dimensions of a problem as critically important to its satisfactory resolution, placing a premium on skills, such as active listening, that help lawyers identify a broader range of interests and objectives at play in a problem situation. It places normative value on client autonomy and party self-determination, counteracting the professional tendency of lawyers to appropriate their clients' problems or to view their clients' problems in solely litigation terms. Finally, a client problem-solving focus values the development of skills that help lawyers reframe problems, question assumptions, shift perspectives, and creatively generate options.

This article traces the problem-solving focus through its development in the ADR movement and demonstrates the similarities between some of the key components of the ADR movement and clinical pedagogy. Part I traces the history of the ADR movement and extracts three of the important lessons it contributes to pedagogy based on client problem solving. Part II shows how similar lessons about client problem solving developed in clinical pedagogy as clinicians figured out how to teach students in practice-based settings. Part III explains how a law school can build on the synergies between these two fields to craft an experiential education program that uses client problem solv-

⁹ See generally Christopher Honeyman et al., *Introduction: The Second Generation of Negotiation Teaching*, in *RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE* (Christopher Honeyman et al. eds., 2009), available at http://digitalcommons.hamline.edu/dri_press/2/.

¹⁰ See Bobbi McAdoo et al., *It's Time to Get It Right: Problem-Solving in the First-Year Curriculum*, 39 WASH. U. J. L. & POL'Y 39, 55-59 (2012).

ing as its unifying theme, using the ongoing curricular reforms at Hamline University School of Law as an example.

I. THEORY AND PRACTICE OF PROBLEM SOLVING IN THE ADR FIELD

To understand the contributions of the alternative dispute resolution (ADR) movement to the more general pedagogy of lawyering as problem solving, some context for the development of the ADR movement is helpful. This part provides a brief history of the modern ADR movement and describes, in some detail, three specific problem-solving concepts from that movement: (1) “process choice” as an important component of legal representation; (2) the importance of identifying underlying party interests in every type of legal representation; and (3) the relationship between client satisfaction and procedural justice. Taken together, these lessons underscore the importance of teaching future lawyers how to analyze and understand client goals and interests and how to ensure that clients are given sufficient opportunity to participate and be heard in legal processes.

A. *The ADR Movement*

While public policy supported the use of arbitration through the adoption of the Federal Arbitration Act in 1925,¹¹ the underpinnings of the modern day ADR movement were set in motion with the growing use of mediation in the 1960s and 1970s.¹² The Civil Rights Act of 1964 created the Community Relations Service (CRS) of the U.S. Department of Justice,¹³ the purpose of which was to promote the use of mediation and conciliation techniques to resolve racial and ethnic controversies.¹⁴ This was followed in the early 1970s with experimentation by prosecutors’ offices in the use of community mediators to resolve “minor criminal disputes.”¹⁵ This period also saw the development of community mediation centers throughout the United States.¹⁶ These centers varied in their approaches but most accepted quasi-criminal cases as well as “neighborhood” disputes of all types, and the mediators

¹¹ The common use of arbitration in labor disputes dates from around the passage of the Taft-Hartley Act in 1945. Roberto L. Corrada, *The Arbitral Imperative in Labor and Employment Law*, 47 CATH. U. L. REV. 919, 920 (1998).

¹² JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 8 (3d ed. 2013).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 9. The first of these programs was created in 1971 in the City Prosecutor’s Office in Columbus, Ohio. *Id.*

¹⁶ *Id.* at 10.

came from a mix of backgrounds.¹⁷ The underlying philosophy of these early mediation programs was community empowerment, i.e., the idea that individuals could learn how to help their neighbors resolve disputes.¹⁸ Since community programs typically handled disputes before they were large enough to enter the traditional legal system, improving the overall efficiency of the courts was not the goal of these programs.¹⁹ Their success, however, set the stage for the developing ADR movement in the courts.

In 1976, judges, leaders of the bar, and legal scholars gathered in Minnesota at the National Conference on the Causes of Popular Dissatisfaction,²⁰ more commonly known as the Pound Conference.²¹ This conference, convened in part to address the cost and delay problems threatening the stability of the court system, is often identified as the start of the modern day ADR movement.²² At the Pound Conference, then-U.S. Supreme Court Chief Justice Warren Burger strongly endorsed “informal dispute resolution processes” as a means for moving appropriate cases more quickly and efficiently through the court system.²³ And Professor Frank Sander delivered an oft-quoted speech suggesting the creation of a multi-door courthouse with an intake process that could identify for potential litigants the appropriate dispute resolution process for their particular disputes.²⁴ While the Pound Conference focused primarily on settling cases more efficiently, Chief

¹⁷ Community mediators were recruited from the neighborhoods in which they lived. While some were legally trained, this was not a requirement and non-lawyers were very involved in the implementation of mediation during this period. “Persons of multiple backgrounds and training capably served as mediators. Substantive expertise was broadly defined; racial and ethnic diversity created access to multiple disputants, and diverse life experiences fostered credibility.” *Id.*

¹⁸ Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR”*, 19 FLA. ST. U. L. REV. 1, 6 (1991).

¹⁹ *Id.* at 7–8.

²⁰ The 1976 gathering was actually a call by Chief Justice Burger to reexamine the “unfinished business” of Roscoe Pound’s 1906 speech to the ABA entitled “The Causes of Popular Dissatisfaction with the Administration of Justice” reprinted in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE: PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 337–53 (L. Levin & R. Wheeler eds., 1979) [hereinafter THE POUND CONFERENCE].

²¹ See *id.* at 31–32, 35.

²² CRIMINAL JUSTICE SECTION, AM. BAR ASS’N, THE STATE OF CRIMINAL JUSTICE 137 (2007).

²³ THE POUND CONFERENCE, *supra* note 20, at 32–33.

²⁴ Sander did not use the term “multi-door courthouse” but provided the framework and inspiration for its development. *Id.* at 83–84.

Justice Burger often articulated a broader theme related to problem solving, namely “[t]he notion that most people want black-robed judges, well-dressed lawyers, and fine paneled courtrooms as the setting to resolve their disputes is not correct. People with problems, like people with pain, want relief, and they want it as quickly and inexpensively as possible.”²⁵

Following the Pound Conference, the ABA created the Special Committee on the Resolution of Minor Disputes charged with “finding or devising dispute resolution mechanisms capable of settling ‘minor disputes’ effectively and efficiently, seeking to set up and evaluate pilot programs and then promoting adoption of the successful models throughout the country.”²⁶ In 1985, the ABA confirmed its commitment to ADR programs by sponsoring three multi-door courthouse projects.²⁷ This was followed, in 1987, by the first state legislative initiatives providing specific authorization to state trial court judges to mandate that parties attempt to mediate their disputes.²⁸ By the end of the 1980s, court-connected mediation programs existed in state and federal courts throughout the U.S.²⁹

This trend of legislative support for ADR continued throughout the 1990s and included the enactment of the Civil Justice Reform Act (CJRA), which “required all federal district courts to develop plans implementing procedures for ADR to combat cost and delay in civil litigation.”³⁰ As the use of mediation and other non-adjudicative processes expanded from minor disputes to general civil cases, the courts’ emphasis on the use of ADR was noteworthy both for its dramatic growth

²⁵ Warren Burger, *Our Vicious Legal Spiral*, JUDGES’ J., Winter 1977, at 23, 49.

²⁶ Earl Johnson, *The Pound Conference Remembered*, DISP. RESOL. MAG., Fall 2012, at 6.

²⁷ JEROME T. BARRETT & JOSEPH P. BARRETT, *A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT* 234 (2004).

²⁸ *E.g.*, Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 PENN ST. L. REV. 43, 49–52 (2003); L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY’S L.J. 325, 327 (2006). Minnesota adopted its version of court-connected ADR in 1993. The rule included a range of processes for litigants to choose among, including, mediation, arbitration, consensual special magistrate, summary jury trial, early neutral evaluation, non-binding advisory opinion, neutral fact finding, mini-trial, and mediation-arbitration (Med-Arb). MINN.CT. R. 114.02, available at https://www.revisor.mn.gov/court_rules/rule.php?type=gp&id=114. In 1996, subsection (a)(10) “other” was adopted as a new option to make clear that parties “may by agreement create an ADR process.” *Id.*

²⁹ BARRETT & BARRETT, *supra* note 27, at 235.

³⁰ *Id.* at 248 (“By the mid-1990s, more than half of state courts, and virtually all of the federal district courts, had adopted mediation programs for large categories of civil suits.”).

and the underlying belief that ADR could significantly assist overworked and underfunded court systems.³¹

While alternatives to litigation were broadly considered, the most remarkable growth of the ADR field was in the development of mediation programs. While some within the ADR community celebrated the rapid growth of court-connected mediation, others were skeptical, and still others were downright hostile to the “transmogrification” of ADR in the courts.³² Mediation was “seen by some as a vehicle for citizen empowerment; by others as a tool to relieve court congestion; and by still others as a means to provide ‘higher quality’ justice in individual cases.”³³ Those who viewed the foundation of mediation as party self-determination supported practice approaches in which mediators assist parties in crafting resolutions based on the parties’ goals, values, and common interests.³⁴ Court administrators and judges, on the other hand, who tend to be more interested in the “efficiency rationales” to support the adoption of mediation programs, were more in-

³¹ During this period, the ABA Special Committee on the Resolution of Minor Disputes became the Special Committee on Dispute Resolution, then a Standing Committee on Dispute Resolution, and eventually became a full ABA Section in 1993, reflecting the evolution of its broader mission and focus. Criminal Justice Section & Section of Dispute Resolution, *Report to the House of Delegates*, 2009 A.B.A. SEC. CRIM. JUST., A.B.A. SEC. DISP. RESOL. REP. 101B, Part I, at 2, available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2009/midyear/recommendations/101B.auth.checkdam.pdf>. Currently, the ABA Section of Dispute Resolution has over 18,000 members. *Membership*, AM. B. ASS'N, http://www.americanbar.org/groups/dispute_resolution/membership.html (last visited Feb. 2, 2015). Its creation and development demonstrates the ABA's recognition that ADR is an important area of focus for lawyers. The fact that the ABA Section has grown so large while the membership of the Association for Conflict Resolution (the professional association not associated with the ABA) has remained under 5000, also chronicles the evolution of the ADR field from being the province of “regular” people who wanted to help their neighbors to a sophisticated network of dispute resolution professionals who are mostly lawyers.

