LEARNING LAWYERING SKILLS AT THE UNIVERSITY OF MALAYA

"I hear, and I forget;
I see, and I remember;
I do, and I understand"[1]

This proverb summarises the clinical approach to legal education.[2] The Law Faculty of the University of Malaya has recently acknowledged the wisdom in this proverb and added a clinical experience to its curriculum. This clinical experience is a final year course in Professional Practice. Following innovative programmes in England, Australia[3] and the United States,[4] this

[1] Silberman, C., Crisis in the Classroom 216 (1970), quoted in Berryhill, W., Clinical Education – A Golden Dancer?, 13 Rich. L. Rev. 69, 89 (1978).

[2] Clinical legal education is the term usually used to describe law school programmes that provide instruction in practical aspects of practising law. It derives from the common practice of using law clinics in which students work with supervision on actual cases. The Report of the Association of American Law Schools – American Bar Association Committee on Guidelines fro Clinical Legal Education (1980) [hereinafter cited as Report] defines clinical legal studies to include:

> "Law student performance on live cases or problems, or in simulation of the lawyer's role, for the mastery of basic lawyering skills and the better understanding of professional responsibility, substantive and procedural law, and the theory of legal practice." Report at 12.

Although the concept of clinical training is not new, modern clinical legal education began in the United States in 1968. Berryhill, W., *supra* note 1, at 216. Law Faculties in Canada, Australia, England and now Malaysia have followed this trend.

[3] The Professional Practice Course is patterned after the clinical programmes offered by the Department of Legal Studies at the University of Kent at Canterbury, England and Monash University in Melbourne, Australia. Proposals on Clinical Legal Education at the Faculty of Law, University of Malaya, were submitted by Associate Professor Visu Sinnadurai and Mr. Philip T.N. Koh, December, 1979 (on file at the Law Faculty). The clinical programme at the University of Kent is described in Muir, S., Clinical Training for Law Students (1977) N.Z.L.J. 425, 428–430. The Monash Clinical Training programme is described in Nash, G., Skills Course or Clinic, 54 Aust. L.J. 535, 537–538 (Sept. 1980) and Nash, G. Clinical Education in Australia – The Monash Experience, CLEPR Newsletter, Vol, XII, No. 1 (1979).

[4] Modern American clinical legal education began in 1968 with the creation of the Council of Legal Education for Professional Responsibility funded by grants from the

course helps students acquire skills necessary to competent client representation. This pioneering programme is one of the first clinical legal education courses offered in Asia.[5] It is taught by members of the Law Faculty and distinguished practitioners.[6]

The Professional Practice Course is designed to give law students a sense of what practising law involves and an awareness of aspects of effective client representation. These formidable tasks are accomplished by a clinical approach that requires student performances in simulated situations and critical observations of the performances of others. Professional Practice students participate in skills instruction classes for two terms and supplement these experiences with observations and

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Ford Foundation. Berryhill, W., *supra* note 1, at 89. Clinical legal education is now a part of the curriculum in nearly all American law schools. For example, in 1975 there were 346 "clinical" programmes listed by the 127 American Bar Association approved law schools responding to the annual survey prepared by the Council on Legal Education for Professional Responsibility. See Survey and Directory of Clinical Legal Education 1974–1975, May 1, 1975, at iii. Although only fourteen subjects in the law school curriculum were the subject of clinics in 1970, fifty-nine subject areas were involved in clinical field-work in 1978–1979. Report at 7.

[5]An integrated approach to legal aid and legal education has been followed by the Law Faculty in Delhi University. See Menon, Dr. N.R. Legal Aid and Legal Education in India, in Selected Readings in Clinical Legal Education 309 (1973) [hereinafter cited as Selected Readings]. Students have been working in a legal aid office within the framework of the College of Law at the University of the Phillippines since 1974. See Tadiar, A., Clinical Legal Education in a Professional Law School – the U.P. Experience, in Council Approach to Legal Education: Proceedings of the Seminar on Clinical Legal Education 11, and 14 (1980). Students have also assumed a responsible role in legal aid programmes in Sri Lanka and Indonesia. See Metzger, B., Legal Aid and the Law Student in the Developing Nations, in Selected Reading, 326 and 329. The programme at the University of Malaya, however, appears to the first Asian course that provides a rigorous classroom exploration of both the generic interpersonal processes that comprise lawyering and the substantive and institutional understandings needed to function professionally.

[6]The Professional Practice course was designed and organized by Associate Professor Visu Sinnadurai and Mr. Philip T.N. Koh. They also taught it assisted by Ms. Nik Ramlah Nik Mahmood and the author, who was awarded a senior Fulbright scholarship for that purpose. The teaching staff and the students of Professional Practice are grateful to the following distinguished practitioners who immeasurably enriched the first edition of the course by donating their time and talents: Hon. Tan Sri Chang Min Tat; Hon Mr. Justice Mohamed Azmi; Hon. Mr. Justice Datuk Harun Hashim; Mr. Shafee Abdullah; Y.M. Raja Abdul Aziz Addruse; Ms. Faridah Ariffin; Ms. Helen Chandran; Mr. Param Cumarasamy; Mr. Cyrus Das; Datin Sarawathy Devi; Mr. Peter Mooney; Mr. Porres Royan; Puan Siti Norma Yaacoh; Mr. Teh Boon Eng; Ms. Maxine Wong and Mr. Gooi Soon Seng.

work on real cases while attached to government law offices during term breaks.[7] They then spend their final term writing a paper on a practical aspect of practising law.

The three distinctive features of a clinical approach to legal education are: (1) requiring students to assume and perform a recognized role in a legal system; (2) using the tension caused by the resulting role adjustment to motivate learning; and (3) using the role experience as the focal point for teaching.[8] The Professional Practice Course follows this approach and makes what lawyers do with clients and witnesses the basic topics for examination. The course separates the practice of law into the skill areas of interviewing, counselling, negotiation, and witness examination. The tasks associated with each of these skill areas are identified, analyzed and demonstrated. The course also makes extensive use of simulated situations where students do exercises in each skill area and receive detailed evaluations of their performances.

