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Mapping, Modeling, and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling

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MAPPING, MODELING, AND CRITIQUING: FACILITATING LEARNING NEGOTIATION, MEDIATION, INTERVIEWING, AND COUNSELING

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I. INTRODUCTION

Instruction in interviewing, counseling, negotiating, and mediation theories and skills has grown in recent years as law schools move slowly toward curriculum balance.[1] This growth acknowledges that law

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1. Very few law schools are balancing their curriculum quickly. A recent investigation of the American Bar Association concluded that instruction in interviewing, counseling, negotiating, mediating, and litigating theories and skills, along with supervision in clinical programs, consumed only nine percent of the total instructional time provided by law schools. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 239-41 (1992) (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) [hereinafter MACCRATE REPORT]. This estimate probably describes Florida's curricular situation where only 6 of 58 tenure track faculty teach part-time in these areas.

An analysis of the 1987-88 budgets of 156 law schools showed a twelve-to-one ratio of expenditures between their nonclinical and clinic curricular efforts. John R. Kramer, *Extra-*

schools should facilitate learning a fuller range of professional skills than most have traditionally addressed. Studies show that many lawyers spend significant amounts of time gathering information, helping clients make decisions, and resolving disputes using negotiation and mediation.[2] Surveys of lawyers also consistently verify the importance of the skills associated with these tasks and the lawyers' belief that these actions can be learned in effective ways during law school.[3]

Although virtually any law school course can provide valuable practice developing these skills,[4] most of this important curricular growth

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Curricular Programs, in THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM: CONFERENCE PROCEEDINGS 74, 74 (Joan S. Howland & William H. Lindberg eds., 1994). The cost of clinical education dropped as a percentage of law school budgets from 4.5% in 1977 to 3.1% in 1987-88. MACCRATE REPORT, *supra*, at 249-50. The Task Force also concluded "that an imbalance in emphasis presently exists in legal education and that most law schools can provide enhanced instruction in skills and values without detriment to their other equally important responsibilities." *Id.* at 277.

2. A survey of more than 1000 lawyers in five federal judicial districts in California, New Mexico, Pennsylvania, and Wisconsin showed that lawyers handling disputes for individual clients typically spent 16% of their time conferring with clients, 15.1% on settlement discussions, and 12.8% investigating facts. David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 91 tbl. 3 (1983). The survey also found that the lawyers spent "a relatively small portion of their time on legal research," only 10.1%. *Id.*

3. These surveys have produced consistent results over time. For example, over 800 Chicago lawyers who had been practicing 4-5 years gave the following rankings of either extremely important or important to the following skills: 97.6% for oral communication, 73.4% for negotiation, 71.6% for fact gathering, and 62% for counseling. Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 473 tbl. 1 (1993). This same survey showed the percentages of these lawyers indicating that they believed theories and skills related to these topics could be taught effectively in law school: 77% for oral communication, 67% for negotiation, 65% for fact gathering, and 57% for counseling. *Id.* at 479 tbl. 4. A survey of 634 California lawyers showed the following percentages of those lawyers listing these theories and skills as either essential or important: 82.9% for interviewing, 86.4% for counseling, and 81.7% for negotiating. Robert A. Schwartz, *The Relative Importance of Skills Used by Attorneys*, 3 GOLDEN GATE U. L. REV. 321, 325 tbl. 4 (1973).

All of these pre-trial skills are listed in the MacCrate Report's recitation of Fundamental Lawyering Skills and Professional Values. MACCRATE REPORT, *supra* note 1, at 163, 176, 185, 191. It indicates the Task Force's conclusion that well-trained lawyers should be competent with them before assuming ultimate responsibility for clients. *Id.* at 163-72 (factual investigation and interviewing); *id.* at 176-84 (counseling); *id.* at 185-90 (negotiation); *id.* at 191-99 (litigation and alternative dispute resolution). The Task Force ultimately recommended that "[l]aw schools should be encouraged to develop or expand instruction in [these] areas." *Id.* at 332 (Recommendation C(13)). Florida alumni apparently agree. A statement that more skills and clinical courses should be added to the upper level curriculum produced the highest agreement ranking in a 1992 alumni survey of alumni.

4. Valuable experimentation with role-playing is occurring across the law school curriculum. *See, e.g.*, Michael Botein, *Simulation and Roleplaying in Administrative Law*, 26 J. LEGAL EDUC. 234, 235 (1974) (teaching administrative law by creating a mock agency modeled

in American law schools has occurred in clinical courses.[5] These courses involve students in the actual representation of clients and allow students to work in simulated legal situations.[6] Research done by educators investigating how professionals learn competent behavior and emerging findings in fields of cognitive science have strongly influenced contemporary clinical instruction.[7] Not surprisingly, this suggests that experienced lawyers can play important roles in helping law schools extend their non-trial professional skill courses to more students.

This essay outlines a way that lawyers can help law schools achieve a better balance. It recommends that lawyers work closely with faculty members who teach large enrollment classes. These lawyers would help smaller groups of students develop and improve legal skills through practical simulations. Using negotiation as an example, this essay argues that lawyers can play three critical roles as students begin to assess and

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after procedures used by the FCC); Lynne L. Dallas, *Limited-Time Simulations in Business Law Classes*, 45 J. LEGAL EDUC. 487, 487-88 (1995) (detailing the author's use of simulations, such as directors' and shareholders' meeting, to teach substantive material in her corporation and securities regulation courses); Robert P. Davidow, *Teaching Constitutional Law and Related Courses Through Problem-Solving and Role-Playing*, 34 J. LEGAL EDUC. 527, 527-28 (1984) (discussing how the author facilitated class discussion by assigning roles of judge, legislator, constitutional revisionist, adviser, and advocates for plaintiff and defendant); Karl S. Okamoto, *Learning and Learning-to-Learn by Doing: Simulating Corporate Practice in Law School*, 45 J. LEGAL EDUC. 498, 498-99 (1995) (arguing that how corporate law is actually practiced should be taught in law school).

Asking students to assume attorney, client, or other participant roles and then engage in interviewing, counseling, negotiation, or mediation tasks can be done effectively in virtually any context. A study of law teachers showed that only 30% used role-playing in first year courses while 81% used it in skills courses. Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 27 (1996). Role-playing injects variety into a classroom and motivates students to learn the material by applying it to simulated situations. Don Peters, *Using Simulation Approaches in Large Enrollment Classes*, 6 J. PROF. LEGAL EDUC. 36, 37 (1988). Few professors, however, devote the time to developing simulations that help students focus on the actions they perform as well as their use of substantive law—a fact demonstrated by the small percentage of class time devoted to simulations in first year (5%) and upper level (6%) courses. Friedland, *supra*, at 27. Consequently, the brief snapshots of legal skills contained in most law school courses do not provide viable substitutes for courses aimed at developing proficiency with these skills.

5. *See* MACCRATE REPORT, *supra* note 1, at 248-53 (describing the expansion of student enrollment, faculty, and investment in clinical legal education).

6. *See, e.g.*, Don Peters, *Learning Low-Visibility Lawyering Skills at the Virgil Hawkins Civil Clinic*, FLA. B.J., July/Aug. 1991, at 45, 45 (discussing the skills learned by students who participate in the clinic).

7. *See, e.g.*, Don Peters & Martha M. Peters, *Maybe That's Why I Do That: Psychological Type Theory, the Myers-Briggs Type Indicator, and Learning Legal Interviewing*, 35 N.Y.L. SCH. L. REV. 169, 173-74 (1990) (stating that because cognitive approaches affect the learning of interviewing skills, students in the Virgil Hawkins Civil Clinic can take the Myers-Briggs Type Indicator in order "to facilitate development of collaborative working skills").

improve their skills. These roles are: (1) mapping—helping students plot their way through the broad and specific guiding frameworks that competent professionals use, if only intuitively, to plan and evaluate actions; (2) modeling—demonstrating a reflective approach to learning that incorporates an openness to the variety and complexity of challenges involved in applying theory to practice; and (3) critiquing—providing specific feedback balanced between positive interpretation and constructive criticism that helps students develop crucial reflective learning skills.

II. SELF-REFLECTIVE SKILLS LEARNING

Effective collaborations between faculty and experienced lawyers begin with shared understandings of what professional skills are and how they can be learned in law school. Skills reflect abilities to behave effectively by accomplishing tasks. They are actions that successfully produce intended effects. Skills are not, however, limited to verbal and non-verbal behaviors. Skills require a cognitive selection process where contextually appropriate goals are chosen and actions that achieve these objectives are produced.[8] This process occurs on multiple levels including theorizing about effective action.[9] This type of theorizing considers identifiable reasons why particular actions will produce intended results.[10] This type of theorizing produces action theories—generalizations about behaviors that are likely to produce intended effects and why.[11]

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8. *See* CHRIS ARGYRIS & DONALD A. SCHÖN, THEORY IN PRACTISE: INCREASING PROFESSIONAL EFFECTIVENESS vii-viii (1974) (referring to skills as "programs for behavior").

9. *See id.* at 13-14 (discussing the skill of learning how to ride a bicycle—"learning to ride [a bicycle] requires both learning the program and learning to internalize the program"). The authors state that to learn a new skill, "it is essential to practise, to develop and draw on tacit knowledge, and to be in a learning situation that permits a reinforcing cycle of feeling and performance to begin." *Id.* at 14.

10. *See id.* at 5-6 (stating that theories of action depend upon assumptions made by the actor).

11. ARGYRIS & SCHÖN, *supra* note 8, at 3-6; DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS 255 (1987). Few words are as elastic in meaning as theory, particularly in academic writing. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 361-63 (1995). The concept of action theories conceptualizes skills as programs for behavior involving cognitive and action dimensions. ARGYRIS & SCHÖN, *supra* note 8, at vii-viii. Effective action requires knowing what to do in a professional practice context to, "under the relevant assumptions, yield intended consequences." *Id.* at 6. This perspective touches all three components of learning. Inasmuch as action theory provides ways to acquire and master what is known and unknown, it helps students extend and clarify the meanings of their own experience, and it supplies a method for testing

Theorizing about effective action proceeds from the premise, advanced by scholars investigating the development of professional competence, that humans design the behaviors involved in negotiating, mediating, interviewing, and counseling.[12] Few aspects of effective

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ideas relevant to problems in an organized and intentional way. MALCOLM S. KNOWLES, THE ADULT LEARNER: A NEGLECTED SPECIES 10 (4th ed. 1990) (quoting R.M. SMITH, LEARNING HOW TO LEARN: APPLIED THEORY FOR ADULTS 34 (1982)). This perspective also encompasses an expansive vision of legal education embracing the "cognitive, behavioral and experiential, affective, and normative aspects of being and learning as a professional." 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, 596 (1994) [hereinafter Menkel-Meadow, *Narrowing the Gap*].

Action theories are not grand, overarching visions like those found in many critiques of legal doctrines and institutions. They typically are "sets of statements about some aspect of reality" that seek "to describe parts of the reality and to specify the relationships among those parts." Joseph D. Harbaugh, *Simulation and Gaming: A Teaching/Learning Strategy for Clinical Legal Education, in* CLINICAL LEGAL EDUCATION: REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS—AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION 191, 194 (1980) (emphasis omitted). The aspects of reality subjected to action theory in non-litigation skills courses tend to be specific tasks and their component parts. *See* Carrie Menkel-Meadow, *The Legacy of Clinical Legal Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555, 556 (1980) [hereinafter Menkel-Meadow, *Clinical Legal Education*] (describing micro theories that "focus on the role and behaviors of the individual lawyer"). These theories are sets of general propositions that predict and explain but are "sufficiently abstract to be relevant to more than just particularized situations." Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 580 (1987).

My students have found action theories valuable, writing:

> I think the nomenclature is useful also. I remember hearing somewhere that some cultures believe that naming a thing gives a person power over it. . . . It's interesting now that I'm becoming comfortable enough with the stuff to recognize what's going on. I'm beginning to be able to spot things as they happen, and identify them on a conscious level.
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> Many of us were already familiar with the behavioral skills we learned in this class because they are life skills. . . . [However,] most of us were not aware of what we were doing. Giving the skill a name and purpose emphasized what it was that we were supposed to do and the advantages or disadvantages of that behavioral choice.

Comments from Students Taking Legal Skills Courses with Don Peters (1991-97) (on file with author) [hereinafter Student Comments]. I have collected these comments over the last five or six years from assigned papers with which students reflected on class experiences and evaluated course requirements.

12. ARGYRIS & SCHÖN, *supra* note 8, at 17-18. The premise is that human behavior is directly influenced by human actions and, consequently, by theories of action. *Id.* People routinely devise courses of action aimed at changing existing circumstances into preferred situations. *Id.* at 205. Thinking, problem solving, and learning fall within this premise. *Id.*

negotiation, for example, depend on premises that occur inherently in the nature of the universe. Rather, lawyers building transactions and resolving disputes negotiate based on premises created by human convention and continued by human choice. In this sense negotiators design their actions by choosing what to do even if they often are not aware of the reasons underlying these choices.

Many explicit and implicit reasons support both common existing negotiation practices and arguably better approaches. These concepts constitute action theories. Action theories provide constructs for predicting intended effects when performing the scores of tasks involved in negotiation including presenting offers and proposals, articulating arguments, phrasing questions, and listening. Action theories also help explain complex events and suggest action choices that worked in the past and how those choices could be improved to achieve better results.[13] These concepts give students frameworks for preparing, organizing, and evaluating experiences as they negotiate in actual and simulated lawyering situations. Focusing on the constructed nature of this process also illuminates the element of choice and the possibility of altering and improving action.[14]

Behavioral learning becomes a "hypothetico-deductive process" for forming, testing, and modifying action hypotheses. *Id.* at 18.

As one example of how differently people design behavioral systems, consider American society's attitude toward resolving disputes by litigation against the perspective in parts of China. Segments of Chinese society often view litigation as a shameful final option which, when used, signals an embarrassing failure to settle situations amicably. Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1206-07 (1966); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 29 (1982). A negotiation student raised in this tradition was viewed as unusually competitive and aggressive by her family's standards yet saw herself much less adversarial than others in her course. Melissa L. Nelken, *Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School*, 46 J. LEGAL EDUC. 420, 428 (1996); *see generally* Carolyn J. Oh, *Questioning the Cultural and Gender-Based Assumptions of the Adversary System: Voices of Asian-American Law Students*, 2 BERKELEY WOMEN'S L.J. 125, 149-51 (1992) (listing passivity and non-aggressiveness as pervasive values in Asian-American culture).

13. *See* ARGYRIS & SCHÖN, *supra* note 8, at 18-19 (discussing how behavioral learning allows a person "to adopt new action strategies").

14. DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION 310 (1983). Learning is a process which changes, shapes, or controls behaviors. *See* KNOWLES, *supra* note 11, at 7. Professionals who do not attend to the ways they construct the reality in which they function are not aware of their action theories. SCHÖN, *supra*, at 310. Consequently, they do not experience any need to choose among different action theories and as a result, seldom consider the possibility of alternative, perhaps more effective, action choices. *Id.*

Scholars writing about law school curricular choices urge a similar attention to choices made regarding subject matter and method. *E.g.*, Howard Lesnick, *The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law*, 10 NOVA

Many action theories of negotiation, mediation, interviewing, and counseling, can be presented in effective ways to much larger groups of students than can realistically enroll in clinical and simulation-based courses taught by one person.[15] These large group sessions augment

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L.J. 633, 635 (1986). Lesnick urges that legal educators "keep asking *why* a certain thing is proposed to be taught, or taught in a certain way, or to a certain extent . . . to become aware of the premises and priorities that trigger our choices," contending that this "process might change our choice, or shape it in a new way." *Id.*

Students have reflected on their semester's experience and the changes it brought, writing:

> I look back on my first negotiation with embarrassment, and that's good because I know how much I didn't know.
>
> [Before this class], [m]y prior negotiations were more of a shoot from the hip type of approach using whatever came natural [sic], so to speak. . . . I was not conscious of what I was doing, and looking back I was not very effective, or at least not as effective as I could have been and hopefully will be in the future.
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> "[More frequent use of process comments and active listening] were great accomplishments for me they were learned skills, and I was able to see their results immediately."

Student Comments, *supra* note 11.

15. The ratio recommended for clinic courses involving actual client representation is no more than 8 students per instructor. *See* MACCRATE REPORT, *supra* note 1, at 250 (stating national clinical average is 8 students to 1 faculty). Florida's Virgil Hawkins Civil Clinic, a program where all theory and skills instruction and field supervision is done by law faculty, uses this ratio to run a law firm located at the law school, providing invaluable learning opportunities to 96 students a year. A mediation clinic beginning in August of 1997 will also be faculty taught and supervised, using a similar ratio. These low student-faculty ratios are essential to insure that client matters are intensively and properly supervised, and that students receive maximum opportunities to individualize their learning experiences. The addition of this new mediation clinic may bring Florida up to the national average, the availability of clinic to 30% of each class. Marjorie A. McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand their Beachhead*, 35 N.Y.L. SCH. L. REV. 239, 280-81 (1990). Although the average enrollment in interviewing and counseling courses nationally is 18 students, *see* MACCRATE REPORT, *supra* note 1, at 251, Florida has always permitted 24 students to enroll in these courses.

The small enrollments required to do these classes effectively always surfaces as a barrier to increasing skills instruction in law schools. *See, e.g.*, John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993) (illustrating the logistical problems of expanding clinical curriculum). Articles that argue that increased skills instruction is too expensive invariably juxtapose these skills courses against large enrollment first and second year core courses. *See* Beverly Balos, *Conferring on the MacCrate Report: A Clinical Gaze*, 1 CLINICAL L. REV. 349, 351-52 (1994) (quoting John Kramer, Dean of Tulane University School of Law); Peter Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 CLINICAL L. REV. 401, 403-04 (1994). Such articles seldom address the costs of seminars and specialized upper level courses that frequently draw limited

reading assignments from professional skills texts presenting general action theories with critical evaluation of demonstration videotapes. Analyzing these taped demonstrations, excerpted from movies, television shows and scripted scenarios, helps students visualize the action theories described in their reading assignments. It allows them to create mental images of effective task performance, an important threshold step in developing professional practice skills.[16]

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enrollments. Balos, *supra*, at 352; Joy, *supra*, at 404. For example, Dean Costonis claims that it would take 17 FTEs (full time equivalents) to offer every Vanderbilt student a 3 hour skills course. Costonis, *supra*, at 185-86. Florida typically allocates 18 FTEs a year to teaching seminars. Moreover, the average class size at Florida in 1989-90 was less than 30 and the overall student to faculty ratio was 20 to 1. Peters, *supra* note 6, at 48. Finding and allocating sufficient resources to increase enrollment in skills courses should be a priority, remembering that legal education "is the 'cheapest' form of graduate education in terms of the person-power attached to students in the learner role." Menkel-Meadow, *Narrowing the Gap, supra* note 11, at 617 n.101.

The courses advocated in this essay may enroll 72 students divided into six sections of twelve. Available space and video equipment at the Law Center allow no more than six small sections operating simultaneously. A small section of 12 creates 6 pairs for the six one on one simulated negotiations, permitting the instructor to observe each pair negotiate for 10-12 minutes. It also allows longer observations of the two teamed negotiation exercises, one done with two teams of two students, and the other creating a multi-party situation run with three teams of two.

16. *See* SCHÖN, *supra* note 11, at 37-38 (stating that to be competent, a student "must learn to recognize competent practice"). Students confronting fundamental professional tasks must build images of competent practice to learn to recognize it. *Id.* at 37. They also need to start developing an appreciation of where they now stand in relation to competent professional practice and to map "path[s] by which [they] can get from where [they are] to where [they want] to be." *Id.* at 38. The thoughtful assistance of expert practitioners can help novices do this mapping. *See* Daniel J. Givelber et al., *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. LEGAL EDUC. 1, 14 (1995).

