



***ABILITY-BASED LEARNING
AND JUDICIAL EDUCATION
An Approach to Ongoing
Professional Development***

JERITT Monograph Eight

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Ability-Based Learning and Judicial Education

An Approach to Ongoing Professional Development

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Foreword

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1998

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**The Judicial Education Reference, Information
and Technical Transfer Project**

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Foreword by Justice Janine P. Geske

Judges often work and play in isolation from those who might ordinarily support and encourage them to better utilize and improve their judicial abilities. Judges cannot ethically turn to friends or even former lawyer colleagues to discuss the issues that face them on the bench. They rarely have the time or opportunity to watch their judicial colleagues in action. Without formal guidance, judges frequently struggle on their own to find better ways to be effective decision makers.

High quality judicial education provides the primary means to develop those abilities and skills necessary to excel at the art of judging. Very few, if any, of us studied or trained to become judges prior to our taking the oath of office. One day each of us was either appointed or elected to a judgeship. The placement of those black robes on our shoulders failed to instantly instill in us the needed judicial wisdom, ability, and knowledge. We, like our predecessors on the bench, must constantly re-examine and develop those abilities that can assist us in truly serving the law and the people who turn to our system of justice.

Although many judges are scholarly, intellectual, and thoughtful persons, some fear utilizing their empathy, compassion, and common sense on the bench. We, as judges, often fail to identify, discuss, and strengthen those aspects of our personalities, values, and talents which might better aid our professional development. When both novice and veteran judges are provided with Ability-Based Judicial Education, we experience the framework, the means, and the opportunity to personally and professionally grow in wisdom and in confidence.

This monograph outlines the background and the road map to designing judicial education programs focusing on the identification and enhancement of those abilities essential to high quality judging. Here, both judicial educators and judges are supplied with the necessary information and encouragement to develop programs which will reach beyond the "traditional continuing legal education seminar," and will pinpoint and advance the improvement of key judicial abilities. If those of us involved in judicial education continue to focus on vital judicial abilities, judges need not struggle in isolation. More importantly, the public will benefit from the enhanced development of those abilities and skills essential to the effective delivery of justice.

Janine P. Geske
Wisconsin Supreme Court Justice
Dean, Wisconsin Judicial College

Foreword by Dr. Dennis W. Catlin

This monograph discusses the potential application of Ability-Based Education to the judicial education process. As described later in the monograph, the Michigan Judicial Institute had the opportunity to examine the potential of Ability-Based Education for judicial education. In 1990 and 1993, the Michigan Judicial Institute conducted a program entitled *Minding the Courts into the 21st Century*. The goal of this program was to challenge judges to examine their personal and professional assumptions and orientations and how these impact decisions they make every day. A further goal was to enable them to identify how they could improve their personal decision making. After examining many possible approaches to accomplishing this goal, the strategy developed centered on identifying, defining, and practicing the abilities of outstanding judges. Throughout the five days of Part I of the seminar, the judges struggled with identifying and defining the abilities of an outstanding judge. At the end of Part I, the judges selected an ability that they wanted to improve upon. In the intervening months between Part I of the seminar and Part II, the judges worked in teams to practice and improve the ability they had selected. When they returned for Part II of the seminar, they reported to each other on their successes in working on this ability.

The concept of “abilities” in the needs assessment or curriculum design process seems to “ring true” with professionals such as judges. It seems to be easier for professionals to define concrete abilities than to talk in terms of needs, goals, and objectives. That was our experience in the *Minding the Courts* program.

Shifting our paradigm from needs assessment to identifying abilities will take some thought on our parts as judicial educators. However, I think the effort will be worth it. Understanding and applying ability-based needs assessment and curriculum design will put another valuable tool at our disposal.

Dennis W. Catlin, PhD
Former Executive Director
Michigan Judicial Institute
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Preface

Ability-Based Learning is one approach to professional education that focuses on the individual professional's ongoing development and self assessment of performance. In this monograph, we explore educational assumptions and principles underlying Ability-Based Learning through application and demonstration in judicial education. We lead the reader through a series of concepts, examples, and activities that demonstrate active involvement by professionals in determining and practicing abilities (activities that might also be applied to other court personnel). We assist the professional to determine abilities for effective performance; define performance criteria for self assessment; and choose abilities for professional development and ongoing practice. We discuss issues involved in integrating Ability-Based Learning with the current perspectives, contexts and substantive content of judicial education.

The monograph is designed so that readers can examine the rationale for Ability-Based Learning in the context of education for the professions.

♦ **Chapter One: *Introduction***

♦ **Chapter Two: *Defining Judicial Abilities for Effective Performance*.** We articulate the meaning of "ability" as a framework for ongoing professional development. We describe judge participation in processes for determining abilities that contribute to effective professional performance.

♦ **Chapter Three: *Understanding Ability-Based Learning*.** We provide a set of assumptions and principles that ground Ability-Based Learning. To give the reader an experiential view of its development, we place Ability-Based Learning in the context of its origins, tracing the questions that led to its creation and refinement.

♦ **Chapter Four: *Designing and Implementing an Ability-Based Curriculum*.** We move to implications for designing and implementing a curriculum. Our goal is to assist the reader to conceptualize how abilities might be learned and self assessed; and to understand how to enable judges (and, by implication, other court personnel) to infer abilities for professional development for improving their performance. We briefly discuss applying selected Ability-Based Learning principles and strategies, and identify some practical issues important for incorporating Ability-Based Learning principles with other judicial education approaches.

♦ **Chapter Five: *Ability-Based Learning Examples for Judicial Education*.** We guide the reader through our thinking as we developed courses for state judges for the Michigan Judicial Institute, and a seminar for judges at the federal level for the Sixth Judicial Circuit of the United States. In our experience, educators are often aided by reviewing and using instructional materials—they aid learning by experience. To so assist the reader, we

include materials for the course and seminar, an independent learning exercise, and a full set of abilities developed by judges. These materials have been tested and refined, are discussed in detail in this chapter, and are included in the Appendices. Judicial educators are invited to reproduce the materials as needed, with the request that they include the citation provided.

- ♦ **Chapter Six: *Issues in Ability-Based Learning and Judicial Education*.** We discuss the evidence—judge perspectives and our own research—for why Ability-Based Learning works, and some caveats and ongoing issues educators face when they are using Ability-Based Learning.
- ♦ **Chapter Seven: *Summary*.** We summarize the Monograph.

We acknowledge that our various readers will approach this monograph with different styles, and read it in quite different contexts: quiet time when they can imagine ideal educational goals and read systematically from start to finish; creating time when they are applying principles as they design teaching, learning, and assessment plans; preparation time the night before conducting a seminar; and “learning-at-a-glance” time when they quickly peruse a document and decide whether it will be useful for a particular project.

We prepared this monograph with each of these readers in mind.

While this monograph is primarily for judicial education executives, administrators, and educators, we also expect that seminar facilitators who are practicing judges will find portions of this monograph useful, particularly when they are working with other judicial educators in designing, reviewing, or critiquing ability-based seminars. We have also developed Chapter Two, “Defining Judicial Abilities for Effective Performance” with an eye toward providing advance reading or interim reading for an Ability-Based Learning seminar. We include this group of judge participants as potential readers of this chapter because we have found that its material is particularly effective in communicating the ideas to judges who are identifying and defining abilities in our seminars.

Permission is granted to copy monograph materials if each handout contains a citation as indicated on the cover page of each Appendix, and if it is used for instructional purposes only.

Acknowledgements

We acknowledge the contributions of the many judges and judicial educators who participated in an application of Ability-Based Learning to judicial education. They made the concept of abilities come alive through the depth of their experiences, their unique judgments, and their willingness to describe how they used abilities day-to-day. They encouraged us to collaborate with them in determining the abilities that underlie effective judicial performance and to develop workable strategies for using abilities in ongoing professional development.

The Leadership Institute in Judicial Education, the Michigan Judicial Institute, The National Judicial College, the United States Sixth Judicial Circuit Court of Appeals, and JERITT all played a role in providing a context for connecting Ability-Based Learning and judicial education. Professor Marcia Mentkowski tried out some of these ideas as a guest faculty member at The National Judicial College from 1979–1983. The late Leander J. Foley, Judge Frank T. Crivello, and Justice Janine P. Geske, judicial educators from Wisconsin, confirmed the importance of identifying abilities through ability interviews with Dr. Mentkowski in 1990. Several judges contributed cases in 1993 and 1996: Chief Judge Julia Smith Gibbons, U.S. District Court, Western District of Tennessee; Judge Casper Grathwohl, Berrien County, Michigan; Judge Joseph Scoville, U.S. District Court, Western District of Michigan; and Judge Sandra Silver, Oakland County Probate Court, Oakland County, Michigan.

Judge Nancy Edmunds, the United States Sixth Judicial Circuit Court of Appeals; Dr. Dennis Catlin, Executive Director, Michigan Judicial Institute; and our colleagues in higher education, Dr. Charles Claxton, Director of the Leadership Institute in Judicial Education; and Dr. Patricia Murrell, Director of the Center for the Study of Higher Education, Memphis State University, supported try-outs of Ability-Based Learning. Dr. Murrell, current Director of the Leadership Institute in Judicial Education, reviewed this monograph. We also thank members of the JERITT Advisory Board who served as reviewers of this monograph, especially State Justice Institute Project Monitor Pamela Bulloch and JERITT's Maureen Conner.

We acknowledge our Alverno colleagues' contributions to the theory and practice that we describe and apply. Alverno faculty originated the concept and practice of Ability-Based Learning in the early 1970's. We recommend *Liberal Learning at Alverno College*; *Student Assessment-As-Learning at Alverno College*; and *Alverno College: Towards a Community of Learning* as additional sources. Georgine Loacker, Professor of English and Chair of the Council for Student Assessment, was involved in the creation of Alverno's ability-based curriculum. Marcia Mentkowski and Kathleen O'Brien joined the effort in 1976: Dr. Mentkowski is Professor of Psychology and Director of the Office of Research and Evaluation; Dr. O'Brien, formerly Dean and Professor of Business and Management, is now Academic Dean. Alverno faculty invite other educators to campus biannually and host annual workshops to enable other educators to study and experience Alverno practices and to work on their own

projects. In the last decade, almost 5,000 educators from throughout this country and abroad have so engaged ability-based teaching and assessment. A number of colleges, universities, and professional schools have integrated Alverno's educational ideas. For further information, contact Alverno Institute: 414-382-6087, or visit Alverno's web site: www.alverno.edu.

We gratefully acknowledge two members of Alverno's Office of Research and Evaluation. Lynn Chabot-Long prepared the manuscript with her usual expertise and care in creating graphics and formatting text. Beverly Weeden coordinated the preparation of instructional materials and the production of this manuscript.

Alverno College
Milwaukee, Wisconsin
February 10, 1998

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CHAPTER ONE

Introduction

Who Is this Monograph for?

This monograph is for use by judicial branch education directors, curriculum planners, and program developers. The monograph is for judges and court personnel who are invested in the ongoing professional learning, development, and performance of those in the judicial branch. We also expect that various curriculum and program committees will want to use this monograph.

We recognize that judicial branch education goes far beyond education for judges. This monograph can be a first step in considering the applicability of Ability-Based Education to judicial branch audiences made up of court administrators, clerks, probation officers, and the like. Herein lies a principle caveat for this monograph. Our experience in judicial branch education consists of developing seminars for judges. While we have had broad experience in working with learners and their faculty in schools, colleges, universities, professional schools, and continuing education we have not tried out the materials in this monograph for court personnel beyond judges. We assume that judicial branch education directors, curriculum planners, and program developers who work with the full range of judicial branch education can use this monograph as they experiment with Ability-Based Learning for participants other than judges.

What Are the Purposes of this Monograph?

The purposes of this monograph are (1) to connect Ability-Based Learning to judicial branch education; (2) to briefly describe the theory of Ability-Based Education as it has been developed over twenty years of practice and research at Alverno College; and (3) to show how Ability-Based Learning works through judicial seminar examples. Over the years, we have worked with learners in our own

Ability-Based Learning focuses on the individual professional's ongoing development and self assessment of performance—a transformative learning process.¹

professional schools of teaching, management, and nursing. We have also worked with college and university faculty colleagues on Ability-Based Learning in professional schools of law, dentistry, pharmacy, medicine, and management. We have designed seminars in a range of continuing education settings. We have designed courses and seminars for judges. Because of these experiences, we believe that Ability-Based Learning is useful

¹ Throughout this monograph there are boxes placed in the text. Either a box highlights main points for a reader, or it is an example of a slide or overhead we use in teaching Ability-Based Learning.

in continuing education. Ability-Based Learning focuses on the individual professional's ongoing development and self assessment of performance—a transformative learning process.

What Is the Rationale for Ability-Based Learning?

For us, professional education is a lifelong venture. We consider judicial education as part of an educational continuum that focuses on professional development across the life

span—conceptualized within education for the professions. Such education would build on prior education, legal or other education such as a degree in criminal justice, management, and so on. In any profession, knowledge must be joined with the application of knowledge, in the context of day-to-day experience.

Professionals are expected to become more and more proficient and to act with a correspondingly deeper understanding of the context for practice and to incorporate the values of the profession into their daily actions. We believe that

changes in society are reflected in the pressures professionals feel to continue to develop and learn.

"Ability" is a communicable idea that enables professionals to connect what they know with what they are able to do. An ability provides a *conceptual framework* for understanding what learning looks like when it is practiced in work and service settings.

The abilities of an effective professional are complex combinations of motivations, dispositions, attitudes, values, knowledge of concepts and of procedure, strategies and behaviors. These combinations are dynamic and interactive, and they can be acquired and developed both through education and experience.

Educational institutions and the professions are experiencing the current press for accountability; and accountability is expected to lead directly to improved quality and excellence. Not only must we as

professionals identify abilities, but we are also expected to be able to judge when we ourselves have developed them to the level expected by the role we fill.

We also hope to characterize abilities

such that they can be assessed by mentors or peers. Ability-Based Learning is worth the investment because it provides for feedback and for professionals to self assess their performance in relation to explicit professional expectations that they themselves determine, that are supplemented by the profession as a whole, and that are critiqued in relation to what is needed by society now and in the future. Self assessment is a transformative learning process.

Abilities become a cause of effective performance when these components are integrated. A complex ability cannot be observed directly; it must be inferred from performance.

A key assumption is that new substantive knowledge is learned best when one is learning to apply that knowledge. Taking a continuing education course in changing trends in the judiciary must be accompanied by a corresponding opportunity to envision implications for day-to-day practice on the bench. Further, continuing education faculty must also provide opportunities for participants to develop a conscious awareness of how substance and

performance come together. Too often educators depend on a two-tiered concept of education where “content” is “covered” in a seminar and performance is left to “later.” We reject this fractured approach. Further, we acknowledge that practicing the application of new knowledge is essential to learning it, and that learning often is internalized when peers provide feedback on performance or when the participant has the opportunity to formulate new concepts, attitudes, and skills in practice situations.

Ability-Based Learning provides learners with opportunities to practice, to receive instructor and peer feedback, and to self assess their performance in relation to explicit professional expectations that they themselves determine. We call these expectations *abilities*.

In sum, we emphasize connecting the learning of new knowledge with performance in day-to-day practice, and learning to assess one’s own performance in relation to a vision of effective professional development envisioned by judges and other court personnel.

Why Invest in Ability-Based Learning?

Ability-Based Learning is worth the investment because it provides ways to help us as educators and practitioners to deal effectively with the professional’s changing role, the knowledge explosion, challenges to professionalism, and the call for competence and quality. Given today’s shifting societal and economic contexts, finding more productive approaches to education is essential.

Anticipating the professional’s changing role

Many professional roles are changing. Court systems and the way cases are adjudicated are changing. For example, there is more emphasis on negotiation in resolving disputes. Citizens are becoming members of arbitration committees. Career shifts and role changes in many professions are often more common because knowledge and technical skills learned in school may need to be shifted to new areas as well as updated. The life span is increasing, and professionals can expect to be practicing longer as well. Many judges become reserve judges following retirement or become involved in arbitration. What abilities will enable professionals to cross widely varied roles and settings? What abilities will need to be developed that can enable a professional to perform across an extended career lifetime?

Making a meaningful response to the knowledge explosion

Our society is experiencing a knowledge explosion brought on by technology and rapid communications. Professions have often responded to the knowledge explosion by specialization. The emphasis on specialties, fed by an advancing technology, has generally

overtaken us in the nineties. In some ways, the need for the professional to generate new knowledge supersedes the more important concern to learn to apply that knowledge in professional practice. There is some suggestion that increased specialization as an end in itself must be reconsidered.

Specialization is often reinforced by the heavy emphasis on the need for new knowledge. Too often, educators try to keep on top of the knowledge explosion by including more and more content in continuing education curricula, and by adding more and more courses and seminars. With the new technologies, some advisors to state bar associations or state judicial education organizations may assume that by providing distance learning courses that the problem can be adequately dealt with. While access to new information is essential, how to apply that information in each unique situation is the more difficult task. Solving that problem can be characterized as deciding “what to do when you don’t know what to do.” Exploring what to do in atypical situations draws on abilities that are fundamental to practice. We think Ability-Based-Learning is worth the investment because practitioners are involved in immediate and continuing choices about what knowledge is needed for solving problems, for deciding, and for making judgments. Ability-Based Learning helps professionals decide what knowledge is useful and relevant in uncommon situations or undefined problems.

Deciding “what to do when you don’t know what to do” draws on abilities that are fundamental to practice.

Preparing professionals for the knowledge and communication systems of the 21st century means linking knowledge to its use in ways that will pull together, rather than continue, the fragmentation of the specialties. In Ability-Based Learning, professionals learn to determine what abilities they need, how to define them in ways that enable a person to use them across contexts, and yet bear the mark of professional specialties and contexts.

Responding to challenges to professionalism by consumers

Most professions are experiencing more forceful and direct challenges from consumers. Consumers ask: “What do you as ‘professionals’ *do* that’s different from other jobs? We know your status and income are different, and that your profession has a long history. But what do you *do* that I cannot do myself? Will I need you in the future if the technical skills you use now become obsolete?” Citizens are joining arbitration boards and crafting their own wills. With the advent of court TV, criticisms of the court system, judges, and court personnel are increasing.

Looking to the *individual* in our society to pull things together is a societal value that lies at our deepest roots, and consumers often respond to broad changes by demanding more and more of individual professionals. Professions also tend to communicate the autonomy of the individual practitioner. Thus, they reinforce the consumers’ expectations of the individual

practitioner. Focusing these consumer values for individual accountability in constructive ways demands leadership from institutions and professions. Educators in professional schools and continuing education are expected to shape the future of the profession. Often, they have little advance warning about the situations the profession will face. Educators, especially when they are members of the professions, are expected to provide such leadership. When they assist professionals to describe the abilities essential to effective practice, the profession itself communicates to consumers what the professional *does* in the broadest characterization of his or her role. They also educate the public on what the profession expects of its members. This kind of education enhances voter awareness and improves selection policy.

Ensuring accountability, quality, and excellence

Ensuring accountability, quality, and excellence may seem obvious. But some years ago when our idea of making educational goals explicit by defining abilities so they could be judged and self assessed, we found that the idea was still caught up in specialization. Behavioral objectives which made educational goals explicit, often were too specific. They seemed to demand learning more and more knowledge in more and more sophisticated ways. Further, assessing educational goals meant assessing knowledge. The field of testing was still immersed in the concept of knowing the right answer and picking it from several other possible answers. Making goals explicit through behavioral objectives failed. This was often because the broad goals that linked knowledge to its use, and that tied the specialized disciplines together, were lost in the shuffle of hundreds of these objectives. The broad goals became defined so explicitly that the central themes that all educators and seminar participants could commit to across an educational program disappeared in specialization.

One challenge for Ability-Based Learning is to make abilities explicit enough to be assessed and at the same time to capture their broadest and most complex meaning. Individuals expect to assess their performance in ways that ensure that they can gradually learn to consistently demonstrate more sophisticated levels of an ability. To do that, individuals need to collect evidence that they are demonstrating abilities.

Professions have traditionally expected that professionals bear a major responsibility for their own assessment. What is necessary to realize this expectation? For us, it means determining the abilities most professionals need, and to learn to continually self assess them. Ability-Based Learning means developing the ability to self assess, the hallmark of assuring that quality and autonomy of the profession is realized through transformative learning.

Ability-Based Learning means developing the ability to self assess, the hallmark of assuring that quality and autonomy of the profession is realized through transformative learning.

Connecting Ability-Based Education with Advances in Professional Education

As we wrote this monograph, we were mindful of the larger issues that confront professional education in general. While the goals of education and the contexts of practice for lawyers, judges, and other court personnel differ in significant ways from those of other professions, we touch on some broader issues that many professions are identifying and attempting to resolve. We discuss some of these to acknowledge that the professions face challenges across the board. We expect to contribute to the continuing dialogue about how to enhance what it means to be a professional and how to educate ourselves and to transform our role.

When educators assist professionals to describe the abilities essential to effective practice, the profession itself communicates to those the profession serves, what the professional *does* in the broadest characterization of his or her role.

Many professions recognize the need for fundamental changes in the way they bring new members into the practice through formal schooling and then continually educate themselves across the professional life span. Lynn Curry and Jon Wergin (*Educating Professionals*, 1993) argue that three issues seem to characterize common concerns: understanding shifts in the contexts of practice; integrating knowledge and performance in curricula; and adopting continuous self-critique that enables professionals to respond to new demands for competence, accountability, and role transformation.