The sequence begins with client interviewing by exploring and performing the skills involved in motivating communication, building rapport and acquiring information. Counselling skills, including methods for developing and maintaining effective client relationships and helping clients make choices, are identified and practised. Negotiation, defined as the exchange of information to reach an agreement, is examined extensively. Students are first exposed to issues including agenda control, using and countering threats, avoiding deadlock, phrasing and sequencing offers, making commitments, and

[7]During the first term break, for example, each of twenty-one students enrolled in Professional Practice spent three days working on cases at the Legal Aid Bureau. They drafted affidavits, letters, and pleadings; did research and prepared memos and opinions; and observed lawyers conducting interviews. Although the students favourably evaluated this expereince the ultimate goal of the programme is to create a Clinic where students can have more regular opportunities to work on real cases under the supervision of interested practising lawyers. This will permit students to learn professional responsibility in "meaningful, internalized way". Barbhizer; D., the Clinical Method of Legal Instruction: Its Theory and Implementation, 30 J. Legal Ed. 72 (1979). For an exciting description of the learning potential in clinical field experiences, see Meltsner, M., and Schrag, P., Scenes from a Clinic, 127 U. Pa. L. Rev. 1 (1978).

[8]Bellow, G., On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology, in Clinical Education for the Law Student 375 and 379 (1973).

reading concession patterns. Then they are given several opportunities to practise negotiating with each other. The practical and strategic elements of witness examination, non-testimonial evidence presentation, and trial court argument are also identified and then performed.

The performance based approach to skills instruction used in the Professional Practice Course requires a method of evaluating student behavior that is more public, specific, immediate and supportive than the traditional mark at the end of the year. Applying the research demonstrating that adequate reinforcement, support, and encouragement are essential to learning,[9] a humanistic model for evaluating or critiquing student performances has emerged. The clinical approach and the humanistic critiquing model, which have both been used successfully in the Professional Practice Course, will be described in detail in this article.

A. THE CLINICAL APPROACH TO SKILLS INSTRUCTION

The clinical approach to skills instruction used in Professional Practice follows the educational theory that a person learns to perform a skill by formulating a hypothesis, by testing that assumption, and by then assessing whether his theory of action and performance were effective.[10] Stated more concretely, a lawyer who wishes to acquire information from a prospective client will choose a course of action, such as opening the initial interview with aggressive and extensive questioning, to accomplish his goal. This choice is often not made explicitly. Although very little lawyering behaviour is truly random, much of it results from choices that are either intuitive or non-explicit.[11] Many lawyers, for example, start their initial interviews by questioning aggressively because they have seen

[9]Shaffer, T., and Redmount, R., Lawyers, Law Students and People 26–27 (1977). The authors provide an excellent, brief summary of the theories and studies of Bruner, Piaget, Conant, and Ausubel. *Ibid.*, at 28–33.

[10]Hilgard, E., and Bower, G., Theories of Learning 608–609 (4th ed. 1975); Harbaugh J., Simulation and Gaming: A Teaching Learning Strategy for Clinical Legal Education, in Report at 191 and 209.

[11]See Argyris, C., and Schoon, D., Theory in Practice: Increasing Professional Effectiveness 10 and 37–38, (1974).

others begin client encounters this way and they accept that behaviour uncritically.[12] Other lawyers may simply assume that this is the proper role for an attorney to play when starting an intital client interview.[13]

The lawyer then begins his interview by questioning his client aggressively and extensively. Many factors in a busy law practice, however, constrain his ability to follow the complete learning sequence and to evaluate later whether he began that interview effectively. He may not have the time to assess his performance because of the pressures of other work and the economic realities of practice.[14] He also may not notice his client's nonverbal discomfort with the immediate creation of a subordinate role in the relationship because interviewing is such a complex interaction.[15] Most of the skill activities of prac-

[12] Imitation of associates is a major avenue for learning the interaction skills that lawyers use every day. Goodpaster, G., The Human Arts of Lawyering: Interviewing and Counseling, 27 J. Legal Ed. 5, and 13 (1975).

[13] Professor Bellow notes that:

> "The lawyer consistently seeks out cues from others engaged in the enterprise concerning appropriate professional behaviour and begins, both consciously and unconsciously, to adjust his or her actions attitudes, and perceptions to these referents.'

See Bellow, G., *supra* note 8, at 381. An excellent summary of some of the issues involved in the role adaptation process, socialization or the professionalization to lawyering, is found in Bellow, G., and Moulton, B., The Lawyering Process: Materials for Council Instruction in Advocacy 8–34 (1978).

[14] Commentators who have analysed the mandatory post-graduate training periods before Bar admission in New Zealand and New South Wales, Australia, have noted that the pressure of work usually prevents meaningful instruction and supervision. Muir, I., *supra* note 3, at 425; Peden, The Role of Practical Training in Legal Education: American and Australian Experience, 24 J. Legal Ed. 503, 509 (1972). Justice Krivosha, of the Nebraska Supreme Court, recently gave this summary of the situation in America:

> "Competency requires time and supervised training. Most major law firms today, most businesses, most employers of young lawyers, have neither the time nor the staff to provide that training . . ."

See Krivosha, Would Residency Program Help Improve Lawyer Competency? 65 Judicature p. 6 and p. 9 (1981).

[15] One of the major difficulties of learning from experience in practice is that "lack of skill may not be perceived as such." Goodpaster, G., *supra* note 13, at 14. In

tising lawyers can be evaluated best if they are observed by a non-participant who will share his reactions with the performer later.[16] Opportunities for observer evaluation in practice, however, are generally limited to significant trials and appeals. Finally, the lawyer may not connect his client's later uncooperativeness to passive aggression against his choice of a lawyer dominated relationship because not all lessons of experience are self-evident. There are so many variables in lawyering situations that effective performances may go unrewarded and poor ones rewarded.[17] Any or all of these factors could prevent this lawyer from learning that beginning an initial client interview the way he did, with aggressive and extensive questioning, is usually ineffective.[18]

The clinical approach counters these constraints and permits full use of the hypothesis formulation, testing and assessment sequence. Its first objective is to make the underlying

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addition, there often is intense "economic, political, and peer pressures to conform to prevailing standards." Barnhizer, D., *supra* note 7, at 74.