Students have written about the value of these video demonstrations, commenting:

> The movie and tv clips are useful beyond their entertainment value. . . . [T]hey show examples of these behavioral choices made by those who have not studied negotiation. They give a sense of concreteness to the abstract ideas presented by some of the reading material. . . .
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> I must stress the importance of the video clips. . . . [T]he acting was fair at best, but the clips allowed me to gain a better understanding than I think possible with the standard law school . . . method[s]. . . . Assimilating the video portions allowed me to reenact those segments which were most helpful in my next negotiation. Nothing can replace actually doing the negotiation, but the video clips were really the best way to prepare for an upcoming negotiation.
>
> [T]hey do not have the same effect as hypotheticals presented to us in books [from more traditional courses]. The usually annoying IF does not appear, because one can see it really happen. That makes one more willing to deal with the issues

Students start to apply action theory to behavior, a process critical to skill development, in non-threatening ways through critiquing choices made by the video performers. These short vignettes model both effective choices to emulate and common mistakes to avoid. They demonstrate that competent practice consists of consciously making many small behavioral decisions.

Reading, watching, critiquing, and talking in large and small groups, however, does not develop and refine skills. Students seeking to assess and improve skills must make and then examine actual action choices. Students can make action choices and learn action theories by acting in simulated problems. Acting engages both cognitive and affective dimensions and creates a sense of personal discovery through trying action choices, comprehending the consequences of those choices, and constructing meaning.[17]

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presented. . . .

Student Comments, *supra* note 11.

17. Two well-respected scholars, Carl R. Rogers and John Dewey, have expanded on the virtues of experiential learning. JOHN DEWEY, EXPERIENCE AND EDUCATION 13 (1938); CARL R. ROGERS, FREEDOM TO LEARN 5 (1969). Rogers noted that experiential learning has a quality of personal involvement as learners confront events and own results through constructing meanings taken from the experiences. ROGERS, *supra*, at 5. John Dewey advocated experiential learning in the early twentieth century, contending that "all genuine education comes about through experience." DEWEY, *supra*, at 25. Dewey emphasized the value of continuity in experience, the potential that "every experience takes up something from those which have gone before and modifies in some way the quality of those which come after." *Id.* at 35. Experiential learning causes professionals to develop interpretative networks of action theories that frame and promote their skills growth. *See* Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287, 325-26 (1994) (discussing Dewey's distinction "between all experience and *educational experience*"). According to Dewey, experiential learning promotes "both . . . knowledge of more facts and entertaining of more ideas and . . . a better, more orderly arrangement of them." DEWEY, *supra*, at 82.

One student captured this well, writing:

> Had I just learned that "one should reflect feelings," and had you just told me, "you know, you really don't reflect feelings," I would have probably just thought "I really should reflect feelings," and forgotten about it after [the course]. But the fact that I had to identify it for myself, on the self-evaluation charts and in the reaction papers, the fact that I had to watch myself fail to reflect feelings, was probably the best way to get me to learn that I have to reflect feelings.

Students Comments, *supra* note 11.

Clinical legal education has emphasized the experiential learning approach since its inception by assigning students to assume and act in roles. According to Gary Bellow:

Action theories require fluid response sequences that cannot be developed without experimentation. Students need to see in their own way how actions are performed and what results are produced.[18] They need to try the actions, see how they fit, and practice those aspects that seem worth internalizing even though they do not come naturally. For example, in negotiation, learning to listen actively by paraphrasing another's statement requires making these active listening responses in appropriate situations.[19] It requires cognitive acceptance of an action

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> The central feature of the clinical method is its conscious use, both conceptually and operationally, of the dynamics of role adjustment. . . .
>
> The dynamics of role adjustment create a reservoir of new meanings and associations. . . . Sensation perception, intuition, feeling, cognition, necessarily combine to produce "new knowledge" at different levels of awareness, complexity, particularity, and immediacy.

Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as a Methodology, in* CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 374, 380-82 (1973). The decisions in these roles and contexts supply "the central sources of meaning" for clinical legal education. *Id.* at 387-88.

18. Reginald D. Archambault, *Introduction to* JOHN DEWEY ON EDUCATION: SELECTED WRITINGS xvi-xvii (Reginald D. Archambault ed., 1974) (discussing Dewey's formulation of the five aspects of reflecting thought). Action-based learning produces evaluation by learners as they assess whether the behavior met objectives and illuminated the confusion or uncertainty they were experiencing. ROGERS, *supra* note 17, at 5. Students completing actions can consider what occurred, what was significant, and why. Paul Bergman et al., *Learning from Experience: Nonlegally-Specific Role Plays*, 37 J. LEGAL EDUC. 535, 537 (1987). Learning this way often generates important personal insights that are not foreseen by instructors and gives students a way to interpret experiences according to their personal learning needs. *Id.* at 537-38.

19. Active listening requires verbal responses that paraphrase what speakers have said, demonstrating listening and understanding. DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 52 (1991). Some scholars contend that it is the most important interpersonal skill for encouraging cooperation in negotiation. *See* DONALD G. GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS 90 (1989) ("The most important of the interpersonal skills that can be employed as a cooperation facilitator in the negotiation context is *active listening*."). Active listening supplies an important component of cooperative style in adversarial strategy. *See infra* notes 24-27 and accompanying text. It provides cheap concessions while giving up nothing on the merits by facilitating better working relationships between negotiators. GIFFORD, *supra*, at 90. Active listening also demonstrates an important component of problem solving strategy by showing respect for speakers and creating an atmosphere conducive to finding solutions promoting fair outcomes. CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 10 (1986).

Despite active listening's value, many students in negotiation find it a very difficult action habit to develop and use. Students have commented:

> The piece of negotiation theory that I found least effective was active listening. The main reason for this is that I did not use it. I cannot explain why I did not use it except that I never felt comfortable employing active listening.

theory that active listening responses are often effective negotiation choices and then internalizing these behaviors so that they flow naturally.

Adding lawyers allows a large class working with a faculty member to be divided into smaller groups. In the smaller groups, participants can apply action theories by practicing the behaviors the lawyers suggest. This creates more opportunities to try and then reflect on action. Assigning students to conduct simulated negotiations with lawyers to observe a portion of each provides these multiple opportunities. My negotiation course, for example, allows lawyers to observe portions of eight negotiations during eight three-hour evening classes in a fifteen-week term. These simulations include disputes before and during litigation as well as transactions, injecting variety to expose students to a broad range of tasks.

These additional performance opportunities permit repetitive practice of important action sequences, often crucial to skill development.[20] New skills begin as awkward, conscious attempts to do certain things in certain ways for particular reasons—following action theories that

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> I cannot recall a single instance when I used feeling-reflection active listening; this needs work.

Student Comments, *supra* note 11.

20. Providing sufficient repetitive practice opportunities is critically important to skill development. *See* GORDON H. BOWER & ERNEST R. HILGARD, THEORIES OF LEARNING 77-78 (5th ed. 1981); Harbaugh, *supra* note 5, at 205; Peters & Peters, *supra* note 7, at 173 & n.15. Students have recognized the need for repetitive practice opportunities:

> The strength of the course in terms of its learning value is in the number of negotiations. It was only through the large number of exercises that I was able to practice self-correction and learn how to be more effective.
>
> [A]ctive listening, justification, and information sharing . . . are skills that the classroom sessions and text have repeated [and] hammered into our way of thinking, and I am starting to do [them] without having to think about [them].
>
> Only after giving away the farm several times was I finally able to put the readings and class discussions into their proper framework. The skills learned in this course must be applied. There is no greater motivation for learning a new subject than when you know you will have to apply that specific knowledge against a specific opponent who has just read the same lesson.
>
> [T]he pressure of weekly and videotape performances forced me to accept mistakes I made . . . as less traumatic events thus allowing me to relax and focus instead on process and skills.

Student Comments, *supra* note 11.

predict intended consequences. Sufficient practice allows students to internalize these new ways of acting as their own, adding them to their behavioral repertoires to use in future identical or similar situations.[21]

Small groups for simulated events allow more coaching to occur through observing and sharing feedback on student actions and discussing behaviors that occur outside observer presence. Small groups give each student more opportunities to explore their thoughts, ideas, concerns, reactions, and questions. This helps students individualize learning, an important feature because each will probably need to develop and improve different skills and predictably progress at different speeds.

The acting and coaching described emphasizes and reinforces a three-step process for learning from experience through purposeful, self-reflective, practice.[22] In this process, the student will prepare, act, and then reflectively evaluate. Ideally, the student will repeat this process for each action chosen to accomplish negotiations tasks.

The first step, preparation, requires selecting behavioral objectives based on theories of action. During this step actors select objectives to pursue, specific behaviors to use, and action theories that predict why these choices are likely to accomplish chosen goals. Conceptualizing action theories as "if I do this then that should result because" formulas converts these action theories into theoretical hypotheses for testing by subsequent behavior. The action theories for this step are introduced by the reading assignments and discussions that evaluate the demonstration videotapes. Written negotiation plans are also assigned for many of the simulations to engage students in this threshold process of prepara-

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21. SCHÖN, *supra* note 11, at 113.

22. The 1992 ABA Task Force recommended that clinics use the now commonly accepted three-step model of "theory instruction, performance, and critique." MACCRATE REPORT, *supra* note 1, at 254. John Dewey proposed this phased model of learning from experience in 1963, suggesting that learners first consciously develop a hypothesis, then test it in experience, and then carefully reflect on the results and modify the hypothesis accordingly. DEWEY, *supra* note 17, at 86-87. Jerome Bruner views the basic act of learning as involving three almost simultaneous processes: (1) acquiring new information which refines or replaces existing knowledge; (2) transforming this data to make it fit new tasks; and (3) evaluating to assess whether the manipulation accomplished the task. JEROME S. BRUNER, THE PROCESS OF EDUCATION 48-49 (1961).

Clinical legal education scholarship has embraced this approach. *See, e.g.*, Stacy Caplow, *A Year in Practice: The Journal of a Reflective Clinician*, 3 CLINICAL L. REV. 1, 5 (1996); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1650 & n.214 (1991); Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243, 255-60 (1992).

tion.[23] This step and the action theories involved are then reinforced by mapping, modeling, and critiquing observations made by lawyers facilitating the small groups.

Negotiation is a complex process to map theoretically because it involves multiple overlapping and independent operations, which makes encompassing it in a single theory impossible. A useful broad theoretical map distinguishes between strategic orientations, described by bargaining objectives,[24] and styles, described as narrow communication behaviors used pursuing strategies.[25] Adversarial—connoting gain

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23. This not very subtle coercion was designed to engage students in the process of selecting objectives and action theories designed to achieve them. Not surprisingly, students reacted to this assignment differently. Sample student comments included:

> Planning is the most important phase of the negotiation. All semester long I prepared diligently for the exercises and every time it played big. I successfully predicted time after time again how the other participants would react and what their positions would be. In this exercise, however, we did very scant planning. I think I know why. There was no negotiation plan due and graded for this exercise. So I learned the hard way.
>
> It was obvious my partner and I were opposite types . . . from our first meeting. She showed up and immediately and proudly announced that she had gotten a chance to read over the negotiation material. I showed up with the negotiation information outlined in every detail.

Student Comments, *supra* note 11.

24. Strategies are interactive processes designed to accomplish desired objectives. *See* Richard K. Neumann, Jr., *On Strategy*, 59 FORDHAM L. REV. 299, 300 (1990). Negotiation scholars recommend viewing a strategy as a set of objectives or ends. *See, e.g.*, ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 393 (1990); GIFFORD, *supra* note 19, at 13; DEAN G. PRUITT & JEFFREY Z. RUBIN, SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 3 (1986). Narrower behavioral initiatives or responses are used to pursue tactics, supplying the means to accomplish strategic goals. *See, e.g.*, GIFFORD, *supra* note 19, at 13; PRUITT & RUBIN, *supra*, at 3; Mary-Lynne Fisher & Arnold I. Siegel, *Evaluating Negotiation Behavior and Results: Can We Identify What We Say We Know?*, 36 CATH. U. L. REV. 395, 418-20 (1987); Neumann, *supra*, at 300.

25. Style consists of the narrow interpersonal communication actions that compose tactics. *See, e.g.*, BASTRESS & HARBAUGH, *supra* note 24, at 390-92; GIFFORD, *supra* note 19, at 18; LARRY L. TEPLY, LEGAL NEGOTIATION IN A NUTSHELL 88-103 (1992) (describing the differing characteristics between lawyers utilizing competitive versus cooperative negotiating styles). A threat, for example, is a common negotiating tactic, more frequently used with adversarial strategy, that can be made with competitive or cooperative stylistic choices in terms of language, pace, tone, and accompanying non-verbal communication. *See* BASTRESS & HARBAUGH, *supra* note 24, at 395-96 (distinguishing competitive and cooperative adversarials). Gifford argues that distinguishing strategies from these very specific, communicational behaviors comprising styles, "yields new flexibility" for negotiators. GIFFORD, *supra* note 19, at 21; *see also* BASTRESS & HARBAUGH, *supra* note 24, at 394-95 (stating that once a person differentiates between the styles

maximizing—and problem solving—describing fair outcome seeking—are the labels assigned to these contrasting strategic orientations which influence virtually all negotiation action theories.[26] The communication tasks in either strategy can be done cooperatively, using respectful and collaborative behaviors, or competitively, employing coercive, often attacking actions. These framing and naming choices produce a four-part conceptual model which encompasses and influences all of the operations and stages of the negotiation process.[27]

The next step, acting, occurs in the simulations conducted during small group sessions.[28] Acting requires translating into action the

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and strategies involved in negotiation, that person can then use different styles within different strategies; i.e., a cooperative style within an adversarial strategy).

26. *See, e.g.*, BASTRESS & HARBAUGH, *supra* note 24, at 393-95; JACQUELINE M. NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL 20-24 (1992); TEPLY, *supra* note 25, at 105-10; Carol B. Liebman, *A Theoretical Basis for Divorce Negotiation, in* NEGOTIATING TO SETTLEMENT IN DIVORCE 1, 5-6 (Sanford N. Katz ed., 1987); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 758-59 (1984); Don Peters, *Forever Jung: Psychological Type Theory, the Myers-Briggs Type Indicator and Learning Negotiation*, 42 DRAKE L. REV. 1, 7-9 (1993). Using "adversarial" and "problem-solving" as the labels emphasizes the perceptual nature of negotiation approaches which invariably involve shifting levels of competition and cooperation. An adversarial perception resembles a litigation mind set; it emphasizes competition and seeks to maximize gain regardless of how others fare. *See* Peters, *supra*, at 7-8. A problem-solving orientation, on the other hand, resembles transactional creation; it emphasizes cooperation and requires genuine commitment to searching for fair solutions that value other negotiators' interests. *See id.* at 8-9.

These contrasting perceptual orientations significantly influence negotiation behaviors. Menkel-Meadow, *supra*, at 759-60 (analogizing negotiating conceptions to paradigms that imprison their creators in unidimensional views until different paradigms are presented). One study showed that "students most supportive of the adversary system and with the strongest belief in manipulative behavior . . . exhibited the highest levels of adversary behavior in [witness interviews]." James H. Stark et al., *The Effect of Student Values on Lawyering Performance: An Empirical Response to Professor Condlin*, 37 J. LEGAL EDUC. 409, 419-20 (1987).

27. BASTRESS & HARBAUGH, *supra* note 24, at 395. Although scholars do not agree on either the number or descriptive labels, when writing about negotiation, they contend that the process evolves through a series of stages. For example, Gifford contends that the legal and social science literature suggest four stages: (1) initial orientation and positioning, (2) issue exploration, (3) bargaining through narrowing or convergence of issues, and (4) closure. GIFFORD, *supra* note 19, at 33-35. He uses these stages as an organizational device for analyzing adversarial and problem-solving strategic actions. *See id.* at 96-118 (analyzing initial proposals); *id.* at 119-39 (discussing the exchange of information); *id.* at 140-62 (evaluating ways to narrow differences); *id.* at 163-73 (discussing closure tactics). Bastress and Harbaugh, on the other hand, argue that negotiation consists of assessment, persuasion, and exchange phases. BASTRESS & HARBAUGH, *supra* note 24, at 405. They contend that either adversarial or problem solving strategy can be used in any phase. *Id.*

28. Several action opportunities also are provided in large class sessions throughout the term, primarily in focused role plays. These present very specific situations requiring action

essentially cognitive activities needed to assess situations strategically, select objectives realistically, and develop action theories appropriately. This action tests the validity of the theoretical hypotheses developed in the preparation step and supplies the data to be used during critiques, the final step. Portions of all of the simulations are videotaped and students are asked to audiotape the remaining parts of these exercises. In addition, students are assigned to listen to their audiotapes and chart their action choices. This self-critiquing requires specific behavior analysis, giving students additional opportunities to assess strengths and weaknesses.[29]

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choices. These focused role plays are designed to highlight important negotiation action choices that can get overlooked in longer performances. They are usually based on the simulations students have just completed, permitting focused practice of specific skills in familiar factual contexts without the distraction produced by concerns about final outcomes. *See* Bruce M. Patton, *Some Techniques for Teaching Negotiation to Large Groups*, 11 NEGOTIATION J. 403, 406 (1995). Focused role plays also allow experientially approaching challenging client counseling questions involved in negotiating. *See* GIFFORD, *supra* note 19, at 184 (arguing that a "lawyer's ability as a counselor is at least as important as [the lawyer's] negotiation skills"). Although all of the negotiation simulations substitute for written statements of client objectives and authorizations of actual client encounters, focused role plays challenge students to respond to some of the difficult aspects of negotiating in a boundary role. Representing another person while dealing with the stresses of the negotiation and the potential conflicts lawyers may have with client interests introduces another important dimension to competent practice that can be explored through focused role play. *See* Blasi, *supra* note 11, at 374-75 (discussing the extension of classic models, such as the prisoner's dilemma, by adding a lawyer's interests to the equation).

Student comments about the use of focused role plays include:

> [T]he in-class role plays and class discussions [of them] are most helpful. . . . [T]oday's problem-solving session . . . really outlined how to develop the problem-solving conversation. In fact, I hope to apply what we discussed today to tomorrow's negotiation. Other role plays have been equally as helpful [considering] my need for immediate feedback.
>
> [P]rior to one of our focused role plays, I was not very comfortable with my use of reframing. . . . We had talked about it some in class. However, I had not found myself using reframes effectively. . . . The focused role play assignment that dealt with reframes really improved my skill. . . . Instead of just briefly discussing . . . we were able to practice using reframes. After the exercise, I found that everyone in the class was beginning to learn how to use reframes more effectively.

Student Comments, *supra* note 11.

29. Students chart their action choices on a form that lists 20 tasks involved in most negotiations. A copy of this chart is included in an Appendix to this essay. Charting action choices requires students to listen to their audiotapes purposefully. It requires them to evaluate their action choices specifically, engaging in the naming and framing process crucial to professional practice. *See infra* notes 36-40 and accompanying text. Students also are encouraged

The final step, critique, requires reflection and interpretation. Critiquing involves identifying what students did and comparing it to their objectives, theories, and outcomes. This step provides the specific data that allow critiquing conversations to unfold. Student and instructor share oral reflections confirming effective choices, identifying ineffective decisions, and developing alternatives for theories and actions that need revising. Using lawyers and small groups allows these conversations to occur when memory is fresh and motivation to discuss and learn is high. These conversations discuss segments of videotaped portions shown to the entire small group and recreate simulation experiences that were not observed. In addition, students are asked to reflect on their theories, actions, and critiques by writing reaction papers after every simulation.[30]

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to assess their skill levels against supplied performance standards. Performance standards are written descriptions of competent task achievement levels. These standards are included in course materials. A copy of the Standards used in my Mediation course is also included in the Appendix.