Understanding shifts in the contexts of practice

Many professions anticipate that professional roles will and must change to accommodate shifts in the contexts of practice. These shifts will be influenced by changing definitions of what a profession is, and by new social problems, political alliances, and global issues. As Donald Schön argues: "On the whole...professional knowledge is mismatched to the changing character of the situations of practice—the complexity, uncertainty, instability, uniqueness, and value conflicts which are increasingly perceived as central to the world of professional practice" (*The Reflective Practitioner*, 1987, p. 14; 1991). We acknowledge that judicial education also takes this concern seriously. Like most educators, we understand that an emphasis on building a theory and research base for a profession is joined by a study of what practitioners need to be able to do now and in the future. Both emphases help determine "what to teach" across the educational continuum.

Integrating knowledge and performance in curriculum design

Most professions can expect to experience new demands to integrate technical, practical, and theoretical knowledge in professional curricula (Curry & Wergin, 1993). An

issue common to most curriculum developers is how to make fundamental changes in the “education-practice discontinuity” (Cavanaugh, 1993). This is challenging because technical skills that are learned and honed in day-to-day practice from year-to-year must not overwhelm theoretical connections in either the professional school class or the continuing education seminar (Shulman, 1987). Many professional school educators believe that experiential learning, or learning to learn from experience, includes learning to think, analyze, reason, and to engage in ongoing self-critique. Solving today’s complex, inter-professional problems, they believe, requires an increasingly sophisticated understanding of both the fundamental theoretical and practical knowledge frameworks that undergird a profession (Sternberg & Wagner, 1986). Such learning, it seems, should occur from the start of professional education. For example, a number of medical schools from the University of New Mexico to Harvard have incorporated problem-based learning in order to build approaches to practical decision-making and judgment that incorporate the many knowledge bases that learners must understand, use, and continuously update in professional practice. A consortium of urban pastors across faiths identified common abilities that cross urban settings and integrate a sophisticated understanding of the sociology of urban life.

Adopting continuous self assessment

The members of most professional associations have experienced a crisis of public confidence in the preparation and performance of graduates, exacerbated by news reports of the failings of experienced professionals. Curry and Wergin suggest that professions must take a proactive stance with regard to new demands for competence and public accountability. This means not only honing the procedures for licensing and investigating complaints. Rather, it suggests that educators and practitioners engage in a continuous review of the outcomes of education, and a critical questioning of whether performance meets expected levels of proficiency and excellence. William McGaghie (*Evaluating Competence for Professional Practice*, 1993) argues that new assessment alternatives are needed. For some, learning to self assess is essential to evaluating one’s own work. Understanding the value base of one’s profession is critical to exercising one’s responsibilities to ensuring the public trust.

We do not intend to take a stance on all of these challenges for professions education. However, this brief summary helps place this monograph within a larger conversation that is currently transforming the professions in ways that both recognize the history of their contributions and prepare them to meet future expectations.

Advances in legal education

In 1992, the American Bar Association published *Legal Education and Professional Development—An Educational Continuum*. This report is widely known as the MacCrate

Report, after the Chair of the Task Force on Law Schools and the Professional: Narrowing the Gap. The primary premise is that the legal profession is changing, and that legal education is a continuum through which lawyers acquire their skills and values. The report identifies ten fundamental lawyering skills and four fundamental values of the profession. The report has been controversial and has spawned a host of articles around who is responsible for teaching the skills and values, and in particular, the law schools' role. The Wisconsin's Commission on Legal Education considered how the report applies to legal education in Wisconsin (State Bar of Wisconsin, 1996).

We think that the primary value of the report from the Commission on Legal Education is that the profession engaged in a process to identify professional expectations that could be used for self assessment and for making an ongoing commitment to self development. We agree with Blasi (1995), and Menkel-Meadow (1994) that one difficulty with the MacCrate report is that the skills sometimes seem to communicate to readers that skills can be separated from content in learning and practicing them—irrespective of where they are learned or practiced (i.e., law school, in-house training programs, or continuing legal education seminars).

Paul Brest and Linda Krieger argue that:

The foundations for the qualities necessary to the lawyer's craft lie in character traits and deep knowledge that one would not characterize as "skills" at all—personal integrity, an inner moral compass, and a perception of one's work as embedded in broad social, economic, political, historical, and for some, spiritual contexts (1994, p. 530).

Consequently, we use the term, *ability*, which incorporates both knowledge and skill into the definition. Substance, skills, and values are not discrete activities that professionals use at one time without regard to the others. Thus, we advance this definition of abilities, elaborated in Chapter Two.

"Ability" is a communicable idea that enables professionals to connect what they know with what they are able to do. An ability provides a *conceptual framework* for understanding what learning looks like when it is practiced in work and service settings. The abilities of an effective professional are complex combinations of motivations, dispositions, attitudes, values, knowledge of concepts and of procedure, strategies and behaviors. These combinations are dynamic and interactive, and they can be acquired and developed both through education and experience.

Eleanor Myers (1997) argues that the collective insights of many legal educators advocate "integrating skills training with the teaching of theory or values...substantive law and values should be taught in combination." These educators encourage law schools "to focus explicitly on integrating skills and values into substantive courses" (p. 401).

Advances in judicial branch education

In recent years, state and national judicial education providers have recognized the need to create new approaches to developing and delivering judicial education. Samples of curricula have demonstrated the inclusion of adult learning principles and practices that encourage expanding the learner's knowledge base and applying that knowledge in such a way that it has practical implications in the everyday life of the learner. This approach symbolizes the move toward education that develops the whole person rather than just aspects of that person, thus reducing the fragmentation that has been inherent in much of adult professional education.

The National Association of State Judicial Educators (NASJE), through its annual conference, provides a forum in which emerging adult education theory can be modeled and critically evaluated before it is implemented in actual judge and court personnel education. NASJE has been active in developing new approaches to judicial education. Those involved in judicial education can stay current with innovations that have the potential to develop their organizations, staff, and learners through the annual conference and through *NASJE News*. *NASJE News*, a quarterly publication dedicated to the judicial education community, often addresses cutting-edge adult education and judicial education efforts that further the professional development of judges and court personnel.

Further demonstration of the commitment that the judicial education community has to adult education principles and practices is evident by the approximately 200 faculty development seminars reported to the JERITT Project judicial education database from March 1990 to September 1996. The number of seminars suggests that the sixty judicial branch education organizations that report to the JERITT Project recognize the value of adult education principles and their application to comprehensive professional education for judges and court personnel across the United States.

In addition, the State Justice Institute (SJI) has dedicated grant funds to enhancing judicial education programs, processes, and outcomes since its inception in 1987. From 1987 through 1997, 450 grants fully or partially dedicated to judicial branch education were awarded by SJI. A good portion of the programs and products emanating from these grants were developed utilizing adult education theory and practices.

Recent SSI funded JERITT publications, *Education for Development: Principles and Practices in Judicial Education* (Claxton & Murrell, 1992) and *Education for Development: The Voices of Practitioners in the Judiciary* (Claxton & Ochsman, 1995) describe in more detail the emergent principles of experiential learning and adult development as they apply to judicial education. Other examples of publications that address the application of adult learning theory to knowledge growth, skill enhancement, and behavioral change in judge and court personnel education are *Adult Education Perspectives for Judicial Education* (Tallman, 1992) and

Curriculum, Program, and Faculty Development: Managing People, Process, and Product (Waldrop & Conner, 1994).

In sum, curricula that include a results orientation through explicit learner-centered objectives and outcomes assure active learning and effective teaching, provide new knowledge, and offer experiential sessions are the norm rather than the exception in judicial education. Thus, Chapter Three, “Understanding Ability-Based Learning,” deals with some of these curricular components in more depth. The chapter includes a section on “Abilities, Learning Objectives, and Learning Outcomes,” that ties the results orientation in judicial education to Ability-Based Learning. For now, we move to the heart of this monograph: Chapter Two: “Defining Judicial Abilities for Effective Performance.”

CHAPTER TWO

Defining Judicial Abilities for Effective Performance

Individuals at enormously complex levels of professional practice—that is, judges—inspire confidence in others and gain the public trust because they are effective and outstanding at what they do. Society looks to them to deal with issues that most people—including other professionals—find unresolvable. The court system is often expected to deal successfully with issues that other institutions cannot resolve. Often, however, judges must make complex decisions and take action in isolation, with little or no opportunity to reflect with a colleague before or afterward. Yet, reflecting on one's judicial performance is essential to learning from one's own experience, and to enhancing effectiveness in dealing with increasingly complex situations and problems. Reflecting on performance with colleagues is essential to building the future of a profession.

Chapter Overview

This chapter is for judicial educators. It defines terms and gives examples from judicial performance. Thus, this chapter may also serve as advance reading for judge participants in Ability-Based Learning seminars.

In this chapter, we illustrate one foundation for a theory and practice for Ability-Based Learning in judicial education: judge participation. We show how judges engage in processes to identify and define the abilities that make for effective and even outstanding performance in their own settings and out of their own experiences. We discuss the importance of formulating these abilities in ways that lead to a deeper understanding of them and how they are used in practice. We show how abilities can assist judges to reflect on their performance on the bench, or in other judicial branch settings.

We illustrate the meaning of abilities through definitions. Then, we illustrate judicial abilities that were identified by judges as part of activities designed and implemented by the authors. These activities include three interviews with judges; a one-day session as part of a more extensive curriculum for judicial education executives, administrators, and practicing judges who serve as judicial educators; two courses integrated into a week-long curriculum for state judges; and a judicial seminar for federal judges.

Examples of abilities identified by other professional schools and associations assist the reader to think about how judicial abilities compare with those from other professions. The judicial branch educator might also begin to think about those abilities that might be

similar or different from those that define effective performance for other court personnel. For example, we expect differences in the definition of abilities given role, position, setting, or jurisdiction.

Finally, we link abilities to effective performance through components and “criteria,” terms that have a particular meaning and application in Ability-Based Learning.

Identifying and Using Abilities

Opportunities to learn new ideas in judicial seminars are helpful for broadening one’s perspectives. However, new knowledge and attitudes are learned best when one can think through whether and how they might be applied day-to-day. The language of “abilities” can assist expert professionals to critically analyze what they do now, to reflect on it, and to discuss with each other those essential abilities that are needed now and in the future.

New knowledge, attitudes, and skills are learned best when one can think through *whether* and *how* they might be applied day-to-day.

Abilities—identified by judges themselves—include knowledge of concepts and procedures, skills, capacities or dispositions, self-perceptions and attitudes, qualities, and perspectives that shape what they do. These components are integrated in practice.

To use abilities, judges must first carefully infer them from their own or other judges’ performances, in relation to what contemporary and future practice requires. Judges can identify these abilities, drawing on their own knowledge and experience. These abilities can then be used via discussion as another way to reflect on actual practices, to think through what might enhance one’s own performance, to select areas to develop further, and to discuss with colleagues what might stretch the profession as a whole.

The language of “abilities” can assist expert professionals to critically analyze what they do now, to reflect on practice...

...and to discuss with each other essential abilities that are needed now to resolve current problems and which also stretch the profession as a whole.

Abilities are integrated with emerging knowledge. Using these abilities means integrating the constantly developing knowledge base of the profession with the capabilities, skills, and values that are fundamental to its ethically responsible practice.

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Defining Abilities

“Ability” is a communicable idea that enables professionals to connect what they know with what they are able to do. An ability provides a conceptual framework for understanding what learned expertise looks like when it is practiced in work and service settings.

“Ability” is a communicable idea that enables professionals to connect what they know with what they are able to do. An ability provides a *conceptual framework* for understanding what learning looks like when it is practiced in work and service settings.

The abilities of an effective professional are complex combinations of motivations, dispositions, attitudes, values, knowledge of concepts and of procedure, strategies and behaviors. These combinations are dynamic and interactive, and they can be acquired and developed both through education and experience. Abilities become a cause of effective performance when these components are integrated. A complex ability cannot be observed directly; it must be inferred from performance.

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Judge Participation in Identifying Abilities

Today, most judges recognize the need to be involved in continuing education. Judicial educators generally rely on advisory committees, questionnaires, needs assessments, and survey data to determine learning needs. An essential question remains: Are judges performing more effectively as a result of judicial education? Most judicial educators are aware that the context for professional practice is changing dramatically. Judges today find themselves practicing, at least implicitly, as educators, psychologists, social workers, and sometimes as spiritual counselors. What kind of education is needed for the expanding role of judges in society, as they take up more and more of the complex problems that challenge judicial decision makers?

This monograph is based on the assumption that judges themselves are in a primary position to determine the essential abilities that are related to effective performance. The ultimate goal is to identify those key abilities that the most effective and outstanding judges apply in performance and continue to develop through ongoing assessment and education. While external perspectives and evaluations of judicial performance are often helpful (e.g.,

ratings by jurors and lawyers; judge selection by citizen advisory groups), ultimately the profession itself is responsible for developing and holding itself to meeting its own expectations for what kind of performance is effective or even outstanding in the context of a given situation and in relation to professional guidelines and ethics. Most professionals acknowledge that their assumptions of what constitutes professional practice of abilities, including standards of ethics and professionalism (as institutionalized, for example, in peer review), *may* become ingrown and unresponsive to its own ideals and to the needs of the populations that it purports to serve. Thus, without external critiques, concepts such as “quality management” and “service orientation” become so much lip service. Nevertheless, continuous improvement of professional proficiency and productivity is tied to ongoing questioning by practitioners themselves about what makes for effective performance, and what distinguishes outstanding performance within various settings.

CONVENTION

Determination of professional effectiveness can come solely from external sources.

OUR ASSUMPTION

Judges themselves are in a primary position to determine the essential abilities that are related to effective performance.

We often use terms such as “effective” and “outstanding” performance, to communicate that Ability-Based Learning assumes the continuous quest for new modes and levels of expertise. An assumption underlies the term “outstanding:” Outstanding

professionals are those who continue to learn and develop to more sophisticated levels of understanding and proficiency. Our assumption counters the convention that outstanding people are born, not made. This convention is particularly troublesome in professional education because professionals have enormous responsibilities. Power for

CONVENTION

Outstanding people are born, not made.

OUR ASSUMPTION

Outstanding professionals are those who continue to learn and develop to more sophisticated levels of understanding and proficiency.

decision-making is granted to professionals, and they usually understand that they have to continually initiate learning across their professional life span. Their goal is to meet changing demands to be continuously effective—and to become generally outstanding at what they do across various situations. Because of the convention that outstanding individuals are born with prerequisite abilities, many in our culture believe that we as a society select persons to be judges—either through appointment or election—because they already have all the qualities and capacities they will ever need to be effective and outstanding. Society seems to believe that those individuals “float to the top,” rather than that professionals become increasingly effective because they continue to develop abilities across time through education and experience.

Another assumption underlies the concept of abilities: New knowledge, skills, and attitudes are learned when used in performance. This assumption counters the convention that if people know what to do, they will know how to do it, and they will do it. This convention is particularly troublesome for professionals because most education traditionally has separated knowing and doing. Too often, educators concentrate more on transmission of information and less on providing opportunities to develop abilities that professionals actually use to perform. Too often, educators focus on inputs, on what the teacher does, rather than on the outcome for the learner, particularly on what an adult learner needs in order to improve performance in context.

CONVENTION

If people know what to do, they will know how to do it, and they will do it.

OUR ASSUMPTION

New knowledge, skills, and attitudes are learned when used in performance.

Identifying Abilities as the Heart of Professional Practice

While any one professional may see similarities or differences between their own abilities and those of a fellow professional, each professional's naming of his or her abilities is important. The naming, and the inferring of abilities from one's own experience and professional knowledge, ensures that abilities emerge from how an individual or group of practitioners demonstrates abilities in their particular context. When professionals give voice to an ability, and say how they define it and perform it, they are speaking about the heart of their practice. Practice is not easily conceptualized, named, or understood. But the concept of "ability" as an idea that helps communicate the meaning of practice to the practitioner illuminates what actions make for effective performance in one's daily work.

When professionals give voice to an ability, and say how they define it and perform it, they are speaking about the heart of their practice.

"Ability" is a *concept* that communicates, because it is also *experienced*. One can conceptualize abilities and also experience having or using one's abilities in situations. "I can imagine what it means to interact effectively with someone who is using the court system. I can also remember experiences where I did interact effectively." This quote shows that abilities, when named and defined, can help individual professionals to name and understand what they do that is effective. "Knowing what abilities I bring to situations, and how I enact them is a kind of prelude to deciding what I need to learn next." For learning to occur, what is to be learned needs to be grounded in a language that resonates with how one uses new learning in practice. Otherwise, learning ceases to connect with the realities of day-to-day practice for the learner.

"Ability" is a *concept* that communicates, because it is also *experienced*. One can conceptualize abilities and also experience having or using one's abilities in situations.

As a professional gives voice to his or her abilities, a professional gives expression to how he or she defines and experiences one's own performance in one's own role, position, or context. This naming can also help a professional think about his or her performance across a range of situations, and in novel situations. We have found that

Analyzing how one performs abilities in one's own context fosters reflecting on performance.

professionals find it important to identify their *own* abilities, rather than to take them from another group of professionals, because *it is important how one performs abilities in one's own context*. When one says "I communicated effectively," one means such and such in a remembered situation. Thus, a professional can analyze and reflect on what he or she thinks makes for effective—or less effective—performance in daily work.

The language of abilities can help a learner connect his or her thinking and acting in situations. For example, if one can think about what the components of one's communication ability are (e.g., speaking on your feet, speaking directly to a person or group rather than lecturing or expounding), one can use one's thinking to guide actions.

The language of abilities can help a learner connect his or her thinking and acting in situations.

Thus, the process of communicating the idea of an ability functions to make professional practice a reality to a particular practitioner. Making an ability explicit makes it accessible to a person for their own learning initiative and professional development.

Examples of Abilities Identified by Institutions/Professions

Judges who participated in the Leadership Institute in Judicial Education (Appalachian State University, April 1990) and two Michigan Judicial Institute seminars (1991, 1993) have identified abilities. The graphic on page 18 shows abilities identified from several sources. They are used with permission from the schools themselves. Alverno College faculty participated in the development of each of these sets of abilities—except those from the American Bar Association's MacCrate Report: "The Statement of Fundamental Lawyering Skills and Professional Values."

From 1994 to 1996, Marcia Mentkowski, the primary author of this monograph, was one of thirty-five members of the Commission on Legal Education of the State Bar of Wisconsin, chaired by Chief Justice Nathan Heffernan and vice-chaired by the Hon. Patricia Gorence. The Commission rigorously took up the MacCrate Report, examined the skills and values for their appropriateness for Wisconsin practice, and issued a report that endorsed skills and values of the MacCrate Report—but included several others: *professionalism*, *judgment*, *civility*, and *conservation of the resources of the justice system*. This example further illustrates that professional groups work effectively to ask:

- What defines the profession?
- What should be taught, learned and practiced?
- What defines effective performance in our particular context and how can professionals continue to improve their practice?

A number of professional schools, such as the University of Wisconsin Medical School and the Purdue School of Pharmacy have worked to identify the key abilities that characterize effective professional performance. The national association of pharmacy (American Association of Colleges of Pharmacy) has done so also (cf. graphic, p. 19).

EXAMPLES OF LEGAL AND JUDICIAL ABILITIES IDENTIFIED BY INSTITUTIONS/PROFESSIONS
American Bar Association (ABA, 1992)²**Fundamental Lawyering Skills**

- Problem solving
- Legal analysis and reasoning
- Legal research
- Factual investigation
- Communication
- Counseling
- Negotiation
- Litigation and alternative dispute-resolution procedures
- Organization and management of legal work
- Recognizing and resolving ethical dilemmas

Fundamental values of the profession

- Provision of competent representation
- Striving to promote justice, fairness, and morality
- Striving to improve the profession
- Professional self-development

State Bar of Wisconsin (1996)³

The Commission on Legal Education added these to the ABA skills and values:

- Professionalism
- Judgment
- Civility
- Conservation of the resources of the justice system

Michigan Judicial Institute, 1991⁴

- Decision-making
 - Employment of coherent system for decision-making
 - Communication of decision-making
- Listening → Empathizing
- Critical thinking (reflective/analytical)
- Leadership
 - Managing
 - Proceedings, environment
 - Self
- Exercise of responsibility
 - Maintaining of public image
 - Teaching
- Exercise of patience
- Commitment to personal growth
 - Awareness of individual strengths, biases, areas to work on
 - Willingness for continual self assessment
 - Openness to knowledge
 - Openness to change
- Fairness/Impartiality
- Courage
- Humility

² American Bar Association. (1992). The statement of fundamental lawyering skills and professional values. In *Legal education and professional development—An educational continuum* (pp. 135–141). Chicago: Author.

³ State Bar of Wisconsin (1996). *Commission on legal education: Final report and recommendations*. Madison, WI: Author.

⁴ Used with permission.

EXAMPLES OF ABILITIES IDENTIFIED BY OTHER INSTITUTIONS/PROFESSIONS⁵

**Clark Community College
Vancouver, Washington**

- Communication ability
- Critical thinking and problem solving
- Global and multicultural perspectives
- Effective citizenship
- Technological literacy
- Capacity for continued lifelong learning

**Alverno College
Milwaukee, Wisconsin**

- Communication
- Analysis
- Problem solving
- Valuing
- Social interaction
- Global perspectives
- Effective citizenship
- Aesthetic responsiveness

**Purdue School of Pharmacy
Lafayette, Indiana**

- Logical thinking and decision-making abilities
- Written communication abilities
- Oral communication abilities
- Effective listening and processing abilities
- Critical thinking abilities
- Evaluating and interpreting scientific and professional literature
- Self-learning abilities and habits
- Solving ethical problems
- Demonstrating leadership
- Adapting to a changing environment

American Association of Colleges of Pharmacy

- Critical thinking and decision-making abilities
- Communication abilities
- Responsible use of values and ethical principles
- Social awareness and social responsibility
- Self-learning abilities and habits
- Social interaction and citizenship

**University of Wisconsin-Madison
School of Medicine**

- Analysis
- Appraisal
- Communications
- Interpersonal skills
- Self and peer assessment
- Self-directed learning
- Handling of stress
- Completion of tasks
- Use of valuing and ethical considerations in decision making

**National Board of Medical Examiners
(for Comprehensive Qualifying Exam)**

- Knowledge and understanding
- Problem-solving and judgment
- Technical skills
- Interpersonal skills
- Work habits and attitudes

⁵ Used with permission

Inferring Abilities from Examples of Performance

An important caveat is that abilities are inferred from performance. Abilities seem to be a kind of a learned language among professionals that they use to talk about their performance when they are asked to reflect on situations where they were effective, or in situations where things did not turn out as they intended.

