

Below are approximately fourteen excerpted pages from a much longer article that has been accepted for publication in the *Clinical Law Review*. For the sake of brevity and so as not to inflict too much unnecessary torture upon my audience, only parts of the introduction, and parts of sections I & II have been included. All of sections III, IV, V and VI, and all footnotes have been omitted.

**THE LAWYERING MAP:
A CURRICULUM-DEVELOPMENT AND STUDENT-EVALUATION TOOL
IN THE LAWYERING AND CLINICAL CLASSROOM**

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Introduction

The everyday work of everyday lawyers rests on complex intellectual foundations and draws from deep wells of multidisciplinary traditions. A lawyer performing such seemingly mundane activities as interviewing a witness or counseling a client has to be all at once a logician and mathematician, a poet and storyteller, a student of self and others, an artist and performer; a lawyer completing such commonplace tasks as drafting a memorandum of law or negotiating a settlement agreement consciously or unconsciously calls upon insights in linguistics, psychology, sociology, economics, philosophy and game theory.¹ But quite often, the complexity of everyday law practice is on the one hand denied by some scholars whose deep immersion into intellectual legal discourse seems to take off from a radical forsaking of all aspects of practice, including academic inquiry into lawyering, and on the other hand hidden by some practitioners whose sincere surrender to the representation of clients or fulfillment of institutional roles seems to leave behind an utter forswearing of all customs of the intellectual life, including critical evaluation of the profession. Between the notion that the practice of law is routine work holding little promise of challenging intellectual analysis and the position that daily practice is real work having nothing to do with intellectual navel-gazing, lawyering has suffered from what Professor Peggy Davis, among others, calls the “under-theorizing of practice.”

Undoubtedly, the relative neglect of the theoretical foundations of practice has many historical causes, but a not insignificant part of the problem certainly has to do with a cultural perception, shared by non-lawyers and a relatively large segment of lawyers, that there is something terribly simple and awfully familiar about the everyday practice of law. Unlike, say, surgeons, who hold people’s bloody organs in their hands, or physicists, who look for the first seconds of the universe in the dust of distant stars, lawyers do not seem to do anything that far removed from life’s ordinary activities: *they read, they write, they talk and talk and talk some more*. Certainly, there is a tendency, particularly among novice lawyers, to believe that there is no need to think critically about the many dimensions of that work; one just does it. Indeed, at times, even experienced attorneys adopt the self-consciously jaundiced view that truly good lawyering is a mysterious alchemy of charisma, intelligence, empathy and nerve that cannot be taught and cannot be learned and that some have it while others simply do not.

It would be easy to dismiss all of this as so much reactionary anti-intellectualism if the idea was not so commonly accepted in sizeable and influential segments of the profession and academia and was not so deeply embedded in the larger culture. Certainly, anyone who has ever struggled to teach, say, interviewing in an intellectually rigorous manner, has had to bear the brunt of skepticism from students for whom the frustrating

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mystery of the rule against perpetuities is worthy of serious academic debate, while the delicate difficulty of one person authentically communicating to another is not. To teach so-called lawyering skills in a manner that eschews rote modeling is to fight to overcome the skepticism on the part of many students that some aspects of legal education – the interpretation of legal rules, the role of administrative agencies – are properly the province of intellectual inquiry, while others – the strategic use of authority in legal argument, the management of differences between lawyer and client – are either a matter of strictly practical skills or innate talent; such skepticism enjoys strong support in the typical academic milieu, has deep roots in most professional environments, and grows out of ancient cultural traditions.

And yet, to be fair, the skepticism on the part of our students, even if always misguided and often undeserved, is not just the result of historical and cultural antipathy toward the theorizing of lawyering. The discipline of lawyering theory may have long ago created and to this day continues to develop a healthy body of unimpeachable scholarship, but it still has some work to do toward connecting that scholarship to the classroom in ways that demonstrate to students how lawyering theory is inextricably linked to day-to-day practice. Students can be ruthlessly rational in asking: *How does all this theory stuff help me with my grades or with getting a job?* The question may be shortsighted but it is nonetheless not an easy one to answer in the context of a lawyering or clinical classroom because the intellectual breadth and diversity of practice, which at times causes lawyering to seem not so much a single cohesive profession as a multitude of disparate disciplines, also makes it extraordinarily difficult for even thoughtful and talented teachers to excavate with their students the broad conceptual underpinnings of the lawyer's work while at the same time making sure that students understand how this conceptual work directly connects to and, indeed is necessary for, the so-called lawyering skills they need in day-to-day practice.