³² See Menkel-Meadow, *supra* note 18; see also James J. Alfini, *Trashing, Bashing, and Hashing it Out: Is This the End of “Good Mediation?”*, 19 FLA. ST. U. L. REV. 47 (1991); Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903 (1997); John Lande, *How Will Lawyering and Mediation Practice Transform One Another?*, 24 FLA. ST. U. L. REV. 839 (1997); Gary L. Gill-Austern, *Faithful*, 2000 J. DISP. RESOL. 343 (2000).

³³ Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 257 (1989). Conflict around/between these different goals for mediation has been a constant source of theoretical and practical tension.

³⁴ *Id.* at 268.

terested in “successful” outcomes, e.g., settlements, regardless of the particulars of the process by which those settlements were reached.³⁵

The earliest proponents of mediation had viewed its value, articulated by Lon Fuller, as the “creation of relevant norms” rather than “achieving conformity to norms.”³⁶ In his seminal 1971 article entitled *Mediation – Its Forms and Functions*, Fuller described mediation’s central quality as “its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.”³⁷ This conception worked well in the context of community mediation programs, but was ill suited to court-connected mediation programs developed “to remove litigation from the courts by facilitating agreements in as many cases as possible.”³⁸ While both the “quantitative efficiency” and “qualitative justice” rationales proceeded to coexist, court systems fully embraced the use of mediation, including mandatory mediation programs.³⁹ The result was a clear realization by lawyers that they needed to quickly learn how to operate in this new reality.⁴⁰ Interestingly, these practice changes intersected with thinking going on in the legal academy about needed changes to the law school curriculum.⁴¹

The ABA Task Force on Law Schools and the Profession: Narrowing the Gap was formed in 1989 “for the purpose of studying and improving the processes by which new members of the profession are prepared for the practice of law.”⁴² The work of this task force culminated in the widely disseminated 1992 report (known as the MacCrate Report),⁴³ which identified ten “fundamental skills and values

³⁵ *Id.* at 259–60.

³⁶ Lon L. Fuller, *Mediation – Its Forms and Functions*, 44 S. CAL. L. REV. 305, 307 (1971).

³⁷ *Id.* at 325. In Sander’s remarks at the Pound Conference, he included Fuller’s articulations of the benefits of mediation. THE POUND CONFERENCE, *supra* note 20, at 69.

³⁸ Baruch Bush, *supra* note 33, at 259–60.

³⁹ Bobbi McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice*, in ADR HANDBOOK FOR JUDGES 1, 5 (Donna Stienstra & Susan M. Yates eds., 2004).

⁴⁰ John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 131, 151, 174–75 (2000).

⁴¹ See A.B.A SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR. LEGAL EDUCATION & PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

⁴² *Id.* at 7.

⁴³ *Id.*

that every lawyer should acquire before assuming responsibility for the handling of a legal matter.”⁴⁴ Significantly for the ADR movement, two of the ten skills identified in MacCrate directly related to ADR:

Skill #8, titled Litigation and Alternative Dispute Resolution, suggested that lawyers needed to have “an understanding of the potential functions and consequences” of litigation and alternative dispute resolution “in relation to the client’s knowledge and objectives.”⁴⁵

Skill #1, titled Problem Solving, suggested that lawyers needed to be “familiar with the skills and concepts involved in problem-solving.”⁴⁶ The elements of this skill identified in the report mirror the approach taught in mediation and negotiation courses, namely: “identifying and diagnosing a problem, generating alternative solutions and strategies, developing a plan of action, implementing the plan, and keeping the planning process open to new information and ideas.”⁴⁷

For the ADR movement, these suggestions were initially supported in the academy by the development of stand-alone ADR courses, some of which predated the MacCrate Report.⁴⁸ These ADR courses typically included coverage of negotiation, mediation, arbitration, and hybrid processes such as early neutral evaluation (“ENE”) and summary jury trial with a strong focus on identifying the strengths and weaknesses of each process so that students would be able to appropriately advise their future clients.⁴⁹ As the understanding of dispute resolution processes, theory, and techniques grew in sophistication, ADR survey courses were often replaced by courses about the theory and practice of specific dispute resolution processes, such as courses devoted en-

⁴⁴ *Id.*

⁴⁵ *Id.* at 181. This skill mirrors the “process choice” discussions which were the organizing theme for ADR courses. See *infra* Part I.B.1.

⁴⁶ *Id.* at 129.

⁴⁷ *Id.* at 129–35. While many ADR scholars celebrated the report’s identification of the very skills taught in ADR and stand-alone negotiation and mediation courses, Carrie Menkel-Meadow criticized the report for enacting “a particular picture of the lawyer, as principally a litigator, a ‘means-ends’ thinker who maximizes an abstracted client’s goals.” Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 594 (1994).

⁴⁸ In 1983, forty-three schools reported offering ADR courses in response to an ABA survey of law schools. By 1986, the ABA reported that “a majority of the ABA approved law schools in America now offer courses or clinics on ADR.” Robert B. Moberly, *Introduction: Dispute Resolution in Law School Curriculum: Opportunities and Challenges*, 50 FLA. L. REV. 583, 585–86 (1998).

⁴⁹ See *infra* Part I.B.1 for a more complete discussion of “process choice.”

tirely to negotiation or mediation.⁵⁰ This is consistent with the more robust development of court-connected programs, especially mediation programs, and both of these topic-specific courses easily included process choice coverage.⁵¹

Additionally, in the context of ADR, some of the MacCrate suggestions were implemented through incorporation of specific skill discussions into traditional law school classes.⁵² This was accomplished by adding content to, for example, Civil Procedure to cover ADR and process choice; Contracts or Torts to cover a negotiation; Clinics to cover problem-solving; etc.⁵³ And at the University of Missouri-Columbia, Professor Leonard Riskin developed a unique approach of integrating ADR into all of the first-year courses.⁵⁴ Students participated in a series of integrated activities throughout their entire first year which included, in order: (1) the writing of a client opinion letter which evaluated several dispute resolution methods (part of Legal Research and Writing); (2) a negotiation in Torts after a brief introduction to negotiation theory; (3) a transactional negotiation in Contracts; (4) an overview of mediation and a mediation role play in Civil Procedure; (5) a medical malpractice negotiation in Torts; (6) participation in a property negotiation, followed by watching experts mediate the same dispute; (7) an interviewing and counseling activity in Property; (8) a discussion of arbitration in Contracts; (9) a plea bargaining exercise in Criminal Law; and (10) a final Civil Procedure activity involving

⁵⁰ See Ann Malaspina, *Mediators in the Making*, STUDENT LAW., Dec. 1992, at 29, 30. The methodology of these courses included presentation and discussion of theory and student participation in simulated role plays followed by student reflection and instructor feedback. See Ronald M. Pipkin, *Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri-Columbia*, 50 FLA. L. REV. 609, 615 (1998).

⁵¹ See Cathy Cronin-Harris, *Why Take ADR Classes in Law School*, ARIZ. ST. U. SANDRA DAY O'CONNOR C. L., https://www.law.asu.edu/Portals/28/Why_Take_ADR_Courses_In_Law_School_by_Cronin_Harris.pdf (last visited Jan. 24, 2015).

⁵² See LEONARD L. RISKIN & JAMES E. WESTBROOK, INSTRUCTOR'S MANUAL WITH SIMULATIONS AND PROBLEM MATERIALS TO ACCOMPANY DISPUTE RESOLUTION AND LAWYERS (1987). The book has two sections: Part A "describes how one person used the book to teach an advanced survey course on Dispute Resolution" and Part B "describes activities and exercises . . . to integrate dispute resolution into standard first year courses." *Id.* at 1.

⁵³ See Malaspina, *supra* note 50, at 30-31.

⁵⁴ Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses: A Report on a Collaboration with Six Law Schools*, 50 FLA. L. REV. 589, 591-94 (1998).

counseling a client about process choice.⁵⁵ Although this pervasive approach tied to ADR has declined for a variety of reasons,⁵⁶ many law schools now have first-year courses that focus on lawyering skills⁵⁷ and incorporate many of the important themes developed in the ADR movement. The next section describes three of the most important lessons from the ADR movement: (1) the lawyer's philosophical map as it relates to process choice; (2) interest-based dispute resolution; and (3) the importance of procedural justice.

B. Lessons from the ADR Movement

In studying and critiquing the ADR movement, legal academics have produced a body of theoretical and empirical work that helps to clarify the underlying models and justifications for mediation and negotiation practice in particular⁵⁸ and to measure their implementation against these ideals. Here the focus is on three foundational concepts, which have particular relevance to the larger project of teaching law students to be effective problem-solvers for their clients.

1. The Lawyer's Philosophical Map/Process Choice

In 1982, Leonard Riskin introduced the concept of the lawyer's philosophical map in an article, *Mediation and Lawyers*,⁵⁹ written ostensibly to support society's use of mediation. Recounting E.F. Schumacher's story in *A Guide for the Perplexed*, in which "living churches" did not appear on the Leningrad maps despite their existence, Schumacher analogized this to his experience in "school and university [where he] had been given maps of life and knowledge on which there was hardly a trace of many of the things that [he] most cared about and that seemed . . . to be of the greatest possible importance to the conduct of [his] life."⁶⁰ Riskin noted that the lawyer's philosophical map is based on two assumptions—adversariness of parties and "rule-solubility of disputes."⁶¹ Even though these assumptions are not always valid, "because of their philosophical map, [lawyers] tend to suppose that these assumptions are germane in nearly any situation that they

⁵⁵ *Id.* at 592–94.