[16]Goodpaster, *supra* note 13, at 14. Professor Goodpaster describes the difficult problem a performer has relating his

> "level of constituent skill performance to the final result. Did the lawyer fail to get an essential fact from his personal injury client because he did not know he needed it, because he did not listen, because he could not make his client appreciate the importance of every detail or because he did not have good rapport with his client."

[17]Goodpaster, G., *supra* note 13, at 14. For example, the lawyer could have reasonably effective results with his dominating interview beginnings, and never encounter any feedback suggesting that a different approach could be even more effective.

[18]Most writers on legal interviewing agree that beginning an initial client interview with aggressive and extensive questioning is usually ineffective. It tends to increase client anxiety and inhibit the development of rapport and trust that motivates full and open communication. These authors urge an initial approach of encouraging the client to talk. This lets the client use his own associational patterns, permits the avoidance of ego threatening material until some rapport is established, and forces the lawyer to listen counter-acting the common tendency to prematurely diagnose a situation based on incomplete facts. See, e.g., Binder, D., and Price, S., Legal Interviewing and Counseling: A Client-Centered Approach 10–12, 14–16, (West Nutshell Series 1978); Shaffer, T., Legal Interviewing and Counseling 119–128 (West Nutshell Series 1976); Watson, A., The Lawyer in the Interviewing and Counseling Process 31–33 (1976).

hypothesis or theory of action explicit and to analyse whether it is likely to produce effective behaviour. This goal is pursued in classes devoted to developing theories of effective behaviour for each significant task involed in interviewing, negotiating, counselling and witness examination. The focus of these classes is not on simple "how to do it" but rather on the more general, enduring aspects of the tasks. Each skill area has a large and rich literature.[19] Each also affords major challenges for research.[20] Although much work remains to be done, general models have emerged and they are keys to the development of effective skills instructional programmes.[21]

[19] Several books have been recently published to assist clinical legal education programmes. They frequently relate developments in social psychology, sociology communications, and many other disciplines to the tasks of lawyering. See, e.g., Bellow, G., and Moulton, B., *supra* note 13; Bergman, P., Trial Advocacy (West Nutshell Series 1979); Binder D., and Price, S., *supra* note 18; Brown, L., and Dauer, E., Planning by Lawyers: Materials on a Nonadversarial Legal Process (1978); Edwards, H., and White, J., The Lawyer as a Negotiator (1977); Hegland, K., *supra* note 18; Jeans, J., Trial Advocacy(1975); Freeman, H., and Weihofen, H., Clinical Law Training: Interviewing and Counseling (1972); note 18; Shaffer, T., and Redmount, R., Legal Interviewing and Counseling (1980); Watson, *supra* note 18.

[20] Law school clinics can serve as testing laboratories for experimental law practice techniques, such as the experimental use of a new computational processor to serve the clients of a law school clinic described in Sprowl, J., and Staudt, R., Computerising Client Services in the Law School Teaching Clinic: An Experiment in Law Office Automation, 1981 A.B.F.R.J. 699. Clinical legal education also has developing and testing theories of law practice. See, e.g., *Ibid* at 700, Leleike, S., Clinical Education, Empirical Study, and Legal Scholarship, 30 J. Legal Ed. 149 (1974); Bastress, R., and Harbaugh, J., Examining Lawyers' Skills, in Report at 233.

[21] Goodpaster, *supra* note 13, at 15. These models serve as general frameworks or explanations of lawyering. Students and instructors use them to assess past performances and to guide future ones. They also serve as a preview of the experience to come in the simulated exercises and field work. David Ausubel describes the concept of a cognitive conceptual structure in a way that has much relevance to learning lawyering:

> "Existing cognitive structure, that is, an individual's organization, stability, and clarity of knowledge in a particular subject matter field at any given time, is the principal factor influencing the learning and retention of meaningful new material. If existing cognitive structure is clear, stable, and suitably organized, it facilitates the learning and retention of new subject matter. If it is unstable, ambiguous, disorganized, or chaoitcally organized, it inhibits learning and retention. Hence it is largely by strengthening relevant aspects of cognitive structure that new learning and retention can be facilitated. When we deliberately attempt to influence cognitive structure so as to maximize meaningful learning and retention we come to the heart of the educative process."

The general models of effective lawyering for each skills area are presented to the students before they perform each task in simulated exercises. These classes provide a structure for learning the skill groups and they usually include a reading assignment that introduces each topic. The reading assignments are customarily bolstered by classroom explanation and examination of the theoretical models and by live or videotaped demonstrations of skilled lawyers using these models effectively.

Working from explicit models of effective lawyering helps the performance and evaluation phases of the learning sequence in several ways. It allows thoughtful preparation by the students which minimises the anxiety generated by having to perform publicly. It also gives them a sense of control over their performance which minimises anxiety and enhances their willingness to accept responsibility for their behaviour.

Using introductory models also increases the chance that the students will perform some aspects of the tasks successfully. This makes positive evaluation possible which boosts confidence and makes critical reaction more easily accepted. The models provide a basis for shared dialogues in the critiquing process. The perfoming student can use the model to clarify questions he has about either the model or the critique of his performance. Students can also or be encouraged to use the model and participate in evaluating performances. Both dialogue possibilities move students down the path toward the ultimate goal of developing self-critiquing skills to help them learn from their experience despite the constraints of practice.

Acquiring an intellectual understanding of effective skill performance is vital but it is just the beginning of the clinical approach. Students now must go forward and translate their intellectual knowledge into proficient behaviour by performing

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Ausubel, D., Cognitive Structure and the Facilitation of Meaningful Verbal Learning, in Contemporary Issues in Educational Psychology 198, 199, quoted in Barnhizer, *supra* note 7, at 82–83. Since Professional Practice surveys a broad range of lawyering skills, the theories developed and presented necessarilly stay general. Some American schools, however, devote separate courses to individual skill groups making more precise and detailed theory development possible. The University of Florida College of Law, for example, offers separate courses in trial advocacy, negotiation, and legal interviewing and counseling.

the tasks. This step follows the thesis that working on a practical, reality based situation stimulates an interest in and a desire to learn.[22]

The learning by doing in Professional Practice occurs when students perform simulated situations requiring skillful completion of all the tasks related to that exercise. The dynamics of this approach force students to confront and make decisions about the legal, behavioural and interpersonal issues involved in successful task completion. It stimulates integrative learning by compelling students to assemble substantive, procedural, and behavioural knowledge to produce an effective interview, negotiation, counseling conference, or witness examination.[23] Having to perform for five minutes in a lawyering situation also usually produces another strong motivator, the desire to perform competently to avoid embarrassment.