In this article I propose an application of lawyering theory to the classroom in the form of a tool that may be used both to design a lawyering curriculum and evaluate students in a lawyering course. This curriculum-development and student-evaluation tool -- call it the Lawyering Map -- is an attempt to trace the intellectual substrata of law practice. As such, it does not outline discrete practice skills, such as client counseling or negotiation, nor does it isolate specific practice tasks, such as drafting an office memorandum law or researching statutory law. Rather, the purpose of the Map is to begin to trace the theoretical foundations upon which all of lawyering rests and to do so in a way that makes it evident to students the relationship between lawyering theory and practice. Below *Part I* begins with an explanation of the rationale for the Lawyering Map. *Part II* describes the structure of the Map, while *Part III* details its contents. *Part IV* examines a lawyering classroom exercise as a case study for using the map to teach rhetoric in written legal argument. *Part V* steps back to discuss the potential risks of the map. *Part VI* concludes with a summary of the functions the Map may be made to serve in a lawyering or clinical course.

I.

The Rationale for the Lawyering Map

I wish to begin with a proposition so uncontroversial as to be downright trite: in a lawyering or clinical classroom, no teacher aims as an outcome of the course to teach students to research case law, draft an office memorandum, use proper citation form, interview a client, conduct a witness cross-examination, or argue an appellate motion. No teacher means for these tasks to serve as the learning outcomes of their course because it is quite possible for students to, say, memorize the basic citation rules of the Bluebook and yet fail to recognize that citation format is a language of its own capable of communicating to the law-trained audience information not only about the authorities being cited but also about the lawyer citing them. Researching, writing and interviewing, vital skills though they may be to the practice of law, are in a strict sense mere

instrumental and interchangeable exercises by which lawyering and clinical educators aim to achieve an ultimate learning outcome at once more ambitious and more elusive: call it teaching students to become problem-solvers as Professors Paul Brest, Linda Hamilton Krieger and Carrie Mendel-Meadow do, or to develop into critical thinkers as Professors Gerald Lopez, Ian Weinstein and Gary Blasi do, or to exercise good judgment as professors Mark Aaranson, Alex Scheer and Angela Burton do.

Yet perhaps precisely because these learning outcomes are so ambitious and so elusive, most clinical educators at some point have experienced the rather bittersweet moment of having students spontaneously and quite earnestly confess how greatly they value the clinical teaching because, *unlike doctrinal classes, lawyering and clinical courses eschew larger theories of the law and the lawyer's role in favor of real, practical skills such as research, writing and interviewing*. And always, the poignancy of that sort of faint praise is rendered all the more damning for it usually coming from students who are otherwise thoughtful, conscientious and hardworking. That students would confuse means for ends – the instrumental exercises of a lawyering or clinical course for its ultimate learning outcomes – cannot always be explained by the cultural separation between theory and practice, but should also be ascribed to the continuing but still incomplete mission to devise classroom strategies that demonstrate the inextricable link between lawyering and clinical theory and day-to-day practice. In between the instrumental class exercises in research, writing, interviewing, counseling and the like, and the definitive learning outcomes of teaching students to become problem solvers, develop into critical thinkers or exercise good judgment, what is needed are intermediate learning outcomes that explain how practicing a task as seemingly mindless as proper citation form can indeed lead to the exercise of good judgment, or how completing an undertaking as seemingly commonplace as an office memorandum can indeed pave the way to becoming an effective problem solver. In short, what is needed is a set of learning outcomes linking instrumental exercises to definitive outcomes; a set of intermediate learning outcomes rooted in theory but aimed toward day-to-day practice.

