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## TEACHING STUDENTS TO THINK LIKE PRACTITIONERS

AUGUST 2, 2021 | JOHN LANDE | [LEAVE A COMMENT](#)

People often say that dispute resolution processes aren't "one size fits all." When practitioners are asked to opine about hypothetical problems, they often say "it depends" and they make "case by case" decisions.

They are telling the truth. Lawyers make complex decisions as negotiators, litigation advocates, and mediators based on a lot of factors, so it is hard to generalize. Practitioners learn from experience, growing their own theories over time, tailored to their particular set of clients, cases, roles, organizational contexts, etc.

Growing out of my work on the [LIRA book](#), I have been focusing on how lawyers, mediators, and parties make decisions in legal disputes – and how law schools can best prepare students for realities of practice. I have written several blog posts about this, most recently, [Reconciling Allegedly Alternative Mediation Models by Using DIY Models](#).

Last month, I gave a presentation at Stephanie and Toby's Shindig (aka Mediation Clinic Think Tank) growing out of this post, which prompted an excellent conversation.

The presentation focused on teaching students about thinking like a mediator. This post applies the same logic to thinking like an advocate in mediation or a negotiator. The techniques can be applied in courses teaching practice skills through simulations, externships, and clinical experiences.

### Mediators' Mental Models

Legal doctrine and theoretical practice models do affect how lawyers and mediators actually think in practice. But they are only a part – I think often only a small part – of how they really think.

Psychologist Kenneth Kressel described mediators' actual mental models as largely unconscious mixtures of formal models and "personal 'mini-theories' of conflict and role of mediators." He defines mental models as "ideas the mediator holds about the role of the media-

tor; the goals to be attained (and avoided), and the interventions that are permissible (and are impermissible) in striving to reach those goals.” They are “mediator coping responses to the complex and demanding task of intervention decisionmaking and the limitations of formal models of practice and conscious human deliberation.”

His work, in collaboration with James Wall, is based on Daniel Kahneman’s book *Thinking, Fast and Slow*, which describes two systems. System 1 is fast, unconscious, and relies on rules of thumb. System 2 involves slow, conscious “mental mapping” of potential interventions to achieve mediators’ goals. System 1 involves mediators’ categories of parties and cases, default goals, routines, and expected effects of particular interventions. System 2 involves strategies for handling challenging situations. System 2 can train system 1 to develop practical profiles and routines. I think we should teach students to develop both systems.

Some dimensions of mediators’ actual mental models include:

- Mediators’ goals
- Types of case
- Types of parties and other participants
- History of conflict
- Parties’ goals, interests, and positions
- Formal models of mediator interventions and effects of interventions
- Common challenging situations
- Principles and strategies to handle challenges

Mediator’s models include interventions such as the following, including their expectations about the effects of interventions:

- Asking questions and listening
- Helping parties assess intangible interests, issues, possible court outcomes, tangible litigation costs, and options
- Referring clients to talk with lawyers, experts, or others
- Providing information and resources
- Assessing intangible interests, issues, possible court outcomes, tangible litigation costs, and options
- Coaching, suggesting options, and giving negotiation advice
- Making proposals
- Predicting court outcomes and effects on parties’ interests
- Applying non-coercive pressure

For more detail on how you can teach students to develop more conscious mediation models in your courses, see the [powerpoint](#).

## Advocates' Mental Models

Many faculty who teach mediation emphasize lawyers' roles as advocates in mediation because new graduates are more likely to serve as mediation advocates than as mediators soon after graduation.

Mediation advocates develop complementary mental models relating to similar dimensions as mediators listed above, e.g., practitioners' goals, profiles of types of case and participants, characterizations of conflicts, parties' goals, etc. Of course, advocates' models reflect their perspectives as advocates. For example, obviously they have different goals than mediators – generally to advance their clients' interests rather than goals oriented to both parties.

Advocates develop their own mental models of mediator interventions and their own (i.e., the advocates') strategies to stimulate, respond to, and sometimes block mediators' interventions. For example, many advocates have philosophies about the value of joint opening statements, mediators' expression of their assessments, and many other procedures and mediator moves. Mediation advocates also develop their own techniques for working with their clients in mediation.