⁵⁶ McAdoo et al., *supra* note 10, at 43.

⁵⁷ *Id.* at 54–55.

⁵⁸ Because arbitration is an adjudicatory process and thus is not dissimilar to litigation courses, the focus here is on the ADR processes of negotiation and mediation.

⁵⁹ Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29, 41 (1982).

⁶⁰ *Id.* at 43 (quoting E. F. SCHUMACHER, *A GUIDE FOR THE PERPLEXED* 1 (1977)).

⁶¹ *Id.* at 44.

confront as lawyers.”⁶² Riskin identified many reasons for the dominance of the map,⁶³ including legal education, in which “[n]early all courses at most law schools are presented from the viewpoint of the practicing attorney who is working in an adversary system of act-oriented rules.”⁶⁴

Riskin’s identification of the deficiencies of the lawyer’s standard philosophical map meshes well with Professor Frank Sander’s articulation of the importance for lawyers to attempt to “fit the forum to the fuss”⁶⁵—the concept that each dispute resolution process, from negotiation to mediation to arbitration to litigation, has characteristics that make that process more or less the “right” one to resolve a given dispute.⁶⁶ Although lawyers, by training or disposition, might prefer litigation, it clearly is not the best process for every situation. To make effective process choice selections, Sander and Professor Stephen Goldberg posited that one must “examine the suitability of various dispute resolution processes from the perspective of the parties to the dispute, and then from the public interest perspective.”⁶⁷ Sander and Goldberg suggested that lawyers make this determination in representing clients by examining: (1) “what are the client’s goals, and what dispute resolution procedure is most likely to achieve those goals?”⁶⁸ and (2) “if the client is amenable to settlement, what are the impediments to settlement, and what ADR procedure is most likely to overcome those impediments?”⁶⁹ They noted that lawyers must make this determination with active client involvement because individual clients have very specific goals and interests.⁷⁰ For example, one client may be very concerned about the relationship with his or her counterpart (which suggests a process in which relationships are preserved such as mediation or negotiation), whereas another client may be more inter-

⁶² *Id.* at 45.

⁶³ The reasons include: congruence with the personalities of most lawyers, consistency with client expectations, functional effectiveness, economics, ability to clarify the law and make it predictable, and societal norms about the benefits of self-interest. *Id.* at 47.

⁶⁴ *Id.* at 48.

⁶⁵ Frank E.A. Sander and Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure*, 10 *NEG. J.* 49 (1994).

⁶⁶ Frank E.A. Sander and Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 *HARV. NEGOT. L. REV.* 1 (2006).

⁶⁷ Sander & Goldberg, *supra* note 65, at 50.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

ested in vindication or precedence setting (which would suggest an adjudicatory process). Determining these key client concerns and interests is the second fundamental lesson from the ADR movement.

2. Interest-Based Dispute Resolution

In the same year that Riskin introduced the lawyer's philosophical map, Roger Fisher and William Ury published their widely used book on negotiation, *Getting to Yes*.⁷¹ Previously, negotiation had been taught as a series of competitive tactics which could be employed in order to get the best deal for your client; for example, "taking of firm, almost extreme positions, making few and small concessions, and withholding information that may be useful to the other party."⁷² In *Getting to Yes*, Fisher and Ury popularized the concept of principled negotiation, which consisted of four primary points: (1) separate the people from the problem; (2) focus on interests, not positions;⁷³ (3) invent multiple options looking for mutual gains before deciding what to do; and (4) insist that the results be based on some objective standard.⁷⁴ They encouraged negotiators to recognize that "each side has multiple interests,"⁷⁵ and the most powerful of these interests are basic human needs, including "security, economic well-being, a sense of belonging, recognition, and control over one's life."⁷⁶ They proposed that better results—"win-win" results—could be attained with principled interest-based negotiation.⁷⁷

Two years after the publication of *Getting to Yes*, Professor Carrie Menkel-Meadow applied the interest-based framework to legal negotiations by positing it as a problem-solving method for both clients and society.⁷⁸ Drawing on her experience "watching teachers and students

⁷¹ ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATION AGREEMENT WITHOUT GIVING IN* (1981) (Bruce Patton was added as an author in the second edition).

⁷² Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 342 (1996).

⁷³ The concept of interest-based negotiation was not entirely new. See Mary Parker Follett, *Constructive Conflict* (Jan. 1925) (unpublished manuscript presented at Bureau of Personnel Administration Conference), available at <http://www.columbia.edu/~mwm82/negotiation/FollettConstructiveConflict.pdf>.

⁷⁴ FISHER & URY, *supra* note 71, at 10–11 (Bruce Patton ed., 2d ed. 1991).

⁷⁵ *Id.* at 47.

⁷⁶ *Id.* at 48.

⁷⁷ See *id.* at 12–15.

⁷⁸ Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) (providing a framework for resolving problems and exploring assumptions about the objectives in negotiations).

in clinical programs struggle to understand negotiation, primarily through strategic and tactical considerations,”⁷⁹ she opined that “zero-sum games in legal negotiations may be more the exception than the rule.”⁸⁰ Menkel-Meadow used the concept of problem solving to highlight the importance of determining a client’s actual needs unlike in “the adversarial model which makes assumptions about the parties’ desires to maximize individual gain.”⁸¹ She concluded her article with the assertion that

[b]y viewing legal negotiation as an opportunity to solve both the individual needs and problems of their clients, and the broader social needs and problems of the legal system, negotiators have an opportunity to transform an intimidating, mystifying process into one which will better serve the needs of those who require it.⁸²

Menkel-Meadow continued to underscore the importance of an ADR curriculum⁸³ in later writings noting:

[h]ow a lawyer frames a question in an initial interview tells us much about how that lawyer hopes to deal with the problem . . . Dispute resolution skills demonstrate the interactive nature of the lawyer’s work—the dynamism of counseling and negotiating on behalf of a client as facts, needs and interests change over time. A focus on how such skills change with the context demonstrates the logic of question-framing in an interview, a deposition, a negotiation session, a mediation and a direct examination. Lawyers can learn to become useful before disputes harden into contentious lawsuits, depending on how they use their skills.⁸⁴

The work of scholars like Riskin, Sander, Fisher, Ury, and Menkel-Meadow, as well as many others, brought depth to courses like ADR, Negotiation, Mediation and Mediation clinics. This included significant exposure, theoretically and through skills-building pedagogies, to techniques such as gathering information, identifying party interests and issues, generating movement in non-directive ways such as helping parties to understand the other’s perspective or point of view, reframing the discussion, and overcoming strategic barriers to resolution. Mediation scholars also brought concepts of voice and recognition to the legal academy—key components of procedural justice, which is the

⁷⁹ *Id.* at 762.

⁸⁰ *Id.* at 787.

⁸¹ *Id.* at 801.

⁸² *Id.* at 842.

⁸³ Menkel-Meadow defined this as including negotiation, problem solving, and mediation as well as litigation. Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. REV. 1995, 1996 (1993).

⁸⁴ *Id.* at 1996–97.

third and final contribution from the ADR movement that will be discussed in this section.

3. Procedural Justice

The concepts developed in procedural justice theory provide an important lens through which students can consider their future role and obligations as lawyers. Specifically, the procedural justice literature engages students in examining the critical questions: “what is justice?”; “what responsibility do lawyers, as officers of the court, have to promote justice?”; and “how does a lawyer appropriately advance her client’s sense of justice rather than her own?”⁸⁵

In the early implementation years of court-connected mediation, the evaluations conducted were less conclusive about the hoped-for efficiency achievements but typically found high levels of client satisfaction with mediation, even when cases did not settle.⁸⁶ Thus, mediation advocates began to understand the importance of “procedural justice” and its role in client satisfaction and client self-determination.⁸⁷

Procedural justice is concerned with the “fairness” of the *process* by which decisions are made rather than just considering the fairness of

⁸⁵ See generally Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473 (2008) (explaining why procedural justice matters to individuals); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978) (explaining procedural justice as a means for lawyers to justify their actions without considering the consequences that are promoted).

⁸⁶ See generally WAYNE KOBBERVIG, *MEDIATION OF CIVIL CASES IN HENNEPIN COUNTY: AN EVALUATION 2* (1991) (noting that mediation improved litigant and attorney satisfaction); CRAIG McEWEN, *AN EVALUATION OF THE ADR PILOT PROJECT: FINAL REPORT V* (1992) (noting that there was no discernible impact on the court docket and that ADR created administrative burdens on court staff); JANICE A. ROEHL ET AL., *CIVIL CASE MEDIATION AND COMPREHENSIVE JUSTICE COURTS: PROCESS, QUALITY OF JUSTICE, AND VALUE TO STATE COURTS: FINAL REPORT* (1992) (discussing that disputants involved in mediation had a higher perception of fairness than disputants in litigation); KARL D. SCHULTZ, *FLORIDA’S ALTERNATIVE DISPUTE RESOLUTION DEMONSTRATION PROJECT: AN EMPIRICAL ASSESSMENT* (1990) (noting existing data lacked reliability and the need for a comprehensive ADR evaluation). See also Roselle Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, CONFLICT RESOL. Q., Fall–Winter 2004, at 55, 65–68 (2004) (summarizing the results of twenty-seven studies).

⁸⁷ See generally Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 WASH. U. L. Q. 787 (2001) (noting that procedural justice concerns are important in developing standards of conduct for mediators in addition to assessing mediator performance and client satisfaction).

the *outcome*, the focus of distributive justice.⁸⁸ Professor Nancy Welsh has studied the procedural justice literature from the perspective of court-connected mediation and summarized it as follows:

[R]esearch has shown that when people experience dispute resolution and decision-making procedures, they ‘pay a great deal of attention to the way things are done [i.e., how decisions are made] and the nuances of their treatment by others.’⁸⁹ As a result, perceptions of procedural justice profoundly affect people’s perceptions of distributive justice, their compliance with the outcomes of decision-making procedures and processes, and their perceptions of the legitimacy of the authorities that determine such outcomes.

