APPLYING NEGOTIATIONS PEDAGOGY TO CLINICAL TEACHING: TOOLS FOR INSTITUTIONAL CLIENT REPRESENTATION IN LAW SCHOOL CLINICS

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Law clinics across the country in a range of subject areas are increasingly engaging in advocacy work on behalf of and alongside institutional clients such as nonprofits, coalitions, tribes, and a range of formal and informal organizations. This article explores how clinicians may employ tools from negotiations pedagogy to teach students how to diagnose and address the complex problems that institutional clients bring to clinics. The article posits that, to effectively represent an institutional client, students must navigate relationships with external players as well as within the institutional client itself. Negotiations pedagogy provides a framework for teaching students how to understand and engage with the relationships that an institutional client—for instance a nonprofit—may have with external players such as governmental regulators, local governments, foundations, other nonprofits, constituents, allies, and opponents. The article examines tools from negotiations pedagogy that assist in teaching students to handle these external relationships as well as relationships within the institutional client, such as with a board of directors, an executive director, and other staff.

Maya and Daniel are law students in the Immigrants' Rights Clinic who have been assigned to work as a team to represent Equal Rights for Immigrants (ERI), a longtime collaborator and client of the Clinic. ERI has asked the Clinic to assist with the development of a policy report about local police practices regarding immigration enforcement. ERI hopes to submit the report to the local city council, to

convince council members that the city should reconsider its practice of assisting in immigration enforcement. The report is one of many strategies that ERI is using to fight immigration enforcement by local police. ERI is also considering litigation, pursuing public education, and assisting individual immigrants with their deportation cases. Maya and Daniel's contact person at ERI is Imelda, a junior staff attorney in charge of ERI's work on local enforcement issues. ERI is a mid-size nonprofit, with a staff of ten individuals and a 15-member board of directors.

I. INTRODUCTION

Clinics across the country are conducting social justice advocacy on behalf of, or in partnership with, public interest nonprofits, unions, grassroots coalitions, small businesses, and other institutional entities. These clinics range broadly in subject matter, from immigration to environmental law to small business transactions. Students in the clinic typically provide representation not to an individual person, but to (or in partnership with) an organization, often a nonprofit organization with an executive director, staff members, and a board of directors. Despite the broad prevalence of such clinics, the clinical literature has not fully explored the pedagogy of institutional client representation in the clinical context.[1] This Article seeks to explore a central question of this emerging pedagogy: how can we teach students to work effectively in partnership with institutional clients to solve the problems they bring to the clinic?

Organizational clients' legal issues are often quite complex, lasting for many years and involving multiple modes of advocacy, high levels of expertise, and many players (both collaborators and adversaries). For example, an environmental organization might reach out to a clinic for help working with a coalition of other groups to file impact litigation regarding water rights. The litigation and related advocacy might last for a decade, encompassing the filing of a complaint, dispos-

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[1] A handful of articles have begun this exploration. *See, e.g.,* Marcy L. Karin & Robin R. Runge, *Toward Integrated Law Clinics That Train Social Change Advocates,* 17 CLINICAL L. REV. 563 (2011); Paul R. Tremblay, *Counseling Community Groups*, 17 CLINICAL L. REV. 389 (2010) (discussing counseling concerns unique to group and institutional client contexts); Jayashri Srikantiah & Jennifer Lee Koh, *Teaching Individual Representation Alongside Institutional Advocacy: Pedagogical Implications of a Combined Advocacy Clinic*, 16 CLINICAL L. REV. 451 (2010) (discussing pedagogical implications of combining direct services and impact advocacy in same clinic); Chai Rachel Feldblum, *The Art of Legislative Lawyering and the Six Circles Theory of Advocacy*, 34 McGEORGE L. REV. 785 (2003) (outlining legislative lawyering skills); Katherine R. Kruse, *Biting Off What They Can Chew: Strategies For Involving Students In Problem-Solving Beyond Individual Client Representation*, 8 CLINICAL L. REV. 405 (2002) (highlighting strategies for large project work in clinics).

itive motions, and appeals, as well as administrative and legislative advocacy. In addition to working with players within the organization, clinic students may also negotiate relationships with other environmental organizations, judges, regulatory bodies, and adversaries. Similarly, a transactional clinic might work with a small nonprofit client who has asked the clinic to assist with a merger. To understand the context for their work, students may need to develop an understanding of the nonprofit client's history and structure. In developing a plan for their work, students would likely interact with the nonprofit's executive director, board of directors, staff, funders, and partner organizations.

Organizational representation involves interactions with a range of individuals and entities outside the organization, including other organizations in the same field, adversaries, decision-makers (including judges), regulatory bodies, and funders. If the organization works in coalition with other nonprofits, it likely has longstanding relationships with community-based groups, legal aid organizations, elected officials, law enforcement, and others. Institutional client representation also encompasses interactions with individuals within the organization—the staff, board of directors, executive director, and others. We believe that, to successfully represent an institutional client, students should learn about the various stakeholders within and outside the organization.

Our central contention is that multi-party negotiations pedagogy provides a useful framework for teaching students how to work with institutional clients. Although the relationship between clinic student and institutional client is not a negotiation in the pure legal sense (involving a formal contract, an adversarial process, or the courts), we contend that it falls within a more expansive definition of negotiation, under which any interaction between two individuals can involve a negotiation to achieve an optimal strategy for both individuals moving forward. Our lives are filled with a myriad of such negotiations: an example is that of a student who asks her professor for additional time to complete a project. Under this broader definition, students working with institutional clients routinely negotiate with their institutional client as well as other players within and outside the institution.

To accurately understand the institutional client's concerns, negotiations theory—as well as our experience in working with such clients—teaches that students must understand the relationships that the institution has with other players in the field. Using the example above, to understand the problem that ERI hopes to address with its report—and thus create a report that ERI regards as a success—Maya and Daniel must understand the relationships between ERI and other

players in the field, including other nonprofits interested in the issue, the police department, city officials, and funders. The history and nature of these relationships influence numerous aspects of the report. For instance, ERI might frame the problem as one that involves public safety, to encourage law enforcement agencies from outside the area to join in urging the city council to change its policy. ERI might characterize prior attempts to solve the problem as failing because of relationships with now-retired members of the city council, to illustrate a new opportunity for change. Or ERI's solutions might involve the monitoring of city practices by a range of other nonprofits who work in the field.

Relationships within ERI are critical to the success of the report as well. To forge a relationship with Imelda, Maya and Daniel may need to understand Imelda's relationships with others at ERI who have an interest in the project, including other staffers, the executive director and the board of directors. For example, if Imelda believes that the report should focus on the stories of those affected by the law enforcement policy, but the executive director (who has final review of the report) wishes to focus on statistics and aggregate analysis of those affected by the policy, Maya and Daniel might create one draft over several weeks of discussions with Imelda, only to have the executive director reject the draft. Funders or other staff at ERI might have different concerns—for example, use of the draft in fundraising or other publicity—relevant to ERI's goals for the report.

We believe that negotiations pedagogy provides a useful framework for teaching clinic students like Maya and Daniel to effectively navigate relationships within and outside an institutional client. Our Article proceeds in three parts. First, we examine the unique structure and dynamics of institutional client work in law school clinics. While the clinical literature has explored individual client representation, including the cross-cultural and ethical dimensions to client interviewing and counseling, clinicians have not yet fully explored these nuances in the institutional client context. Second, we posit that negotiations pedagogy about multi-party negotiations provides useful tools for clinicians teaching students to diagnose institutional clients' issues. Last, we offer a few concrete curricular suggestions for implementation of these pedagogical tools.

II. The Pedagogy of Institutional Client Clinics

How should we prepare students to work with institutional clients? Much of the vast clinical literature about interacting with individual clients is directly relevant. Regardless of whether they are working with an institutional or an individual client, students must ex-

plore various concepts, including cross-cultural lawyering, active listening, and ethics.[2] In addition to these core skills, however, students working with institutional clients may contend with a range of issues arising from the fact that their client is not an individual. As explained below, these issues may require understanding the structure of the institution, the role of the students' institutional contact person within the organization, and the historical relationship between the institutional client, the clinic, and other external players.

In this article, we focus on the early stages of the representation, when students are learning about and diagnosing the institutional client's issues. During this early diagnostic phase, the scope and nature of the relationship are often established.[3]

A. *Types of Clinics Representing Institutional Clients*

Institutional client work forms the basis for many different types of clinical work. A range of subject-area clinics represent institutional clients, including environmental law clinics, immigration clinics, international human rights clinics, civil rights clinics, workers' rights clinics, and educational advocacy clinics.[4] Other clinics focus on a particular modality of work, such as business or nonprofit transactions, complex litigation, or legislation; these clinics also typically work with institutional clients.[5] Yet others adopt a combined advocacy model, in which students simultaneously work on individual cases and institutional client work.[6]

The Immigrants' Rights Clinic at Stanford Law School, for instance, adopts a combined advocacy model, in which all students work

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[2] *See infra* nn. 26-33 and accompanying text.

[3] *See, e.g.,* DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH Chs. 5, 7, 8, 9, 10 (2d ed. 2004) (discussing diagnosis as a function of fact-gathering in initial client contacts, disputes, business transactions, and clarifying client objectives); PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS 33-59 (2010) (describing importance of diagnosis phase in problem solving).

[4] For example, a number of environmental law school clinics represent institutional clients, including those at Lewis and Clark, Golden Gate University, University of Denver, Stanford, Harvard, Duke, and Columbia.

[5] A number of transactional clinics represent institutional clients, including those at Northwestern, NYU, and Stanford. *See* ANTHONY J. LUPPINO, CAN DO: TRAINING LAWYERS TO BE EFFECTIVE COUNSELORS TO ENTREPRENEURS, A REPORT TO THE EWING MARION KAUFFMAN FOUNDATION (Jan. 30, 2008), at 19 & Appendix 2, *available at* http://ssrn.com/abstract=1157065 (listing 50 law school clinics "that are popularly referred to these days as 'transactional clinics.'"). For a description of a legislation clinic, see Chai Rachel Feldblum, *The Joy of Teaching Legislation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 31 (2003-2004).

[6] *See generally* Srikantiah & Koh, *supra* note 1, at 458-64 (describing combined advocacy clinics).

not only on individual client cases, but also on a broader advocacy project with an institutional client. This happens in a variety of ways, including involving students in larger advocacy projects that stem from legal services work, developing partnerships with community-based organizations to engage in law and organizing, and collaborating with impact litigation organizations to seek law reform. These projects have included: impact litigation, for instance on behalf of noncitizens subjected to prolonged detention in the Ninth Circuit;[7] briefs on behalf of local and national organizations representing the interests of noncitizens before the United States Supreme Court,[8] the federal courts of appeals,[9] and Inter-American Commission on Human Rights;[10] litigation under the Freedom of Information Act (FOIA);[11] legislative advocacy on behalf of local nonprofits; preparation of reports to support administrative and local advocacy;[12] crea-

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[7] *See, e.g., Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013); *Leonardo v. Crawford*, 646 F.3d 1157 (9th Cir. 2011); *Diouf v. Napolitano*, 734 F.3d 1081 (9th Cir. 2011); *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011); *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010); *Aguilar-Ramos v. Holder*, 594 F.3d 701 (9th Cir. 2010); *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2009); *Casas-Castrillon v. Dept. of Homeland Sec.*, 535 F.3d 942 (9th Cir. 2008); *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008); *Diouf v. Mukasey*, 542 F.3d 1222 (9th Cir. 2008).