Simulations permit skill development without risk to the rights of real clients. They also allow a structured approach to skill learning in a controlled, safe and supportive atmosphere which increases the chance that good habits will develop.[24] The

[22] See Muir, I., *supra* note 3, at 425.

[23] See Bellow, G., *supra* note 8, at 395--596. Effective action requires integration and synthesis of knowledge from all spheres and a clinical course is one of the few opportunities most students receive to practise this necessary aspect of professional life. Professor Barnhizer gave this description of this aspect of the clinical approach:

> Legal education is presented in many separate subject matter compartments, divided more by tradition and the particular preferences of individual teachers than through any attempt to reflect the realities of the lawyering process. These arbitrary separations will result in very many students not comprehending the integrated nature of the law but instead viewing it as a series of unconnected sets of half-understood principles. The clinical setting permits the development of methods through which these artificially separated components can be brought together.

Barnhizer, D., *supra* note 7, at 77.

[24] Harbaugh, J., *supra* note 10, at 206. Professor Harbaugh explained:

> One of the principles derived from educational psychology particularly applicable to advanced learners is that early learning encounters may have a dramatic, lasting effect upon subsequent learning. When dealing with an unknown skill or subject matter, the student's initial learning experience may set or fix habits that are difficult to alter. Likewise, success or failure during an early encounter may establish attitudes affecting motivational variables.

Ibid

simulations are usually written by the legal teaching faculty who select and simplify aspects of the legal environment to produce manageable units for performance and evaluation. Elaborate scripts for the actors who are the clients and witnesses are used to ensure that designated issues arise and particular consequences attach to anticipated student choices and conduct.[25]

Most of the student performances in the Professional Practice Course are conducted in scheduled class periods which lets nonperforming students observe them and participate in the evaluation of them.[26] Most of the performances are also limited to five minutes for two reasons. First, even this short amount of time produces an enormous amount of behavioural data to evaluate specifically. Second, the limitation is necessary to maximize opportunities for each student to perform.

Most learning is enhanced by repetition[27] and practice is particularly necessary to assimilate the complex behaviours needed to represent clients effectively.[28] The Professional

[25]Professor Harbaugh has identified the following eight basic steps in building an effective simulation:

> "(1) isolating the learning problem; (2) examining the legal system; (3) deciding on legal theories; (4) establishing the controls; (5) creating the stimulus mechanism; (6) Outlining the response mechanism; (7) Guaranteeing the consequence situation; and (8), planning for feedback and reinforcement."

Harbaugh, J., *supra* note 10, at 211–215; see Meltsner, M., and Sohrag, P., Toward Simulation in Legal Education (1975).

[26]The other option commonly used is to conduct student performances outside of class, videotape them, edit the tapes, and then show selected portions of the performances in class. Although this minimizes the potential anxiety resulting from public performance, it involves a signficantly greater amount of faculty time. A variation of this approach is used in the negotiation classes in Professional Practice, the only classes which do not impose a 5 minute limit on performances. In these classes the students are divided into two-person, teams and then scatter to negotiate. After they either conclude or run out of time, they return to the classroom. One team is videotaped and the exercise is processed by reviewing that videotape.

[27]E.G., Harbaugh, J., *supra* note 10, at 205; Hilgard, E., and Bower, G., *supra* note 10, at 58, 86, 118, 144, 242, 276, 313–314, 343, 369–370.

[28]Harbaugh, J., *supra* note 10, at 205. Professor Harbaugh explains:

> "legal interviewing is a multi-faceted task. The legal interviewer must be conscious of such factors as language choices,nonverbal signals, topic control, probing

Practice Course provides opportunities for repetition by classes on the basic skills in the first term followed by classes in the second term which, while emphasizing practice in family law, criminal trials, and automobile accident litigation, also incorporate interviewing, negotiating, and witness exercises.[29]

Practice alone, however, does not make either perfect or proficient. Although students learn from doing, what they learn is haphazard and potentially inaccurate unless the performer sees the results of his choice and acts.[30] The process of helping a learner see the results of his performance is usually called providing feedback, a word borrowed from electrical engineers. It is also called critiquing or evaluating because it involves reviewing the performance and pointing out in a precise and specific manner what aspects were effective and not effective and why.

Virtually all educational psychologists agree that feedback and reinforcement are essential to meaningful learning.[31] Most also believe that feedback is most effective when it is received soon after the performance.[32] Students expect feedback in

techniques, and chronological confusion. It is unusual for a law student, even one who has studied interviewing theory, to conduct a very good legal interview on the first try. It is more likely that the student will do well in some parts of the interview (e.g., understanding non verbal communication of effective fact gathering) and will do less well with other aspects (e.g., fail to understand topic control or the use of probe techniques) because he or she cannot learn all these things at once. Thus, the law student should practise interviewing to develop an awareness of all cues and the appropriate responses."

Ibid., at 205–206.

[29] For example when studying Family Law students must interview their client to find the facts necessary to draft the required pleadings. The Criminal Trial Unit has exercises requiring the examination in chief and cross examination of a police officer and the introduction of real and documentary evidence. Motor Vehicle Accident Litigation is studied through exercises requiring negotiation and witness interviewing.

[30] Goodpaster, *supra* note 13, at 14.

[31] See, e.g., Ericksen, D., Learning Theory and the Law School Classroom, CLEPR Newsletter, Vol VI, No. 4, at 6 (Oct. 1973); Goodpaster, *supra* note 13, at 14; Harbaugh J., *supra* note 10, at 208–210. Redmount, R., A Conceptual View of the Legal Education Process, 24 J. Legal Ed. 129, 166 (1972).