Charting also encourages students to reflect on patterns of strengths and weaknesses, often providing insights into specific events during the negotiation. Student comments about this assignment included:

> [T]he item counted most was interruptions. . . . In fact [when the other negotiator leaked information suggesting 4 times my initial offer was in his range] I jumped in and corrected him.
>
> I walked away from the table feeling like I had really accomplished something. Then I listened to the tape. Ouch! This is a wonderful exercise for driving home subtle (and not-so-subtle) flaws in the negotiation that are not apparent in the heat of the moment, and that would otherwise go undetected by the party making the error.
>
> I reviewed the tape [and] I realized that I had asked a number of compound [questions] one right after the other. I am glad that I had a chance to hear for myself on tape how aggressive and perhaps confusing I might have sounded. . . .
>
> [O]ne of the first things we learned was not to interrupt. I remember how ridiculous that video sounded when the attorney kept interrupting the client [who] just wanted to get her story out. . . . Yet when it came down to it, I counted sixteen, yes, sixteen interruptions on my tape.

Student Comments, *supra* note 11.

30. These reaction papers are designed to encourage students to reflect on and critically evaluate their action choices. Robert B. Moberly, *A Pedagogy for Negotiation*, 34 J. LEGAL EDUC. 315, 319-20 (1984). They facilitate organizing thoughts about long, potentially chaotic events and require "sorting, naming, and framing." Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 59 (1995) (noting that in an adult educational context, "[j]ournal writing

III. CRITICAL FACILITATING ROLES

Adding lawyers effectively to this self-reflective skills learning process requires developing appropriate roles for them to perform during the small group sessions. A general lecturing role is not needed because action theories are presented in reading assignments discussed and

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is a highly-valued tool for reflection"). Reaction papers encourage students to probe beyond the surface of important choices, to think more deeply about those choices, and to take more responsibility for learning. J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55, 60 (1996). They may bring "into consciousness the often inchoate, pre-conscious theories and principles by which the student is operating." Goldfarb, *supra* note 22, at 1650. These papers also respond to learning differences by providing an additional way students can generate insights about action theories, behaviors, and negotiating effectiveness. *See id.* at 1650-51. Some students prefer to learn by talking about experience while others gain more from writing about it. *See* GORDON LAWRENCE, PEOPLE TYPES AND TIGER STRIPES 10, 43 (3d ed. 1993) (explaining that differences in personality type preferences affect the ways that people prefer to learn).

The reaction papers are limited to three pages. Learning from prior experience that focusing these papers helps many students, the course syllabus provides that while any aspect of performance, critique, or discussion may be analyzed, students may use a simple formula. This default formula asks the students to evaluate the most effective and least effective choices that student or another student made and to explain why they reached these conclusions. This default formula also encourages students to analyze the most surprising aspect of the event, critique, or discussion.

The professor reads and grades these reaction papers, providing another way students can influence their course marks. Other graded events are the observed performances, evaluated by lawyers on a form, and negotiation plans, marked by the facilitators.

Students have commented on the value of writing the reaction papers.

> I've actually become a supporter of the reflective learning process. When the course first began, I was skeptical that such a process would be an effective learning tool for me. But at each negotiation task, I found myself more keenly aware of my actions, as I learned from my past successes and failures. First, each reaction paper forced me to evaluate my choices.
>
> [A]s the old adage goes, good judgment comes only from experience, and experience comes from bad judgment. But the adage is only true if one reflects on the bad judgment and converts it into a learning experience.
>
> Writing these papers . . . forced me to sit down, listen to, and think about what I did in each of these sessions. I would not have learned nearly as much if we were not required to write these papers.
>
> Some people are capable of stepping back and looking at what they did. Others can't be that dispassionate. Also, no matter how dispassionate the student may be, they are still stuck with only their frame of reference.

Student Comments, *supra* note 11.

demonstration video vignettes evaluated in the large class meetings. Instead, as suggested earlier, these lawyers should perform the three critical facilitating roles of mapping, modeling, and critiquing.

A. *Mapping*

Mapping supplies a metaphor for helping students recognize where they are and where they need to travel to develop skill performing negotiation tasks. Without an overarching map stating precise sequences and formulas for negotiation competence, every student must develop individual routes. In developing these routes, students predictably start at different places, possess different strengths, and find different challenges. Mapping helps students realize the importance of using action theories consciously and explicitly. It encourages students to build their individual paths to competence by discovering the actions and attitudes they need to become more effective negotiators.

Students starting to negotiate as lawyers frequently encounter a bewildering array of stimuli as they confront tasks that need to be accomplished quickly and successfully. Even a seemingly simple, single issue, buy-sell negotiation requires making challenging decisions about strategic orientation, information disclosure, exchange tactics, argument framing, question phrasing, and listening. These challenges can confuse students who often expect professional skills courses to be much less theoretically rigorous.[31]

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31. Students have commented:

> To be honest, when I signed up for the course, I didn't really think that I was going to learn a whole lot. . . . I felt that I would get practice honing some skills, but I had no idea the amount of theory and preparation that enter into . . . every negotiation.
>
> In my mind learning how to negotiate was like learning to be popular—one either was good at it naturally or not. . . . Thankfully, . . . I persevered until I realized that this class wasn't about learning to purely negotiate and always come out ahead. Rather, it was more about identifying, analyzing, and reflecting about behaviors and discussing ways to effectively deal with them.
>
> I entered the class with the preconceived notion that successful negotiators were born and not made. Successful negotiation, I believed, required nothing more than effective communication skills. Although the initial readings awakened me to the concepts of various negotiation theories, it all seemed like academic drivel. . . . It was not until after the first few simulated negotiations that I realized the various theories were effective and of great practical use.

Student Comments, *supra* note 11.

The initial dimensions of these student responses mirror the totally false—but commonly accepted—dichotomy between theory and practice. Although neither theory nor practice has much value alone in the context of learning and legal education, clinical instruction is often labeled practical and thus a somehow lower order of learning while traditional legal education is theoretical and consequently more valuable. *E.g.*, Richard A. Matasar, *The MacCrate Report from the Dean's Perspective*, 1 CLINICAL L. REV. 457, 475-76 (1994) (stating that one factor contributing to the difference in status between clinical and mainstream faculty is the disdain that each group has for the other's work). This hierarchial judgment is communicated by viewing the learning of legal skill as merely training while other more conventional law school learning is viewed as teaching. Menkel-Meadow, *Narrowing the Gap*, *supra* note 11, at 617 n.100.

A theory-practice dichotomy makes no sense when applied to learning which, as most educational theorists agree, requires action because it is self-inflicted. *See* Blasi, *supra* note 11, at 359 (arguing cognitive science research demonstrates "that a person with an engaged, active stance and the perspective of a problem-solver inside the problem situation acquires an understanding quite different from that of a passive recipient of disconnected information"); *see also* KNOWLES, *supra* note 11, at 61 (contending adults learn best through applications to real-life situations); SCHÖN, *supra* note 11, at 92 (asserting Carl Jung's view that "education is what one does to and for oneself") (quoting Thomas Cowan, Professor at the University of Pennsylvania (1979)). Effective action requires knowing the underlying theory—a person "must know the elements constituting the [action], their relationship, causal and otherwise, . . . and the effect of various stimuli on the [action] under specified conditions." Robert J. Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223, 247 n.63 (1981). This applies whether the actions are riding a bicycle, evaluating an appellate court opinion, or conducting a negotiation. Often this knowledge is unsophisticated, non-purposeful, and preconscious or tacit. Condlin, *supra*, at 247 n.63; *see also infra* notes 76-78. This knowledge nevertheless remains theoretical. Condlin, *supra*, at 247 n.63. Without some sense of what to do, all options would be equally attractive and persons would not know how to act. *Id.* Because theory is a prerequisite of any effective action, "the study of any subject is neither inherently practical nor inherently theoretical." *Id.*

Traditional legal education amply demonstrates the falseness of this theory-practice dichotomy by emphasizing knowledge applications throughout its large enrollment, core course curriculum. These large enrollment courses are intended, with varying degrees of explicitness, to develop analytical and analogical skills. The primary benefit of the Langdellian method used widely in these courses is this method compels students to act by analyzing cases rather than simply reading them. Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 465 (1996). This approach challenges students to apply facts to law, make distinctions, and probe arguments for consequences. *Id.* at 466. Many teachers are more interested in this skills acquisition than in imparting any particular set of substantive knowledge. *See* Eric M. Holmes, *Education for Competent Lawyering—Case Method in a Functional Context*, 76 COLUM. L. REV. 535, 535 (1976) ("[T]here has generally been too narrow a view regarding specific skills and perspectives to be imparted to law students."). Forty-six percent of law faculty surveyed listed improving student thinking abilities as their primary goal in first year courses, more than three times the number who listed having students learn substantive legal doctrine. Friedland, *supra* note 4, at 20-21.

Despite benefiting from the false but pervasive theoretical rather than practical labeling privilege, considerable evidence suggests that many of these basic first-year courses are insufficiently theoretical. For example, many first year students complain of the paralysis that results from having to act yet not knowing what to do, and this stressful situation often contributes to

Applying substantive and procedural knowledge developed elsewhere to primarily oral communicative tasks that have seldom, if ever, been emphasized can be daunting. Many students, for example, initially think that asking questions is simply a matter of making interrogative statements. Students fail to give this action more advance thought or subsequent reflection. The students do not consider or realize that questions can be phrased using forms falling on a continuum from open to leading. They do not realize that how the question is framed exerts predictable effects on responses and relationship issues between questioners and respondents.

Although these action theories underlie legal and skill issues in trial advocacy, they also help competent negotiators predict effective questioning approaches. Helping students add these action theories to their repertoires, however, is complicated by the contrasting orientations to negotiation mentioned earlier. These orientations affect the predictive success of various forms of questions. Therefore, action theories about effective ways to inquire will depend upon the choice to seek maximum gain or a fair outcome.[32] Consequently, the seemingly simple task of

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psychological distress. *See* Stropus, *supra*, at 456-58. One study found that between 17-40% of law students experienced depression and other symptoms—compared with 3-9% in the general population—as a result of their law school experience. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 246-47. One student gave this description, encompassing both paralysis and distress, of the first days of law school:

> The last several nights I've awakened at 3 or 4 o'clock in terror. What if I get called on tomorrow? Do I understand that case well enough to withstand Thomas's interrogation? How can I keep all these facts straight? Hell, I can't even remember what seat I sit in in class.

James R. Elkins, *Rites de Passage: Law Students "Telling Their Lives,"* 35 J. LEGAL EDUC. 27, 32 (1985).

More explicit discussion of the action theories involved in analysis, analogy, and argument, similar to that done in negotiation and other clinical skills classes, may facilitate learning and alleviate psychological distress in these courses. Many commentators have recommended this solution. *See, e.g.*, John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. LEGAL EDUC. 275, 286 (1989) (arguing that pointing out recurring patterns of reasoning, examining modes of argumentation, and evaluating rhetorical strategies facilitates learning); Stropus, *supra*, at 478 (recommending that instructors should explain why questions were asked and why answers were responsive or problematic so that students learn "that probative questions are the very essence of sound legal analysis").

32. Closed questions typically work best in adversarial strategy because other negotiators have little incentive to respond to open questions and can easily block them by providing narrow and safe responses. GIFFORD, *supra* note 19, at 125. Open questions, however, have value in problem solving strategy because they communicate an interest in learning another's agenda

asking questions skillfully requires much richer pre-act cognitive analysis and more sophisticated post-act reflection than most students initially realize.

Helping students map their way from where they are to where they want to be requires constant attention to both developing and refining action theories that guide purposeful behavioral choice. Accomplished through frequent inquiries and discussions about theory choices, mapping helps students generate frameworks for guiding and evaluating future professional practice. These frameworks supply knowledge sets for planning action, evaluating effectiveness of behavior, and making on-the-spot modifications of earlier choices that respond effectively to unexpected situations. Most students learn some of these skills by using action theories self-reflectively to change behaviors and as a result consistently produce more effective results.[33]

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without the focus provided by narrower questions. BASTRESS & HARBAUGH, *supra* note 24, at 413.

33. Questioning and listening choices are involved in most tasks lawyers perform and studies have shown that students can increase their abilities to perform both. For example, students have increased their use of open inquiry after exposure to instructional units emphasizing the value of this action choice in interviewing contexts. *See, e.g.*, Don Peters, *You Can't Always Get What You Want: Organizing Matrimonial Interviews to Get What You Need*, 26 CAL. W. RES. L. REV. 257, 284 n.84 (1989-90) (finding that students used an average of 7% open inquiry in actual client interviews after 10 hours of instruction, as opposed to 2% before); Paula L. Stillman et al., *Use of Client Instructors to Teach Interviewing Skills to Law Students*, 32 J. LEGAL EDUC. 395, 401 (1982) (finding law students increased their use of open questions after receiving simulation-based instruction). Similar findings have been reached regarding increasing student use of active listening. *See, e.g.*, John L. Barkai & Virginia O. Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. U. L. REV. 505, 526-27 & nn.63-64 (1983) (finding students after four hours of instruction increased empathy scale measurements from a pretest mean of 2.46 to a 4.91 mean on the Truax Accurate Empathy Scale); Peters, *supra*, at 279 n.69 (finding that students increased average use of active listening from 7% to 15% of total responses).

Evidence of successful skills learning at a law school apparently does not yet play a large role attracting prime student applicants nor does it significantly affect a law school's academic rankings. *See* Matasar, *supra* note 31, at 477-78 (suggesting that demonstrating skills acquisition by students is not likely to impress outsiders). Some critics conveniently overlook available evidence as they claim clinicians carry the burden of showing that increased skills instruction recommended in the MacCrate Report will produce more learning. *See, e.g.*, Costonis, *supra* note 15, at 194 (arguing there is no empirical basis for concluding skills can be learned in law school to a level of competence). Many make this claim despite the absence of "studies demonstrating that anything [done] during law school has any effect on [student competence] upon graduation." Givelber et al., *supra* note 16, at 21.

Apparently the primary path for law schools to improve their national rankings remains "a faculty's scholarly productivity." John S. Elson, *The Regulation of Legal Education; The Potential for Implementing the MacCrate Report's Recommendations for Curricular Reform*, 1 CLINICAL L. REV. 363, 380 (1994); *see* Matasar, *supra* note 31, at 476-77. Blasi notes, "in the hierarchy of prestige and self-assessments of worth in law schools, surely philosophical jurispru-

The value of acquiring this type of knowledge has been demonstrated by learning theorists studying the development of professional competence[34] and recent research in cognitive science, the investigation of the nature of intelligence.[35] Scholars observe that skilled practitioners consistently demonstrate ways of framing problems that are appropriate to the situations they confront.[36] These frames name aspects of situations for analysis.[37] Skilled practitioners also tackle difficult problems by breaking them into component parts.[38] They frequently create temporary or partial frames, knowing that these assumptions will need revision or replacement as the process continues.[39] These framing skills

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dence and constitutional adjudication rank well above considerations of what ordinary (though expert) lawyers do in ordinary cases. Blasi, *supra* note 11, at 391.

34. *See supra* pt. I.

35. *See, e.g.*, Mitchell, *supra* note 31, at 278 (discussing the meaning of the term "intelligent").

36. *See* SCHÖN, *supra* note 11, at 29 (discussing the adjustments for context that skilled performers make); SCHÖN, *supra* note 14, at 309-10 (discussing frame analysis). Frames consist of images, categories, precedents, and exemplars and constitute the repertoire practitioners bring to situations. SCHÖN, *supra* note 14, at 309. Frames supply the components of patterns, resulting from accumulated experiences, that facilitate the construction of more complex conceptual schemes. Baker, *supra* note 17, at 298 & n.34.

37. *See* SCHÖN, *supra* note 14, at 309.

38. *See* SCHÖN, *supra* note 11, at 49.

39. Schön describes an architect teaching a student how to deal with a difficult land contour problem by reframing the situation as not one of fitting the shape of the building to the slope, but rather one of giving coherence to the site in the form of a geometry that can be imposed upon it, noting that the student can break open the hypothecated discipline later. SCHÖN, *supra* note 11, at 49. Reevaluating and expanding what you know helps solve difficult problems. *See* John Nivala, *Zen and the Art of Becoming (and Being) a Lawyer*, 15 U. PUGET SOUND L. REV. 387, 390-91 (1992) (citing ROBERT M. PIRSIG, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE 249-58 (1974)). The master cellist Yo-Yo Ma described his approach to complex problems: "[W]hen you break it down into basic components you can approach each element without stress. Then, when you put it all together, you do something that seems externally complex, but you don't feel it that way. You know it from several different angles." David Blum, *Profiles: A Process Larger than Oneself*, THE NEW YORKER, May 1, 1989, at 41, 48.

Blasi argues that the use of design provides a problem solving context closely analogous to lawyering. Blasi, *supra* note 11, at 348-49. Both design and lawyering provide situations where the initial circumstances are imperfectly known and where only multiple, imprecise goals exist. *Id.* at 349. In these circumstances, better or worse answers are the only responses. *Id.* There are no "right answers." *Id.* Problems found in both design and lawyering are large and only imperfect feedback about the effects of decisions made along the way is possible. *Id.* Blasi concludes:

> [I]n design as in law, large problems break down into smaller problems and ultimately into individual decisions. . . . All but the simplest case involves separable and distinct subproblems. . . . The solution to each subproblem . . . depends on the outcome of prior efforts to solve other subproblems and constrains

are particularly appropriate when negotiating because the absence of any single overarching theory makes the underlying decision of whether to maximize gain or pursue fair outcomes, and all other related choices, highly context dependent.[40]

Action theories frame and name professional practice, breaking into manageable parts what otherwise appear to be seamless action patterns. These frames highlight potentially subtle aspects and interconnected components of effective professional action. They show things to look

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future efforts to solve the overall problem.

Id.

40. Most negotiation scholars agree that deciding which strategy to use requires a context-based analysis of the situation presented and the particular behavioral environment existing during each moment of the interaction. *See, e.g.*, SCHÖN, *supra* note 14, at 309-10; Blasi, *supra* note 11, at 335-36; Menkel-Meadow, *supra* note 26, at 758-60. Situational variables include:

> (1) the subject matter of the negotiation in terms of whether it is a dispute to be resolved or a transaction to be planned, (2) the number and nature of issues involved, including whether the focus is unavoidably distributive or has integrative potential, and (3) relationship factors including the possibility of future, and the consequence of past, relationships between clients and negotiators.

Peters, *supra* note 26, at 29. Negotiation segment variables include the strategy and style employed by other participants and the stage of the exchange. *Id.* at 29-30.

Context, in the sense of knowing what one needs to do to be effective, is also important to learning law successfully. *See* Mitchell, *supra* note 31, at 278-83 (discussing the differences in problem-solving approaches between experts and novices). Lack of attention to context often impairs learning in traditional, large enrollment core courses. Cathaleen A. Roach, *A River Runs Through It: Tapping Into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 672-73 (1994); Stropus, *supra* note 31, at 476-80. At least initially, students often do not understand why the Langdellian method is used and what they need to do to learn through it successfully. Stropus, *supra* note 31, at 476-77. Teachers often assume that this context is self-evident or that students should struggle to generate this knowledge on their own. Roach, *supra*, at 674. Providing context through clarifying the purpose of the Langdellian method—the goals of the method of learning—facilitates learning. Stropus, *supra* note 31, at 477-78. Placing students in clear roles that provide contexts for their prospective answers is also important. Mitchell, *supra* note 31, at 286. This combats a tendency for students to conclude that practical skills learned in law school are of little value because their class experiences have emphasized non-contextualized analytical reasoning from and with appellate cases. Stropus, *supra* note 31, at 461. As one student complained: "The traditional approach virtually ignores the fact that most lawyers examine the law within the context of a client-matter where the law in the abstract has little value. Working through a 'hypo' is remarkably different from attempting to work with a client." Jennifer Howard, *Learning to "Think Like a Lawyer" Through Experience*, 2 CLINICAL L. REV. 167, 173 (1995).