[8] *See, e.g.*, Brief of Amici Curiae American Civil Liberties Union et al. in Support of Petitioner, *Nijhawan v. Holder*, 557 U.S. 29 (2009); Brief for Asian American Justice Center et al. as Amici Curiae Supporting Petitioners, *Lopez v. Gonzales*, 549 U.S. 47 (2006).

[9] *See, e.g.,* Brief of Amicus Curiae Immigrant Defense Project, *Sanchez v. Holder*, No. 13-2653 (7th Cir.) (filed Aug. 25, 2014); Brief of Amicus Curiae Immigrant Defense Project, *Syblis v. Holder*, No. 11-4478 (3d Cir.) (filed Feb. 26, 2014); Brief of Amici Curiae Immigrant Defense Project et al., *Carrasco-Chavez v. Holder* (4th Cir.), No. 12-2094 (filed Aug. 5, 2013); Brief of Amici Curiae Immigrant Defense Project et al., *Almanza-Arenas v. Holder*, Nos. 09-71415, 10-73715 (9th Cir.) (filed May 28, 2013); Brief of Amici Curiae Immigrant Defense Project et al., *Mondragon v. Holder*, No. 11-2133 (4th Cir.) (filed Mar. 18, 2013); Brief of Amici Curiae in Support of Petitioner-Appellant During Pendency of Rehearing En Banc, *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); Amici Curiae Brief of National Association of Criminal Defense Lawyers et al., *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc).

[10] *See, e.g.*, Report on Prosecutorial Discretion and Family Unity in Support of Public Thematic Hearing, Inter-American Commission on Human Rights (filed Aug. 21, 2014) (arguing for broader implementation of prosecutorial discretion in U.S. immigration laws given international human rights norms protecting family unity), *available at* http://www.law.stanford.edu/organizations/clinics/immigrants-rights-clinic/publications; Written Comments of Human Rights Watch Before the Inter-American Commission on Human Rights, *Smith & Armendariz v. United States* (filed June 6, 2007) (No. 12.561) (arguing that aggravated felony provisions of U.S. deportation laws violate international human rights standards), *available at* http://www.hrw.org/sites/default/files/related_material/armendarizvUS071007_0.pdf

[11] *See, e.g.*, National Lawyers' Guild San Francisco Chapter v. Dep't of Homeland Sec'y, No. CV-08-5137 (N.D. Cal. filed Nov. 12, 2008).

[12] *See, e.g.*, Jennifer Lee Koh, Jayashri Srikantiah & Karen Tumlin, Deportation Without Due Process (2011) (*available at* http://www.law.stanford.edu/organizations/clinics/immigrants-rights-clinic/projects) (last visited Jul. 1, 2014); Asian Americans

tion of model pleadings for immigration nonprofits; advocacy regarding local police and probation practices on behalf of community organizing groups; and development of public education materials in collaboration with community-based organizations.[13]

Other clinics in the Mills Legal Clinic at Stanford Law School also represent institutional clients, in different ways. For instance, the Environmental Law Clinic represents a range of nonprofits, community groups, coalitions, and tribes on litigation before the federal and state courts, advocacy before state and federal regulatory agencies, and legislative advocacy. Its projects span years and sometimes decades, and involve a variety of players, such as other nonprofits, community groups, and local, state and federal government actors. The Organizations and Transactions Clinic has a completely different docket and focus, but it also requires students to conduct a broad range of lawyering and advocacy on behalf of institutional clients. Students in the O&T Clinic represent nonprofits in a broad range of sectors, from sustainable agriculture, housing, and education, to immigration, on a variety of projects including governance advice and mergers/acquisitions.[14] Like the Environmental Law students, O&T students must work with clients who have been in existence for years and decades, and an understanding of organizational history and relationships is critical to their work. Similarly, the International Human Rights and Conflict Resolution Clinic works with a broad range of institutional clients, as well as stakeholders in communities that have suffered abuse, to prepare factual documentation and reports, including for litigation before national and international tribunals.[15]

Although the institutional advocacy projects in clinics like the environmental, transactional, human rights and immigration clinics at

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FOR CIVIL RIGHTS AND EQUALITY, LIMITED ENGLISH PROFICIENT PARENTS AND THE JUVENILE JUSTICE SYSTEM: A WHITE PAPER ON LANGUAGE ACCESS IN SAN MATEO COUNTY, CALIFORNIA (2008) (on file with authors); ASIAN LAW CAUCUS & STANFORD LAW SCHOOL IMMIGRANTS' RIGHTS CLINIC, Returning Home: How U.S. Government Practices Undermine Civil Rights At Our Nation's Doorstep (2009) (on file with authors).

[13] *See, e.g.,* KNOW YOUR RIGHTS FOR IMMIGRANT PARENTS NAVIGATING JUVENILE JUSTICE SYSTEM (2012), PRACTICE ADVISORY FOR LAWYERS REPRESENTING CANCELLATION OF REMOVAL APPLICANTS (2011), PRO SE U VISA MANUAL (2012); IMMIGRANT RAIDS KNOW YOUR RIGHTS MATERIALS (2008) (all materials available at http://www.law.stanford.edu/organizations/clinics/immigrants-rights-clinic/projects) (last visited Jul. 1, 2014). *See* Piomelli, *supra* note 2, at 1395-96 (describing "inclusive" and "participatory" model of community public education). *See generally* Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433 (1998) (describing collaborative vision of community legal education).

[14] *See* LUPPINO, *supra* note 5, at Appendix 2 (collecting names of 50 transactional clinics).

[15] *See* http://www.law.stanford.edu/organizations/clinics/international-human-rights-and-conflict-resolution-clinic (describing current projects).

Stanford Law School cover a broad range of work and involve different levels of complexity, they share several key attributes. As we explain below, most of the projects involve collaboration with an institutional client, the use of a range of lawyering and advocacy tools,[16] and the desire to extend beyond individual rights to effect broader social change.

B.   Benefits of Institutional Client Representation in Law Clinics

Institutional client work permits students to engage in large-scale problem-solving to effect social change. Paul Brest and Linda Hamilton have broadly defined "problem" as "any situation in which the state of affairs varies, or in the future may vary, from the desired state, and where there is no obvious way to reach the desired state."[17] Legal problem solving is a related concept: it refers to the ability to take into account the context in which legal problems arise, identify creative solutions, and carry them out while remaining cognizant of potential legal and non-legal barriers.[18] In a human rights clinic, for instance, a student might investigate and write a report about prison conditions in the U.S. or abroad, working alongside a coalition of nonprofits and community organizations. A student in an immigrants' rights clinic might work on impact litigation and advocacy to change the government's detention practices, in partnership with a national nonprofit and a coalition of its partner organizations. Through such projects, students in law clinics have made important contributions toward social change.[19]

By working in partnership with institutional clients, law students learn how to diagnose and solve complex legal and policy problems by employing a range of tactics, including litigation, transactional work, legislative and local advocacy, public education, or regulatory work.[20]

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[16] *See* ALAN K. CHEN & SCOTT CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE Ch. 5 (2012).

[17] Brest & Hamilton, *supra* note 3, at 9.

[18] *Id.* at 8-11. The MacCrate Report identifies "problem solving" as a core lawyering skill. MACCRATE REPORT, http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).authcheckdam.pdf, at 141-48. *See also* Mark Neal Aaronson, *Thinking Like a Fox: Four Overlapping Domains of Good Lawyering*, 9 CLINICAL L. REV. 1, 1 (2002) (defining problem solving and practical judgment as two of "four overlapping domains of good lawyering").

[19] *See* Chen & Cummings, *supra* note 16, at Ch. 5; Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 389-409 (2008) (describing clinic driven by collective mobilization); Frank Askin, *A Law School Where Students Don't Just Learn the Law; They Help Make the Law*, 51 RUTGERS L. REV. 855, 856 (1999) (articulating social justice benefits of law reform-focused clinic, and concluding that "there is much more to clinical legal education than training in the skills of litigation and counseling").

[20] *See* Kruse, *supra* note 1, at 422-34 (describing clinic's efforts to address systemic lack

Students learn, first hand, that problem solving requires more than handling litigation. For example, an organization like ERI may define a "problem" broadly as local law enforcement cooperation with the immigration authorities (and relatedly, define its ultimate advocacy goal as eliminating such cooperation). ERI may use many methods to advocate for elimination of referrals, ranging from litigation to local advocacy, and may work with a wide range of collaborators, including other social justice organizations, elected officials, and grassroots groups. The work the clinic is doing with ERI—preparing the report—is thus only part of ERI's larger advocacy. To ensure that the report fits in with the broader advocacy effort, Maya and Daniel must have an awareness of the broader context for the problem—including what ERI is doing in the city other than working on the local law enforcement issue, how other nonprofits are participating in the advocacy, and what discussions have already taken place with elected officials—so that they can determine an appropriate message, messenger, and audience for the report. This process requires significant strategic thinking about the advocacy, including how to maximize its likelihood of success, as well as a deep understanding of the other players working on the issue, ranging from collaborators to adversaries.

Through working on large-scale problem-solving, students like Maya and Daniel begin to hone their professional judgment, or what the authors of the Carnegie Report refer to as the "wisdom of practice": "the ability to size up a situation well, discerning its salient features relevant not just to the law but to legal practice, and most of all, knowing what general knowledge, principles and commitments to call on in deciding on a course of action."[21] Clinic work solving problems

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of access to legal information in local family court system as an opportunity for students to develop problem-solving skills); Andrea M. Seielstad, *Community Building as a means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 Clinical L. Rev. 445, 506-12 (2002) (describing framework for teaching problem-solving through community building).

[21] *See* WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW 115 (2007) [hereinafter "CARNEGIE REPORT"]; Laurie Morin & Louise Howells, *The Reflective Judgment Project*, 9 CLINICAL L. REV. 623, 625-29 (2003) (describing problem solving, wisdom, and judgment). *See also* Mark Neal Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247, 249 (1998) (describing judgment as "key faculty" required by lawyers); Kenneth R. Kreiling *Clinical Education and Lawyer Competency: the Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 Md. L. Rev. 284, 286 (1981) (noting that clinical education should ultimately seek to "foster professional growth and competence," which it can only do if "the emphasis for learning is focused beyond the immediate skills needed to perform clinical tasks"); Alan Lerner, *Law & Lawyering In The Workplace: Building Better Lawyers By Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107, 111 (1999) (observing that "the heart of what lawyers do is the exercise of critical judgment"); Roy Stuckey, *Teaching with Purpose*: *Defining and Achiev-*

for institutional clients prepares students for the realities of practice. Advocacy groups are increasingly turning to non-litigation advocacy to achieve their social change goals. Particularly if recourse to the courts has proven ineffective, organizations have turned to other, more creative problem-solving approaches, including legislative work, regulatory advocacy, and public education.[22] Deborah Rhode has documented, for example, that over the past three decades, the percentage of resources that several public interest organizations have spent on litigation has decreased, while those expended on other advocacy modalities, such as legislative work and public education, has increased.[23] Even beyond public interest work, the practice of law has evolved, and requires lawyers to exercise judgment in evaluating a range of regulatory, legislative, public education, media and other strategies.[24]

C.   *Teaching Students to Diagnose Institutional Clients' Problems*

Clinicians teaching students to work with institutional clients can draw on a vast scholarship about representing individual clients. Much of this literature is highly relevant to the representation of any client, whether institutional or individual. For example, learning to lawyer across lawyer-client difference is important for both individual and institutional clients.[25] However, several critical aspects of institutional client representation distinguish it from the individual representation context. Among other things, to offer effective representation—and to diagnose institutional clients' issues—students should learn about the internal structure and relationships within the institution, as well as the relationships between the institution and

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ing Desired Outcomes in Clinical Law Courses, 13 CLINICAL L. REV. 807, 811 (2007) (noting that "[h]elping students acquire an understanding of legal problem-solving and begin developing their expertise as problem-solvers is the most important task of legal education").