My purpose here is to offer this set of intermediate learning outcomes in the form of a Lawyering Map. For this Map to actually serve the objective I would claim for it of bridging the distance between instrumental classroom exercises, such as drafting a memorandum of law, and definitive learning outcomes, such as becoming a problem-solver, it must, in my view, do at least four things: First, it must chart the entire intellectual domain of lawyering such that it is not particular to any field or specialty of the profession, but is as applicable to, say, litigation practice as to transactional work, or as applicable to criminal defense as to trust and estates representation. Second, it must survey the complete catalogue of skills lawyers display in the daily routine of their work such that it is not limited to discrete tasks lawyers are called upon to perform, but is as relevant to the drafting of a memorandum of law as to the completion of an affidavit, or as relevant to the taking of a witness deposition as to the conduct of a client interview. Third, it must project beyond the immediate setting of a classroom such that it is not limited to any one particular lawyering or clinical course, but is as potentially useful to a simulation-based clinical course as to a substantive upper-class clinic, or as useful to a first-year lawyering skills course as to a professional office. Fourth, it must speak to the variety of audiences who have cause to be concerned with evaluating student lawyering competencies such that it does not address just lawyering and clinical law teachers, but speaks to students themselves as readily as to anyone else who might otherwise be inclined to look exclusively to the traditional grading system as a measure of student past performance and a predictor of future prospects.

Should the Map meet these four criteria for usefulness, then working with it as a tool to design a lawyering or clinical curriculum and evaluate student performance would be a matter of abiding by the following protocol: In the initial planning phases of a particular course, the teacher uses the Map to set definitive curricular goals. At the start of the semester, teacher and students review the Map in order to agree on the intermediate learning outcomes, which, once achieved, may set students on the path to becoming problem-

solvers, grow into critical thinkers, or exercise independent judgment. With each instrumental exercise or clinical task, teacher and students isolate the learning outcomes of the Map applicable to the exercise or task at hand. In the course of planning and implementing the exercise or task, students independently measure their own performance against the learning outcomes of the Map. At the conclusion of the exercise or task, teacher and students use the learning outcomes of the Map to critique in-class or in small-group configurations the extent to which the student may have achieved the goals established at the beginning of the exercise. Finally, in the course of each subsequent exercise or task, teacher and students revisit the Map to make explicit both the links between the learning outcomes of one exercise to those of another, as well as the links between the learning outcomes of any one exercise to the definitive learning outcome of the course.

An example might help make the point clearer: Most lawyering skills courses feature as a central part of the curriculum the process of interpreting the law as a counselor instead of an advocate. One of the most basic instrumental exercise lawyering and clinical educators use to explore this aspect of the curriculum is the drafting of an office memorandum. In its simplest incarnation, this exercise usually provides students with a closed universe of facts in the form of an in-role memo from a supervising attorney, recounting the circumstances of the case and directing student-attorneys to research relevant law and to draft an office memo on the application of the law to the facts of the case. In more complex embodiments, the goals of the exercise are enriched by asking students to interview a live client instead of providing them with a written set of facts, and by asking them to counsel the client face-to-face upon instead of the drafting of the memo serving as the culmination of the exercise.

But even when using the relatively simple version of starting with a closed universe of facts and ending with the draft of a memo, lawyering and clinical teachers always intend this instrumental exercise to achieve some fairly ambitious learning outcomes. As an initial matter, the exercise is usually meant to demonstrate that, when a lawyer works as a counselor, the same need for meticulousness in interpreting the law as an advocate abides but the agenda shifts: the lawyer remains the client's advocate, interested in urging legitimate interpretations of law favorable to the client's goals, but the lawyer also becomes the client's advisor, interested in providing a realistic sense of legal rules will or should constrain or facilitate pursuit of the client's goals. Also, the exercise is normally meant to show that, because an office memo may have multiple audiences – from the supervising attorney in charge of the case to yet-unknown attorneys who might review the client's file in the future – the author of the memo must achieve the difficult balancing act of directly answering the question presented while at the same time attending to the potential future uses of the memo as the template for a client letter, an advocacy document, or a research tool. Finally, the exercise is often meant to acknowledge that, since lawyers bring their own values to legal interpretation whether at the level of an argument in a brief or at the level of analysis in a legal memo, at times it is difficult to clearly detect and faithfully respect the line between subjective persuasion in the former and objective advice in the latter. In short, most teachers mean for the interpretive shift posed by the movement from advocate to counselor to lead to the realization that the lawyer is ultimately a problem-solver for the client, for the balancing of the expectations of various audiences to bring to the fore the lawyer as critical thinker, and for the careful separation between objective advice and subjective persuasion to demonstrate the ever-present need for the lawyer to exercise of good judgment.