This application of context responds to what we know about how adults learn. As Knowles argues: "Adults need to know why they need to learn something before undertaking to learn it. . . . Consequently, . . . the first task of the facilitator of learning is to help the learners become aware of the 'need to know.'" KNOWLES, *supra* note 11, at 57-58.

for and pitfalls to avoid when constructing competent practice. Action theories also give students tools to use when planning and evaluating their own experiences. They help students anticipate what sorts of actions are likely to be effective in particular contexts by giving them markers to measure when their actions have been successful and when they need improvement.

Students starting to negotiate continually confront problems facing situations where they have to act, desire to behave skillfully, and yet do not know what to do. Solving these action problems requires selecting and producing effective action. Research into problem-solving suggests that experts use highly organized knowledge systems to find solutions quickly.[41] Expert problem-solvers differ from novices not in the amount of information they have, but in the better ways they have organized it.[42] They appear to scan organized knowledge frames quickly to find solutions rather than engage in systematic searches that slowly consider multiple options.[43]

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41. *See, e.g.*, Blasi, *supra* note 11, at 335; Mitchell, *supra* note 31, at 282. This was demonstrated at a faculty workshop where small groups analyzed a fact pattern in criminal law, completing specific tasks, and then discussed their analytic approaches. Mitchell, *supra* note 31, at 280-81. One of the groups was composed exclusively of people teaching criminal law courses. *Id.* at 280. This expert group quickly developed and applied methods for analyzing the hypothetical. *Id.* at 282. They constructed a coherent solution which was "triggered by and transcended the facts." *Id.* This group also "worked with apparent ease and enjoyment." *Id.* The other groups demonstrated behaviors typical of novices. *Id.* at 283. They used haphazard approaches, manifested uncertainty regarding where to start, and tended to focus on more concrete, surface features of problems. *Id.* at 282. These non-expert groups reported that their work was slower, more difficult, and often generated anxiety. *Id.*

42. *See, e.g.*, Baker, *supra* note 17, at 322; Blasi, *supra* note 11, at 335; Mitchell, *supra* note 31, at 278. Intelligent persons might be smart because their knowledge is organized better rather than because of global qualities in their thinking. Mitchell, *supra* note 31, at 278 (citing Robert Glasser, *Education and Thinking: The Role of Knowledge*, 39 AM. PSYCHOLOGIST 93, 98 (1984)). Because expert faculty have organized knowledge sets about "legal vocabulary; cases; use of analogies; characteristic 'patterns' or 'moves' in reasoning; relationships between bodies of doctrine; . . . and historical perspective[s]" which their novice students typically do not possess, this lack of knowledge may demonstrate the value of providing more contextual information to first year law learners. *Id.* at 278-79; *see also* Roach, *supra* note 40, at 674 (stating that many professors "have spent years honing a general legal framework" for their classes).

43. Blasi, *supra* note 11, at 335. Research on expert and novice physicians shows that experts access "a large library of patterns of illness stored in long-term memory . . . [which] allows them to simply *recognize* large-scale patterns of patient history and symptomatology, and to fix quickly on a possible diagnosis." *Id.* at 353. Experts thus use "direct pattern-matching recognition" to solve problems rather than "[t]he complex chain of inference and hypothesis pursued by novices." *Id.*

Schema theory provides one method for describing these ways that experts organize their knowledge.[44] Schemata are mental constructs embodying expectations about situations and information.[45] Experts have more and better organized problem schemata, consisting of information regarding frames, important components, and likely solutions, than novices possess.[46] Experts solving routine problems simply select appropriate schemata, adapt them to the situation, and execute their solutions.[47]

Skilled negotiators draw on existing schemata and solutions quickly and naturally in routine situations, producing behaviors that flow seamlessly yet mask virtually simultaneous solving of action problems. Novices encountering even routine action problems, on the other hand,

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44. Richard C. Anderson, *Some Reflections on the Acquisition of Knowledge*, EDUC. RESEARCHER, Nov. 1984, at 5, 5. Schema theory supplies an important component of cognitive learning theory. Positing that knowledge's essence is structure, this view contends that learners create these structures as a way to organize information that is received. *Id.*; Friedland, *supra* note 4, at 5. Once structures are created, information can be readily retrieved and reconstructed in light of new experiences. *See id.* at 6.

45. *See, e.g.*, Blasi, *supra* note 11, at 337 (defining schemata as "models of the world"); Mitchell, *supra* note 31, at 277; Friedland, *supra* note 4, at 5-6. Schemata are related to frames, patterns, scenarios, and scripts. Baker, *supra* note 17, at 298 n.34. Schemata have been defined as recurrent patterns which emerge as meaningful structures in our perceptual interactions. Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1147 (1989). Related to theory, schemata resist abstract formalization because:

> Although schemata provide coherence, regularity, and consistency, as patterned gestalts, they are not formal structures in the sense of the rules and representations approach in information processing. They do not become pure concepts since they always retain something of the texture and complexity of the temporal events and historical circumstances out of which they arise.

DIANE GILLESPIE, THE MIND'S WE: CONTEXTUALISM IN COGNITIVE PSYCHOLOGY 149 (1992).

46. Blasi, *supra* note 11, at 335.

47. *Id.* at 338. An expert considering whether to file a summary judgment motion, for example, probably

> does not use a long process of inferential reasoning to work seriatim through each of the individual arguments about whether summary judgment should be sought. She more likely perceives the problem all at once or as a few subproblems, each of which she understands as a variation on a theme she has extracted from past situations. In so doing, however, she does not retrieve all the myriad irrelevant details of the past cases, but rather the schemas she has extracted from them all. . . . Retrieving such schemas [sic] may also lead to the retrieval of associated solution schemes. . . .

Id.

lack the cognitive knowledge constituting a schema that suggests what to do.[48] Seeing no predictably effective solution quickly, they often default to using habitual behaviors.[49] These natural responses are frequently less effective and thus not skilled.[50]

A skilled negotiator suddenly encountering provocative acts by other bargainers, for example, effortlessly applies a schema that suggests making a rapid response.[51] This rapid response implies that the tactics have been recognized.[52] Communicating recognition often neutralizes provocative tactics, particularly when non-escalatory messages are used.[53] Novice negotiators confronting similarly provocative acts, on the other hand, may, lacking schemata and drawing upon habitual patterns of avoiding conflictive activity, choose to make no response.[54] This choice communicates no recognition and consequently provides little neutralizing stimulus.[55] In addition, this choice may suggest that provocation worked and encourage provocateurs to repeat and intensify this behavior.[56]

Developing organized sets of schemata for solving routine action problems supplies an important goal for nonlitigation skills courses. Lawyers facilitate this growth by continuously emphasizing effective action theory when discussing action choices made in simulated negotiations. These conversations are coordinated with the action theories presented in assigned readings and evaluated in large classes through outlines, containing suggested discussion points, that are prepared by the collaborating professor. The simulations are designed to illustrate particular negotiation issues so that discussions can include those issues along with other points that student experiences bring out. Although student theory choices and action experiences vary, assigning everyone to do the same exercise produces shared familiarity with key points.

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48. Mitchell, *supra* note 31, at 282.

49. *Id.*

50. *See id.* at 282-83 (comparing the way lawyers expert in criminal law handled a criminal law question with the way non-criminal lawyers handled the same problem).

51. *See* ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 130-31 (2d ed. 1991) (stating that a good negotiator must learn to recognize tactics and how to neutralize them).

52. *See, e.g.*, BASTRESS & HARBAUGH, *supra* note 24, at 464-65 (describing four reactions a negotiator may choose: ignore the behavior, react with humor, criticize the behavior, or use intimidation as well).

53. FISHER ET AL., *supra* note 51, at 130-31.

54. *Id.* at 130.

55. *See id.* (stating that doing nothing rarely works).

56. *See id.* (referring to how the use of appeasement just before World War II only made the situation worse).

Student pairs and teams conducting simulated negotiations are scheduled so that participating lawyers can observe performances by each. Showing vignettes from the taped portions of student performances provides a rich way to facilitate learning by performers and others who have just completed the same exercise.[57] While sharing conversations about these excerpts, lawyers can inquire about the action theories performers selected.

Asking questions engages student participation in these conversations, involving participants in analyzing their performances. It suggests collaborative exploration rather than hierarchial evaluation, potentially making these conversations less threatening.[58] Asking rather than telling also invites dialogue, casting lawyers as learning facilitators rather than all-knowing teachers. This method teaches good mapping accurately because negotiations invariably present events where no absolute answers regarding optimum action theories and behaviors exist, relegating competent practice to informed yet debatable predictions, opinions, and reactions.

Asking about objectives and action theories provides opportunities for performers to improve their preparation skills by articulating their goals and action plans. This diagnostic inquiry also helps everyone learn what performers were seeking to accomplish before interpreting their actions, insuring that analysis occurs within the context of actors' objectives. It makes little sense to constructively criticize performers for acting inconsistently with particular action theories if they chose others.

Inquiring about action theories also provides ways to give learners positive feedback in situations that might otherwise produce only constructive criticism. Students who identify appropriate action theories in response to this inquiry, for example, can receive positive feedback that rewards these choices even though their subsequent behavior was not effective. This adds initial favorable feedback to balance the constructively critical interpretation of the behavior that follows.

Asking about action theories facilitates learning when performers articulate choices that are clearly inappropriate.[59] Explaining why these

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57. *See infra* pt. II.C.

58. Lawyers need to be sensitive to how they phrase these questions. Asking questions with obvious answers, for example, usually heightens rather than lessens performer anxiety. Using closed or leading questions to make points or back performers into corners is similarly counterproductive. *See* Nina W. Tarr, *The Skill of Evaluation as an Explicit Goal of Clinical Training*, 21 PAC. L.J. 967, 968-69 (1990) (arguing clinical feedback should be presented in a non-threatening manner). Although these ways of phrasing inquiry are consistent with persuasion, the goal of mapping, along with modeling and critiquing, is mutual exploration, reflection, and learning, not advocacy.

59. Finding examples of clearly inappropriate action choices in negotiation is complicated

choices were erroneous provides valuable information for performers

by the context-dependent nature of virtually all decisions mentioned earlier. *See supra* note 40. Choosing action theories that are inconsistent with intended strategy provides a common situation where ineffective behavior can be usefully highlighted for performers and observers. Initial exchange communications in adversarial strategy, for example, encompass offers and concessions and should ordinarily be phrased narrowly and specifically to communicate commitment and inflexibility. BASTRESS & HARBAUGH, *supra* note 24, at 507-08. In problem solving strategy, however, broad and general phrasings are recommended for proposals to communicate flexibility and openness. *Id.* at 511-12. Liberal, unilateral information disclosure promotes finding fair outcomes but risks leaking leverage and resistance points in adversarial strategy. Peters, *supra* note 26, at 8-9.

A choice to lie about a material fact rather than block presents another frequent dilemma. This choice constitutes unethical practice. *See* RULES REGULATING THE FLORIDA BAR, *in* FLA. B.J., Sept./Oct. 1997, Rule 4-4.1(a) (prohibiting the making of a "false statement of material fact"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(a) (1994) (same). Discussing the consequence of the choice to lie rather than block facilitates learning. So does analyzing the difficulties of determining what constitutes material facts in negotiation, an issue which has generated significant treatment in legal literature. *See, e.g.*, Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 U. RICH L. REV. 99, 99 (1982); Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1, 1-2 (1987); Walter W. Steele, *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1387-88 (1986).

Students care passionately about the ethical dimensions regarding lies during negotiations:

> I was uncomfortable with the perception that we were being taught to lie. Blocks run the risk of being perceived as lies, whether they can be characterized as affirmative misrepresentations or not, and therefore I don't think that most blocking techniques are effective.
>
> What really concerns me about these [ethical] issues is that there does not appear to be any clear cut guidelines. Everyone in the class thought differently as to what was or wasn't ethical. Given these sporadic views[,] I don't know how to prepare myself for practice.
>
> [Y]ou can never trust anyone. This fact was the hardest aspect of the course for me to understand. Whether I was engaged in adversarial strategy or in problem solving strategy, I would get tricked into trusting someone. . . .
>
> I learned that as an intellectual discussion, defining honesty is no problem for negotiators, but when faced with an opponent in an actual negotiation, it was not so cut and dry. . . . I learned a valuable yet somewhat jaded lesson at this negotiation—never trust anyone, especially the guy on the other side.
>
> The worst thing I did was lie. I got caught off guard by an obvious question. . . . I did not have a block prepared for this question, though I should have anticipated it. . . . It is easy to see these and other alternatives now, but I let myself get [caught] off guard, and I didn't think quickly enough to make a good recovery. On this point alone I wish I could do this negotiation in order to make amends.

Student Comments, *supra* note 11.

and observers. It also often augments and reinforces reading assignments and earlier large class coverage of these points. Many students find this repetition helpful because new concepts are not always learned the first time they are read or applied.

Not all action choices need diagnostic inquiry about objectives and theories. Lawyers intending to share positive feedback often skip this stage and articulate why they found specific behaviors effective. Connecting these explanations to action theories, often by identifying assumptions made about the underlying theory choices, models effective learning.[60] Forgoing inquiry shortens critiques and facilitates discussing taped excerpts involving every performer. Facilitators, however, should avoid a common tendency to ignore inquiry. Asking rather than telling is probably the most important component of good critique, yet it is often the least evident and hardest to do.

As mentioned, small group discussions also include negotiation experiences that were not observed or taped because having students perform entire negotiations has great learning benefit.[61] This challenges facilitators to generate high quality discussions, grounding them by

60. *See infra* pt. II.B.

61. *See* Fisher & Siegel, *supra* note 24, at 413 (arguing that well-constructed negotiations increase in realism the longer they continue). Unlike interviewing, counseling, and the components of trial advocacy such as witness examinations, opening statements, and closing arguments, the negotiation process does not adapt well to making short, focused action periods the primary instructional focus. For example, students can be asked to start an interview, counseling conference, or direct examination and their performances can be stopped after five minutes and evaluated against generally accepted theoretical models. This approach usually facilitates learning for performers and observers encouraged to participate in these critiques. Students also can be asked to pick up client sessions or witness examinations where previous performers stopped with little loss in the simulation's ability to reflect enough reality to motivate participants to perform seriously.

Neither approach works well with negotiation, however, because the process is much less circumscribed by generally accepted theoretical models. Negotiations also lack the presumably nonadversarial nature of attorney-client interactions and the relatively clear understandings of appropriate behavior established by rules of evidence and notions of etiquette that exist in trial advocacy contexts. As a result, the assumption that any portion of a particular negotiation will yield important behavioral material to analyze for performers and observers is not viable. My experience observing numerous negotiations, both actual and simulated, suggests that peak periods of critically important behavioral choices alternate with slack periods of down time when not much occurs. These factors contribute to my observation that having students perform entire negotiations provides the best learning opportunities.

The approach recommended here assumes that observing 10-12 minutes of 6 pairs of students will, along with the focused demonstration tapes used for most exercises, generate significant material for valuable discussions. The eight negotiations required by this approach provide nine and a half hours of performance time. These action opportunities are supplemented by performance assignments in fifteen short, focused role plays. *See supra* note 28.

eliciting specific examples of theory choices and behaviors.[62] My course includes short videotapes showing lawyers confronting key issues in the simulations, providing visual examples that may help ground discussions. These vignettes frequently stimulate student questions about and disclosures of different choices. Students also may apply small group analysis of the taped demonstrations to the choices they made on these points, perhaps analyzing aspects of their decisions in their reaction papers.

B. *Modeling*

New actions often are learned by imitating others. New lawyers probably use this method more than any other to develop and refine negotiating skills, and unfortunately, as a result, often imitate and learn ineffective action theories. As suggested earlier, the approach to skills learning recommended here employs demonstration as a learning tool by using video vignettes that precede student performances. This procedure facilitates visualization and assimilation. Video vignettes also are shown occasionally after simulations to focus discussion. In order to emphasize and maximize student opportunities to learn from their experiences, lawyer demonstrations of performance skills are not emphasized. Short demonstrations of specific actions when critiquing performances, however, usefully illustrate other ways of accomplishing particular tasks.

Although lawyers are not generally asked to demonstrate action tasks, they must consistently model fundamental skills needed to learn

62. *See* Patton, *supra* note 28, at 404 (stating that teaching assistants in negotiation classes must maintain high quality evaluative discussion by the students). For example, students making abstract or conclusory statements about their experiences should be encouraged to state specifically what they did and why. *Id.* This lets them practice important reflective learning skills connected to formulating and describing action theories and keeping track of actual behavior. The latter task can be challenging in fast-paced negotiation interactions. Disputes from student disagreements about what happened should be resolved hypothetically for discussion purposes by suggesting assumptions regarding what was done. These assumptions demonstrate how a situation can be framed hypothetically, a key component of expert naming, framing, and solving problems. *See supra* note 39. Students also should review the accuracy of these assumptions when writing reaction papers by listening to their audiotapes and reflect on the validity of the hypothesized theories and interpretations.

Students occasionally continue negotiating during discussions, often expressing strong, even angry feelings in the process. When this occurs, lawyers should encourage students to demonstrate effective confrontation skills by requiring participants to summarize what the other said before making any response. *See* Patton, *supra* note 28, at 404. This slows dialogue, often cooling the conflict, and demonstrates how active listening helps disputants come to understand differing perspectives. This process of mutual summarizing also frequently helps disputants reach the point of agreeing to disagree, all that is needed to return to productive full-group discussion. *See id.*

from experience. These skills are undoubtedly the most important professional habits for students to develop because this type of learning continues long after gradation. Students will have many more opportunities to learn from their experiences in the 30 to 50 years that they practice than in one or two law school courses.

The constant search for useful action theory begins this modeling by helping students to map their progress through developing frameworks and mental schemata.[63] It continues when facilitators explicitly articulate the reasons why they interpret action choices as either effective or ineffective. Although lawyer-initiated interpretation should be balanced with invitations to self-critique,[64] facilitators frequently will share interpretative remarks that evaluate action choices during small group discussions.

Minimal learning results when facilitators make vague interpretative comments. Saying that an offer made during a portion of the video shown to the entire small group was "very good" or "not persuasive," for example, has little value beyond generating positive or negative feelings. Such non-specific comments leave performers wondering why facilitators reached these conclusions and produce no significant lessons for other students watching and listening. They provide nothing upon which future behavior can be planned or measured. A specific comment, such as saying that the offer was effective because it was expressed concisely in precise language and justified by plausible factual rationales provides more value.[65] Repeating the actual language used by the student in the offer makes this interpretative comment even more useful.

Specifically articulating behavioral assessments and their supporting rationales models the precision needed to learn from experience when supportive feedback from others is not available, a common component of most non-trial practice contexts. Articulating the basis of interpretative conclusions also enhances learning in important ways. Performers feel less defensive when they hear specific reasons why their action was deemed ineffective. These precise rationales communicate that critical evaluations address behavior rather than self-worth.[66] Embarrassment

63. *See supra* pt. II.A.

64. *See supra* pt. II.C.

65. Communicating adversarially strategic offers in specific, precise language creates the appearance that negotiators are committed to positions and masks willingness to concede from these positions. *See, e.g.*, BASTRESS & HARBAUGH, *supra* note 24, at 508; GIFFORD, *supra* note 19, at 102. Similarly, adversarial offers should be justified by specific reasons that communicate commitment to these positions. BASTRESS & HARBAUGH, *supra* note 24, at 509; TEPLY, *supra* note 25, at 177.

66. Careful attention to language, tone, and manner of delivery is essential because forceful, dramatic phrasings often sound far more critical than intended. For example, a guest

stemming from specific positive feedback can be minimized in this same way.

Connecting interpretive comments to action theories also objectifies assessment—particularly important when sharing constructive criticism. These linkages suggest that critical evaluations of behavior are based on objectively conceptualized standards, contained in action theories, rather than on personal whim, animus, or desire to embarrass. Creating these explicit theoretical contexts also makes it safer for performers and observers to disagree with interpretive comments because these challenges raise questions of theory rather than personal competence or worth.