An ability cannot be observed directly. It must be inferred from performance

In 1990, Marcia Mentkowski tested the assumption that abilities are a kind of learned language, through interviews with some Wisconsin judges. One said,

I was able to settle that dispute because I got everyone to communicate with each other and focus on what they had in common. You have to have the ability to listen in this job if you're going to figure out what is going on with people. You can't approach this job without a deep sense of the worth of all persons, the idea that you are going to be fair.

Note this judge's way of talking about effective performance. This judge seems to use ability language as a framework that is immediately relevant to performing in a particular situation, and that can then be used for generalizing across one's experience in a number of situations. Thus, we can tap this important resource for assisting judges—and other court personnel—to identify abilities.

To use abilities, judges must first carefully infer them from their own or other judges' performance—in relation to what contemporary and future practice may require.

Abilities are transferable

Abilities are transferable. We have learned that an ability enables an individual to perform effectively across a wide range of situations, and in complex and novel settings. Although individuals learn abilities in specific settings, they can transfer them and modify them in a variety of contexts. Abilities become transferable because the idea of "abilities" functions as an organizing principle for professional role performance and satisfaction.

Because abilities are the frameworks on which professionals construct learning, they carry new learning with them to apply across settings and roles. They use abilities to create a theory of action that they test out in various work situations. They use abilities to plan, organize, and structure their performance at work.

Abilities are holistic

An ability is a competence that is integral to the person. We have learned that a person integrates the multiple components or aspects of an ability (e.g., attitudes, skills, motivation, new knowledge) so that it becomes a cause of effective performance. The definition of an ability is not limited to a unitary trait, a personality characteristic built into one's genetic code, or a skill like verbal ability. Thus, abilities are teachable, that is, they can be taught and learned. Because they can be learned, they can be further developed through education and experience.

The definition of an ability is not limited to a unitary trait, a personality characteristic built into one's genetic code, or a skill like verbal ability.

In the interviews, the three judges⁶ responded to this question: "What personal qualities does a person have to develop as a judge?" (Note: "Clues" to abilities and qualities are in italics.)

...develop the ability to get *job satisfaction* [from autonomy] other than from peer interaction; advocacy is different from the dispassionate, impartial view that judges are expected to take. In advocacy, one develops relationships with other lawyers and gets satisfaction from those relationships (Judge Frank T. Crivello).

...develop *confidence* and belief in the self (Judge Crivello).

...develop a positive "center" so that one can achieve *peace of mind*, can be at peace with decisions that one makes (Judge Crivello).

...strong *sense of ethics* (Judge Janine P. Geske).

...ability to commit to the integrity of the process; *trust the system*. (Some judges have a very high IQ, and yet operate out of the assumption that the end justifies the means) (Judge Geske).

...understand and act out of the recognition of where I fit in the system and *what my role is* (Judge Geske).

⁶ Permission to be quoted in judicial education materials was given in 1991 by Judge Frank T. Crivello, Circuit County Judge, State of Wisconsin; Judge Leander J. Foley, Retired Circuit Court Judge in Reserve Status, State of Wisconsin; and Judge Janine P. Geske, Circuit Court Judge, State of Wisconsin.

...not be swayed by external opinion (this includes friends, media exposure, public opinion, electionability, political friends); able to recognize when lawyers are choosing individuals to argue before you that could have the potential to sway you because of who they are in relation to you and to *resist that influence* (Judge Geske).

...*integrity*; there is a lot that goes on behind the scene. You have a great deal of power in decision-making. You have to have the ability to set aside all those influences, from friends too. You have to be able to take risks, to make enemies (Judge Geske).

...faith in yourself, *trust in your own judgment* (Judge Geske).

It takes *kindness*; have to be kind and not cruel; have to be firm, may have to send a person to prison for life. Have to do your job, carry out the role, but if you are cruel you will never repair that person, one must not be vindictive; one must be kind as a judge; explain why; what are the reasons (Judge Leander J. Foley).

Be honest; absolute *honesty*, stay apolitical re the influences brought to bear; show integrity (Judge Foley).

Develop *insight*; understand how people come to believe that they are treated fairly; that is why it is essential to get from people what you have to have to make a decision based on facts and the law. If you do not have that insight, cannot see what they see, you cannot make a good decision (Judge Foley).

Abilities are developmental

Abilities can be developed. We have learned to do this pedagogically, that is, to describe abilities in ways that illustrate increasingly sophisticated levels of expertise. In a given profession, abilities can be identified from interviews and performance logs of outstanding performers within that professional group.

For example, here is one judge's response when asked: "What are the abilities of effective judges? What makes for effective performance?"

...it is the ability to relate actual situations to legal principles; the ability to take new fact situations and apply and interpret these in relation to legal situations and apply and interpret these in relation to legal principles. There are "givens," one must then synthesize legal material and apply it to new fact situations (Judge Crivello).

Here are two judges' responses when asked: "What abilities does it take to be an outstanding performer?"

...it takes *patience* in giving everyone a chance to have their day in court; to be heard even though what one is hearing is obvious. It takes *listening*, to communicate that you are listening to each person's point of view; such that people feel that the judge listens to them (Judge Geske).

...in the *listening*, be able to determine issues presented in arguments made without getting the self involved, and over directing it. The authority figure who over-directs the process doesn't let persons say what the issues are. A good listener does get the process moving; people have to get to the point and not ramble on and on, but the judge can not take [the right to be heard] away from them (Judge Foley).

The following examples of effective judicial decision-making are developmental, as illustrated from the interviews. In response to the question "which abilities are developed on the bench?" Judge Foley noted a *gradual development* of *decision-making*, that proceeded through various levels that became increasingly sophisticated. Note the following "Example of Developmental Components of Decision-Making." Here, the ability has been defined through specifying components or aspects of complex decision-making that are *qualitatively* different. Judge Foley defines "effective" and "outstanding" as components that differ in what the judge actually does: "articulating....," "comparing....," "making....," and "teaching."

EXAMPLE OF DEVELOPMENTAL COMPONENTS OF COMPLEX DECISION-MAKING ABILITY**ABILITY: COMPLEX DECISION-MAKING**

...to take a learned, a profound approach to the issues before you; to learn not to advocate

Developmental Components:

- Articulating decision-making
...to articulate decision-making through writing and speaking: to articulate the decision-making process; to make findings of fact; to say why you made the decision, what the findings of fact are, what the law is
- Maintaining confidence in decisions
...you also must develop confidence in your decisions. You learn [confidence] in judicial education. You hear others say, 'I did that wrong, I did this right.' You learn through comparison with what you did
- Autonomous decision-making
...have the guts to make decisions. There are many influences on you: sympathy, concern for results, care. You cannot let those influence you; you have to make decisions on the law and the facts; you have to make decisions that hurt other people. You are influenced by these things, but you are influenced in that it makes you more human. This makes you better articulate your decisions and why you make them, because then those affected will understand [a decision] better
- Teaching through decision-making
...you must learn to teach in your decision-making process. [Teaching through decisions] helps others respect the law and the judicial system. Why must they pay money? Why must they go to jail? Why must they stop doing this?

— Judge Leander J. Foley, Retired Circuit Court Judge in Reserve Status, State of Wisconsin

Another example of an ability that is developmental is *communication ability*, in the sense that each of the following aspects are learned through increasingly complex experiences on the bench.

Judges responded when asked by the interviewer, "What makes for effective performance?"

- Communicating impartiality:
...communicate impartiality (Judge Geske)

- Communicating fairness:
 - ...deciding on law and the facts such that others get the feeling about you that you are neutral, as a representative of the law. Show you are fair, just, such that even the poor who do not have the best lawyer feel that each is a person who has been treated fairly (Judge Foley)
- Communicating a judge's role:
 - ...take the attitude of a judge as opposed to an advocate; attitudes and skills can be learned (Judge Foley)
 - ...realize your role is to be a decision-maker (Judge Geske)
- Communicating an apolitical stance in a political system:
 - ...ability to get presented and promoted in the political system while maintaining the apolitical qualities required of the judge...ability to select apolitical arenas for promotion such as education and public speaking that do not interfere with apolitical stance (Judge Foley)

Note that a more sophisticated component of *communication* ability, communicating an apolitical stance in a political system, emerged in response to this question: "Which abilities do you think judges as a group need to develop to meet new demands of the judicial system?" The following abilities also emerged:

...*administrative and management skills* are new demands because of a quantitative increase in cases (Judge Crivello)

...*case management and computerization*; administrative skills; ability to handle large, complex lawsuits and manage complex litigation (Judge Geske)

...develop *more understanding and knowledge of scientific evidence*, complex statistics, and so on, to handle much more complicated issues (Judge Geske)

...*understand and comprehend bioethical issues* that have philosophical and religious implications; judges have to decide these; judges are asked to make decisions with philosophical and religious implications that are not based in legal knowledge (Judge Geske)

...*ability to withstand public pressure*; handle the influence of greater exposure of your decisions and decision-making in the media; have to handle influences of public opinion ("Put em in jail!") ("He's a sentencing judge"). You have to be a judge, not an image; each case is individual, you can't be influenced by being on TV (Judge Foley).

EXAMPLE OF DEVELOPMENTAL COMPONENTS OF COMMUNICATION ABILITY

ABILITY: COMMUNICATION

Developmental Components:

- Communicating impartiality
...communicate impartiality (Judge Geske)
- Communicating fairness
...deciding on law and the facts such that others get the feeling about you that you are neutral, as a representative of the law. Show you are fair, just, such that even the poor who do not have the best lawyer feel that each is a person who has been treated fairly (Judge Foley)
- Communicating a judge's role
...take the attitude of a judge as opposed to an advocate; attitudes and skills can be learned (Judge Foley)

...realize your role is to be a decision-maker (Judge Geske)
- Communicating an apolitical stance in a political system
...ability to get presented and promoted in the political system while maintaining the apolitical qualities required of the judge...ability to select apolitical arenas for promotion such as education and public speaking that do not interfere with apolitical stance (Judge Foley)

Abilities are defined as developmental through identifying components in order to make them teachable and to assist judges and other judicial educators to determine which abilities describe effective performance, which abilities need to be developed on the bench, which are in response to new demands, and which abilities can be inferred from outstanding performance. For example, effective performance includes relating to people, which can be developed on the bench. In response to new contextual demands, however, this ability also includes withstanding attempts to be influenced, both by public opinion or by the media in the court.

Judge Geske characterized "outstanding" judicial performance as being made up of several abilities, including these components that signify *motivations* or *dispositions*:

- Willingness to prepare:
...adequate preparation; understanding the issue (Judge Geske)
- Willingness to reflect:
...willingness to reflect; difficult to do because often you may have to sentence eight felons a day; have to take time to reflect on both philosophical issues and on what you are doing. Often you can't prepare the way you would like so you need to take time to reflect outside courtroom hours (Judge Geske).

Linking Abilities to Effective Performance

Clearly, judicial education has an important role to play in ability development. But Ability-Based Learning works best when a professional connects abilities to what the professional actually does, and then uses abilities and their components in reflecting on his/her practice. To understand this critical element of Ability-Based Learning, we now turn to further refining the meaning of abilities. Ability-Based Learning works when: (1) An ability is understood as *complex and multidimensional*; (2) Complex abilities are made explicit in a specific professional *context*; (3) Abilities are broken open into *components*; and (4) Components are further articulated through *criteria*. We take up each point in turn through definitions and examples. All the terms or concepts overlap and interact and cannot be understood individually. Nevertheless, for the purposes of exposition, we take them up sequentially here for judicial educators.

Judges develop a set of complex, multidimensional abilities that are:

- essential for effective performance
- descriptive of outstanding performance
- learned from reflecting on practice
- transferable to performance situations the judge is likely to experience
- essential for new roles a judge will be expected to exercise
- responsive to new or increased demands on the judicial system
- important for the judiciary of the future

Abilities as complex and multidimensional

An ability is a complex, multidimensional combination of components. For example, effective judicial decision-making is an ability. It is, no doubt, a key ability that defines the profession. That ability is made up of several components. The following questions are designed to draw out components of decision-making ability. What kind of knowledge of the law does decision-making require? What skills, or jurisprudential techniques are needed for arriving at a decision? What kind of dispositions or motivations enable a judge to state a ruling clearly and concisely? What kind of personal qualities enable a judge to maintain composure when under attack? What dispositions, developed over time, enable a judge to meet the time limits for decisions that one has set? What kind of self-perceptions are necessary to imagine a competent performance that communicates respect for a belligerent witness? What kinds of attitudes enable one to express empathy for all of the parties involved? What kind of actions or behavior, such as stating a holding up front, demonstrate appreciation of judicial communication and the law? What kind of values permit all parties to be heard?

Professionals are effective in a range of settings and situations, because they use **complex** abilities and integrate them in performance.

Abilities—identified by judges themselves—include the knowledge, skills, capacities or dispositions, values, self-perceptions and attitudes, qualities, and perspectives that shape what they do.

JUDICIAL ABILITIES, COMPONENTS, AND CRITERIA: EXAMPLES

An ability is a complex combination of components. For example, effective judicial decision-making is an ability. It is, no doubt, a key ability that defines the profession. That ability is made up of several aspects. What kind of knowledge of the law does decision-making require? What skills, or jurisprudential techniques are needed for arriving at a decision? What kind of dispositions or motivations enable a judge to state a ruling clearly and concisely? What kind of personal qualities enable a judge to maintain composure when under attack? What dispositions, developed over time, enables a judge to meet the time limits for decisions that one has set? What kind of self-perceptions are necessary to imagine a competent performance that communicates respect for a belligerent witness? What kinds of attitudes enable one to express sympathy for all of the parties involved? What kind of actions or behavior, such as stating a holding up front, demonstrate appreciation of judicial communication and the law? What kind of values permit all parties to be heard?

Prior work by judges at the state level, at the Michigan Judicial Institute in 1991 and 1993, demonstrates that judges identify **abilities**. For example, some of the abilities that state judges identified through consensus include:

ABILITIES:

- | | |
|--|------------------------------------|
| (1) decision-making; | (6) commitment to personal growth; |
| (2) listening and empathizing; | (7) fairness/impartiality; |
| (3) critical thinking (reflective and analytical); | (8) courage; and |
| (4) leadership; | (9) humility. |
| (5) exercise of patience; | |

Experience shows that an ability can be broken open into components that lead to specifying behavioral indicators or criteria that enable professionals to understand an ability and how it expresses itself in performance. Thus, **components** are identified and **criteria** are specified to enable professionals to practice for improved performance. For example, judges at the state level identified three components of the judicial decision-making ability:

ABILITY: EFFECTIVE JUDICIAL DECISION-MAKING

Components:

- (a) employment of coherent system for decision-making;
- (b) oral communication of decision-making; and
- (c) written communication of decision-making.

Each ability component was further specified through five criteria.

ABILITY COMPONENT: EMPLOYMENT OF COHERENT SYSTEM FOR DECISION-MAKING

Criteria:

- Defines issues to be decided
- Demonstrates attentiveness by incorporating all legal and factual issues into a decision and articulates reasons
- Permits all parties to be adequately heard
- Demonstrates that all conflicting evidence has been evaluated
- Demonstrates knowledge and appreciation of the law and jurisprudential techniques for

The idea is that professionals can describe their performance, identify abilities they need to develop, and then articulate how they know when they are effective. The idea is that by knowing what abilities characterize outstanding performance, a professional can aim to improve his or her own performance.

Nearly 800 performance interviews across professions (Mentkowski and Rogers, 1993) show that professionals organize their role in terms of abilities. Professionals seem to use the language of abilities to plan, organize, and structure their performance at work. They use abilities as frameworks that are immediately relevant to performing in a particular situation. An essential next step for Ability-Based Learning, however, is linking abilities to effective performance.

Making abilities and components explicit in a specific professional context

Professionals are effective in a range of settings because they use complex abilities and integrate them in performance. We noted earlier that it is important for each professional group to identify abilities for themselves. The meaning of an ability is grounded in the language of a particular profession, and the ways a practice community actually contributes to society. However, the meaning of abilities cannot remain in the abstract. The meaning of abilities must be grounded in practice to become a reality for the participant. That is why Ability-Based Learning depends on articulating abilities and their components in a specific professional context (e.g., urban pastors in Chicago; secondary school principals; state level judges in Michigan).

Alverno faculty have collaborated with a number of professional groups and associations to identify abilities and their *components*. Four examples follow.

EXAMPLES OF COMPLEX ABILITIES AND THEIR COMPONENTS

ABILITY: EFFECTIVE INTERACTION WITH A VARIETY OF OTHERS

Components:

- Deals with conflict openly and constructively
- Listens effectively to viewpoints of others
- Makes self available for one-on-one ministry
- Challenges others to work together
- Engages others in process, involvement
- Persuades others to act
- Uses influence to promote welfare of church

— Seminary Consortium for Urban Pastoral Education (SCUPE)

ABILITY: PROBLEM ANALYSIS***Components:***

- Get all of the relevant information by
 - Rephrasing the question or problem to see if new issues emerge
 - Listing the key problem issues
 - Considering other possible sources of information
 - Identify possible causes
 - If necessary, obtain additional information
 - Evaluate the information to insure that all essential criteria are met
 - Restate the problem considering new information
 - Determine what criteria indicate that the problem or issue is resolved
- National Association of Secondary School Principals (NAASP): Developmental Program for School Principals

ABILITY: PERSPECTIVE-TAKING***Components:***

- Identifies similarities and differences between one's own perspective and those of others
 - Examines ways in which one's performance is affected by reflecting on other perspectives
 - Enters another's perspective by reasoning within that perspective; can put one's self into another's place and view how another would think, feel, act
- Leadership Institute in Judicial Education, April, 1990

ABILITY: EMPLOYMENT OF COHERENT SYSTEM FOR DECISION-MAKING***Components:***

- Defines issues to be decided
- Demonstrates attentiveness by incorporating all legal and factual issues into a decision and articulates reasons
- Permits all parties to be adequately heard
- Demonstrates that all conflicting evidence has been evaluated
- Demonstrates knowledge and appreciation of the law and jurisprudential techniques for arriving at a decision

— Michigan Judicial Institute, 1991

Identifying components of an ability that lead to criteria

Making abilities explicit is a three-fold process: (1) inferring abilities from performance; (2) identifying ability components that lead to (3) articulating criteria. As components become more specifically behavioral they can serve as criteria. (Presenters rarely burden participants with the fine and technical distinctions surrounding these terms.)

Through analyzing simulated or remembered performance, an ability can be “broken open” into components. These components are aspects of an ability. Identifying components leads to identifying “criteria” that take the form of behavioral descriptors or indicators that further define an ability. Behavioral indicators or criteria enable professionals to understand an ability in more depth, and how it expresses itself in performance. Using ability components and/or criteria, individuals can infer their abilities from current examples of performance. Thus, criteria enable professionals to practice for improved performance.

Judicial criteria are guidelines for deciding an issue. In this monograph, we define criteria as behavioral indicators describing effective performance.

Identifying components of an ability leads to specifying criteria. Criteria for an ability describe it in more detail. It is here that differences among professions and between professional performances within a profession emerge. An ability, by itself, can often communicate only the qualities that professions share, although the pattern and language may differ from profession to profession.

Identifying components of an ability leads to specifying criteria. Criteria are behavioral indicators that describe effective performance.

To understand an ability, one might “break open” an ability into its components. These components may begin as very general descriptions. Note that some of the components are quite specific. Eventually, components may become specific enough (in contrast to an ability) to be observed in performance. At this point of specificity, we call them criteria or behavioral indicators because they may be used not only to “conceptualize” or “learn” what an ability means, but they may also be used as performance criteria or standards that define effective performance—an aspect of evaluating an ability.

Criteria provide a picture of an ability. Criteria may be used in three ways: (1) to understand an ability; (2) to understand how an ability develops in complexity or dimension over time, or in relation to varied contexts; and (3) to evaluate an ability in performance.

No one ability component suffices in the absence of others. For example, state level judges (Michigan Judicial Institute, 1991) identified *oral communication of decision-making* by judges as including, in addition to certain qualities, the following judicial actions: (1) explains that both sides were considered; (2) explains evidence, burden of proof and why certain evidence has or has not been persuasive; (3) discusses issues, law, and cites authority where appropriate; (4) compliments attorneys and witnesses where appropriate; (5) explains

holding at the end so that non-lawyers understand the reason for the decision before they quit listening; (6) ruling clearly and concisely, expressing sympathy for the parties (making palatable that which is distasteful). These actions can also serve to give meaning to an ability. They can serve as behavioral descriptors or performance criteria for assessing performance of a peer or of him or herself.

