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I stand in the unenviable position of being someone inside legal academe having to respond to the trenchant criticisms of contemporary legal education by Justice Wahl and Ms. Ramo. Let me begin by strongly endorsing the sug-

gestion that law schools are not doing all that they can do, nor all that they should do, to prepare students for a lifetime as lawyers. I reach this conclusion, however, from a somewhat different perspective than our earlier speakers.

During these remarks, I intend to apply several of the concepts we teach our students about basic lawyering skills to the issue of the role of professional skills education within the law school. Many of us, after all, are advocates for the teaching of professional skills, at the same time that we purport to teach students to be better legal advocates. What can we learn from our own teaching that will assist us in advancing the cause of professional skills education? Specifically, I think our advocacy of professional skills education could benefit from the following three types of analysis of lawyering skills that many of us teach in the classroom:

1. Have teachers of professional skills framed the questions regarding the teaching of professional skills in the proper form?¹

2. Have professional skills educators used what they teach about fact investigation and case planning to present the history of legal education in a manner that supports and does not defeat lawyering skills education?²

3. Have advocates of professional skills education, when negotiating with their more traditional colleagues, chosen negotiation strategies wisely?³

The two questions that were posed to this panel were: First, what are professional skills? And second, why should law schools teach them? I think these questions are both inaccurate and politically counterproductive, because they imply that traditional law professors are not teaching lawyering skills at all. I agree with the comments of the earlier speakers that law schools are not teaching all of the necessary skills and perhaps are neglecting some of the most important ones. I think, however, that most of us who have taught clinical programs—on balance—would prefer to work with students who spent their first year of law school exposed to a fairly rigorous and traditional first year curriculum.

The proper form of the question is Justice Wahl's reformulation: not *whether* professional skills should be taught in the law school, but rather *which* professional skills should be taught in the law school?

This form of the question is not only more accurate, but also more advantageous when proponents of professional skills education deal with their more traditional colleagues. When the law professor, who teaches jurisprudence and conflicts of law and whose only professional experience prior to teaching was clerking with a federal Court of Appeals, is confronted with the question whether we should teach professional skills, she probably is threatened at some level. Coming from the American Bar Association, practicing lawyers, or clinical teachers, such a question suggests a "we-they" dichotomy. It suggests that the practicing bar and professional skills educators believe there is little which goes on in the traditional classroom which has any value to the lawyer.

1. For a discussion of the importance of framing questions in the proper form, see e.g., G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 197-211 (1978); D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 38-52 (1977).

2. See e.g., D. BINDER & P. BERGMAN, *FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF* 5-6, 120-21 (1984).

3. See e.g., Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41 (1985).

The second lawyering skill that should be applied to the role of professional skills education within legal academe is the use of identical facts to support different arguments. Many of us have seen Dave Binder demonstrate how a single fact can be used by adversaries to support conflicting arguments.⁴ Let us try the same exercise, not with a historical fact, but with a historical figure in legal education. It's time for professional skills educators to reclaim the legacy of Christopher Columbus Langdell. Now that is a radical, and probably uncomfortable, suggestion. The worship of Langdell, in some ways, did a significant harm to professional skills education. He isolated the training of lawyers from the real world. He suggested to us that Law is scientific, apolitical, and neutral—a suggestion that nobody in her right mind, not even our most traditional colleagues, would agree with today.