Some aspects of advocates' models inevitably are unconscious System 1 conceptions and routines, and others are conscious System 2 strategies and techniques. Faculty can teach students to develop more conscious models as mediation advocates much as they can develop more conscious models as mediators.

The same logic applies to lawyers' models of negotiation. Negotiators may use the formal models of positional and interest-based negotiation (or any of the variations), but they almost certainly use their own personal "mini-theories" of conflict and role of negotiators. I conducted a [study of lawyers' negotiations](#) in which I found that the two polar models were composed of several dimensions summarized in the following table, which didn't always correlate in real negotiations, contrary to the theoretical models. So, rather than teaching students to use one of the traditional models, faculty could teach students to build their personal negotiation models focusing on the specific, concrete dimensions instead of the abstract theoretical models.

## Framework for Analyzing Negotiation

Variable	Continuua of Negotiation Process Characteristics		
<b>Concern for other party</b>	No concern for other party's interests		Great concern for other party's interests
<b>Communication process</b>	Exclusive use of exchange of offers	Everyday conversation	Exclusive use of interest-and-option process
<b>Value creation</b>	Creation of no value		Creation of maximum possible value
<b>Tone and tactics</b>	Hostile tone and tactics		Friendly tone and tactics
<b>Use of Power</b>	Extreme use of power		No use of power
<b>Source of norms</b>	Exclusive focus on extrinsic norms		Exclusive focus on intrinsic norms

Adapted from John Lande, *A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation*, 16 CARDOZO J. CONFLICT RESOL. 1, 47 (2014).

### Possible Course Assignments

Faculty can help students be more conscious in their practice models through one or more of the following assignments.

Reflective Practice Groups. Students could be required to participate in reflective practice groups outside of class. These groups can help students learn to learn – one of the most important things we can teach.

Faculty might require students to spend several hours in practice groups during a semester. Faculty might or might not require students to submit papers or videos related to the practice groups, and might or might not grade this activity.

In these groups, students would focus on dilemmas in their cases. Typically, one member of the group describes a difficult situation, and the group asks questions to help the subjects better understand what happened. Questions might include how they perceived the situation, how they intervened (and why), what they expected to happen, what actually happened, what other interventions might they have used, and how this situation compares with others that they have dealt with. The classic version of the process follows the facilita-

tive philosophy of helping subjects figure things out themselves rather than having group members describe their own experiences, offer suggestions, etc.

I was intrigued by a reaction of a colleague who said that these questions were much like the questions she asks her clinic students in her supervision sessions debriefing mediations using a nondirective clinical supervision model. If students participate in reflective practice groups outside of class, they can be more candid because they don't have to worry about performing for the professor or the class. If students are required to make class presentations, practice group sessions can help them prepare or rehearse their presentations.

Especially in courses where you don't use the kind of supervision model that Gail does, you might spend some time in class demonstrating how to lead a reflective practice group.

I was very pleased that Michael Lang participated in this program. He wrote the book – actually two books – on reflective practice. Here's his [website](#), with information about the books and lots of other resources. He made some interesting observations you might want to check out, starting at minute 43 of the video.

Stone Soup Interviews. Faculty using [Stone Soup assignments](#) might encourage or require students to interview practitioners about how they handled particular challenging situations. Students might ask questions such as the ones listed above to probe the practitioners' thinking in actual cases. One colleague suggested that it can be useful to ask experienced practitioners about what they do differently than in the past. Students often will find that the practitioners aren't conscious of all the decisions they made because some are so routine. The subjects may appreciate that the interview helps them reflect more carefully on things they take for granted.

Paper Outlining Practice Model. Your students will do many different types of work after they graduate, and you might assign them to write out their assumptions about their future practices, informed by what they learned in your course. For example, they might describe the kinds of cases they hope or expect to handle, clients they would represent, their default goals, likely challenging situations, and plausible interventions, etc.

Some students have clear expectations about the kind of work they will do after graduation, sometimes continuing employment from jobs during law school. Such students should be able to have concrete ideas to express based on their experiences. Other students don't know what they will do after graduation, so this paper would be more of a thought experiment. In either case, their models inevitably will evolve with actual experience. Writing out their models can help them assess and refine their work more consciously and explicitly.

For more detail, see my [prior post](#).

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