Using criteria as performance standards

One may use criteria as performance standards, that is, behavioral descriptors that also help a professional determine whether and how a performance meets expected levels of proficiency and excellence. Thus, criteria need to include qualitative elements in order to distinguish between levels of the ability. There is a real problem if criteria used as performance standards for describing level of effectiveness are only a shorthand for “some of the ability, more of the ability, all of the ability.” For example, how does a law student learn what “legal writing ability” means if the performance standard is “1st-year student legal writing, 2nd-year student legal writing, 3rd-year student legal writing?” An equally cloudy example of problematic performance criteria or standards is “poor legal writing, average legal writing, or excellent legal writing.”

Recall that in Judge Foley’s example of complex decision-making (p. 23), these qualitative elements arranged as developmental levels include:

- articulating decision-making
- maintaining confidence in decisions
- autonomous decision-making
- teaching through decision-making

Through identifying *developmental* performance criteria, members of a profession show the depth and complexity of professional performance. They articulate the gradual sophistication in thought and action that accrues through experience.

Our ultimate question as educators is: How may we assist a professional to identify and practice abilities through learning experiences and curricula? We turn to that question in Chapter Three. Some readers may prefer to read Chapters Four and Five to review instructional approaches and materials first, before returning to Chapter Three. We ordered the chapters because of our usual proclivity to expect “theory-to-practice” descriptions.

However, we anticipate that readers have also come to understand, through their own experience, that theory derives from practice as well.

Our ultimate question as educators is: How may we assist a professional to identify and practice abilities through learning experiences and curricula?
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CHAPTER THREE

Understanding Ability-Based Learning

Chapter Overview

In this chapter, we describe Ability-Based Learning in four ways.

- We review the concept of “ability.”
- We connect Ability-Based Learning with explicit learner-centered learning objectives and learning outcomes.
- We identify educational assumptions, and learning and assessment principles that underlie the examples in this monograph that illustrate Ability-Based Learning. (They also undergird the examples in Chapter Five that the reader can use to “see” Ability-Based Learning in the context of judicial seminars that worked.)
- We tell some of our own story of how we developed Ability-Based Learning out of practice and continue to refine it through research, so that our readers can experience it with us.

We trust that these four ways of presenting Ability-Based Learning will assist readers who have different learning styles to better understand this kind of learning, and provide them with a glimpse of how we as educators work to continuously improve it.

Revisiting the Definition of “Ability”

Recall that an “ability” is a communicable idea that enables professionals to connect what they know with what they are able to do. Abilities provide a conceptual framework for understanding what learned expertise looks like when it is practiced in work and service settings.

In our experience, how abilities are defined and assessed makes a big difference in how useful they are to educators and to professionals who are developing their abilities. As stated earlier:

The abilities of an effective professional are complex combinations of motivations, dispositions, attitudes, values, knowledge of concepts and of procedure, skills, strategies and behaviors. These combinations are dynamic and interactive, and they can be acquired and developed both through education and experience.

Our research⁷ confirms that the idea of abilities does make sense to practicing professionals, including educators. Abilities also make sense to employers and to various publics. When a profession creates an adequate picture of abilities, this picture can communicate to various groups the nature of what professionals do, as well as to improve learning for professionals themselves.

Our work in judicial education confirms that when abilities are identified and defined by judges, they use these abilities to construct performance. Further, they use criteria to make judgments about how well their performance is described by these criteria, that is, how “effective,” “expert,” or “outstanding” their performance is in a particular context.

Linking Abilities, Learning Objectives, and Learning Outcomes

An orientation to learning that focuses on what the learner is able to do has been infused in judicial education, in part, through a focus on specific *learner-centered learning objectives*. In judicial education, specifying learning objectives assists judicial educators to make more explicit what it is that participants are expected to learn, rather than to focus only on what information a faculty member expects to “deliver.” There has been a continual effort in judicial education to develop learner-centered learning objectives in a way that goes beyond the earlier use of learning objectives in the field of professional education. At that time, learning objectives in education were often very specific and extensive lists of the content or information that an instructor hoped to “cover” or convey to students.

Learner-centered learning objectives may be specified at the beginning of a course or seminar as the two boxed examples show.

We make a distinction between a learning objective and a learning outcome. When learning objectives are realized in performance by participants, objectives become learning outcomes. A learning objective is more likely to enable a learner to reach a learning outcome when it further specifies *what the learner is expected to do with what one knows*. When a participant demonstrates what he or she knows, each realizes learning in its fullest sense. The

Learner-Centered Learning Objectives

At the completion of this course, you will be able to:

- recognize common sentencing problems
- create a better structure for sentencing hearings
- rule more confidently in difficult cases
- organize your sentencing statement to maximize its effect on various listeners

Justice Janine P. Geske, Wisconsin Supreme Court

⁷ DeBack & Mentkowski, 1986; Mentkowski, 1988, 1998; Mentkowski, O'Brien, McEachern & Fowler, 1982; Mentkowski & Rogers, 1993; Mentkowski & Doherty, 1984; Mentkowski & Strait, 1983; Read & Sharkey, 1985.

learner demonstrates his or her learning through performance (rather than, for example, through a questionnaire that invites the learner to evaluate their course or to make claims about what they learned).

In our experience, linking learning objectives with learning outcomes combines the advantages of learning objectives with an orientation to learner performance. For example, a learning objective might specify that “Participants will understand the principles of jurisprudence.” In contrast, a learning objective that also makes expected learning outcomes more explicit specifies that “Participants formulate several principles of jurisprudence, and use these principles to identify and resolve legal and value issues in cases.” An instructor might then go on to identify learning activities (e.g., following a lecture, formulate principles individually and in a small group discussion using hypothetical cases, and two cases from each learner’s own experience). As a peer assessment exercise, the instructor may invite participants to evaluate each other’s work in relation to “learning outcomes.” How do we define learning outcomes? We define them as abilities, components, and criteria. Criteria are the link to assessment: criteria make performance expectations visible and explicit.

Learner-Centered Learning Objectives

As a result of this presentation, you will be better able to:

- identify the special problems that develop in analyzing hearsay issues involving reported testimony, dying declarations and statements against interest
- ask the right questions of the proponent of the evidence to develop a complete record
- create a record for your ruling that can withstand appellate review

Readings:

Federal Rules of Evidence

Seminar Outline and Hearsay Problems

From: *Reported Testimony, Dying
Declarations and Statements Against Interest*
Justice Janine P. Geske, Wisconsin Supreme Court

Ability-Based Learning is also learner-centered. The concept of Ability-Based Learning builds on the ideas underlying learner-centered learning objectives. It does this by determining abilities that form the basis for effective performance. This is a further step in *inviting learners to conceptualize their learning in terms of what they do with what they know*. Further, defining abilities helps each learner to break open the dispositions, attitudes, values, behaviors and skills, knowledge of concepts, strategies and procedures that he or she brings to bear in situations.

Ability-Based Learning can engage the learner more completely as a person. Through defining abilities, the learner considers his or her usual ways of thinking, feeling, acting, judging, and deciding in complex situations. For example, rather than imagining the act of judging as primarily a legal or intellectual exercise, judges can come to better learn how their values, prior socialization, professional experience, knowledge of the law and how it is developing in their state or jurisdiction, knowledge of community or cultural norms, and their own intellectual and emotional orientations are involved in complex decision-making or other such abilities. By reflecting on their performance, they can analyze how the kind of situation, area of the law, or jurisdiction shapes the ways in which they approach issues and decide them in an actual performance or series of performances over time.

When abilities are defined through components that lead to further specifying behavioral indicators or criteria, we make explicit another link between learning objectives and learning outcomes. Thus, judicial educators may analyze their already formulated learning objectives for learning outcomes, and also for abilities they expect learners to demonstrate through a variety of already created exercises and assessments.

Educational Assumptions, and Learning and Assessment Principles in Practice

We believe that colleagues hoping to understand and use any approach to education benefit when educational assumptions, and learning and assessment principles that underlie the approach, are made explicit. The next section provides a brief picture of these for the judicial educator.

Alverno College faculty originated and developed Ability-Based Learning. Over the years, they continuously refined educational assumptions, and learning and assessment principles as these emerged from implementing an ability-based curriculum (Alverno College Faculty, 1994)⁸. **Four foundational assumptions** are described in *Student Assessment-as-Learning at Alverno College* (Alverno College Faculty, 1979, revised 1985, 1994, p. 4). These assumptions have also emerged during our work with a consortium of institutions from high school through professional school (Consortium for the Improvement of Teaching, Learning, and Assessment, 1992).

1. Education goes beyond knowing what and knowing how, to being able to do what one knows.
2. Educators are responsible for making learning more available to the learner by articulating outcomes and making them public.

⁸ Alverno is a private four-year liberal arts college for women in Milwaukee, Wisconsin, with over 2,000 degree students enrolled in either a weekday or weekend time frame. A Master's Degree is offered for men and women. Generally, students are from southeastern Wisconsin, are first-generation college students, and work before, during and after college. Since 1973, graduation from Alverno has required students to demonstrate eight abilities to an explicit level of effectiveness in the context of disciplinary or professional content: communication, analysis, problem solving, valuing in decision-making, social interaction, global perspectives, effective citizenship, and aesthetic responsiveness. Faculty have determined and taught these abilities in general education courses and in a variety of disciplines. They have made abilities explicit through criteria and assessed them in multiple modes and contexts through a faculty-designed student performance assessment system. Alverno has studied these abilities through its educational research and program assessment system, and by collaborating with many other institutions and their faculty through a variety of consortia that cross the educational spectrum from elementary through professional schools.

3. Abilities—integrated with content—must be carefully identified in relation to what contemporary life requires.
4. Assessment is integral to learning.

Further, faculty reflection led to **learning defined as a process** that is

- integrative and experiential
- characterized by self awareness
- active and interactive
- developmental
- transferable (p. 9)

The judicial branch educator will recognize the emphasis on learning from experience, similar to David Kolb's (1984) emphasis on taking in experience as well as processing experience (Claxton & Murrell, 1992; Hutchings & Wutzdorff, 1988). Alverno faculty have also determined that learning must be active and interactive, and they develop instruction that enables learners to take responsibility for their own learning and to learn in interaction with others. Alverno faculty also define learning as developmental and transferable (cf. pp. 9–11). These learning principles have several implications for the definition of abilities.

As Alverno faculty developed an ability-based curriculum, they realized that student assessment would become an essential component of the learning process:

Student assessment-as-learning is a multidimensional process, integral to learning, that involves observing performances of an individual learner in action and judging them on the basis of public developmental criteria, with resulting feedback to the learner (Alverno College Faculty, 1979, revised 1985, 1994, p. 6).

Several **assessment principles** emerged from practice, as faculty implemented this concept of student assessment across disciplines and professions.

1. If learning is to be *integrative and experiential*, assessment must *judge performance*.
2. If learning is to be *characterized by self awareness*, assessment must include expected *outcomes* and explicit public *criteria* and student *self assessment*.
3. If learning is to be *active and interactive*, assessment must include *feedback and elements of externality* as well as performance.

4. If learning is to be *developmental*, assessment must be *cumulative and expansive*.
5. If learning is to be *transferable*, assessment must be *multiple in mode and context*.

We used these learning and assessment principles in designing judicial education courses and seminars. Our examples are based on these principles. We believe that these examples implicitly acknowledge the considerations that are inherent in using Ability-Based Learning in judicial education.

But before we describe judicial courses and seminars, we think it will help the reader to see how these assumptions and principles developed out of practice. We think our readers, especially those who are curriculum designers, will relate to our experiences developing Ability-Based Learning. Further, we hope to illustrate that this kind of learning developed over time, in context. While the setting in which we practice is quite different from that of judicial educators, we think that a common goal unites us: improving teaching so learners are improving their learning.

Developing Ability-Based Learning from Experience

How did Alverno faculty originate Ability-Based Learning? Early in the 1970–71 academic year, our president posed some crucial questions to our faculty. They included: “What kinds of questions are being asked by professionals in your field that relate to the validity of your discipline in a total college program?” “What is your department’s position on these?” “How are you dealing with these problems in your general education courses, and in the work for a major in your field?” “What are you teaching that is so important that students cannot afford to pass up courses in your department?” (Alverno College Faculty, 1976, revised 1985, 1992).

In a year-long series of meetings, each department presented their response to the whole faculty. At the end of that year, during a week-long session, faculty realized that they had one crucial question in common: “What are the outcomes for the learner, given the input by the faculty?” Over the next two years, Alverno educators defined a set of eight broad abilities (Communication, Analysis, Problem Solving, Valuing in Decision-Making, Social Interaction, Global Perspectives, Effective Citizenship, Aesthetic Responsiveness) that each learner would need to demonstrate in order to graduate. Faculty further defined each ability via a sequential, increasingly complex set of six levels. All learners are expected to progressively demonstrate levels 1 to 4 of each ability *integrated with the content of the discipline*, usually by the end of the general education sequence. Learners then demonstrate levels 5 and 6 of those abilities most integral to their discipline or professional area.

Faculty realized that they had one crucial question in common: “What are the outcomes for the learner, given the input by the faculty?”

What happened when Alverno faculty began to define abilities in this way? What happened when we defined abilities both within and across the disciplines, so persons outside our own disciplines could understand them, and could reinforce the abilities in their teaching? We embraced an enormous complexity. When we could no longer define our discipline or area of knowledge in terms of content, theory, or constructs alone—as sophisticated as these might be—we had to do some rethinking. As it turned out, we had to rethink a great many things. Fortunately, we did not know that at the time.

Teaching for abilities

Each faculty member, in each of the courses, now began to think in terms of abilities of a professional in the relevant area of study.⁹ This new thinking required a major shift in our educational rationale. How would we as faculty rethink our courses? We were grounded in our disciplines, grounded in content, and now we had to think about what learners would be able to do with that knowledge. We began to think not just about knowing, but about doing.

We were used to thinking about what “I as a faculty member” would do with that knowledge. I would decide what was important. I would organize it and “cover” it. I would decide how to present it effectively. I would invite each learner read it for themselves in the library. I would ask learners to discuss content in small groups. Instead, I now had to decide which abilities were central to my discipline, to psychology, for example. Suppose I think that the abilities of analysis and problem solving are central to learning psychological theories of learning.

- How do these abilities appear? What developmental level of the ability will I expect?
- How can I focus on analysis and problem solving when I invite learners to perform in assignments and assessments?
- How can I make these abilities explicit in relation to substantive content?
- How can I create learning situations that enable the learner to encounter and deal with analysis and problem solving as a professional would, using both these abilities as they are integrated by the learner with his or her knowledge of the field?

⁹ Alverno College Nursing Faculty, 1979; Earley, Mentkowski & Schafer, 1980; Loacker, Cromwell, Fey & Rutherford, 1984

- How do I best assist the beginning learner?
- How do I best assist the more advanced learner?

The outcome of this process is not that a syllabus now appears greatly changed. Rather, the learning outcomes of the course are different, and how I focus on them is different. What I invite the learner to do is different—to understand how problems are solved, and to solve problems in psychology simultaneously.

If I am focusing on what learners do, I will think more carefully about analysis and problem solving and how they are infused with knowledge or content, or in the case of continuing education, with the topic of a course or seminar. I will think about analysis and problem solving as constructs that could help the learner to organize his or her role performance, as well as his or her career and professional development. For example,

- Are my ability definitions, that is, components and criteria, complex enough that even the most sophisticated learner has more to learn?
- Are my definitions of analysis and problem solving causally related to effective performance in the professional role the learner has chosen?
- Are these abilities those that the learner would continue to develop, that would change in complexity over his or her professional lifetime?
- Will these abilities serve the professional throughout his or her professional career, and could the professional continue to develop them through professional education?
- How are these abilities linked to the learner's own educational and professional values?

As faculty, we have found that we needed to rethink our discipline and profession as well as what to teach for. Focusing on abilities in no way meant getting rid of content. Rather, we had to understand content better. We had to better understand what was at the heart of our discipline and profession.

Not only did we have to rethink our disciplines, we had to rethink how learning occurs. We expected early on that some learning had to be sequential, that one level of complexity had to be mastered before a learner moved to the next. Learners, we thought, could benefit from achieving developmental levels expressed through increasingly developmental performance criteria for an ability.

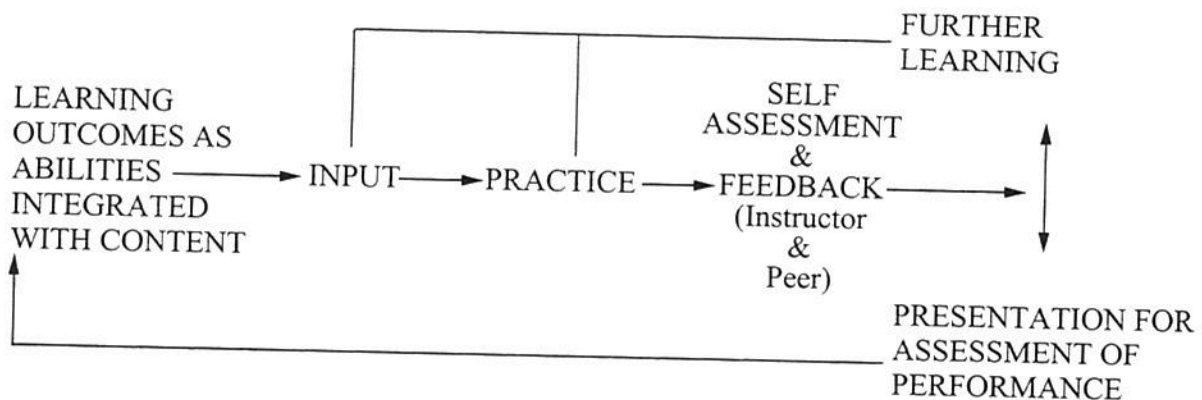
Clearly, if we were to embrace all this complexity, learners had to do their part. They had to become active learners. But how could learners accomplish this? How could learners become able to learn on their own? After all, we could not follow learners into their careers, continuing to set up learning for them. But if they were to learn on their own, that meant *learning how to learn*.

Finally, could I teach analysis and problem solving in psychology and remain oblivious to how a learner was learning it in other courses? Soon we realized that learning had to be a joint responsibility and focus for an entire department. Ultimately, individual student learning became a joint responsibility of the whole faculty, an expectation already set by our communications faculty. In sum, we found ourselves learning to work together toward a common goal of continuous learning in a well conceptualized and designed curriculum.

Assisting the learner to practice learning

One of the more specific questions that shaped faculty design of instruction was: "How do we assist learners to practice their learning and abilities?" Earlier, we described the important role of defining learning as *explicit abilities that underlie effective performance*. Learning also meant various types of input (lecture, discussion, role play, internship, text analysis, etc.) Learning meant creating: further learning experiences and/or opportunities to practice; to receive feedback on performance; and assignments for what and how to learn next—assignments that consider, for example, individual learning needs and styles.

CHART 1: LEARNING PROCESS AT ALVERNO



It soon became clear to us that if we were to teach for abilities that link knowledge and its use, we had to create opportunities for practice and for performing abilities in the settings where learners would perform them after college. This approach is often taken for granted in professional schools, and liberal arts colleges have usually assumed that performance is a necessary element in science laboratories or in the music practice room. But now we realized that we should expect internships of every liberal arts student in the humanities, sciences, and the arts, as well as in teaching, health care, and business and management. Further, if learning means that students are to be able to try out concepts in action, such learning means rethinking our courses so that all learning is experiential. It soon became apparent that we would need performance opportunities. We could no longer assume

that understanding what concepts underlie communication and social interaction abilities is enough. Each and every learner now needed practice in communication, and practice in social interaction in the context of their major field.

Opportunities to practice in all the classes, not just in the laboratory, became an essential part of learning (Doherty, Mentkowski & Conrad, 1978). We also had to rethink internships and clinical performance instruction, and to carefully redesign them. We soon came to structure these internships to ensure that individuals learned from their experience. We learned to find settings where professional abilities could be applied, and we began to train the mentors from these settings. We designed parallel seminars to assist learners to make sense out of their experience in the field, to share their experiences, to analyze their own working style in these settings, to reflect on their experience, and to come to some conclusions about how to perform better. Along the way, we continued to experiment with ways to select experiences that would truly result in new learning, to ensure that learners could reflect on their experience and create new theories to understand the problems they were faced with, and to test out new theories of action. What was the result? These abilities began to take shape, to open up, to become defined more carefully. Ineffective teaching strategies fell by the wayside. In sum, learning became accessible when the abilities, components, and criteria became explicit. An unanticipated consequence was that our assumptions about learning and our educational values also became explicit.

In sum, we learned that:

- To respond effectively to change, learners who have learned how to learn become able to use a wide range of complex abilities in performance, to self assess them in relation to criteria, and to learn on their own.
- Pedagogically, learning outcomes become cumulative and sequential; one level of complexity is mastered before one moves to the next.
- Important components of a learning process include: input, practice, self-assessment, feedback, and further learning. All components are necessary for learning to occur.
- Some of our educational values include developing active, self-sustained learning, linking knowledge to its use, and developing values for growth, change, and realizing one's potential.
- Knowledge must be linked to its use in order to be learned effectively. This means providing opportunities to practice and ensuring that each learner can learn from her or his experience.

Assessing abilities as integral to learning

The process of becoming educators who focus on learner abilities and learning outcomes was aided by another shift in thinking. Learner assessment became an opportunity for learning. How did we embrace assessment? When faculty first asked, "How will we know if each student has achieved these abilities?" they assumed that there may be existing instruments that could measure the abilities they had defined. There were no such instruments. Then they assumed it was just a matter of putting the experts to work designing instruments. They employed a large testing firm to develop some instruments: These experts designed multiple choice and short answer instruments to measure these complex abilities. The faculty realized they would have to design their own assessment process that focused on abilities integrated with content. In the process, they began to clarify student assessment-as-learning, a process for the individual learner, for his or her ongoing development.

