MEDIATION SKILLS AND CLIENT-CENTERED LAWYERING: A NEW VIEW OF THE PARTNERSHIP

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Most law school mediation courses teach a set of problem-solving skills that are seen as useful in lawyering and that are also taught in other lawyering skills courses. By contrast, some mediation courses present a relatively new approach called "transformative mediation" and teach a different set of skills focused primarily on "interactional support" rather than on problem solving. This Article argues that these interactional support skills are also useful in lawyering, especially in client-centered practice, and therefore courses that teach these skills should also be welcomed in the law school skills curriculum. Part I offers a summary of some of the primary skills taught in transformative mediation and clarifies how they differ from the problem-solving skills taught in a conventional mediation course. Part II suggests that "client-centered lawyering", an approach advocated by many lawyering skills teachers, shares some fundamental premises with transformative mediation. Part III explores in depth how each of the primary transformative mediation skills can be of practical value in legal practice, at many stages of a case – from the client interview, to the development of case theory, to settlement discussions and oral advocacy – especially for lawyers practicing client-centered lawyering. Part IV offers a model for integrating an introduction to client-centered lawyering skills in the design of a course on transformative mediation. Having shown how the interactional support skills taught in transformative mediation courses add concrete value to the lawyer's performance of key tasks, the Article argues that the inclusion of transformative mediation courses in the curriculum,

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along with existing skills courses, will enhance overall training for lawyering practice.

INTRODUCTION: MEDIATION SKILLS AND CLIENT-CENTERED LAWYERING

For those who have studied or taught the practices and skills of mediation and lawyering, the complementary relationship of the two subjects is evident. The literature on these subjects reflects this relationship, with each employing similar concepts and insights.[1] One major theme in the literature and the teaching of these subjects has been the way in which both kinds of practices should involve a primary focus on the activity of "problem solving."[2] That is, good mediators and lawyers have this in common: they are good problem solvers, who have excellent skills in that activity.

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[1] There is a substantial literature on both subjects. References to the mediation skills literature are provided below, where they are germane to the particular points in the text. Important sources in the lawyering skills literature include, among others: STEFAN H. KRIEGER & RICHARD K. NEUMANN, ESSENTIAL LAWYERING SKILLS (3rd ed., 2007); DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (2nd ed. 2004); FIONA BOYLE ET AL., A PRACTICAL GUIDE TO LAWYERING SKILLS (3rd Ed., 2005). The foregoing deal primarily with skills involved prior to the stage of trial. Other texts treat the subject of trial advocacy skills per se. *See, e.g.,* STEVEN LUBET, MODERN TRIAL ADVOCACY (3rd ed. 2010); THOMAS A. MAUET, TRIAL TECHNIQUES (8th ed. 2010). In this article, the Krieger and Neumann text will be used as the primary source on the current view of the basic skills that are seen as important to effective lawyering, since it is widely used, comprehensive, up-to-date, and reflective to some degree of the link between lawyering and mediation skills.

Examples of similarities between mediation and lawyering skills, as discussed in the literature, include the following: Both identify the skill of asking questions as central to practice, and both use a similar framework identifying different types of questions. *See, e.g.,* Stefano Moscato, *Teaching Foundational Clinical Lawyering Skills to First-Year Students*, 13 J. LEGAL WRITING INST. 207, 213-14 (2007); JOSEPH B. STULBERG, TAKING CHARGE/MANAGING CONFLICT 70-73 (1987) [both using the same framework of moving from broad to narrower questions]. Both employ the concept of "active listening" as a means of drawing out client narratives. *See, e.g.,* KRIEGER & NEUMANN, *supra*, at 84-85; Leonard L. Riskin, *Mediation Training Guide*, in LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 335, 343 (3rd ed. 2005). [both advising the use of "active listening" and defining it similarly]. Both see "problem-solving", including creativity, as a key skill needed for effective practice. *See, e.g.,* KRIEGER & NEUMANN, *supra*, at 29-35, 39-41, 227-28; Riskin, *supra*, at 341-45 [both including problem solving as a key aspect of practice].

[2] *See, e.g.*, Paul Brest and Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 TEMP. L. REV. 811, 827-28 (1999); KRIEGER & NEUMANN, *supra* note 1, at 29-35; CARRIE MENKEL-MEADOW, LELA PORTER LOVE & ANDREA KUPFER SCHNEIDER, MEDIATION: PRACTICE, POLICY AND ETHICS 92 (2006); Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOT. J. 217, 225-28 (1995). *See* generally Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance,* 19 OHIO ST.J.DISP.RES. 965, at 979-984(2004) [referencing a variety of mediator competency tests that emphasize problem-solving skills].

It follows that teaching the skills of either of these practices should include the concepts and methods involved in problem solving. Indeed, the fact that mediation is often seen as an exercise in problem solving, with the mediator serving as an expert in that activity, is one justification for the inclusion of mediation skills courses and clinics in many law schools today.[3] When students in mediation courses and clinics learn how to guide parties in a problem-solving process that resolves a conflict, they are learning skills that can easily be translated to their future work as lawyers representing clients in the legal process, whether in transactional practice or in dispute negotiation.

An interesting question is raised, however, by the development at some law schools of mediation courses and clinics that present the mediation process itself in a way that differs greatly from the conventional, problem-solving view. Instead of the problem-solving view of mediation, these courses present what is known today as the "transformative" approach to mediation.[4] In that approach, as explained in many articles and books over the last two decades, the mediator's work focuses not on guiding the parties toward a solution to specific problems, but on supporting them in having a constructive interaction about their situation and disagreements without focusing on problem solving per se.[5]

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[3] *See* Cynthia A. Savage, *Recommendations Regarding the Establishment of a Mediation Clinic*, 11 CARDOZO J. CONFLICT RES. 511, 512 (2010) [reporting on the number of mediation clinics in U.S. law schools].

[4] For a description of one clinical mediation course that uses the transformative approach, *see* Robert A. Baruch Bush et al., *Supporting Family Strength: The Use of Transformative Mediation in a PINS Mediation Clinic*, 47 FAM. COURT REV. 148 (2009). Today, the clinic described in that article also handles family court and juvenile delinquency cases, all using transformative mediation methods. For a fuller description and explanation of the transformative approach to mediation, *see infra* text accompanying notes 29-43. *See also* Robert A. Baruch Bush & Joseph P. Folger, *Transformative Mediation: Theoretical Foundations* [hereinafter, *Transformative Theory*], in TRANSFORMATIVE MEDIATION: A SOURCEBOOK—RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS [hereinafter SOURCEBOOK] 15 (Joseph P. Folger et al., eds., 2010) [providing a brief exposition of the central elements of this theory of mediation]; Robert A. Baruch Bush and Joseph P. Folger, *Transformative Mediation: Core Practices*, in SOURCEBOOK, *supra*, at 31 [hereinafter *Core Practices*] [providing a description of the methods and key practices of this approach to mediation]; ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (2d ed. 2005) [presenting the transformative mediation model in full, including an illustrative case study with commentary].

[5] *See, e.g.*, Robert A. Baruch Bush & Sally G. Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPPERDINE DISP.RES. L.J.67 (2002) [offering a brief summary of theory and key practices]; Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263 (1996) [identifying indicators of this approach to practice]; Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 NEG.J. 271 (1999) [explaining the relation of empathy to this model of mediation]; James R. Antes et al., *Is A Stage Model Of*

More specifically, the mediator works to support the parties in changing the quality of their interaction, shifting from the negative and often destructive interaction they have become caught in, on various issues, toward a positive and constructive conversation about those same issues.[6] That conversation may lead to issues being resolved, but it may serve other ends that are important to the parties regardless of whether a solution is reached – such as gaining greater clarity about the nature of their situation and disagreements, recapturing a sense of capacity for making their own decisions, and developing greater appreciation for each other's perspectives and experiences. All of these results – related to the parties' interaction and their attitudes toward themselves and each other, more than to the specific issues they are dealing with – have been shown to have real value to parties in conflict independent of whether specific solutions are found to specific problems.[7] In short, as the literature puts it, transformative mediators employ practices that support parties in changing the quality of their conflict interaction, as they discuss various issues and possibilities for resolution.[8]

The question arises, however, whether these kinds of practices, to

Mediation Necessary?, 15 MED. Q. 287 (1999) [arguing that the stage models described by most mediation theorists are not essential]; DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK (Joseph P. Folger and Robert A. Baruch Bush, eds. 2001) [hereinafter, DESIGNING MEDIATION] (presenting a collection of essays by expert trainers on methods of training unique to this model of mediation) .

[6] *See Core Practices*, *supra* note 4, at 24-25.

[7] *See* James A. Antes, *The Experience of Interpersonal Conflict: A Qualitative Study*, in SOURCEBOOK, *supra* note 4, at 125 [presenting original research showing that parties to conflict care about interactional dimensions]. Explanations for the value parties place on improving interactional quality draw upon work on procedural justice, as well as work on the psychology of well being or "positive psychology". Regarding the former, *see* Robert A. Baruch Bush, *"What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. DISP. RES. 1, 29-32 (1996) [summarizing procedural justice research showing that satisfaction with social processes is higher when they allow high degrees of self-determination and communication – the components of positive interaction]. Regarding the latter, *see* Martin E. P. Seligman & Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction*, 55 AM. PSYCHOLOGIST 5 (2000); Martin E. P. Seligman et al., *A Balanced Psychology and A Full Life*, 359 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON 1379 (2004). Seligman, when President of the American Psychological Association introduced the phrase "positive psychology," defined as the scientific study of the strengths and virtues that enable individuals and communities to thrive. Before and since that time, study in this field has shown that the sense of well-being is a function of "three innate psychological needs – competence, autonomy, and relatedness" – which parallel the components of positive interaction as understood in transformative conflict theory. *See* Richard M. Ryan and Edward L. Deci, *Self-Determination Theory and the Facilitation of Well-Being*, 55 AMERICAN PSYCHOLOGIST 68 (2000).

[8] *See Transformative Theory*, *supra* note 4, at 24. As it turns out, parties often care as much or more about that kind of interactional change, as about the reaching of an agreement or the terms of an agreement. *See supra* note 7.

the extent that they are different from the practices of problem-solving mediators, have any useful application to the kinds of tasks lawyers perform in their representation of clients? If so, then teaching transformative mediation skills to law students or lawyers has value as a part of professional legal education. To put the question more sharply: It has been accepted that teaching problem-solving skills to lawyers through courses on mediation has value as a part of professional training; does teaching "interactional support skills" to lawyers have similar value, so that courses teaching these skills deserve a place in the curriculum? This Article makes the case that these skills are indeed valuable in the practice of law, and that transformative mediation courses teaching these skills should be welcomed in the law school and CLE curriculum.

Part I of the Article offers a summary of some of the primary skills used by transformative mediators in the mediation process, and clarifies how they differ from the problem-solving skills normally taught as part of conventional mediation courses.[9] Part II presents a short overview of the approach to legal practice called "client-centered lawyering", which is taught in most lawyering skills courses today, and with which the skills of transformative mediation resonate quite strongly. Part III explores in depth how each of the primary transformative skills can be of use in legal practice, at many stages of a client representation – especially for lawyers committed to "client-centered lawyering."[10] Part IV offers a model for incorporating an emphasis on client-centered lawyering skills in the design of a course or clinic on transformative mediation.

I. Mediation Skills: Solving Problems, Or Supporting Interaction?

The skills involved in mediation, as taught in law school courses and clinics, can differ significantly depending on what approach or "model" of mediation the instructor is teaching.[11] Most commonly,

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[9] *See infra* text accompanying notes 11-43, for a discussion of the skills taught in courses on both approaches to mediation. In this Article, the terms "transformative mediation skills" and "interactional support skills" will be used interchangeably. The skills are aimed at supporting parties in making clear, self-determined choices, and in appreciating perspectives other than their own, both of which are key elements of constructive interaction, the main goal of transformative mediation. *See infra* text accompanying notes 16-18, 30-32.

[10] *See infra* text accompanying notes 46-68, for a definition and discussion of this approach to lawyering and its unique aims.

[11] Until the early 1990s, mediation was seen as a "generic" process practiced with stylistic differences by individual mediators. However, beginning in the mid-1990s, it became clear that mediators were using consistently different approaches that reflected diverse "models" of practice, which viewed the process as having different aims, and used signifi-

the approach taught is the problem-solving (or "facilitative") model of mediation, but in some cases the transformative model is the one presented by the instructor. A brief summary of the skills used in each model is useful to illustrate the differences in these skills, as background for discussing in Parts II and III how the skills of the transformative approach might be valuable tools not just for mediation, but for lawyering.

A. *The Overall Contrast between the Two Approaches*

In the practice of mediation as a problem-solving process – the approach used most widely today in law school courses and clinics and in the field generally – mediation is seen as a process aimed at reaching resolution of specific problems faced by parties in conflict. To achieve that goal, the mediator leads the parties through a sequence of stages: opening the session, setting ground rules, gathering information, defining issues, exploring options, generating movement by forceful persuasion, and achieving agreement.[12] While the description of stages and strategies in the literature differs from text to text, the commonalities are very clear, as to both the goal of the process and the means to achieve it. What is also clear is the principle that the mediator is the one who controls and directs the process at every stage, and that effective mediation requires the exercise of such mediator control to keep the process moving toward the goal of resolution.[13] This practice of mediator process control, despite the importance placed on party self-determination in mediation theory, is often explained with the conventional wisdom that "the parties con-

cantly different practices. *See* Bush, *supra* note 2, at 981-84. Although the models were characterized and labeled in a number of ways, two of them have gained fairly wide recognition today, and they are described in the text above – the problem-solving (or facilitative) and the transformative models. *See id.*; Robert A. Baruch Bush: *Staying in Orbit or Breaking Free: The Relationship of Mediation to the Courts over Four Decades*, 84 N. D. L. REV. 707, 739-42 (2008) [describing the emergence of these two models and their characteristics].

[12] This approach is also known as "facilitative mediation," as discussed below, *see infra* text accompanying note 17. On the view of problem-solving as the goal of mediation, *see* Menkel-Meadow, *supra* note 2, at 225-27; RISKIN ET AL., *supra* note 1, at 338, 341-45. On the view that the process involves a series of stages, *see* JAMES J. ALFINI, SHARON B. PRESS, JEAN R. STERNLIGHT, & JOSEPH B. STULBERG, MEDIATION THEORY AND PRACTICE 107-40 (2006) [hereinafter, ALFINI] (offering a good summary of the stages followed in problem solving mediation).

[13] *See, e.g.*, Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VERMONT L.REV. 85, 97-106 (1981) [presenting a good description of the classical view of how the mediator controls the process]. *See also* Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work*, in WHEN TALK WORKS: PROFILES OF MEDIATORS (D.M. Kolb & Associates, eds., 1994) 459, 470-74 [summarizing what they call the "settlement-oriented" mediator's strategies for controlling the process, based on their close qualitative study of several mediators at work].

trol the outcome, but the mediator controls the process."[14] From this fundamental principle of mediator control of the process, many specific mediator practices follow, which will be discussed in the following section.

By contrast, the most fundamental principle of practice in the transformative approach is that the mediator's job is "to support and never supplant party deliberation and decision-making," on every matter whether regarding process or outcome, and to "support but never force inter-party communication" at every point where the possibility for enhancement of mutual understanding arises.[15] Basic texts make this principle clear, and it is given great prominence in training materials.[16] Thus mediators in this approach do not control or direct the process, do not use interventions that intentionally steer the discussion, and do not substitute their judgment for the parties' on any matter of process, substance, or communication. In short, the process is not mediator-driven, but *party-driven*. What mediators do, instead of directing the process themselves, is to *support the parties' own process* of presenting their views, thinking about what is being said (by themselves and each other), and making their own decisions on how to understand the situation, their options, and each other – and ultimately on what, if anything, they want to do about all of these things. In short, the essential work of the mediator is to *support* the parties' *deliberation, communication, and decision-making*, rather than to direct them in any way.[17] The reason for employing supportive rather than directive practices is that the aim of the process is party empowerment and interparty recognition – and thus positive interactional change – rather than resolution per se; and interactional change is most likely achieved through mediator support rather than mediator direction.[18] Again, many specific practices flow from these basic

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[14] *See, e.g.*, John M. Haynes, *Mediation and Therapy: An Alternative View*, 10 MEDIATION Q. 21, 23-24 (1992). *But see* Joseph P. Folger, *Who Owns What in Mediation?: Seeing the Link between Process and Content*, in DESIGNING MEDIATION, *supra* note 5, at 55 [challenging the distinction between process and content control].

[15] *See Transformative Theory*, *supra* note 4, at 25.

[16] *See* BUSH & FOLGER, *supra* note 4, at 131–214 [presenting a case study that concretely illustrates how the principle of supporting party deliberation and decision-making translates into actual practice]; Susan Beale & Judith A. Saul, *Examining Assumptions: Training Mediators for Transformative Practice*, in DESIGNING MEDIATION, *supra* note 5, at 9 [describing elements of training programs in transformative mediation practice].

[17] *See Core Practices*, *supra* note 4, at 31–50 [discussing specific practices that support party deliberation and decision-making without controlling it].

[18] *See* Bush, *supra* note 11, at 746-48 [explaining the connection between interactional change and supportive rather than directive intervention]. For a fuller explanation of these terms – empowerment and recognition – as used in transformative mediation, *see infra* text accompanying notes 29-30. *See also* BUSH & FOLGER, *supra* note 4, at 53-78 [fully explaining the terms, and clarifying possible misinterpretations of them].

principles.

The following two sections present short accounts of the skills – in either problem solving or interactional support – that are commonly taught in law school or CLE mediation courses. These accounts will clarify the significant differences between the skills emphasized in courses centered on the two different approaches to mediation.

B. Facilitative Mediation and the Skills of Problem Solving

The approach to mediation taught in most law school courses, which focuses on facilitating the resolution of disputed issues between parties in conflict, is called by different names. However, it is most often referred to as either "facilitative" or "problem-solving" mediation, because the aim of the mediator is to facilitate a resolution of the problematic issues on which the parties are in conflict. The mediator in this approach is seen as an expert in problem solving – not only as to process but also as to subject matter – and her expertise on both is seen as crucial to the achievement of a resolution.[19]

Given this view of the mediator's role, it is natural that mediation training courses for law students and lawyers focus on two kinds of skills: those involved in managing the communication in a session, and those involved in discovering the nature of the parties' problem, devising possible solutions, and persuading parties to accept the solution devised. Thus the skills involved relate to both problem solving and communication management.[20] In both areas, the mediator is presumed to bear primary responsibility, and therefore needs to have appropriate skills.

1. Managing Communication.

The skills involved in managing the parties' communication in the mediation process are deployed throughout a session, to avoid the disorganized and unproductive exchange the parties are likely to have if communication is not structured and controlled.[21] Training courses teach several discrete skills in this category:[22]

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[19] *See* Kolb and Kressel, *supra* note 13, at 473-74 [describing how mediators in this model see themselves as process and substance experts].