As a bridge between definitive outcome and instrumental exercise, the Lawyering Map would set the following intermediate learning outcomes with respect to a student's capacity to exercise problem-solving skills in undertaking the general research and analysis the law relevant to the memo, as well as managing the specific interpretive shift from advocate to counselor:

- An ability to identify and investigate the nature, source and authoritative weight of legal and non-legal rules;

- An ability to identify, investigate and formulate the range of interpretations of a single legal rule, and to synthesize multiple legal rules, taking account of the nature of those rules, their source, and their authoritative weight;
- An ability to identify, investigate and balance the range of interpretations of legal rules against the role of the interpreter;
- An ability to investigate, identify, and formulate the narrative and rhetorical structures that underlie the interpretations of legal rules;
- An ability to balance the aesthetic and ethical integrity of the range of interpretations of legal and non-legal based upon professional norms, personal ideals, and client and institutional loyalties.

With respect to a student's capacity to develop critical thinking by balancing the expectations of various audiences for the memo and by working through the drafting conventions and structural components of the memo, the Map would set the following learning outcomes:

- An ability to identify, investigate and formulate the structures, conventions, costs and benefits of various interactive modes or genres in legal culture;
- An ability to identify, investigate and anticipate patterns of individual and institutional expectations and behaviors within various interactive modes or genres;
- An ability to frame and calibrate one's written and spoken voice to abide by and, when need be, break from the conventions of particular interactive modes or genres;

And, with respect to the student's capacity to exercise good judgment in distinguishing between objective advice and subjective persuasion, the Map would set the following intermediate learning outcomes:

- An ability to anticipate, recognize and monitor the extent to which one's own as well as others' inherited beliefs, personal values, and accepted wisdoms may illuminate or conceal the full range of possible interpretations of legal and non-legal rules;
- An ability to anticipate, recognize and monitor the possibility that the psychological portrait of an individual and the social profile of an institution may make them more or less likely to be receptive to particular interpretations of legal and non-legal rules;
- An ability to frame and calibrate one's written and spoken voice to connect with and, when need be, set against the psychological portrait of an individual or the social profile of an institution;

These intermediate learning outcomes are offered here as an example of the use of the Map for the simplest version of an office memo exercise, in which students do not interact with a live client but work with a closed universe of facts. Obviously, the learning outcomes would need to be expanded to cover such topics as

fact development and management of face-to-face interaction if the exercise were to feature an open universe of facts and a live client. However, in the context of the simplified version of the exercise, the learning outcomes outlined above do indeed meet the four yardsticks by which one may judge a Map purporting to be a bridge between definitive learning outcomes and instrumental lawyering exercises: the learning outcomes are not particular to any field or specialty of the profession, in the sense that the same discipline a student would bring to bear in interpreting rules in a litigation context would also be necessary in interpreting rules in the shadow of which much of transactional work takes place; they are not matched to a narrow task, in the sense that the same attention a student would pay to the conventions of drafting an office memo would also come into play with respect to the conventions of drafting an affidavit; they are not limited to the setting of a first-year lawyering skills course, in the sense that the need to carefully calibrate one's voice in interactive settings to match the expectations of the audience is as crucial in the pressure-filled environment of clinical field-work as in the rarefied atmosphere of the classroom; and the learning outcomes need not be just the language of teachers, in the sense that they may provide as valid a basis for students to continue to monitor their progress outside of the classroom as for teachers to evaluate the success of their curriculum.

But, in terms of the office memo itself these learning outcomes are relevant for a more specific reason still in that they would permit students to take lessons learned from the one particular type of memo they may have drafted for the course and apply them to a variety of other memos time and circumstance would not permit to be covered even in the most comprehensive of lawyering courses. There is, after all, no such thing as a generic office memorandum. An office memo addressed to a colleague who knows virtually nothing of the law analyzed in the memo is a very different thing than one addressed to an expert in the field; an office memo prepared months prior to the start of litigation is a very different thing from one drafted in the midst of trial. The intermediate learning outcomes outlined above would arguably permit students to adapt their work to suit changing audiences and varying circumstances even if in the lawyering or clinical course the instrumental exercise of drafting an office memo was addressed one specific audience and one particular set of circumstances.