Student Assessment-As-Learning

This process, integral to learning, involves observation and judgment of each student's performance on the basis of explicit criteria, with feedback to the student for improving learning and to the faculty for improving teaching.

It serves to certify student achievement in developing academic knowledge and abilities required for graduation.

There are ongoing challenges. To begin with, we cannot observe a complete picture of a learner's ability directly. We must rely on *sampling an individual's behavior*. A human being is a living mystery, only partly visible to another person. Yet even that part would take a lifetime to record. One day we see a student thinking through a mathematics problem on paper; another time we see her thinking through an economics problem with a group. From the thousands of hours of a student's college career, we can select but a handful for careful observation. Through them we seek to get as complete a picture as we can.

How do we know a given sample performance is representative? Is the student having an unusually bad (or good) day? Can she exhibit the same abilities under different circumstances? Will she? How many samples are necessary to provide as full as possible a picture of her ability? How varied need the samples be to suggest the complexity of an ability? All of these are questions we continue to grapple with and learn more about from our practice.

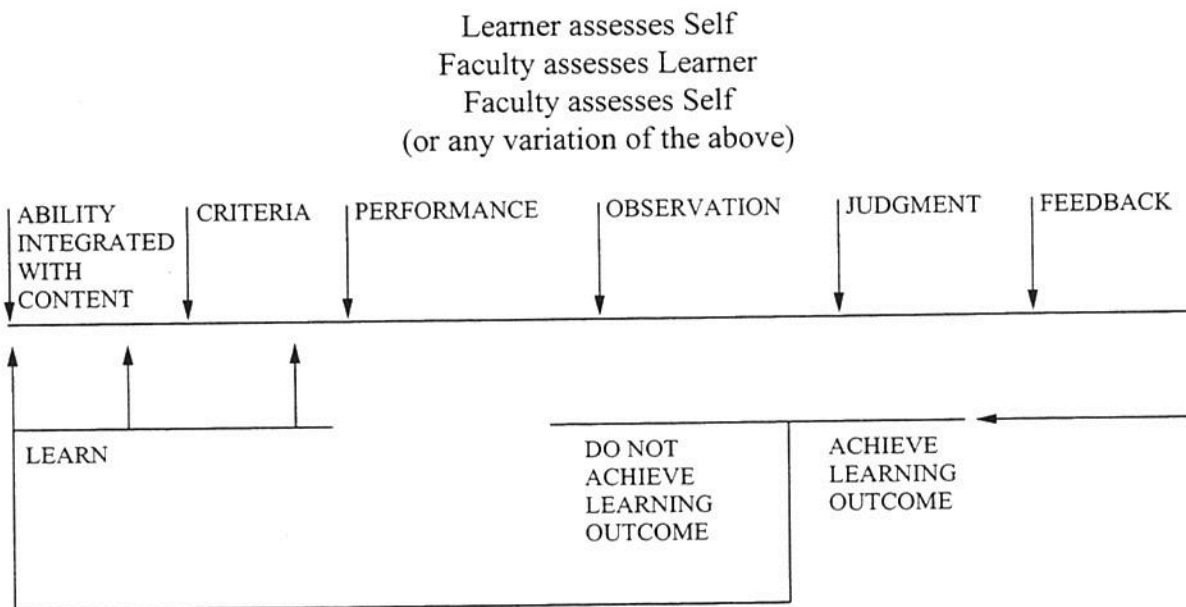
Then there is *observing*. Even the smallest sample performance of human behavior is so richly complex that we can focus only on a few key elements. Which ones are most important? How many? How do we record them? At what level of specificity? Within which framework(s)? Does the situation really call for them? Does it restrict the student to doing only what we are looking for, or does it challenge her to show her best?

Judging raises more hard questions. How can we separate an intangible ability like analysis from an activity like writing that makes it visible? Who shall judge? How do we assure some reliability among several assessors? In judging we are applying criteria. What criteria describe an “effective” action? How much demonstration of an ability is enough? How many criteria? How specific? How does the context of a performance affect the criteria? Which criteria are essential? Which distinguish quality? How are these and other criteria set? By whom? What constitutes sufficient evidence?

Giving feedback reconnects the judgment with a learner, but it will be helpful only if improved learning results. How specific must it be to become most meaningful to her? How close to the actual performance? What level and amount of information will enable a learner to perceive her performance in a way that will make possible and even encourage further development? What kind of feedback will assist a student to separate judgments of her performance from judgments of herself? What kind will assist her in developing her ability to self assess?

These questions are not the kind that have fixed answers. To undertake assessment-as-learning means sampling an individual’s behavior and observing and judging according to criteria. It means developing a whole array of techniques, to take into account the fullest possible range of human talents. And it means an ongoing commitment to dealing with these kinds of questions. (Alverno College Faculty, 1979, revised 1985, 1994, pp. 4–6).

Chart 2: ASSESSMENT-AS-LEARNING PROCESS AT ALVERNO



The assessment process is effective when:

- The mode of learner response (group discussion, oral presentation, essay, client interaction, portfolio, etc.), is consistent with the ability being assessed
- Public, developmental criteria describe a picture of the ability being assessed
- Multiple judgments of the ability are made across contexts

Because all such variations in criteria as form and specificity are determined by context, it is impossible to provide a formula, but the area of specifying criteria is a territory that can be mapped. We suggest various starting points and routes, and some important guidelines for decisions on the journey. Our overriding principle remains: assistance to the student in becoming an autonomous learner. Therefore, what we are working toward for each student is a stage at which criteria have been so well articulated along the way that they become common, though changing, ground for understanding abilities in all their variations and eventually need be stated only for clarification and comparison. (Alverno College Faculty, 1979, revised 1985, 1994, p. 34).

- Expert judgment applies criteria to performance
- The learner receives individual feedback on strengths and weaknesses in performance
- Self assessment applies criteria to performance

Assisting learners to use feedback to improve learning and performance

How can we assist the continuous learner to use feedback to improve learning and performance? When we make the commitment to providing for structured feedback to each individual, based on careful observation and expert judgment, we discovered an interesting set of issues. We gradually learned how to provide for feedback that both challenged and supported learning while linking feedback to explicit criteria so feedback could be more public, objective, and open to negotiation with the learner. For example, when we give feedback, we consistently interact with the person to see how they are interpreting it. Sometimes we adapt the feedback to incorporate the person's receptivity and understanding. At other times, we give additional information, and elaborate the evidence for our judgments.

How could we fit the feedback to the person so they could use it for learning, and at the same time obtain feedback relative to the ability, and to its defining criteria? We learned to do several things. First, criteria had to be explicit and public, and we learned to provide them ahead of learning time. Then we learned how much to emphasize weaknesses in performance in relation to strengths. We learned to give learners positive feedback on their

strengths, and to describe only one or two weaknesses. This helped learners decide what is most central to their performance problems. We learned to create further learning so learners could build on these strengths to continue to improve performance.

One strategy that worked was to ask learners to assess each other. Judgments from a peer compared the same criteria to performance, feedback was reinforced and seemed more external. Another strategy was to invite assessors from the business and professional community to give feedback (Alverno College Faculty, *The Volunteer Assessor at Alverno College*, 1984). Peer and outside assessors solved another dilemma: providing enough assessors to enable each learner to receive feedback. We learned to teach ourselves and others to give appropriate feedback. As a result, we gained another source of expertise that funneled information into ability and criteria development and the development of assessment techniques. In the process, we have learned that giving effective feedback is in itself a developmental ability and that it improves the whole assessment process. Feedback contributes to independence in learning.

Assisting learners to self assess their learning and abilities

As we progressed, we made a gradual but enormously helpful discovery. We began to realize that individual learning occurs when each learner self assesses his or her own learning and abilities. This idea seemed to be the critical key to internalizing the criteria for performance, and to directing their own learning. How well learners became able to self assess was an important clue to how well they understood each developing ability. Learning to self assess enabled them to perform more effectively in the future. The quality of this performance was dependent to some extent on how explicit we had made the criteria that defined abilities and how well we had been able to structure the feedback.

Confirming our initial assumption that *self assessment is an essential key to self-directed learning* also reinforced our operating principle that *abilities must continue to be refined*. Through self assessment, persons learned to identify what they were after in their own performance, and to make judgments about how well they were performing. Coming to consensus with an assessor, a learner had to reconcile sometimes disparate judgments of an assessor with the published criteria, and the records of the sample of one's performance—whether a videotape of a speech or group interaction about a community problem.

For the learner, coming to consensus in relation to performance criteria is an exercise in the kind of autonomy and quality assurance required of professionals. But this has meant that we—educators and learners alike—must better understand what it means to exercise expert judgment. Making qualitative, expert judgments, pooling extensive sets of information and making an interpretation that affects the lives of others, is a part of professionalism clearly in demand but not well understood. Our basic assumptions about assessment needed to be changed. We found that we had to develop expertise in assessment, to monitor how assessment occurred, to design instruments, to give better feedback, create better criteria, make better expert judgments, and build opportunities for ongoing self assessment.

Learning to self assess as educators

It is beyond the scope of this document to describe the evolution of our approaches to self assess our effectiveness as educators. This narrative does describe the evolution of Ability-Based Learning with an evaluative stance. We describe how we learned to improve Ability-Based Learning by self-assessing our own performance as educators *in relation to what and how students actually learned*. In 1976, we initiated processes for such self assessment at the program and institutional level (Mentkowski, 1994; 1998).

Institutional and Program Assessment

- Processes that yield patterns of student and alumna learning, development, and performance on a range of educational outcomes. They provide meaningful feedback to faculty, staff, and various publics for improvement, shared learning, and demonstrated effectiveness.
- These processes ensure comparisons to standards (faculty, disciplinary, professional, accrediting, certifying), and enable evidence-based judgments of how students and alumnae benefit from the curriculum and college culture.

CHAPTER FOUR

Designing and Implementing an Ability-Based Curriculum

Chapter Overview

This chapter provides guidelines for judicial education executives, judicial educators, judicial education faculty, and others who are creating and implementing curricula that incorporate Ability-Based Learning theory, research, and practice.

Implications for Curriculum Design and Implementation

Given our definition of abilities, and the assumptions and principles of Ability-Based Learning and assessment, these questions can guide curriculum design and implementation:

1. How might we assist ourselves as educators, who are grounded in content areas, to think about learning in terms of developing abilities that are integrated with our discipline and profession? How are abilities integrated with course content?
2. What strategies might be used to identify, define, and refine abilities? Who is involved and how?
3. What kinds of teaching strategies maximize learning? How do we assist continuous learners to link knowledge and its use, and to practice learning and abilities?
4. How might one assess abilities? What basic assumptions about assessment need to be understood? How might we begin to assess abilities without having complete definitions of abilities?
5. Given that we focus on individual performance in assessment, how might we manage the interpersonal involvement by educators and peers in providing for individual feedback, especially when we expect continuous learners to become increasingly effective at meeting criteria?
6. How do we assist continuous learners to self assess?
7. What characterizes Ability-Based Learning?
8. What makes Ability-Based Learning work?

These are guiding questions for those judicial educators who expect to integrate Ability-Based Learning with their own expertise in adult learning and education. We take up these questions, either explicitly or implicitly, in Chapters Four and Five.

Setting Context for Ability-Based Learning

In our experience, judicial educators include judicial education executives and administrators, practicing judges and justices who serve as deans, as faculty or facilitators, and educators from other disciplines and professions. In discussions with educators from each of these groups, we and these colleagues have identified Ability-Based Learning as an important way for new understanding of legal and other judicial topics, perspectives and points of view to be considered and applied. As a part of these discussions, we found that it is essential for each of these individuals who makes up a faculty to have opportunities to discuss the concepts, learning outcomes, methods, and potential learning outcomes of Ability-Based Learning. In this way, curriculum designers, program organizers, course instructors, facilitators, and evaluators deal with issues related to Ability-Based Learning well in advance of conducting a course or seminar. As with any approach to learning, questions about the value of Ability-Based Learning for a particular group, setting, or judicial branch are best articulated, examined, and discussed by all of those who participate and those who are ultimately responsible for the success of a judicial education curriculum.

Each ability-based example discussed in this monograph was part of a larger program within an ongoing judicial curriculum. Each evolved through dialogue between the principal parties including judges and other judicial educators. Dialogue included the following considerations:

- Rationale for the overall curriculum and a particular program
- Discussion and specification of broad course or seminar learning outcomes
- Clarification of who the judge participants are, their expectations, and their prior experience with the judicial curriculum
- What kinds of courts, court systems, kinds of decisions, and areas of the law are likely to be involved
- How Ability-Based Learning fits within the larger structure of the judicial curriculum, that is, how the content of other components of the particular program will be integrated with Ability-Based Learning so that it is not a separate component, but rather, an approach whereby judges can consider and potentially apply the full range of concepts experienced and discussed in the program

- What an ability is
- What Ability-Based Learning is and why it can be an effective component of a judicial curriculum
- Evidence that Ability-Based Learning works
- Discussion of processes and methods and how these methods are related to broad curricular goals
- How Ability-Based Learning will be introduced to participants in the introduction to a program by the judges who are responsible for the over-all design of the curriculum (e.g., Chief Justice of a State Supreme Court, Federal Judge)
- How judge faculty members will be involved and what they will do—including providing live demonstrations of identifying, defining, and practicing abilities and/or creating written cases
- How judge participants will be involved, what they will do during the course or seminar, and what they will be able to do afterward as a result of their involvement
- Ongoing meetings and conference calls between judicial educators and participating judges about potential critiques of the curriculum and how those will be dealt with by the educators before and during a particular course or seminar
- Discussion of the strengths and weaknesses of such a course or seminar, given the conditions for learning
- How the program and its ability-based component will be evaluated by the participants and the educators

Clarifying Learning Outcomes

The learning outcomes for each Ability-Based Learning course or seminar vary with the topic, the history of judicial education for those individuals, and the current context in a particular setting and locale. Each judicial educator works to clarify the learning outcomes within the context for learning so that the application of abilities identified and the use of criteria for self assessment are relevant to the participant's daily practice.

Course

Learning Outcome 1:

- To identify and define the abilities of an outstanding judge

Learning Outcome 2:

- To develop a way to determine the abilities most important to one's own performance
- Create a plan to test them out in the improving of that performance

Example of Abilities and Criteria That Integrate New Course Content¹⁰

ABILITY: OBTAINS PARTICIPATION WHERE THERE MAY NOT BE A CONSENSUS

- Criteria:*
- Elicits fair participation of all parties, including jurors
 - Asks who is not “at the table” or “present” (e.g., victims, mentally disabled, other societal groups)
 - Shows awareness of own perspective and seeks other perspectives
 - Considers breadth of participation in a community decision when that decision is relevant to the issue on which one is ruling
 - Considers limitations on role
 - Considers impact of recent theoretical perspectives and evidence as additional considerations that may or may not apply
 - Considers perspectives “in dialogue” and in aggregate, not necessarily weighted equally
 - Does not displace previous views, rather adds and considers others

Related abilities when “participation” is a value. . .

ABILITY: ANALYZES SYSTEMS

- Criteria:*
- Recognizes all the relevant “voices”
 - Grasps social dynamics and power relations

ABILITY: IMAGINES POSSIBILITIES

- Criteria:*
- Imagines and engages in a broader social-cultural conversation
 - Is open to a new “story,” a revised history

ABILITY: TAKES INTERPERSONAL ACTION

- Criteria:*
- Listens—to hear the silenced voice in its own terms
 - Facilitates the speaking of that voice, if inarticulate
 - Reframes so dominant voices can hear other voices
 - Is empathetic to fears, insecurities, and what is at stake

¹⁰ Developed by Marcia Mentkowski (Prof. of Psychology, Alverno College) in collaboration with judicial educators (a) Ann Juergens (Professor of Law, William Mitchell College of Law) who presented “Exploring Jurisprudential Orientations” and (b) Dr. James Price (Washington, DC) who presented “The Judicial Role in Society: Disagreements, Disputes, and Conflicts” for Judicial Decision-Making: Minding the Courts Now and in the Future (Michigan Judicial Institute, December, 1993).

Integrating Abilities with Substantive Content

In our experience, film examples (e.g., the judge who decides a case in the film *Whose Life Is It Anyway?*) are enormously helpful as an initial prompt in assisting participants to identify abilities, to discuss what abilities are, and to name abilities important for judicial practice. However, to move to a participant's integration of content and abilities out of their own experiences, it is essential to have live demonstrations (judges describing situations, analyzing them, and identifying abilities and defining them through criteria). It can be helpful in advance or during a course or seminar to work with other program material (e.g., "Understanding the Perceptions of Individuals Experiencing the Court"; "Perspectives on Tort Reform"; "Jurisprudential Orientations and the Evolution of the Legal System"; "Media and the Courts") in order to create some examples of abilities where the overall program content and abilities are integrated. The example on page 52 is illustrative.

Seminar

Learning Outcome 1:

To understand how abilities enable professionals to perform effectively

Learning Outcome 2:

To infer abilities and criteria from judicial performances

Learning Outcome 3:

To identify abilities and criteria you are now demonstrating, or those needed in moving a current situation toward resolution

Ongoing Learning Outcome 4:

To define a set of abilities inferred from judicial performance and abilities that might stretch the profession as a whole—toward dealing with increasingly complex issues

Designing Learning Experiences

We design learning experiences based on the learning principles described in Chapter Three. Most readers are well-versed in principles of adult education, and may wish to develop learning experiences based on the principles in Chapter Three, as well as those that they have applied throughout their own design of instruction for continuing education.

Often, some prior reading assignments support learning experiences. These readings may include the judicial concepts underlying a judicial seminar:

Example: "Minding the Courts into the 21st Century: A Survey of Judicial Decision-Making Techniques" by John H. Shepherd, Judge, Michigan Court of Appeals, Michigan Judicial Institute, 1990, 1993.

We have also assigned readings in professional development concepts underlying Ability-Based Learning:

Example: "Defining Judicial Abilities for Effective Performance" from the 1998 monograph, *Ability-Based Learning and Judicial Education: An Approach to*

Kathleen O'Brien: East Lansing, MI: The Judicial Education Reference, Information and Technical Transfer Project (JERITT) <http://jeritt.msu.edu>

Related theoretical articles may also provide insights:

Example: "Theories of Action" from the 1974 book, *Theory in Practice: Increasing Professional Effectiveness* by Chris Argyris and Donald A. Schön: San Francisco: Jossey-Bass. The example, "theories of action," illustrates how other theoretical frameworks (e.g., learning styles, cognitive-developmental frameworks) can be integrated with Ability-Based Learning.

Such articles are chosen in consultation with judicial educators who are coordinating the course or seminar, and who reflect on the expectations of the participants and the feasibility of doing advance reading. Generally, we do not make assumptions that each participant will have read all of the advance material. We recognize that some participants will not have the opportunity to prepare other than to scan the material. Thus, short presentations summarize key assumptions and concepts in the readings.

Designing Exercises for Practice

We design individual and group exercises to allow for the identification, definition, and refinement of judicial abilities. However, the abilities themselves can be useful beyond the greater awareness that they bring. The idea is to use the abilities in the actual context of practice. Exercises can guide this process. Each participant can choose a mentor to meet with during and outside a course or seminar experience over

Theories of Action

Underlying Principle: All human beings need to become competent in taking action and simultaneously reflecting on this action to learn from it.

Espoused Theory: The theory of action to which we give our allegiance—our response to the question: "How would you behave in this situation?"

Theory-In-Use: The theory of action that actually governs our actions—constructed from observations of our behavior.

—Chris Argyris and Donald A. Schön, 1974

Seminar

Learning outcome 2.
To infer abilities and criteria from judicial performances

Individual Exercise (15 minutes)

- Watch video excerpt and record behavior (worksheet p. 96–97)
- Infer abilities from performance (worksheet p. 96–97)
- Read one situation
 - Situation I: "Medical Malpractice..."
 - Situation II: "Hearings on IRS Summons..."
 - Situation III: "Settlement Negotiations..."
- Observe how abilities and criteria emerge from analysis of judicial performance

time, who can serve as a peer advisor and assessor. Indeed, the examples in Chapter Five assume working with a colleague on almost every phase of the activity. Dyads, small, and large groups may experience guided designs together. We assign participants to groups in advance, and prefer that they remain in the same groups to provide continuity and depth.

Designing Ability-Based Self Assessment

The independent learning exercise “Practicing Abilities Toward Outstanding Judicial Performance: Performance Log and Self Assessment” (Appendix C, page 140) can be used by course or seminar participants afterward as a learning strategy for documenting, analyzing, self assessing, and improving performance using abilities. Only the participant decides whether to share any part of his or her log with a colleague.

Principles for designing self assessment exercises and feedback strategies are built into the exercise and include:

Does the *self assessment* I am planning enable the participant to:

1. Observe him/her self in action?
2. Develop the habit of questioning the meaning of observations?
3. Develop ability to make judgments using standards or performance criteria and explicit evidence?
4. Make distinctions [among developmental levels of an ability, its components and criteria]?
5. Seek out alternative models of performance?

Does the manner of *giving feedback* that I am planning include:

1. Observing learner in action?
2. Analyzing performance?
3. Making judgments about performance using standards or performance criteria and explicit evidence?
4. Leading to prescriptions?
5. Communicating feedback meaningfully to learner?

(Alverno College Faculty. *Student Assessment-As-Learning*. Milwaukee, WI: Alverno College Institute, 1994, p. 115)

Implementing an Ability-Based Curriculum

The usual caveats apply for any implementation of a curriculum: collaboration with experienced judges and judicial educators, creating learning outcomes, exercises, and materials well in advance for feedback and redrafting; pilot testing instructions; continuous improvement during the course or seminar itself; and adjustment on the spot as the context and participants require.