[32] Erickson, S., *supra* note 31, at 6; Harbaugh, J., *supra* note 10, at 209 n. 57. Professor Harbaugh notes:

"Most of traditional legal education violates these principles with bewildering regularity. For most law students the only significant consequence situation in

simulation classes and failure to provide it is generally perceived as a negative evaluation.[33]

Feedback and reinforcement in the Professional Practice Course is ordinarily provided immediately after each performance. This process is shared by the teaching staff, the guest practitioner, and the students who did not perform. A second form of feedback is used in classes that videotape the performances. This feedback session involves only one instructor and the performing student who review the videotape together after class.

Although helping the learner see the results of his performance is an essential aspect of learning skills, it must be done sensitively because it can easily cause either undue defensiveness or anxiety. The value of feedback is diminshed by the degree to which the performer does not hear it because of feelings of defensiveness or anxiety.[34] The risk is increased when the feedback is given publicly after the performer has put himself in the vulnerable position of acting in a complex, multi-dimensional situation. The feedback should also be provided in ways that contribute to the performer's ability to evaluate his own performance when he leaves the secure and supportive environment of the classroom. Feedback that induces dependence on the critiquer hampers the cultivation of an ability to learn from experience, a major goal of clinical legal education.[35]

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any course is the semester ending final examination. Moreover, because formal examination review is almost nonexistent in legal education, few students understand what it is they have done right and how they have erred. As a result, students find it difficult to respond to positive (good grades) and avoid negative (poor grades) reinforcers."

Ibid., at 209–210.

[33] Harbaugh, J., *supra* note 10, at 210, Hilgard, E., and Bower, G., *supra* note 10, at 194, citing the studies of Amsel and Wagner.

[34] Bellow, G., *supra* note 8, at 385, 393; Bryant, S., Evaluation of Student Performance (unpublished paper prepared for Big Sky Clinical Law Teachers Conference, June, 1980, on file at Law Faculty); see Barnhizer, D., *supra* note 7, at 104, 132.

[35] See, e.g. Bellow, G., *supra* note 8, at 394–395; Bryant, S., *supra* note 34, at 1.

B. A HUMANISTIC CRITIQUING MODEL

The need to help students see the results of their performances without inducing either excessive defensiveness or dependence has led clinical law teachers to develop a model for critiquing student performances. This model is customarily shared with students at the beginning of their clinical experience to guide their participation in the process and to minimize their initial anxiety about it.[36] It should also be shared with the practitioners who join in the critiquing process.[37]

The model has three stages or phases: inquiry, data review and interpretation. Each helps promote learning while also minimizing defensiveness and dependence. Although these stages are interrelated, they will be described separately to demonstrate the complexity of the important critiquing process.

1. INQUIRY

This stage involves asking students about their performance instead of telling them about it. It is the most important stage of the model[38] and also the hardest to follow.[39]

[36]See, e.g. Bellow, G., and Moulton, B., Civil Problem Supplement to the Lawyering Process 78–79 (1978); Shaffer, T., *supra* note 12 at 188–193; Students in the Professional Practice Course are introduced to the critiquing model by a reading assignment, a short lecture, and a brief demonstration.

[37]The National Institute for Trial Advocacy in the United States, which uses teams of law professors, judges and practising lawyers to provide instruction to young practitioners, provides advance training in the critiquing process to the teaching staff. This approach has been followed in many American law school courses in trial advocacy and the author uses it in a course at the University of Florida which focuses on interviewing, negotiating, and counseling. Time constraints unfortunately prevented sharing the critiquing model with the guest practitioners this year in the Professional Practice Course. Perhaps this article could be used next year to correct this omission.

[38]Bryant, S., *supra* note 34, at 9; Condlin, R., Toward a Theory of Fieldwork Instruction (unpublished paper on file at the Law Faculty). Some psychologists involved in skills instruction contend that inquiry should be the only aspect of a critique because: (1) the most effective learning is that which students do actively; and (2) the counterproductive aspects of defensiveness caused by interpretation cannot be eradicated completely.

[39]Condlin, R., *supra* note 38.

Asking instead of telling has three significant benefits. First, it permits sharing the critique with the performer, an approach which has several advantages. Students have a higher motivation to learn about topics and issues that they select.[40] Students also may have had learning dilemmas in preparing or presenting their performance that are not apparent from it. Opening the agenda to the performer avoids leaving the identification of these dilemmas solely to the critiquer's perception. Agenda sharing also promotes student self-awareness of their behaviour. A student who accepts the offer and accurately identifies some aspect of his performance has demonstrated an important part of learning from experience when no one else can provide feedback. Finally, agenda sharing can minimize initial defensiveness because it gives the student an opportunity to select a safe topic.

A second benefit flowing from asking a student about his performance instead of telling him about it is that it permits student self-evaluation. This is self-teaching and it combats dependence by recreating precisely what the student will have to do later to learn from experience. The process is enhanced by the critiquer's opportunity to react by rewarding accurate self-evaluation and discussing inaccuracies. Self-evaluation also minimises defensiveness because it usually serves as a face saving device. Students feel better about their performance if they have the opportunity to identify their mistakes before anyone else does.[41] If ineffective behaviour is accurately identified, their self-awareness can be positively reinforced, the discussion can be shifted to how they would do it differently next time, and the defensiveness generated by negative feedback can be avoided.

Finally, asking instead of telling is the only way to diagnose accurately what the student was attempting to do before reacting to what he did. Putting it another way, asking allows

[40] Bryant, S., *supra* note 34, at 2; see Meltsner, M., and Schrag, P., *supra* note 7, at 21.

[41] Open questions, such as "How did it go?" or "How effective was your performance?" produce this face-saving phenomenon. Questions may also direct a self-evaluation to a specific topic, such as "How successful do you think you were at building rapport?" or "How would you evaluate your information acquisition?"

checking the student's theoretical choices. It does not make much sense, for example, to critique a student for not following a theoretical model if the student intentionally chose to deviate from it. Reacting to the actions in the context of the theory chosen also has several advantages. It permits discussion of theory in application and can lead to refinement and improvement of theory if the student's choice worked as well as or better than the model.[42] It also reinforces the message that competent lawyering involves both making appropriate theoretical choices and producing effective action.