This then is the central rationale for the Lawyering Map: to chart the whole of the intellectual domain of lawyering and survey the entire catalogue of skills lawyers bring to their work and, in doing so, provide a theoretical framework within which, and a practical vocabulary with which, lawyering and clinical teachers and students may first set concrete learning outcomes for student performance across a variety of lawyering tasks, and then assess student success at meeting those outcomes in each particular task. In this way, the same learning outcomes that would set goals for, and allow an evaluation of, a student's interpretation of rules in an advocacy document such as a trial motion would be just as theoretically appropriate in setting parallel goals for, and allowing a parallel evaluation of, the student's interpretation of rules in a non-advocacy document such as an office memorandum. Similarly, the same learning outcomes that would set goals for, and allow an evaluation of, a student's development of facts during a witness deposition would be just as theoretically appropriate in setting parallel goals for, and allowing a parallel evaluation of, the student's development of facts during a client interview. In short, the Lawyering Map outlined below should provide teacher and student with both a practical vocabulary and a theoretical schema for planning, executing and critiquing the work that lawyers do.

II.

The Structure of the Lawyering Map

The legal profession is made up of such innumerable specialists working toward such incalculable purposes in such uncountable fields that, not only do lawyers of different specialties often seem to belong to entirely different professions, but even the solo practitioner with a small practice uses an array of intelligences

wide enough to spread over a vast expanse of cognitive, social and literary domains. The intellectual breadth and diversity of practice, which causes lawyering to seem at time not so much a single cohesive profession as a multitude of barely related disciplines, would also seem to render slightly absurd the two questions with which the Lawyering Map purports to be concerned: *What is it that lawyers do when they do lawyer's work? And how is it that lawyers do the work they do?*

These questions, though immensely complex and perhaps fated to always remain to some extent open, are nonetheless not completely beyond any form of meaningful theorizing. In the visible displays of their diverse practices, lawyers of different specialties may appear to be vastly different creatures, but beneath the surface of their varying professional habits and rituals, when lawyers serve clients, fulfill institutional roles or pursue legal scholarship they all stand on the same intellectual ground: They use an array of analytic, psychological, linguistic and bodily intelligences to interpret rules, investigate facts, construe how desire – the client's or their own – fit those rules and facts, and manage the contextual dynamics that shape all human interaction, even that which takes place at a distant remove. It does not at all matter the lawyer's field or specialty, nor does it matter the lawyer's training or talent; in the fullness of the profession and across the multitude of tasks performed even in a single typical day of practice, all lawyers apply analytic, psychological, linguistic and bodily intelligences toward interpreting rules, developing facts, understanding desire and managing contextual dynamics; some more self-consciously than others and some perhaps more naturally than others, but all do as a matter of practical necessity if not intellectual inclination.

These Lawyering Dimensions of rules, facts, desire and contextual dynamics and these analytic, psychological, linguistic and bodily Lawyering Intelligences never stand in isolation; they are in constant dynamic interaction and one of the fundamental challenges of lawyering and clinical teaching is to find effective ways to on the one hand isolate each dimension or intelligence while on the other dramatizing their fluid and dynamic interaction. A lawyer who perceives that a witness is displaying certain physical cues of discomfort is most obviously relying on bodily intelligence, but the interpretation of how those physical cues fit or do not fit with the words the witness speaks requires equal measures of analytic, linguistic and psychological intelligences. Or, a lawyer interviewing a witness may be operating most conspicuously in the dimension of fact development, but the lawyer cannot function effectively without an appreciation of how law, desire, and contextual dynamics serve to expand, limit, or otherwise shape both the facts the lawyer solicits and those the client offers. Or finally, a lawyer who is sufficiently analytically intelligent to use game theory principles to predict how various actors will react to certain offers during a negotiation would still operate under a significant handicap during the actual negotiation if, for lack of bodily intelligence, the lawyer's physical demeanor unwittingly betrays instances when the lawyer bluffs or makes a serious offer.