In our experience, pilot testing on a small scale is helpful, but not always possible. In the examples described in this monograph, the ideas were piloted with three experienced judges and then with experienced judicial educators before an actual course was designed for judges, justices, and judicial educators (with the leadership of Dr. Charles Claxton and Dr. Patricia Murrell, Leadership Institute in Judicial Education, 1990). The curriculum was then redesigned for two additional judicial courses involving two sets of judge participants (with the leadership of Dr. Dennis Catlin (Michigan Judicial Institute, 1991, 1993). A seminar was later constructed for federal judges (with the leadership of Judge Nancy Edmunds, Sixth Judicial Circuit of the United States, 1996). While there were some common elements in the primary designs of the exercises, there were some modifications depending on participants (e.g., judicial educators; judges at the state level; federal judges). For example, the federal judges responsible for the program asked that exercises require colleagues to specify abilities per jurisdiction (e.g., appellate, district, bankruptcy, magistrate).

Evaluating Curriculum Impact

We suggest the usual curriculum evaluation procedures. In addition, we evaluate program impact by reviewing and analyzing the quality of the abilities that are generated by the judges. Such a review examines the effectiveness of the course or seminar. The following questions help determine the effectiveness of instruction.

- Are abilities identified?
- Are abilities defined through components and criteria?
- Are the abilities, components, and criteria inferred from examples of performance?
- Has there been sufficient opportunity for the exercises to generate performance in depth, so that the analysis of performance by the participants is adequate to generate criteria? If the abilities that emerge are common virtues and not profession-specific,

and if performance criteria do not allow for a range and depth of performance, it will be difficult to use the performance criteria for self assessment.

- Have the demonstrations (e.g., film, live interview, case, etc.) been sufficiently in-depth to enable a discussion of differences in perception and judgment of what abilities emerge, and whether the performance was effective? If so, the discussion among the participants is more likely to lead to a full illumination of the components and criteria that describe a picture of the ability.
- Can each participant use the abilities and performance criteria to give developmental feedback to a colleague and to self assess?

We now turn to the examples themselves, to further illuminate how these Ability-Based Learning principles are applied in practice.

CHAPTER FIVE

Ability-Based Learning Examples for Judicial Education

Chapter Overview

In the following example, Judge Sandra Silver illustrates to her colleagues how she restored community relationships in a high-profile case:

I was notified that a case involving a juvenile had been assigned to me. This fourteen year-old had murdered both parents and a sibling. There was an incredible outcry, particularly in the community where the family resided. My first duty was to protect the child from the loudly expressed anger of other family members and leaders of the church. I arranged for the juvenile to attend his parents' funeral under the auspices of the minister with the assistance of the quickly appointed Guardian Ad Litem. It became necessary to keep the press away from this child, and I issued a blanket Order prohibiting any photographing or direct communication.

Any case of this wide notoriety presents numerous problems for a judge, not the least of which is communication through the press to the community. I decided that stonewalling or locking the press out as was requested, would neither protect the child, nor diffuse the anger sweeping the fundamentalist Christian congregation, to which this family belonged. I decided to hold an informal press conference and accept questions from anyone. This greatly defused the situation, kept the community informed, and left me free and able to hear the case and consider reports for disposition.

Judge Silver documented this situation for an Ability-Based Learning course. In addition to issues about restorative justice, the case raises several questions for the judicial educator: What learning outcomes might be served by this case? In what learning context did Judge Silver create the case? How did Judge Silver use it as a learning opportunity with her colleagues? This chapter describes ability-based learning in action.

This chapter describes an Ability-Based Learning course, seminar, and exercise for judges that we designed and tested over time. We set context for the course, seminar, and exercise materials. Materials are described and referenced here, but included in Appendices A, B, and C. The materials illustrate differences in time-frame of a longer course (Appendix A) and a shorter seminar (Appendix B), allowing for an independent follow up exercise

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(Appendix C). All materials needed for each are included in the appendices so they can be easily reproduced for use. Permission is granted to copy monograph materials if each handout contains a citation as indicated on the cover page of each Appendix, and if it is used for instructional purposes only.

Both the course and seminar examples focus on:

- communicating the educational assumptions and learning principles underlying Ability-Based Learning
- using an experiential approach toward identifying abilities
- identifying abilities, components, or criteria out of each judge's own practice through an interview strategy
- making the connections among abilities, self assessment, and improving performance in a professional development context
- working together with colleagues in interviewing and interview analysis, so peers can be a resource for analysis, reflection, feedback, and peer assessment

Some differences between the course and seminar include:

- the extent to which participants define abilities through identifying components that lead to specifying criteria
- the kind of demonstration by judges of inferring abilities from performance
- the degree of practice time
- the extent to which participants define abilities developmentally, through components and criteria (neither example allows enough time for distinguishing the developmental level of a criterion, e.g., beginning, experienced, advanced)
- the extent to which participants define performance criteria and use them as standards for assessing increasingly effective performance over time (neither example allows for such assessment)
- the extent to which participants distinguish abilities that are likely to be needed or demonstrated in particular settings, states, or jurisdictions.

Appendix D contains a set of defined abilities created by state-level judges that can serve as an example.¹²

Ability-Based Learning Course: Identifying, Defining, and Practicing Abilities¹³

This Ability-Based Learning course was created for judges as part of a broader week-long program that focused on judicial decision-making. The judicial decision-making content of the program included sessions on how factors such as a judge's personal orientation, jurisprudential orientation, and personal and professional values influence the decision-making process. The process of defining and analyzing abilities was integrated very closely with these other substantive areas. The other areas provided a substantive foundation for judge participants to begin to explore and define judicial abilities.

The process of defining and analyzing judicial abilities was expected to strengthen the decision-making of judges. Integrating ability-based exercises described here with other faculty presentations strengthens the ability-based course. We recommend integrating these ability-based exercises with other judicial education content to create an ability-based program or curriculum. The strength of this example is that it approximates the kind of integrated curricula that we recommend for Ability-Based Learning because it provides a parallel format that is integrated with related substantive presentations.

The ability-based course for a week-long program is scheduled for six hours and forty-five minutes over five days. There are five sessions, one per day within a week's curriculum. The plan for the week is on the following page as well as in Appendix A.

All of the course materials for this course can be found in Appendix A. We will refer to the material in the Appendices throughout this chapter. For example, when you see (A, page 94) it refers to Appendix A, page 94.

¹² These abilities were created by thirty-nine Michigan judges as part of "Identifying, Defining, and Practicing the Abilities of an Outstanding Judge," conducted by Georgine Loacker and Kathleen O'Brien as part of a judicial curriculum, *Minding the Courts Into the 21st Century*, designed by the Michigan Judicial Institute, Dennis Catlin, Executive Director. Part I was held November 27–30, 1990 and Part II, February 7–8, 1991 (cf. Foreword).

¹³ Here the reader may wish to refer to Chapter One, "Introduction," and Two, "Defining Judicial Abilities for Effective Performance." We have used the main points, highlighted in boxes inserted throughout the text, as material for slides and overheads in presentations about Ability-Based Learning.

Identifying and defining abilities

The first day's session introduces the participants to the concept of abilities, bringing forward many of the concepts in Chapters One and Two of this monograph. For the introduction to abilities, we present several key assumptions about abilities (A, page 95). Communicating the full definition of abilities is essential. It is important that participants understand that abilities are not unitary personality traits, habits, or a list of virtues that are learned early in life and cannot be taught or developed further. Quickly, however, we move to inviting participants to infer abilities from performance using a video excerpt of judicial performance ("Observing Performance and Recording Behavior for Inferring Abilities" (A, pages 96, 97). These excerpts are brief (five minutes) so they can be drawn from films, and so they fall within the "for instructional purposes only" copyright rule.

Because we are working from the adult learning principle that learning is active and interactive, we also include an opportunity for the large group to discuss the abilities they observed, to share evidence, and to move toward identifying components and criteria that define an ability.¹³ We have found it particularly helpful to then move to small group discussions, where individuals identify abilities from their own experience, clarifying the specific meaning that each person gives to each ability (A, page 98), with a group consensus rounding out the activity (A, page 99). This exercise helps persons choose an ability of their own in later sessions.

We usually include presentation material in short form as handouts, so that participants can refer back to ideas and so the instructor, when visiting with a small group, can clarify the information easily. Just as most educators do, we find a variety of ways to communicate information or share experiences, and to allow for multiple ways of learning and learning styles. Some examples of handouts (we print them in various colors) are found in A, pages 100, 101, 102, and 103. Examples from other professions can help illuminate the differences in abilities between professions (A, page 103), because they illustrate differences in language and purpose of a profession, while helping to clarify similarities. Focusing on differences can be a first step in moving toward becoming more explicit in defining abilities with components and criteria. In this way, participants can focus on what makes for effective performance, and they can make the leap from seeing abilities as generic to seeing evidence of how they are shaped and molded by experience, role, and particular setting or jurisdiction. For example, federal judges found it helpful to discuss some differences in components of abilities needed at the state vs. the federal level.

¹³ Recall that "component" and "criteria" are overlapping categories. It is rarely useful to take time to discuss these terms in the abstract with participants, unless they are judicial educators.

IDENTIFYING, DEFINING, AND PRACTICING THE ABILITIES OF AN OUTSTANDING JUDGE

Plan for the Week

Learning Outcomes

- To identify and define the abilities of an outstanding judge
- To develop a way to determine the abilities most important to one's own performance and to create a plan to test them out in the improving of that performance

First day: **Identifying, Defining, and Practicing the Abilities of an Outstanding Judge**

Presentation and large group activity (1 hour, 45 minutes)

What are the abilities of an outstanding judge?

Presenter

Second day: **Further Defining and Refining the Abilities of an Outstanding Judge and Linking Abilities to Effective Performance**

Small group exercise (1 hour)

How can we judge abilities in performance?

Presenter

Judge Facilitators

Third day: **Analyzing Performance and Self Assessing Judicial Abilities**

Small group exercise (1 hour)

How can we analyze and self assess a performance log for abilities?

Presenter

Judge Facilitators

Fourth day: **Practicing the Abilities of an Outstanding Judge**

Presentation and small group exercise (2 hours)

How can we practice abilities in future performance?

Presenter

Judge Facilitators

Fifth day: **Reflections on Our Learning**

Presentation and small group exercise (1 hour)

What have we learned? What's next?

Presenter

Judge Facilitators

Defining and refining abilities and linking abilities to effective performance

In this course, the first day's activities are followed by presentations on various areas of judicial content. The second day's Ability-Based Learning session begins with exercises that ask: How can we judge abilities in performance (A, pages 104, 105)? This means linking abilities to effective performance, and it is here that live demonstrations by at least two judges are essential for framing the individual and group exercises that follow (A, page 105). Usually, a judge's live demonstration is preceded by a description of the interview for creating a performance log—its nature and purpose. Here, we have found the Behavioral Event Interview helpful (McClelland, 1978) (A, page 106). It is an outgrowth of the Critical Incident Technique developed by John Flanagan (1954), and many judicial educators may find it familiar. Sometimes a presenter conducts a live interview to create a case.

The interview provides for interactive learning in two phases: It first invites each participant to choose an ability they wish to work on (A, page 107), and to complete the exercise. Then in a dyad, they interview each other. The interview exercise (A, page 108) is used by a participant to guide his or her interview with a colleague and to take notes on the colleague's responses. This interview immediately moves the concept of an ability from the abstract to the personal and professional, and expects participants to begin a reflection process. We have often found it helpful to assign readings in advance that introduce participants to Argyris and Schön's (1974; Schön, 1987, 1991) concept of the "reflective practitioner" so that they are primed to consider what abilities they might wish to select, then to compare the selected abilities and components to what they think they do (espoused theory), and then compare those with what they actually do (theory in use). The goal here is to begin individually to think about which abilities he or she would like to develop further.

This attention to individual choices is important, because it emphasizes the process of identifying abilities, rather than asking the participant to be an "external evaluator" of the accuracy or validity of a set of abilities identified by other judges or professions. Focusing on the participant's own performance helps define abilities as useful to the individual in improving performance, rather than to focus on the kinds of academic arguments about the value of Ability-Based Learning that are perhaps best discussed before the seminar by the judge educators, later in the course by participants after experience with the process (A, page 119), or in a post-hoc session for refinements that might improve future courses.

Analyzing performance and self assessing judicial abilities

One way to move quickly to an analysis of performance, is to rely on live, interview demonstrations—a judge's public description of situations, performance, and reflection on it. In our experience, judges have been very willing to be interviewed by a presenter in front of their peers, and willing to engage in self-reflection. Naturally, we involve judge facilitators well in advance, and provide an exercise (Appendix C) to assist them to develop a situation in advance of doing it "live." The open discussion of professional performance that follows

such a demonstration has been particularly helpful because it sets the stage for the dyad exercise—an interview for creating a performance log.

To help the reader visualize this kind of live interview demonstration, we written examples contributed to this monograph by Judge Sandra Silver (cf. Chapter overview) and Judge Casper Grathwohl (used with permission). With the presenter as “interviewer,” each judge first did a live interview demonstration. Judge Silver selected two abilities (to protect, to publicly communicate). She orally described a situation that called for that ability, where she felt she had demonstrated effective performance.¹⁴

¹⁴ In the boxed examples, this live interview was written as an example by each judge. Each judge also edited for clarity and confidentiality.

Restoring Community Relationships in a High-Profile Case

Choose an Ability: To protect
To publicly communicate

Choose a Situation...that called for this ability, where you have demonstrated effective performance.

I was notified that a case involving a juvenile had been assigned to me. This fourteen year-old had murdered both parents and a sibling. There was an incredible outcry, particularly in the community where the family resided. My first duty was to protect the child from the loudly expressed anger of other family members and leaders of the church. I arranged for the juvenile to attend his parents' funeral under the auspices of the minister with the assistance of the quickly appointed Guardian Ad Litem. It became necessary to keep the press away from this child, and I issued a blanket Order prohibiting any photographing or direct communication.

Any case of this wide notoriety presents numerous problems for a judge, not the least of which is communication through the press to the community. I decided that stonewalling or locking the press out as was requested, would neither protect the child, nor diffuse the anger sweeping the fundamentalist Christian congregation, to which this family belonged. I decided to hold an informal press conference and accept questions from anyone. This greatly defused the situation, kept the community informed, and left me free and able to hear the case and consider reports for disposition.

Hon. Sandra G. Silver, Oakland County Probate Court, Oakland County, Michigan

In the group discussion that followed, Judge Silver and the participants then analyzed the situation. She discussed what worked and what she planned to develop further.

In a second live interview demonstration, Judge Grathwohl discussed a situation that caused undue difficulty, where he wanted to ease the burden of the situation. He chose one where he may have been somewhat effective, but that stretched his personal and professional abilities. For this monograph, Judge Grathwohl created the following example.

Medical Malpractice Case**Choose an Ability:** Patience

Choose a Situation...that caused you undue difficulty, where you want to ease the burden of the situation. Select one where you may have been somewhat effective so far, but that is now stretching your personal and professional abilities.

During peremptory challenges, the defendant's attorney preempted the only black juror on the panel. The black juror was asked only one question by the defendant's attorney and that was "could you be fair to the defendant doctor?" and the juror answered "yes." Plaintiff's attorney immediately asked for a hearing outside the presence of the jury and requested that the black juror remain seated pursuant to the *Edmons v. Leesville Concrete* case. (U.S. Supreme Court, 1991 59 US Law Week, 4574.)

After consideration, I told the black juror to remain in the jury box. We resumed jury selection. Defendant's lawyer requested to make a motion outside the presence of the jury. The attorney stated that my ruling in seating the black juror showed my bias and prejudice and asked that I disqualify myself. I refused the request and defendant's attorney said that he was appealing to the Chief Judge and since I was the Chief Judge, I could not hear the appeal.

I adjourned jury selection until the following day and contacted the State Court Administrator's Office in Lansing. The following afternoon a visiting judge heard and denied the motion to disqualify. Jury selection continued until a jury was seated.

Defendant's attorney said he could not continue because he had a migraine headache. I lost my composure! I yelled at him that he was attempting to disrupt the trial. I accused him of unprofessional conduct. The attorney jumped up and again asked me to disqualify myself and declare a mistrial. I was so exasperated that I declared a mistrial.

I still am upset about my response to the attorney's actions. Upon reflection, I could have done better.

Hon. Casper Grathwohl, Circuit Judge, Berrien County, Michigan

Judge Grathwohl's postscript:

After reviewing my situation during our judicial seminar, Judge John Shepherd of the Michigan Court of Appeals (who was my college roommate) commented on my performance. He observed:

"You did fine up until the end. You might have taken a recess, calmed down, taken time to reflect, or consulted with a colleague. It's very possible the lawyer did have a migraine headache!"

Judge Grathwohl's writeup of his interview as an example is particularly effective because his self-reflection includes discussion with a colleague, who also contributed a lecture presentation during the week-long curriculum. Seminar participants were familiar with Judge Shepherd's concepts, and were able to integrate them into the definition of the ability that followed the discussion of Judge Grathwohl's case.

After the live interview demonstration, Judge Grathwohl asked his colleagues: What other abilities might help resolve this situation? What are the criteria that help to define "exercise of patience?" For example:

ABILITY: EXERCISE OF PATIENCE

- Criteria:**
- Shows self-constraint
 - Maintains sense of humor
 - Uses mediative techniques where appropriate
 - Tolerates a variety of communication styles
 - Takes time to review relevant decisions before rendering opinion
 - Allows statements to be completed
 - Allows sufficient time for thought, argument, situation to develop
 - Shows awareness of servant role

— Michigan Judicial Institute, 1991

Note that our design asks participants to initially describe a situation where they have been effective, and to use this as a basis for learning to analyze the interview collaboratively (A, page 109), inferring abilities and criteria from performance. Then they describe a situation that caused undue difficulty.

Also note that each judge demonstrated a different kind of situation. Judicial educators who are practicing judges were particularly insistent that each kind of situation be addressed—situations where one is effective and situations that were problematic in that regard. For example, Judge John Shepherd emphasized in his lecture in this seminar that these kinds of "cases of first impression" have important aspects that can help to teach judges.

In the next day's session (A, page 112), we ask participants to describe a more problematic situation, as did Judge Grathwohl. We have alerted participants to the importance of both kinds of situations. The second experience supports participants in imagining abilities and criteria that are needed to resolve current, problematic situations. Thus, the abilities and criteria that are defined and practiced have a future orientation.

What kinds of situations should be chosen? The following elements of a situation were defined in interaction with judicial educators and practicing judges—including the language (A, page 111). The judges who planned the workshops were interested that the course provide a challenging experience for their colleagues and for themselves.

What Kind of Situation Might I Choose?

Choose a situation where you think practicing this ability could enhance performance. What kind of situation might be most helpful (a) for inferring abilities already demonstrated, (b) for considering and applying new ideas and concepts, and (c) for inferring abilities needed to resolve current situations?

The most useful kind of situation (or set of related situations) has a number of dimensions:

- it is compelling
- it may appear unresolvable now
- it is currently taking up your personal and professional attention
- it is causing you undue difficulty and you want to ease the burden of the problem
- you want to move the situation toward resolution in order to benefit other persons or groups
- you may be somewhat effective so far; but the problem is really stretching your abilities

The situation might be a problem that is related to the general topics addressed in this course. **The situation can be—but it need not be—a legal case.** Either way, plan to preserve confidentiality of institutions, persons, or cases where appropriate.

Once again, participants interview each other (A, pages 112, 113). The exercise involving participants in analyzing their performance logs invites them to explain differences between what they wanted to do and what they actually did, and to identify the ideas or concepts that might be applied to move the situation toward resolution (A, page 114). Participants then continue by elaborating the abilities needed, because those will be the focus of an action plan to practice those particular abilities. When judges work together, they preserve confidentiality as appropriate.

Three concepts are important for facilitators to re-emphasize:

- Each situation calls for a number of abilities. Abilities are integrated in an effective performance.
- It is challenging to call forth all components of an ability that might need to be developed. Abilities are made up of new knowledge, behaviors and skills, as well as self-perceptions



Abilities are Integrated in Effective Performance

and attitudes. Abilities rely on motivation and dispositions developed over years of experience. How these components are combined in a particular situation helps define the nature of expertise, and can distinguish an effective performance from one the participant considers outstanding.

- Defining sophisticated levels of proficiency in understanding judging and the law are essential to performing more sophisticated abilities. Performance criteria that are formulated developmentally, that is, they call for beginning, developing, or advanced levels of proficiency, are needed for ongoing professional development.

The following case, developed by Judge Julia Smith Gibbons is illustrative. Judge Gibbons analyzes a situation that takes place over time, and illuminates its complexities. She analyzes and reflects on her experiences to infer abilities.

Settlement Negotiations in a Complex Civil Case

Choose an Ability: Patience Communication Understanding of Human Nature

Choose a Situation... that called for these abilities, where you have demonstrated effective performance.

Where did the situation occur?

Who was involved?

I conducted the settlement negotiations in a complex civil case which was assigned to another judge in our district. Trial was estimated to last four months. I participated a few weeks before the trial was scheduled.

The case arose out of the sale of the stock in a local radio company engaged primarily in selling television and radio time to various companies nationwide. An out-of-state purchasing company paid \$40 million, with future payments contingent on future earnings. The selling shareholders were: (a) the founder, who was president and majority owner of the company; (b) chief financial officer; (c) trusts established for the founder's family; and (d) the general counsel (also trustee for trusts). At the time of the sale, the founder entered into an employment agreement with the purchaser under which he would run the company for ten years.

What happened?

What led up to it?