Doing these tasks well requires modeling two additional components of successful learning from experience: self-awareness and openness. Self-awareness, a critical component of negotiation and other non-trial interactive skills, demands that facilitators be able to articulate their action theories as they interpret behavioral choices in student performances. At an obvious level, this requires that the lawyer know the action theories contained in assigned readings and developed earlier in large classes. The outlines and suggested discussion points shared by the collaborating faculty member provide this knowledge.

At a less obvious level, however, self-awareness requires the lawyer to articulate adaptations, modifications, and refinements of action theories to fit them to situations encountered. Action theories supply general propositions that predict and explain and must always be fitted to specific contexts.[67] Many negotiation action theories need contextual adaptation connecting them to strategic choice.[68] Other general theoretical insights, such as the reciprocal norm that often applies to exchanging information and concessions, have less specific predictive and explanatory power and consequently need extensive grounding in specific situations.[69] Many action theories, like many doctrinal points developed

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critiquer in one of my classes began a critique of a five minute interviewing performance by saying, "I don't know who I dislike more, you or the client." This phrasing, while dramatic, needlessly attacked the student and the actor playing the client. It also stated a conclusion that was far too general to be helpful. A comment stating that the student did several things that may have damaged rapport with this client, listing specific examples, would have been much more helpful.

67. *See supra* notes 40, 59.

68. *See, e.g., supra* note 32 (discussing the appropriate situations to use either open or closed questions).

69. Specific action theories provide significant predictive and explanatory power because they target narrow behaviors and usually produce intended effects. *See supra* note 32 (open versus closed questions); *supra* note 59 (ethical dilemmas); *supra* note 65 (specificity of offers). Different question and exchange phrasings, for example, aim at narrow behaviors and frequently create predicted results. Other more general theories, such as knowledge that negotiators tend

in traditional courses, depend on facts and situations rather than provide absolute answers. They supply starting points for modification and refinement as circumstances and contexts warrant similar to traditional class discussions of hypothetical scenarios based upon court opinions.

In addition, practice events often present unique contexts where theoretical knowledge is incomplete.[70] Even simulated negotiations frequently force students to deal with uncertain and indeterminate situations where existing action theories are neither sufficient nor easily accessible before acting.[71] The ongoing dilemma of influencing the

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to expect reciprocity in information exchange, neither predict nor explain much in any context. Students nevertheless need to consider these theories when formulating other action plans. A negotiator who plans to acquire extensive specific information early, for example, should consider how she will handle probable expectations that she also will have to answer questions. Planning simply to ask and block probably will not be effective unless other contextual factors supersede the norm of reciprocity. Consequently, facilitators need to be sensitive to these general norms and contextualize them to student performances.

Another dimension of contextual application requires clear analysis of how action theories are used. For example, active listening theory suggests that paraphrasing what a speaker said demonstrates cooperative style by valuing another's agenda by proving the listener heard and understood the communication. *See supra* note 19. Using cooperative style generally promotes reaching agreement in either strategy by minimizing impasse risks from escalatory cycles generated by responses to the attacking behaviors of competitive style. Listening paraphrases, however, also can be combined with reframing statements that recast communications more favorably in efforts to gain advantage. Recipients of these reframing efforts may resent them, converting the stylistic consequences from cooperative to competitive. Consequently, interpreting a student's use of an action theory requires clearly identifying how it was used.

70. Baker contends "that 'practice is always *underdetermined* by theory.' " Baker, *supra* note 17, at 338 (quoting ROBIN USHER & IAN BRYANT, ADULT EDUCATION AS THEORY, PRACTICE, AND RESEARCH: THE CAPTIVE TRIANGLE 74 (1989)). Capturing an experience I often have shared in my classes, he noted:

> Time after time, I have observed students in my negotiation class flounder during a simulated negotiation even though they had theorized about the negotiation in advance. Their theory could not accurately predict the stream of dilemmas they actually faced. Although the process of thoughtful preparation may have created a *resource* upon which they *might* draw, the resource was one of confident familiarity rather than a theory-based blueprint of how to proceed.

Id.

This insufficiency of theory may largely result from novice status. Practitioners encounter two types of action situations, familiar and unfamiliar. SCHÖN, *supra* note 11, at 33-34. Familiar problems are solved quickly by applying internalized frames and schemata. *Id.*; *see also supra* notes 41-43 and accompanying text. Unfamiliar situations present problems which have no obvious fit between event characteristics and available frames and schemata. SCHÖN, *supra* note 11, at 34. Typically, law students starting to negotiate as lawyers are novices, facing far more unfamiliar than familiar action situations. Their initial learning curve is likely to be steep.

71. These dilemmas raise the challenging question whether it is realistically possible to develop theory before acting in uncertain situations requiring simultaneous actions. Baker argues

strategic choice of other negotiators or deciding when and how to shift from gain maximizing to problem solving or vice versa, cannot be easily planned or simply answered by pre-selected action theories.[72] Similarly, several of the simulations challenge students to manage situations where many issues seem amenable to problem-solving strategy but a few invite gain maximization. Competent practice in these situations often requires reacting spontaneously to events as they unfold. Although action theories provide important diagnostic clues for making these decisions, reconstruction through reflection may describe skilled practice in these situations more accurately than theory generation before acting.[73]

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this is not possible, contending that contextual cognitivists demonstrate that "[t]oo much of practice is situation-specific and subconscious to be dependent on [abstract] Theory." Baker, *supra* note 17, at 337. He then criticizes the clinical catechism, advanced in this essay, for inappropriately elevating the "articulation of a formal Theory-of-action before action . . . on the mistaken assumption that known, articulable Theory is reliably deployed on conscious command in pre-defined problem settings." *Id.* at 338. In my view, Baker overdraws an analogy between the action theory sought by clinicians and "rule-driven rationalism" pursued elsewhere in law schools. *See id.* at 354. Baker's argument also unnecessarily diminishes the valuable role that specific theories framing particular action choices—like phrasing questions, paraphrasing listening responses, connecting information and exchange choices to strategy choice, and considering stylistic dimensions of language, tone, and pacing—play in helping novices.

Although negotiations frequently present uncertain dilemmas which transcend these specific action theories, knowing and using these markers helps novices develop the exemplars and patterns that make skillful navigation of indeterminate situations possible. Novices have to start somewhere. Specific action theories, in my view, provide a good place to begin. *See* Menkel-Meadow, *Narrowing the Gap, supra* note 11, at 610 (critiquing the MacCrate Report's "overly abstracted, and standardized conception of counseling" for ignoring specific tasks like question framing and demonstrating empathy).

Students struggle with these broad dilemmas in their negotiation experiences:

> A weakness that I have, and I am still frustrated about it because I don't know how to fix it, is what to do when I want to problem solve and the other side wants to gain-max. I don't have to switch my tactics to play their game, but how do I get them to switch to my side? Usually what I did was get angry, become competitive, then throw out any purposeful behavior I might have planned.
>
> I think that the distinction between problem solving and adversarial strategy is a necessary and helpful distinction, but one aspect of it caused problems for me. My attempts to fit an entire negotiation into one or the other paradigm, in a very black and white way, with no ambiguity, caused me to do things that were not very effective.

Student Comments, *supra* note 11.

72. *See supra* pt. I.

73. Baker argues that a contextual theory before action in these situations is inaccessible and irrelevant. Baker, *supra* note 17, at 337. He claims that Donald Schön, George Lakoff, Mark Johnson, Jerome Bruner, and other contextual cognitivists contend that problem-solvers show

Making these reconstructions helps students develop situation models and exemplars to use when confronting similar future situations.[74]

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a "preference for reasoning by pattern, theme, and exemplar, by analogy, metaphor, and narrative, rather than by Theory." *Id.* at 340. He further contends that:

> Humans are poised to interpret situational dilemmas intuited through a gestalt awareness of a total but unique context. Both the particulars and the situational gestalt coherence prime and control cognitive functions prior to any recourse to Theory. Accordingly, Theory is constructed in response to a problem task *after* an intuitive recognition, unexplained in most accounts, of the salience of the Theory (or pattern or metaphor) to the *present* contextual dilemma.

Id. at 338. Schön appears to agree, writing: "Although we sometimes think before acting, it is also true that in much of the spontaneous behavior of skillful practice we reveal a kind of knowing which does not stem from a prior intellectual operation." SCHÖN, *supra* note 14, at 51.

Although I have experienced and seen this gestalt awareness or knowing in action, I also believe that advance knowledge of specific action theories can inform it. It can provide important diagnostic clues in negotiation, stemming primarily from information disclosure and bargaining exchange choices. These clues suggest what strategic inferences can be safely drawn. For example, determining what strategy other negotiators are using requires determining how they are using information. This determination provides valuable clues regarding when shifting from adversarial to problem-solving strategy would be effective. I contend that these types of specific action theory based clues also can be incorporated in Baker's situational gestalt coherences and Schön's knowing in action to help negotiators make these difficult choices in uncertain situations. *See* SCHÖN, *supra* note 14, at 51; Baker, *supra* note 17, at 338. They may already be there at an intuitive level in the exemplars and models expert negotiators use. *See* Menkel-Meadow, *Narrowing the Gap, supra* note 11, at 618 (arguing that the constituent aspects of lawyering such as question-framing and active listening should be taught first and then be incorporated into specific frameworks and tasks).

Baker contends that theory emerges from action largely as after-the-fact reconstruction rather than before-the-fact governing agent. Baker, *supra* note 17, at 345-46. He summarizes a contextual cognitivist view of this reconstruction process:

> Although it is unlikely that we can provide real, i.e. cognitively accurate, narratives or explanations of our choices or decisions . . . , we do persist in constructing such explanations on our own or when asked to do so. These explanations reanimate our thinking, creating a "longer-term effect of becoming the real reasons for subsequent decisions." The correspondence from after-the-fact-reflection to future truth is not one-to-one, but the well-told stories and practical theories derived from experience do become core resources in our future engagements.

Id. at 347-48 (citations and emphasis omitted).

74. These larger action dilemmas, when viewed from another perspective, present problems that are too complex to be resolved by simple problem recognition and solution processes. *See* Blasi, *supra* note 11, at 338. Blasi describes these situations as containing many different subproblems, evoking several schemata yet not fitting within any of them. *Id.* He suggests the use of situation models helps experts negotiate these dilemmas skillfully. *Id.* at 338-39. Situation models are process representations that are specific as opposed to categorical. *Id.* at 339. They are composed of schemata with the "variables filled in." *Id.* They can be run in

Finally, although the simplifications of reality created by simulations limit their reach, most exercises generate events which require dealing with unexpected, surprising issues. Seldom does a performance class replicate only the points on a faculty outline and demonstration video. Facilitating learning thus challenges lawyers to create viable action theories dealing with surprising events, make context-necessary modifications of specific actions, and analyze situation-specific resolution of broad practice scenarios, while always stating explicitly why they believe recommended actions are likely to produce intended effects.[75]

This is not easy. Expertise often lies in doing something and not in verbal theorizing about it, making identifying and articulating why particular actions are likely to accomplish intended results difficult.[76]

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simulation according to a script based on expectations. *Id.* For example, lawyers can create fairly discrete models of opposing counsel, judges, and clients, and then use these models to preview what might happen if specific actions are taken. *Id.* at 341. Students working together over a semester in small groups develop situation models of each other and use them when planning and performing negotiations. Similarly, students can start developing patterns and models from these kinds of recurring, broad events that cannot be encapsulated easily in one or two schemata.

Baker suggests that organizing situation-specific knowledge effectively requires creating practice exemplars. Baker, *supra* note 17, at 342. He notes: "Expertise is often packed in the form of incident accounts—context-rich accounts of nonroutine incidents. . . . [Exemplary] stories are records of lessons learned, analogues, and key decisions, stored in a form that is easy to call up when needed. They function like the voice of experience. . . . " *Id.* at 342-43 (quoting Gary A. Klein, *Using Knowledge Engineering to Preserve Corporate Memory, in* THE PSYCHOLOGY OF EXPERTISE: COGNITIVE RESEARCH AND EMPIRICAL AI 170, 180-81 (Robert Hoffman ed., 1992)).

Learning very specific action theories provides markers and categories that can help novices begin to develop situation models and exemplars. *See supra* notes 71-73. Blasi emphasizes the value of facilitating learning by helping novices learn the factors to which they should attend. Blasi, *supra* note 11, at 390. He argues "[e]ven when all we have to offer on the 'theory' spectrum is our judgment about the criticality of category, that may be considerably more useful in the long run than the more common unstructured narrative of miscellaneous things done right and wrong." *Id.*

75. Surprises, by definition, generate outcomes inconsistent with expected effects and force virtually spontaneous generation of action theory and behavior. SCHÖN, *supra* note 11, at 28. Surprises invite virtually on the spot experimentation but often trigger habitual or virtually automatic behaviors when actors fail to engage in spontaneous reflection. *Id.*; *see* Peters, *supra* note 26, at 110 (stating that when under stress, people tend "to resort to familiar, natural behaviors). The value of surprises in generating insights about habitual patterns supplies one reason they are listed in the default formula for reaction papers. *See supra* note 30 (describing reaction papers); *infra* notes 113-14 (listing examples of student recognition of their own recurring behavior patterns).

76. SCHÖN, *supra* note 11, at 22-25. Expert lawyers "tend to find it almost impossible to explain their thought processes to the novice across the gap of their different levels of experience." Harold A. McDougall, *Lawyering and Public Policy*, 38 J. LEGAL EDUC. 369, 384 (1988). Humans routinely learn complex behaviors like riding bicycles or juggling without

Skilled practitioners who have been successfully doing things for many years may find that they know more than they can say. They often can do effective things without fully knowing why they do them.[77] Making the effort to construct verbal descriptions of key components of this knowledge facilitates learning, helping students name and frame, develop schemata, and build situation models and practice exemplars.[78]

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developing resulting abilities to verbally describe their performances in even roughly adequate terms. SCHÖN, *supra* note 11, at 24-25. Attempting to describe these processes through a consciously articulated system of action theories will produce long propositional sets that may not be necessary to facilitate learning these skills. Simply pointing out key fundamental elements of these larger knowledge sets may suffice if learners try and practice them. *See id.* at 25 (describing the identifying of the sequences of operations and procedures and the clues observed). Specific negotiation action theories supply these key fundamental elements of the larger, less certain tasks which require developing situation models and practice templates. They help novices uncover key operations which invariably involve questioning phrasing, listening, and stylistic consideration of language, tone, and pace. They also provide observable clues in careful analysis of information and contextual assessment of strategy.

77. SCHÖN, *supra* note 11, at 25. Sometimes deviations from a norm are more easily described than the norm itself. *Id.* at 23-24. Occasionally wrong answers are given when skilled practitioners are asked to describe actions they know by doing. *Id.* at 25. Many of the cognitive processes that experts use have become automatic or subconscious, enabling them to focus on other things. Givelber et al., *supra* note 16, at 14. One negotiation student captured this well, comparing herself to a skilled mediator whom she observed:

> I've been able to approach that level of performance on a few occasions, when dealing with things that I'm very, very familiar with. Once again, I think it has a lot to do with internalizing a lot of the necessary actions as sort of a sub-conscious package, and thus freeing the conscious mind to focus on the matter at hand. . . . [F]or example, when I need to speak to someone in Spanish, and I need to use forms of speech and words with which I am not familiar[,] I need to spend a lot more of my (admittedly limited) brain power just figuring out how to say what I want to say, and that strains my ability to focus and be creative.

Student Comments, *supra* note 11.

78. It is possible to reconstruct aspects of this tacit knowing notwithstanding these difficulties. *See* SCHÖN, *supra* note 11, at 25. These reconstructions, despite probable inaccuracies, facilitate learning. *See* ARGYRIS & SCHÖN, *supra* note 8, at 157. According to Baker:

> The fact that the conscious searchlight of reflectiveness can probe only so far and only a few things at a time is no reason to deny it any role whatsoever. . . . The thematic coherences and theory which emerge . . . may become resources for our future engagements and corrective for our biases and ineffective hueristics.

Baker, *supra* note 17, at 355. Professionals must "learn to develop microtheories of action that, when organized into a pattern, represent an effective theory of practice." ARGYRIS & SCHÖN, *supra* note 8, at 157.

Small group facilitators encountering this difficulty should comment on it, modeling the struggle that all practitioners must embrace to make sense of and learn from their experiences. Facilitators who acknowledge their uncertainties demonstrate that professionals need to reflect on their own practice to increase competence.[79] They also stimulate learning.[80]

Acknowledging difficulties articulating action theories models patience, optimism, and self-tolerance—important components of professional competence. Competent negotiation is not necessarily easy to do initially, and one doesn't always get it right the second or even third time. This sharing also diminishes student tendencies to view facilitators as all-knowing masters. Lawyers who are unwilling to surrender that role need not participate. It reminds students that interpreting their experience, not unthinking obedience to instructions, creates professional competence. It also reinforces the tentative, developmental, and context-dependent nature of most negotiation action theories, reminding students to look for frames, schemata, and situation models rather than absolute answers.

Modeling the related learning skill of openness requires willingness to consider and value different perspectives. Inquiries about action theories, for example, may produce responses that facilitators do not anticipate. Unless the theory chosen is totally wrong, openness requires considering and valuing the different perspective encompassed in the choice. This openness permits discussion of the strengths and weaknesses of performer choices and facilitator preferences. Open dialogues

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79. Schön argues that the ultimate in professional artistry lies in the ability to reflect-in-action, having a conscious "reflective conversation" with situations as they unfold. SCHÖN, *supra* note 14, at 268. Usually generated by surprising, unexpected, or nonroutine events, this inner monologue requires reflection in the midst of action without interrupting it. SCHÖN, *supra* note 11, at 26. A critical function of this process is thinking "critically about the thinking" that stimulated the attention. *Id.* at 28. This critical thinking may cause restructuring "strategies of action, understandings of phenomena, or ways of framing problems." *Id.* This reflective conversation creates instant experimentation to "try out new actions . . . , test [the] tentative understandings . . . , or affirm the moves . . . invented to change things for the better. *Id.* Schön believes that this is the way professionals create their own theories of practice as they learn from experiences, building schemata, situation models, and exemplars on the journey. *See id.* at 22-39 (describing examples of theories of practice created by various types of professionals).

For students, the journey to creating theories of practice for their professional life starts with awareness in action. Although few students reach reflection-in-action levels during law school, most start becoming aware in action. One student, for example, wrote: "As the semester progressed, a little light bulb would actually turn on while inappropriate behaviors arose. . . . Other times, a little inaudible 'yes' pat-on-the-back type positive reinforcement to myself would flash through my mind." Student Comments, *supra* note 11.

80. Carl Rogers wrote that an effective way he learned, and believed he facilitated learning in others, was to state his uncertainties, try to clarify his puzzlement, and in this way get closer to the meaning of his experience. ROGERS, *supra* note 17, at 154.

reinforce the provisional, contextually dependent nature of action theories and remind students that competent professionals continually create and refine their schemata and situation models as they practice.

Similarly, lawyers should remain open to opportunities to turn disagreements voiced by performers and observers into dialogues. Helping disagreeing students clarify the meanings they derive from events and emphasizing performer interpretations of experience facilitates learning.[81] Asking other participants for their reactions helps because hearing how other negotiators responded to action choices also facilitates learning.[82] Advantages and disadvantages of differing perspectives can be discussed. Full exploration and mutual understanding, rather than advocacy and persuasion, should be modeled.[83] When

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81. Everyone understands the world in slightly idiosyncratic ways influenced by unique mixes of values, experience, ideology, personality type preferences, and emotional sensitivities. Condlin, *supra* note 31, at 228. Consequently, students will observe and interpret behaviors and verbal critiques differently, frequently creating different but plausible understandings. *See id.* at 228-29. Focusing on performer interpretations also acknowledges the important role that student experience plays in adult learning. KNOWLES, *supra* note 11, at 59. Ignoring or devaluing adult experience risks "not rejecting just their experience, but rejecting them as persons." *Id.* at 60.