At the same time, Langdell's revolution in legal education left a legacy which professional skills educators have the right to claim. It was he, after all, who brought actual cases and judicial opinion into the law classrooms. It was Langdell who said that it was essential to teach law students in the first year how to analyze cases and make arguments. That is not all law schools should be doing to educate lawyers, but I do think it is a part of professional skills education, broadly defined. I am not suggesting Langdell as a new cult figure for clinical education, but I do believe that it is wrong for professional skills educators to concede his legacy to proponents of retrenchment and conservatism within legal education. Reclaiming the legacy of Langdell is a symbol of the reality that professional skills education is in the mainstream, not the periphery, of American legal education. The third—and most important—lawyering skill that advocates of lawyering skills education should consider is how to most effectively choose a negotiation strategy. The negotiation under consideration is the “meta-negotiation” between representatives of the practicing bar and clinical teachers, and the more traditional professors and law school deans who control legal education. In the past, proponents of clinical education and other forms of lawyering skills education sometimes have been successful and sometimes have been frustrated by pursuing what Jim White⁵ and other teachers of negotiation theory would regard as a *competitive* negotiation strategy. Sometimes clinical educators have convinced the ABA House of Delegates to vote with them or have gained the requisite political allies on various committees. Sometimes they have succeeded in using threats of accreditation inspections to prompt law schools to devote adequate resources to clinical education. All of us with an interest in professional skills education owe an enormous debt to the people—many of whom are attending this conference—who have established the beachheads of clinical education in the law schools and who have made professional skills education an integral part of the American legal education.

I suggest, however, that the future of professional skills education within the law schools in many instances would benefit from another approach. Those of us who seek to advance professional skills education should borrow new negotiation approaches, such as the problem-solving approaches described by Pro-

4. See also D. BINDER & P. BERGMAN, *supra* note 2, at 120-21.

5. See e.g., H. EDWARDS & J. WHITE, *PROBLEMS, READINGS AND MATERIALS ON THE LAWYER AS A NEGOTIATOR* (1977).

fessors Roger Fisher and Bill Ury⁶ and by Professor Carrie Menkel-Meadow.⁷ Let me begin with two specific ideas from problem-solving negotiation theory, although I do not think that these exhaust the ways in which problem-solving approaches can assist us in trying to get professional skills education out of the periphery and into the core of legal education.

The proponents of problem-solving negotiation advise that the negotiator should consider the underlying interests of the other party. What are the underlying interests of traditional faculty members and conservative deans? I have already mentioned that talk of more professional education in the law schools may generate professional insecurities. It is a second interest of traditional legal educators which I think is more important, however. One of their underlying interests is a firmly held and genuine conviction, with which I agree, that law schools have a dual role. Law schools educate lawyers, but law schools are also research institutions. I would like to defer consideration of the complex relationship between scholarship, professional skills education and traditional classroom education for a moment. Let me just state, at this time, however, that just as professional skills professors need to reclaim the legacy of Langdell, I think that they also should seize the mantle of truly creative and meaningful legal scholarship.

Before discussing professional skills education and scholarship, consider one other problem-solving approach to negotiation: the use of objective criteria to resolve disputes, as suggested by Fisher and Ury.⁸ The question being addressed, "Which lawyering skills should be taught within the law school?" best can be analyzed if broken down into two component questions. These two component questions then can be answered by reference to objective criteria. The first issue, addressed by Justice Wahl and by Ms. Ramo, is: What skills are needed for a lifetime career in the practice of law? Dean John Mudd and other faculty members at the University of Montana Law School have surveyed practicing lawyers on precisely this question. Their survey results, as well as the reflections of experienced and insightful practitioners and judges, can provide the objective criteria with which to answer this first question.

The second issue is: Which skills are law schools better equipped to teach than law firms and continuing legal education programs? A generation ago, trial practice skills were the only lawyering skills other than traditional legal analysis, argument, and research and writing which had crept into the main tent of the legal education circus. But within the last twenty-five years, there has been an explosive increase in the variety of lawyering skills taught by law schools: interviewing, counseling, negotiation, cost-benefit analysis and case-planning, among others. These skills are being taught by law schools, I think, because law schools have unique abilities to research these areas and to teach them. First, law school professors draw upon their own practice experiences and, more importantly, the observations and reflections of those teaching clinical programs. Second, law school professors are in the best position to study the work of other

6. R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981).

7. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. Rev.* 754 (1984).