[20] *See* Bush, *supra* note 2, at 969-81 [offering examples of mediator performance tests that specify the skills necessary to show competency in facilitative mediation].

[21] *See* Stulberg, *supra* note 13, at 90 [arguing that mediator control is essential to a productive session].

[22] On the skills described below, *see* Stulberg, *supra* note 13; ALFINI, *supra* note 12, at 107-39; Riskin, *supra* note 1, at 335-47 [excerpting a "training guide" used for training programs in facilitative, problem-solving mediation]. The skills described in the text are specified as criteria for competency in many mediator performance tests. *See* Bush, *supra*

Opening and structuring the session: Mediators learn to compose and deliver to the parties a clear "opening statement" that describes the goal of the session, the role of the mediator (not to make outcome decisions but to guide the process), the order of the process, the ground rules to be followed, the confidentiality of the process, and the place of the separate meeting or "caucus." While it seems elementary, the skill of putting the opening into appropriate language, and delivering it clearly, must be learned and practiced to be fluent and effective in defining expectations for the session. Moreover, from this first step, the mediator is taught to follow through by organizing and structuring the entire session, including when to move from one stage to the next – when to meet jointly, when to caucus – and when to "wrap up" an agreement or declare an impasse.

Controlling the flow of information: Mediators learn to firmly control and structure the flow of information from the parties, because without structured communication, less information is revealed and the exchange can degenerate quickly into disorder. Specific skills taught include: how to direct turn-taking by the parties, how to prevent party interruptions of one another, and how to ask the kinds of questions of each party that will elicit elaboration or clarification of the information they provide. Special emphasis is put on skill in asking "probing" questions, designed to uncover information that is not initially revealed.[23]

Controlling and filtering negative expression: Mediators learn to control or filter the subjects discussed and modes of expression used, because certain subjects and tones make rational problem solving more difficult. Three particular skills taught include: how to control parties when they get emotional or hostile, by cutting off these modes of expression; how to "reframe" or filter all party statements into language that is neutral and not antagonistic; and how to limit discussions of the past and keep parties "focused on the future." The skill of reframing, in particular, is emphasized as a way of keeping the discussion "on track" toward practical problem solving.[24]

2. *Problem solving.*

The skills of problem solving are also central to the mediator's work, because parties themselves are rarely trained or skilled as problem solvers. The mediator must serve, in effect, as the lead problem

note 2, at 972-85.

[23] *See, e.g.*, Stulberg, *supra* note 13, at 103-06; Kolb and Kressel, *supra* note 13, at 472-73; Bush, *supra* note 2, at 972-73.

[24] *See* Stulberg, *supra* note 1, at 72. *See also* Bush, *supra* note 2, at 974-80 [quoting mediator competency tests that include "reframing" as a core competency].

solver, although s/he will probably involve the parties in the process to some degree.[25] In this area, mediation courses usually emphasize several specific skills:

Identifying issues/demands in terms of underlying "needs and interests." Mediators learn to translate parties' demands into "needs and interests" terms.[26] The skill is to "probe" for the need or interest that underlies and is driving a demand. Doing so is central to leading the parties into an integrative or interest-based bargaining process, in which the needs of both sides can be cast as parts of a mutual problem, and win/win solutions can be sought. This skill is often connected to the "caucus" or private meeting with each side, since "probing for interests" is often easier without the other party present. Translating into needs/interests is related to the skill of "mutualizing" or finding "common ground" – that is, showing how parties' interests coincide. The skill also involves diplomatically excluding from discussion "intangible" matters, like those rooted in emotion or principle, since they usually frustrate the rational problem-solving process.

Devising creative solution packages that meet all sides' needs. Mediators are trained to act, themselves, as skilled integrative bargainers and by various means to identify solutions that will "solve the problem" faced by the parties. This may involve guiding the parties in a problem-solving exercise, or simply identifying a win/win solution and presenting it to the parties. Here too, as in "probing for interests," the mediator is taught how to look for and stress "common ground." This skill is also taught in conjunction with the caucus, since exploring solution packages is usually easier with one party at a time. The skill taught here is parallel to the skill taught in negotiation courses based on the integrative model, which are common today.[27]

Persuading the parties to accept the solution and come to agreement. Even a good solution usually requires some persuasion to gain final acceptance, and mediators learn a variety of techniques for "closing the deal," all of which involve exercising some degree of persua-

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[25] *See* Bush, *supra* note 11, at 720-24 [describing the view of the mediator as problem solver that emerged in the 1990s and has held sway ever since].

[26] On the skills discussed here and below in this subsection, *see* Bush, *supra* note 2, at 974-89 [summarizing the problem-solving skills described by theorists and required by competency tests]; Riskin, *supra* note 1, at 341-47 [presenting a mediator training guide that emphasizes problem-solving skills]. Regarding the practice of translating demands into underlying needs or interests, as a core element of integrative bargaining, *see, e.g.,* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754, 794-813 (1984); David Lax and James Sebenius, *Interests: The Measure of Negotiation*, 2 NEGOT. J. 76, 78-91 (1986).

[27] *See, e.g.,* Menkel-Meadow, *supra* note 26, at 794-813; Lax and Sebenius, *supra* note 26, at 78-91; Donald Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST.L.REV. 41, 52-57 (1985).

sion on one or both parties. Again, this may be more easily done in the private caucus, since it often involves a measure of "devil's advocacy," creating doubts for each party about the likelihood of finding a better solution.[28]

C. Transformative Mediation and the Skills of Supporting Interactional Change

Courses in some law schools concentrate on a model of mediation that differs substantially from the problem-solving model discussed above. Transformative mediation aims not at achieving agreements that resolve the parties' problem, but at supporting the parties' attempts to change the quality of their interaction itself, from negative to positive. In transformative mediation theory, interactional change includes and depends upon two specific, positive "shifts" that parties make. In the "empowerment" shift, a party moves from a sense of confusion and helplessness precipitated by the conflict, to a sense of personal clarity and efficacy. In the "recognition" shift, a party moves from a sense of defensiveness and hostility toward the other party, to one of interpersonal openness and understanding.[29] Together, these changes in the parties' experience of themselves and each other work to improve the overall quality of their interaction. As noted above, these interactional changes are valued by many parties independent of the outcome of the mediation process, although positive interactional change most often also generates a resolution of the problem the parties are dealing with.[30]

At a practical level, supporting interactional change means pursuing two specific goals, and the skills of interactional support are all aimed at one or both of these goals: (1) *supporting party deliberation and decision making*; and (2) *supporting inter-party communication and understanding.*[31] Throughout the text below, the term *"interac-*

[28] *See* Stulberg, *supra* note 13, at 102; Riskin, *supra* note 1, at 346-7 [both sources describing the "devil's advocate" role and how it is used by the mediator in separate caucuses with both parties].

[29] For a full discussion of the empowerment and recognition shifts, and their impact on conflict interaction overall, *see Transformative Theory*, *supra* note 4, at 19-26; BUSH & FOLGER, *supra* note 4, at 41-84. The emphasis on these shifts, and especially the empowerment shift, reflect congruence between the transformative mediation model and the "client-centered" approach to lawyering practice. *See infra* notes 57-68 and accompanying text.

[30] *See supra* note 7 and accompanying text [offering evidence that parties value positive interactional change per se]; Lisa Blomgren Bingham, *Mediation At Work: Transforming Workplace Conflict At The United States Postal Service*, in SOURCEBOOK, *supra* note 4, at 321, 327-29 [reporting that, in one major mediation program focused on achieving interactional improvement through transformative mediation, rates of case closure and outcome satisfaction were also high, over several years of operation].

[31] *See Core Practices*, *supra* note 4, at 31ff; BUSH & FOLGER, *supra* note 4, at 65-72

tional support skills" refers to the skills used in transformative mediation that advance one or both of these specific goals. These skills, as described below, are quite different from those used in problem-solving mediation. The skills are summarized here in three main areas, and discussed in greater detail in Part III in connection with their application to the lawyering process.[32]

1. Following the parties' lead.

Supporting interactional change in mediation means becoming a participant in the parties' conflict conversation, while *not* becoming the controller of the conversation. For most professional "helpers," including mediators, this kind of supportive posture is neither natural nor easy, since professional roles in our culture tend to involve directing clients through a process. Therefore, transformative mediation courses teach the skills of supportive, but non-directive, participation. Mediators learn several specific skills in this area, including:

Letting go of control – for process as well as outcome. Mediators learn to let go of control of the session, rather than hold onto it firmly. This begins from the very opening of the session, so mediators learn to offer some opening information but to allow the parties to interrupt it, skip over it, and get right into their own comments if that is their choice.[33] The same holds true throughout the mediation: parties can interrupt each other (and the mediator), change topics, return to subjects discussed earlier, and so forth. The mediator is taught to allow parties this complete freedom of choice, and to hold back from the strongly learned professional tendency to "organize" the discussion for them.[34]

[describing how all the practices of the transformative mediator relate to one or both of these two goals]. In teaching transformative mediation, the emphasis is on the skills needed to achieve these two goals.

[32] On the skills discussed below, *see Core Practices*, *supra* note 4; Bush and Pope, *supra* note 5 [describing each of these skills, and giving illustrative examples]. *See also* Dorothy J. Della Noce et al., *Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model*, 19 OHIO ST. J. DISP.RESOL. 1005 (2004); Dorothy J. Della Noce et al., *Signposts and Crossroads: A Model for Live Action Mediator Assessment,* 23 OHIO ST. J.DISP.RESOL. 197 (2008) (hereinafter *Signposts*). [Both articles describe and compare the skills and typical interventions of transformative mediators and problem-solving mediators]. For a case study illustrating all of the skills discussed below, *see* BUSH & FOLGER, *supra* note 4, at 131-270.

[33] *See* Sally Ganong Pope, *Inviting Fortuitous Events in Mediation: The Role of Empowerment and Recognition*, 13 MEDIATION Q. 287 (1996) [describing the author's exploration of a party-driven approach to the opening of a session].

[34] The skill of letting go of process control involves many different specifics, One specific aspect of the skill is to avoid "we" talk by the mediator, which implies the mediator holds the same status as the parties in making choices. Instead, mediators learn to use the

Staying attentive and following the parties. Mediators learn that, while letting go of control, they must remain closely focused on and attentive to whatever the parties are saying – and how they are saying it – because only this close attention enables them to step in with support when it is called for. Again, close listening without losing focus is an acquired skill for most professionals, who are accustomed to doing more talking than listening in interactions with clients. This skill includes the ability to refrain from interrupting parties, even if the interruption is a question meant to clarify something that was said. The mediator is taught to step in only when the parties are done speaking, or clearly getting ready to finish. Another aspect of the skill is listening attentively but "without an agenda" – that is, pure listening without simultaneously thinking about how to "use" what is being said, for example, to plan toward a solution.[35]

2. "Amplifying" the parties' conversation.

With interactional change as the aim, the most important kind of support a mediator can provide is to offer parties a way of better "hearing" their own conversation, so that they can become more deliberate about what they are saying, how they are saying it, and how they might want to change either of these. Conflict interaction is often *reactive* on both sides, with each party reacting to what the other is saying without much reflection or thought, so that it is hard for either person to hear what is being said through the "noise" of the back-and-forth.

A shift from reactive towards *deliberate* communication can occur only when the exchange itself becomes more audible or accessible to the parties. Such "amplification" places parties in control of their own discourse – they can hear and take control of their own "voices." This move toward a sense of control over and responsibility for the conversation – the "empowerment shift" referred to earlier[36] – is usually the key step in changing the interaction from negative to positive. The sense of control and responsibility tends to generate a sense of

"you" form of address to convey respect for the parties' authority over the conversation. *See Signposts*, *supra* note 32, at 212-15.

[35] In one training manual, the skill is explained by an analogy to "listening like a cow:" "Pay attention . . . Just be there. Don't be thinking about a solution, or how you should fix it. Just listen hard and try to be present. It's very bad business to invite heartfelt speech and then not listen. . . . [This] is a theory of attention that depends little on therapeutic skills and formal training: listening like a cow. Those of you who grew up in the country know that cows are good listeners. . . . This is a great antidote to the critical listening that goes on . . ., where we listen for the mistake, the flaw in the argument. Cows, by contrast, manage at least the appearance of deep, openhearted attention." MARY ROSE O'REILLY, RADICAL PRESENCE 27-29 (1998).

[36] *See supra* text accompanying notes 29-30.

openness and consideration, and as these both emerge, the quality of the interaction as a whole becomes more positive, constructive and balanced.[37] Mediators learn several specific skills that they can employ to help parties "hear" and take control over their own conflict conversation, so that it becomes more thoughtful, deliberate and open:

"Reflecting" (not reframing) parties' individual comments. Mediators learn to "reflect" party's narrative comments *without* changing or filtering their content or tone. The ability to do this is of course dependent on the kind of close listening mentioned above. Building on the skill of attentive listening, the mediator learns how to "mirror" each party comment back, staying close to the party's actual language, and avoiding both filtering and interpretation.[38] This kind of response effectively allows the speaking party to "have a conversation with him/herself," and in doing so to get clearer on what s/he is trying to say. At the same time, it allows the other party to "listen from a safe place" without having to respond, and in doing so to better hear what is being said. For both, the reflection "slows down" the pace of the exchange and makes it more understandable to the parties, increasing their opportunity for deliberation. At the same time, the mediator's inclusion of even negative, hostile language in reflection helps each party to hear just how strongly the other feels, and also allows each to "back off" if they decide they "went too far." In these ways, too, the reflection of parties' remarks supports an increase in their sense of clarity, control and responsibility in the conversation.

Reflection is a difficult skill to learn, because it requires "sticking to the text" of the party's comment rather than creatively interpreting, or filtering. Many find this hard to do, since we are prone to alter and interpret others' remarks when repeating them, adding our own "spin" to what was said. It is also difficult – and may even seem risky – to repeat harsh and even offensive language, so the tendency to "soften" is quite strong. The skill of reflection requires the discipline of rejecting both editorial creativity and personal squeamishness, and being a faithful "scribe" for both parties.[39]

[37] This dynamic of a shift from reactive to deliberative, including an increased sense of both control and consideration, and thus "conflict transformation", is the heart of the transformative conflict and intervention theory. *See Transformative Theory*, *supra* note 4, at 19-26; BUSH & FOLGER, *supra* note 4, at 53-78.

[38] For concrete examples of the use of reflection and summary in mediations, *see Core Practices*, *supra* note 4, at 39-44; Bush and Pope, *supra* note 5. For an extended case study illustrating all of the skills discussed here in the text, *see* BUSH & FOLGER, *supra* note 4, at 131-270. Note the contrast between the skill of reflection as described here, and the skill of "reframing" as taught in problem-solving mediation, where filtering and softening party language is central to the skill. *See supra* text accompanying notes 23-24.

[39] Experts on problem-solving mediation skills express the concern that faithful reflec-

Summarizing topics and lines of disagreement. Mediators also learn how to offer support when reflecting individual comments is not practical, because the parties' rapid back-and-forth offers no space to intervene after specific comments. For this common circumstance, mediators learn a different skill that also supports conversational clarity, but in a different way – how to offer topical "outlines" of a portion of a conversation, summarizing the topics that both parties have mentioned and the differences they expressed on each topic.[40] This outline of topics and lines of disagreement, following the actual order in which they arose, gives parties a "map of the conversational ground."[41] Although the uninterrupted discussion may have become confused or complicated, the summary offers the parties a clear overview of what they've addressed, and where and how they differ, and gives them a platform for making choices about where to move next. Because the summary emphasizes differences rather than common ground, it also shows both parties exactly what, and how serious, those differences are. This clarifies the choices they face in addressing their situation; it also reveals for each person what matters to the other and why, offering them bases for reconsidering each other's viewpoints.

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tion will sound too much like "parroting" the parties' words, and that this may not only be unhelpful but alienating to the parties. *See, e.g.*, STULBERG, *supra* note 1, at 70-71. However, those who practice reflection in transformative mediation find that the opposite is true: "Of all the skills that have been taught in our transformative mediation class I think that by far the most useful one to incorporate is 'reflection'. In fact, I tried it out . . . and reaped wondrous results." Comment by transformative mediation trainee, on file with Author [hereinafter, *Comment*]. *See also* Jody B. Miller, *Choosing to Change: Transitioning to the Transformative Model in a Community Mediation Center*, in SOURCEBOOK, *supra* note 4, at 181, 192-94; Peter Miller and Robert A. Baruch Bush, *Transformative Mediation and Lawyers: Insights from Practice and Theory*, in SOURCEBOOK, *supra* note 4, at 207, 221-26 [both describing the experiences of the authors, as mediators, with the powerful impacts of the practice of reflection]. Sometimes, the practice of faithful reflection is questioned on the ground that it may permit the injustice of a stronger party using abusive language to intimidate a weaker party. In fact, many of the practices of "following the parties" can be challenged on similar grounds. For an extended response to these kinds of objections, and an argument that transformative practices pose the least risks of injustice to "weaker" parties and the greatest chance for such parties to gain justice in mediation, *see* Robert A. Baruch Bush and Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. DISP. RES. 1 (2012).

[40] *See Core Practices*, *supra* note 4, at 41-44 [describing and illustrating the practice of summary]. In courses on transformative mediation, law students and lawyers usually find summary a more familiar skill, since it involves more of the kind of "issue-spotting" that they are trained and accustomed to do by their legal training.

[41] Again, this kind of "faithful" map of the conversational ground, offered without any strategy for influencing what issues are discussed first and which are postponed, is quite different from the skill of summarizing in facilitative mediation, in which summaries are intentionally used to allow the mediator – and not the parties – to "structure the agenda". *See* Stulberg, *supra* note 13, at 99-103 [showing how mediators use summaries to order issues for discussion, sometimes excluding difficult issues entirely, in order to make resolution more likely].

Going toward rather than away from the "heat". Both reflecting and summarizing must incorporate a third "amplification" skill in order to be effective. Mediators learn to embrace rather than suppress the "hot" parts of the conversation – the parts where parties express negative, hostile, and antagonistic views, and do so in highly emotional language and tone.[42] Rather than interrupting to stop such negative and emotional expression, reframing to filter it out, or offering a partial summary that ignores it, mediators learn to allow these forms of expression and to include the negative and the emotional in their reflections and summaries, without downplaying them at all. In fact, they learn to emphasize the "hot" comments and language, because doing so once again helps the parties to hear clearly what each is saying, and why, and to deliberate and decide how to respond to one another. This skill is hard for many mediators, who are accustomed to seeing hostile or emotional expression as inimical to constructive interaction – or who may simply get frightened or put off by such expression. In transformative mediation courses, mediators see how "moving through the heat" is far more constructive than trying to suppress it, and they learn to keep their own "cool" and accept the parties' "heat" in order to support parties in the conversation.