82. Involving other participants further objectifies interpretation, affords valuable insights, and encourages participation in the process of analyzing specific behavior in the context of action theories. *See* Moberly, *supra* note 30, at 321. Students have commented about these values:

> I learned that when I did not answer [her] question about my offer because her position was outside an acceptable range, she felt like I was not being open and being very competitive. Yet, when I said it, I did not think I was being rude.
>
> Talking about the other person's mental reactions to my behavior really made me aware of my acts. . . . The best example . . . is . . . the other attorney's thoughts about my standing up in the . . . negotiation. I did not think anything of this when I did it. Now I know certain people are threatened or a little taken back by it.
>
> One of the events that struck me the hardest was when I found out that my "throw the baby off the cliff" analogy angered [one of the lawyers representing the baby in a personal injury claim]. . . . [I]f she really was angry, then my analogy had the wrong effect . . . [but] my analogy seemed like a good one. . . .

Student Comments, *supra* note 11.

83. Persuasive behavior is usually competitive on some level and undercuts mutual understanding and learning by restricting the types of information shared. *See* Condlin, *supra* note 31, at 239-45. It also subtly influences students to distrust their experience and thus can stifle significant learning. *See* ROGERS, *supra* note 17, at 154.

Critique should pursue mutual exploration, reflection, and learning, not advocacy. Lindeman, in 1926, suggested that adult learning is optimally pursued by "[s]mall groups of aspiring adults who . . . begin to learn by confronting pertinent situations; who dig down into the reservoirs of their experience before resorting to texts and secondary facts; who are led in the discussion by

disagreement involves modifying action theories, lawyers may also provide positive feedback regarding the effort regardless of how they feel about the result.

Facilitating learning negotiation demands another level of self-awareness and openness from critiquers, one that insures that the contrasting orientations to the process are equally valued. Put simply, participating lawyers may need to stretch to facilitate student learning of problem-solving theories and skills because these schemata and actions may not be fully understood and developed in their professional repertoires. Limited empirical and considerable anecdotal evidence suggests that while some lawyers primarily engage in problem-solving negotiation, a much greater number conceive of the process adversarially.[84] Scholars contend that adversarial assumptions infuse virtually all lawyer-conducted negotiations, often leaving problem-solving theories and actions largely counter-intuitive and counter-cultural.[85] Adversarial assumptions may not produce more impasses in

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teachers who are also searchers after wisdom and not oracles. . . ." EDUARD C. LINDEMAN, THE MEANING OF ADULT EDUCATION 11 (1926).

This has been described as a Zen approach, and it encourages law teachers to be facilitators and guides, not gurus. Greg K. McCann et al., *The Sound of No Students Clapping: What Zen Can Offer Legal Education*, 29 U.S.F. L. REV. 313, 315 (1995). Like many aspects of Zen, avoiding persuasive behaviors and promoting mutual exploration is challenging, difficult, and elusive. *See* Condlin, *supra* note 31, at 275-76 (contending that persuasion through asserting critiquer's interpretations of student behavior rather than collaborating with performers to explore their meanings is pervasive in clinical teaching); Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 531 n.87 (1995) (asserting that persuasion dominates traditional law teaching as well as trial advocacy, negotiation, and clinical courses).

84. *See, e.g.*, BASTRESS & HARBAUGH, *supra* note 24, at 374; Menkel-Meadow, *supra* note 26, at 764-65. Gerald R. Williams surveyed the negotiating behavior of lawyers in Denver, Colorado, and Phoenix, Arizona. GERALD R. WILLLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 15-40 (1983). Although Williams' research did not distinguish between strategy and style as those theories are articulated in this essay, Williams' survey has been interpreted as showing a pervasive use of adversarial strategy in negotiation. GIFFORD, *supra* note 19, at 29 & n.6; Peters, *supra* note 26, at 28 n.113.

85. *See* Menkel-Meadow, *supra* note 26, at 764; Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225, 257 (1995). Riskin contends that perspectives embodied in the adversary system of litigation pervade the lives of American lawyers. Riskin, *supra* note 12, at 30. This perspective creates a standard philosophic map containing core assumptions that disputants are adversaries in win-lose contests and that disputes should be resolved through third party application of legal rules. *Id.* at 43-44. A study of how the public and lawyers view lawyers suggests that adversarial behavior is a major component of both perspectives. *See* Marvin W. Mindes & Alan C. Acock, *Trickster, Hero, Helper: A Report on the Lawyer Image*, 1982 AM. B. FOUND. RES. J. 177, 191-92. Lawyers listed "competitive" as the adjective most applicable to attorneys while the public chose it as the second most applicable term. *Id.* The hero image, described as aggressive,

practice, however, considering the overwhelming percentage of matters that settle rather than go to trial. They probably do, however, encumber many agreements with excessive bargaining costs and unrealized joint gains.[86]

Scholars of how professionals develop competence suggest that these orientation tendencies extend beyond law. The most common general set of behavior patterns displayed by professionals in business, public administration, industrial management, and teaching direct interpersonal actions toward achieving unilaterally defined objectives, use information primarily to persuade, and strive to win and avoid losing, all hallmarks of adversarial negotiation strategy.[87] Action theories based on these objectives usually generate defensive, mistrustful relationships and deteriorating problem-solving processes.[88] Many aspects of traditional legal education reinforce these interactive behavioral patterns, often producing student-faculty and student-student relationships characterized by competition, persuasion, and guarded information sharing.[89]

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competitive, and successful, is the most valued image of both the bar and the public. *Id.* at 180, 191. Applying this image to negotiation suggests the predominance of adversarial strategy that most scholars accept. *See supra* note 84. Nelken claims that negotiation students must confront the "idealization in American legal culture of an aggressive, competitive stance towards others [where], [a]s society's hired guns, lawyers are supposed to shoot first and ask questions later." Nelken, *supra* note 12, at 427.

This adversarial orientation begins much earlier than law school. Psychological studies reveal that given an option of choosing cooperation for mutual gain or competition resulting in no gain, American children prefer to compete. John J. Dieffenbach, *Psychology, Society and the Development of the Adversarial Posture*, 7 OHIO ST. J. ON DISP. RES. 261, 265-74 (1992). As one student wrote:

> Lawyers are not perceived as listeners but rather arguers; no one ever said when you were little, "oh, you listen so well, you should be a lawyer." Also throughout a student's law school experience they are always expected to spout off their knowledge and to do this at the drop of a hat; therefore student[s] are not taught how to deal with clients or to listen.

Student Comments, *supra* note 11.

86. *See, e.g.*, Robert A. Bush, *"What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. DISP. RES. 1, 8 (1996).

87. ARGYRIS & SCHÖN, *supra* note 8, at 63-84; SCHÖN, *supra* note 11, at 256-59; *see* Lee Bolman, *Learning and Lawyering: An Approach to Education for Legal Practice, in* ADVANCES IN EXPERIENTIAL SOCIAL PROCESS 111, 119-20 (Cary L. Cooper & Clayton P. Alderfer eds., 1978).

88. ARGYRIS & SCHÖN, *supra* note 8, at 72-73.

89. Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284, 295-96 (1981).

Adversarial strategy seems to be the preferred orientation for most law students initially approaching negotiation tasks in these courses.[90] Strategic selection supplies an ongoing course theme and some students consistently resist learning problem solving theories and skills.[91] Others

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90. *See supra* note 84. Students have commented on their adversarial orientation, writing:

> There is no doubt that I am very competitive by nature. Law School has only sharpened that character. I really wanted to win this negotiation—score more points than anyone else in the class. This would have satisfied my need for achievement and fed my ego. But the result may not be as good as it first appears.
>
> For me, it's all real in law, but it's all a game; someone always wins and someone always loses. Sometimes, as we saw this term, both sides can win at the same time. But isn't winning the whole idea? If I win, the client wins; if the client wins, he is happy, and I get paid.
>
> I would find myself fighting over something merely because I felt that if I could get it, I, not my client, would win the fight. I would view certain negotiations as a battlefield, where I would be the general, just with one thing on his mind, to win!
>
> The potential for manipulation in negotiation is scary for me. I have spent many dollars trying to clear my personality of its manipulative characteristics. [The student then described using adversarial strategy masked by cooperative style] [i]n some ways I enjoyed it, which is the really frightening part. I am unsure whether the enjoyment is the winning or an adrenaline rush. I hope it isn't the taking advantage of others.

Student Comments, *supra* note 11.

The prevalence of war (battlefield, general, fighting) and sports (game, scoring more points, someone always wins and loses) in these comments is striking. *See* Thornburg, *supra* note 85, at 225-26.

91. Students have commented in their final reaction papers:

> I am so ingrained with adversarial theory of dispute settlement that I can fully reveal my negotiating stance only with the greatest of efforts. I am always wondering how the other party is going to twist my revelations to their advantage. I have always viewed a negotiating session as a [gain] maximizing event to be exploited, if not to the fullest, at least to the point I believe is fair to all parties. Unfortunately, but not unexpectedly, not all parties agree with my identification of what is fair. As a result, my version of problem solving evolves into my attempt to impose my fair solution onto all parties.
>
> [The student questioned whether it is possible to talk about the law and use problem-solving because] one must take into account the substantive law which is inherently adversarial because one must take positions as to the law and then justify them.
>
> I am not sure how realistic it is to expect in practice that there is or even may be a creative solution hiding in every dispute-oriented negotiation. I sense, or rather

find they prefer these schemata and actions.[92] Although many students blame legal education upon confronting their adversarial orientation,[93]

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my fear, is that money is almost always the only issue of substance on the bargaining table, and the only thing either side is willing to discuss. If the message is that we're merely to be open to the possibility that integrative issues may be lurking in the most adversarial of setting, then I will not be heard to object, but throughout the semester I've gotten the impression that we're being asked to believe, unrealistically, that integrative issues will always be there, and one only needs to be creative enough to discern them.

Student Comments, *supra* note 11.

Facilitators should remember that this reluctance to accept problem-solving theories may result from refusal to give up something seen as valuable rather than inherent shortcomings or poor facilitation. *See* SCHÖN, *supra* note 11, at 116-17.

92. Negotiation students have written:

> [P]roblem solving was just so much more pleasant. However, if we were not introduced to it in class I could see myself in my first negotiation, in the real world, trying to use an adversarial strategy when it is totally uncalled for. . . . None of my other classes really prepare us for problem-solving. . . .
>
> Last summer I worked at a personal injury firm in South Florida. While there, I saw my fair share of competitively styled tactics. Bank representatives called us "ambulance chasing assholes," insurance adjustors made jokes about our clients, and attorneys screamed at each other. . . . While I was being taught to draft demand letters, my supervising attorneys emphasized. . . . [n]o demand letter was complete unless it included threats and intimidation. This was difficult because . . . I hate confrontations.
>
> When I entered negotiation class that first day I, probably like most of the people in the class, viewed the negotiation process as always being a zero-sum game. I believed that nearly every negotiation invariably resulted in there being one winner and one loser. I think that my naivety was born out of my prior [belief] that in order to zealously represent one's client, it was necessary for a lawyer to jump up and down, while yelling and flaring his or her nostrils. Prior to this class, it had never dawned upon me that more might be accomplished by shunning the traditional "A yells at B, B yells at A, A yells at B again" negotiating process.
>
> I enjoyed the easy-going, laid-back, non-adversarial atmosphere of a problem solving negotiation. My MODE scores indicate that I prefer sharing and accommodation over competition. I think [these preferences] made me feel more "at ease" in a problem-solving negotiation than in an adversarial one.

Student Comments, *supra* note 11.

93. For example, students have written:

> Our whole approach to law school since the LSAT has been adversarial and competitive. We have been shown and practiced the adversarial method in everything we do and everything we read. For most law students, problem solving

most accept that effective negotiation requires competence with each strategy.[94] Virtually all legal situations involve both.[95] Most law students readily accept the value of developing problem solving skills to practice competently in legal contexts featuring growing use of mediation and other non-zero sum resolution methods.

Abilities to assess accurately which strategy predominates at any particular stage of a negotiation, and why, underlie the context-sensitive approach to these tasks used by skilled experts. These abilities lie at the core of assessing whether students developed effective action theories and used congruent behaviors. Development and refinement of these abilities cannot be facilitated well by lawyers who are neither aware of their orientational biases nor open to thinking about situations and contexts from different perspectives.

Demonstrating self-awareness and openness ultimately requires reframing the role from teacher to learner. Opportunities to teach professional skills are chances to learn twice, when preparing and when reacting to different student experiences. Learning one's action theories and sharing them at appropriate moments, as well as learning from different perspectives articulated during discussions, facilitates skills development. Doing this well requires continuous efforts to seek to understand what students experiences were and what they meant to those students. This focus on mutual learning goes to the heart of facilitation, the most important self-learning skill participating lawyers model.

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is unfamiliar territory that many do not feel comfortable with.

> It seems as though everything else [learned in law school] that is used to indoctrinate a law student just serves to make us more arrogant[,] intellectually impersonal[,] and less able to get along with people.

Student Comments, *supra* note 11.

Although this blaming seems convenient, legal education's general emphasis on "a punishment-centered theory of socialization" affording a prominent role to competitive success or failure probably contributes to the predominance of an adversarially strategic conception of negotiation found in law students. *See* GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY 29-34 (1978); Barry B. Boyer & Roger C. Crampton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 269-70 (1974).

94. *See, e.g.*, GIFFORD, *supra* note 19, at 22-23 (arguing that a competent lawyer must be able to utilize the various negotiation strategies in the appropriate context); DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 30-35 (1986) (arguing that different strategies are essential to competent negotiation); LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 116 (1987) (providing an overview of adversarial and problem-solving strategies).

95. LAX & SEBENIUS, *supra* note 94, at 33.

C. *Critiquing*

Reflective dialogues facilitate learning[96] and many dimensions of the conversations that develop feedback about student performances have been analyzed earlier. Feedback, a term clinical legal educators borrowed from psychologists who adapted it from electrical engineers, provides accurate information about events.[97] Educational theorists generally agree that feedback is essential to meaningful learning because it is extremely difficult to assess and change behavior without it.[98]

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96. *See, e.g.*, Kreiling, *supra* note 89, at 286 n.8; Richard S. Prawat, *Promotion Access to Knowledge, Strategy, and Disposition in Students: A Research Synthesis*, 59 REV. EDUC. RES. 1, 33 (1989). The ability to generalize from experience to improve future performances is enhanced by articulating why actions were chosen and reflecting on the effects of these behaviors. Kreiling, *supra* note 89, at 286 n.8. Prawat concluded:

> Verbalization appears to be the best means for achieving [reflective awareness of existing knowledge]. Thus, there is considerable support for the notion that discourse or dialogue plays a vital role in promoting student understanding and reflective awareness. . . .
>
> In the process of relaying thoughts to others, we also relay them to ourselves. It is the process of formulating thoughts into communicable representations that is most important in developing an awareness of what one knows. Through verbalization, our thoughts become an object for reflection.

Prawat, *supra*, at 14.

The term critique has been adopted by clinical legal education to describe these reflective dialogues. Steven Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. LEGAL EDUC. 123, 123 n.1 (1987). As in discussions of art, critique connotes constructive commentary that is intended to be supportive, neutral, and honest. *Id.* Critiquing should be distinguished from criticizing which carries negative connotations of expressing dissatisfaction or disapproval. *Id.*

97. *See, e.g.*, INTERACTIVE INSTRUCTION AND FEEDBACK 93-94, 96 (John V. Dempsey & Gregory C. Sales eds., 1993); ROBERT M. GAGNÉ, THE CONDITIONS OF LEARNING 270-71 (1965); MALCOLM KNOWLES, THE MODERN PRACTICE OF ADULT EDUCATION: FROM PEDAGOGY TO ANDRAGOGY 57-58 (rev. ed. 1980) (identifying "principles of teaching" which are conducive to adult learning).

98. A major criticism of traditional legal education targets how it has ignored the feedback function, typically providing evaluation only once on final examinations. This lack of feedback has been cited as one of the reasons that many students experience psychological distress. *See, e.g.*, B.A. Glessner, *Fear and Loathing in the Law Schools*, 23 CONN. L. REV. 627, 646, 657-58 (1991); Roach, *supra* note 40, at 671. One study found that up to 40% of law students suffered depression or other symptoms, resulting from their law school experience. *See* Benjamin et al., *supra* note 31, at 246. Students definitely value the feedback available in smaller enrollment skills courses, as evidenced by these comments:

> [T]he opportunity for feedback was extremely helpful in determining what strategies were most effective and how styles were perceived.

Feedback facilitates learning by encouraging performers to assess it against: (1) action theories predicting why the behaviors they sought to use would accomplish intended effects; (2) whether they acted congruently with their theories; (3) whether their theories and actions produced desired outcomes; and (4) what aspects of their theories and actions should be changed in the event desired outcomes did not occur.

Although critiques compare actions with theories and outcomes, they must do more than simply list errors and tell how to perform tasks in ways lawyers deem more effective. Helping students develop effective habits of reflecting on their theories and behaviors so that they can identify and correct ineffective performance choices when they practice on their own is the ultimate goal of critiquing. Frequent discourse mapping action theory and modeling specific interpretations provide crucial components of learning how to learn from experience through self-reflective practice.[99]

Conceptualizing critiquing as shared feedback conversations also may help lawyers remember the value of using positive interpretations as well as constructively critical comments. Many approach critiquing initially by concentrating primarily on pointing out errors, assuming that performers know when they acted effectively. Performers frequently interpret the absence of positive feedback as signals that their behavior was either insignificant or unimportant.[100] Performers also may respond to the absence of positive feedback by concluding that these action choices were wrong, perhaps so off target that critiquers refrained from commenting to avoid embarrassing them.

Effective critiques balance specific interpretations of actions done effectively with constructive criticism that identifies errors and explores more effective alternatives. Positive feedback reduces defensiveness. It also builds confidence, an important component of all skills learning. Sequencing critiques to provide positive feedback before constructive criticism reduces the likelihood that defensive mechanisms will prevent performers from understanding errors and suggested alternatives.

Research demonstrates that positive reinforcement regarding tasks students did well motivates learning more than constructive criti-

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> [W]ithout clear feedback, it is often hard to know what behavior was and was not effective. Everyone is faced with instances where things went wrong, but it is hard to tell why.

Student Comments, *supra* note 11.

99. *See supra* pt. II.A.-B.

100. *See* INTERACTIVE INSTRUCTION AND FEEDBACK, *supra* note 97, at 94 (describing a study showing that an absence of feedback early in a lesson resulted in poor performance).

cism.[101] Recognizing effective action theory and behaviors facilitates learning because it identifies what should be repeated in identical and similar contexts. It also reinforces and builds confidence for students observing critiques who used the same or similar actions in their experiences with the exercise.

As mentioned, critiques in these courses occur by dissecting portions of videotaped performances after showing them to the group and discussing theory and action choices that were not taped.[102] Taped excerpts that permit feedback balanced between positive and constructive criticism should be selected from longer portions of observed performances. Maintaining this balance, along with selecting segments that compliment suggested discussion points, coordinate with demonstration videos, and raise intriguing action theory or professional responsibility questions, supply the criteria for selecting excerpts.[103]

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101. *See* Harbaugh, *supra* note 11, at 209 (stating that positive reinforcements are preferred over negative reinforcements); Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725, 767-68 (1989) (stating students should feel the teacher wants them to succeed). One student, requesting more videotaped demonstrations of effective as opposed to ineffective behavior, wrote: "It is easier for me to emulate good behavior than to find and correct ineffective behavior." Student Comments, *supra* note 11.