[22] *See* Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2046 (2008). *See also* Kimberly O'Leary, *Clinical Law Offices and Local Social Justice Strategies: Case Selection and Quality Assessment as an Integral Part of the Social Justice Agenda of Clinics*, 11 Clinical L. Rev. 335, 342 (2005) (discussing broader social justice impact of collaborations between clinic and local organizations); Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1386 (2009) (democratic lawyers "treat litigation, lobbying, community and popular education, media campaigns, political mobilization, and organizing as a range of options to fully explore and to mix and match as each specific context warrants.").

[23] Rhode, *supra* note 22, at 2047.

[24] Institutional client work in the clinical context also raises numerous challenges, particularly as to student ownership and time management. *See* Srikantiah & Koh, *supra* note 1, at 474-78 (listing challenges).

[25] *See* Paulette J. Williams, Cross–Cultural Teaching in the Business Law Clinic, 76 TENN. L. REV. 437 (2009) (stating cross-cultural issues that arise in a transactional clinic).

outside players. This section highlights the relevant pedagogy from the individual client context and sketches out the areas where institutional client work requires new teaching methods.

1. Lessons From Individual Client Representation

In individual representation, the traditional balance in the early stages of representation—including during the diagnosis phase—is between establishing rapport and gathering information relevant to the representation.[26] In addition to exploring this balance, clinicians teach students to understand inhibitors to open discussion, including student interruptions, embarrassment, student resentfulness, the client's assessment of what is important to her case, cross-cultural dynamics,[27] struggles with empathy,[28] and the client's memory.[29] Students learn to use appropriate language and tools like active listening to encourage client communication.[30] Students also explore their ethical obligations, and may learn how to communicate with clients

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[26] *See* ROBERT F. COCHRAN, JR., JOHN M.A. DIPIPPA & MARTHA M. PETERS, THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 57-73 (1999) (explaining balance between rapport and fact gathering during first interview); STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS 82 (3d ed. 2007) [hereinafter "Krieger &Neumann"] (identifying four purposes of the first interview: forming an attorney-client relationship, learning the client's goals, "learning as much as the client knows about the facts," and reducing the client's anxiety).

[27] *See* Jean Koh Peters & Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001) (discussing cross-cultural training in clinics); Antoinette Sedillo López, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Communication Through Case Supervision in a Client-Service Legal Clinic*, 28 WASH. U. J. L. & POL'Y 37 (2008) (exploring cross-cultural representation in clinical context).

[28] *See, e.g.,* Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 NEB. L. REV. 1 (2008) (discussing empathy in legal education); Philip M. Genty, *Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 CLINICAL L. REV. 273 (2000) (same). *See also* Susan L. Brooks, *Using Therapeutic Jurisprudence to Build Effective Relationships With Students, Clients and Communities*, 13 CLINICAL L. REV. 213 (2006) (outlining therapeutic jurisprudence techniques for law clinics); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605 (2006) (same).

[29] *See generally* KRIEGER & NEUMANN, at 83; STEPHEN ELLMANN ET AL., LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 34-49 (2009) [hereinafter "Ellmann"] (exploring "hindering concepts in the attorney-client relationship").

[30] *See* KRIEGER & NEUMANN, at 84-86 (explaining and encouraging active listening); ELLMANN, at 23-31 (explaining active listening). *See also* Linda F. Smith, *Always Judged-Case Study of an Interview Using Conversation Analysis*, 16 CLINICAL L. REV. 423 (2010) (using conversation analysis to critique language of first client interview); Gay Gellhorn et al., *Law and Language: an Interdisciplinary Study of Client Interviews*, 1 CLINICAL L. REV. 245 (1994) (applying anthropological study methods to analyze language used during first client interview).

who are traumatized.[31] Clinicians encourage students to explore why their clients may not disclose "everything" during the first interview, and in particular, how to handle an (sometimes false) impression that a client might be fabricating the truth.[32] Students representing clients with disabilities, youth, the elderly, or clients with psychosocial or mental disorders may need to learn additional skills.[33]

The core skills of working with individual clients are equally important in the institutional client context. Students who work with an institution typically work with a contact person within that organization. Skills like active listening or cross-cultural communication are deeply relevant in establishing and developing the relationship with the contact person. To prepare for their first meeting with Imelda, for instance, Maya and Daniel must negotiate a balance between establishing rapport and gathering necessary information and background (the same balance they would negotiate with an individual client). They must manage interruptions, respond to Imelda's sense of what is most important to the report, and convey their empathy. While these critical diagnostic skills from the individual client context are extremely important in institutional client work, Maya and Daniel must also learn additional skills because of the fact that their client is an organization.

2. *The Specific Needs of Institutional Client Work*

The institutional client differs from the individual client in several critical respects. Most obviously, the individual client is a person, with whom a student can establish a deeply individualized relationship through meetings during which the students seeks to understand the client and establish rapport. By contrast, an institutional client—whether a nonprofit, a tribe, or a community group—is an entity comprised of individual (often hierarchically structured) staff members and, sometimes, a board of directors. Although students might have a contact person within an institution (with whom they may be able to establish a deep, personal relationship), to represent the needs of the organization as a whole, the students must also understand how the contact person reflects the goals of the larger institution.[34] Returning to Maya and Daniel's example, to gain an understanding of ERI, the students must not only establish a relationship with Imelda, but they must also understand Imelda's relationships with her peers and super-

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[31] *See* KRIEGER & NEUMANN, at 102-104.

[32] *See* KRIEGER & NEUMANN, at 104-106.

[33] *See* ELLMAN, at 109-138 (discussing "interviewing and counseling atypical clients").

[34] *See* Tremblay, *supra* note 1, at 413-22 (explaining that different groups might have different decision-making structures).

visors at ERI, the role of the project in Imelda's desires to achieve promotion and recognition within ERI, the interest of ERI's board of directors in the local law enforcement project, and the funding sources (and limitations) for ERI's work on the project.

Decision-making is different as well. An individual client is typically asked to make a decision herself about her own case.[35] By contrast, institutional decision-making may happen through formal or informal structures involving, potentially, by-laws, a voting process, and various other steps.[36] To gain approval for a particular approach in writing the report, for instance, Imelda and the students may need to obtain approval of not only ERI's staff, but potentially also a larger coalition of organizations to which ERI belongs.

Students may also grapple with informational and expertise asymmetry with their institutional client contact. If an institutional client contact is an advocate with decades of experience in the field, the student must learn to negotiate the relationship despite her status as a novice. Maya and Daniel, for example, may contend with the fact that Imelda is a lawyer who has more experience than they do about local law enforcement issues, and that Imelda's perspective on the issues will likely be broader than theirs. Students may struggle to understand their own legitimacy when working with community or membership organizations who have been working on a given social justice issue for a long time. Some students wonder whether they should offer their opinions, and whether their viewpoint should even be relevant to advocacy decisions. Oftentimes, students negotiate an asymmetry in both expertise and time: the students may not be experts, but they have time to work on the project. Conversely, the in-

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[35] *See, e.g.*, Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation,* 12 Clinical L. Rev. 369 (2006) (discussing limits of client-centered approach); V. Pualani Enos & Lois H. Kanter, *Who's Listening? Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting*, 9 Clinical L. Rev. 83 (2002) (describing inclusive view of client-centered approach); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 Stan. L. Rev. 1731 (1993) (outlining limits and nuances in client-centered representation); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 Ariz. L. Rev. 501 (1990) (same); David A. Binder & Susan C. Price, Legal Interviewing and Counseling: A Client-Centered Approach (1977) (describing client-centered approach).

[36] *See* William H. Simon, *Whom (Or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 Calif. L. Rev. 57 (2003) (discussing ethical issues with organizational client work); Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 Tenn. L. Rev. 179 (2001) (highlighting ethical issues from corporate practice); Robert E. Rosen, *The Growth of Large Law Firms and its Effect on the Legal Profession and Legal Education: The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 Ind. L.J. 479 (1989) (describing the role of inside counsel and relationship to organizational representation).

stitutional client might have the expertise, but not the time.

Institutional client work also can require collaboration with a wide range of individuals.[37] Maya and Daniel may be required to meet with other staff members at ERI beyond Imelda, including lawyers and non-lawyers. They must negotiate the different interests that staffers may have in the project. The public education director at ERI, for example, may have an interest in timing the release of the report based on other major ERI activities. The executive director of ERI might want the report to address the goals of foundation sponsors for ERI's work. To begin work on the project, and in their preliminary meeting with Imelda, Maya and Daniel should understand these various interests and future collaborations.

Even beyond relationships within ERI, students like Maya and Daniel must understand ERI's history with other peer organizations, funders, and the community it seeks to serve, in order to gauge how to frame the report to acknowledge that history. What other organizations are working on immigrants' rights issues in the area? To ensure that the report accords with the work of peer institutions, Maya and Daniel must know how ERI's work fits into these existing dynamics. It may be relevant, for example, whether the various organizations are all competing for funds for immigrants' rights work, or whether the organizations meet regularly to collaborate on various issues. Even more important, to ensure that the report meets ERI's ultimate goal of reflecting the voice of the community it seeks to serve, Daniel and Maya must learn something about that community, including how ERI is accountable to the community and what outreach it does within the community.[38] If an institutional client like ERI is a membership organization, it may have responsibilities to its constituents as well.

In addition to these collaborative relationships, students like Maya and Daniel must understand their client's historical relationship with relevant adversaries or audiences, so that the history is reflected in the strategic thinking underlying the report. For Maya and Daniel, it would be relevant, for example, that ERI had previously worked

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[37] *See* Srikantiah & Koh, *supra* note 1, at 478-85 (discussing teaching collaboration in clinics as part of institutional client representation); Harriet Katz, *Reconsidering Collaboration and Modeling: Enriching Clinical Pedagogy*, 41 GONZ. L. REV. 315, 320 (2006) (explaining importance of collaboration in legal practice).