3. Highlighting decision points – but letting the parties decide.

When the aim is to support interactional change, and a key driver of such change is the parties' shift toward a greater sense of their own control of the situation, mediators need skills not only in allowing parties to make choices, but also in highlighting for them the opportunities for choice that arise in a conversation. In conflict conversation, moments can arise where different choices are possible, but due to the pace of the interaction, the opportunity for choice is not realized. Mediators learn to notice these moments, slow down the conversation when they arise, and highlight for the parties that there are choices at these points that are entirely theirs to make. This realization, and the consequent deliberation and decision making that parties do, give them a powerful sense of their own strength and efficacy. This strengthening can set in motion a positive cycle of mutual recognition that can change the quality of the entire interaction. The skill of high-

[42] *See Signposts*, *supra* note 32, at 213-14 [discussing this practice and the rationale for it]. Once again, this skill contrasts sharply with the skills taught and practiced in facilitative mediation, as discussed above. Indeed, it has been argued that the implicit "rules" of facilitative mediation – rules that are "applied" by the mediator in controlling the process – require the suppression of expressions of blame as well as negative emotions, *See* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1555–75 (1991) [describing the use of rules of rationality, prospectivity, and compromise in ways that disadvantage women and minorities].

lighting choice points includes a few specific elements:

"Checking in" after reflecting or summarizing. Mediators learn that, when they finish reflecting a party comment or summarizing a segment of back-and-forth, they can give the parties the opportunity to decide whether the reflection/summary fully captured what was said, or whether they want to add or change something. The simple question "Does that sound right to you?" or "Is there something I missed?" makes the parties the authorities over their own remarks, and gives them power to correct the mediator's "report." This kind of "checking in" helps parties make deliberate decisions about what they actually want to say or not say. The result is to increase the parties' sense of their control over the conversation, which then becomes less reactive, and more deliberate and constructive.[43]

Catching and highlighting hesitation or doubt. Mediators learn to listen for all points where parties express hesitation or doubt about how the conversation is unfolding. This may include a point where a party seems unclear or uncomfortable about the process. Or, more important, the doubts may concern some aspect of decisions that are being made or solutions being adopted, and a party seems uncertain about whether to go ahead with the decision or solution. At such points, mediators learn to use the "checking in" question to give parties the chance to express their doubt/objection, think it through, and make deliberate decisions about how to proceed. Checking in at these moments puts parties in a strong position, giving them "room" to be more deliberate about the decision, and thus take greater control over both process and outcome.

D. Different Models, Different Aims, Different Skills

It is clear from the comparison of the skills described in the previous two sections that the skills taught in problem-solving and transformative mediation courses are very different. The difference is understandable, considering the very different conceptions the two models hold of the aim of mediation and the role of the mediator in the process. From this point forward, this Article focuses only on the skills of *transformative mediation*, and their connection to lawyering practice. The discussion of problem-solving mediation in this Part was intended only to show the many and significant differences between the skills involved in the two approaches, which should be clear by now. Given those differences, it is clear that courses in problem-solv-

[43] For examples, in a case study, of how checking in increases deliberation and improves the conversation, *see* BUSH & FOLGER, *supra* note 4, at 131-270. For a discussion of how this kind of question, in particular, can be very useful in lawyering practice, *see infra* text accompanying notes 105-06.

ing mediation, while they do teach skills important in lawyering practice,[44] do *not* teach the interactional support skills that are central to transformative mediation – skills aimed at supporting (without supplanting) party decision making and communication.

The question remains: Just as the problem-solving skills taught in facilitative mediation courses are thought to have value in the lawyering process, can it be shown that skills in *interactional support* as taught in *transformative mediation* courses will also have value for law students and lawyers in their legal practice? This Article argues that this is indeed the case, and that transformative mediation courses should therefore be included more widely in the skills curriculum. Indeed, the skills of transformative practice are very congruent with, and would reinforce, some of the practices already focused on in lawyering skills courses themselves – especially those that teach client-centered lawyering, an approach to legal practice which is discussed in the following Part.[45]

However, to be clear: the argument being made here is not that courses in facilitative mediation skills should *not* be part of the curriculum, but rather that transformative mediation skills courses should *also* be part of the curriculum. The inclusion of both kinds of courses can help strengthen the teaching of lawyering skills in law schools and in CLE programs. This is especially so where the skills curriculum emphasizes client-centered lawyering, as discussed in the next Part.

II. Client-Centered Lawyering And Its Aims

The lawyering skills literature, for several decades, has encouraged the practice of what is known as "client-centered" lawyering.[46] The term is used to connote several different characteristics

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[44] Regarding the importance of problem-solving skills in lawyering practice, *see* Brest and Krieger, *supra* note 2, 827-28; Menkel-Meadow, *supra* note 2, at 225-28; Kreiger & Neumann, *supra* note 1, at 29-35, 39-41, 227-28. Moreover, the specific lawyering skills discussed in these sources are congruent with many of the skills taught in problem-solving mediation as described in the text above. Compare Krieger & Neumann, *supra* note 1, at 84-85, 227-28, with Riskin, *supra* note 1, at 343, 341-45 [each discussing "active listening" and "creative problem solving" as core skills, the former in client-centered lawyering, the latter in problem-solving mediation].

[45] *See infra* text accompanying notes 46-68. This Article in no way suggests that transformative mediation courses can *substitute* for lawyering skills courses, only that they can *supplement and reinforce* the skills taught in them, in a congruent way.

[46] The first discussions leading to this conception of the lawyer's proper role date back to the 1970s and the publication of a seminal article, *see* Gary Bellow, *Turning Solutions into Problems*, 34 NLADA Briefcase 106 (1977), and the first casebook on the subject, David A. Binder & Susan C. Price, Legal Interviewing And Counseling: A Client-Centered Approach (1977). Much of the attention to client-centered lawyering has been generated through the clinical legal teaching profession, since their work is most related to training in the lawyering process per se. *See* Katherine R. Kruse, *Fortress in the*

and aims of the lawyering enterprise, when practiced in a certain manner. At the simplest, it refers to the question of "who decides" what should happen in the representation, and especially who determines the goals to be sought and outcome to be accepted – holding that these decisions belong to the client alone.[47] At another level, the connotation of "client centered" is that the representation should focus not on legal issues alone but more broadly on solving whatever problems the client faces, legal and non-legal, as defined by the client.[48]

A third and arguably deeper meaning is given to the term by those who see a "client-centered" approach as one of "client empowerment," i.e., maximizing the degree of client participation in all aspects of the case, not only to preserve client control over decisions and address non-legal problems, but to *strengthen the client's own capacity* for self-determination and agency.[49] Professor Dinerstein links this view of "client-centeredness" to strands in political theory, psychology, feminist theory and sociology, and suggests that this approach "aids clients by allowing them to exercise control over their lives" and "can enhance the client's sense of . . . autonomy."[50] He and others cite many sources as affirming this "empowerment" aim of client-centered lawyering, going back to early proponents of this approach in the 1970s.[51]

On all of these dimensions, client-centered lawyering is distinguished from a more "traditional" or "lawyer-centered" approach. In that approach, the lawyer takes the primary role in decision making, the focus of the representation is on narrow legal concerns rather than

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Sand: the Plural Values of Client-Centered Representation, 12 CLIN. L.REV. 501, 507-17 (2006) [giving an account of the history of work on this subject].

[47] *See, e.g.*, KRIEGER & NEUMAN, *supra* note 1, at 23-25.

[48] *See, e.g.*, Brest and Krieger, *supra* note 2, at 811-12, 827-28; Mark Neal Aaronson, *Four Overlapping Domains of Good Lawyering*, 9 CLIN. L. REV. 1, 17-22. *See also* Kruse, *supra* note 46, at 508-11 [noting that recognition of the importance of non-legal considerations is one of "four important cornerstones" of the client-centered approach, meaning that the lawyer's role is "to help clients resolve problems, not merely to identify and apply legal rules"].

[49] For two good discussions of this "client empowerment" view of client-centered lawyering, *see, e.g.*, Kruse, *supra* note 46, at 526-29; Robert. D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 12 ARIZ. L. REV. 501, 517-44 (1990).

[50] *See id.*, at 517-34, 538-44, 548-551 & n.231.

[51] *See id.*, at 519-23 [*citing* Bellow, *supra* note 46]; Kruse, *supra* note 46, at 526-29 [*citing*, among others, GERALD LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VIEW OF PROGRESSIVE LAW PRACTICE (1992)]. One inspiration for the development of this view of the aim of client-centered lawyering was a major study by Douglas Rosenthal in 1974, suggesting a "participatory model" of the lawyer-client relationship, intended to "promote the dignity of citizens as clients. . ., make the client a doer, responsible for his choices [and] increase the chances for [the] client achieving a measure of control over [his] own life. . . ." DOUGLAS ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 168-69 (1974).

the client's problems defined broadly, and the case is largely conducted by the lawyer with little if any client participation or engagement.[52] There is no clear evidence on what proportion of lawyers follow each of the two models – traditional and client-centered – but in the clinical teaching of lawyering skills, the client-centered model is generally favored today,[53] although there is recognition that the appropriate method may vary depending on the type of client being represented.[54]

In the literature on client-centered lawyering, there is a strong emphasis on the lawyer's function and skills as problem solver, and not simply as a legal analyst and trial advocate. Since a central aim of representation is to find solutions to the client's problems broadly understood, the lawyer must be skilled in the problem-solving process and not just in legal analysis and argumentation.[55] As a result, problem-solving skills receive great attention in lawyering skills courses and texts, which seems entirely appropriate.[56]

However, as just mentioned, an equally important aim for the client-centered lawyer is to conduct the representation in a manner that supports and facilitates client participation and empowerment. In addition, client-centered lawyering means addressing the client's broad, self-defined concerns, and for many clients this can include improving their interaction with the other party, not just solving particular problems.[57] The point is that to fulfill *these* aims, the skills needed may be different than those of an expert problem solver. Problem-

52 *See* Dinerstein, *supra* note 49 at 506-07 ["Traditional legal counseling reflects an absence of meaningful interchange between lawyer and client.]; KRIEGER & NEUMANN, *supra* note 1, at 19-22 ["This is often called the traditional model of the attorney-client relationship: the passive client protected by the powerful professional."].

53 *See* Kruse, *supra* note 46, at 501-03 [". . . the client-centered approach remains the predominant model for teaching lawyering skills."].

54 *See, e.g.*, KRIEGER & NEUMANN, *supra* note 1, at 21-22.

55 *See* Brest and Krieger, *supra* note 2, at 811-12 ["[L]awyers serve as society's general problem-solvers. . . . Good lawyers bring more to bear on a problem than legal knowledge and lawyering skills."]; Kruse, *supra* note 46, at 508-09 ["[T]he client centered approach offered . . . an alternative vision of lawyering that conceptualized legal representation primarily in problem solving terms. . . ."].

56 *See*. e.g., KRIEGER & NEUMANN, *supra* note 1, at 29-35, 227-28 [advising the use of a six-step problem solving approach to addressing the client's situation] . Of course, lawyering skills courses do not ignore the importance of legal analysis and strategic skills, in preparing for either legal negotiations or the eventuality of a trial. Such analytical and strategic skills are still seen as central to the work of the lawyer, even in a client-centered approach. *See, e.g.*, *id.*, at 131-49 [discussing the "legal elements" model of organizing facts and arguments]. However, the approach to trial preparation and advocacy in a client-centered approach may also include interactional support skills, as will be discussed below. *See infra* text accompanying notes 138-55.

57 Regarding the importance that many parties in conflict place on improving interaction, *see supra* note 7 and accompanying text, *infra* notes 119-20 and accompanying text.

solving skills, as they are conventionally taught, do not necessarily ensure either client empowerment or interactional improvement. Therefore, there may be a need for *two different skills sets* to be an effective client-centered practitioner – the skills of problem solving *and* the skills of interactional support. The literature does not recognize this need clearly, but it is a logical conclusion given the diverse aims of the client-centered approach.

It is in this context that the skills taught in courses on transformative mediation may add value to the lawyering skills curriculum. Those skills look to different purposes than substantive problem solving, and they have impacts that problem-solving skills alone may not provide. That purpose and those impacts involve strengthening the client's capacity for self-determined deliberation and decision making, and helping improve interpersonal interactions valued by the client. In addition to problem-solving skills, client-centered lawyers are in need of concrete, practical skills that can help them achieve these equally important aims.

While the client empowerment *goal* is consistently valorized in the literature, there is less attention given to the *specific lawyering skills* and practices that can achieve this goal.[58] For example, in discussions of client interviewing there is much attention to the practice of "active listening," a skill that is intended in part to support client empowerment.[59] However, in addressing later stages of a representation, discussion of skills that support client empowerment and interactional improvement is less common and concrete than that devoted to problem-solving skills. It is here that the kinds of concrete practices taught in transformative mediation courses may have relevance and value for those interested in teaching lawyering, and practicing law, in a manner that supports the client empowerment and interactional

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[58] The goal of client empowerment has long been valorized in the literature, as noted above. *See supra* notes 49-51 and accompanying text. More recently, "social justice" lawyering scholarship has reemphasized the importance of client self-determination and empowerment. *See, e.g.*, Alizabeth Newman, *Bridging the Justice Gap: Building Community by Responding to Individual Need*, 17 CLIN. L. REV. 615, 627-31 (2011) [arguing that "[i]f the lawyering process is to be an effective tool for social justice, the means cannot be inconsistent with the ultimate goals," suggesting that the client should be treated as "a vital partner from the very outset," and supporting "the conception of the lawyer as coach and the client as capable partner."]; Spencer Rand, *Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work's Empowerment Approach*, 13 CLIN. L. REV. 459, 485 (2006) [citing the social workers' ethical code provision that "People empower themselves and our job is to assist them", and arguing that social justice lawyering must be based on the same principle]. Despite this affirmation of the principle of client empowerment as central, the literature provides relatively few specifics on the actual lawyering practices that can support client empowerment in the unfolding of an individual representation.

[59] *See infra* notes 83-90 and accompanying text.

aims *as well as* the problem-solving aim.[60]

It is important point to note here that the congruence between client-centered lawyering and transformative mediation can be seen not only at the level of skills but also at the level of underlying premises. That is, the two approaches are founded on similar premises about the basic human capacities and motivations of the people who become clients of lawyers and mediators. The most important of those shared premises is that every human being, including the client, has the capacity and the desire to act with self-determination – what current academic discussions call "agency." That is, human beings are not helpless victims of the problems they encounter; on the contrary, they are strong and competent actors capable of marshaling the internal resources needed to confront and overcome those problems. And if the client has temporarily "lost footing" and needs assistance, this loss is temporary and situational, not permanent or essential. Moreover, clients have a profound desire to exercise this inherent capacity for self-determination, and thereby recover their balance and reassert control over their situation and their life.[61] This fundamental assumption is based on evidence from the social sciences, but it is also based on philosophical beliefs about the nature of the human being as a moral agent.[62] Transformative mediation theory posits this view of the human being — and client-centered lawyering theory posits a very similar view.[63] At this deep level, the two approaches share a com-

[60] Some work has been done that carries specific suggestions for the kinds of concrete practices that support client empowerment, especially in the initial client interview. *See, e.g.*, Gay Gellhorn, *Law and Language: An Empirically Based Model for the Opening Moments of Client Interviews*, 4 CLIN. L. REV. 321 (1998); Linda F. Smith, *Interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centered" Interview*, 1 CLIN. L. REV. 541 (1995). Both of these articles, based on empirical research on client interviews, include practical suggestions regarding how to conduct such interviews in ways that further client empowerment. Many of the suggestions they make are consistent with the analysis in Part III below, as will be noted there. It is unclear, however, whether the specific practices suggested by Gellhorn and Smith have been incorporated into the standard approach to teaching legal interviewing, or any other part of the lawyering process. *But see* KRIEGER & NEUMANN, *supra* note 1, at 86, *citing* Gellhorn's advice on avoiding interruptions in the early portion of a client interview.

[61] *See* BUSH & FOLGER, *supra* note 4, at 59-61, 250-56 [setting forth this view of the human capacity and drive for agency (or autonomy), as well as the human capacity and drive for connection, discussed below in the text, and citing sources articulating this view in multiple disciplines].

[62] *See id.* However, this view is not shared by all models of professional intervention, some of which assume the opposite – that human beings fundamentally lack the resources or will to solve their own problems, and need infusions of expertise from outside in order to survive these challenges. *See, e.g.*, Kolb and Kressel, *supra* note 13, at 470-74 [discussing how settlement oriented mediators take this second view]. *See* generally BUSH & FOLGER, *supra* note 4, at 239-47 [describing this second view in detail and suggesting its ideological roots].

[63] Regarding the premises of transformative mediation theory about human agency, *see*

mon foundational outlook.

This premise about human capacity and motivation leads to another one, regarding the kind of help a professional can and should offer to a client facing a serious problem. Given the client's capacity and desire for self-determination and agency, the help offered should consist of support rather than direction, support that helps the client reconnect with and reassert their fundamental strength, through understanding and reflecting on their situation, and then deliberating and deciding how to address it. This kind of supportive assistance is what client-centered lawyering involves.[64] It is also what transformative mediation involves.[65] In both, the professional aims at supporting what the client does, rather than "doing for" the client, throughout the professional engagement.

Finally, a third premise that seems common to both practices concerns how to understand the client's problems. Both transformative mediation and client-centered lawyering assume that the client's problems may go beyond narrow legal concerns and include non-legal problems, including their relations and interactions with other parties.[66] In transformative mediation, special attention is placed on the interactional dimension of client concerns, because the view of clients

Transformative Theory, *supra* note 4, at 19-24; BUSH & FOLGER, *supra* note 4, at 53-65. Regarding similar premises in client-centered lawyering theory, *see, e.g.*, Dinerstein, *supra* note 49, at 512-17 [discussing the philosophical value of personal autonomy, understood as the human being's capacity and desire to make one's own choices, as one of the bases of the theory], 538-44 [discussing Rogerian therapy's premise of "the client's capacity to choose" and "the individual's ability to solve his own problems" as one of the bases of the theory]; Rand, *supra* note 58, at 490-91 [explaining that students of client-centered lawyering ". . . should learn respect for clients, including personal respect for a client as a conscious individual who has the potential for personal empowerment . . . [which] allows the student to reject the concept of the client as a helpless victim. . . ."].

64 *See, e.g.*, Dinerstein, *supra* note 49, at 521, [*quoting* Wexler's view that, "The hallmark of an effective poor people's practice is that the lawyer does not do anything for his clients that they can do or be taught to do for themselves. The standards of success for a poor people's lawyer are how well he can recognize all the things his clients can do with a little of his help, and how well he can teach them to do more."] (*citing* Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 1049, 1055 (1970)); Rand, *supra* note 58, at 485 [citing the social workers' ethical code provision that "People empower themselves and our job is to assist them," and arguing that social justice lawyering must be based on the same principle of supportive assistance]; Alejandro Covarrubias and Anita Tijerina Revilla, *Agencies of Transformational Resistance,* 55 FLA. L. REV. 459, 465 (2003) [advocating that lawyers "provide and develop skills and services that make it possible for [clients] to engage in at least one of several forms of empowering changes."].