102. The use of portions of videotaped negotiations in learning these skills has been recommended. *See, e.g.*, Fisher & Siegel, *supra* note 24, at 413; Moberly, *supra* note 30, at 319. Unfortunately, time does not allow individual critique sessions with performers, as often done in clinical and trial skills courses. The professor also will not have adequate time to do individual video review sessions with all 72 students who perform eight times during the term. The course design instead chooses group review of selected video segments of observed portions of the negotiations. The assumption is that this combination, along with mandatory charting and written reflection, will facilitate learning.

Many students find that watching taped clips showing other approaches is valuable. One, for example, wrote: "There is no better way to learn than to do, however, I think I learned an enormous amount from watching and critiquing others as well." Student Comments, *supra* note 11.

These tapes are placed on reserve in the Library's Media area and students are encouraged to view their performances. Seeing performances on tape facilitates attribution of competence because it creates distance between a performer's awareness of inner turmoil and how the action is presented outwardly. It enables students to see themselves as others saw them. *See* Michael D. Storms, *Videotape and the Attribution Process: Reversing Actors' and Observers' Points of View*, 27 J. PERSONALITY & SOC. PSYCHOL. 165, 171 (1973). Students frequently report that their performances were not nearly as ineffective as they thought. One student comments that: "Watching yourself on video really does make a difference in how one views one's performance. I saw that I rarely did as terribly as I thought I had." Student Comments, *supra* note 11.

103. Doing these challenging tasks well requires preparation and spontaneous judgment. Armed with an outline of discussion points and a transcript of the demonstration video that is available for analysis after performances, lawyers watch portions of each individual or teamed pairing negotiate. Detailed notes should be taken to facilitate selecting excerpts that allow giving each student positive feedback. Student video technicians not enrolled in the course attend each session and can note the precise points on the recorder's index counter when facilitators hand

Remembering that anxiety and defensiveness may be felt by the performers seeing their action choices shown visually to others, and that these responses may impair the learning value of feedback, facilitators must critique video excerpts sensitively. Interpretations of behavior should typically sequence positive feedback before constructive criticism. Constructive criticism should be shared rather than asserted, using phrasings suggesting helpful intentions rather than advocacy. Constructive criticism also should be sensitive to classroom dynamics, remembering that observers often attribute more reputational significance to feedback than facilitators intend.[104] Phrasing interpretations as direct or projective personal statements may also make communications more collaborative and invite more dialogue. A direct personal

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or nonverbally signal excerpt possibilities. Lawyers will have to create reference systems on their notes to allow them to move from selected excerpt to the next one easily, and the technicians will remain to assist them. My years of experience with this approach suggest that moving through the tape in the order performers are scheduled is easiest even though it influences the order in which points are discussed. Moving around through long sections of tape can be time-consuming.

Showing at least one excerpt involving each student each performance class is recommended. Discussing one positive and one constructively critical choice by each student in the group each session is sufficient. This gives every student positive feedback and an invitation, through inquiry about theory choice or behavioral interpretation, to participate actively in the small group discussion. It also protects any single student from feedback overload. Performers can absorb only a limited amount of feedback before overload generating resistance, not understanding, sets in. The period before overload occurs tends to be shorter in public critiques like those used in these courses because they present greater risks of anxiety and defensiveness.

104. Professional responsibility lapses provide common situations where students may inappropriately create reputation models that run for the rest of the course because the mistakes are critiqued publicly. I learned this lesson through experience, showing my entire class a situation where an unprepared negotiator, when responding to a question about a material fact, lied, rather than blocked. My critique, along with the class's unwillingness to be forgiving, branded this performer as dishonest and untrustworthy for the rest of the term.

Confronting the same situation ten years later, I invited the student to self-critique. He did and did not suffer the same term-long reputational modeling. Reminding students that conversations focus on action theories and behaviors, not inherent personal characteristics may also become necessary when deceptive and competitive choices are discussed. Unmasking deceptive behaviors and analyzing competitively stylistic choices "also may influence students to use problem-solving strategy and cooperative style in negotiation courses because these choices offer the least risk of embarrassing public disclosures." Peters, *supra* note 26, at 30 n.120.

Class reputations develop quickly as the implications of strategic and stylistic choices become known during discussions. This occurs narrowly when students exchange confidential information, something they are encouraged to do after performances. It also happens more publicly during small group discussions. These conversations present several opportunities to encourage students to apply contextual analysis to their reputational modeling. Simply observing students make effective, contextually appropriate adversarially strategic choices, for example, does not mean that they will not be similarly skillful confronting problem-solving situations.

phrasing, for examples, states that the interpretation comes from the facilitator's opinions rather than from abstract, received wisdom. A projective personal phrasing states how facilitators would have felt or reacted hearing or seeing these acts.

Asking performers to self-critique specific behavioral choices frequently provides a useful option. As is the case when asking about action theories, inquiry invites performers to participate in interpreting their choices. Building on the undisputed evidence of the action depicted on the tape, asking performers to interpret specific behavioral choices extends a critique's scope to include this reflective activity.

Asking for self-critiques also provides opportunities to provide positive feedback for effective self-evaluations. Performers who effectively interpret successful actions can be rewarded for demonstrating an important component of learning from experience. This creates a positive feedback loop, beginning with the performer's articulation of the successful action choice and ending with the facilitator's reinforcement of the effective self-critique.

Asking also allows performers to interpret ineffective behaviors, potentially providing another way to reduce defensiveness. Acknowledging and effectively interpreting mistakes lets performers save face. It also lets facilitators provide positive feedback regarding the effective self-critique, balancing what otherwise might have been an entirely constructively critical encounter.[105] The feedback conversation can then continue as facilitators inquire or suggest how the act could be done more effectively next time, returning to action theory by articulating why suggestions are likely to produce more effective outcomes.

Critiques also may explore whether action was consistent with theory. Lack of congruence between action and theory frequently explains ineffective behavior, but cognitive understanding of action theories does not automatically produce recommended behaviors.[106]

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105. Students who inappropriately self-critique ineffective behavior as successful, however, present serious challenges, not unlike those faced by judges who refuse to direct verdicts confident that juries will do the right thing and then must enter judgments notwithstanding those verdicts. The public correction process should begin by carefully diagnosing the performer's action theory and inquiring about objective evidence supporting the judgment of effectiveness. Assuming these inquiries produce no viable grounds for reasoned disagreement, critiquers should share their different perspective as tactfully as possible, connecting it to action theory and objective indicia of non-effectiveness. Fortunately, this situation does not arise often.

106. ARGYRIS & SCHÖN, *supra* note 8, at 12 (asserting that learning skills requires knowing both their concrete behaviors and their theories of action; and it is not accomplished by merely knowing the theories); Kreiling, *supra* note 89, at 295 (contending that mere cognitive appreciation of action theories is not enough to produce the behaviors needed to act that way). Students have experienced this reality, writing:

Existing behavioral tendencies strongly influence action choices, sometimes overriding stated intentions to behave differently.[107] These habitual behavioral patterns commonly create more difficulties in acting consistently with articulated action theories than complexities in these frameworks cause. They also typically supply default behaviors when unexpected events short-circuit purposeful action choice.

Helping students identify when they had difficulty acting consistently with their intentions enhances skill learning. These situations, called learning dilemmas,[108] motivate students to change their behaviors. Most students, aspiring to competence, will value and seek behavioral consistency and predictability.[109] Learning dilemmas also challenge

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> This is a very painful process. I'm beginning to despair that I'll ever get it right. Undergoing this kind of feedback (a.k.a. constant scrutiny by self and others) is just a wee bit draining; both emotionally and intellectually. And whereas I might have a theoretical grasp of what to do, putting it into effective action is quite another thing. Maybe I'm not as quick a learner as my fellow students, but it usually takes me a few tries to get something right, especially if I'm overcoming some ingrained behaviors.
>
> Merely knowing the theory is not enough to trigger the behavior if the person has insufficient capacity for it or inclination to use it. . . .
>
> I watched myself slip back into my natural tendencies . . . even when I didn't want to. I never expressed empathy about how awful the injuries must be even though that morning I had just read about a little child who had been ridiculed in school about a facial scar and thought she would go to hell when [she] died. I was actually thinking about making a feeling comment but instead I came out with a discussion of assumptions of percent of negligence. Natural tendencies are hard to change.

Student Comments, *supra* note 11.

107. *See* Peters & Peters, *supra* note 20, at 173 & n.16.

108. ARGYRIS & SCHÖN, *supra* note 8, at 99 (stating that examining dilemmas is an essential aspect of learning).

109. *Id.* at 99-100; Kreiling, *supra* note 89, at 292 & n.29. Givelber and his co-authors describe the process this way:

> The central conceptual proposition of contextualism is our ability to clump raw experience into . . . socially meaningful events. Because human cognition is predisposed to confront and resolve the authentic dilemmas that arise in . . . social events, the resolutions of these dilemmas become markers for experiencing, exploring, and resolving future dilemmas. Accordingly, the patterns that emerge from experience and the exemplars of problems solved become predominant cognitive resources in future encounters with comparable dilemmas.

Givelber et al., *supra* note 16, at 9-10 (footnotes omitted).

students to grapple with what motivates their inconsistent actions. As mentioned, these challenges are formidable because much of what actually motivates action often lies obscured, manifested primarily by habitual behavioral patterns or mimicry of others.

Large class sessions give students measurement tools for generating and exploring insights regarding action habits. Two such measurement tools, which are commonly employed in other professional contexts, are the Myers-Briggs Type Indicator[110] and the Thomas-Kilmann Management of Differences Exercise.[111] These instruments measure preferences for common cognitive and behavioral approaches to acquiring information, making decisions, and resolving conflicts. Students often find that these tools help them identify actions that come easily to them and behaviors that, while valuable theoretically, are difficult to produce.[112] These instruments also promote personal inquiry into why

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Baker suggests that everyone maintains a "running, reflective" inner dialogue that helps them "make sense of [the] world." Baker, *supra* note 17, at 357 n.245. He also argues that humans seek narrative coherence and concentrate attention on problematic issues in efforts to find explanations. *Id.* at 347-48. These efforts to generate predictability and consistency of action animate students to overcome learning dilemmas once they identify them. *Id.* When approaching many new problems, as novices do when entering social practice domains, they benefit from "striving for coherence through the medium of dialogue either internal or external." *Id.* at 348.

110. The Myers-Briggs Type Indicator (MBTI) is a psychometric instrument, resulting from a 22-year project conducted by Isabel Briggs Meyers and her mother, Katharine Briggs. Peters & Peters, *supra* note 20, at 173-74. This instrument is designed to make Carl Jung's theory of psychological types accessible and useful. *Id.* Jung's typology creates a specific method for carefully observing similarities and differences found in common human behavioral patterns. ANGELO SPOTO, JUNG'S TYPOLOGY IN PERSPECTIVE xvi (1989). The instrument can provide valuable insights about habitual behavioral patterns and is increasingly used in clinical courses. *E.g.*, Ogilvy, *supra* note 30, at 70-72; Peters & Peters, *supra* note 20, at 173-74 & n.20.

111. This instrument is a forced-choice, 30-item questionnaire designed to measure conflict resolution preferences or styles. Steven Hartwell, *Understanding and Dealing with Deception in Legal Negotiation*, 6 OHIO ST. J. ON DISP. RESOL. 171, 188 (1991). "Thomas' theory describes two dimensions and five modes of handling conflict. The first dimension is assertiveness, one's attempt to satisfy one's own needs. The second dimension is cooperativeness, one's attempt to satisfy another party's needs." Joan Mills et al., *Conflict-Handling and Personality Dimensions of Project-Management Personnel*, 57 PSYCHOL. REP. 1135, 1135 (1985). The five modes of handling conflict indicated by this instrument are competing (high assertiveness and low cooperation), accommodating (low assertiveness and high cooperation), collaborating (high assertiveness and high cooperation), avoiding (low assertiveness and low cooperation), and compromising (intermediate assertiveness and cooperation). *Id.* at 1135-36.

112. Students have commented on this experience:

> I have come to realize because I am basically uncomfortable with conflict, I tend to try to minimize it by giving greater concessions. Now that I understand this tendency I'm more able to counteract it to a large extent by merging any such concessions.

actions were chosen that extends beyond the normal clinical dialogue—which stops with exploring whether behaviors accomplished identified objectives.[113] Knowing their action tendencies helps students

> I need to recognize my personality and type tendency is to believe logical, reasonable, and foreseeable implications that result from listening to what is said by the other negotiator. I hear one or two statements and visualize the logical result of those two statements and then think I heard the logical result. . . . I need to recognize when I am basing an important negotiating decision upon one of these implications and verify it's truth with the other negotiator.
>
> My natural inclination is to respond to pleas for sympathy with solutions to problems. These responses are almost never helpful.
>
> I knew I felt comfortable with a problem-solving approach. However, what I always found most difficult in negotiation . . . [was] dealing with adversarial others, of which there are so many. [B]y having the opportunity to . . . learn ways to cope with [adversarial strategy], I am better suited to deal with it when I encounter it in the future. . . . In one case, negotiating a late delivery of a printing order, I was called a "stupid bimbo" back [in pre-law school work experience]. I had no idea how to deal with this kind of hostility [and] hung up on my customer and cried for two days. Today, I could confront that kind of you message with the appropriate response: "I understand your anger, but do you think that name-calling will help us find a solution to our problem?" I will certainly take it less personally next time.
>
> My inattention to detail affected my negotiations the most. Knowing the weakness, I can work to overcome it by writing everything down . . . or by having a partner focus on the details while I focus on main ideas.

Student Comments, *supra* note 11.

113. *See* Peters, *supra* note 26, at 103 (arguing type theory may encourage students to take an extra step and analyze why inconsistent behavior occurred). Facilitators should offer interpretation regarding behavioral motivation tentatively because it is risky to speculate why someone acted in a particular way. Rigid language choices such as saying "you did this because" stereotype students. They blur the important distinction between action and person and generate defensiveness that harms learning. A tentative interpretation suggesting a possible explanation and seeking performer confirmation is predictably more helpful. For example, saying that "it seemed to me that this action was influenced by a strong pattern of preexisting behavior, what do you think?" may facilitate student self-discovery of the source of their actions.

Students have written:

> This simple distinguishing skill [between strategies and styles] has also helped me integrate my highly accommodative MODE score with the felt need to develop hard-nosed negotiating skills before I entered practice. Much to my satisfaction, I learned how to be adversarial and push for a position when I knew it means less for the other side. In the course my self-confidence has grown enough that I do not fear people disliking me if I compete with them and I conceive of it less as "taking advantage of them." My [MBTI] thinking preference perhaps helped me to overcome some of the discomfort about adversarial strategy because I can

develop tactics for modifying them.[114]

These strengths and weaknesses vary among students because they bring different degrees of competence with the generic skills involved in performing common negotiating tasks. Understanding and valuing these differences, learning dilemmas, and the measuring tools which help students access them, provides another important dimension of

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> characterize the process as a game, and thus give myself permission to be a little less accommodative. Overall, I am on my way toward modifying my behavior toward a balanced approach toward accommodation and competition.
>
> I'm particularly intrigued with the MBTI's usefulness a tool for self-correction. However, self-correction is easier said than done. All people, regardless of profession, would like to be good self-correctors. . . . We've all had to ask ourselves questions like . . . "Why did I let their joke hurt my feelings so much? Why did I quit [trying] with that interviewer? Why does she fly off of the handle so quickly?" What is so frustrating about such instances is the lack of some tangible guide to help evaluate one's behavioral choices. That is why the MBTI is such an extreme revelation to me. I can help be the guide for self-evaluation and correction.
>
> I discovered how much I avoid and accommodate. This comes from my dysfunctional family and childhood, but I didn't realize how I used avoidance in so many areas of my life. I've been practicing confrontation. When I feel that first impulse to duck and get out of the situation at any cost, I take a deep breath and I say it, even if I'm afraid the other person will become angry that I'm pushing it.
>
> [The MBTI] provided an organized framework in which to think about the negotiation exercise. . . . [It] seems to help me climb into my own head and find insights I might not otherwise acknowledge.
>
> I totally shut down the listening process. I attributed this to my strong judging preference. . . . [During the last exercise when my position was attacked] my first instinct was to shut down. . . . But I realized what I was about to do mentally and stopped. I changed my posture in the chair and made a concerted effort to listen.

Student Comments, *supra* note 11.

114. *See* Peters, *supra* note 26, at 107-09. Acquiring awareness of action tendencies and ways to counter them in appropriate contexts parallels helping law students improve their metacognitive abilities about their learning processes. *Id.* Enhancing student awareness of their individual learning preferences and helping them make appropriate adjustments, enhances law school performance. *See* Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157, 159 (1995) (discussing an empirical analysis showing effectiveness of the academic support program at UCLA); Paul T. Wangerin, *Learning Strategies for Law Students*, 52 ALB. L. REV. 471, 476-77 (1988) (arguing that student awareness of their learning processes and abilities to make appropriate adjustments enhances law school performance). Helping students acquire this awareness, often using the MBTI, is an important goal of academic support efforts that are expanding in American law schools. *See, e.g.*, Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63, 103 (1995); Roach, *supra* note 40, at 682; Stropus, *supra* note 31, at 485-86.

critiquing. Remembering personal action tasks that formerly did not come easily may help facilitators demonstrate patience when students struggle with tasks that seem easy. This knowledge also reinforces the value of providing open feedback, encouraging students to overcome behavioral tendencies rather than view them as unalterable parts of their personalities.

IV. CONCLUSION

Skilled, dedicated lawyers and judges have already helped many law schools provide sufficient introductory learning opportunities in trial advocacy theories and skills.[115] This essay argues that lawyers willing to map, model, and critique can help law schools extend learning opportunities in simulation-based interviewing, counseling, and negotiation skills courses, the most neglected areas of professional skills curriculums.[116] These extensions should compliment, not replace, clinical programs providing actual experience-based learning.[117] Large

115. Florida, like many other law schools, has adopted the approach promoted by the National Institute of Trial Advocacy for teaching litigation theories and skills. This approach uses lawyers and judges to teach small group sections in litigation skills courses following many of the ideas advocated here. *See* Lubet, *supra* note 96, at 124-25. This approach creates the largest number of skills courses reported in recent surveys. *See* MACCRATE REPORT, *supra* note 1, at 257-58 (identifying 444 courses designed to teach competence in litigation and ADR procedures). A significant number of law students are able to enroll in litigation skills courses. *Id.* at 240 (estimating 58% of American law students enroll in trial advocacy courses).

116. The MacCrate Report concluded that a majority of American law students had either one (32%) or no (28%) professional skills courses if trial advocacy, moot court, first year and advanced legal research and writing, and first year introduction to lawyering courses—offered by a small number of schools—are discounted. MACCRATE REPORT, *supra* note 1, at 240. This investigation also suggested that non-trial interactive skills courses were offered much less frequently than litigation courses. *Id.* at 248. For example, 246 negotiation and/or ADR and 84 interviewing and/or counseling courses were offered. *Id.* at 248 n.19. Florida offered only one section of its negotiation and interviewing and counseling courses in the 1995-96 and 1996-97 academic years. Each course enrolled only 24 students, accommodating approximately 6% of its graduating classes in those years.

117. While simulations provide many learning benefits, they also have serious limitations. They are not real and many students have trouble taking them seriously. The lack of real clients means no real tension exists between what clients want and negotiators can achieve during the limited time allowed for negotiating. Exceeding authority, for example, has no real consequences. The challenging tasks in acquiring authority and helping clients decide whether to accept negotiation proposals are also largely ignored except for a few focused role plays. *See supra* note 28. The absence of real stakes makes replicating the actual risks of shifting to a problem solving strategy in practice difficult. All that really is at stake is a grade and even that is seldom connected directly to outcome.