[38] *See, e.g.*, Shauna I. Marshall, *Class Actions as Instruments of Change: Reflections on Davis v. City and County of San Francisco*, 29 U.S.F. L. Rev. 911 (1995) (tracing the achievement of class unity in the Davis discrimination class action case); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 Calif. L. Rev. 1879 (2007) (describing the role that public interest lawyers played in a campaign for immigrant workers against a corporate chain of restaurants in New York).

alongside the police on an anti-domestic violence initiative. Organizations often have complex relationships with governmental entities, whether the courts, administrative agencies, local governments, or other state and federal entities. These relationships can change with time, sometimes depending on the political affiliations of the elected officials. At a more fundamental level, nonprofits must comply with certain state and federal laws to maintain their nonprofit status. These laws impose limitations on the nonprofit's activities and certain reporting requirements.[39]

Clinic students representing institutional clients may also be required to address complex ethical questions, including identifying "who is the client?" Particularly with organizations that follow non-hierarchical or informal governance modes,[40] students must learn how to best determine who speaks for the client. Although some of these concerns can be addressed through a retainer letter that identifies an individual authorized to act on the institution's behalf, this may not end the inquiry given that, as Bill Simon has pointed out, "clients cannot waive their rights to adequate representation."[41] If the organization's concerns diverge from those of the contact person, the Model Rules of Professional Conduct require clinic students to clarify that they represent the organization, not the contact person.[42] And in some circumstances—such as with Native American tribes or informal community groups—even deciphering the nature and scope of the conflict, as well as the lawyers' ethical obligations, can pose particularly thorny challenges.[43]

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[39] *See, e.g.*, 26 U.S.C. §§ 501 *et seq.* (imposing annual reporting requirements with the Internal Revenue Service).

[40] These may include Native American tribes and loosely-formed community groups. As to tribes, Christine Zuni Cruz has observed: "[a]lthough the attorney receives directives from . . . duly authorized tribal figures, the attorney represents the tribe as a whole and not just the tribal leaders or tribal governing body." Christine Zuni Cruz, *[On The] Road Back In: Community Lawyering in Indigenous Communities*, 24 Am. Indian L. Rev. 229, 257 (2000) (quoting former Governor Verna Teller of the Pueblo of Isleta). *See also* Paul R. Tremblay, *Counseling Community Groups*, 17 Clinical L. Rev. 389, 457 (2010) ("[A] lawyer representing a community group client possesses some discretion, and perhaps an obligation, to intervene more actively in the decision making of that client than in any of the previous contexts, in order to ensure the client's faithful pursuit of its public mission.").

[41] *See* Simon, *supra* note 36, at 109 (citing Model Rules of Prof'l Conduct R. 1.2, cmt. 5 (2001)). *See also* Tremblay, *supra* note 40, at 467 (observing that "[t]he more loosely-structured the entity is . . . the greater the responsibility of the lawyer to ensure that the constituent with whom she meets is a faithful proxy for the wishes of the group.").

[42] Model Rules of Prof'l Conduct R. 1.13(f) (2009); *see also id.* R. 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

[43] *See, e.g.* Stephen Ellman, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 Va. L. Rev. 1103, 1140 (1992) (arguing that lawyers should distill the various constituent view-

Students working on institutional client projects may work in large clinic teams, beyond the teams of two that might staff an individual case. Their efforts to understand an institutional client and create rapport with the client's staffers may be affected by the nature, structure and size of their clinic team. This might include their instructor, who may have a preexisting relationship with the institutional client. In the case of ERI, for instance, the Clinic has a longstanding relationship, likely involving collaboration between ERI's executive director and staff and the clinic's director and staff. To earn Imelda's trust and establish an effective working relationship with her, Maya and Daniel may need to know about this history.

Technology can both aid and complicate institutional client relationships. Unlike individual clients, who typically meet students in person at a given clinic's offices, institutional clients may require students to go to the institutional client's workplace. Because of scheduling and other constraints, institutional client contacts may communicate via conference call and email. This is particularly true of institutional clients who are in different cities, states, or even countries than the clinic. Working via email and conference calls are important skills for students to learn, but establishing rapport via a conference call is much harder to do than it is in person. And confidentiality and privilege concerns are different in email than with in-person meetings because emails tend to be forwarded widely by the recipient. Maya and Daniel, for instance, may send an email to Imelda with their confidential assessment of particular law enforcement officers, but that advice might be transmitted by Imelda to ERI's board or allies without the necessary caveats about confidentiality.

Of course, many of the distinctions we draw here between institutional and individual clients are not always so stark. Individual clients are part of families and communities that are important to their lives and legal matters. Some individual clients communicate via email or phone. Nevertheless, we posit that the institutional client typically presents a unique range of internal and external relationships necessitating pedagogical methods beyond those from the individual client context.

3. *The Student Perspective*

We have interviewed students who have worked on institutional advocacy projects within the Stanford clinics. Their stories share a common theme: that they were surprised by how important the rela-

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points into a single mandate); Simon, *supra* note 36, at 87 (advocating that the lawyer align with the side whose argument holds greater merit; or if this is unclear, remain neutral).

tionships within and outside their institutional client were to the effectiveness and success of their representation. As an example, one student reported her experience working with a large institutional client as it negotiated its litigation and regulatory advocacy with a federal agency. The student stated that the clinic director served as the lead attorney and had a long-standing, deep relationship of trust with the client. The students prepared for their main project—a meeting between the client and the regulatory agency—by reviewing relevant case law and court filings as well as prior clinic memoranda on the project. Because the client was located far away, the students were only able to communicate via teleconference prior to the meeting between the client and the regulatory agency. The student reported that while her work on the project was incredibly gratifying, she experienced some confusion about how decision-making worked within the institutional client, and who had ultimate decision-making authority. She also did not fully appreciate the importance of the troubled history of the institutional client's relationship with the regulatory agency. The meeting turned out to be an opportunity for the institutional client's staff and members to vent rather than a step toward resolution of the client's issues with the regulatory agency. While the student tried to steer the conversation toward resolution, she ultimately realized that the client's interests were in expressing concerns, not seeking resolution. Matters were further complicated by the fact that different individuals in the organization had varying levels of hostility to the federal agency. In reflecting on her clinic work, the student shared that she did not fully appreciate how important it was for her to understand not only the legal questions, but also the history of the organization's interactions with government entities, as well as the decision-making structure within the organization.

III.   Useful Lessons From Negotiations Pedagogy

To assist clinical students in diagnosing and understanding the complexity of institutional client representation, clinicians can usefully draw on negotiations pedagogy. In this Article (as in negotiations literature), the term negotiation extends beyond a narrow view of compromising rights or principles during a settlement discussion associated with litigation. The Article's broader view of negotiation encompasses any interaction between two or more parties who pursue a joint strategy to advance both their interests better than either party could achieve independently. The analytical and strategic dimensions of negotiation derive from the decision sciences,[44] whose pedagogy

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[44] Decision sciences is a field of study that focuses on how individuals make decisions

offers some useful tools for the complex substantive and social challenges that institutional client work presents in the law clinic context.

In this section, we identify the similarities between multiparty negotiations and institutional client representation that allow us to borrow from negotiations theory in teaching students about institutional clients. We then highlight specific tools from multiparty negotiations pedagogy that can prepare students to work with institutional clients.

A.   Similarities between multiparty negotiations and institutional client work

A negotiation is the direct interaction between two or more parties by which each aims to do better by agreement than would be possible alone. In simple terms, a negotiation results from any situation in which a party cannot unilaterally get what it wants from another party or a tribunal. Negotiation can occur between and among individuals as well as organizations, and is not necessarily adversarial.[45] A lawyer's life is replete with negotiations large and small, including: with a client to gather information from him about his case; with a witness to elicit information about a client's case; with other lawyers (colleagues and counterparts) regarding the scope of discovery or settlement of litigation; and with an agency or court. In fact, despite the focus on litigated cases in legal education and practice, a very small percentage of filed cases go to trial; rather, the vast majority of them are resolved through settlement negotiations.[46]

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and draws on theory from economics, psychology, philosophy, mathematics and statistics. *See* R. DUNCAN LUCE & HOWARD RAIFFA, GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY (1957, 1985). HOWARD RAIFFA, NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISIONMAKING (2003).

[45] Negotiation theory has long focused on achieving optimal outcomes in bilateral interactions by asserting demands, making threats and resisting concessions. Precursors of the negotiation analysis literature include work in game theory (interactive decision making), most prominently, JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944) and THOMAS SCHELLING, STRATEGY OF CONFLICT (1960). Later scholars advanced the notion of a principled or "win-win" approach that would identify and reconcile parties' underlying interests for mutual gain. More recent work recognizes and seeks to integrate both bodies of study through managing both cooperative strategies to create value for all the parties and competitive strategies by each party to claim that value. *See, e.g.,* RICHARD E. WALTON & ROBERT McKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS (1965); ROGER FISHER & WILLIAM URY, GETTING TO YES (1981); HOWARD RAIFFA, THE ART & SCIENCE OF NEGOTIATION (1982); DAVID LAX & JAMES SEBENIUS, THE MANAGER AS NEGOTIATOR (1986). Behavioral scholars have drawn on cognitive and social psychology to shift the focus from theoretical best outcomes to how people actually negotiate, especially in terms of communication, trust, relationships, perceptions and biases. *See, e.g.,* MAX H. BAZERMAN AND MARGARET A. NEALE, NEGOTIATING RATIONALLY (1992).

[46] *See* Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, 30 ABA J. OF THE SECT. OF LIT. 1 (2004); Marc Galanter & Hon. William G. Young, *Vanishing Trials, Van-*

Multi-party negotiations are complex interactions involving multiple parties negotiating multiple issues, over time, with internal and external players.[47] An example is a negotiation between a multinational corporation seeking to extract and develop natural resources in a developing country. The negotiation presents as a two-party negotiation of a licensing agreement between a national government and a corporation. Those two parties have authority to execute an agreement; but, there are many additional stakeholders who will be affected by, and can influence, the negotiation. Within the company are diverse interests among the board and executive management, including sales, marketing, research and development, tax, finance, personnel and perhaps corporate social responsibility measures, on whether this undertaking offers more short or long term benefits than alternative projects elsewhere in the world. From the country's perspective, the government has many competing internal actors among its ministries of foreign affairs, interior, environment, finance, as well as national and local politicians, related and unrelated industries, labor unions, and citizens. Achieving an optimal outcome, from both the government and company perspective, requires a series of nested agreements among the multiple parties, and a deep understanding of how those parties interrelate.

Institutional client representation is, at least in part, a multiparty negotiation. Returning to the ERI example, the Clinic's representation will involve multiple institutions, each comprised of individuals with distinct interests in the project that the Clinic seeks to complete. The Clinic, for example, includes Maya and Daniel, as well as the clinic director and other Clinic students and the law school at large. ERI includes Imelda, the junior attorney-contact, as well as other executive, program and support staff, ERI's board of directors, and constituents. To complete the project for ERI, Maya and Daniel will be required to interact with all of these people to gather information, develop an understanding of what resources are available, forge coalitions and collaborations, and determine what tasks they should perform. Each of these steps requires negotiations with multiple individuals, both within and outside ERI and the Clinic. These interactions are further complicated by the fact that some of the conversations occur between attorney and client, with the attendant professional and ethical obligations and limitations. If Maya and

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ishing Juries, Vanishing Constitution, 40 Suffolk U. L. Rev. 67, 73 (2006).