65 *See Transformative Theory*, *supra* note 4, at 24-26; BUSH & FOLGER, *supra* note 4, at 63-72 [both explaining the principle of mediator support, rather than direction, as fundamental to transformative mediation].

66 Regarding transformative mediation, *see* BUSH & FOLGER, *supra* note 4, at 45-49 [illustrating the concern for interpersonal interaction]; regarding client-centered lawyering, *see, e.g.*, KRIEGER & NEUMANN, *supra* note 1, at 295-99 [recognizing "relationship" interests as among the important concerns clients may have].

as human beings is that, beyond the capacity and desire for agency, they also have an inherent capacity and desire to understand and connect with others, even in the face of serious differences.[67] Thus, reversing an alienated, negative interaction is likely to be of real concern to many clients, and professional help is often sought to support their own efforts to achieve this goal. While this particular value is less emphasized in client-centered lawyering, it does find some expression in the literature.[68]

In sum, these two fields of professional practice – client-centered lawyering and transformative mediation – share some very fundamental values and premises regarding the capacities and desires of their clients. At this deep level, there is a strong congruence between these fields that becomes obvious in reading the literature on both. Given this underlying congruence, the central goal of this Article is to show how, when translating premises into concrete practices, transformative mediation skills can be of real use to lawyers who are trying to put the values of the client-centered approach into practice in their work; and therefore the inclusion of transformative mediation courses in the law curriculum has real value to legal education.

III. Interactional Support Skills: Uses In Client-Centered Lawyering

Over the past several years, together with colleagues who teach training courses and clinical programs in transformative mediation, this Article's author has realized the potential value of the skills taught in those courses for the training of law students and lawyers in the skills of effective lawyering practice, especially within a client-centered approach.[69] Recall that the *interactional support skills* of transformative mediation *("IS skills")*, at a more specific level, are skills in *supporting clients in their own deliberation, decision making, and communication*.[70] While touched upon in some law school and CLE courses, these kinds of skills are not the main or explicit focus of such courses at present.[71] The hope of the author is that this Article will

[67] *See* Bush & Folger, *supra* note 4, at 59-61, 250-56 [setting forth this view of the human capacity and drive for connection, as well as the human capacity and drive for agency, discussed above in the text, and citing sources articulating this view in multiple disciplines].

[68] *See, e.g.*, Krieger & Neumann, *supra* note 1, at 297 [recognizing the importance of relationship to some clients].

[69] *See* Bush et al., *supra* note 4, for a description of one such clinical course.

[70] *See supra* text accompanying note 31. Wherever the term "interactional support" is used in the text below, this is the meaning of the term. In the text below, "IS skills" refers to these specific skills of "interactional support," as taught in transformative mediation courses, and as described in Part I above.

[71] *See supra* text accompanying notes 2-3; *infra* note 156 and accompanying text. As

help bring the value of these skills to the attention of lawyers, clinical and other law teachers, law school and CLE administrators, and others, so that training in transformative mediation attracts more interest in the legal academy and profession. In order to illustrate that value, this Part follows the course of a typical legal representation, and shows how and where the IS skills taught in transformative mediation can be of substantial value to lawyers engaged in client-centered legal practice.[72]

A. The Flow of a Case: Opportunities for using IS Skills

The lawyering tasks considered here will follow the flow of a typical case. Of course, these tasks may unfold in a different order than listed here, and not every case will involve all of them, but they are common tasks involved in representing clients, whether in litigation-related or transactional lawyering. In either context, many of the following tasks will be involved: interviewing the client; fact gathering, including interviewing witnesses; developing a theory of the case as a preparation for negotiation or litigation; conducting negotiations or settlement discussions; and engaging in oral advocacy in court.[73] In

will be discussed below in this Part, skills like active listening and targeted questioning, frequently taught in both mediation and lawyering skills courses, surely have important uses in the lawyering process. However, the skills taught in transformative mediation differ in significant ways from these traditionally taught methods, and these different skills have real potential for bringing added value to teachers and students of the lawyering process. In the text below, "IS skills" refers to the specific skills of "interactional support" that are taught in transformative mediation courses, as described in Part I above.

[72] From this point forward, the discussion in the text assumes that the lawyer follows a client-centered approach, and is interested in achieving all its aims. References to "lawyering skills" or "lawyering practice" are meant to connote that approach. However, many of the skills discussed below may also be useful to lawyers following a traditional approach, as will be evident from the discussion in the text. The emphasis here on the client-centered approach is because that approach is the one generally taught in lawyering skills courses, and because IS skills have particularly strong value given the aims of that approach.

[73] In the typical law school curriculum, not all of these tasks are covered in a single course. Rather, there are usually separate courses covering different stages and tasks of representation. Typically, the curriculum is organized so that: a course in legal interviewing, counseling and negotiation covers those subjects, including fact investigation and theory building; a separate course covers pretrial advocacy, including pleadings and discovery; a third course covers trial advocacy, especially witness examination. Similarly, texts on lawyering skills usually address some subset, but not all, of the tasks mentioned. *See, e.g.*, KRIEGER & NEUMANN, *supra* note 1. Omitted from the list of tasks here are legal writing (taught separately as a required first-year course), appellate advocacy, written and oral (taught separately as a required course), and legal drafting (usually the focus of advanced courses on "transactional lawyering" in different contexts). The writing/drafting tasks are not discussed in this article, although interactions with clients before and after drafting might involve the IS skills focused on here Appellate advocacy tasks are not discussed here, as the points made would be repetitive of those made regarding other tasks. The discussion of IS skills in this article does not suggest that any of the above-mentioned courses should be omitted or changed, but rather that a course on transformative media-

the sections below, not all of these tasks will receive equal attention, but some comments will be offered regarding each. Clearly, each of these tasks will have different importance in litigation-related or in transactional lawyering, but the teaching of lawyering skills in general will touch on them all in some degree. In the following discussion, the analysis focuses mostly on the use of these skills in connection with the dispute settlement/litigation process, but the reader can infer parallel points regarding some aspects of transactional lawyering, with appropriate adjustments for context.[74]

The IS skills considered here, as described in Part I, include:

- *Following* the client (and other speakers) by (1) *letting go* of the need to control or structure what is being said and (2) *staying attentive* and listening closely and without interrupting.[75]
- *"Amplifying"* the client's (and other speakers') comments by (1) using close *reflections* without filtering, (2) using *topical summaries* of difference without editing or weighting, and (3) capturing *"hot" language* and tone without avoiding or suppressing.[76]
- *Enhancing decision-making* for the client (and others) by (1) using the amplification skills just mentioned; (2) *checking in* after reflections and summaries, and at process decision points, and (3) *checking in* to allow full consideration at points of doubt or hesitation.[77]

The aim of this Part is to illustrate how instruction in the above IS skills, through transformative mediation training, can enhance the lawyer's effectiveness in each of the lawyering tasks performed throughout the representation. In each section, the approach here is to identify the *aim of the task*, and then discuss how IS skills may contribute to the lawyer's *effective performance of the task*.

Before proceeding with this discussion, an important disclaimer is in order: The author of this article is not an expert on lawyering skills, either as a practitioner or as an academic; however, he has been "of counsel" in multiple litigations, studied the literature on lawyering skills, and worked for many years with both clinical law teachers and

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tion skills would add value by teaching additional and different skills that are congruent with, and that supplement and reinforce, the skills taught in the other courses mentioned.

[74] Because of the different contexts, treating both the litigation-related and transactional lawyering processes in a single article would be difficult, and would involve considerable switching back and forth between the two contexts. Therefore, the choice was made to focus on only one of the two. The one chosen was litigation-related lawyering because the majority of lawyering skills courses focus in major part on that process – whether or not this is justified by the kinds of work done by most lawyers. In some places in the discussion below, additional comments in the footnotes will address the transactional lawyering applications of points made in the text.

[75] *See supra* text accompanying notes 32-35.

[76] *See supra* text accompanying notes 35-42.

[77] *See supra* text accompanying note 43.

litigators. Given that background, what follows should be read as the observations of an expert teacher of mediation practice, who is well informed on many aspects of the lawyering process, regarding how IS skills learned in transformative mediation courses may help lawyers to be more effective in the tasks they are called upon to perform in representing a client.

One more clarification is important. The following discussion recognizes that lawyering skills courses already teach practices similar to some of the IS skills mentioned above.[78] The point here is that the impact of these courses on law students can be enhanced through courses in transformative mediation, which focus on IS skills explicitly and in greater depth. The aim here is not to critique the existing lawyering skills curriculum, but to suggest a way of usefully supplementing it. In fact, the view taken here is that the content of transformative mediation training would be highly congruent with the existing lawyering skills curriculum, and would support its teaching of the skills needed for effective client-centered lawyering.

B. Interviewing the Client: Identifying Facts/Goals and Establishing the Relationship

Most discussions of lawyering skills begin with the all-important task of the client interview.[79] Clearly, this task is an essential beginning of the representation. It is usually understood as having two main aims: first, gathering information about the client's problem and clarifying the client's goals; and second, initiating a good relationship that will be sustainable through the ups and downs of the representation.[80] While the literature certainly addresses the skills of conducting a good client interview, the IS skills taught in transformative mediation can add value in achieving both of these aims.

Moreover, these IS skills can help to achieve a third important aim that begins with this first task and continues throughout the case – supporting client empowerment. Consider the context of this interview: the client is involved in a serious conflict (or a lawyer would not have been consulted) that has likely placed him/her in a state of anxiety, confusion, uncertainty, doubt, anger, etc. In the midst of this crisis, s/he is now entering a professional environment that is unfamiliar and even intimidating. Given this combination of being in a highly

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78 *See infra* notes 83-93 and accompanying text.

79 *See, e.g.*, KRIEGER & NEUMANN, *supra* note 1, at 82-83; CAROLINE MAUGHN & JULIAN S. WEBB, LAWYERING SKILLS AND THE LEGAL PROCESS 107 (2d ed. 2005); BOYLE ET AL., *supra* note 1, at 239-42.

80 *See* KRIEGER & NEUMANN, *supra* note 1, at 82-83 [summarizing the main purposes of the initial interview].

stressful state, and entering what seems like another country in which the client doesn't speak the language or understand the culture, the client is likely to be inarticulate, confused, and fearful – in short, in a state of "disempowerment."[81] The initial interview has to overcome all this, and help the client to regain his/her equanimity and the ability to participate effectively in the case. In effect, this event has to help the client regain his/her "footing" after having been thrown off balance by the conflict. Supporting the client's recovery of a sense of equanimity and capacity, and the ability to participate effectively in the case, is thus a critical first step in client empowerment and therefore a third important aim of the client interview.[82]

The IS skills involved in *following and not leading* conversation, as taught in transformative mediation courses, can be of great help in the process of helping the client to regain his/her footing, as well as achieving the other aims of the client interview. The principle of "active listening," defined as listening empathetically and without interrupting to ask questions, is taught in most if not all lawyering skills courses.[83] But many lawyers still have difficulty listening to a client's narrative without interrupting to clarify, ask questions, or try to bring structure to a seemingly disorganized story.[84] These interruptions occur because lawyers tend to *listen for* something in the client's story –

[81] This account of the client's state of mind at the point of the initial interview parallels the description, in transformative theory, of conflict as a "crisis in human interaction" that usually generates a deterioration of the client's sense of both self-efficacy and connection to other. *See Transformative Theory*, *supra* note 4, at 16-18; BUSH & FOLGER, *supra* note 4, at 45-53 [both describing the "negative conflict cycle" that results in parties being trapped in a state of disempowerment]. In a transactional case, the "crisis" state of mind may be the result of worry or anticipation about the possible course of a crucial deal, rather than the occurrence of a dispute or disruption, but the impact may be very similar. The need to help the client to regain balance and "settle down" is just as significant to effective representation.

[82] *See supra* notes 49-51, 58-63 and accompanying text, for a discussion of the client empowerment goal, in client-centered lawyering, and its bases.

[83] *See, e.g.*, KRIEGER & NEUMANN, *supra* note 1, at 84-85 ["Active listening . . . is a way of encouraging talk without asking questions"]; RISKIN ET AL., *supra* note 1, at 144 [Active listening is a . . . device for conveying nonjudgmental, empathetic understanding, and for eliciting information."]; Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships*, 10 CLINICAL L. REV. 755, 758 (2004) ["Active listening is a particular form of listening that involves . . . demonstrating your respect for and sympathy with [the client's] concerns."]. The same skill is taught in problem solving mediation courses, *see, e.g.*, Riskin, *supra* note 1, at 343 [including this skill in a mediator training "outline"]. In some of the latter, however, the skill taught is the kind of focused "listening *for*" that is mentioned in the text below, *see infra* text accompanying notes 84-88, rather than the kind of simple, purely attentive listening taught in transformative mediation courses. *See id.; see also supra* note 35 and accompanying text.

[84] *See* Gellhorn, *supra* note 60, at 326, 335 [reporting that in research on client interviewing, the dominant pattern was for the lawyer to control the floor and begin a series of closed-end questions, testing various hypotheses, often within a few minutes, or less, of the time the client began speaking].

for the issues, the key facts, the likely sources of evidence, and so on.[85] As a result, questions are natural to clarify the points that seem important to what the lawyer is listening for, including the elements of possible legal theories.[86] Even if the lawyer refrains from actually interrupting the client narrative, s/he may well be formulating questions and ideas about the case from the time the client first begins speaking.[87] In this sense, the lawyer is often leading or preparing to lead the discussion; s/he is out ahead of the client, and is not *fully* listening, even when the client is speaking.[88] Given the lawyer's concerns for developing the case, this is not hard to understand. As a result, however, active listening as originally defined is hard to sustain in practice.

85 *See id.,* at 345 [noting that "new questions are formulated mentally without listening to the client's responses"]. Even in a transactional representation, the lawyer may be "listening for" what s/he imagines are the crucial elements needed to structure a favorable deal, based on his/her past experience in similar situations.

86 Indeed, lawyering skills courses and texts place major emphasis on the importance of questioning skills. *See, e.g.*, KRIEGER & NEUMANN, *supra* note 1, at 47-49 [summarizing the "basic concepts" of question and noting that "an effective lawyer asks good questions constantly."], 96-102 [detailing the kinds of questions to be asked in an initial interview, and noting that "one of the marks of an effective professional is the ability to ask useful questions in a productive way."]; Moscato, *supra* note 1, at 213-15 [stressing the importance of good questioning skills, and describing the skills needed]. The skills taught usually involve a measured progression from open and general to closed and specific, like a "funnel," and emphasize the need to question in an organized fashion, exhausting each topic before allowing the client to move to another, and linking the questioning to legal theory building. *See id.*, at 214 ["[N]o effective interview or deposition can take place without employing the T-funnel questioning pattern."]; KRIEGER & NEUMANN, *supra* note 1, at 71-80 [describing this as what they call "cognitive interviewing," *citing* Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995)].

87 Lawyering skills texts do recommend against early interruption of a client narrative. *See, e.g.*, KRIEGER & NEUMANN, *supra* note 1, at 45-46 ["The lawyer learns more by just listening"], 89 ["[D]o not leap in with questions"]. However, this does not mean the lawyer should not be thinking of, and making notes about, questions s/he wants to ask regarding the narrative, which is recommended. *See id.,* at 80 [*quoting* Wydick, *supra* note 86, who advises ". . .not to interrupt the witness in the middle of a narrative response. When the witness says something worth pursuing, the interviewer should make a note of it and come back to it later."]. So the listening is actually directed and focused, and not purely attentive as described here in the text. Some authors do argue for the practice of simple, undirected listening as the best way to begin the client interview. *See* Gellhorn, *supra* note 60, at 345-46 [advocating "listening well and with subtlety" to the client's opening narrative, without interruption and without even mental formulation of questions]. But this seems to be a minority view.

88 At least some lawyering texts suggest that "the lawyer should remain in control at all times," meaning "that the lawyer is the person who sets the structure and decides what issues are dealt with and when." *See* BOYLE ET AL., *supra* note 1, at 247. Several studies of lawyer-client interviews documented this kind of approach by lawyers in actual practice. *See* Smith, *supra* note 60, at 546-49 ["These studies . . . show the lawyers as sometimes dominating their clients, controlling the conversation and the definition of the client's problem, and dictating its resolution."]. This is similar to the principle of "process control" in facilitative mediation, where "the party controls the outcome but the mediator controls the process." *See supra* text accompanying notes 13-14. The IS skills of transformative mediation lead to a different approach, as discussed in the text.

With training in IS *"following"* skills, a lawyer is able to *let go* of the need to lead the client, the need to immediately identify a structure in the narrative that is useful for legal argument. The lawyer engages not in "listening for" relevant content, but in *"attentive listening" – listening per se, with close attention and focus*, and without a need for theme, structure or endpoint. In effect, attentive listening is what active listening is meant to be, without other purposes mixed in. This kind of "profound" listening, without interruption or agenda, and with close attention, almost automatically ensures that the client will pour forth a wealth of information; and even if its relevance may not be immediately clear, that will emerge as the interview proceeds.[89] The result is a better understanding of the client's problem and goals, and a better basis for ultimately resolving the problem. Attentive, profound listening also helps build the client's trust in the lawyer, since this kind of attentiveness to what s/he is saying conveys very powerfully the lawyer's respect and regard for the client. At the same time, it supports the client in regaining self-confidence. It confirms that his/her story is important, since the lawyer is clearly taking it so seriously. The overall point: active listening – in the sense of pure, attentive listening – is recognized as an important lawyering skill, and transformative mediation courses can enhance competence in this kind of active, attentive listening.[90]

The effectiveness of attentive listening is reinforced, in the client interview, by the use of *amplifying* skills learned in transformative mediation training. For example, the lawyer with these skills can respond to the client's story, at natural intervals or pauses in the flow of the narrative, *not with questions but with reflections* that mirror back what the client has just said without editing or toning-down. *Reflecting the client's words*, as explained earlier, provides a natural platform for elaboration, deliberation, and clarification – it allows the client to hear what s/he is saying, think about it, and thus refine and confirm

[89] Precisely this kind of approach, and impact, is described by research on some lawyer interviewing practices that "let go" of the need to follow the organized and focused approach to questioning generally recommended, *see supra* note 86, and instead "follow" the client narrative, listening "receptively" and asking questions that flow from whatever the client has just said. *See* Smith, *supra* note 60, at 556-57. The same research suggests that even if the uninterrupted client narrative seems disorganized, organization can emerge later in, or after, the interview; and simply allowing and helping the client to "pour out her story" is the "single most important benefit" of the client-centered interview. *Id.*, at 583 ff. Thus, some of the lawyering skills literature sees just this kind of receptive, attentive listening as "active listening."