8. R. FISHER & W. URY, *supra* note 6, at 84-98.

university disciplines, such as social psychology, as they relate to lawyering processes including negotiation, counseling or interviewing. The last fifteen years has seen a massive infusion of work from other disciplines into legal education, as represented by the many excerpts of research and writing from these other fields contained in Professors Bellow and Moulton's seminal text *The Lawyering Process*⁹ or by Andrew Watson's book, *The Lawyer in the Interviewing and Counselling Process*.¹⁰ The skills that lawyers need as interviewers and counselors are not wholly unique to lawyers; they do bear some resemblance to the processes taught to psychiatrists and social workers.

It is time to reject the idea that professional skills education is not intellectually challenging. As law and the social sciences have become the most recent trend in legal education, traditional legal educators scarcely have noticed the important link between the professional skills studied in clinical programs and the scholarship of social scientists concerning lawyering processes. It's time for professional skills educators to seize the mantle of the truly creative opportunities for research and scholarship.

On my flight to this conference, I read an excellent manuscript prepared by my colleague Mary Twitchell, who is neither a clinical nor a professional skills education specialist, on the ethical dilemmas of lawyers working in teams.¹¹ What struck me as I read the manuscript was, although there was nothing in the legal literature which even raised these issues previously, clinical educators had been talking about these same ideas for many years at clinical conferences and in clinical course classrooms.

By not putting their analysis in writing, clinical educators fail to reach a larger audience. They also do not gain the professional respect of those who believe strongly in the research role of the law school. As clinical education has struggled, with considerable success, for the resources and professional stature needed to fulfill its teaching and service functions, it has neglected to place the same emphasis on research opportunities and obligations. For the most part, those of us who have taught clinical programs and other lawyering skills courses, have not fought hard enough for blocks of time to pursue research or created the necessary incentives to engage in research and writing. Teachers of lawyering skills have not established as a professional norm the obligation to share our ideas beyond the walls of the classroom.

Recently, there are encouraging signs that lawyering skills teachers are beginning to realize the importance of scholarship, both in its own right and as a means of bridging the gap between themselves and traditional academicians. In October 1986 the University of California at Los Angeles and the University of Warwick co-sponsored the first international conference on clinical scholarship at which more than twenty scholarly papers on lawyering skills and processes were presented.¹² At the AALS Clinical Section Workshop held in the spring of 1987, clinical educators began to analyze the commonly recognized lawyering skills such as negotiation, counseling and interviewing by breaking them down

9. G. BELLOW & B. MOULTON, *supra* note 1.

10. A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELLING PROCESS* (1976).

11. Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 72 Minn. L. Rev. 697 (1988).

12. A number of the papers presented at that conference are published in 34 UCLA L. Rev. 577-924 (1987).

into their fundamental building blocks—idea generation, questioning, judgment and values. Such analysis went beyond borrowing applicable concepts from social scientists and adapting their research for the use of professional skills education. The participants referred to these new forms of analysis as “methodological” breakthroughs; anybody else from the university setting would have referred to them as “intellectual” breakthroughs. Neither they nor others in legal education gave them the recognition their work deserved. Most of the ideas have not been published; perhaps that is why.

In conclusion, allow me to return to the original questions posed and now offer some tentative answers. The first question was “What are professional skills?” Those professional skills which the law school curriculum traditionally ignored but which are now being taught are nothing more than understandings of human interactions that lawyers use in their professional roles. The law itself, after all, is a set of human relationships, human interactions and human organizations.

Why then should professional skills such as interviewing, counseling and negotiation be taught in the law schools? Because no one else—not the mega-law firms, not the continuing education programs—have as their primary function the study of law in action.

Some law school professors interested in the lawyering processes and professional skills can continue to borrow from social psychology and other disciplines to enrich teaching materials and legal scholarship. Others will continue to conduct living laboratories in lawyering usually referred to as clinical programs.

How can it be that in a decade in which law and social sciences is the hottest topic in legal education that clinical programs and professional skills education, the part of the law school which has the only living social science laboratory on most university campuses, are often regarded as being of marginal importance to the mission of the law school and intellectually unworthy? Those of us who *teach advocacy* must do a better job of *advocacy* ourselves.