[47] *See* Richard Zeckhauser, Ralph Keeney & James Sebenius, Wise Choices: Decisions, Games and Negotiations, Ch. 15, 18 (1996); Howard Raiffa, Negotiation Analysis: The Science and Art of Collaborative Decision Making, Ch. 21, 22, 26 (2002); David Lax & James Sebenius, 3-D Negotiation (2006).

Daniel can recognize the diverse interests and relationships and incorporate their understanding into their work, they can improve the quality of their report as well as solidify the working relationship with ERI.

B. *The tools that negotiators use, and their use for clinics*

Negotiation pedagogy centers on the notion of identifying "interests." Negotiations posed as a bilateral struggle over positions, such as "I need a 20-page report on local immigration policy by June 1st" versus "It can't be ready by then" would likely be experienced by Maya, Daniel, and Imelda as a win-lose proposition. But if Maya and Daniel explored beyond the stated positions as to why each party's demands are important, they would likely have a very different conversation with Imelda. On the one side, the report submission may be relevant to educating the public and city council members before an election; on the other side, students' ability to master the necessary legal and statistical information on a fast schedule may be unrealistic, and the quality of the report could be compromised with a premature deadline. If Maya and Daniel focus on the deeper interests at stake, they will have more room to maneuver and reach a mutually desirable outcome with Imelda.

Interests are what motivate a negotiation. What does each party care about, and what are his or her needs, concerns and priorities? Interests include both tangible interests (such as obtaining a payment, having legal rights vindicated, or setting a precedent) and intangible interests (building trust, maintaining self-esteem, maintaining quality relationships, getting respect, participating in a respectful process, obtaining credit, communicating effectively, saving "face", or enhancing political leverage). A party's interest might be for short term gain or longer term rewards. The rationale for focusing on interests is twofold. First, interests are a deeper, more fundamental expression of what the negotiators value; secondly, there is usually more flexibility in achieving interests, than strictly focusing on positions. The various parties may have some compatible and shared interests, some independent interests, and some interests that conflict.[48]

A relatively simple example is negotiating for a job. The positions might be "I would like to be hired as an attorney at a salary of $100,000" versus "We are offering you $80,000." Financial terms are often the focus of positional negotiations. The underlying interests on why the specific dollar amount is important may be more revealing.

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[48] *See* DAVID LAX & JAMES SEBENIUS, MANAGER AS NEGOTIATOR 63-87 (1986); HOWARD RAIFFA, ART AND SCIENCE OF NEGOTIATION 148-165 (1982).

The candidate's interests could include the ability to live in the city, pay student debt, support family, feel respected for education and experience, and have opportunity for interesting work with good colleagues; the employer's interests might be an ability to hire a qualified candidate within a short-term budget crisis, maintain its reputation with law school career offices, and not set too high a precedent for future hires. If these parties focus on the array of important interests, they may find the means to address them beyond the specific salary in ways that are relatively inexpensive (e.g., flexible work hours, bonus eligibility, professional memberships), or to trade off interests that have different priority to the parties. Framing a negotiation around interests requires skill in giving and getting information, asking questions to understand others' perspectives and why a particular position is important, and listening intently to translate initial positional demands into more flexibly negotiated outcomes.[49]

With multiparty negotiations involving three or more parties, students must address additional issues beyond identification of interests. The challenges with such negotiations are several: structural, social, informational, decisional, and procedural. Structurally, the negotiation typically involves more than the interests of individual players because of the role of coalitions in such negotiations. Student negotiators must learn how coalitions form and also how to manage coalitions to shift the leverage and success of the negotiation.[50] With more than two parties, communication and social interaction become more complicated. As multiple parties share information relating to the negotiation, the information flow substantially increases, leading to cognitive overload, particularly for the novice negotiator.[51] Multiparty

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[49] Negotiation pedagogy usually focuses both on (i) learning certain principles of analysis around identifying interests, developing options for achieving those interests, and building a strategy to reach agreement, and (ii) experiencing those principles by practicing in simulated cases, then reflecting on what is effective in what circumstances. *See* Lawrence Susskind, Robert Mnookin, Boyd Fuller & Lukasz Rozdeiczer-Kryszkowski, Teaching Multiparty Negotiation: A Workbook (2003); Teaching Negotiation: Ideas and Innovations (Michael Wheeler ed., 2000). For research on the effectiveness of negotiation training, *see* Hal Movius, *The Effectiveness of Negotiation Training*, 24 Negot. J. 509 (2008); Janice Nadler, Leigh Thompson & Leaf Van Boven, *Learning Negotiaton Skills: Four Models of Knowledge Creation and Transfer*, 49 Mgm't Sci. 529 (2003); Jared R. Curhan, Hillary Anger Elfenbein & Heng Xu, *What Do People Value When They Negotiate? Mapping The Domain of Subjective Value in Negotiation*, 91 J. of Personality and Soc. Psychol. 493 (2006).

[50] *See* Howard Raiffa, Art & Science of Negotiation 257-274 (1982); Howard Raiffa, Negotiation Analysis: the Science and Art of Collaborative Decision-making 430-449 (2003); Leigh Thompson, The Mind and Heart of the Negotiator 208-222 (2005); and Roy Lewicki, David Saunders & Bruce Barry, Negotiation, Ch. 9 (6th ed. 2009).

[51] *See* Max Bazerman & Margaret Neale, Negotiating Rationally (1992).

negotiations are typically governed by decision rules that range from simple majority to consensus, with variants in between. Process choices are myriad as well. To reach decisions or form coalitions, players may decide to meet together, in small groups, or individually in sequence.[52]

Negotiations teachers employ three principal tools to teach students how to engage in multiparty negotiations—tools that we believe would assist clinical students in working with institutional clients: mapping, goal-setting and multiparty strategy. Mapping serves as a diagnostic to identify all the key people and interests that might be affected by a negotiation. Goal-setting both synthesizes the range of goals the key people might have, and disciplines the objective of the negotiation. The negotiator can then develop a sequencing strategy to achieve that goal—taking into consideration the key relationships—by building support through accumulating information and individuals' support.[53] A multiparty strategy takes what is known —the desired outcome on a set of issues, and the map of people and organizations who care about the issues—and builds a strategy to proceed. That strategy involves both framing topics to be negotiated in a mutually meaningful way, and planning how to build support.

1. Creating an All-Party Map

A core skill in multiparty negotiation is to create a map of the parties and their interests. Mapping calls for sketching out the conceptual scope of the project or problem to be addressed, and then identifying who will be involved, can influence, or will be affected by, the project decision.[54] Mapping is particularly useful for students learning negotiation because it imposes a disciplined study of the parties affected by a negotiation and their interests. Mapping is useful

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[52] *See* HOWARD RAIFFA, NEGOTIATION ANALYSIS: SCIENCE AND ART OF COLLABORATIVE DECISIONMAKING 385-520 (2003); LAWRENCE SUSSKIND AND JENNIFER THOMAS-LARMER, THE CONSENSUS BUILDING MANUAL, CH. 1-2 (1999).

[53] Problem solving theory also uses a diagnostic guide to defining the problem, mapping whose interests are affected, framing the solution to respond to those interests, and developing a multi-party strategy to reach the solution. *See* PAUL BREST & LINDA HAMILTON KRIEGER, *supra* note 3, at 42-45.

[54] Mapping has been described as a tool to advance negotiation preparation from both a forward-looking and backward-looking perspective. *See* MICHAEL WATKINS, BREAKTHROUGH BUSINESS NEGOTIATIONS (2002) and PAUL WEHR, *Conflict Mapping Guide*, *in* CONFLICT REGULATION 18-21 (1979) (using mapping to identify parties and interests). Lax and Sebenius describe "backward mapping" as identifying the ultimate goal or outcome, and then working backwards step by step to the present to unpack what needs to be done, or who needs to be engaged, to achieve that goal. DAVID LAX & JAMES SEBENIUS, 3-D NEGOTIATION, CH. 14 (1986). *See also generally* Lax & Sebenius, *Dealmaking 2.0: A Guide to Complex Negotiations*, HARVARD BUSINESS REVIEW (Nov. 2012) and James Sebenius, *Beyond the deal: Wage a "negotiation campaign"*, 13 NEGOT. 11 (NOV. 2010).

even in a two-party negotiation, such as a divorce, to help identify other interested people, such as children, employers, and relatives. With multiple parties, mapping is even more critical, because of the broad range of parties and interests that might be implicated in a negotiation. Without a map, a negotiator—particularly a novice negotiator—may miss an influential relationship critical to the success of the overall negotiation.

Returning to the multinational example above involving natural resources, the ultimate interests would be to gain support from the relevant governmental ministries, domestic industries and labor organizations, and to address any resistance from environmental and indigenous groups. A map might start with identifying the key entities and their relationships with each other (see Figure 1). By consciously acknowledging the possible parties and their respective interests in a map, the negotiator is likely to have a more precise understanding of the situation underlying the negotiation, and thus of the options for advancing the various organizations to a mutually beneficial outcome.[55]

For many of these reasons, mapping is a useful tool for institutional client work, which also involves multiple players both within and outside the institution. Mapping forces students to identify and explore the external players who have a stake in the work of the institutional client. At the same time, mapping engages students in the critical work of identifying the different members within an organization who have goals and priorities relevant to the project.[56] In this way, mapping can be thought of as an integral step to diagnosing a client's issues early on, to pinpoint sources of information and relationships that might help or hinder the project; over time, the map reminds lawyers to update their assumptions and tailor both the advice to give and how to give it over the course of the representation.[57]

Applying this tool to the ERI hypothetical, Maya and Daniel may initially believe that the list of parties is obvious: the Clinic teacher, Maya and Daniel, and Imelda. But the mapping exercise may force

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[55] Organizational development theory also recognizes the importance of identifying affected parties and their interests. In order to understand an organization's culture and interests, Levinson has identified six main types of information: "identifying information," basic descriptive data; historical data; structural information; "process data" or how members of the organization communicate with each other; "current functioning information" for making decisions, whether quickly or more deliberately; and attitude information on how the organization relates to its colleagues and constituents. HARRY LEVINSON, ORGANIZATIONAL DIAGNOSIS 519-538 (1972).