[90] In the text below, the term attentive listening will be used to refer to this pure kind of active listening which, as explained in the text, is taught effectively in transformative mediation skills courses. *See supra* note 35 and accompanying text.

what s/he wants to say.[91] All of this supports the client's self-expression or "voice," rather than interrupting or breaking its flow. When mediators trained as problem solvers to formulate and ask "probing questions" learn to respond to party narratives differently, by simply reflecting what was said, they are amazed at the impact this has, in helping the party both to become more articulate in their comments, and also to add more detail, depth and richness to their narrative.[92] In a similar way, the practice of reflecting what a client is saying in the initial interview can give the lawyer more and better information about the client's problems and goals, and it can also help clients "pull themselves together" and regain their calm in a very difficult moment. When lawyers help clients to do that, it is bound to increase the client's trust and confidence in them – and it is also bound to help the client regain self-confidence and clarity, and thus support client empowerment.

None of this is to say that learning to use this skill is easy for lawyers who have been trained to evaluate as they listen, and to seek clarification, whether this means interrupting the client with questions or making mental notes of questions to be asked later. Indeed, as noted earlier in the context of mediation, this skill sounds simple but is actually quite difficult to master. However, if it can be taught and learned as a part of a lawyer's training, the skill of reflection will have great benefits in actual practice. Indeed, some lawyering skills experts explicitly advocate reflection or "mirroring" in response to a client narrative, citing the same kinds of benefits mentioned above, although it is often framed as part of "active listening" rather than as a separate skill.[93] Again, the point is clear: The IS skill taught in transformative

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[91] *See supra* notes 36-39 and accompanying text. While lawyering skills texts generally emphasize questioning skills, especially sequenced and focused questioning, *see supra* notes 84-87, some studies document and recommend a different approach in which "questioning was not organized by topics or conducted in T-funnels [but] was restating and confirming what the client had explained, and allowing the client to provide further details. . . . [T]he questions . . . confirmed and clarified statements the client had already made. . . . [They] followed up on the client's statements and confirmed important information." Smith, *supra* note 60, at 566-67. This kind of questioning comes very close to the practice of reflection as described in the text, suggesting that reflection can be a useful skill for client interviewing. It should be evident that skills like attentive listening and reflecting, when employed in transactional practice, will have positive impacts on information flow, client trust, and client empowerment, similar to those discussed in the text here in the litigation context.

[92] *See Comment*, *supra* note 39; Miller, *supra* note 39, at 192-94; Miller and Bush, *supra* note 39, at 221-26 [all offering accounts of the effectiveness of reflection in supporting party shifts to greater clarity and decisiveness].

[93] *See, e.g.*, Dinerstein et al., *supra* note 83, at 758 ["Active listening is a particular form of listening that involves . . . 'mirroring' or paraphrasing what you have heard said explicitly, and by putting into words the implicit feeling emanating from the speaker. . . as a way to verify for yourself and your client that you understand what he has told you and as a

mediation is congruent with, and reinforces, the practice taught in the lawyering skills curriculum, strengthening the competence of lawyers in serving their clients.

Going further, consider the IS skill of *summarizing topically* without trying to edit or judge content, as taught in transformative mediation. Using this skill, the lawyer can help the client organize the narrative of the case him/herself rather than having the lawyer provide the organization. That is, once listening and reflecting has drawn out a wealth of material from the client, but not in an organized fashion, the lawyer can offer a summary that points out what seem to be the different themes, topics and concerns embedded in the narrative.[94] If the summary is faithful to the client's narrative, then this simple outline of the concerns that were mentioned gives clients, once again, the power to take over – to see clearly for themselves the different aspects of their "case," including facts and goals, and then to correct, add or subtract, and prioritize, organizing their own story as they see fit.[95] This can lead directly into a discussion of the goals and priorities

way of demonstrating your respect for and sympathy with his concerns."]; RISKIN ET AL., *supra* note 1, at 140 ["Active listening is a . . . device for conveying nonjudgmental, empathetic understanding, and for eliciting information. The interviewer restates both the content and the feelings she believes are associated with the statement."]. *See also* Smith, *supra* note 60, at 584-86 [reporting on research showing that "statements of factual reflection and confirmation following a client's initial narrative. . . were useful. . . . Either the client responded by reconfirming the goal and explaining it or she responded by amending the attorney's statement until the goal was clarified."]. *But see* Gellhorn, *supra* note 60, at 337, 347 [advising lawyers to avoid using reflections, which he calls "recompleters," early on in an interview because "they cut off expression of new concerns and prematurely define the focus of the dialogue."].

[94] Clearly, the use of the summarizing skill in the client interview, and other stages of a case, may differ from its use in transformative mediation. In the latter, the mediator is summarizing an exchange between two parties, including topics raised by both and the different positions taken by each on those topics. *See supra* text accompanying notes 40-41. In the former, the lawyer is summarizing topics raised by a single speaker, the client, and his/her stance on those topics – although sometimes the client narrative may include references to what the other party is concerned about and what they have said about their stance. However, in some stages of representation, such as settlement discussions, the summarizing may be supporting a two-sided exchange. *See infra* text accompanying notes 119-26. Regardless of these differences, the skill being used is similar in all these contexts, and will support the kinds of benefits mentioned here in the text.

[95] In lawyering texts, the skill of "finding" or "creating" the "story" embedded within the client's narrative is seen as a lawyering skill. In other words, creating the story is the lawyer's job: story-finding and story-crafting are skills the lawyer needs to learn. *See* KRIEGER & NEUMANN, *supra* note 1, at 49-50 ["Effective lawyers have two clusters of story skills. The first are *story-finding* skills. . . . The second . . . involves *telling the story*."], 159-75 [discussing the "story model" of persuasive fact analysis, and noting that "By crafting the facts into a meaningful story, a lawyer can greatly enhance her client's chances of success," *id.* at 160.]. However, some commentators have recognized "the importance of lawyers facilitating their *clients'* story-telling and the barriers that lawyers create [that] impede such client story-telling," concluding that, "For many clients, the need to present their cases through lawyers can be quite frustrating." Dinerstein, *supra* note 49, at 550 n. 228. If

of the client, also aided by the lawyer's reflections and summary of the client's comments. The summarizing skill is thus used to help the client actually determine for him/herself the aims of the representation. Given the account of the problem and the goals identified as important, as they emerge directly from the client's self-edited narrative and comments, the mission of the case is established in concrete terms that are set and understood clearly by the client. By the end of this process, the client is likely to have gained a significant measure of confidence, and thus greater capacity for effective participation in his/her case.

This discussion of the client interview has made no reference to the skill of questioning, and indeed transformative mediation practice places little emphasis on asking questions, with one exception discussed below.[96] This lack of attention to questioning is a contrast to the considerable attention given to this subject in the lawyering skills literature.[97] That attention is understandable, because lawyers must think about putting facts and goals into legal elements and causes of action, in order to prepare and pursue the client's legal case. The point here is not that legal-element-focused questioning has no place in the lawyer's skill set, but rather that the IS skills of attentive listening, reflecting and summarizing might be used *first,* and that doing so will likely produce a greater wealth of information about both the problem and the client's goals, which can then be pursued with more focus through questioning skills as normally taught in lawyering courses.[98] And, as noted, using the IS skills first will also help increase

lawyers learn the skill of summarizing as described in the text, clients may experience more of a sense that they are in control of their own story, and less frustration. This is especially true if, as discussed in the following sections, the client-structured summary becomes the basis for developing case theory and presentation. *See infra* notes 107-17 and accompanying text.

[96] *See infra* text accompanying notes 105-06.

[97] *See, e.g.*, Moscato, *supra* note 1, at 213-15; KRIEGER & NEUMANN, *supra* note 1, at 47-49, 96-102 [both describing the same basic method of questioning, moving from broad to narrow, and exhausting each topic before moving to another]. *See also supra* note 86. As noted earlier, problem solving mediation courses also stress the use of different kinds of questions as a key mediator skill. *See supra* note 23 and accompanying text.

[98] If questioning is started too early in the interviewing, the questions can inevitably guide the client deeper in one direction and cause other possibly important matters to be lost from the picture, and then not recollected. *See* Gellhorn, *supra* note 60, at 335-37 [presenting research from medical interviewing documenting this effect, and arguing that it occurs equally in lawyer interviewing]. Thus practically, it may be that the client interview should involve two rounds – the first using the IS skills to allow for the greatest undirected flow of information, the second using questioning skills to follow up and begin formatting the information in a fashion congruent with legal rules. *See* Smith, *supra* note 60, at 580 ["Even if an attorney does not realize the legal import of all the facts immediately that should be no cause for concern. The attorney usually will have time to reflect upon the information and to identify its theoretical import after the interview."] In any event, law-

the client's sense of his/her control, confidence, and participation, contributing right from the start to the aim of client empowerment.

In sum, when the lawyer begins with an interview that follows the client's lead – using IS skills of attentive listening, reflecting, and summarizing – and thus arrives at a clear statement of the client's problem and goals that is generated, refined and confirmed by the client him/herself, the lawyer has already taken a major step in supporting the client's self-determinative authority and capacity. In addition, s/he has established a solid informational foundation for pursuing the case, and a solid relationship between lawyer and client. In short, the IS skills taught in transformative mediation courses can add concrete practical skills that advance all of the several aims of client-centered lawyering, right from the outset of the representation.

It is interesting that the literature on client-centered lawyering practices – and especially on the aim of client empowerment – focuses heavily on the initial lawyer-client interview. Presumably, lawyering practices in *later stages* of the case should *also* aim for client empowerment, and lawyers' training should include specific practices that might support this aim throughout the case. Otherwise, the empowerment gained at the outset of the case may be lost at later stages, undermining the overall client empowerment goal. The remainder of this Part will show how IS skills can support specific lawyering practices, *throughout* the unfolding of the case, that further client empowerment – and also further the problem-solving.and legal aims of the representation.

C. *Fact Gathering: Interviewing or Deposing Parties/Witnesses*

The aim of the fact gathering stage is similar to that of the client interview, but here the focus is almost entirely on gathering information about the facts of the case – whether confirming or conflicting with the client's narrative – in order to begin planning for how to address the client's problem. To some extent, however, this stage also impacts the client empowerment goal, as will be discussed. It will be evident, in this and following sections, that while the IS skills taught in transformative mediation are centrally important for the goal of client empowerment, they are equally useful in achieving the other goals of representation, including an outcome that best addresses the client's problem, in or out of court.

At one level, the value of IS skills in the fact-gathering stage

yers trained in the IS skills will tend to allow more time in the interview for undirected – but supported – client narrative, before introducing questions of a more focused nature. This is another example of how IS skills are congruent with, and add value to, the lawyering skills normally taught in courses on the subject.

looks back to the initial client interview. At that first stage, using IS skills will help draw out the fullest elaboration of the facts underlying the client's problem, including which facts the parties are likely to differ on. In addition, the summary will have identified the kinds of relief or goals the client is seeking, which the lawyer will begin to translate into legal claims as s/he contemplates possible legal action. All these elements are critical in setting the direction for fact gathering and witness interviewing: With the client goals clear, the lawyer can project what facts must be proven for the goals to succeed as legal claims, and then the lawyer knows where to go and whom to interview to gather useful evidence.[99] Thus, having conducted an effective initial interview will provide a strong foundation for fact gathering, and IS skills will have helped to make that interview as useful as possible.

In witness interviewing itself, IS skills will once again be actively used, since interviewing will involve interacting with witnesses and others in possession of useful evidence. In such interactions, the lawyer can engage in the same kind of *attentive listening* to focus on and follow the person's account, followed by *reflecting* their comments to draw them out fully, and *summarizing* to capture the key factual points supported (or undermined) by the person's account.[100] Together, these IS skills will help to draw out from every person interviewed the fullest picture of the evidence that they can provide, including evidence that contradicts the client's account as well as evidence than confirms it. In other words, the lawyer's interviewing is again based on *following rather than leading* the witness. In effect, rather than *"looking for"* the desired evidence in the witness's account, the lawyer is *"waiting for"* and helping it to emerge, without allowing his/her emerging theory of the case to influence what the witness relates or "push" it in a certain direction. As with client interviewing, the discussion here doesn't address questioning skills – not

[99] *See* KRIEGER & NEUMANN, *supra* note 1, at 141-42 [describing the use of the "legal elements" method of organizing the facts and identifying needed evidence]. In a transactional context, the fact gathering may be framed by both legal and non-legal considerations. Thus, if a deal is being structured, legal requirements will have to be met, and the investigation may in part involve determining what facts exist (or don't exist) to meet those requirements. At the same time, making the deal will involve knowing what kinds of interests are at stake for both parties and what options exist to satisfy them, both of which need to be clarified through fact gathering. In searching out facts on both these dimensions, the IS skills discussed in the text will be of substantial value.

[100] As noted at the end of the previous section, IS skills can inform specific lawyering practices not only in the initial client interview, but throughout the unfolding of the case, that are supportive of client empowerment – and the other important aims of the representation. The discussion here in the text begins to show how this is the case, and subsequent sections will continue to illustrate this. At the same time, there are fewer references in some of these sections to literature that discusses client-empowering practices in the later stages of the case, because there is simply less discussion of such practices.

because they are not important, but to make the point that using the IS skills of reflection and summary *first,* and deferring questions as long as possible, may draw a fuller account from the witness.[101] With this approach, the lawyer will often elicit more information than is expected, whether favorable or unfavorable to the client's case.

Using IS skills also helps by simply creating a more "welcoming" climate for the person being interviewed: that is, the lawyer's method of interviewing conveys a real sense of interest in what the person has to say, however it may affect the case, and this itself leads the witness to be more forthcoming. This is especially so since, using IS skills, the lawyer's reflections and summaries will include and not soften the "heat," the conflictual and emotional parts of the statements made – implicitly encouraging the witness to reveal everything s/he has to say, in whatever manner s/he wishes to say it.[102] In this way, each interview will contribute to better preparation for the further pursuit of the case by uncovering more evidence, favorable or unfavorable. And advance notice of unfavorable evidence is as important as discovery of favorable evidence. Finally, the welcoming climate created by IS skills create a more positive relationship with the witness, which can be helpful if the case goes to trial and the witness is examined in court. The favorable impression made by IS skills in the interview stage can pay dividends later in examination at trial.[103] The use of IS skills as taught in transformative mediation is thus strongly supportive of effective fact gathering and witness interviewing.

The IS skills and methods just discussed may be even more helpful in interviewing or deposing the opposing party. For example, the use of reflections, prior to more interrogatory questioning, can help the deponent party feel their statements are being understood, and can perhaps shift, even if slightly, their suspicious posture towards the deposing lawyer. As with other witnesses, it can invite them to clarify

[101] *See supra* note 97-98 and accompanying text. The suggestion here can be seen as consistent with the advice of some lawyering skills texts regarding good questioning methods, which involve starting with open, broad questions that elicit client/witness narrative, and listening to the resulting narrative with few if any interruptions. *See, e.g.*, KRIEGER & NEUMANN, *supra* note 1, at 89 ["do not leap in with questions"]. Only after this does the lawyer follow up with specific questions. *See id.*, at 47-49, 96-102 [presenting basic principles of questioning in this manner and describing the specifics of "cognitive interviewing"]. The practice suggested here would enhance this method, by adding reflections and summaries that can draw out and enrich the initial client/witness narrative, thus providing a broader platform for questioning once it begins.

[102] *See supra* text accompanying note 42.

[103] *See* KREIGER & NEUMANN, *supra* note 1, at 118-19 ["[Y]ou will learn more [from witnesses] if your mind is open and receptive [and] witnesses will trust you more easily. . . . There is a fair chance you will have to deal with this witness again, and the witness may treat you better in the courtroom if [s/he] has experienced you as a reasonable and fair minded person."]

what they said in a non-confrontational manner, enhancing the quality and quantity of information gathered in the deposition and improving the overall tone of communication, and this can impact not the only the deposition itself, but future interactions such as settlement discussions.[104]

Another IS skill can be mentioned here which may help greatly at this stage – and even earlier. Although transformative mediation training generally deemphasizes asking questions, one IS skill does involve asking a certain kind of question. After listening to and reflecting a statement from a witness (or party deponent), the lawyer can add more value by asking the kind of simple question described in Part I as *"checking-in."*[105] That is, the lawyer can end the reflection by asking, "Did I understand you correctly?" or "Did I leave something out?" or "Was that close to what you said?" The check-in question reinforces the witness's sense of the lawyer's genuine interest in his statement: the lawyer really wants to "get it right," not just hear "what s/he's looking for." This sense of genuine interest is likely to draw out the witness to the fullest, because it carries a very different tone than the kind of "probing" question often asked to get the information the lawyer wants and needs. The probing question, because of its investigatory tone, can actually evoke defensiveness and caution, leading to a less than fully forthcoming response. The check-in question, with its curious rather than probing tone, is more likely to set the witness at ease and elicit a full response.[106]

Equally important, the checking-in question really does serve to catch mistakes – either in the lawyer's understanding of the witness's statement, or in the witness's recollection of the facts. If the mistakes

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[104] *See infra* text accompanying notes 122-24. As discussed there in the text, interaction with the opposing party is likely to be clouded by suspicion and hostility, whether in settlement discussions or in interviewing/deposing the party. IS skills can "defuse" these negative attitudes, and even generate more openness and receptivity. This may be a greater challenge in depositions, which are "public record" and therefore generate more guardedness, than in confidential settlement discussions, where one's guard can be lowered. But IS skills may help to change at least the degree of mistrust and guardedness that typically occur in a party deposition.

[105] *See supra* text accompanying note 43.

[106] Again, lawyering skills texts do recognize that probing questions can be off-putting for witnesses (and clients), and recommend holding them off until after an initial narrative is finished. *See, e.g.*, KRIEGER & NEUMANN, *supra* note 1, at 89 ["[D]o not leap in here with questions. [M]any clients want to make sure from the beginning that you hear certain things about which the client feels deeply. If you obstruct this, you will seem remote, even bureaucratic, to the client."]. *See also* Gellhorn, *supra* note 60, at 323-26, 335[reporting research on medical interviewing that documents the commonness, and ineffectiveness, of probing with questions early on]. The suggestion here is that the check-in question can help draw out that narrative more fully, before probing begins, and that this will help both in fact-gathering and in the impression left on the witness.

are not caught right away, then the case will be built on facts that can be shaken later on; while if the mistakes are caught and corrected at the outset, then the factual record, and every argument built on it, is stronger.