Several other important aspects of negotiation cannot be realistically simulated. The artificial worlds of simulations, for example, cannot include the full factual variety and nuance confronted negotiating even simple situations in practice. This can diminish learning the important theories

enrollment courses ideally should compliment actual clinical experiences by providing a preliminary grounding in action theory and practice before students apply them in real situations. Unfortunately, few American law schools currently provide this curricular sequencing to significant numbers of their students.[118]

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and skills required to bargain for information effectively. Students who carefully prepare questions to ask, for example, invariably confront honest "I don't know" responses as they quickly move beyond the simulation's boundaries. This also increases the power of an "I don't know" block in ways that raise troubling professional responsibility implications. *See* BASTRESS & HARBAUGH, *supra* note 24, at 419 (suggesting that most litigators would say that an "I don't know answer" means that the attorney has no knowledge of the information the question seeks).

Similarly, the search for creative solutions is not nearly as rich in simulations. The unavoidable artificiality easily transforms this important task into an educationally counterproductive search for solutions the author has hidden. Students figure out this limitation, and some play with it in their reaction papers:

> We also knew that since that a simulation from Don (a\k\a puzzleman) Peters, there had to be an answer here somewhere. Since it seemed unlikely the trick was some hidden fact or creative solution (too many numbers for that) we figured that the trick had to be in finding the right balance of concessions.
>
> I never really can get it out of the back of my head that this is not a real negotiation, but a simulated one. Accordingly, I'm always looking for short cuts in trying to figure out what you (Peters) want out of us.

Student Comments, *supra* note 11.

Actual practice experiences in clinic courses remedy these flaws. Negotiating property and custody arrangements in the Virgil Hawkins Clinic, as well as plea bargains in the State Attorney and Public Defender Clinics, present real tugs between client loyalties and obligations to other lawyers, judges, and third parties. They exist in the infinite world of actual information and nuance rather than three page textual summaries. Creative solutions must be actively found rather than deduced from what is known about the author.

Field experiences also confront students with the constant surprises that abound in practice, giving them the chance to examine how they respond to this unpredictable world. These experiences test whether the insights, perspectives, schemata, situation models, and exemplars developed in simulation courses bear accurately on real practice.

118. Florida provides the simulation then the field sequence only for its criminal law clinics by making trial practice a prerequisite for the field sequence. This sequencing is made possible only because bar participation allows offering large section trial practice courses every term. Florida typically offers 8 or 9 sections of its Trial Practice every fall term, and 10 every spring. Each section enrolls 12 students and is facilitated by a different lawyer or judge. The Trial Advocacy course which enrolls 24 students is given twice a year. Consequently, litigation skills instruction is provided to 70% of the graduating class.

No similar sequencing is possible for the important law office and non-litigative dispute resolution skills analyzed in this essay. Although the Law Faculty in 1993 recommended as part of a curriculum revision that non-trial skills courses offer 240 seats a year (serving approximately 60% of the senior class), this goal has not been achieved. Sixty-nine seats were offered in academic 1993-94 and 91 in academic 94-95. The vast majority of students who enroll in the Virgil Hawkins Civil Clinic, Mediation Clinic, or Criminal Law Clinics do not have a chance

Competent mapping, modeling, and critiquing in negotiation classes demands sophisticated decisionmaking. It requires high levels of self-awareness and openness because it asks lawyers to deal with theories and skills that lack the level of shared understandings and experiences that trial advocacy courses possess. It also requires thoughtful behavior choosing when to use and how to phrase inquiry, and selecting, sequencing, and articulating interpretation that skillfully balances positive and constructively critical commentary.

Facilitating learning through mapping, modeling, and critiquing involves much more than sharing war stories or imparting substantive knowledge.[119] Competent mapping, modeling, and critiquing approaches artistry in guiding conversations that are much more complex than mere recitations of effective and ineffective choices. As suggested by this essay, much of which enlivens these roles with learning potential is not obvious. These conversations resemble jazz because they integrate mapping, modeling, and critiquing with improvisation that flows from specific circumstances, contexts, and student learning needs.

Participating mappers, modelers, and critiquers must be purposeful and reflective in their actions to facilitate valuable learning experiences for their students. Reflective practice of these roles supplies important demonstrations while simultaneously helping students develop essential negotiation skills. This reflective learning includes the most important set, acquiring systematic ways to learn from experience. Further explication of this artistry probably should be left to improvisation through reflective practice.

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to learn interviewing, counseling, and negotiating theories and skills in a simulation-based courses offered before their clinical experiences.

119. General stories about practice experiences usually provide little learning benefit and are discouraged. Sharing specific experiences with the types of situations students have dealt with in their simulated negotiations, however, often demonstrate alternative approaches effectively. They also help students build action theory frameworks and tactical repertoires. Similarly, although course design allows no opportunities for broad lecturing by lawyers, sharing specific knowledge competencies, such as how to evaluate and value cases, provides valuable additional information enriching learning.

APPENDIX A

Student _____ Negotiation/client represented _____ Date _____

NEGOTIATOR'S ACTION CHOICES CHART

Please complete using a slash marking [//// ///] system

INFORMATION GATHERING

1. Open questions:
2. Closed questions:
3. Leading questions:
4. Compound questions:
5. Blocks:

LISTENING

6. Interruptions:
7. Active listening reflections of content:
8. Active listening reflections of feelings:
9. Active listening longer summaries:

OTHER STATEMENTS AND INTERVENTIONS

10. Statements justifying positions:
11. Statements articulating interests:
12. Statements articulating offers/counteroffers
13. Statements articulating proposals:
14. Process comments:
15. Positive feedback statements:
16. Statements articulating arguments:
17. Statements making appeals:
18. Statements articulating threats:
19. Statements proposing trades and packaging possibilities:
20. Statements proposing bridges and other creative solutions:

ERRORS

21. Mistakes resulting from listening errors:
22. Information disclosure mistakes:
23. Mistakes resulting from misreading negotiation strategies used by other negotiator[s]:
24. Mistakes resulting from stylistic choices:
25. Mistakes resulting from premature analysis and judgment:

APPENDIX B

SKILLS PERFORMANCE STANDARDS

Traditional courses usually base most of their evaluation on one performance of the important professional skills of legal reasoning, analysis, and writing well under time pressure in ways that demonstrate substantive knowledge. This course differs because its evaluation rests on multiple opportunities to perform important interviewing, counseling, and mediation skills, as well as on abilities to write reflectively about these experiences under minimal time pressure. Although we will undoubtedly spend far more time talking about performance standards here than in virtually all more traditional courses, I worry that my grading process may appear arbitrary unless some sense of the performance level expected from you is presented. I also suspect that this more structured approach to assessment may help some learning styles perform better. Consequently, the following performance standards are offered to provide specific criteria that will influence my grading.

These standards seek balance between sufficient specificity to be helpful without providing so much detail as to be overwhelming. These standards are drafted broadly because effective lawyering often requires modifying and developing new theory. Correlations between these standards and the lawyering theories developed in our text and supplemental reading assignments are frequent and intentional.

These standards also draw significantly from the Statement of Fundamental Skills and Values contained in the Report of the Task Force on Law Schools and the Profession, entitled *Narrowing the Gap*, and issues in 1992 by the American Bar Association's Section on Legal Education and Admission to the Bar [hereinafter the "MacCrate Report," named after the Task Force Chair, Robert MacCrate]. The MacCrate Report articulates minimum competency standards that lawyers should meet before undertaking sole responsibility for representing clients. MacCrate Report at 138-221.

Unlike the MacCrate standards, however, this approach articulates criteria in scales described as level 3, 2, and 1. This approach permits providing more specific examples of each level for each skill, hopefully making it easier for all of us to evaluate ourselves. Each brief description for each scale in each skill sketches a general level of development to help us connect them to specific performances and general ability levels. It is not uncommon to be at different levels for different skills.

You may also produce specific performances of the same tasks that connect to different scales, hopefully demonstrating an upward learning curve as this course progresses.

Another objective in creating these scales to demonstrate the incremental and developmental nature of acquiring professional skills. Level 3 describes very effective performance, representing virtual mastery of the skills and tasks. This standard is pitched high as an aspirational level to which all of us should continually strive, and work hard to sustain upon reaching.

Level 2 descriptions encompass effective, competent performance. It is the more realistic level to which most of us should strive during the brief time we are in this course. This level will, however, leave us with much to continue to practice in order to develop level 3 mastery.

Level 1 descriptions suggest adequate, minimally competent performance. Although getting here may require significant effort and practice, I join the view articulated in the MacCrate Report that this level of competence is needed for representing clients adequately. Obviously, this level contains many areas where additional reflective practice is needed to improve skills to Level 2.

Although I want you to strive for level 3 or 2 performances in all opportunities presented by this course, my use of these scales is not designed to inject a quantitative dimension to evaluation. I have not developed a way to correlate the point total I award to a performance or reaction paper directly to these scales. Consequently, I will not be adding your 1s, 2s, and 3s, on either individual performances or at term's end, totalling them, and then curving the totals. [I will, however, do this regarding the points I assign to each graded assignment and paper]

I also do not have minimum point totals for an A, B-plus, B, and so forth. Obviously consistent level 3 performances will produce an A while consistent efforts that fall below level 1 present cause for concern. Beyond that, however, generalizations are not possible, except for the assurance that I will avoid any quantitative use you can think of for these scales in grading. They are included here to help us evaluate specific performances, identify starting and ending skill levels, and promote development of these critically important abilities.

I. MEDIATING[1]

1. Investigation and Information Gathering

(3) Sensitively gathered relevant facts about objectives, interests, and situations. Made highly effective questioning choices, mixing open and closed inquiries appropriately, and avoiding leading or compound phrasings. Vigorously pursued understandings of reasons and interests behind positions, justifications, and proposals advanced by participants. Employed systematic, organized, and thorough inquiry designed to learn, clarify, and elaborate. Effectively monitored and recorded new information and changing positions. Superb awareness and analysis of facts on both obvious and subtle dimensions.

(2) Gathered most of the relevant facts about objectives, interests, and situations although some understandings lacked depth and precision. Questioning was generally effective with open and closed inquiries usually phrased and sequenced appropriately, and compound and leading formulations used infrequently. Employed moderately effective organization but missed some aspects of facts of situations, contextual clues, and interests of the participants. Generally good monitoring of new information and changing circumstances but missed some approaches to and aspects of agreement possibilities.

2. Listening and Empathy

(3) Listened masterfully using both passive and active approaches, avoided interruptions, and heard and understood everything participants said. Active listening done extensively throughout employing both content and feeling reflections at appropriate times using effective language. Always fully aware of all potential motivational problems and used motivating statements and positive feedback extensively and appropriately.

(2) Listened effectively using primarily passive listening, with a few interruptions and minor failures to hear and understand what participants said. Did not use active listening extensively and the responses made generally emphasized content rather than feelings.

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1. Many of the ideas for this section of performance standards were suggested by Christopher Honeyman in his excellent article, *On Evaluating Mediators*, 6 Negotiation Journal 23 (1990).

Generally aware of motivational issues and used some motivating statements and positive feedback remarks effectively.

(1) Listened somewhat using primarily passive listening with too many interruptions and failures to hear and understand what participants said. Used very little active listening and virtually all responses employed reflected content with frequent failures to paraphrase content and feelings diminishing mediation effectiveness. Some but often minimal awareness of motivational issues and generally insufficient and ineffective use of motivating statements and positive feedback.

3. **Neutrality**

(3) Consistently avoided displaying or suggesting bias or favoritism for or against any participant. Skillful softening of touch questions by using sympathetic phrasings, reassuring tones, and effective sequencing choices. Always displayed concern for feelings of all participants and modeled actions and attitudes that demonstrated cooperative and constructive interaction. Consistently and conspicuously recognized good points raised by others, encouraged participants to make their own decisions, and avoided pressing ideas and solutions on disputants unnecessarily.

(2) Generally avoided displaying or suggesting bias or favoritism for or against any participant. Occasionally failed to soften or ask tough questions and consequently missed possible opportunities for agreement. Avoided antagonizing participants and generally modeled cooperative problem solving actions and attitudes. Usually communicated understanding of participant priorities, acknowledged most useful points and comments raised during discussions, and avoided over-selling ideas and solutions.

(1) Frequently exhibited or suggested bias or favoritism through misleading, loaded, and unfair questions, inappropriately phrased and sequenced comments, and poor process decisions. Often used implied threats and other coercive measures as substitute for cooperative persuasion, occasionally antagonizing participants. Usually modeled cooperative problem solving actions and attitudes although occasionally used competitive behaviors suggesting lack of concern for participants and their interests. Displayed tendencies to dominate conversations, use harshly phrased questions, challenge other's percep-

tions in counterproductively forceful ways, and over-sell own ideas and solutions.

4. **Problem Solving Inventiveness**

(3) Skillfully avoided early commitment to proposals and solutions, attending always to underlying problems rather than their symptoms. Effectively created and described unusual but workable solutions consistent with facts, contexts, and participant interests. Always flexible and open to new ideas and suggestions. Vigorously pursued relevant avenues for collaboration between participants, always encouraging them to seek and develop new solutions.

(2) Generally avoided early commitment to proposals but displayed some tendencies to prematurely judge situations and ideas and to confuse positions with underlying needs. Generally worked well with solutions suggested by parties but did not personally develop a full range of inventive or collaborative solutions. Usually open to new ideas and suggestions but occasionally rigid, usually regarding their own proposals and solutions. Allowed collaborative problem solving by participants but did not always actively stimulate it.

(1) Prone to premature judging, developing solutions, and pushing participants to agree before essential facts and mutual interests identified and fully explored. Generally failed to develop workable and effective solutions, often requiring considerable help from participants to perform these tasks. Often neglected to encourage collaborative effort, frequently using behaviors that impeded or blocked joint problem solving.

5. **Persuasion and Presentation**

(3) Consistently communicated verbally and non-verbally with confidence, clarity, and persuasiveness. Always articulate and appropriately enthusiastic. Competently uses all communication tools including eye contact, positive gesture, and appropriate tonal and pacing choices. Comments always effectively organized and presented in easily understandable language.

(2) Generally communicated verbally and non-verbally in clear, concise, and persuasive ways. Usually articulate and enthusiastic and generally used communication tools such as eye contact, positive gesture, and tonal and pacing choices effectively. Usually organized

capably although occasionally not at ease with new and unexpected situations. Occasionally used jargon and legalese that diminished participant understanding.

(1) Communications frequently unclear, difficult to understand, and often non-persuasive with little positive impact on participants. Frequently seemed unprepared, often appearing uncomfortable and underconfident. Comments often not organized well and occasionally unrelated to appropriate mediation goals. Frequently used halting gestures, poor eye contact, and ineffective tonal and pacing choices. Frequently used jargon, legalese, and vague statements that undercut participant understanding.

6. **Interaction Management**

(3) Skillfully made all decisions about caucusing, order of presentation, and other interaction dynamics consistent with progress toward resolution and agreement. Managed participant representative relationships effectively. Consistently demonstrated acute sense of rising tension and implemented effective options for responding to these dynamics in ways that encouraged agreement. Skillfully used reframing, neutralizing, and similar interventions, conveying sense of readiness to cope with any exigency.

(2) Generally made effective interactive management decisions that controlled the process but made occasional choices that did not always reflect useful resolution strategy. Generally dealt with participant representatives effectively. Displayed adequate skill managing tension, and making reframing, neutralizing, and similar interventions. Avoided dominating and did not allow participants to bully each other.

(1) Displayed only adequate process management, often making decisions and interventions that were not justified by appropriate mediation goals. Often allowed participants and their representatives to control process in counterproductive ways that impeded reaching agreement. Frequently unaware of rising tension levels and often failed to respond and manage resulting behaviors effectively. Occasionally confused or overwhelmed by factual and legal complexities. Often failed to use effective neutralizing, reframing, and similar interventions.

7. Lawyering During Mediation

(3) Excellent understanding of the mediation process and superb abilities to prepare clients for and represent them during court-ordered and voluntary mediations in both circuit civil and family law contexts. Good at anticipating where mediations were heading and responding flexibly and spontaneously to unexpected and surprising events. Superbly skilled at developing strategies, theories, and effective interventions simultaneously, conducting efficient and quick mini-counseling conferences with clients during mediations, and coping productively with conflicts between parties, lawyers, and other professional participants.

(2) Good understanding of the mediation process and generally good ability to prepare clients for and represent them during court-ordered and voluntary mediations although occasional preparation gaps or lapses occurred. Often tended to do much better work in one of the common Florida mediation contexts than the other. Effective at developing strategies and interventions simultaneously even though occasional rigidity produced poor responses and mini-counseling sessions contained some inaccurate or incomplete portions. Good at anticipating future directions although occasionally made ineffective choices when confronting unexpected and surprising developments. Good at dealing with conflicts although occasional problems surfaced, particularly when confronted by or dealing with strong emotions.

(1) Adequate understanding of the mediation process even though obvious and nuanced meanings often missed. Generally cursory preparation of clients for court-ordered and voluntary mediations that were often rushed, haphazard, and incomplete. Usually much more effective in one common Florida mediation context, generally circuit civil, that the other, typically family law. Often dominated and rushed mini-counseling conferences displaying little sense of where mediations were likely to go. Frequently failed to provide critically important information needed to inform clients fully and often blocked efforts to engage in collaborative endeavor, often by injecting inappropriately adversarial behavior. Frequently failed to respond flexibly and effectively to unexpected and surprising developments. Adequate ability to deal with conflicts although often used defensive and controlling responses producing deviations from cooperative and constructive interactions in the face of even minor tensions.

II. REFLECTIVE LEARNING

(3) Mastery of process of reflecting upon and learning from experience demonstrating highly developed awareness of reasons for action encompassing willingness to critically assess the appropriateness of these reasons and the goals set, and to analyze whether it would have been desirable to define the goals differently; an ability to evaluate the appropriateness of the action chosen to pursue the goals set including assessing whether it would have been desirable to use different action; and skill at examining the effectiveness of reactions to unexpected events. Highly skilled at making effective and spontaneous adjustments to planned behaviors when circumstances or conditions warrant. Very effective at identifying practices that will make it possible to replicate effective and guard against ineffective aspects of performances in the future. Highly skilled at remaining open to understanding and learning new and different ideas and perspectives, demonstrating sensitivity to and respect and value for fundamental human differences, and critically evaluating established systems and procedures to generate ideas and approaches for modifying and improving them.

(2) Effective at process of reflecting upon and learning from experience including well developed awareness of reasons for action encompassing general willingness to critically assess theories underlying action and goals sought, and whether it would have been desirable to define the objectives sought differently; the ability to evaluate appropriateness of the action chosen to pursue the objectives including whether different action choices would have been desirable; and skill at examining the effectiveness of reactions to unexpected events. Good at making effective and spontaneous adjustments to planned behaviors when circumstances or conditions warrant. Generally good at identifying practices that will make it possible to replicate effective and avoid repeating ineffective aspects of performances in future actions although failures to reflect on theory and action occasionally occur. Generally willing to remain open to understanding and learning new and different ideas and perspectives, usually sensitive to and willing to respect and value important human differences, and frequently will evaluate established systems and procedures critically, often developing ideas and approaches that modify and improve them.

(1) Competent at process of reflecting upon and learning from experience including some self-awareness of reasons for action and some willingness to critically assess these underlying reasons and the goals sought to determine whether the objectives could have been

defined differently even though occasional tendencies to act in non-purposeful ways occur. Adequate at evaluating appropriateness of action chosen to pursue objectives although difficulties articulating what was done occasionally occur. Often experiences difficulties making effective and spontaneous adjustments to planned behaviors that are warranted by circumstances or conditions. Competent at identifying practices that will make it possible to replicate effective and guard against repeating ineffective aspects of performances in the future even though significant improvement is needed in both identifying and reflecting on theory and action. Occasionally not open to understanding and learning and different ideas and perspectives, and not always sensitive to or willing to respect or value important human differences. Displays tendencies to accept established systems and procedures uncritically and seldom initiates ideas and approaches that will modify and improve them.