What did you think, feel, intend?

The next year, the IRS and FBI seized the local company records in a widely-publicized raid. The company's founder, general counsel, and chief financial officer—along with 13 employees of the company's customers—were indicted and convicted of various offenses arising out of paying kickbacks to customers' employees in order to obtain and keep business.

continued

The out-of-state purchaser sued the former shareholders, the general counsel's law firm, and another attorney who had participated in negotiations for the sale. The purchaser contended that defendants were guilty of fraud, in failing to disclose the kickbacks and earnings. Defendants asserted that there was no fraud, that the purchaser knew about the arrangements with customers' employees prior to the sale, and relied on independent information rather than that provided by the local radio company.

What did you do?

When my settlement efforts began seven years after the original sale of the stock, we were essentially dealing with a common law and statutory fraud case with extremely complex facts and some interesting legal issues about liability of the trusts. At an initial meeting of the parties, I decided that counsel for all parties, and the parties or their representatives needed to be present at settlement negotiations. During early negotiations, I realized that only the plaintiff's lawyers and representative and the founder and his lawyers needed to be present at the start. The founder was the key figure in the litigation. He had served time in prison, but was still a very wealthy and proud man—and a masterful negotiator. The plaintiff distrusted him enormously. Nevertheless, the bulk of any settlement funds would have to come from him. He had greater personal exposure, and, other than the trusts, was the only one with enough money to pay a significant settlement. The founder set some of the settlement ground rules at the outset. He also insisted that the plaintiff negotiate with him for a total settlement amount (excluding funds to be paid by insurance companies). He thus assumed authority to negotiate on behalf of the trusts.

I wrote to the plaintiff encouraging acceptance: ("...My personal assessment of [the founder] is that he may well settle this case ultimately, but only through the negotiate and trade approach with which he feels comfortable. My personal preference was to avoid such an approach and to urge the parties to very quickly become quite candid about their ultimate positions with respect to settlement. This approach does not seem possible, however. Thus, it appears that we will all have to use [the founder's] approach if we genuinely desire settlement. I realize that [your corporation] may feel some irritation..."). I also urged plaintiff to rely on the founder's assurance that, if a total figure was agreed on for himself and the trusts, he would negotiate for the trust's contribution. Plaintiff ultimately acquiesced in founder's ground rules and approach.

We then began a slow process of moving toward a settlement figure. Plaintiff sought damages including the entire \$40 million purchase price, mandatory prejudgment interest under the state blue sky law, and punitive damages. The founder's total assets were not more than \$15 million; trusts totaled \$12 million. Obviously, plaintiff could not hope to collect what they wanted, although they were properly enthusiastic about their prospects of success on their claims against the founder and the other defendants. Also, there was a real question as to the amount of any jury verdict.

continued

After talking extensively with the parties together and separately, I concluded that the case could probably settle for somewhere between \$13 and \$20 million. The plaintiff attorneys and the founder let me know that they concurred. By this time the founder had agreed to pay \$12 million, and I was pretty certain he would pay \$15 million. Ultimately, I was able to identify \$15 million as a figure that plaintiff would accept, provided some contribution could be obtained from the insurance companies who had legal malpractice coverage for the lawyer defendants. Throughout, I was a conduit for communication and a neutral party who provided constant comment about the risks of litigation.

At this point, I turned my attention to the insurance companies. I was uncertain whether plaintiff would really refuse to settle if they didn't contribute, but it seemed fair that they should. I went to them before a final agreement had been reached so they would feel some pressure to help achieve settlement. The companies initially resisted, partly because I simply told them that \$250,000 from each company would probably settle the case. Without much opportunity for negotiation, ultimately I convinced them to avoid a four-month trial of uncertain outcome.

What was the outcome?

Within a day or two, the insurance companies agreed to pay \$250,000 each, and the founder agreed to a \$15 million figure. The founder, as he had promised, obtained a portion of these funds from the trusts. Many details remained to be resolved, but the hard part for me was over. The parties continued to work on the details. I intervened when they encountered a problem or two that they could not resolve on their own. My role here was generally to throw out new ideas for discussion and to offer a gentle view as to which party might yield on a particular point.

The settlement resolved the federal litigation and related state litigation. The parties were pleased, and so were the judges involved. Overall, I felt that this settlement negotiation went well, although perhaps I could have used a bit more finesse with the insurance companies.

The negotiation was quite time-consuming. I probably spent at least a week on it—still far less than the time needed for my colleague to try the case.

Hon. Julia Smith Gibbons, Chief Judge, U.S. District Court, Western District of Tennessee

What other abilities helped resolve this situation? What are some components or criteria?

ABILITY: COMMUNICATION

- Accurately reflects the proposal of one person to another.
- Puts one person's proposal in the "terms" of the other

ABILITY: NEGOTIATION

- Determines who needs to be involved
- Maintains control by giving it up
- Develops trust among negotiators who have reason not to trust

—Sixth Judicial Circuit of the United States, July, 1996

Practicing the abilities of an outstanding judge

The idea of practicing abilities rests on a self assessment of one's performance, alone and in collaboration with a colleague (A, pages 115, 116, 117). The concept of self assessment is a desired part of the learning process (Alverno College Faculty, 1994). Self assessment is built in as an essential element of learning, as part of each learning situation. A learner's self awareness of his or her learning would include the ability to judge what he or she achieved in his or her performance, how he or she achieved it, why he or she did what he or she did, and what he or she might yet do to improve. Therefore we work to include some mode of self assessment. In this case, the mode involves analysis of interview material, comparison to criteria which now serve as criteria for performance. We have learned that self assessment is itself an ability to be developed (Loacker & Jensen, 1988).

- Self assessment is built in as an essential element of learning, as part of each learning situation.
- A learner's self awareness of his or her learning would include the ability to judge what one achieved in one's own performance, how one achieved it, why one did what one did, and what one might yet do to improve.

In order to practice abilities in one's professional setting after the course, each participant creates an action plan, specifying the abilities and criteria he or she intends to develop further, what learning strategies he or she will use and feedback on the plan from a colleague.

In our experience, the fourth day's process of creating an action plan (A, page 118) flows quite easily from the expertise in reflection and feedback that has emerged in the previous sessions. For example, judges may be asked to choose a colleague to meet with outside the course to review progress in ability development. At a future course, judges may bring that experience to a course planned for as much as six weeks later. The action plan incorporates feedback from a colleague during the course. Judicial educators can also rely on the group to share abilities identified for development. This provides judges with insights into which abilities may be needed for development of the profession as a whole, and those that might be the focus of another course or seminar. Further, it provides another opportunity for mentoring (Conner & Anderson, 1992).

Reflections on our learning

Because this course is created as part of a larger curriculum, we do not include a separate evaluation form. However, this hour of reflection (A, page 119) allows for review, refinement, critique, and building of participant learning, as well as evaluation of curriculum impact. Resource materials complete this set of materials for the course (A, page 120).

Ability-Based Learning Seminar: Defining Abilities for Effective Performance

The seminar was created for federal judges as part of a three-day conference. The seminar was designed for an hour and a half (we recommend two hours), and was concurrent with three other seminars—each judge completed all four across a two-day period. The strength of this example is that it maximizes the time that judges interact with each other about their own performance, even though there is limited time for defining abilities.

The seminar illustrates how Ability-Based Learning can be communicated in a short-term, two-hour seminar. While the outcomes for participants are naturally less extensive than a more full-fledged experience, judicial educators may note how the language and ideas communicate the concept. Many adjustments have been made. Advance handouts are included (Appendix B, Seminar Materials, B, pages 122, 123).

Learning outcomes and exercises are specified (B, page 124), and cases and seminar materials are included for ease of reproduction and use (B, pages 125–137). Note that cases replace live demonstrations (B, pages 126–130).

Because the two-hour seminar does not permit a sequential process, we designed the seminar materials so the judge could choose the kind of situation.

PREPARE INDIVIDUALLY (10 minutes)**CHOOSE AN ABILITY(IES):** _____**CHOOSE A SITUATION** _____

- ☐ A. Choose a situation that called for this ability, where you have demonstrated effective performance

OR

- ☐ B. Choose a situation that has caused you undue difficulty, where you want to ease the burden of the situation. Select one where you may have been somewhat effective so far, but that is now stretching your personal and professional abilities

In our experience, some judges have argued that the more experienced judges should contribute situations where they have been effective, because then the abilities that are identified are more likely to be descriptive of the upper reaches of performance. This could lead to specifying criteria at the more “advanced” level of proficiency. Other judges suggest that the more experienced judges contribute currently problematic situations, because they are more likely to have the problem cases than are the less experienced judges. The former are more likely to be able to draw on extensive experience to determine which abilities will need to be developed both by themselves and by the profession as a whole.

How might judges define developmental criteria, or level of proficiency? While neither the course nor the seminar allows for the discussion time needed to specify the developmental level of each criterion, this kind of exercise could be the basis for such an effort.

Ability-Based Learning Exercise: Practicing Abilities Toward Outstanding Judicial Performance: Performance Log and Self Assessment

The independent learning exercise (Appendix C: Exercise, pages 139–145) was created as a stand-alone activity for use after a course and seminar, irrespective of the time given to each so that each judge may carry Ability-Based Learning into his or her daily practice and continue to self assess performance. The time to complete the exercise varies with individuals.

This independent learning exercise is self explanatory. We suggest that judicial educators might try out Ability-Based Learning for themselves by completing the exercise out of their own experience in judging or in education. It provides a “nutshell” exercise that participants can use following an introductory seminar, either in preparation for a meeting with a colleague outside a course or seminar or to bring to a future one.

Judge Scoville used this exercise to create the following case for the materials used in the seminar. The case follows.

Hearings on IRS Summons Enforcement Actions

Choose an Ability: Listening
Communicating attitude of fairness
Self-Control

Choose a Situation... that caused you undue difficulty, where you wanted to ease the burden of the situation. In this situation, you may have been somewhat effective so far, but the situation is now stretching your personal and professional abilities.

Where is the situation occurring?
Who is involved?

In our district, we are often called upon to hear IRS summons enforcement actions, usually arising from the taxpayer's complete failure to file a return or pay taxes. The respondents are generally tax protesters and are sometimes members of citizens' militia groups. They hold unorthodox views about government and advance frivolous defenses, such as the unconstitutionality of the Sixteenth Amendment.

What happened?
What led up to it?
What did you think, feel, intend?
What did you actually do?

The typical situation involves an in-court hearing on an order to show cause why the summons should not be enforced. This typically involves an Assistant U.S. Attorney, an IRS revenue officer as witness, and the taxpayer/respondent representing himself. The respondent often attempts to raise meritless objections, present immaterial testimony, or make long statements of political philosophy irrelevant to the narrow issues at hand. At first, my approach was to sustain objections to such presentations and to attempt aggressively to confine the respondent to the issues. I soon learned that this approach was counter-productive, for a number of reasons: (1) I became embroiled in arguments with the pro se respondents, who were unfamiliar with court proceedings or the rules of evidence but wanted to make their points in their own way. (2) In explaining the reasons for my rulings, I was forced to make it clear that nothing the respondent thought was important really mattered. This would lead to anger and frustration by the respondents, who thought I was biased against them, was not giving them a fair hearing, and had prejudged the case before hearing their side. (3) Rather than saving time, I was causing the hearings to be protracted. By sustaining objections, I was encouraging the U.S. Attorney to make more of them, leading in turn to more lengthy arguments over the relevance of inconsequential issues. (4) The respondents' perception that they were not being heard engendered resistance to my ultimate decisions, leading to appeals, contempt citations, and a concomitant waste of more time.

continued

What has the outcome been so far?

As a result, my usual practice of running a disciplined courtroom and sticking closely to the issues was having the opposite of its intended effect in these special situations. I was not being a peacemaker, one of the litigants left the courtroom with a feeling of grievance, and future litigation was virtually assured.

After reflecting on your performance, what did you do?

I now take a much different approach, as a result of asking myself how I would like to be treated if I were in the respondents' place. Regardless of the merits of their legal position, I begin by explaining the nature of the proceeding. I acknowledge that the respondents are probably unfamiliar with court proceedings and tell them that I will therefore give them latitude in presenting their case. I say at the outset that I am just going to listen at the hearing and that I will make no decisions that day, because I want to carefully consider the case. I make it clear that the hearing is devoted to factual issues only; legal issues and citation to authority (e.g., the Magna Carta, the Declaration of Independence) are better presented in writing, so each party will have seven days after the hearing to present written authorities. During the hearing, I generally allow the respondents to present whatever they want. Objections by the U.S. Attorney are either overruled or taken under advisement. (The U.S. Attorneys have now picked up on this approach, so they generally do not object.) I will often ask questions in a sincere tone, to show that I am trying to understand the respondents' position, and I will answer their questions, to the extent that I can. I try never to become angry or impatient, and I thank both parties at the end of hearing.

What is the outcome now?

This approach has several benefits. The respondents seem to be put at ease by the initial statements. Because they are allowed to make their presentation as they planned it, they are not likely to get angry or frustrated. By making the point that written arguments are a more effective way of approaching legal points, I am able to cut off long political speeches, not because they are irrelevant, but because the respondent would be better served by presenting such complicated points in writing. I now spend far less time in the hearing and the court system devotes less time to those cases as a whole. I believe this is because the respondents feel that they have received a fair hearing and that their positions were not prejudged.

What abilities did you demonstrate in this situation?

I believe that in this circumstance the abilities to control one's self, to create an atmosphere of fairness and to communicate the fact of listening has defused potentially tense and confrontational situations.

Hon. Joseph G. Scoville, Magistrate Judge, U.S. District Court, Western District of Michigan

What other abilities and criteria helped resolve this situation?**ABILITY: *TAKING ANOTHER'S PERSPECTIVE***

- Identifies similarities and differences between one's own perspective and those of others
- Examines ways in which one's performance is affected by reflecting on other perspectives
- Enters another's perspective by reasoning within that perspective; can put one's self into another's place and view how another would think, feel, act

—Ability derived via the Leadership Institute in Judicial Education, April, 1990

Judge Scoville's case is an excellent example of how judges turn problematic situations into effective ones over time, and thus improve their performance so that they have a positive impact on the law and on citizens' experiences in the court.

Abilities: Abilities of an Outstanding Judge Determined by Judges at the State Level through an Ability-Based Learning Process

During the course, we have found it helpful to continually document and distribute the abilities as they are developed over the sessions. During and after the course, judicial educators can analyze and synthesize the abilities so that participants can make choices about their current and future use.

Can the set of abilities generated by a more extended course be useful to judges in another course or seminar? There is a difference of opinion among the judicial educators we have worked with on this question. Some emphasize the importance of the process of generating abilities, and are concerned that a complete set generated by another group may distract participants from going through the process on their own. Others find such a set valuable for comparison purposes in the later phases of a course experience. Still others believe that sets of abilities, synthesized over several courses, could be useful for developing curriculum. Our experience with other professional groups supports this view, as we note in the Introduction.

Clearly, such an effort needs to consider the context for performance: the state, court system, and so on. In Appendix D (pages 147–154), we provide one set of such abilities generated by a 1991 seminar at the Michigan Judicial Institute (used with permission), so readers can approach this question with a set of abilities in hand.

Note that this set of abilities was developed during a two-part course (Part I was five days; Part II was two days with some months separating the two parts). This extended time frame allowed for refinements that are unlikely to be achieved during a shorter time frame.

CHAPTER SIX

Issues in Ability-Based Learning and Judicial Education

Chapter Overview

This chapter discusses and summarizes some of the issues judicial educators and judges may deal with in designing and implementing Ability-Based Learning.

Why Do Judges Appreciate Ability-Based Learning?

In our experience with courses and seminars, judges seem to appreciate the opportunity to engage in Ability-Based Learning because they themselves are the developers of ways to become articulate and aware of what makes for their own effectiveness on the bench. They also acknowledge that the opportunity to become engaged with a colleague in a meaningful discussion of their problems and performance is a plus. This is because the processes they experience go far beyond the usual sharing of anecdotes, to insights about how to improve performance, and to actual ways to internalize metacognitive thinking and observing strategies that they can use while they are engaged in judging day-to-day.

Judges note that anecdotes rarely use the language of performance. Often, anecdotes are selected because all turned out well. The situations created as part of Ability-Based Learning are selected because they are problematic. Judges may demonstrate expertise, but they also expect new insights to emerge, along with current, challenging issues in the profession. The process invites sharing of another colleague's reflection, analysis, and experience. To paraphrase one judge, "The purpose of Ability-Based Learning is to assist us as judges to reflect not only on our successes, but to learn from those situations where we were not as effective as we had hoped to be. Our intentions were good, but the consequences were not what we anticipated. If we can break the silence on these kinds of situations, we can bring a colleague's thinking into our own reflection. Neither of us may have an identical situation again, but our looking for patterns is reinforced—and that's why we want to take the time to do this. Focusing on patterns is important because it can give us some insight as a profession into what we need to develop generally." To paraphrase another judge's observation, "We are taking our professional time—and sometimes personal vacation—to participate. I want something to think about beyond the course, and something to do once I get back on the bench. I assume most of my colleagues expect the same."

Judges consider that knowledge alone often evaporates when a judge is in a trying experience, and automatic decision-making takes over. To change performance means having learning opportunities that enable a participant to practice these changes—to connect new ways of knowing with new ways of doing.

What Characterizes Ability-Based Learning?

What characterizes Ability-Based Learning? First of all, abilities are the language of experienced common sense, the tacit knowledge of a profession that enables professionals to perform day-to-day. Ability-Based Learning provides for the explicit definition of expectations assumed to be learned from the broad effects of completing a variety of courses in continuing education. We think that core abilities should be consistently fostered and assessed across a curriculum. Both our experiences and our research findings (Alverno College Faculty, 1994; Mentkowski, 1988; Mentkowski & Doherty, 1983, revised 1984; Mentkowski & Rogers, 1993) have confirmed that educators cannot take for granted that the experienced adult learner has mastered, for example, complex interactive skills, their application, or their integration with other abilities.

Ability-Based Learning assumes that ability development is consistently fostered across curricula. Faculty organize themselves to ensure that it happens. Take, for example, analytical ability. Faculty redesign their courses to foster the development of this ability within the context of their particular professional specialization. By infusing criteria for analytical ability into learning activities, assignments, and assessments, faculty create an environment with a consistent message about learning. Another example is an aspect of communication ability, writing. Originally, developing writing ability was assumed to be fully developed in college. Now, for example, law schools develop legal writing ability, create writing criteria, and ask learners for application of writing skills in other courses, translating the criteria into the context of another course. Reinforcement of abilities is thereby pervasive, and faculty may continue to work to define them, and to identify the unique ways abilities are expressed by learners. It is not any particular teaching technique (group discussion, internships, experience-based learning in the classroom, self assessment using one's videotaped speech in moot court) that can characterize a faculty's overall strategy. Rather, it is the systematic, consistently evaluated use of these strategies, in relation to what is learned, and the learner's developmental level, that characterizes the faculty's approach.

Ability-Based Learning, when integrated across disciplines and professions, can continue throughout the life span. This expectation includes the value of continuous self assessment against the standards of peers, faculty, external assessors, and the discipline or professional area. Since assessment is a process, learning is seen as continuous, where performance incorporates not only knowledge, but its application. The learner experiences this consistent message about learning, and about expectations for becoming independent and autonomous in directing and assessing one's own learning.

Assessment is integral to the learning process. Teaching strategies incorporate an assessment process that makes learner/peer/faculty interaction and systematic, detailed feedback an expected part of learning. Learners are not in the dark about how they need to improve, relying only on comments about "good work" to guide the development of their next course or seminar.

Ability-Based Learning is learner-focused. Demands for the ongoing reevaluation, research and redefinition of abilities, their teaching and their assessment, comes from a systematic attention to learning outcomes, and to learner perceptions of their learning. New learner populations, new learner problems, new issues for learners are the driving force for educational change—coupled with organizational structures that ensure that well thought out change occurs, and that these changes are consistently evaluated. Change is a collaborative faculty effort, just as the development of the curriculum and its evaluation is a collaborative effort that transcends how continuing education is currently organized, and the disciplines and professions that contribute to it.

Why Does Ability-Based Learning Work?

Professionals continue to develop and adapt abilities

According to studies of practicing professionals including Alverno alumnae, abilities are refined depending on their specific application. They are also combined in various ways given situational demands, and they are adapted to fit a particular action plan. Alumnae spoke again and again of combining (“trying to take everything and put it together in a workable process”) and modifying their abilities (“I should not have come on so directly in getting them to try out this approach. I needed to show them how we can get the work coordinated and out faster, first”). In our studies, effective professionals consistently used a combination of abilities in a single situation.

Abilities function as an organizing principle for role performance

What are the consequences of organizing learning in terms of abilities? Although our studies show that professionals use abilities, they also use abilities to create a theory of action that gets tested out in various work situations. This is in sharp contrast to the view that technical knowledge alone is the basis for effective performance. Professionals do say they learn new technical skills, but they do not necessarily emphasize this knowledge when they describe how they go about deciding what to do (“My job is never the same. I use communication and analysis because you work very independently, you have to analyze the financial statements from taxpayers and determine a course of action”).

How did abilities carry over to performance? Faculty had identified intellectual and interpersonal abilities for a new curriculum based on experience as educators and professionals, and on an analysis of academic disciplines and literature reviews. But would these same abilities form a basis for effective performance at work after college? Evidence shows that both intellectual and interpersonal abilities are critical for effective work performance.

Using abilities leads to self-confidence

Using abilities led to self-confidence at work and was the basis for satisfaction in professional positions. Being able to perform abilities led to staying on the job. But another important indicator of such satisfaction was the degree to which professionals experienced continued learning, an intrinsic value which motivates not only career development and job choice, but also determines whether one continues to develop and adapt one's abilities.