. . . a disputant’s perception of procedural justice anchors general fairness impressions . . . Further, research has indicated that disputants who have participated in a procedure that they evaluated as fair do not change their evaluation even if the procedure produces a poor or unfair outcome.⁹⁰

E. Allan Lind and Tom Tyler, prolific researchers on procedural justice issues, have found that the following characteristics enhance participant perceptions of procedural justice: the opportunity for participation/voice;⁹¹ the neutrality of the forum;⁹² consideration by the third party of the participants’ views, concerns and evidence;⁹³ and dignified and respectful treatment towards participants.⁹⁴ Understanding the characteristics that enhance perceptions of procedural justice is critically important for all future attorneys to consider in their representation. Indeed, this understanding can do much to counteract the “lawyer’s philosophical map” discussed earlier.⁹⁵

⁸⁸ The literature on “justice” include several different types: distributive justice (concerning fair outcomes), retributive and reparative justice (concerning how to respond to violation of norms), and procedural justice (concerning treatment in making and implementing the decisions that determine outcomes or, said another way, the process and procedures used to arrive at outcomes). Morton Deutsch, *Justice and Conflict*, in *THE HANDBOOK OF CONFLICT RESOLUTION* (Morton Deutsch et al. eds., 3d ed. 2014). See also Welsh, *supra* note 87, at 817.

⁸⁹ Welsh, *supra* note 87, at 818–19 (quoting E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 242 (1988)).

⁹⁰ *Id.*

⁹¹ LIND & TYLER, *supra* note 89, at 101–04; Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCHOL. 117, 121–22 (2000).

⁹² Tyler, *supra* note 91, at 122.

⁹³ *Id.*; see also LIND & TYLER, *supra* note 89.

⁹⁴ LIND & TYLER, *supra* note 89, at 214; see also Tyler, *supra* note 91, at 122.

⁹⁵ See *supra* Part I.B.1. This is one of the reasons Riskin used to advocate for mediation to be studied in law schools.

These complex concepts are more easily understood and internalized in the context of specific experiences, and mediation and negotiation courses are excellent vehicles to provide this opportunity.⁹⁶ The pedagogy of these ADR courses is built around the exploration of dispute resolution and conflict theory coupled with the opportunity for students to try on the roles of negotiators and mediators.⁹⁷ Even more significantly for purposes of understanding procedural justice, students take on the roles of parties in dispute in negotiation and mediation courses. Through these simulations, students have the opportunity to reflect both on how well they are able to understand and implement their clients' goals and interests (when assuming the role of attorney or mediator) and whether they felt listened to and respected in the process (when assuming the role of client).⁹⁸ Through these experiences and discussions, students reflect on the important role attorneys play in providing clients with procedural justice, as well as substantive justice.⁹⁹ While trial advocacy courses provide wonderful opportunities for students to learn the skills of creating a narrative that advances their client's interests, students in these courses usually do not have the opportunity to take on the role of the client to experience the impact of having someone else "tell your story." Given the importance clients attach to procedural justice elements, it is critical that law students understand in a visceral way what it means to be heard and be treated with dignity in a "fair" forum. The simulations in mediation and negotiation courses provide students with the opportunities to experience procedural justice elements and also to reflect and

⁹⁶ "Tyler has also indicated that more informal legal procedures, especially mediation, are viewed as 'particularly fair' and 'typically rated as more satisfactory than court trials.'" Bobbi McAdoo, *A Mediation Tune up for the State Court Appellate Machine*, 2010 J. DISP. RESOL. 327, 328 (2010) (quoting Tyler, *supra* note 91, at 121).

⁹⁷ See Ellen E. Deason et al., *Debriefing the Debrief*, in EDUCATING NEGOTIATORS FOR A CONNECTED WORLD: VOLUME 4 IN THE RETHINKING NEGOTIATION TEACHING SERIES 301, 305 (Christopher Honeyman et al. eds., 2013).

⁹⁸ *Id.* at 324.

⁹⁹ See Melissa Nelken et al., *Negotiating Learning Environments*, in RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE 199, 214 (Christopher Honeyman et al. eds., 2009) (highlighting that "one goal of a negotiation course may be to help learners develop and apply effective schemas for negotiating in a range of contexts," i.e., the effective "transfer" of skills to negotiate effective resolutions to novel legal problems); see also Jennifer Gerarda Brown, *Deeply Contacting the Inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays*, 39 WASH. U. J.L. & POL'Y 189 (2012) (arguing that law students should learn empathy in law school and values-based negotiation role plays are one way to do so).

consider how these elements relate to and can inform their future legal practice.

The scholars who made these important contributions to the ADR movement came to similar conclusions about the central role of the client in problem solving, albeit from slightly different angles. Sander focused on understanding a client's goals and impediments to settlement in order to assess which process would be most productive and yield the best results.¹⁰⁰ Riskin admonished lawyers to be sensitive to their own philosophical map, which could prevent them from seeing the landscape and items of interest to their clients.¹⁰¹ Fisher, Ury, and Menkel-Meadow framed negotiation—including legal negotiation—as an effort to solve individual and societal needs by focusing on underlying interests.¹⁰² Welsh, Bush, Lind, and Tyler focused on the procedural justice research to highlight the importance of client participation to achieve satisfaction with the process.¹⁰³ Each of these lessons from the ADR movement complements and enhances the lessons developed in lawyering skills instruction, which is explored next.

II. THE CLIENT PROBLEM-SOLVING FOUNDATION FOR LAWYERING SKILLS INSTRUCTION

The lessons about client problem solving from the ADR movement fit well within the pedagogy of lawyering skills, as it has developed within clinical legal education, from a search for teaching materials to accompany the rapid expansion of clinical programs in the 1960s and 1970s to an explicit focus on teaching client problem solving.¹⁰⁴ By 1992, the Committee on the Future of the In-House Clinic described clinical education as “first and foremost a method of teaching” in which students “are confronted with problem situations of the sort that lawyers confront in practice” and are asked to “deal with

¹⁰⁰ Frank E.A. Sander & Stephen B. Goldberg, *Making the Right Choice*, 79 A.B.A. J. 66 (1993).

¹⁰¹ Riskin, *supra* note 59, at 44.

¹⁰² FISHER & URY, *supra* note 71, at 10; Menkel-Meadow, *supra* note 78, at 760.

¹⁰³ Welsh, *supra* note 87; Baruch Bush, *supra* note 33; LIND & TYLER, *supra* note 89; Tyler, *supra* note 91.

¹⁰⁴ In 2002, the *Clinical Law Review* devoted a symposium issue to “Papers Presented at the UCLA/IALS Conference on ‘Problem-Solving in Clinical Education.’” 9 CLINICAL L. REV. iii (2002). Notably, in cataloguing fundamental lawyering skills, the American Bar Association’s MacCrate Report lists “problem-solving” first, ahead of even “legal reasoning and analysis” and “legal research.” MACCRATE REPORT, *supra* note 41, at 138, 141.

the problem in role.”¹⁰⁵ As the lawyering skills literature for clinical instruction matured, it endorsed a client-centered model of representation that focused on teaching law students—not just how to solve problems like a lawyer—but how to solve problems *for clients*.¹⁰⁶ This section describes the history and development of lawyering skills instruction, showing how the demand for clinic teaching materials fueled the development of instructional materials in generalized lawyering skills and how those materials came to be grounded in a client-centered philosophy of legal representation.

A. Generalized Lawyering Skills Instruction

In the 1960s and 1970s, clinical legal education began to take hold in American law schools as the result of an influx of funding from the Ford Foundation.¹⁰⁷ With law clinics beginning in almost every law school in the country,¹⁰⁸ clinicians were faced with the challenge of figuring out how and what to teach students as they represented real clients in actual cases.¹⁰⁹ As Bea Moulton put it, describing the genesis of the groundbreaking lawyering skills textbook she co-authored with Gary Bellow: “Clinicians were starting from scratch in school after school, helping students represent thousands of poor people. They

¹⁰⁵ *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 511 (1992). Clinical legal education has in the past been understood to encompass the teaching of law practice in three settings: in-house clinics; externships; and simulations. See generally Elliott S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations*, 51 J. LEGAL EDUC. 375 (2001). However, with the new emphasis on “experiential education” in law school, the definition of “clinical legal education” may be narrowing to specify teaching students in the real practice settings of clinics and externships. Cynthia Adcock et al., Working Grp. on Vocabulary and Collaboration, Alliance for Experiential Learning in Law, *A Glossary for Education in Law Schools, in Experience the Future: Papers from the Second National Symposium on Experiential Education in Law*, 7 ELON L. REV. 1, 12, Part II.A, at 15 (2015).

¹⁰⁶ See *infra* Part II.B.

¹⁰⁷ Barry et al., *supra* note 8, at 18–19. During this period, the Council on Legal Education for Professional Responsibility (CLEPR) and its predecessor organizations funded by the Ford Foundation distributed nearly \$13 million to “jump-start” clinical legal education. *Id.* at 19; see also J. P. “Sandy” Ogilvy, *Celebrating CLEPR’s 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools*, 16 CLINICAL L. REV. 1, 9–18 (2009) (describing in more detail the impact of CLEPR funding on clinical legal education).

¹⁰⁸ Barry et al., *supra* note 8, at 18.