Questioning students about their performances must be done carefully because it can increase defensiveness and anxiety instead of minimizing them. Asking questions with obvious answers and using closed questions to back performers into a corner usually produce anxiety and defensiveness.[43] The tone and language used in the questions are also significant. Using an intimidating, accusatory or controlling tone when questioning a performer is invariably counterproductive.[44] Some psychologists contend that "why" questions always produce defensiveness.[45] Asking extremely open questions can also produce anxiety in a public setting.[46] When the critiquing is done in the presence of other students or observers, specific diagnostic questions pertaining to specific behaviour, theories of action, or

[42] A similar learning opportunity occurs when a student has done something very effective and cannot articulate his underlying theory of the action. This dramatically illustrates that intuition and luck are factors in law practice, but not particularly reliable guides for future situations.

[43] Condlin, R., *supra* note 38. Aggressive questioning may remind students of unpleasant experiences in other classes where questions are used to embarrass or harass. See e.g. Dillon, J., Paper Chase and the Socratic Method of Teaching Law, 30 J. Legal Ed. 529, 533–535 (1980); Cooper J., The Law School Way, R., Lawyers, Law Students and People, 172–173 (1971); Taylor, L., Law School Stress and the "Deformation Professionelle", 27 J. Legal Ed. 251, 254–255 (1975).

[44] Care must be taken to avoid questions that are rhetorical, argumentative, incomplete, or designed more to confirm preconceptions. Condlin, R., *supra* note 38.

[45] Benjamin, A., The Helping Interview (1969); quoted in Shaffer, T., *supra* note 12, at 124.

[46] Beginning a critique with extremely open questions such as "What were your objectives in this performance", can create an unpleasant feeling analagous to being called on to recite in class. Directed at someone who just performed publicly in front of peers, it can be unnerving and anxiety producing.

aspects of self-evaluation are usually more effective.[47] Open agenda sharing questions, however, are always appropriate because they do not tend to generate defensiveness or anxiety.

2. *DATA REVIEW*

Determining what was done is a crucial step in the learning process of testing whether that behaviour was effective. Keeping track of who did what in the complex interpersonal communications involved in practising law can be difficult[48] so a major goal of a feedback session is to make the performer aware of his behaviour. Although asking is the most effective way of checking whether the performer has that awareness, telling the student what his behaviour was is commonly done in public critiques.

Data review can be done either before or after interpretation and it can also be made part of an inquiry.[49] It must be specific, precise and detailed whenever it is done. Providing specific data demonstrates how precise the testing process must be to learn the lessons of experience successfully. Specific data review also minimises defensiveness because it communicates that the interpretation will be directed at the student's detailed behaviour in this performance and not at him personally. It reduces the potential that negative reinforcement will be

[47] Questions such as "What was your objective when you began the interview by asking about the client's family:" "What was your theory when you chose not to seek a client narration at the beginning of the interview", and "How successful were you at building rapport" are usually effective. In less public critiquing sessions and field work supervision, however, more open inquiry is essential and less anxiety producing. See generally Condlin, R., *supra* note 38.

[48] See note 17 *supra*

[49] For example, a critiquer may approach a performance which featured a lot of leading questions asked on examination-in-chief in three ways: (1) interpretation first by saying, "You used too many leading questions. There were at least twelve; let me give some examples"; (2) data first by saying "You used twelve questions that were leading including the following examples . . . . . "; or (3) as part of a specific inquiry; i.e. "What was your objective in using at least twelve leading questions in this examination?" Although a good critique mixes all these approaches, it may be easier to reach agreement about the data where no video or audio record is made by doing the data review first. Following this option may also reduce defensiveness. Bryant, S., *supra* note 34, at 5.

received primarily as a personal attack on the student's ego. It also makes positive interpretation easier to accept.

Reviewing data immediately after a performance, the approach used in the Professional Practice Course, requires accurate note-taking. The notes should record what the performers say and do. Using a non-lawyer to observe and comment on the important non-verbal aspects of the performance is also valuable.[50] Videotaping performances substantially enhances data review. It removes the risk of distortion caused by erroneous recollection of the data and provides the answer if a disagreement develops about what the behaviour was. The camera also records non-verbal behaviour better than most observers can.

The tone and language used either in asking about or reciting the data also affects the amount of anxiety and defensiveness generated by the feedback. The data should be shared rather than imposed on students. The goal is learning, not displaying critiquing or note-taking skills.[51]

3. INTERPRETATION

This stage of the process assesses whether the behaviour was effective or not and explains that assessment. It can be done either by the performer, using inquiry and self-critique, or by the observers. It must be specific in either case.

Very little learning results from broad, conclusionary interpretations. "That was a very good interview," or "that argument was not very effective" leave students wondering why and produce no lasting lessons from the experience. Specific

[50]The Professional Practice Course occasionally used an American Educational Psychologist, Dr. Martha Peters, for this purpose. Team teaching between lawyers and psychologists is becoming increasingly common in the United States. Sessions of the National Institute for Trial Advocacy, for example, often use a nonlawyer to observe and provide feedback on nonverbal behaviour.

[51]Another major flaw with much of traditional legal education is that it defines educational goals in terms of the teacher's interests rather than what best helps students learn. Care must be taken to see that this does not happen with the clinical method. See Condlin, R., *supra* note 38; Kettleson, J., Some Thoughts on Clinical Teaching and Learning 10–11 (unpublished paper prepared for NITA Workshop Session on the Teaching-Learning Process in Clinical and Trial Advocacy Courses, July 1975, on file in the Law Faculty).

interpretation minimises defensiveness and anxiety by targeting the behaviour, not the individual, for evaluation. The process of being specific also demonstrates the precision required to make the school of experience productive later.