Of course, just as checking-in serves a valuable function in interviewing witnesses and seeking evidence, it serves the same functions earlier on, in *the initial client interview* – helping to elicit a full and accurate picture of the client's problem and the goals s/he is seeking to achieve. In that interview, the check-in question can be used as a follow up to every reflection and summary offered by the lawyer. Moreover, in the client interview, yet another benefit flows from checking-in after reflecting or summarizing: the check-in puts the client firmly in charge of the "final" version of the facts of the case and the goals being sought. It allows him/her to correct whatever the lawyer reports having heard – and indeed to correct and edit whatever s/he has initially said – so that the ultimate statement of the case is exactly as the client wants it. This contributes powerfully to the aim of client empowerment, in addition to strengthening the factual and theoretical foundation of the case.

D. Theory Development: Finding the Legal Logic and Narrative "Story" of the Case

Beyond identifying the client's goals and assembling a solid foundation of facts about the case, another central task of the lawyer is to develop a "theory" of the case in both the legal and narrative dimensions.[107] In the legal dimension, the theory has to match client goals with possible legal claims, and match the known facts to the required elements of those claims. In the narrative dimension, the theory has to shape the client's concerns and factual account into an appealing and powerful "story" of what happened and why the client deserves relief.[108] This "case theory" will be the framework for presenting the

[107] *See, e.g.*, KRIEGER & NEUMANN, *supra* note 1, at 131-81 [discussing different models and skills involved in developing a persuasive theory of the case]; Binny Miller, *Teaching Case Theory*, 9 CLIN. L. REV. 293, 297 (2002) ["Case theory is one of the most important "subjects" that a clinical professor teaches. As the key means of framing a case, case theory is *the* central problem that lawyers confront in putting a case together."]; James A. Tanford, *Preparing a Case Theory* (available at http://www.law.indiana.edu/instruction/tanford/b584/CaseTheory.pdf, last visited Dec. 12, 2012) ["Developing a theory of the case will be the single most important thing you do."]. *See also* LUBET, *supra* note 1, at 13-22 [emphasizing the importance of case theory in trial practice]. The task of developing case theory is thus seen as a core skill by teachers of both basic lawyering skills and trial practice. The use of the term "finding" to describe this task, in the title of this Section, is inspired by Krieger and Neumann's discussion, in their text, of "story-finding skills." *See* KRIEGER & NEUMANN, *supra* note 1, at 49-50, 172-75.

[108] *See* KRIEGER & NEUMANN, *supra* note 1, at 141-47, 159-75, 178 [describing the "legal

client's claims and arguments in a manner that is understandable and persuasive – either in settlement discussions with the other party, or in pleadings and other litigation documents.[109] In either context, the theory of the case lays the foundation for a convincing presentation, legal and factual, that justifies the client's claims to the relevant audience. Developing this theory, working with the facts and the law, is a matter of analysis and creativity on the lawyer's own part.[110] Can the kind of interactional support skills taught in transformative mediation still be useful at this stage, where the lawyer is working alone and not interacting with others? What value can IS skills bring to this lawyering task, and what can they do to further the client empowerment aim at this stage?[111]

One part of the answer lies in looking back to the client and witness interviews.[112] The narrative initially given by the client, as elabo-

elements" and "story" models of persuasive fact organization, which correspond to the two dimensions mentioned in the text, and concluding that most cases will involve a combination of these models]; Miller *supra* note 107, at 303-04 [". . .case theory involves a melding of law and story, not just pure storytelling."]; LUBET, supra note 1, at 19-20 [noting that the case theory must include both the legal and narrative dimensions].

[109] Case theory is now considered important for the drafting of pleadings, as well as overall case preparation. The narrow aim of pleadings in a legal action is to establish jurisdiction, begin the litigation by giving notice of the nature of the claim, and put the client's goals into the form of a legally cognizable cause of action. *See* Elizabeth Fajans and Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, at 9-13 (available at http://works.bepress.com/elizabeth_fajans/20); FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS [hereinafter, FEDERAL PRACTICE MANUAL], Sec. 4.1.B. (available at http://federalpracticemanual.org/node/24). However, both practitioners and skills teachers increasingly recognize that pleadings also serve the broader function of presenting the theory and "story" of the case, in an organized form, in order to make the client's claims understandable and persuasive. *See* Fajans and Falk, *supra*, at 16-19; FEDERAL PRACTICE MANUAL, *supra*, at Sec. 4.1.B.2. Indeed, the skill of developing case theory, and giving that theory an intelligible narrative form, is taught in quite similar ways in courses on pre-trial advocacy and courses on basic lawyering skills. *Compare* RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE (2nd ed. 1994) 241-48, 304-09 [discussing persuasive case theory in the context of drafting motions], *with* KRIEGER & NEUMANN, *supra* note 1, at 131-181[discussing different models of theory development as a basic lawyering skill]. It should be noted that drafting pleadings is a skill that is usually taught separately from the basic skills of interviewing, counseling and negotiation, whether in a basic legal writing course or in an advanced course on pre-trial practice.

[110] The lawyer's own analytical and creative efforts are also seen as central in many of the other tasks involved in the lawyering process. *See, e.g.,* KRIEGER & NEUMANN, supra note 1, at 31-32, 172-75.

[111] As noted above, *see supra* note 100, there is not a great deal of attention to the client empowerment goal in this or other stages of representation beyond the initial interview. However, that aim continues to be an important one throughout the case, so that goal is considered here too.

[112] *See supra* text accompanying notes 79-106. Although the text here refers to "witness" interviews, the point includes interviews/depositions with the opposing party also. Indeed, the summary of those interviews may add even more to the clarification of differences between the parties on major issues.

rated in response to the lawyer's *reflections* and digested in his/her *summary,* will have identified the key matters of concern to the client on which there are differences with the other party, and a good initial picture of what those differences are. Therefore, if IS skills have been employed during the initial interview, it will produce not only a good statement of the goals of the representation, but a good outline of the issues in contention, the positions being taken by the parties on those issues, and the facts alleged in support of those positions. In addition, using IS skills during witness interviews will have added more shape and substance to the picture of the case. Thus the client and witness interviews provide the infrastructure on which to build the theory of the case. While this general point is not novel, the added value is the likelihood that this infrastructure will be fuller and sounder because of the IS skills used in the client and witness interviews to draw out the fullest information about the client's problem and goals.

Furthermore, in the narrative dimension of theory development, the IS skills used in interviewing the client can help the lawyer to fashion a more vivid and compelling story of the client's situation and needs. The many *reflections* offered by the lawyer during the interview will have given him/her greater familiarity and fluency with the client's own "voice" – the actual language and tone the client uses to describe what has happened and what impact it has had. The mediator's *summarizing* during the client interview, highlighting the client's own "framing" of each concern, will similarly help capture the client's unique voice. In short, using IS skills in the client interview can generate richer narrative resources and these resources can help the lawyer put the client's voice more fully into the "story" of what happened.[113] The result will be a story that has greater immediacy and impact in the ears of its audience.

In the legal dimension of case theory, the lawyer obviously will have to convert the client's problems and goals into legal terms, laying out a valid cause of action as well as legal and factual bases sufficient to prevail on a motion to dismiss (and/or for summary judgment) if

113 Lawyering skills teachers recognize the importance of bringing the client's voice into the presentation of the case. See, e.g., KRIEGER & NEUMANN, supra note 1, at 173 [discussing the importance of "hearing your client's voice" in developing a persuasive case theory]; Fajans and Falk, *supra* note 109, at 43-45 ["The allegations in a more artful complaint comprise a . . . narrative told from the plaintiff's point of view and told, if not in the plaintiff's own voice, at least in a voice that the plaintiff can recognize."]; Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 563-70 (1994) [arguing passionately that bringing the client's perspective into case theory not only helps develop "a more winning case theory" but also "advances an argument that matters to him on a personal or political level, or makes room for his voice"].

the case goes forward.[114] However, s/he can draw from interview summaries, from both client and witness interviews, in doing this. The *summarizing* done during the interviews can be collected into a single memo for each interview; and since summarizing with IS skills tends to elicit a fuller and more accurate picture of goals and facts, the *summary memos* will contribute in several ways to developing a sound legal case theory: They can help identify which concerns of the client should be put forward as specific causes of action in the pleadings, and they can provide the basis for a fact statement that alleges facts necessary to prove required legal elements and also tells a compelling story.[115] They can also help the lawyer anticipate where opposing counsel will disagree, regarding facts alleged and positions taken, and plan for how to engage the opposition. Finally, the summary memos can give a clear picture of what matters most to the client, and where s/he and the other party differ most sharply, giving the lawyer direction for what to emphasize most in the case narrative, and where to aim the sharpest arguments. At the same time, they can indicate where stipulations can be made and issues removed from contention.[116]

In sum, a case theory based on a fully-formed, client-generated picture of what matters in the case and what s/he believes occurred, in the client's own voice – the kind of picture that IS skills help to elicit – can produce a more powerful legal argument and narrative story, for either negotiation or litigation purposes.

But still more is achieved through using IS skills, because theory development practice based on IS skills can help continue the client's experience of control over the unfolding of the case, and hence the client's experience of self-determinative capacity, or empowerment. Frequently, when a client first hears the arguments or sees the legal documents composed by the lawyer, the client is left struggling to understand what is being said and why. The formal statements of facts, the framing of issues or causes of action in legal terms, often seem utterly remote from the client's understanding of what happened and what they've said they want. And it is often difficult and time con-

[114] *See, e.g.,* FEDERAL PRACTICE MANUAL, *supra* note 109, at Sec. 4.1.B.3.; NEUMANN, *supra* note 109, at 243-45.

[115] See, e.g., FEDERAL PRACTICE MANUAL, *supra* note 109, at Sec. 4.1.B.2-B.3.; NEUMANN, *supra* note 109, at 245-48, 304-07. For an illustration of the potential usefulness of interview summaries (put into single memo form) for developing case theory, *see* KRIEGER & NEUMANN, supra note 1, at 145-47, 153-56 [presenting charts that organize the known facts of a sample case in order to establish both the required legal elements and the chronology, and listing "client interview memo" most frequently as the source of those facts].

[116] Here, too, the summary of interviews/depositions of the opposing party will also help to clarify where the parties differ and where they do not. *See supra* note 112.

suming for the lawyer to explain to the client what the arguments and documents mean, relating them to the client's original account of their problem and goals. As a result this explanation may be ineffective, or may not occur at all, and if this happens the client begins to lose their sense of control over their own case.[117] The impact may be less intelligent and effective participation by the client as the case unfolds further, and therefore less success in achieving the client's goals. It may also be the undermining of the client's self-determinative power, since one cannot effectively direct what one cannot understand. In short, the representation may not fully achieve its aims.

However, if there is a clear link between the client interview and the lawyer's theory and presentation of the case – in substance, structure, and actual language and tone – then the client can see how the lawyer's work expresses his/her "story" and goals, and can thus continue to experience ownership over the case being pursued in his/her name.[118] The lawyer allows the client to lead the case rather than follow along behind. Both goals are achieved: The theory and presen-

[117] *See* Dinerstein, *supra* note 49, at 550 & n. 228 [citing references to "the barriers that lawyers . . . create to impede . . . client story-telling" and noting that "For many clients, the need to present their cases through lawyers can be quite frustrating."]. Some scholars argue explicitly that clients should be fully included in decision-making throughout the case, even on matters of strategy usually seen as within the lawyer's "sphere of expertise" – such as the development of the theory of the case, and other matters of "legal strategy." *See* Kruse, *supra* note 46, at 522-24 [*citing* as examples of this view: Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Meaning*, 44 BUFF. L. REV. 71 (1996); Miller, *supra* note 113; Miller, *supra* note 107]. My own experience in litigations, both as a client and as of counsel, has often reflected what is described here in the text. Where the clients were community organizations with lay-boards of directors, and the written complaint required their approval, they sometimes had great difficulty understanding how the arguments being offered, and the complaint itself, reflected either their grievances or their account of the facts behind the case. Explaining this to them was quite difficult in some cases. In others, it was much easier, because the complaint – and especially the statement of facts – was composed almost directly from notes of client conferences, and often included their own verbal formulations.

[118] As mentioned in the earlier discussion of the client interview, *see supra* note 95 and accompanying text, allowing and supporting client control of "story-telling" is an important element of client empowerment. While this support can start in the client interview, it becomes even more important in developing case theory, as discussed here, and in presenting the client's case in court, as discussed below, *see infra* text accompanying notes 154-55. At both of these stages, the client's story takes on concrete form, and the client-centered lawyer needs skills that help keep that form in the client's authorial, or at least editorial, control. Dinerstein cites a report of one Supreme Court litigant's complaint that "I wish we could present the case. I wish it doesn't have to be through an attorney. I feel kind of cheated." *See* Dinerstein, *supra* note 49, at 550 and n. 228. The more that the case theory and arguments, in negotiation or in court, reflect the client's own narrative as s/he told the story, the less cheated – and the more empowered – the client will feel. *See* Miller *supra* note 113, at 564-65 [". . . client inclusion [in case theory development] values client choice for its own sake. . . . [C]ase theory is the piece of the case that goes most to the heart of who the client is by determining how his story is told. Because the client is inside the story, the client has the right to decide how to tell it."].

tation of the case is sharp and powerful, contributing to the eventual attainment of the client's goals (in negotiation or in court); and at the same time, client empowerment is supported and furthered.

E. Conducting Settlement Discussions: Problem-Solving and Interactional Dimensions

In settlement discussions, one aim is clear: to reach an agreement on how to settle the case on terms that effectively resolve the client's problem. However, there is often another aim as well, for the parties – to conduct the discussions in a way that improves, or at least does not worsen, the quality of the interaction between them.[119] Since in client-centered lawyering the lawyer seeks to achieve the client's goals defined broadly, and not in narrow legal terms, addressing this kind of

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[119] Research supports the view that parties in conflict often care about the quality of process (interaction) as much as the outcome (problem resolution), *see supra* note 7 and accompanying text. Therefore, it is unfortunate, but not surprising, that the lawyering literature does not give much attention to the *skills needed* to achieve interactional goals in settlement discussions. *See, e.g.*, KRIEGER & NEUMANN, *supra* note 1, at 283-91 [focusing on the problem-solving skills needed in settlement negotiation (although recognizing interactional *goals* as important)]. *See also* ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATION: SKILLS FOR EFFECTIVE REPRESENTATION 349-519 (1990) [offering a lengthy presentation on the adversarial and problem-solving approaches to negotiation skills, with no significant reference to interactional support skills]. This is not surprising because experts in conflict resolution generally emphasize the problem-solving dimension over the interactional one. This is true in the mediation literature, where the dominant approach to practice, and much of the literature, emphasizes problem solving. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 55-77 (1994) [summarizing the dominance of the problem-solving approach in mediation]; Menkel-Meadow, *supra* note 2, at 225-28 [extolling the problem-solving approach]; Bush, *supra* note 2, at 979-984 [discussing the prominence of the problem-solving approach in mediator performance tests]. It is still more so in the negotiation literature, where the emphasis of even "modern" or integrative negotiation theory is on solving problems by creative integration of complementary needs and interests. *See* Menkel-Meadow, *supra* note 26; Gifford, *supra* note 27; Lax and Sebenius, *supra* note 26 [all presenting negotiation as a problem solving process based on integration of complementary interests]. Only a few "alternative framings" of negotiation have emerged, primarily from feminist scholars who argue for an approach to negotiation focused more on interaction and relationship. *See* Barbara Gray, *The Gender-Based Foundations of Negotiation Theor*y, in R. LEWICKI ET AL., eds., 4 RESEARCH IN NEGOTIATION IN ORGANIZATIONS 59 (1994) [critiquing the rational, integrative model of negotiation and suggesting a relational, interactional alternative]; Deborah M. Kolb and Gloria G Coolidge, *Her Place at the Table: a Consideration of Gender Issues in Negotiation,* in IRA & SANDRA ASHERMAN EDS., THE NEGOTIATION SOURCEBOOK 259 (2001) [suggesting the outlines of a feminist, relational view of negotiation]. In this context, it is not surprising that lawyering literature on the settlement discussion stage emphasizes problem-solving skills. However, it is unfortunate, because this stage of the representation involves direct interaction with the other side, and it therefore carries great potential for addressing the client's interactional as well as problem-solving goals. Here, again, IS skills have much to offer in enhancing the lawyering skills curriculum as it teaches about settlement negotiation.

interactional concern should be an important aim of the representation.[120] In the task of conducting settlement discussions, the more effective the lawyer's IS skills, the more effective s/he will be in achieving both kinds of goals.[121]

In this stage of representation, the entire process is one of interaction with the opposing counsel and their client – but it is an interaction frequently clouded by suspicion and hostility. Often, the lawyer in particular is viewed by the opposing party and their counsel as the worst person in the room, and is practically demonized. There can be a deep level of suspicion and antagonism, especially from the opposing party, and this attitude can undermine the productivity of the discussions on both dimensions, problem resolution and interpersonal interaction.[122]

Effective use of the IS skills taught in transformative mediation can be of real help at this stage. For example, *attentive listening, and using reflections and check-ins* with opposing counsel (and parties), can help convey the message that their statements are being taken

[120] *See supra* text accompanying notes 48-57. The interactional dimension can be important to the client in many kinds of cases, even beyond the obvious ones where there is an important ongoing relationship between the parties. *See* Vicki and Dusty Rhoades, *Transformative Mediation in the District Courts*, available at http://www.transformativemediation.org/?q=node/158 [last visited July 11, 2012]; Joseph P. Folger, *Transformative Mediation and the Courts: A Glimpse of Programs and Practice,* in SOURCEBOOK, *supra* note 4, at 165, 167-68; 172-75; Miller, *supra* note 89, at 182-88 [all documenting how parties to court-based mediations, in all kinds of non-relationship-based cases, care about interactional issues that are addressed in transformative mediation]. These sources suggest that the same would be true in a broad range of matters brought by clients to lawyers.

[121] In most discussions of lawyering skills in negotiation, the skills focused on are those of problem solving. *See, e.g.*, KRIEGER & NEUMANN, *supra* note 1, at 283-91; Brest and Krieger, *supra* note 2; Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905 (2000). Even though there is recognition that interactional goals are important to some clients, interactional issues seem to be viewed as one type of problem that problem-solving skills can address, rather than as a different dimension of concern that can only be addressed by different skills. Perhaps because of this orientation to the negotiation process, the skills taught in problem-solving mediation courses are seen as adding value to the curriculum. However, while there is certainly value in lawyers having the kinds of problem-solving skills taught in many mediation courses, the point of this Article is to show that there is *also* value in their having the IS skills that are taught specifically in transformative mediation courses.