[56] In his rules for advising a client, Jeswald Salacuse notes that when the client is an organization, members of the team may have different goals and priorities. Jeswald Salacuse, *The Art of Advising Negotiators*, 11 NEGOT. J. 271, 273 (1995).
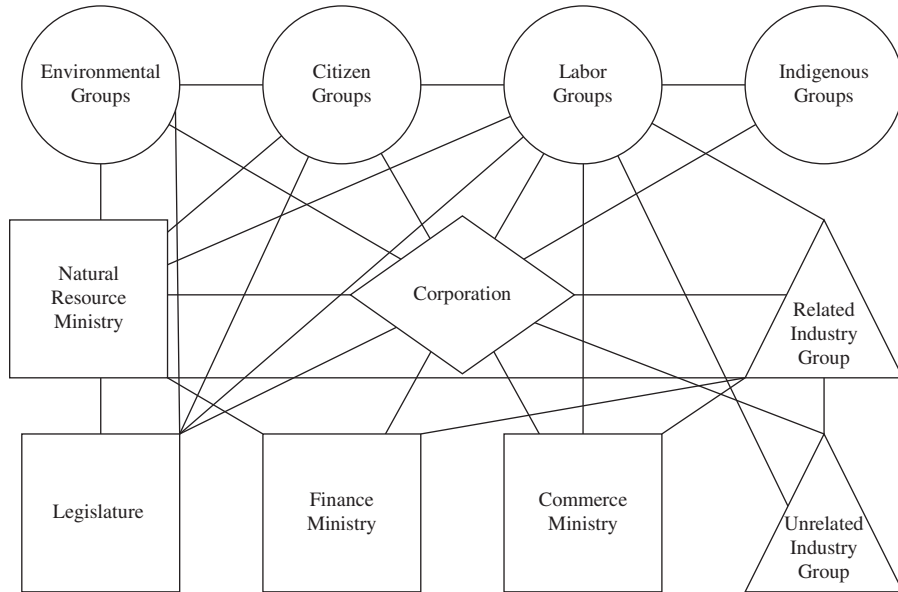
[57] *See id.*

FIGURE 1. ALL-PARTY MAP FOR LICENSING AGREEMENT BETWEEN
NATIONAL GOVERNMENT AND CORPORATION

them to realize that many more individuals may be implicated. ERI
might have an executive director who has ultimate decision-making
authority over the project. Other staffers or board members might
influence the project, and could even be able to block it. These indi-
viduals might have other interests that could affect, or be affected by,
the project. The various players may have different perceptions of the
role and competence of Maya and Daniel. Beyond the Clinic and
ERI, local, state or national agencies may have an interest in ERI's
advocacy. Elected officials may have resources to contribute or politi-
cal incentives to oppose ERI's efforts. Other organizations (nonprof-
its, business groups) might have resources or expertise, political
motivations, or reason to oppose ERI's work.

　　If Maya and Daniel fail to identify potential parties, they risk se-
riously miscalculating the support and information necessary to pre-
pare the report and to ensure the report accomplishes its objective to
shift policy. For example, if an ERI board member has policy experi-
ence or special knowledge, and Maya and Daniel fail to identify her as
a resource, they may waste time and miss a significant opportunity. If
someone else at ERI is developing a public education briefing, and
that effort is not synchronized with the policy report, ERI may look
uncoordinated and lose credibility.

　　Once Maya and Daniel identify the various actual and potential

parties implicated by their work for ERI, the next step is for them to understand the nature of the parties' relationships with each other and with ERI. Relationships may be identified as cooperative, non-cooperative, primary, or supportive. Cooperative relationships may include those with allies like other attorneys, staff or the executive director at ERI, as well as other individuals or organizations dedicated to immigration policy. Non-cooperative parties might include law enforcement or governmental entities that oppose the reform that ERI seeks to advance. Some relationships might be primary, or critical to the success of the advocacy; others might be secondary or supportive but not as critical. As Maya and Daniel explore the complexity of the multiple parties' web of relationships and influence, they enhance their ability to manage allies in support of the project and anticipate possible opposition. Identifying allies, for instance, serves both to create more support for the report's policy initiative, and to tap expertise and resources for content and dissemination of the report. Perhaps an ERI director has links with the city council, or an ERI attorney formerly staffed another nonprofit focused on immigration policy. Maya and Daniel can approach allies for possible approaches to obtaining information for their report or to learn about the perspectives of others whom they are seeking to persuade. An ally may be willing to make an introduction to another interested party so that Maya and Daniel can begin to develop additional key relationships.

Once Maya and Daniel identify the relevant parties and relationships, they must explore each party's interest in the project to complete their map. Why would, or wouldn't, each party on the map support the proposed report project? Common interest in producing a quality policy report can bring the parties together. But identification of differing interests can yield significant value as well. The parties may differ as to the priority of the report to their work, their level of expertise in the subject matter, and the time they have to devote to the project. Acknowledgment of these differences may permit Maya and Daniel to forge working relationships that enable the parties, working together, to generate a better outcome than individuals working alone. The notion of working with differences to build value is based on leveraging the difference in the parties' relative priorities, risk tolerance, time preference, and capacities, even as they aspire to the same ultimate goal. Here, for example, ERI has expertise and a network of contacts, but limited time and human resources to prepare the report; ERI needs the reputation of preparing an excellent report. Maya and Daniel have limited expertise and contacts, but possess time and enthusiasm, not to mention that the credit for their good work will be a good grade. Thus, by dovetailing their respective strengths
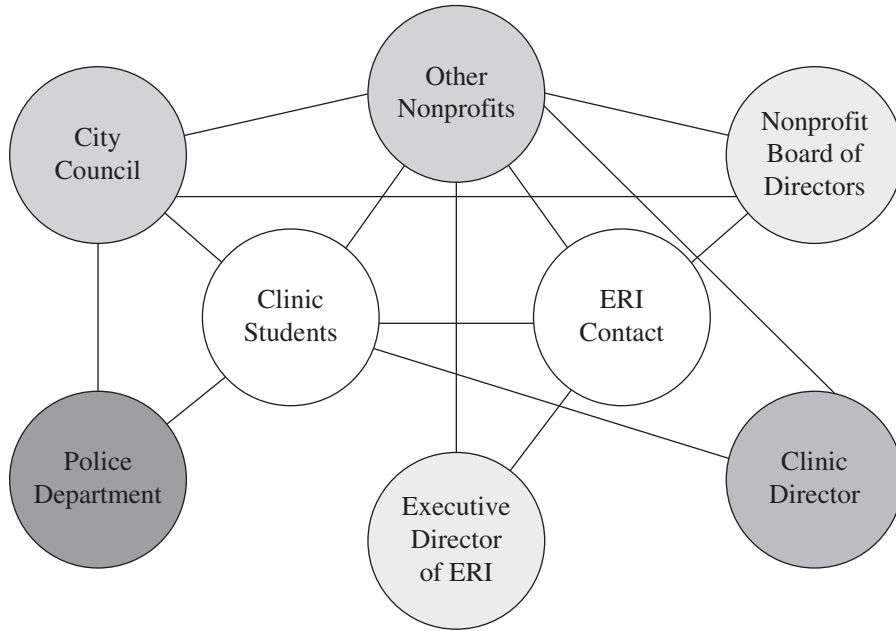
FIGURE 2. ALL-PARTY MAP FOR INSTITUTIONAL
CLIENT RELATIONSHIPS

and priority interests, Maya, Daniel, and the various parties with an interest in the report are better off than they would have been without the joint effort. If Maya and Daniel understand the interests of each key person or organization (including ERI) and reflect those interests in the content and dissemination of the report, they can maximize the effectiveness of the report in spurring policy change.

To flesh out their all-party map, Maya and Daniel should start with their own interests. For Maya and Daniel, the objective is likely to work on an interesting project, gain experience to facilitate long-range employment, and produce a report that both they and their professor consider well done. Corollary interests might include garnering the respect of Imelda and others at ERI; acquiring knowledge and skill on the topic of the report; and building relationships, particularly those that can lead to future employment after law school. Imelda's goal is to receive a quality report, with minimal supervision, and ultimately to effect social change. Her other interests may be to build her reputation with ERI's board of directors and peer organizations; to open up time to work on other matters; and perhaps to build a relationship with the Clinic's academic institution. Even between Imelda and the Maya-Daniel team, some interests coincide but others could compete or be misaligned. If time to work another project is more

important to Imelda (because, for instance, that project is likely to garner more credit with her boss or ERI's board), she may not devote sufficient time to getting Maya and Daniel access to information and people. Thus, while their overall objective is aligned, their respective underlying interests are not. If Maya and Daniel do not understand that Imelda places a higher priority on another project, they may find themselves left hanging and unable to do the quality work they intended. Conversely, if Maya and Daniel are able to talk with Imelda, understand her priorities and express their concerns, they can either negotiate adequate time and supervision (from Imelda or one of her colleagues), or restructure the project or timing to align with Imelda's present capacity.

In addition to considering parties' interests, Maya and Daniel would benefit from understanding the scope of those interests by considering each party's alternatives to contributing to the report. In other words, what is their "plan B"? For Maya and Daniel, if the ERI project fell through, they would be assigned to another project. Maya and Daniel can compare those projects in terms of time required, expertise gained, level of legal interest, clinical relevance, previous working relationships, and other factors. From ERI's perspective, if the Clinic did not prepare the report, ERI's staff, including Imelda, would likely be required to write it, reducing time available for other ERI work. By probing how the proposed ERI project compares to alternative projects for the Clinic or ERI, Maya and Daniel can better gauge the relative value of the project in negotiating its specifics. The more accurately Maya and Daniel probe and assess the respective interests and alternative strategies, the more they can tailor the outcome to serve ERI.

In sum, for Maya and Daniel, the mapping process informs: (1) how to engage the necessary people to produce a persuasive policy report, and (2) how to present the report to the relevant audiences in a way that accomplishes the ultimate goal, shifting police policy on immigration enforcement. If the map has correctly diagnosed who is involved in both of those levels, Maya and Daniel increase the likelihood of satisfying their own goals and those of ERI. If Maya and Daniel have identified and interviewed collateral actors on the map, they will be able to acknowledge those individual and collective interests and strengthen the report's overall credibility. On the other hand, if there is a misunderstanding or lack of clarity about key actors, motivations, and interests, the report's effectiveness will be diminished. For example, if Maya and Daniel write a solid advocacy piece based on normative policies undertaken in other regions, but fail to take into consideration the local political interests and previous efforts, their

recommendations will risk being unreasonable.

Mapping also requires students to understand their own assumptions about the various actors in an advocacy effort. Do Maya and Daniel assume that local law enforcement will be completely hostile to any advocacy by immigrant groups? The map may enable Maya and Daniel to understand (and then hopefully question) their assumptions, and explore alternative ways to overcome potential resistance.

As Maya and Daniel prepare for the project and meeting with Imelda, they might seek to learn (from the clinic director, Imelda or others) the following information, to begin to create the map:

- Parties. In order to build a critical mass of support for the project, those who are subordinate to Imelda, as well as others over whom she has no direct authority, must see it in their own interests to help advance the project. Consider who has authority to approve the project and who has influence and could support, or oppose, the project. What are the relationships among this network of actual and potential parties?
- Interests. For each of the individuals and groups identified on the map, what are their needs, concerns and priorities (or how might one find out)? How do interests coincide, how do they differ? What arguments might one use to persuade others to a proposed approach?
- Alternatives. Each individual or group will have alternative strategies to achieve their respective interests. Alternative strategies might be to use another resource person to do the work, defer the work until another time, do another project, or use an entirely different approach than a public advocacy report.

If the IRC director has a pre-existing relationship with ERI, she may have a sense of the basic map as part of the client engagement process and the finer points of detail can be part of the students' undertaking. A preliminary map ideally includes all of the parties and stakeholders, their respective interests, and alternatives to working together.[58]

The map provides an overview of the relationships and interests involved, so that a student can more clearly diagnose how those interests align (whether shared or competing among the parties), and what incentives exist for key actors to participate (or not) in the advocacy. The map then serves as a guide for designing options for consideration

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[58] Fisher and Ury described a term for such alternatives, BATNA: Best Alternative To Negotiated Agreement, which is essentially one's "plan B" for achieving one's interests. BATNA is the reference point for a negotiator as to whether to agree with the other party, or not. In a two-party negotiation, BATNA sets the parameters for an agreement, whether settling litigation or forming a partnership. *See* ROGER FISHER AND WILLIAM URY, GETTING TO YES, CH. 6 (1981). If what is proposed is not better than both parties' BATNAs, it will not generate support.