A specific assessment alone is not enough because the interpretation must also explain why the behaviour either was or was not effective.[52] This explanation should be linked to a theory of lawyering. Effective interpretation also involves either providing or inquiring about alternative approaches.[53] Specific techniques for correcting behavioural deficiencies are also appropriate.[54]

Interpretation must include positive feedback. Positive reinforcements are more important and should usually be given first. Research demonstrates that positive reinforcement motivates learning more than constructively critical feedback does.[55] Although it is often assumed that because someone does something well he must be aware of it, no specific, positive feedback on the point sends the message that the choice was either insignificant or unimportant. Recognizing effective choices and actions is essential to self-learning. Specific positive feedback singles out effective choices and action so that the student consciously knows what to repeat next time. Analysing

[52] Condlin, R., *supra* note 38.

[53] Bellow, C., and Moulton, B., *supra* note 36, at 79. The authors stress the value of short demonstrations:

> "Be willing to give examples of what you would have done. And don't just describe, get up and do it. Your performance will provide a better contact and it will encourage others to feel easy about role-playing their suggestions."

Ibid. For a general discussion of clinical teaching by role-modeling, see Barhizer, D., *supra* note 7, at 136.

[54] "It isn't as helpful to say, 'You talked too fast' (most people with this vice are aware of it), as it is to suggest ways of dealing with the problem (changing sentence length, rehearsing pace and transitions, consciously pausing before going to another topic or sentence, etc.)."

Bellow, G., and Moulton, B., *supra* note 36, at 79.

[55] Harbaugh, J., *supra* note 10, at 209; Hilgard, E., and Bower, C., *supra* note 10, at 608–609. It is unfortunate thet the terms "critique" and "evaluation" frequently connote exclusively negative feedback.

why specific behaviour was effective reinforces those points for others in the class who have planned to do the same thing. It also stimulates discussion about theory.

Interpreting effective behaviour first is important because it minimises the defensivenss and anxiety generated by the critiquing process. It also boosts confidence and makes later identification of less effective conduct easier to accept and understand.

Although the performance should be carefully analyzed for its positive aspects, interpretation must be honest.[56] Major mistakes in the performance should be discussed because letting them pass without comment sacrifices potential learning for the performer and the observing students. Asking for self-critique or postponing the critical interpretaion until later in the critique can be used to reduce defensiveness.

Every minor flaw in the performance does not have to be covered because there is a limit to how much feedback a performer can absorb without losing the ability to hear and understand it.[57] This period tends to be shorter in public critiques like those used in Professional Practice. Subsequent student performances frequently produce opportunities to make the same point in a positive way.

Interpretation must be delivered with an appreciation of its potential to generate defensiveness and anxiety. Sensitive, tactful language and careful attention to the manner and tone of delivery are essential. Conclusory or dramatic phrasings can often sound more critical than intended.[58] Effective interpretation

[56] Bryant, S., *supra* note 34 at 9; Bellow, G., and Moulton, B., *supra* note 36 at 78.

[57] Clinicians call this phenomenon overloading. It means that students cannot absorb everything about their performance at one time so topic selection is appropriate. E.g., Barnhizer, D., *supra* note 7, at 117; Bryant, S., *supra* note 34, at 2.

[58] Every clinician has his or her favourite story about a counterproductively phrased interpretation. Mine involves a lawyer who told a performer after observing five minutes of an initial interview, "I don't know who I dislike more, you or the client." This phrasing attacked the student personally and was too general to be of learning value. A better phrasing would have been that the student did several things that probably damaged rapport with this client and then give specific examples. Or consider this example:

> "An instructor in a workshop setting once said to a woman performer, 'you come on like a truck driver'. The point could have been made just as forcefully, and with greater chance of acceptance, if the instructor had said something like, 'You

should be shared rather than advocated.[59] The process should always have the potential to be a dialogue rather than a monologue with performers given ample opportunities to respond to or clarify the interpretation.[60] Checking the accuracy of your theoretical assumptions and whether your interpretation is clear are effective methods to maintain the potential for dialogue.[61] Interpretation is also enhanced by the critiquer's openness to differing points of view and by his willingness to teach by demonstrating the lawyering skill occasionaly and receiving student feedback on his performances.[62]

Videotaping substantially improves the interpretation stage of feedback. If critiquing is done immediately after the performance, later review of the videotape checks the critique's accuracy, permits its clarification, and provides an opportunity

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were too aggressive with this witness. Let me repeat some of the language you used . . . . . ."

Bellow, G., and Moulton, B., *supra* note 36, at 78–79.

[59] Since the feedback is given by persons with considerable skill at persuasion, care must be taken to ensure that the delivery always matches the performer's sense of what is helpful feedback and what is not. See, Condlin, R., *supra* note 38; Bellow, G., and Moulton, B., *supra* note 36, at 70.

[60] See Bellow, G., and Moulton, B., *supra* note 36, at 79; Bryant, S., *supra* note 34, at 9; Condlin, R., *supra* note 38.

[61] "It is worth reserving some time to talk about how helpful the members of the class feel they have been, and to give the performers a chance to 'critique the critiquers!' As we've said before, a primary goal of clinical instruction is to develop learning as well as lawyering skills. They both have to be practised and discussed."

Bellow, G., and Moulton, B., *supra* note 36, at 79.

[62] Teacher demonstration has many advantages. Beginning the performance-critique segment of the class with one in which a student critique is solicited, such as was done in the first Professional Practice class on interviewing, is an excellent way to remove some of the anxiety from the process. It communicates that the instructor is willing to be as vulnerable as the students will be when they perform. Subsequent demonstrations also reinforce the message that practising law involves making decisions, some of which will prove to be more effective than others. Analysing which is which, and learning from both, is the key to becoming competent. Faculty demonstrations teach by role modelling using the imitative aspect of learning mentioned previously. See note 13 *supra*. They also can be effective in showing how the same objectives can be accomplished using different styles and approaches.

for additional feedback.[63] Video review may also add a dimension to learning by making it easier for a performer to interpret his performance.[64]

4. *APPLYING THE MODEL*

Applying the model involves deciding when and how to inquire, when and how to review the specific behavioural aspect of the performance, and how to phrase and sequence interpretation. Although these questions are interrelated, they should be considered separately when planning and delivering a critique. Critiquing, like all other skills, is enhanced by preparation. Reading the assigned theoretical material, reviewing the simulation, and outlining approaches to the task is sufficient preparation to produce crisp and comprehensive critiques.[65]

The emphasis given to each stage of the model varies with the context of the critique. For example, the public nature of the critiques in the Professional Practice Course probably creates a shorter period of student absorption than exists in individual

[63] The Law Faculty's lack of videotape equipment unfortunately made it difficult to use this aspect of interpretation in this year's Professional Practice Course. The Law Faculty has asked the Dean to investigate purchasing this equipment. Although the Education Faculty and the Language Centre occasionally loaned their equipment, only five performance classes were taped.