¹⁰⁹ See, e.g., Michael Meltner, *Celebrating The Lawyering Process*, 10 CLINICAL L. REV. 327, 331 (2003) (reflecting on his early days of clinic teaching: “Until I had to figure out how to teach what previously was just done, I never sought to understand lawyering in anything approaching the rigor that a law teacher would apply in parsing doctrine.”).

needed a book.”¹¹⁰ Existing practice materials were not much help; they tended to take “a strong ‘this is the way to do it’ perspective” that did not invite exploration and inquiry in an academic setting.¹¹¹ Moreover, although many experienced lawyers were skilled at lawyering tasks like interviewing or negotiation, most lacked a “framework or vocabulary for describing what the task involved or how to get better at it.”¹¹²

Bellow and Moulton’s early textbook, *The Lawyering Process: Material for Clinical Instruction in Advocacy*,¹¹³ introduced a new approach to teaching generalized lawyering skills that significantly shaped subsequent developments in the field. The Bellow and Moulton approach began with the premises that the practice of law is complex and multifaceted and that the lawyering process can be analyzed and taught with the same kind of academic rigor applied in other areas of the law school.¹¹⁴ Indeed, Bellow and Moulton applied analytic rigor in the project of creating their teaching materials, subjecting their own practice experience to deep analysis and seeking resources from other disciplines to explore and critique each component part of the lawyering process.¹¹⁵ The resulting instructional materials divided the lawyering process into six tasks—interviewing, constructing a case, negotiating,

¹¹⁰ Bea Moulton, *In Memoriam: Gary Bellow*, 114 HARV. L. REV. 409, 420 (2000).

¹¹¹ Bea Moulton, *Looking Back on The Lawyering Process*, 10 CLINICAL L. REV. 33, 50 (2003).

¹¹² *Id.* at 46.

¹¹³ GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978).

¹¹⁴ David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191, 191–92 (2003).

¹¹⁵ Moulton describes the process as follows:

Gary would begin by asking a question like, “What are the goals of a client interview?” And I would come up with something, and he would refine it, or add to it, and then we might qualify it, and eventually we’d develop some sort of list. And then he’d say, “Who else conducts interviews like that?” And that would be a hard one, because client interviewing wasn’t like therapy, or social science research, though there were some common aspects. Perhaps doctors did something similar, or journalists, if they were writing about sensitive subjects Anyway, it was good that the law school at USC was part of a larger campus, because we would come up with a list of possibilities that took us to the main library or other libraries to skim practically every book or article that had the word “interview” or other clues in the title. It was a process that was repeated with respect to almost every lawyering task except trying cases, and even there, Gary wanted to track down examples from literary criticism and drama that would flesh out his story-telling and performance analogies.

Moulton, *supra* note 111, at 50–51; *see also* Moulton, *supra* note 110, at 418–19 (providing a similar description of the process of creating *The Lawyering Process* textbook).

examining witnesses, presenting arguments, and counseling¹¹⁶—which largely track what we now call fundamental or essential lawyering skills.¹¹⁷ Instead of rote cookbook-type instruction, Bellow and Moulton provided analytical frameworks for understanding each lawyering skill; drew on empirical studies and models from other disciplines; and devoted a special section to exploring the ethical dimensions of each part of the lawyering process.¹¹⁸

Although Bellow and Moulton did not explicitly focus on client problem solving, the excavation of the deep structure of lawyering facilitates a basic building block of problem solving: the transfer of skills learned in the context of one legal practice setting into other practice areas.¹¹⁹ As David Binder and Paul Bergman explain, specific training can provide a basis for “near transfer,” defined as the ability to apply skills to “relatively routine and repetitive” tasks where “surface features tend to remain consistent from one situation to another.”¹²⁰ However, problem solving requires “far transfer,” the ability to adapt and tailor general principles to the unique needs of a new situation.¹²¹ By helping students understand and internalize the foundational concepts that underlie generalized lawyering skills, educators “enable students to transfer the concepts, strategies and techniques they begin to use while in clinical courses to the many and varied practice settings they are almost certain to encounter after graduation.”¹²²

B. *The Client-Centered Approach to Legal Representation*

As lawyering skills literature expanded and matured, it developed a firm normative grounding in what came to be known as the “client-

¹¹⁶ Bryant & Milstein, *supra* note 7, at 4 (describing the six component parts as interviewing, constructing a case, negotiation, witness examination, argument, and counseling).

¹¹⁷ See, e.g., MACCRATE REPORT, *supra* note 41, at 141–207 (identifying as “fundamental lawyering skills”: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute-resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas); STEFAN H. KRIEGER ET AL., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* (4th ed. 2011) (dividing skills instruction into the four categories listed in the title).

¹¹⁸ Bryant & Milstein, *supra* note 7, at 4–5.

¹¹⁹ Binder & Bergman, *supra* note 114, at 198.

¹²⁰ *Id.*

¹²¹ *Id.* Teaching far transfer is also a concept developed in the ADR pedagogy. See Nelken et al., *supra* note 99, at 214–30.

¹²² Binder & Bergman, *supra* note 114, at 198.

centered approach” to legal representation, popularized in a 1977 textbook by David Binder and Susan Price,¹²³ which spawned several subsequent editions with various co-authors.¹²⁴ Although presented as instructional materials for teaching client interviewing and counseling, the subsequent editions of David Binder’s “client-centered approach” textbooks offered something more: a vision of lawyering that viewed legal representation as client problem solving, focused on client satisfaction, and promoted client participation in the lawyer-client relationship.¹²⁵

The cornerstone for the client-centered approach is its conceptualization of lawyering as client problem solving.¹²⁶ As the authors emphasize, “no matter who the client, what the substantive legal issues or whether the situation involves litigation or planning, your principal role as a lawyer will always be the same—to help clients achieve effective solutions to their problems.”¹²⁷ Effective solutions were defined as solutions that would result in maximum client satisfaction,¹²⁸ which depended not only on the results that a lawyer could achieve for a client, but also on how the client was treated in the process.¹²⁹

The client-centered approach took a sharp turn away from the directive and paternalistic approach in traditional notions of professionalism, which was coming under increasing fire in the mid-1970s in both law and medicine.¹³⁰ Instead, it placed a premium on under-

¹²³ DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

¹²⁴ See, e.g., DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (3d ed. 2012).

¹²⁵ Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 *CLINICAL L. REV.* 369, 376 (2006); see also BINDER ET AL., *supra* note 124, at xxi. (“More than a set of techniques, the client-centered approach is an attitude of looking at problems from clients’ perspectives, of seeing problems’ diverse natures, and of making clients true partners in the resolution of their problems.”).

¹²⁶ Kruse, *supra* note 125, at 376.

¹²⁷ BINDER ET AL., *supra* note 124, at 3. It is striking how similar this notion is to Chief Justice Burger’s 1977 quote. See *supra* note 25 and accompanying text.

¹²⁸ BINDER ET AL., *supra* note 124, at 318.

¹²⁹ The early literature in interviewing and counseling suggested that a client participatory model of representation would lead to objectively better results, largely basing this conclusion on a 1974 study by Douglas Rosenthal. See Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 *ARIZ. L. REV.* 501, 544–45 (1990) (discussing the influence of the Rosenthal study on arguments in favor of client-centered representation).

¹³⁰ Kruse, *supra* note 125, at 381–83 (describing the historical context into which the client-centered approach was introduced, including the informed consent movement

standing and addressing the non-legal aspects of a client's situation, defined as the economic, social, psychological, moral, political, and religious consequences likely to flow from representation choices.¹³¹ Although lawyers can help identify legal strategies and predict legal outcomes, Binder and Price argued, the determination of what will best satisfy a client can be made only within the context of a client's unique values, which the client may have difficulty articulating and quantifying.¹³² As a result, in many decisions relating to legal representation, the client-centered approach suggests that "the lawyer should leave the final decision to the client to make on the basis of the client's own intuitive weighing process."¹³³

The client-centered approach to legal representation is a corrective to the inherent tendency of professionals to view their clients' problems solely or excessively in terms of the client's legal issues, missing much of the context in which the client's legal issues arise.¹³⁴ Lawyers can fall into the mental habit of viewing "clients' problems as though legal issues are at the problems' center," Binder and his later co-authors cautioned, "much as Ptolemy viewed the Solar System as though the Earth were at the center of the universe."¹³⁵ The client-centered approach articulated the need for lawyers to put legal expertise to work in the context of the totality of a client's concerns, keeping the client, rather than the client's legal issues, at the center of the representation.¹³⁶

To keep the client at the center of the representation, the lawyer's actions must respond to the client's perceptions and feelings and reflect the client's values.¹³⁷ Binder and Price turned to the field of psychology for methods that would achieve these goals, relying in part on

in the medical field, empirical criticism of traditional lawyering, and the procedural justice studies in dispute resolution).

¹³¹ BINDER ET AL., *supra* note 124, at 5–15.

¹³² BINDER & PRICE, *supra* note 123, at 148.

¹³³ *Id.* at 135–40.

¹³⁴ Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 104 (2010) (noting that lawyers have a tendency to view their clients as "walking bundles of legal rights and interests instead of whole persons"); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 21 (1975) (noting that professional training teaches professionals to respond to clients as segments or aspects of persons, not as whole people).

¹³⁵ BINDER ET AL., *supra* note 124, at 5.

¹³⁶ *Id.* at 14–15.

¹³⁷ *Id.* at 8–11 (listing as hallmarks of a client-centered approach: (a) seek out potential non-legal consequences; (b) ask clients to suggest potential solutions; (c) en-

the client-centered therapeutic techniques of Carl Rogers, after which they named their approach.¹³⁸ These techniques include the use of empathic understanding as a facilitator of communication¹³⁹ and active listening techniques for demonstrating understanding of both the content of what a client has said and the feelings that accompany it.¹⁴⁰

Although the original Bellow and Moulton skills textbook was situated squarely within the context of litigation, lawyering skills instruction has expanded over time to include techniques for client problem solving in transactional settings. As early as 1991, the Binder textbooks included special chapters with techniques for gathering information and counseling clients about business deals.¹⁴¹ As transactional clinics have become more prevalent,¹⁴² instructional materials have expanded to focus on the lawyering skills that are more specific to deal making.¹⁴³

Client problem-solving skills are now widely taught in both clinic and simulation courses. Many schools offer stand-alone skills courses focused on client interviewing and counseling or incorporate instruction in those skills into more general first-year lawyering courses. Although the Binder textbooks now compete in a more crowded market of instructional materials, the client-centered or client-participatory approach is almost always included and often cited as the preferred model of lawyering.¹⁴⁴ The client-centered approach is also promoted

courage clients to make important decisions; (d) provide advice based on a clients' values; (e) acknowledge clients' feelings and recognizes their importance).