None of this is to deny that different lawyers use different intelligences in greater or lesser degrees, or that different lawyers work in different dimensions to greater or lesser extents. Arguably, a trial lawyer probably relies on linguistic intelligence to a different (or even greater) degree than a transactional attorney, and a matrimonial lawyer probably uses psychological intelligence in different (or even greater) ways than a tax attorney; a trust and estates attorney probably struggles with client desire more often than a class action litigator, and a criminal defense lawyer probably needs to be far more adept at developing facts than the typical constitutional scholar. Still, it remains that being (or more precisely *learning to become*) analytically, psychologically, linguistically and bodily intelligent about the interpretation of rules, development of facts, understanding of desire and management of contextual dynamics represents the common intellectual ground upon which all lawyers stand no matter their training, no matter their general practice and no matter their specific specialty.

The Lawyering Map surveys that intellectual ground by first isolating the core components of each

Lawyering Intelligence and the central characteristics of each Lawyering Dimension. The Map then proceeds to examine the interaction between the core components of each Intelligence and central characteristics of each dimension, thereby yielding a definition of (or a set of learning outcomes for) what it means to, say, become analytically intelligent in interpreting rules, linguistically intelligent in developing facts, psychologically intelligent in understanding desire, or bodily intelligent in managing certain contextual dynamics. A graphic representation of the Map may be made as follows, with each of the sixteen cells representing the intersection of a Lawyering Intelligence and a Lawyering Dimension:

	Rules	Facts	Desire	Contextual Dynamics
Analytic Intelligence	1	2	3	4
Psychological Intelligence	5	6	7	8
Linguistic Intelligence	9	10	11	12
Bodily Intelligence	13	14	15	16

For example, to take cell #1, as will be discussed in greater detail in *Part III* below, the core component of analytic intelligence is a capacity to come up with statements, models, and theories which are logically consistent and susceptible to mathematical treatment, whereas the central characteristic of the dimension of rules is the range of interpretations to which rules may be subjected based not only on their source, nature, and authoritative weight, but also on the narrative and rhetorical structures that underline those rules and the identity and role of the interpreter. Thus, the intersection of Analytic Intelligence and Rules Dimension yields the following set of learning outcomes:

- An ability to identify and investigate the nature, source and authoritative weight of legal and non-legal rules;
- An ability to identify, investigate and formulate the range of interpretations of a single legal rule, and to synthesize multiple legal rules, taking account of the nature of those rules, their source, and their authoritative weight;
- An ability to identify, investigate and balance the range of interpretations of legal rules against the role of the interpreter;
- An ability to investigate, identify, and formulate the narrative and rhetorical structures that underlie the interpretations of legal rules;
- An ability to balance the aesthetic and ethical integrity of the range of interpretations of legal and non-legal based upon professional norms, personal ideals, and client and institutional loyalties.

For another example, to take cell #6, again as will be discussed in greater detail in *Part III*, the core component of psychological intelligence is an intra-personal ability to access one's range of perspective, affect, emotion and desire as a means of understanding and managing one's behavior, as well as an interpersonal ability to assess other individuals' range of perspective, affect, emotion and desire as a means of understanding and influencing those other individuals or institutions within which they function. On the other hand, the focal characteristic of the dimension of facts is the potential influence of physical senses, memory, language and identity on the perception, recollection, expression and comprehension of facts. Thus, the intersection of psychological intelligence and facts yields the following learning outcomes:

- An ability to anticipate, recognize and monitor the influence of one's own or another's identity upon the perception, recollection, expression and comprehension of facts;
- An ability to anticipate, recognize and monitor the possibility that the psychological portrait of certain individuals or the social profile of certain institutions may make them more or less likely to be receptive to particular interpretations of facts;
- An ability to balance the aesthetic and ethical integrity of the range of interpretations of facts based upon professional norms, personal ideals, and client loyalties, and institutional roles.

In order to justify these examples and fill in every one of the sixteen cells of the Map, it remains then to explain what, in the context of the Map, is meant by Lawyering Intelligence and Lawyering Dimensions. I turn to that topic below.