[122] Recent literature on negotiation, drawing from clinical psychology research, documents the way in which adversaries' mutual suspicions can result in each side almost automatically discounting the reliability of whatever is said by the other, as well as attributing negative motivations to one another, both of which increase the likelihood negotiations will fail. *See* Bush, *supra* note 7, at 11-12, and nn. 20-21 (*citing* Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in KENNETH J. ARROW ET AL. EDS., BARRIERS TO CONFLICT RESOLUTION 26 (1995) [hereinafter, BARRIERS], and Robert H. Mnookin and Lee Ross, *Introduction,* in BARRIERS, *supra*, at 3, 14-15) [both sources describing strategic and cognitive barriers that frustrate rational, integrative bargaining and result in impasse]. Lawyers engaged in adversarial negotiations are probably often impacted by such "cognitive barriers" in the perceptions of the other side.

seriously and understood, and this itself can shift their negative posture. It can create a different tone for the exchange, one of interest and openness rather than resistance and adversariness, thereby disarming the other side's natural defensiveness and hostility.[123] Beyond improving the overall tone of communication, using IS skills can also invite the other side in a non-confrontational manner to clarify or add to what was said, enhancing the quality and quantity of information that is put on the table. Since withheld or distorted information is a common cause of impasse in negotiation, this enhancement is a real benefit to the discussions.[124] If the lawyer listens attentively to the opposing counsel and party, rather than "listening for" weaknesses or resistance, and then resists making an immediate response but instead reflects and checks in about what s/he believes was said,[125] this can have many positive impacts:

- it can help identify mistakes of understanding that could undermine the discussion;

[123] This is one of the arguments of the feminist approaches to negotiation. *See* Gray, *supra* note 119; Kolb and Coolidge, *supra* note 119. It is also suggested by research on the effect of "emotional regard" on negotiator cooperation. *See* Keith G. Allred et al., *The Influence of Anger and Compassion on Negotiator Performance*, in NEGOTIATION AND SETTLEMENT ADVOCACY: A BOOK OF READINGS 329 (Charles B. Wiggins and L Randolph Lowry eds., 2d Ed. 2005) [finding that expressions of positive regard by parties result in cooperative and value-increasing bargaining behaviors]. One striking instance of the phenomenon noted in the text is reported by a lawyer who had learned IS skills in a transformative mediation course while in law school. He recounts: "As a Docket Attorney for the IRS Office of Chief Counsel I often find myself utilizing the tenets of transformative mediation, recognition and empowerment, to settle highly contentious cases with difficult taxpayers. One such case reached my desk after having been through a long and strained examination process and subsequent Appeals process. After one face-to-face meeting with the taxpayer and his attorney, the taxpayer agreed with the IRS's position on the issues and conceded the case. After the meeting, the taxpayer's attorney informed me that our meeting was the first time throughout the entire process where the taxpayer spoke and was actually listened to. This helped clarify the taxpayer's understanding of his position and the IRS's position on the issues and ultimately led to the resolution of the case. A little recognition and empowerment can go a long way in helping to resolve even the most contentious tax cases." [Email received by the author from the lawyer involved, July 26, 2012.].

[124] *See* Bush, *supra* note 7, at 8-12 [summarizing the literature on informational and cognitive "barriers" that lead to informational scarcity or distortion in negotiation, with the result that the discussions needlessly fail to reach resolution].

[125] In some lawyering skills texts, listening and reflection methods similar to the IS skills mentioned here are discussed in the context of *client interviewing*. *See, e.g.*, KRIEGER & NEUMANN, *supra* note 1, at 81-87 [discussing "active listening" and related skills]. *See also supra* notes 83-93 and accompanying text [discussing several sources that support the use of interviewing methods similar to attentive listening and reflection]. However, when settlement negotiations are addressed, the focus is almost entirely on problem-solving skills (or more adversarial methods). *See id.*, at 350-54 [describing methods that parallel those of classic integrative negotiation texts]. For this stage of the case, the value of IS skills does not seem to be recognized at all. This is ironic since, as noted here in the text, the settlement discussion stage is interactional in its essential character.

- it can prompt further elaboration of what was said, thus adding further information, substantive and emotional, to the table;
- it can prompt the other side, hearing a reflection of what they said, to modify or retract some of the statements made;
- it can elicit clarification of the arguments being made, allowing for a more intelligent response, whether to accommodate or resist them;
- it can allow the lawyer to hear more fully whatever is being said – including possible points of openness, creativity, or mutuality that would otherwise be missed;
- it can avoid or slow down a reactive back-and-forth between the sides, and instead prompt more reflection and deliberation on everyone's part.[126]

In all these ways, IS skills used during settlement discussions are helpful in making those discussions a more thoughtful, deliberate, and therefore productive exchange – one that is more likely to produce a creative resolution of the problem.[127]

These dynamics apply to the interaction between all those involved, clients *and* lawyers. So even when discussions are held between lawyers alone, without clients present, the dynamic of suspicion and hostility may undermine the *lawyers' interaction*, and IS skills can help to avoid this result. However, viewed from a different angle, the above comments carry particular significance when clients *are* present, whether or not actively participating in the discussions. When clients are present in settlement discussions, they are in effect returning to the conflict interaction they were embroiled in when the matter began. In this environment, it is easy for the dynamic of negative interaction to resurface between them – with each party falling back into self-doubt, suspicion, and mutual alienation – even though both are

[126] All of these are precisely the kinds of things that occur regularly in transformative mediation, and in effect the lawyer using IS skills as suggested here is acting in a fashion similar to a transformative mediator, and achieving similar impacts. *See Core Practices*, *supra* note 4, at 39-44; Miller and Bush, *supra* note 39, at 211-18, 221-25; James R. Antes et al., *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS Program*, 18 HOFSTRA LAB. & EMP. L.J. 429, 434-61 (2001) [all describing positive impacts, in transformative mediation, that are similar to those mentioned here in the text]. Obviously the lawyer here must still fulfill the duty to represent the interests of his/her client, but this "mediative" role is consistent with that duty because it has the impact of improving the productivity of the settlement discussions, which is in the client's ultimate interest. In addition, it helps the client with improving the interaction itself, which may be an important client interest, so again the duty to serve the client's interests is met.

[127] Of course, even with the best problem-solving and IS skills the discussions may not produce a resolution. In that case, however, the use of IS skills during the discussion are likely to lead to more clarity and less animosity, and therefore a clearer and less adversarial understanding of differences and a better foundation for next steps beyond the negotiation.

now accompanied by their lawyers.[128] Productive settlement discussion will be very difficult when this occurs, and the undesired negative interaction will continue or even worsen.

However, a lawyer's effective use of IS skills can support the occurrence in the settlement discussions of the same kind of "empowerment and recognition shifts" for the parties that often occur in transformative mediation. These shifts would reverse the parties' negative interactional dynamic, thereby helping the client achieve one of his/her goals by improving the quality of the interaction with the other party.[129] In addition, these shifts would help the discussions, even with clients present, to proceed more positively and productively toward resolution of the client's problem. In short, since settlement discussion with the clients present is *itself* a conflict interaction, the IS skills that work in mediation to change interaction positively, as well as facilitate resolutions, can have the same effects in settlement discussions.

There is one final way in which IS skills make a difference in the settlement discussions phase, and this involves the client empowerment goal of the representation.[130] Frequently, settlement discussions place the lawyers in the driver's seat and the clients in the back – either absent entirely, or else observing but not actively participating, and often not understanding what is transpiring in front of them. Some of the literature on client-centered lawyering discusses this phenomenon as disempowering the client, leaving him/her largely unengaged in the process until a decision to accept or reject a settlement has to be made.[131]

This experience of having things done *for* them rather than participating actively denies clients the full experience of self-determination in the pursuit of their claims. And even when the discussions follow a problem-solving rather than an adversarial approach, for example in the emerging practice of "collaborative lawyering," the problem-solving effort is often largely directed by the lawyers on both sides, who exert substantial control over the process (and sometimes

[128] Regarding the negative conflict interaction dynamic, *see Transformative Theory*, *supra* note 4, at 17-18; BUSH & FOLGER, *supra* note 4, at 45-53 [both describing the nature and the impact of the "negative conflict cycle" that results in the disempowerment and mutual alienation of both parties].

[129] Regarding the nature of empowerment and recognition shifts, and their central importance to achieving positive interactional change, *see supra* notes 29-30 and accompanying text; *see also* BUSH & FOLGER, *supra* note 4, at 53-65 [describing the character of these shifts and their impact on "regenerating" positive interaction between the parties].

[130] *See supra* text accompanying notes 49-51.

[131] This is argued strongly in the literature on social justice lawyering, which sees client empowerment as a major goal of lawyering practice. *See supra* notes 58, 63-64 and accompanying text.

the decisions made).[132] That is, while clients may participate in the discussions, it is the lawyers who direct and drive the process. Much like the mediator in a problem-solving mediation process,[133] the lawyers are assumed to be the experts in problem solving, and the clients are expected to let them direct the process, with client input in the form of giving or withholding assent to specific proposals as they emerge from the lawyer's problem-solving efforts. There is some logic to this lawyer-directed approach to negotiation, parallel to the logic of problem-solving mediation, since if clients took a more central role, the discussions might lack direction, become over-emotional, and fail.[134] So the limitations on client participation might seem useful, even if they decrease client empowerment.

However, if the lawyer has learned IS skills through transformative mediation training, s/he can use those skills to facilitate a discussion that offers far more direct engagement and self-determination to the clients – on both sides – without sacrificing problem-solving productivity. By allowing clients to take the lead, and then listening attentively and following those comments (by both parties) with reflections and check-ins, the lawyer can support the clients' active participation and interaction, and help them achieve all of the bulleted benefits mentioned above.[135] Further, the lawyer can use IS summarizing skills, at appropriate intervals, to help the clients themselves track the progress of their discussions and make choices about what to focus on, when, and how.[136]

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[132] *See, e.g.*, John Lande, *The Problems and Perils of Collaborative Law*, DISPUTE RES. 29, 30-31 (Fall, 2005); Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases*, CHAPTER 5 (LAWYER-CLIENT RELATIONSHIPS IN COLLABORATIVE LAWYERING) (2005) [available at: http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/p5.html]; John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO STATE LAW JOURNAL 1315, 1368-72 (2003). These sources all document the degree of lawyer control over the negotiation process in collaborative lawyering, even though clients are almost always present, and are supposed to be active participants, in CFL negotiation sessions. Given this finding, it would seem still more likely that lawyers take control, and clients are "disempowered", when negotiation sessions are conducted between problem-solving lawyers who follow a standard approach to representation rather than the collaborative model.

[133] *See supra* text accompanying notes 25-28.

[134] *See* Kolb and Kressel, *supra* note 13, at 470-74 [reporting that some mediators explain their process-control practices by reference to these settlement-frustrating impacts of permitting greater party control].

[135] *See supra* note 126 and accompanying text.

[136] The transformative mediator uses the same skills to help the parties do the same things, for themselves, in mediation. *See Core Practices*, *supra* note 4, at 36-41; BUSH & FOLGER, *supra* note 4, at 133-64 [both sources presenting and explaining examples of IS practices as used in transformative mediation, and their impacts] . Again, the point here is that the skills learned in a transformative mediation course will have value as lawyering skills in client-centered legal practice.

In all these ways, the lawyer's IS skills can help the clients to be more thoughtful and deliberate, and therefore to have a productive exchange – leading either to a negotiated resolution, or to a clear and non-acrimonious understanding of their differences as they move forward. Equally important, the lawyer's use of IS skills transforms the clients' experience of these discussions from an alienating, disempowering one, to one that is powerfully engaging and supportive of the clients' sense of self-determination. If regaining and increasing this sense is one important goal of the representation, as it is in client-centered lawyering, then IS skills are of great value in the settlement discussions phase – for not only the problem-solving but also the interactional and empowerment dimensions of the client's goals.[137]

F. Oral Advocacy: Pre-Trial and Trial

Clearly, an important part of the lawyering process, where settlement discussions are not successful, is engaging in oral advocacy on the client's behalf, whether in the pre-trial, trial, or appellate stages of a representation. The primary aim, in these stages, is to persuade the relevant audience of the justness of the client's cause, although as discussed above regarding other stages, the goal of client empowerment may also be relevant at these points in the case.

Trial advocacy skills are usually taught separately from the basic lawyering skills discussed above, and usually in separate advanced courses. Though they share some common elements with the basic skills – including questioning and "storytelling" for example – they involve particular expertise in the processes of examining witnesses in court (and witness preparation), complying with rules of evidence, etc. Those aspects of trial advocacy training are beyond the scope of this Article. However, some aspects of the lawyer's work at the trial stage can be commented on here, because trial advocacy commonly involves an *interaction* between the lawyer and someone else – the intended audience of his/her presentation.[138] Once that interactive dimension of trial advocacy is acknowledged, the importance of IS skills becomes

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137 As discussed throughout, client-centered lawyering assumes that clients are interested not only in favorable outcomes, but in participating in the *process* of the case in a way that strengthens their control and self-efficacy, and their sense of decency toward the other party. *See supra* text accompanying notes 48-57. In transformative mediation theory, the same assumption is made about the parties to mediation, and the practices followed therefore aim at party empowerment and recognition. *See Transformative Theory*, *supra* note 4, at 22-24 [explaining the premises of human capacity and desire for both autonomy and connection, which underlie the transformative model's approach]. Again, the congruence between transformative skills and client-centered lawyering skills is clear.

138 *See, e.g.*, LUBET, supra note 1, at 13-22, 317-26 [discussing the task and skills of "storytelling" in trial advocacy, and the need to consider the audience – the jury – in constructing and telling the story of the client's case].

apparent.

In the typical litigation, the lawyer interacts with several different types of "audience" or interlocutor – including the court, opposing counsel, witnesses and juries. IS skills can lead to more effective lawyering with each of these interlocutors, and each will be considered briefly here.

Interaction with the Court. Whether in pre-trial hearings or at trial, the lawyer is frequently interacting with the court through oral advocacy. Of course, lawyers are taught from their earliest lessons that one must be extremely respectful in addressing a judge.[139] But what does that mean, and what else beyond being respectful can be helpful in the interactive dimension of oral advocacy? IS skills provide useful answers to these questions. Some examples:

> — In direct argument to the court on contested motions, the IS skills of *attentive listening* to opposing counsel, coupled with *reflection*, can be a good way to introduce one's own argument: "Your Honor, opposing counsel has just argued that. . . . . . However, in the instant case this principle does not apply, because. . . ." Having listened closely, and accurately heard and reflected the other side's argument, helps the lawyer to launch her own argument more powerfully. The use of IS skills can thus support a more effective argument to the court. These skills can also convey a respectful and civil attitude toward opposing counsel, which may itself communicate respect to the court in whose presence the arguments are being made.

> — When the judge raises a question about something in the lawyer's written papers or an oral argument just presented, IS skills help the lawyer *let go* of his/her own control over the argument, *listen attentively* to the court's question, and even *reflect* the question and *check in* to see if it was understood correctly: "Your Honor, I understand that your question is. . . . . Do I have that right? If so, then . . . . ." In short, using this combination of IS skills not only conveys the lawyer's respect for the court (and its every word), but also ensures that the lawyer understands clearly the court's concern and therefore can respond to it more effectively.[140]

[139] *See, e.g.,* NEUMANN, *supra* note 109, at 365-66 ["The most effective way to present arguments is in a tone of what has been called 'respectful intellectual equality."]. Interestingly, this advice is offered in a text on legal writing, a course usually offered in the first year of law school, but which introduces many of the same skills involved in other lawyering skills courses, including oral advocacy.

[140] In effect, the lawyer here is treating the court itself in much the same way s/he treats a client in the initial interview. *See supra* text accompanying notes 89-93. One basic text stresses the importance of this kind of response to questions from the court in oral argument on appeal. *See* NEUMANN, *supra* note 109, at 359-60 [". . . the most effective thing you can do in oral argument is to persuade through your answers to the judge's questions."]. When the court raises questions at trial, the same point applies.

The surest way to lose the court's respect, or alienate it, is to misinterpret the judge's question. IS skills help to avoid this serious misstep.

Interaction with Opposing Counsel. Though opposing counsel do not address each other directly in front of the court, they are indirectly interacting whenever they respond to each other's arguments. The quality of that interaction itself can have an impact on the judge – favorable or otherwise. When the lawyer's response to opposing counsel – for example regarding an evidentiary objection, or the validity of a motion – is aggressive and deprecating, this gives the court a very different impression than when the lawyer's response acknowledges opposing counsel's argument but takes respectful issue with it. Therefore, whether in open court or in a sidebar conference at the bench, IS skills can be useful. *Attentive listening* may allow for a better understanding of where both the judge and opposing counsel are coming from in the exchange. A brief *reflection* of what was said can help both the judge and opposing counsel feel that the lawyer is not just ready to argue, but has also heard the other side's point. This can convey an attitude that is firm but not confrontational, which may make the court a more receptive audience.[141] The underlying point is that no one, including a judge, is comfortable watching or being dragged into a nasty fight, and IS skills allow the lawyer to "fight" in a civil but firm way.[142] Doing so is likely to influence the judicial audience more in one's own direction.

Interaction with Witnesses. If a trial is held, the examination of witnesses will be a central element of that event. As noted above, the subject of witness examination at trial, per se, is largely beyond the scope of this Article. Moreover, examination of witnesses is a process tightly governed both by evidentiary and procedural rules and by strategic considerations. However, IS skills may still have something to contribute to effective advocacy, both in witness examination at trial, and in witness preparation before trial.[143] For example, the IS skill of

[141] It can also have a positive effect on the inevitable settlement conferences that may occur before the trial is over, and enhance the lawyer's reputation as being fair, reasonable and willing to listen.

[142] One trial advocacy text recommends that the lawyer's "demeanor" should be courteous, confident and considerate. *See* LUBET, supra note 1, at 7-8 ["[Y]ou do not use bullying tactics to intimidate your opponent. . . . A respectful lawyer will not wage a war of attrition against witnesses or other lawyers. . . ."]. Research has shown that people experience the kinds of aggressive behaviors that are typically displayed in a negative conflict interaction as unpleasant and repellent. *See* Antes, *supra* note 7. Aggressive, adversarial treatment of opposing counsel may well be experienced in the same way by the court itself.

[143] As emphasized throughout this Article, the point here is not that IS skills are completely different from those currently taught in trial practice courses, but rather that they

attentive listening can be very helpful. With his/her own witness, the lawyer's close, attentive listening to the witness, after asking a question, can help draw out a fuller response in the same way that this occurs in witness interviewing.[144] In addition, despite advance preparation, the experience of testifying in open court is highly stressful for any witness, and calm, attentive listening by the lawyer during the questioning may itself help the witness testify more calmly and therefore more convincingly. On cross-examination of adverse witnesses, attentive listening to the witness during questioning can also have positive impacts. For example close, attentive listening can help the lawyer ensure that the witness has given a clear answer to the question asked.[145] More generally, attentive listening, even to an adverse witness, can convey an overall impression of civility to the court and jury, and possibly even to the opposing counsel and party, that may work in the client's favor whether in court determinations, jury deliberations, or settlement discussions.[146]

IS skills may also be useful in the process of witness preparation before trial. It is widely recognized that preparing witnesses to testify is critical to effective trial advocacy.[147] The process of witness prepara-

are congruent with what those courses already teach. *See, e.g.,* MAUET, *supra* note 1, at 115 [noting, in one major trial practice text, the importance of skilled listening to the answers given by one's one witness].