¹³⁸ See, e.g., BINDER & PRICE, *supra* note 123, at 15 n.12 (citing Carl Rogers in discussing the use of non-judgmental understanding as an inducement to communicate); BINDER ET AL., *supra* note 124, at 27 (including an extensive quote from Rogers on empathic understanding).

¹³⁹ BINDER ET AL., *supra* note 124, at 27–28.

¹⁴⁰ *Id.* at 46–48.

¹⁴¹ *Id.* at 197–211 (Gathering Information for Proposed Deals); *id.* at 212–24 (Techniques for Gathering Information about Proposed Deals); *id.* at 376–406 (The Counseling Model and Proposed Deals).

¹⁴² Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J.L. & POL'Y 85, 86 (2013).

¹⁴³ See ALICIA ALVAREZ & PAUL TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE (2013), for an example of an instructional guide on deal-making.

¹⁴⁴ See, e.g., ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATING 26–32 (1990) (discussing “person-centered” helping theories based on Rogerian psychology); STEPHEN ELLMANN ET AL., LAWYERS AND CLIENT: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 6 (2009) (describing “engaged client-centered representation” as the set of fundamental principles that “should infuse the entire lawyer-client relationship”); STEPHAN H. KRIEGER & RICHARD K. NEUMANN, ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 22 (4th ed. 2011) (discussing the client-centered approach as the preferred model of

in the ABA Law Student Division's annual Client Counseling Competition, in which teams of law students simulate an office consultation with a client and are judged on their effectiveness in actively listening and responding in a non-judgmental way to the client's concerns.¹⁴⁵

C. Client Problem-Solving Skills in Clinical Pedagogy

Teaching methods in live-client clinics include a variety of methods to facilitate client problem solving in actual cases, including individual supervision meetings;¹⁴⁶ case rounds;¹⁴⁷ seminar-style reading and discussion;¹⁴⁸ simulations and role-plays;¹⁴⁹ self-reflection;¹⁵⁰ and structured feedback on performance.¹⁵¹ Clinical instructors are generally cautioned to withhold explicit direction in favor of assisting students in the process of generating and evaluating options for taking the next step in a case or matter.¹⁵² This "non-directive" supervision model is designed to maximize student learning by giving students primary responsibility and control over the lawyering experience within a supervisory structure that helps students reflect and generalize about the choices they make.¹⁵³

legal representation); *see also* JENNIFER K. ROBBENOLT AND JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* (2013) (pursuing similar insights for lawyers from the perspective of ADR scholars).

¹⁴⁵ *See generally* Debra L. Zorn, *Some Suggestions for Successful Interviewing in the ABA Client Counseling Competition*, 18 CREIGHTON L. REV. 1443 (1985) (describing in detail the judging criteria in the competition).

¹⁴⁶ *See* Kenneth Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981); Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 110 (1993-94).

¹⁴⁷ Susan Bryant & Elliott S. Milstein, *Case Rounds: A "Signature Pedagogy" for Clinical Education?*, 14 CLINICAL L. REV. 195 (2007).

¹⁴⁸ Milstein, *supra* note 105, at 377-78.

¹⁴⁹ *See id.* (discussing the use of simulation in clinical teaching).

¹⁵⁰ J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55, 77 (1996); Amy L. Ziegler, *Developing a System of Evaluation in Clinical Legal Teaching*, 42 J. LEGAL EDUC. 575, 577 (1992).

¹⁵¹ *See* Beryl Blaustone, *Teaching Law Students to Self-Critique and to Develop Critical Clinical Self-Awareness in Performance*, 13 CLINICAL L. REV. 143 (2006) (describing a "feedback model designed to engage law students in a rigorous and routinized analysis of lawyering performance").

¹⁵² Justine A. Dunlap & Peter A. Joy, *Reflection-in-Action: Designing New Clinical Teacher Training by Using Lessons Learned from New Clinicians*, 11 CLINICAL L. REV. 49, 67 (2004).

¹⁵³ *See generally* Kreiling, *supra* note 146 (explaining the learning theory behind clinical supervision and describing clinical supervision methods). However, non-directive supervision has been criticized when it is employed to the exclusion of other helpful

A key component of clinical instruction pushes students to uncover and question the assumptions they bring to identifying and analyzing the problems posed in legal representation.¹⁵⁴ Clinicians are encouraged to “seize the disorienting moments” that students will inevitably encounter when the realities of legal practice—particularly poverty law practice—challenge their preconceived notions of how law and legal systems operate.¹⁵⁵ Cognizant that law students often come from different socioeconomic backgrounds than their clients, clinics teach cross-cultural understanding by asking students to imagine “parallel universes” that might explain their clients’ or others’ behavior in a variety of different ways.¹⁵⁶

As the client-centered approach to legal representation became integrated into clinical teaching, concerns about client participation and client voice have also worked their way into clinical instruction.¹⁵⁷ A line of scholarship arising from clinical cases illustrates the struggles of integrating client voice into advocacy, especially in poverty law contexts, where the legal story needed to fit the client’s case into a viable remedy can lack the dignity of the client’s actual narrative.¹⁵⁸ In a classic case study drawn from poverty law practice, Lucie White analyzed

teaching techniques, such as collaboration and modeling. See, e.g., Harriet Katz, *Reconsidering Collaboration and Modeling: Enriching Clinical Pedagogy*, 41 GONZ. L. REV. 315 (2006).

¹⁵⁴ Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 298, 304 (2001).

¹⁵⁵ Fran Quigley, *Seizing the Disorienting Moment*, 2 CLINICAL L. REV. 37 (1995). This concept of disorientation as a means of advancing understanding was one of the topics explored in The Rethinking Negotiation Teaching Project led by Hamline University. *Rethinking Negotiation Teaching*, HAMLINE U. SCH. L., <http://www.hamline.edu/law/dri/rethinking-negotiation-teaching/> (last visited Feb. 5, 2015). In particular, see VENTURING BEYOND THE CLASSROOM: VOLUME 2 IN THE RETHINKING NEGOTIATION TEACHING SERIES (Christopher Honeyman et al. eds., 2010) [hereinafter VENTURING BEYOND THE CLASSROOM] (containing a section entitled “Beyond the Classroom,” which included eight chapters about adventure learning in which students directly experience “real” negotiations, the goal of which is to become aware of cognitive or rational responses as well as emotional responses). See also James Coben, Christopher Honeyman, & Sharon Press, *Straight Off the Deep End in Adventure Learning*, in VENTURING BEYOND THE CLASSROOM, *supra*, at 110; Melissa Manwaring, Bobbi McAdoo & Sandra Cheldelin, *Orientation and Disorientation: Two Approaches to Designing “Authentic” Negotiation Learning Activities*, in VENTURING BEYOND THE CLASSROOM, *supra*, at 140.

¹⁵⁶ Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 70–72 (2001).

¹⁵⁷ Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 487 (1994).

¹⁵⁸ See, e.g., Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

the representation of “Mrs. G.,” a client defending against a claim of welfare overpayment, who has to characterize her purchase of Sunday shoes for her children as a “necessity” in order to prevail on the legal merits.¹⁵⁹ Several clinicians followed suit, analyzing the impact on clinical legal education of White’s basic premise that legal norms can silence the narratives of socially subordinated clients.¹⁶⁰ Although this literature is not specifically tied to the procedural justice research that has been so influential in the ADR field, it helps translate the concerns about client participation and voice into the context of advocacy and representation.

In short, the history and development of clinical pedagogy reflects many of the themes and concerns that were developing side-by-side in the ADR movement during the last part of the twentieth century. The next part of this article explores these synergies and suggests that they can usefully be employed to develop a law school curriculum around the central theme of client problem solving, using Hamline’s experiential curricular reform as an example.

III. BRINGING A PROBLEM-SOLVING FOCUS TO EXPERIENTIAL EDUCATION: THE HAMLINE EXPERIENCE

As the experiential education movement picks up steam within legal education, the extent to which it will reshape legal education remains unknown. Law schools that are taking up the challenge of broader-scale curricular reform are experimenting with a range of approaches, from a full-blown retooling of the third year of law school, to more modest creation, expansion, and coordination of experiential opportunities in the curriculum.¹⁶¹ At Hamline University School of Law, the faculty has chosen to focus on a progression of experiential requirements and opportunities under the unifying theme of client problem solving, which takes advantage of the synergies created among Hamline’s long-standing commitment to lawyering skills in-

¹⁵⁹ *Id.*

¹⁶⁰ See, e.g., Miller, *supra* note 157 (analyzing a clinic case to illustrate how the development of case theory can be an entry point for integrating client narrative into representation); Robert D. Dinerstein, *A Meditation on the Theoretic of Practice*, 43 HASTINGS L.J. 971 (1991) (using a clinic case to illustrate the complications of integrating client narrative into case theory).

¹⁶¹ See, e.g., *The New Third Year: Third Year Components*, WASH. & LEE U. SCH. L., <http://law.wlu.edu/thirdyear/page.asp?pageid=652> (last visited Dec. 15, 2014); *Legal Skills in Social Context*, NE. U. SCH. L., <http://www.northeastern.edu/law/experience/lssc/> (last visited Dec. 15, 2014).

struction and its Dispute Resolution Institute.¹⁶² This part explains those synergies, describes how client problem solving emerged as the unifying theme at Hamline, and shows how it is built into Hamline's experiential programming.