Party or Stakeholder	Interests	Alternative(s)
Clinic students: Maya & Daniel	Quality report; desire to be treated as an equal at the table; need to acquire legal skills; hope to do interesting work; reputation with instructor and peers; desire to earn good grades	Do a different project within the Clinic
ERI contact: Imelda, Jr. Attorney	Quality report; minimal supervision; career advancement at nonprofit; reputation with peer community; publicly acknowledged expertise; successful advocacy outcome	Do the report herself; hire interns or others to help with the report; don't do the report
Executive director of ERI (Imelda's boss)	Nonprofit positioned as policy leader; quality report; successful advocacy outcome; ongoing relationship with clinic	Use staff or intern; let another organization do report
Clinic director	Quality report; ongoing relationship with nonprofit; good educational experience for students; making sure nonprofit is funded; stable relationship with organizational partner	Select another project
Nonprofit board of directors	Nonprofit's reputation & leadership in policy community; achieving nonprofit's organizational mandate; meeting needs of constituents; making sure nonprofit is funded	Use staff or intern; let another organization do report
Other nonprofits	Demonstrate expertise and leadership in policy field; build network of collaboration	Defer to ERI on the report and pursue other strategies independently
City Council	Acquire sufficient information to understand policy issues; understand consequences of legislation; respond to public pressures	Take initiative and use own staff to prepare background research, or defer action until public attitude emerges
Police Department	Input into report; administrative mandate; operational capacity; protect against public protest	Take initiative independently or jointly with City Council on preferred strategy; defer immediate action

FIGURE 3. ALL PARTY MAP OF RELATIONSHIPS AND INTERESTS

that address the interests of all key parties and a process for pursuing them. Students may approach parties in a sequence that builds support according to their interests, addresses their respective alternatives, and neutralizes opposition. For example, if some resistance is expected from the police department on certain topics, it may be more persuasive to engage other nonprofits to build a coalition of support, then approach an administrator or member of the city council (to "take their temperature"), before approaching a police representative. Or perhaps there is a member of the city council who will look to the police for direction; in that case, the students should reverse the approach strategy. Understanding the influence network and patterns of deference will guide the sequencing strategy.

2. *Joint Goal-Setting*

Negotiation theory notes that those who are clear and optimistic about their goals are more likely to achieve them. Those who articulate those goals with precision, assert their own needs and concerns, and convey those interests to others, are likely to do better.[59] As an example, one might express a desire to open an environmental nonprofit to advocate environmental policy. A more specific goal might be to educate citizens on energy efficiency. An even more specific goal would be to provide access to all school children to an interactive energy-saving demonstration project with take home flyers, or to achieve 10% reduction energy consumption in the next year. The more precise and concrete the goal (which may include both short-term and longer-term objectives), the more focused the project design, and the greater the parties' satisfaction with the outcome and support for its implementation.[60]

If articulating the goal itself is a topic of discussion among the involved people, and not assumed as a given, they are more likely to be invested in its success. As various goals are proposed, it can be useful to designate a period for "brainstorming" in which various ways to frame and achieve a goal are identified, without any commitments or evaluation of the goals. Once a number of ideas are expressed,

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[59] *See* G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 26-39 (2006). "You have to know what you want, and be able to articulate [it] in your own mind with precision. This sounds self-evident, but you'd be surprised how many people don't actually know what they want with the kind of precision that a negotiation demands. Then, you have to think of the 2000 ways to get where you want to go: what the trades might be, what the arguments might be, what the moves might be on the other side. And you watch carefully, and listen carefully, talk less, and remain persistent." Charlene Barshefsky, Speech at Great Negotiator Award, Program on Negotiation at Harvard Law School (Apr. 2000).

[60] *See* JIM SHULTZ, THE DEMOCRACY OWNER'S MANUAL (2002).

then the options can be ranked according to agreed upon criteria. For example, consider a community that is reviewing its public transportation system. The goal might be framed at different levels of purpose and scope, e.g., highway system or bus system (diesel, natural gas, electric). Whether the goal is energy efficiency, reducing congestion, or transport for workers to jobs will take the negotiation in different directions. The more stakeholder voices are involved in setting the goal, the more support can be garnered for the undertaking over the long term. Literature on fair process and procedural justice highlights the importance of how a negotiation is conducted, and reveals that parties value process as much as outcome.[61]

In the case of the Clinic's project with ERI, setting the project goal is a joint decision by ERI with the Clinic. By discussing the goal with ERI, Maya and Daniel may develop a richer perspective about ERI's work that in turn enhances the goal-setting process. ERI's key objective is to effect a meaningful policy change; the report is instrumental to achieving that objective. ERI may be exploring other tools, in lieu of or in addition to the report, to achieve the objective. For example, ERI may be embarking on a public relations media campaign, engaging in meetings with key elected officials, or sponsoring a policy dialogue workshop.[62] Even if the report is confirmed as the principal short-term goal, the students would benefit from a detailed discussion with Imelda to agree on the kind of report desired, including the content (data, legal cases, case stories, experiences in other jurisdictions), format, voice, target audience, and delivery schedule.

How should Maya and Daniel engage with Imelda to develop the goal for their work together? Negotiations theory suggests a "brainstorming process."[63] Starting with their map of the key actors and their interests, Maya and Daniel can discuss all the different ways to achieve those interests. As to each possible tactic, they can discuss relevant constraints, including time, manpower, and access to essential information or actors. Finally, they can determine what criteria they will use to measure a good advocacy outcome. Even if Maya and Daniel eventually focus on the report and the goals specific to it, the process of understanding the overall advocacy context will give them valuable information for framing the report's contents.

Goal setting may be undertaken in two stages, initially between

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[61] *See, e.g.,* LAWRENCE SUSSKIND & JENNIFER THOMAS-LARNER, THE CONSENSUS BUILDING MANUAL (1999); A. LIND & TOM TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

[62] *See, e.g.* Paul Brest and Linda Hamilton Krieger, *New Roles: Problem Solving Lawyers As Problem Solvers*, 72 TEMP. L. REV. 811 (1999) (distinguishing between diagnosing the essence of the problem, and selecting a course of action).

[63] Fisher & Ury, *supra* note 58, at 60-63; Susskind, *supra* note 61, at 117-120.

the clinic director and Imelda (before Maya and Daniel are assigned to the project), and subsequently with Maya and Daniel, once they are on board. Even if the project is set in advance by Imelda and the clinic director, it will be important for Maya and Daniel to understand the background thinking that led to specifying the project as given, including whose interests were considered and why a report was selected as the preferred mechanism to induce policy change.

Beyond the advocacy goals associated with the report, Maya, Daniel, and Imelda should explore process-oriented goals about how they hope to work together to produce the policy report. They may hope for an effectively-conducted project with efficient communication, a good working relationship, and a positive learning experience with periodic feedback and coaching. The other parties involved in the project may have process goals as well. The clinic director, for instance, may have different priorities than ERI, including shaping the project into smaller segments that students can grasp, and completing the project segment in an academic term.[64] In addition, each party— whether the students, Imelda, or the director—may conceive and weigh each such factor differently. The students clearly have a shorter-term focus, and will value interesting work and talking with high profile policymakers. ERI has both short and long term vision, and may value more time on research of policies tried in other regions. The clinic director also has short term goals for the student experience, as well as a longer term relationship with ERI.

As to both process- and advocacy-oriented goals, the process of exploration may be iterative. Even once Maya, Daniel, and Imelda define initial goals, they may wish to revisit them if unforeseen opportunities or problems emerge.

3. *Multiparty Negotiation Strategy Design*

Let's assume that ERI and the Clinic have agreed on the project goal: for Clinic students to prepare a policy report for ERI that will promote a shift in local policy on degree and kind of cooperation by officials in immigration enforcement. Maya and Daniel have sketched out a preliminary map of the various parties who will interact with each other, and other stakeholders who are affected by and can influence how the project is undertaken. The next step for them is to build on their analysis of people and interests in the map and consider how working relationships can enhance those interests. They can then use those relationships to plan a sequenced approach for achieving their goal of producing an effective report.

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64 *See* Kruse, *supra* note 1, at 434-41.

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In negotiations theory, strategy and sequencing is critical to success, particularly with multiparty negotiations. Such negotiations typically involve not only a broader array of resources and expertise, but also multiple parties and interests. Without a focus on strategy and sequence, group negotiations can yield worse results than two-party interactions due to poor communication, poor coordination and poor motivation for engagement.[65] The more heterogeneity among people, the harder to share information, hear others' ideas, and creatively problem-solve.[66] With the increase in parties involved, the likelihood of coalitions emerges, both in favor of, and opposition to, the project.[67] Maya and Daniel likely face these issues as well in the institutional representation context with ERI, given the broad range of players and the various competing interests. Additional barriers that Maya and Daniel may encounter with ERI may be overt as well as subtle, including power imbalances between the students and ERI staffers (including Imelda),[68] lack of time, low managerial skills by Imelda, internal or external political resistance to the students' participation, or parties' decision to withhold information if their interests are askew with the project's goals.[69] Even though students will be devoting significant energy and time to the report, the value of their contribution may not be acknowledged unless someone within ERI paves the way.

How can Maya and Daniel overcome these barriers? One starting point is the same as in the individual client context: they can focus on creating a good working relationship with Imelda, their client con-

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[65] *See* HOWARD RAIFFA, NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING 385 *et seq.* (2002).

[66] *See* Jeffrey Polzer, Elizabeth Mannix & Margaret A. Neale, *Multiparty Negotiation in its Social Context*, *in* NEGOTIATION AS A SOCIAL PROCESS 123-142 (Roderick M. Kramer & David Messick, eds., 1995); Roderick Kramer, *The More the Merrier? Social Psychological Aspects of Multiparty Negotiations in Organizations*, *in* RESEARCH ON NEGOTIATION IN ORGANIZATIONS VOL. 3 307-322 (M. Bazerman, Roy J. Lewicki & Blair Sheppard eds., 1991).

[67] In fact, the coalitions may antedate the project itself. *See, e.g.,* Saadia Touval, *Multilateral Negotiation: An Analytic Approach*, *in* PROGRAM ON NEGOTIATION BOOKS (J.W. Breslin & J.Z. Rubin eds. 1991).

[68] *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984). Jeswald Salacuse has discussed structuring the advisor-client relationship as a partnership, which is relevant to the case of an organizational client. JESWALD SALACUSE, THE WISE ADVISOR: WHAT EVERY PROFESSIONAL SHOULD KNOW ABOUT CONSULTING AND COUNSELING (2000).