144 *See supra* text accompanying notes 100-101; *see also* KRIEGER & NEUMANN, *supra* note 1, at 118-19 [explaining the positive impact of a "welcoming" approach in interviewing]. With the lawyer's own witnesses, trial advocacy texts recommend asking open questions and then listening attentively. *See* LUBET, supra note 1, at 56-57; MAUET, *supra* note 1, at 115. Of course, the lawyer at trial will be concerned that the testimony given is relevant and probative of elements required for the success of the claim, and this may require directing and limiting the witness's answers rather than allowing the more elaborate responses that are useful in early interviews. *See, e.g.,* LUBET, supra note 1, at 56-57. However, attentive listening will also be useful in preventing witnesses from wandering beyond the limits of useful testimony.

145 *See* LUBET, supra note 1, at 99-100 ["[I]t is the witness's answer that constitutes evidence, not your question, and you must listen carefully to ensure that the evidence is what you expected."]. Attentive listening can also help the lawyer better notice contradictions within the witness's account, which may help in challenging adverse testimony. *See* KRIEGER & NEUMANN, *supra* note 1 at 124 [advising, in pre-trial interviewing of a hostile witness, that "Instead of challenging a stubborn witness, silently note the self-impeaching things the witness is saying," which will make it easier to undermine the testimony later].

146 *See* MAUET, *supra* note 1, at 263 ["Cross-examination does not require examining crossly. The jury will react negatively if you sound and act tough on the witness without a good reason. . . ."].

147 Both academics and practitioners address this subject. *See, e.g.*, John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 279 (1989) [noting that "American litigators regularly use witness preparation, and virtually all would, upon reflection, consider it a fundamental duty of representation and a basic element of effective advocacy."]; John W. Allen, *Emerging from the Horse-Shed, and Still Passing the Smell Test: Ethics of Witness Preparation and Testimony* (available at http://www.lawyertrialforms.com/powerarticles/PowerLit_ethics_of_preparation.htm, last visited July 12, 2012) [citing Section 116 of RE-

tion, unlike examination at trial, involves far fewer constraints on the communication between lawyer and witness.[148] Most discussions of the practice, however, raise the concern that certain modes of witness preparation may, even if unintentionally, have distorting effects on witness testimony. To avoid this, and to steer well clear of encouraging false testimony, one expert advises using a process very similar to that suggested above for initial client and witness interviews.[149] In the trial preparation process, the lawyer is advised to "[a]sk the witness open-ended questions. . . [d]o not routinely ask leading questions. . . [a]llow the witness to recount everything. . . instruct the witness not to edit out material that seems incomplete or irrelevant. . . [and avoid] interrupting the witness during the narrative [so as not to] halt the flow of information."[150] The process just described can usefully integrate the IS skills of *reflection, summarizing and checking in,* just as they are used in initial interviews, to be more effective in helping the client or witness refresh his/her memory before trial without influencing the account. Coupled with other techniques suggested by practice and ethics experts, IS skills can thus help prepare clients and witnesses for trial, both effectively and ethically.

Finally, beyond the direct impacts on the evidence presented at trial, IS skills may be useful in supporting the goal of client empowerment at the trial preparation stage. As mentioned earlier regarding the task of theory development, client empowerment is advanced when clients are included in decision making even in tasks normally thought of as within the lawyer's "sphere of expertise."[151] Developing case theory and drafting pleadings is one such task; trial strategy, including preparing testimony, is another. Lawyers may believe, and fairly so, that they must be in control of what their clients and witnesses say at trial, because they have expert knowledge on what must be included in that testimony in order to prove the elements of the legal claim. It follows that in preparing for trial, the lawyer should decide how the client's story should be presented, within the limits of a truthful account, even if this requires the client to tell his/her story in a manner different from that which s/he would prefer.

However, while this approach may seem best calculated to

STATEMENT OF THE LAW THIRD, THE LAW GOVERNING LAWYERS as expressly permitting interviews with a witness for the purpose of preparing testimony, and listing a wide range of permissible witness preparation activities].

[148] *See* Applegate, *supra* note 147, at 339-41, 342-43; Allen, *supra* note 147.

[149] *See* Liisa Renee Salmi, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial,* 18 REV. LITIG. 135, 173-74 (1999). *See also supra* text accompanying notes 100-101.

[150] Salmi, *supra* note 149, at 173-4.

[151] *See supra* notes 117-18 and accompanying text.

achieve success at trial, some argue that it is possible (and important) to preserve client empowerment by involving the client in discussions of trial strategy, including the manner and content of their own testimony, while not ignoring the client's chances of legal success.[152] Following this view, if a client strongly desires to "tell his/her story" at trial in a certain way, and the lawyer believes that a different presentation is needed to establish points vital to the case, the lawyer can use IS skills to discuss *this disagreement itself* with the client. The lawyer can *listen attentively* to the client's positions and reasons for wanting to testify in a certain way, *reflect* them faithfully, state his/her own positions and reasons for disagreeing, *check in* to ensure that the client fully understands the consequences of choosing one presentation or the other, and then invite the client to make an informed choice of what s/he wants to do.[153] It may be that a lawyer is not ready to go so far in putting the client empowerment goal on a par with that of legal success; but if s/he is, then IS skills can help to do so while remaining faithful to the ethical obligation to pursue the client's interests and the principle of informed consent.

Interaction with the Jury. Another critical interaction occurs in the opening and closing statements, where the lawyer directly addresses the jury. This interaction also implicates the client indirectly in a fashion that makes IS skills important. As in the development of case theory at an earlier stage of the case, an opening or closing statement involves composing and presenting a "story" of the case that a jury will find appealing and moving. Here, it is possible the lawyer may be inclined, because of his/her experience and training in rhetorical skills, to compose and present this story *for* the client.[154] However, allowing and helping clients themselves to "write the story", rather than having it written for them, could contribute powerfully to client empowerment.[155] And while the lawyer must be the one to pre-

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152 *See supra* note 117 and sources cited there; Kruse, *supra* note 46, at 522-24 [discussing the argument made by some that to be truly participatory, client-centered lawyering should involve clients in legal strategizing and case-theory development].

153 *See supra* notes 95 & 117-18, and *infra* notes 154-55, and accompanying text, discussing similar tensions in deciding on the "story" that should be told in the pleadings and in opening and closing statements. In those contexts, the importance of permitting clients to "speak in their own voice" is emphasized, as a matter of client empowerment. It would seem that this is even more salient in the context of deciding on the testimony the client is to give in court, where his/her "voice" is most directly involved.

154 *See, e.g.,* LUBET, supra note 1, at 23-29, 61-67 [describing the lawyer's role in composing and presenting the "story" of the case]. *See also* KRIEGER & NEUMANN, *supra* note 1, at 49-50, 94-95, 159-75 [discussing the skill of storytelling in the context of developing case theory, with the implication that the lawyer him/herself must have the skills of both "finding the story" in the client's account and then "composing the story" in the manner most likely to be appealing to the ultimate audience].

155 *See* notes 95 & 117-18 *supra*, and accompanying text [arguing for the inclusion of the

sent the story in court, if the client has participated closely in drafting it, and then "hears his/her own words" spoken out publicly in court, this surely supports the goal of client empowerment.

G. Summary

In the previous sections, it has been shown that the *interactional support skills* taught in courses on transformative mediation can be valuable at many stages of a legal representation, beginning with the initial client interview, in settlement discussions, and throughout the process of legal representation. At each of these stages, IS skills increase the lawyer's effectiveness in achieving the aims of that particular stage – whether building client trust, establishing the facts of the case, developing a persuasive case theory, conducting productive settlement discussions, or presenting the case in court. At the same time, throughout *all* the stages, IS skills help the lawyer achieve the overarching aim of client empowerment, using *specific and concrete measures* to engage the client's full participation in the case and to help build the client's capacity for self-determination and advocacy for his/her own goals, in and beyond the case.

These IS skills may be touched upon elsewhere in the law school curriculum, whether in lawyering skills, negotiation, or conventional mediation courses. But none of those venues gives IS skills the kind of in-depth, hands-on treatment, in concrete and specific terms, that they receive in courses on transformative mediation. The author does not question the value of the other kinds of courses mentioned, and the skills taught by them. Rather, the point is that, given the clear value of the IS skills described here in many aspects of the lawyering process, courses in transformative mediation that teach these skills should be included more widely, along with other skills courses, in the law school curriculum. The following Part offers a brief description of a transformative mediation skills course that teaches IS lawyering skills to law students and lawyers. It also explains how this course is congruent with client-centered lawyering at not only the skills but the

client in the construction of the story of their own case]. In effect, the lawyer is a "speechwriter" for the client. But just as a speechwriter for a public figure must try to capture the client's own thoughts, consulting with him/her, inviting and accepting editing, and giving the client authority to approve or disapprove the text, so the client-centered lawyer does with his/her client in the opening and closing statement. A powerful analogy to this is found in the recent film *"The Queen,"* a fictionalized account of the events following the death of Prince Diana, and the conflict over whether a state funeral would be held. *See* Stephen Frears (dir.) and Peter Morgan (wr.), *The Queen* (2006). One crucial scene involves the drafting of the speech than the queen will deliver to the country, on television, regarding the decision she has made to allow a public ceremony. The speech first drafted by the Prime Minister's staff fails to capture her "story" of the decision, and almost causes the cancellation of the speech.

values level.

IV: A Model For Teaching Lawyering Skills Through Transformative Mediation Training

As noted in the Introduction, mediation skills courses have been offered for some time in law schools, on the belief that the skills of problem-solving mediation had value, as lawyering skills, for law students and lawyers.[156] However, it was only in the late 1990s that a transformative mediation skills training course was added to the curriculum at Hofstra Law School, and taught by the author of this Article. That course was based on a training course designed by the Institute for the Study of Conflict Transformation, of which the author/teacher was a founder.[157] Since then, the course has undergone constant refinement, and it has been taught by many other instructors, both at Hofstra and elsewhere, including other law and graduate schools.[158] Most recently, the author has worked to incorporate an emphasis on lawyering skills into the teaching of this mediation skills course. A brief description of that work gives some idea of how a course on transformative mediation can be explicitly used to advance the learning of lawyering skills, in law schools and CLE programs, as well as to reinforce the *values* underlying client-centered lawyering.

The transformative mediation skills course begins with an introduction explaining the interactional dimension of conflict, including the theory of "empowerment and recognition shifts" and the research that confirms their importance to parties in conflict.[159] The course then introduces the role of the third party as mediator, and distin-

[156] The general case for teaching mediation skills courses in law schools has been made previously, though the courses involved are teaching the problem-solving model. *See, e.g.* Jacqueline M. Nolan-Haley and Maria R. Volpe, *Teaching Mediation as a Lawyering Role*, 39 J. Legal Educ. 571 (1989); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report,* 69 Wash. L. Rev. 593 (1994). I know of no published article that advocates teaching transformative mediation as a means of enhancing lawyering skills.

[157] The course was originally designed to train transformative mediators for a workplace mediation program at the United States Postal Service. *See* Bingham, *supra* note 7[describing the development, and documenting the impacts, of the REDRESS mediation program's use of transformative mediation]; Antes et al., *supra* note 126 [reporting on a qualitative research project collecting case studies of REDRESS mediations].

[158] Some of the law schools include: Pepperdine University Law School, Temple Law School, and Hamline Law School. The course has also been offered as a CLE course in many venues, in the U.S. and Canada, and in graduate programs such as the Dispute Resolution and Conflict Management Program at Southern Methodist University. At Hofstra, the course has also been taught to students practicing in a live-client mediation clinic. *See supra* note 4.

[159] *See supra* text accompanying notes 7 & 29-30. This introduction is based on the account offered in *Transformative Theory*, *supra* note 4, and Bush & Folger, *supra* note 4, at 41-84.

guishes the role of mediator in offering interactional support from the conventional role of the mediator in offering conflict management and problem solving expertise. The practical enactment of this IS role is then linked to discrete skills, including attentive listening, reflecting, summarizing, checking in, and others, as described in Part I of this Article.[160] Each of these skills is explained, demonstrated, and practiced, and then students engage in simulated mediation sessions, to experience the way in which the skills can be used and the impact they have in supporting shifts from destructive to constructive interaction.

In recent years, the instructors have added content at each phase of the course to link the mediation theory and skills to the subject of lawyering practice. Thus, in the theoretical introduction, students are invited to think about the goals of a typical client, and consider how and why interactional change, and client self-determination or empowerment, may often be important goals of the client. To concretize this discussion, students review their own conflict experiences, and their interactions with professionals, and are invited to consider whether they themselves value positive interaction, and self-determination, as much as favorable outcomes.

When the role of the mediator is introduced, and the IS role contrasted with the problem-solving role, the course begins to ask students to imagine what taking an IS role might involve for a lawyer – not acting as a mediator, but in the representation of a client. The theory of client-centered lawyering is introduced to situate the IS role in the lawyering skills "universe," and the premises of client-centered lawyering are linked to those of transformative mediation through readings and discussion.[161]

In effect, these first two units of the course address foundational values. They establish the "philosophical reasons" for following what is essentially a client-centered approach – both in mediation and in lawyering practice – by contrast to a more traditional model of professional control. In fact, the values and premises of these two client-centered approaches are highly congruent, as explained above in Part II, and this congruence is explained as a preamble to the focus on specific skills. Students learn that transformative mediation shares basic, deeply-rooted premises with client-centered lawyering, about the core capacities and motivations of the client as a human being, and the kind of "help" that is most valuable to such a person, whether from a

[160] The texts used in the course have been BUSH & FOLGER, *supra* note 4, and SOURCEBOOK, *supra* note 4.

[161] Readings assigned include excerpts from Dinerstein, *supra* note 49, and Kruse, *supra* note 46.

mediator or a lawyer.[162] Students are invited to realize that, while it might first seem farfetched to think that "empowerment" and "recognition" are client concerns in the world of legal practice, these concerns are taken very seriously in client centered lawyering – so they are worth learning about. Students are also invited to think generally about what kind of differences might be involved in taking a client-centered approach to the lawyering process, using IS skills in a typical client representation. The stages of a representation are outlined, in order to lay out the set of tasks where using IS skills might be considered.

Once the course reaches the stage of teaching the specific skills of transformative mediation, students are asked, at the close of each skills unit, to consider where and how this skill might be used in representing a client. The "map" of the stages of a typical case is presented in chart form, and a discussion is facilitated in which students suggest at which stage(s) of lawyering the specific skill can be used, and how. The discussion typically begins with the skill of attentive listening as applied in the client interview, but as the students catch on they realize that this skill has applications at many other stages of a representation – as explained and illustrated in Part III above. The same kind of insight is elicited regarding each of the skills in turn, as the course introduces them. The "filling in" of the skills/stages chart is begun in class, but student "homework" each night involves writing a short journal entry to elaborate on how the particular mediation skills learned that day could be useful in various stages of a legal representation.[163] Each day begins with discussion, drawn from the journals emailed to the instructor the night before, of how the skills taught on the previous day have application in many more of the stages of lawyering than first thought.

This same pattern is followed in the units that teach reflection, summary, and checking-in, as each skill in turn is "placed" on the map of lawyering tasks and its applications and value are discussed, first in class, then in journals, and then again in class. By the time the students have begun to integrate all the transformative IS skills in actual simulated mediations, they are also ready to begin imagining how the lawyering of an entire case might unfold with consistent use of IS skills throughout, in the fashion described in this Article. This returns the discussion to the theory of client-centered lawyering, but with a much richer and concrete picture of what that approach might look like in practice, and why it might be desirable both for clients and for

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[162] *See supra* notes 61-68 and accompanying text.

[163] For an excerpt from one of those journals, showing how the student understands the application of the skill of reflection to her lawyering practice, *see Comment*, *supra*, note 39.

lawyers themselves.[164]

The course concludes with a unit on mediation ethics, which invites students to think about why different approaches to mediation might give rise to different ethical standards – and then asks them to again apply those insights about mediation ethics to the challenges of engaging in an unconventional, client-centered approach to legal practice.[165]

Since beginning to include in this mediation training course a focus on the applications to lawyering skills, the response of law students and lawyers has been overwhelmingly positive. Clearly, the majority of those taking the course will never become professional mediators, but they will become (or are, for CLE participants) lawyers, and discovering how mediation-related IS skills can make a difference to their legal practice makes the course much more meaningful to them. For many, it concretizes the possibility of engaging in a more humane and less adversarial mode of practice, which they have been concerned about since beginning their legal training.[166] They also recognize that the skills taught in this course – skills they can and do employ as lawyers and legal interns – were not focused on, and mostly not even mentioned, in any other course they had taken. The students' recognition of the importance of the skills being taught, and the uniqueness of the opportunity to learn them, led the author to write this article in order to bring wider attention to the value of including in the curriculum a transformative mediation course explicitly linked to lawyering skills.

Conclusion: An Invitation To Widen The Project

This Article is intended as an invitation to colleagues within the law school and CLE worlds to consider joining, and widening, the pro-

[164] Dinerstein points out, in his analysis of the justifications for client-centered lawyering, how this approach to practice has advantages for lawyers as well as clients. *See* Dinerstein, *supra* note 49, at 552-54[describing the ways in which client-centered practice leads to greater lawyer satisfaction with his/her role and practice].

[165] For a discussion of the ethical implications of following different approaches to mediation practice, *see Robert A. Baruch Bush, Efficiency and Protection or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 Fla.L.Rev.253, 255 (1989). In the course, specific ethical questions are studied, in relation to two different mediator ethics codes, one based on a transformative and one on a problem-solving approach. The answers to the questions are quite different under each code, and the impact on the students' awareness of the significance of different approaches to practice, including legal practice, is greatly increased.

[166] One student, at the close of the course, approached the instructor and said that, prior to taking the course, he had been on the verge of dropping out of law school, because he could not imagine treating clients, colleagues, or opponents in the adversarial manner he had begun to think was necessary to practice. This course showed him an alternative, he said, and it was one that would allow him to express his humanity in his professional work.

ject begun by the author and his colleagues to teach lawyering skills within a transformative mediation skills course.[167] We believe the work begun in our courses has shown the value of this partnership of disciplines. We are convinced that interactional support skills have great value in legal representation, and we know that transformative mediation offers an excellent vehicle for teaching those skills. We are hopeful that others will be enticed by the account given here to try the same kind of melding of these subjects in courses in their schools and CLE programs.

[167] As noted above, *see supra* note 156, the inclusion of mediation skills courses in law schools is not new, but the inclusion of a transformative mediation skills course is a significant, and we believe valuable, innovation.