A. Synergies Between Dispute Resolution and Clinical Pedagogy

From the 1970s to the 1990s, the fields of alternative dispute resolution and clinical legal education were developing within distinct subcultures of the legal academy, with only marginal overlap among professors who studied or taught in both fields.¹⁶³ Yet there are strong synergies between the fields that create fertile ground for collaboration as law schools move into the new era of experiential curricular reform.

Importantly, there is a shared commitment in both fields to the integrated teaching of theory and practice.¹⁶⁴ The integration of theory and practice lays an important foundation for the exercise of professional judgment because it helps lawyers tie the decisions they make in day-to-day practice to the foundational principles of good lawyering.¹⁶⁵ One of the dangers in the new push toward experiential learning—especially in an era of fiscal austerity—is that law schools will retain the teaching of legal theory within the walls of the law school and “farm out” their students' experiential learning to practicing lawyers, who may or may not be well-situated to transmit their own expertise.¹⁶⁶ A key feature of Bellow and Moulton's development of generalized lawyering skills instruction was its studied integration of theory and practice, designed to educate students in the purposes, un-

¹⁶² *The Hamline Experiential Progression*, HAMLINE U. SCH. L., <http://www.hamline.edu/law/experiential-learning/experiential-progression/> (last visited Nov. 11, 2014).

¹⁶³ Many schools, including Hamline, developed mediation clinics, taught by faculty who straddled both fields. See *infra* Part III.B. Carrie Menkel-Meadow is an early and notable exception for her deep involvement in both clinical legal education and alternative dispute resolution and her ability to envision the connections between them. See, e.g., Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEVE. ST. L. REV. 555 (1980); Carrie Menkel-Meadow, *The Lawyer as Problem-Solver and Third-Party Neutral Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785 (1999).

¹⁶⁴ Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, *supra* note 163.

¹⁶⁵ *Id.* at 555.

¹⁶⁶ For a fuller development of this idea, see Katherine R. Kruse, *Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice*, 45 MCGEORGE L. REV. 7, 28–29 (2013).

derlying justifications, and deep structure of each part of the lawyering process, and this pedagogical approach continues to characterize skills education in both law school clinics and alternative dispute resolution courses.¹⁶⁷

Beyond these synergies in pedagogical approach, the clinical legal education and ADR movements teach similar lessons about the basic tenets of client problem solving. There is a significant commitment in each field to the ideas of client autonomy, self-determination, and control, backed by the idea that clients will be best served if their self-defined goals and interests are met by the legal representation.¹⁶⁸ This commitment is evidenced in the insistence of the client-centered approach that the non-legal dimensions of a situation often predominate in the client's thinking and determine the outcome that will best satisfy a client.¹⁶⁹ And it pervades the problem-solving approaches to negotiation and mediation, which suggest that identifying and satisfying the parties' underlying interests are often more important than vindicating their legal positions.¹⁷⁰ And there is a concern in each field about the importance of the client being heard and understood in the legal process and the important role that lawyers play in ensuring that this happens both inside and outside the lawyer-client relationship.¹⁷¹

Both fields share a concern that lawyers' law-centered focus can impede their ability to engage in effective problem solving for and with their clients. Riskin's identification of the "lawyers' philosophical map" points to the danger that lawyers will overvalue litigation as a dispute resolution process, missing opportunities to find common ground among disputing parties.¹⁷² The client-centered approach is based on a similar concern that lawyers will view their clients' problems in legal terms and overlook the importance of the social, psychological, economic, political, and moral dimensions of the client's situation.¹⁷³

Each field focuses instruction on a common set of techniques and capacities based on ensuring that legal representation stays true to the attainment of client goals and consistent with client values and priori-

¹⁶⁷ *Id.* at 27–28.

¹⁶⁸ See generally Menkel-Meadow, *The Legacy of Clinical Education*, *supra* note 163.

¹⁶⁹ See *id.*

¹⁷⁰ See generally VENTURING BEYOND THE CLASSROOM, *supra* note 155.

¹⁷¹ *Id.*

¹⁷² Riskin, *supra* note 59, at 43–48.

¹⁷³ *Id.* at 44.

ties.¹⁷⁴ A common set of techniques for interpersonal communication, designed to elicit a broader range of information from clients and parties, includes active listening, neutral and non-judgmental empathic responses, and appeals to deeper values or future interests.¹⁷⁵ Each field also focuses on developing habits of mind that help lawyers break out of their preconceptions and see a situation from multiple or different perspectives.¹⁷⁶ Clinical pedagogy focuses on developing the habits of challenging assumptions and of reflective practice.¹⁷⁷ Dispute resolution emphasizes identifying underlying interests as a way to reframe problems and generate multiple possible solutions.¹⁷⁸

The shared pedagogical techniques, the shared concern that lawyers will fall prey to law-centric analysis, and the common commitment to client goals, values and perspectives, create a solid foundation for collaboration between those in the ADR and clinical legal education fields as they shape an experiential program around client problem solving. The following sections demonstrate how this collaboration is occurring at Hamline University School of Law, which has harnessed its historic strength in ADR in implementing a more recent set of experiential curricular reforms.

B. The Development of the Client Problem-Solving Focus at Hamline University School of Law

Early in the history of Hamline University School of Law, the Hamline faculty embraced the goal of providing students with an integrated progression of lawyering skills instruction.¹⁷⁹ In 1985, Hamline's Director of Lawyering Skills Program proposed a plan to develop a progressive sequencing of skills courses throughout the curriculum in the areas of litigation practice, public interest advocacy, general law office practice, and corporate and commercial law practice.¹⁸⁰ Although the plan was never fully implemented, it coordinated what

¹⁷⁴ Menkel-Meadow, *The Legacy of Clinical Education*, *supra* note 163, at 556.

¹⁷⁵ *Id.* at 559.

¹⁷⁶ *Id.* at 556.

¹⁷⁷ *Id.* at 556-57.

¹⁷⁸ *Id.* at 557.

¹⁷⁹ Hamline University School of Law was accredited by the American Bar Association in 1980 after having joined Hamline University in 1976.

¹⁸⁰ Marilynne K. Roberts, *Lawyering Skills at Hamline University School of Law 9-15* (Feb. 1985) (unpublished manuscript) (on file with author). These courses included a foundational course in Lawyering Skills, followed by intensive simulation courses in general practice, litigation practice, public law practice, and corporate practice. *Id.* at 43. These simulation courses would be followed by clinical courses focusing on client

were then disparate skills and clinic offerings and set the stage for the development of a robust array of skills, clinic, and field placement courses in the Hamline curriculum. As the planning document noted, the question for Hamline was “not ‘whether’ skills training, but which skills, and when.”¹⁸¹ Indeed, as early as 1985, there was a “consensus among the faculty that skills training is necessary and desirable” and “support for making skills training integrated and interrelated within the curriculum.”¹⁸²

However, Hamline’s commitment to teaching the skills associated with client problem solving is rooted even more deeply in its history as a leader in the field of alternative dispute resolution. In 1991, Hamline faculty member Bobbi McAdoo founded Hamline’s Dispute Resolution Institute (DRI), to “deliver world-class teaching of ADR-related subjects for law students and lawyers.”¹⁸³ McAdoo’s work in Minnesota’s larger ADR community provided a significant role for DRI in its early years, training lawyers and judges in the wake of Minnesota’s enactment of a state statute mandating the consideration of ADR in all civil cases.¹⁸⁴ The DRI has gone on to become a top-ranked dispute resolution program in the nation, partnering in national and international programs and projects, as well as offering certificates in dispute resolution, international business negotiation, and global arbitration law and practice.¹⁸⁵

At the core of the DRI philosophy and approach, there has always been a commitment to integrating ADR knowledge and skills into instruction about the traditional advocacy role of the lawyer.¹⁸⁶ In the

representation in each area. *Id.* at 50. The plan was to be phased in over a four-year period between 1985 and 1989. *Id.* at 58.

¹⁸¹ *Id.* at 6.

¹⁸² *Id.*

¹⁸³ HAMLINE UNIV. SCH. OF LAW, DISPUTE RESOLUTION INSTITUTE: 20TH ANNIVERSARY 18 (2011).

¹⁸⁴ McAdoo et al., *supra* note 10, at 57; MINN. GEN. R. PRAC. 114.

¹⁸⁵ *Dispute Resolution Institute*, HAMLINE U. SCH. L., <http://www.hamline.edu/law/dri/> (last visited Nov. 11, 2014). In addition to its study abroad programs in London and Jerusalem, DRI collaborated with ADR Center Foundation, Italy, to direct a multi-year pedagogical project hosting conferences in Rome, Istanbul, and Beijing. The project, called “Rethinking Negotiation Teaching,” was based on the premise “that Western, particularly American, concepts have dominated the development of negotiation teaching over the last three decades in the world’s law and business schools without critical examination of the need for cultural adaptation.” HAMLINE UNIV. SCH. OF LAW, *supra* note 183, at 14.

¹⁸⁶ McAdoo et al., *supra* note 10, at 58.

1990s, Hamline was one of six law schools to participate in the University of Missouri-Columbia's program to integrate dispute resolution pervasively throughout the law school curriculum.¹⁸⁷ Jim Coben, one of the clinical professors hired under Hamline's lawyering skills rollout, quickly turned his attention to ADR, developing a series of mediation-based clinics, including the first mediation representation clinic in the country.¹⁸⁸ More recently, in 2008, Hamline stopped offering its Certificate in Dispute Resolution to Juris Doctor students, creating a new integrated Certificate in Advocacy and Problem-Solving (CAPS), which incorporated not only courses about the theory of conflict and ADR processes, but also litigation courses, such as Evidence and Trial Advocacy, and an advocacy practice requirement that students complete three credits of clinic, externship, or advanced skills courses.¹⁸⁹

In 2007, in the wake of the Carnegie Report, the Hamline faculty again turned its attention to experiential curricular reform, holding both a retreat to promote good teaching across the curriculum and a faculty colloquium devoted to studying the Carnegie Report's recommendations for a curricular overhaul.¹⁹⁰ In 2008, the Dean appointed a faculty task force, charging the faculty to develop a first-year course to provide "knowledge about the role of lawyers in society and the context in which legal problems arise" and to "introduce the theme of problem solving as a distinctive part of a Hamline education."¹⁹¹ In response, the faculty developed the course, Practice, Problem-Solving and Professionalism (P3), and offered it for the first time in fall 2010.¹⁹² The P3 course is a foundational course designed to introduce students to the many roles that lawyers assume in society, including

¹⁸⁷ *Id.* at 57.