[69] *See* KENNETH ARROW, ROBERT MNOOKIN, LEE ROSS, AMOS TVERSKY & ROBERT WILSON, BARRIERS TO CONFLICT RESOLUTION (1995) (providing expansive overview of strategic, social, institutional and contextual barriers); Lee Ross & Andrew Ward, in *Naïve Realism: Implications for Social Conflict and Misunderstanding* (Stan. Ctr. on Conflict & Negot. Working Paper No. 48, 1995) (describing the dangers of subjective interpretation with highly intelligent people).

tact. The traditional clinic focus on establishing rapport applies with full force to Maya, Daniel and Imelda.[70] Using their all-party map, Maya and Daniel can also work to establish rapport and relationships with other key players.[71] Negotiations theory recognizes the importance of rapport as well: the sense of being "on the same team" can reap significant benefits.[72]

Beyond rapport with Imelda, Maya and Daniel can employ their map to strategize about a sequence for approaching parties interested in the report. In negotiations theory, sequencing is built on the premise that the order one seeks support from others matters.[73] If the ultimate target audience for ERI's report is the city council, then Maya and Daniel will want to start by approaching other nonprofits before going to allies closer to the city council. As Maya and Daniel sequence their conversations with players in the advocacy effort, they will want to consider what information they share with each entity and how they communicate (via email, phone, or in person). These process choices can have marked effects on the outcome.

Sequencing, mapping, and goal-setting are all key tools from the multiparty negotiations context that we believe contribute to the clinical pedagogy for representation of institutional clients. Application of negotiations pedagogy to institutional client representation in clinics is not without its challenges, however. For one thing, it takes more time to apply these new tools, both for the students and for the institutional contact person from whom the students will need to gather information (for instance to form a map or to determine the overall project goals). Students may struggle to make time for these activities during a short quarter or semester, particularly when the subject matter of the project is itself complex and when the project moves and changes quickly. Institutional client contacts like Imelda

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[70] *See supra* nn. 26-33 and accompanying text. If visual access to build rapport is not possible, and prior relationships do not exist, then special attention to pre-negotiation and getting acquainted can help promote a more cooperative approach to negotiation. *See* Laura Nadler, *Rapport In Negotiation and Conflict Resolution*, 87 MARQ. L. REV. 875 (2004).

[71] As most negotiations take place within and among groups, the relations among group members and group processes are critical. *See* Deborah G. Anacona, Raymond A. Friedman & Deborah M. Kolb, *The Group and What Happens on the Way to Yes*, 7 NEGOT. J. 155 (1991).

[72] For example, opportunities for informal and formal gatherings of team members, getting acquainted, use of videoconferencing/online video chatting, attending staff or board meetings, and conducting regular feedback, all help enhance the students' ability to research and prepare the report.

[73] *See* James K. Sebenius, *Sequencing to Build Coalitions: With Whom Should I Talk First?*, in WISE CHOICES: DECISIONS, GAMES, AND NEGOTIATIONS 324-348 (Richard J. Zeckhauser, Ralph L. Keeney & James K. Sebenius eds., 1996) (providing highly analytical exposition on sequencing).

may be extremely busy, and may not be open to making time for conversations with students about the internal structure of their organization, its history, peer institutions, or alternatives to the particular advocacy task at hand.

Institutional clients may also resist the application of tools like mapping and goal-setting because they may not see the advantage of such tools. A contact person like Imelda will likely have a very clear sense of what she wants students to accomplish in a clinic term. She may not wish to engage in the revisiting of overall advocacy goals. To some extent, Imelda and other institutional contacts must buy in to the educational function of the clinic in order to see the value of such pedagogical tools; not all institutional client contacts may be willing to do so. We discuss proposed solutions to these challenges below, along with our suggestions for changes to clinic design that flow from the use of negotiations pedagogy.

IV. Consequences for Clinic Design

Application of negotiations theory—which highlights the importance of relationships with allied and adversarial parties—has several consequences for clinic design. This Section sketches out some suggestions for clinic design and also addresses some of the limits of applying negotiations methods in the institutional client context.

A. Client selection

The success of the mapping and other negotiations exercises in this Article turn in large part on the willingness of institutional clients to engage in the pedagogical mission of clinical education. Students like Maya and Daniel would likely rely heavily on their institutional contact person, Imelda, for information about ERI and its relationship structure, both internal and external. Success for mapping and goal setting—and by extension for understanding the issues of the institutional client—depends in large part on the willingness of the contact person to engage with students about internal relationships within the organizations, through dialogue and providing a bridge to interactions with other staff members or board members. The same is true for external relationships: Maya and Daniel will be able to construct a much more robust map and accurate project goals if Imelda devotes the time to explain the history of ERI and its work within the immigrants' rights community, including interactions with frequent adversaries. Because so much of the success of diagnosis (at least at first) turns on the client contact, clinic directors who regularly represent institutional clients may wish to screen for organizations with contact persons who are willing to invest the necessary time to bring students

up to speed. Clinic directors may also wish to explain the mapping exercise and diagnosis goals of conversations about organizational structure and history prior to engaging a new institutional client.[74]

One way to set expectations with institutional clients is through detailed retainer agreements that explain the clinical educational model and mission. The various institutional client clinics at Stanford, ranging from immigrants' rights to environmental, rely on such agreements to set expectations of institutional clients and of the contact person at such organizations. In addition, prior to entering into a new relationship with an institutional client, the clinic director may wish to make arrangements for students to participate in the activities of the organization in ways that are not directly related to their project, but that nevertheless enhance their understanding of the organization's operation, including observing board meetings and attending staff meetings.

In addition to preparing the institutional client contact, clinic teachers may wish to work closely with students like Daniel and Maya to discuss how to elicit information from the institutional client contact that would enable the students to flesh out the map and goals. Points to cover during the first meeting may include:

- The protocol for students to meet, get acquainted with, and establish their status with others at ERI;
- Background information available at ERI, online, or in the law library to get informed on the organization and the legal issues;
- Authority and decision making procedure on who within ERI ultimately determines and approves the report content, format, and voice;
- How and when to conduct interim status checks;
- Introduction to people and information at ERI, external parties, and other nonprofit organizations who may be interested in collaborating, or competitive with, the ERI report; and
- Scheduling a meeting at the halfway point of the semester for feedback.

In addition to preparing an agenda, students may wish to moot their first meeting with the institutional client contact, to ensure that their interview style strikes the appropriate balance between establishing rapport and gathering information. With preparation, students can minimize the time that institutional client contacts must devote to ed-

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[74] Because the map relies on public information in that Maya and Daniel would likely comb the Internet and other sources for publicly available information about ERI and its collaborators, constituents, and adversaries, a clinic director may wish to choose nonprofits about which some information is publicly available. For nonprofit clients, students like Maya and Daniel would likely review information that the nonprofit has filed with regulatory agencies such as the Internal Revenue Service.

ucating them about the historical relationships with other players and the internal dynamics within the institution.

B.   *Active Listening and Other Foundational Skills*

As we have discussed, many of the skills critical to individual client representation—including interviewing, counseling, and cross-cultural representation—are equally important in the institutional client context. One often overlooked skill, active listening, can be particularly critical in the institutional client context. Active listening refers to the intentional, rather than simply passive, act of understanding another's experience or perspective. It has been recognized in both the multiparty negotiations and lawyering contexts as a critical skill.[75]

Just as interests form the core of successful negotiation, active listening is the means by which the negotiator learns what is important to her counterparts, and thus is able to frame her proposals for action or agreement in terms that are mutually appealing. In client counseling, focused listening demonstrates a commitment to the client, contributes to building rapport, and, combined with skilled questioning, unpacks the detailed information necessary for representation. One recent text suggests that listening is critical for lawyers to make "the kind [of] connection necessary for a trusting and successful attorney-client relationship across all kinds of differences."[76] In the context of a multiparty negotiation, listening becomes an even more complex undertaking. In a series of one-on-one and group conversations, the negotiator needs to listen carefully in order to check assumptions about what each party values most, and to understand the priority interests and relationships that a successful outcome will need to address.

C.   *Transitions and ownership*

For projects that have spanned several years prior to a given clinic student's participation, it may be necessary to allocate additional time—prior to a student's actual involvement with the project—for the student to come up to speed on the organization, its history and the background of the project. We have found that student ownership is diminished when the only source of information about an ongoing project is the clinical instructor. Students tend to defer to the instructor's expertise, even after an initial transition period at the start

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[75] *See* DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH Ch. 5 (2d ed. 2004); John Barkai, *How to Develop the Skill of Active Listening,* 30 PRACTICAL LAWYER 73 (Jun. 1984); DOUGLAS STONE BRUCE PATTON & SHEILA HEEN, DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST 163-183 (1999).

[76] *See* ELLMAN, *supra* note 29, at 27.

of a term. If the organizational client is willing, the best way for the student to learn about the organization and its work is through observation and meetings with key staff members. Nonetheless, it may be helpful during the early part of a term for students to have several structured conversations with clinic faculty who have worked on the project in previous terms. Indeed, one clinic at Stanford asks students to draft preliminary project plans and hypotheses, and then interview clinical faculty for information that might fit into their preliminary research agenda.

Needless to say, it is also critical that each student who works on a longer-term project maintains careful documentation of interactions with any party to the project in the clinic file. In the Immigrants' Rights Clinic, students document not only their substantive work (in legal memoranda and the like) but also their impressions about the organizational client and its relationships. We ask students to write short reflections after each major event in an organizational client project, whether a client meeting, a community meeting, a hearing, a coalition gathering, or an interaction with other players in the advocacy effort. These reflections have proven to be invaluable to subsequent clinic students as they begin work on the project.

Particularly for projects that span several quarters, it can be helpful to have certain students serve as the designated liaisons to particular coalition players. These students can then manage the relationship with the entity during the course of the quarter, eliminating the need for group calls and streamlining the logistics and planning associated with managing the relationship. When the term ends, the student can document her relationship with the entity for use by future students working on the project.

D.   *Faraway clients and technology*

Advocacy projects with organizational clients who are not in the same geographic area require additional consideration. It can be difficult for students to develop the necessary knowledge about the organization and its relationships from a distance. Students are not as easily able to attend board or staff meetings, and most communication with the client happens through conference calls and email. Although students learn valuable professional skills—such as how to run a conference call—they also face significant barriers in establishing the rapport necessary to gather information to develop an organizational map.

Technological solutions, particularly video conferencing, can alleviate some of these concerns, although they are not a substitute for in-person meetings. The IRC and other clinics at Stanford with organi-

zational clients make an effort to have students have at least one (if not more) in person meeting with their organizational clients. Still, the importance of understanding the relationships and interests of the entities involved in a given advocacy effort suggests that long-distance client representation should be limited to those cases where the organizational contacts understand that they may need to spend additional time bringing students into the loop, both at the initial diagnostic stage and throughout the representation.

V. Conclusion

Mapping, goal setting, and sequencing are all methods from negotiations pedagogy that are useful in preparing students in law clinics to represent institutional clients with large-scale advocacy. In particular, these methods enable students to explore the relationships that institutional clients have with external entities, both allies and adversaries, and then to apply their knowledge to structuring and sequencing their work with the institutional client. Mapping helps students to identify key stakeholders both within and outside the institutional client, as well as their interests in the project that the institutional client has brought to the clinic. Goal setting enables clinic students to understand the institutional clients' larger goals for advocacy, and to grapple with any differences between those goals and those of the clinic and its students. Finally, sequencing encourages students to think critically about how and when they approach the various players in advocacy work. The ultimate goal of these methods is to help students diagnose the full complexity of the advocacy that the institutional client seeks to implement, thus enabling the students to learn the skills needed to make a thoughtful and meaningful contribution to that advocacy and their future practice.