[64] Psychological studies have shown that competence is more easily attributed to observed performances of others than it is to reconstructions of one's own behaviour. Storms, Videotape and the Attribution Process: Reversing Actors' and Observers' Points of View, 27 Journal of Personality and Social Psychology 165 (1973). This research contends that people are more likely to assign a competent result in their own behaviour to luck or environmental factors. *Ibid* Videotape, however, lets students observe themselves. If the psychological research is sound, this phenomenon makes it easier for students to attribute effective performances to "skill". Students often remark after watching their performance on videotape that they did not seem nearly as bad as they thought they would be.

[65] The National Institute for Trial Advocacy uses this approach and also has prepared short teacher's manuals which describe the critiquing process and list the issues likely to arise in each problem. Law Professors adapting this approach to their classes have also successfully enhanced their participant's critiques by giving them the readings, the simulations, and a description of the critiquing process before they are scheduled to appear.

video reviews.[66] The presence of others and the desire to maximise student performance opportunities also tends to narrow the scope and frequency of inquiry in public critiques. Extensive inquiry should be done in individual and other less public feedback sessions. Some agenda sharing and diagnostic inquiry, however, should be done in all critiques, even public evaluations.

Practitioners can play a major role in this approach to skills instruction. The Professional Practice Course has created numerous opportunities for collaboration between academics and practitioners. Teachers develop the simulations and present the theoretical models while practising lawyers help them critique student performances.[67] Practitioners can also help by demonstrating how they would perform the simulation after several students have tried it.[68] Teaching usually involves learning for the instructor as well as for the students. Practitioners may find that the specific skill models and the self-examination of their own theoretical assumptions necessary for effective critiquing and demonstrating are valuable ways to refine their skills.

This critiquing model can be and has been used not only in teaching with simulated situations but also in live client work. It

[66]This is particularly true in supervision of field work where the intensity of involvement will generate strong student needs to analyse their perfomances. See, e.g., Bryant, S., *supra* note 34, at 5; Condlin, *supra* note 38; Kettleson; *supra* note 51, at 6.

[67]The National Institute for Trial Advocacy in the United States has developed a system, now frequently copied in law school courses, that uses practitioners to increase the opportunities for student performances. This approach brings in several practitioners who form a team and initially critique several student performances before the entire class. Then the class breaks into smaller groups led by one person and the emphasis shifts to getting everyone on their feet each week. Critiques are still provided but they are shorter. The goal is giving everyone a chance to practise the skills under consideration.

[68]See note 62 *supra*. Practitioner demonstrations also prove that difficult tasks can be accomplished effectively. They can be very effective when the student performances have not been overly impressive. The examination in chief class in Professional Practice this year, for example, produced four student examinations that were not scintillating. The class ended with a crisp and effective demonstration by Mr. Peter Mooney of how this witness could be examined successfully. The following discussion and critique of that demonstration was very instructive and showed that an effective examination of this witness was possible.

has been applied successfully to many "traditional" areas of law schools curriculums.[69] It is a model that can be used to further skills development within a law firm. It also is an approach to learning that can be applied to all aspects of professional life.[70]

Using this critiquing model demonstrates a style of lawyering that is open and collaborative. This style contrasts with the competitive-persuasive style of interaction used in litigation. Although the persuasive mode is important to much that students will do in adversary endeavour, the collaborative style is also relevant to many of the client-centered and law office tasks that await them in practice.

The Professional Practice Course does not produce mastery of the complex interpersonal skills that it surveys. Only years of thoughtful and self-critical practice produce mastery. The Professional Practice Course can, however, give students the tools to teach themselves from their experience. The clinical approach and the critiquing model used in Professional Practice teaches a process of formulating an explicit theory of action before acting; of becoming aware of actions taken in pursuit of theoretical objectives; and of interpreting the consequences of

[69]Several American law teachers have created substantial simulations to teach substantive and behavioural aspects of their courses. For example, labour management negotiations are often simulated to motivate learning in Labour Law courses. E.g., Hollander, P., The Simulated Law Firm and Other Contemporary Law Simulations, 29 J. Legal Ed. 311, 318 (1978). Professor Donald B. King uses simulations on Products Liability Law, Commercial Paper, Holder in Due Course, Bank-Customer Relations, and Letters of Credit to teach his Commercial Law Courses. King, D., Simulated Game Playing in Law School: An Experiment, 26 J. Legal Ed. 580 (1974). Professor Micheal Botein of the University of Georgia simulates an administrative hearing because he finds it more effective than teaching Administrative Law in a traditional fashion. Botein, M., Simulation and Roleplaying in Administrative Law, 26 J. Legal Ed. 234 (1974). The model has obvious utility whenever the experience in these simulations are processed. It can also be applied productively in most moot court and appellate advocacy programmes, Legal Writing courses, and other situations designed to produce a form of periodic evaluation.

[70]See Meltsner, M., and Schrag, P., *supra* note 7, at 30 n. 18, 54. The authors, while describing their very open use of a learning approach similar to the model described here note:

> "Without belaboring a subject plainly deserving independent examination, we believe that traditional pedagogy provides law firms and other legal institutions with graduates all too willing to engage in levels of competition far in excess of that required by the needs of good lawyering and disciplined work habits. If legal

both. Students learn this process by participating in it when inquiry is liberally used in their critiques and also by having specific data review and interpretation modeled by their critiquers. This Course is an exciting and welcome addition to the Law Faculty's curriculum.

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education can be 'humanized' – and without being wildly optimistic we think it can – why cannot the same be done for the practice of law?"
Ibid., at 30 n. 18.