¹⁸⁸ *Id.*

¹⁸⁹ *Certificate in Advocacy and Problem-Solving (CAPS)*, HAMLINE U. SCH. L., <http://www.hamline.edu/law/dri/caps/> (last visited Nov. 11, 2014). The Certificate in Dispute Resolution (CDR) is still offered to business and law professionals and graduate students, but is no longer an option for Hamline J.D. students. The change was made so that Hamline Law graduates would understand alternative dispute resolution in the context of the day-to-day, problem-solving work of lawyers.

¹⁹⁰ McAdoo, et al., *supra* note 10, at 58 n.89.

¹⁹¹ *Id.* at 58 (quoting Memorandum from Jon Garon to the Faculty of Hamline Law School (May 2008)).

¹⁹² McAdoo et al., *supra* note 10, at 39. The course was revised and offered again in spring 2012, and has been offered two more times in the spring of students' first year, with modifications each time. In 2014, the faculty voted to increase the credits from two to three and incorporate instruction in professional responsibility. The new course, Practice, Problem-Solving and Professional Responsibility, will be offered for the first time in spring 2015.

advocate, counselor, negotiator, and transactional architect, “all of them grounded in problem-solving.”¹⁹³

While the foundational P3 course focuses explicitly on lawyers as problem-solving professionals, other curricular reforms help to integrate client problem-solving lessons throughout all three years of law school. In 2013, the Hamline faculty approved a plan called the Hamline Experiential Progression,¹⁹⁴ a coordinated set of requirements and opportunities for students to reinforce and deepen the problem-solving lessons that are introduced in P3. And in 2014, the school named its first Associate Dean of Experiential Education and Curriculum to implement these curricular changes and others to reshape the law school curriculum.¹⁹⁵ With the adoption and implementation of the Hamline Experiential Progression, the faculty has come full circle by endorsing a curricular plan with the same attributes of integration and sequential progression that its first Lawyering Skills Director proposed in 1985.

C. Client Problem Solving in the Hamline Experiential Progression

The Hamline Experiential Progression is not merely a plan for lawyering skills education; it is designed to instill a client-centered philosophy and approach toward lawyering informed by the problem-solving principles in the field of ADR. The progression begins in the first year with the P3 course, which lays the foundation for client problem solving. P3 combines: (1) instruction and in-class exercises in the skills of interviewing, counseling, and negotiating; (2) instruction in the professional responsibilities of lawyers, with a focus on lawyers' fiduciary duties to clients; and (3) exploration of the many types of careers that lawyers pursue. P3 is designed to counteract the law-based and litigation-based frameworks that students internalize through casebook instruction and issue-spotting exams; to introduce foundational concepts of client problem solving, such as interest identification and the prevalence of non-legal considerations in client decision-making; and to provide instruction in the basic techniques associated with client-centered lawyering and problem-solving dispute resolution.

¹⁹³ McAdoo, et al., *supra* note 10, at 60.

¹⁹⁴ *The Hamline Experiential Progression*, HAMLINE U. SCH. L., <http://www.hamline.edu/law/experiential-learning/experiential-progression/> (last visited Nov. 11, 2014).

¹⁹⁵ *School of Law Names New Dean for Experiential Education and Curriculum*, HAMLINE U. SCH. L. (Sept. 27, 2013), <http://www.hamline.edu/HUNewsDetail.aspx?id=42949940> 51.

In their second year, students are required to take at least one of Hamline's Lawyering Skills Labs. The Skills Labs are one-credit ungraded modules appended to upper-level electives that teach material tested on the bar examination. Existing Skills Labs include Criminal Procedure, Constitutional Law, Evidence, Family Law, Secured Transactions, and Wills and Trusts, with three more in development.¹⁹⁶ The labs take students through hands-on exercises that simulate the process of representing clients in each area of law and are developed and taught in collaboration with lawyers who practice in each area.¹⁹⁷

The Hamline Skills Lab program was designed with two pedagogical objectives in mind. First, it seeks to reach all students with an intermediate level of skills instruction in the second year. Upper-level bar courses tend to attract high student enrollment and an uneven student interest in the practice area covered by the course, making it challenging to integrate detailed simulations directly into the courses.¹⁹⁸ Skills Labs break students out of these high-enrollment courses for hands-on practice-based instruction in small groups with lawyers who practice in an area of special interest to them. Second, the Skills Labs program seeks to reinforce basic client problem-solving principles in the context of specific practice areas. Labs have been designed with the expectation that lab exercises will: (1) require students to distill and develop facts from interviews and documents rather than providing facts to students in summary form; and (2) require students to place clients' legal issues in the context of clients' non-legal concerns, such as clients' financial limitations and the impact of representation decisions on clients' ongoing relationships with others.¹⁹⁹

In the third year, the Hamline Experiential Progression provides two elective bridge-to-practice programs, each of which is grounded in a vision of integrated theory and practice. In Hamline's Semester-in-

¹⁹⁶ *Skill Labs*, HAMLINE U. SCH. L., <http://www.hamline.edu/law/experiential-learning/labs/> (last visited Nov. 11, 2014). Additional labs are being developed for Commercial Law, Contracts, and Modern Real Estate Transactions.

¹⁹⁷ For example, the Family Law Skills Lab simulates several steps in representing clients in divorce proceedings; the Criminal Procedure Skills Lab takes students through the process of investigating and litigating a suppression motion; the Secured Transaction Skills Lab takes students through the process of negotiating and drafting a term sheet for acquisition of a corporation, preparing security agreement to finance the acquisition, and working through modifying those agreements.

¹⁹⁸ *Skills Labs*, *supra* note 196.

¹⁹⁹ *Experiential Learning: Learn While Doing*, HAMLINE U. SCH. L., <http://www.hamline.edu/law/experiential-learning/> (last visited Nov. 11, 2014).

Practice program, students earn ten to twelve credit hours for a combination of full-time immersion in a field placement, with a companion requirement of a faculty-supervised academic component, in which the student designs a project to explore an issue of law or policy related to the student's fieldwork.²⁰⁰ The academic component is designed to provide a regular opportunity for informal faculty interaction with Semester-in-Practice students and to help the students broaden and generalize the lessons they are learning from immersion in practice through concurrent study of legal or policy issues.²⁰¹

Hamline's other bridge-to-practice program is an Experiential Third Year program, which allows students to design a third-year curriculum consisting of at least fifteen credit hours of experiential courses, including at least one clinic or externship.²⁰² Students are given priority registration for any component of an approved Experiential Third Year plan, guaranteeing them access to smaller-enrollment clinic or externship courses. Like the Semester-in-Practice program, Hamline's Experiential Third Year program is designed to foster collaboration and communication among students, law faculty, and members of the practicing bar. Students who participate in the program must assemble an advisory team consisting of two law professors and one practicing lawyer, ensuring that the student's third-year plan is designed with input from both academic and practical sources.²⁰³

Hamline's Experiential Progression is still a work in progress, continuing to incorporate elements of programs that are proving successful at other law schools and undergoing refinement based on experience and feedback. There is no question, however, that its shape has been influenced and enriched by the synergies between the fields of ADR and clinical pedagogy, as they intersect and overlap to define what it means for lawyers to be effective problem solvers for clients and for society.

²⁰⁰ *Semester-In-Practice*, HAMLINE U. SCH. L., <http://www.hamline.edu/law/experiential-learning/semester-in-practice/> (last visited Nov. 11, 2014).

²⁰¹ Hamline University School of Law Semester-in-Practice Faculty Advisor Guide (on file with author). In addition to meeting regularly with the student to discuss the student's chosen academic project, faculty advisors also receive the student goal-setting exercises, timecards, mid-semester evaluations, and reflective papers, which are standardized for all externship placements, and they are required to meet with the student and the student's field supervisor in a mid-semester evaluation meeting.

²⁰² *The Hamline Experiential Progression*, *supra* note 194.

²⁰³ *Semester-In-Practice*, *supra* note 200.

CONCLUSION

As we prepare students for careers in a dynamic and shifting market for legal services, the problem-solving focus has particular relevance. Although there is no consensus on the exact shape and direction of law practice,²⁰⁴ it is clear that law graduates will need problem-solving skills to be flexible and creative in charting their legal careers in the unmapped territory of the future of law practice. As Hamline University School of Law has responded to the call for experientially based reform, it has made problem-solving skills the centerpiece of its approach to legal education, drawing on the strengths of the faculty and programs within its Dispute Resolution Institute. In the process, Hamline has discovered the common ground of client problem-solving skills and values, which has always existed among students who develop client problem-solving skills in ADR courses and those who learn the practice of client-centered representation in clinics. As the experiential education movement continues to broaden, the common ground of client problem solving can prove fertile soil for integrating the lessons from ADR about underlying interests, process choice, and procedural justice and lessons about client-centered lawyering typically taught in clinics. Clinical and ADR professors who seek this common ground will find what some have known all along: that the ADR and clinical legal education movements have been traveling parallel paths along the same road for many years.

²⁰⁴ See, e.g., William D. Henderson, *Letting Go of Old Ideas*, 112 MICH. L. REV. 1111 (2014) (reviewing two recent books on fundamental change in the legal profession).