Professionals demonstrate learning to learn

Learning to learn means discovering how to derive from an environment and experience what one needs to know to adapt one's abilities. Our research results strongly suggest that using these skills and the consequent adaptation of abilities is such an important process that persons need to specifically educate themselves for it. Values for learning to learn are realized in professionals' motivation to use and adapt abilities to a range of contexts. They test out new ways of doing things to find out what will work. Learning how to adapt abilities involves a process of applying judgment and abilities in action, obtaining feedback and adjusting accordingly.

What Are Some Issues in Applying Ability-Based Learning?***Defining abilities***

One problem is that abilities have been defined as traits in the past, independent of either situation or situational contingency. We could easily simplify definitions of abilities again. That would return us to "trait psychology" and "labeling" which would be a pendulum swing rather than a more sophisticated reconstruction of ability definition. Or abilities can be defined too specifically as sets of skills that do not require expert judgment. We have found that broad definitions that are flexible and focus on process as well as abstract definitions are most likely to work.

Ability-Based Learning can focus too much accountability for effective performance on the individual professional. We try to carefully consider situational and societal constraints that do not allow for persons to do their best work. Further, we expect to continuously rethink ability definitions so that they focus on performance in settings that are realistic. It is important for us to keep in mind that abilities are not the only constructions that professionals use to organize role performance. However, we learned that educators can more directly influence development of abilities in professional school and through continuing education than they can influence sociological factors.

Most educators who design learning for professionals recognize that once performance is required in the field, rather than in classrooms, skills other than technical competence become paramount. Educators of professionals are not likely to have as many of the problems some undergraduate faculty have in linking knowing and doing.

Involving professionals in self assessment

We continuously involve learners in their own assessment. This requires interpretation, utilizing and understanding expert judgment, something we teach learners and yet do not seem to practice enough as educators. However, professionals do define their role in terms of individual autonomy and responsibility, which cannot be said for every other role that might benefit from ability assessment. The ability to self assess one's own performance results from Ability-Based Learning. This cannot but improve a profession that is based on autonomy, and that appreciates how effective self assessment contributes to quality assurance and role transformation.

Creating effective assessment

Many measuring techniques are obsolete, and we can no longer use static indicators of performance of abilities. Educators need new technology to help us do that. We acknowledge that there is a difference between being able to assess an ability, give feedback, assist a learner to self assess, and certifying a professional.

Determining level of proficiency and connection to context

The demands of actual professional role performance find their way into continuing professional education because these faculty are often drawn from and maintain their practice. One of the more challenging issues educators face is dealing with the developmental needs of a profession especially as part of continuing education. This means developing increasing sophistication, or proficiency in the integration of new knowledge and performance demands, and successfully transferring abilities across situations.

We have learned that professional programs often have a cadre of professional "alumni" willing to serve as external, expert assessors of some abilities, and to identify level of proficiency in various contexts. Seminar participants have proved willing to serve as peer assessors. This can allow for individual assessment and feedback.

The experience of reflecting on performance enables an individual to examine performance in relation to their own expectations for it. These expectations are derived from

education and experience. Together with their colleagues, judges are responsible for improving not only their own performance but that of the profession. By having a picture of those abilities that account for effective performance—described through criteria—that the individual chooses to develop, the professional has a way to see themselves in action, to step back and make a judgment not only about the matter at hand, but also about how they are contributing to its fair resolution. When judges collaborate on determining abilities, they have conversations about what makes for effective performance in particular kinds of situations, settings, and areas of the law.

Determining abilities is a process whereby judges can discuss what is needed for the future of the judiciary because they develop a language to describe needed developments in the profession. This can lead to further communication about what kinds of new learning are necessary to continue to advance the judicial branch. Further, this language provides for peer feedback, the primary way professionals assist each other to improve performance over time. Such evaluation can lead to improvements in the profession because those judges who practice this kind of peer and self assessment often become the mentors of the judiciary and the judge educators of tomorrow.

CHAPTER SEVEN

Summary

This monograph connects Ability-Based Learning and judicial education. For some years, we have been exploring various ways in which the theory and practice of Ability-Based Learning relates to other approaches to education. We believe education in general is helped when each educator, at each level of the educational continuum across the learning life span, makes these connections. Thus, while there are many differences among our own experiences, setting, and the learners we serve, and the experiences of full-time educators in continuing education, we have worked in this monograph to focus on what we have in common. That commonality is fostering learning that serves an adult learner who is continuously faced with new challenges and experiences, and so must continuously learn across a professional life span. We ourselves are learners like that. We, as educators, are enormously challenged by our profession and particularly by today's learners. These individuals are often enormously experienced in their own professions and well along in their professional careers. They have clear ideas about what kind of learning works for them. Learning is, therefore, mutual. This monograph is the outcome of such interactive learning.

In the monograph, we discuss the rationale for Ability-Based Learning, citing the advances in education for professionals that call for learning that connects new knowledge with its use—learning that is immediately relevant and provides for reflection, feedback, and self assessment toward more effective performance day-to-day—a transformative learning process. To carry on that theme, we discuss processes whereby judicial abilities are derived by judges from their practice and new knowledge. We use these examples to illustrate the meaning of “ability” and how it connects to effective performance.

Then we discuss educational assumptions and principles that are fundamental to Ability-Based Learning. We expect that many judicial educators will find these resonant with adult learning principles. To provide context for these assumptions and principles, we describe the genesis of Ability-Based Learning as we have developed and experienced it.

As we turn to discuss issues of curriculum development and implementation of Ability-Based Learning, we rely on the assumption that Ability-Based Learning, at its start, will be included as one component in the broader curriculum of a state justice institute, national college, or conference. Therefore, we set context for Ability-Based Learning examples within the expected structure of continuing education, and then provide a detailed description of how we construct a course or seminar in such a context. We refer the reader specifically to course, seminar, and exercise materials at the end of the monograph. Finally, we discuss why Ability-Based Learning works, and identify some of the issues that arise in doing Ability-Based Learning.

Most educators rest their approaches to ongoing professional development in a wealth of experiences with learners, their own disciplinary and professional education, and a continuing reconceptualization of how they connect what they know with what they do. This monograph is one more way to support that process, and to assist all of us as educators to communicate with each other about our own values, educational assumptions, and practices.

Our work in Ability-Based Learning can be described by Ralph Ellison, (*Shadow and Act*, 1964) as “no matter of sudden insight but of slow and blundering discovery.” It is a continuing challenge to leave behind our past interpretations of what learning should be, and to focus learning on what a continuously educated person might become.

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References include books and articles written for educators that describe the genesis, development, and use of Ability-Based Learning; research that supports its long-term impact on learning, and related references from professions and judicial education that connect to Ability-Based Learning. For further reprints, order forms, and other information about Alverno materials, contact Alverno College Institute, PO Box 343922, Milwaukee, WI 53234-3922. Phone: 414-382-6087; FAX: 414-382-6354; Email: gail.safranski@alverno.edu; visit Alverno's web site: www.alverno.edu.

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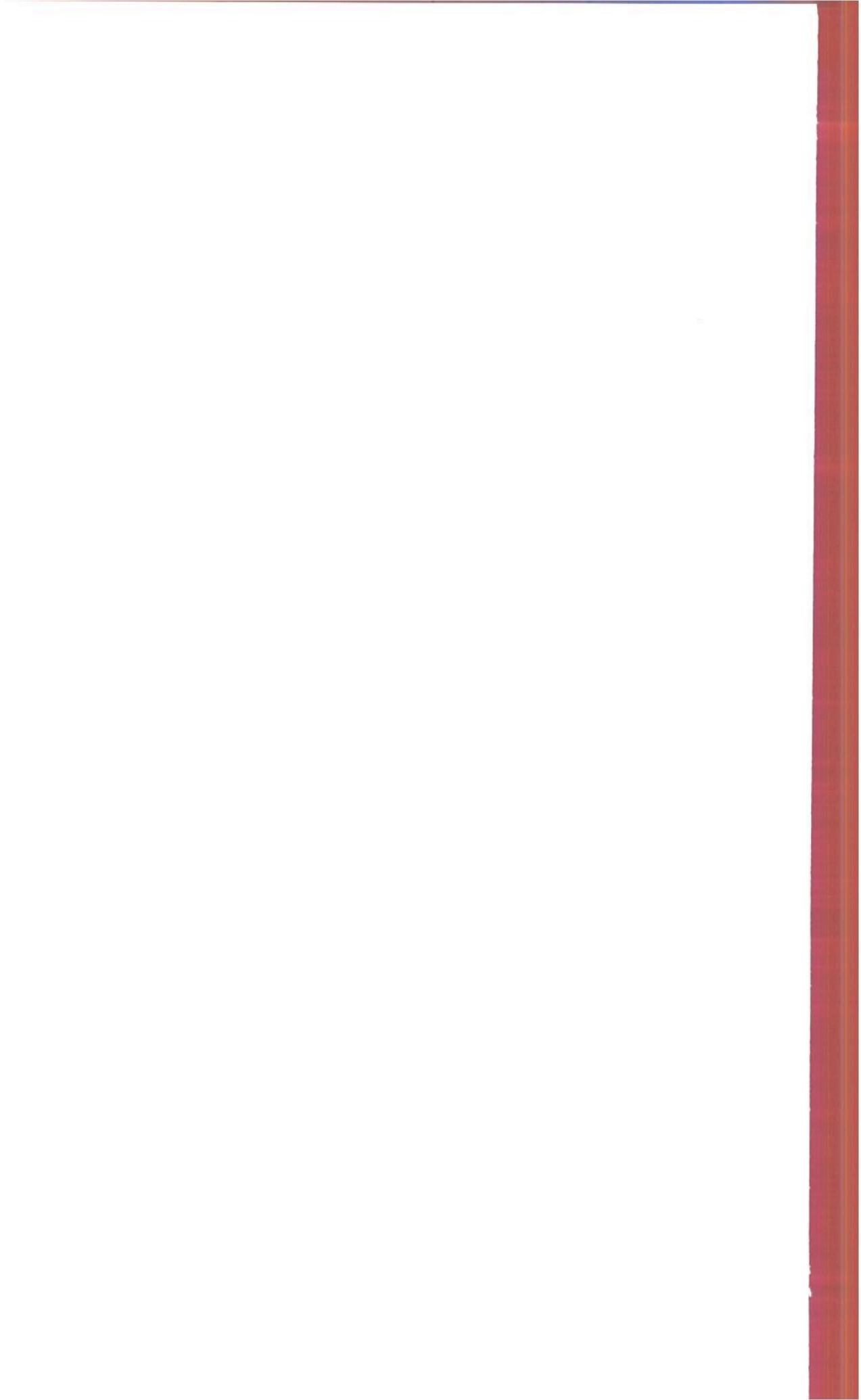
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APPENDICES

Ability-Based Learning Materials

Permission is granted to copy monograph materials if each handout contains a citation as indicated on the cover page of each Appendix, and if it is used for instructional purposes only.



APPENDIX A

Course Materials

**Identifying, Defining, and Practicing the
Abilities of an Outstanding Judge**

Mentkowski, M. (1993, December). Identifying, defining, and practicing the abilities of an outstanding judge. Curriculum materials created for *Judicial decision-making: Minding the courts now and in the future*. Michigan Judicial Institute Seminar, Ypsilanti, MI.

Permission is granted to copy these materials if they are cited as follows:

Mentkowski, M., Loacker, G., & O'Brien, K. (1998). *Ability-Based Learning and Judicial Education: An Approach to Ongoing Professional Development*. East Lansing, MI: Judicial Education Reference, Information and Technical Transfer Project (JERITT). <http://jeritt.msu.edu>

IDENTIFYING, DEFINING, AND PRACTICING THE ABILITIES OF AN OUTSTANDING JUDGE

Plan for the Week

Learning Outcomes

- To identify and define the abilities of an outstanding judge
- To develop a way to determine the abilities most important to one's own performance and to create a plan to test them out in the improving of that performance

First day: **Identifying, Defining, and Practicing the Abilities of an Outstanding Judge**

Presentation and large group activity (1 hour, 45 minutes)

What are the abilities of an outstanding judge?

Presenter

Second day: **Further Defining and Refining the Abilities of an Outstanding Judge and Linking Abilities to Effective Performance**

Small group exercise (1 hour)

How can we judge abilities in performance?

Presenter

Judge Facilitators

Third day: **Analyzing Performance and Self Assessing Judicial Abilities**

Small group exercise (1 hour)

How can we analyze and self assess a performance log for abilities?

Presenter

Judge Facilitators

Fourth day: **Practicing the Abilities of an Outstanding Judge**

Presentation and small group exercise (2 hours)

How can we practice abilities in future performance?

Presenter

Judge Facilitators

Fifth day: **Reflections on Our Learning**

Presentation and small group exercise (1 hour)

What have we learned? What's next?

Presenter

Judge Facilitators

IDENTIFYING AND DEFINING THE ABILITIES OF AN OUTSTANDING JUDGE

Learning Outcomes

- To understand the meaning of “ability” and “criteria”
- To identify and define the abilities of an outstanding judge
- To understand how abilities enable professionals to perform effectively

First day: (1 hour, 45 minutes): **What are the Abilities of an Outstanding Judge?**

1. Introductory Presentation (p.7)

- What does “ability” mean?
- Why is it important?

2. Individual Observing/Inferring Exercise

- Watch video excerpt and record behavior (p. 3–4)
- Infer abilities from performance (p. 3–4)
- Extend list of abilities from own experience (p. 5)
Include brief explanations

3. Small Group Inferring Exercise

- Produce group list of abilities with brief explanations (p. 6)
- Submit group list to presenter (p. 6)

4. Large Group Exchange

- Recorder from each group present two abilities on overhead

5. Plan for the Week

OBSERVING PERFORMANCE AND RECORDING BEHAVIOR FOR INFERRING ABILITIES

As you observe the judge's performance, please note significant behaviors on the left. *After* your observation is complete, infer abilities and note them on the right.

Behaviors	Abilities

There's more space on the next page!

Behaviors	Abilities

IDENTIFYING ABILITIES DESCRIPTIVE OF JUDICIAL PERFORMANCE

What are the abilities of effective judges? What makes for effective performance?

Clarify the specific meaning that you give to each one.

IDENTIFYING ABILITIES DESCRIPTIVE OF JUDICIAL PERFORMANCE

What are the abilities of effective judges? What makes for effective performance?

Clarify the specific meaning that you give to each one.

Names: _____

EXAMPLES OF ABILITIES IDENTIFIED BY INSTITUTIONS/PROFESSIONS¹⁵

Clark Community College Vancouver, Washington

Communication ability
Critical thinking and problem solving
Global and multicultural perspectives
Effective citizenship
Technological literacy
Capacity for continued lifelong learning

Alverno College Milwaukee, Wisconsin

Communication
Analysis
Problem Solving
Valuing
Social Interaction
Global Perspectives
Effective Citizenship
Aesthetic Responsiveness

Purdue School of Pharmacy Lafayette, Indiana

Logical thinking and decision-making abilities
Written communication abilities
Oral communication abilities
Effective listening and processing abilities
Critical thinking abilities
Evaluating and interpreting scientific and professional literature
Self-learning abilities and habits
Solving ethical problems
Demonstrating leadership
Adapting to a changing environment

American Association of Colleges of Pharmacy

Critical thinking and decision-making abilities
Communication abilities
Responsible use of values and ethical principles
Social awareness and social responsibility
Self-learning abilities and habits
Social interaction and citizenship

University of Wisconsin-Madison School of Medicine

Analysis
Appraisal
Communications
Interpersonal skills
Self and peer assessment
Self-directed learning
Handling of stress
Completion of tasks
Use of valuing and ethical considerations in decision making

National Board of Medical Examiners (for Comprehensive Qualifying Exam)

Knowledge and understanding
Problem-solving and judgment
Technical skills
Interpersonal skills
Work habits and attitudes

American Bar Association (ABA, 1992)¹⁶

Fundamental Lawyering Skills

Problem solving
Legal analysis and reasoning
Legal research
Factual investigation
Communication
Counseling
Negotiation
Litigation and alternative dispute-resolution procedures
Organization and management of legal work
Recognizing and resolving ethical dilemmas

Fundamental values of the profession

Provision of competent representation
Striving to promote justice, fairness, and morality
Striving to improve the profession
Professional self-development

State Bar of Wisconsin (1996)¹⁷

The Commission on Legal Education added these to the ABA skills and values:
Professionalism
Judgment
Civility
Conservation of the Resources of the Justice System

Michigan Judicial Institute, 1991

Decision-making
Employment of coherent system for decision-making
Communication of decision-making
Listening – Empathizing
Critical thinking (reflective/analytical)
Leadership
Managing
Proceedings, environment
Self
Exercise of responsibility
Maintaining of public image
Teaching
Exercise of patience
Commitment to personal growth
Awareness of individual strengths, biases, areas to work on
Willingness for continual self assessment
Openness to knowledge
Openness to change
Fairness/Impartiality
Courage
Humility

¹⁵ Used with permission

¹⁶ American Bar Association. (1992). The statement of fundamental lawyering skills and professional values. In *Legal education and professional development—An educational continuum* (pp. 135–141). Chicago: Author.

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**IDENTIFYING, DEFINING, AND PRACTICING THE ABILITIES OF AN OUTSTANDING JUDGE
MEANING OF “ABILITY”¹⁸**

“Ability” is a communicable idea that enables professionals to connect what they know with what they are able to do. An ability provides a *conceptual framework* for understanding what learned expertise looks like when it is practiced in work and service settings.

Abilities are complex.

An ability is multidimensional. It is a complex combination of skills, motivations or dispositions, self-perceptions, attitudes, values, knowledge, and behaviors that enable an individual to perform effectively. Abilities become a cause of effective performance when these components are integrated.

A complex ability cannot be observed directly; it must be inferred from performance.

Abilities are transferable.

An ability enables an individual to perform effectively across a wide range of situations, and in complex and novel settings. Although we learn abilities in specific settings, we can transfer them and modify them in a variety of contexts. Abilities become transferable because the idea of “abilities” functions as an organizing principle for professional role performance and satisfaction. Because abilities are the frameworks on which professionals construct learning, they carry new learning with them to apply across settings and roles. They use abilities to create a theory of action that they test out in various work situations. They use abilities to plan, organize, and structure their performance at work.

Abilities are holistic.

An ability is a competence that is integral to the person. It is an integration of its components in a way that enables the ability to become a cause of effective performance. The definition of an ability is not limited to a unitary trait, a personality characteristic built into one’s genetic code, or a skill like verbal ability. Thus, abilities are teachable and developmental.

Abilities are developmental.

Abilities can be learned. In a given profession, abilities can be identified from interviews and performance logs of outstanding performers within that professional group.

An ability can be broken open into behavioral indicators or criteria that enable professionals to understand an ability and how it expresses itself in performance. Thus, criteria enable professionals to practice for improved performance. Professionals are effective in a range of settings because they use complex abilities and integrate them in performance.

¹⁸ Adapted from Alverno College Faculty, *Assessment at Alverno College* (1985), Milwaukee, WI: Alverno College Productions; and from Mentkowski, M., & Rogers, G. (1993, summer), Connecting Education, Work, and Citizenship: How Assessment Can Help, *Metropolitan Universities: An International Forum*, 4(1), 34–46.

Criteria¹⁹

- Criteria are behavioral indicators of an ability as seen in performance.
- Criteria define performance standards. Through them we clarify our basis for judgment.
- Whether we are identifying or using criteria or doing both, we are engaged in *making inferences* that hinge on relationships between criteria, ability, and performance.

We infer criteria from our idea of an ability and of remembered performances.

- Criteria describe the observable *components* of an ability by specifying the behaviors that represent an ability in use. They provide a picture of the ability as seen in performance.
- In identifying criteria, we rely on our knowledge and experience. We may have judged and rewarded critical thinking long enough, for example, to be able to state that a critical thinker must be able to distinguish fact from opinion, to identify relations between conclusions and arguments, to question unwarranted assumptions, and so on. From such specifics we gradually picture the ability and then we articulate criteria that delineate the picture.
- The picture sketched by criteria should be sufficient to enable us to judge the presence of an ability in a performance.
- Criteria provide assistance in structuring one's thinking about an ability so one can develop it.

Guidelines for Judging Criteria

1. Do the criteria describe the *ability* to be demonstrated?
 - Do the criteria include enough components to provide a picture of the ability?
 - Do the criteria include enough components to enable one to infer the ability from them?
2. Are the criteria *appropriate to the context* in which the ability is to be used?
3. Could one meet these criteria in a variety of ways?
4. Could one *self assess* based on these criteria?
5. Could *another* person *judge* one's performance using the criteria?

¹⁹ Adapted from Alverno College Faculty, (1985) *Assessment at Alverno College*, Milwaukee, WI: Alverno Productions; and Loacker, G., Cromwell, L., and O'Brien, K., (1986) *Assessment in Higher Education: To Serve the Learner*, in C. Adelman (Ed.), *Assessment in Higher Education* (Report No. OR86-301, pp. 47-62), Washington DC: Department of Education.

EXAMPLES OF ABILITIES AND COMPONENTS THAT SERVE AS CRITERIA²⁰

ABILITY: EFFECTIVE INTERACTION WITH A VARIETY OF OTHERS

Components or

- Criteria:*
- Deals with conflict openly and constructively
 - Listens to viewpoints of others
 - Makes self available for one-on-one ministry
 - Challenges others to work together
 - Engages others in process, involvement
 - Persuades others to act
 - Uses influence to promote welfare of church

—Seminary Consortium for Urban Pastoral Education (SCUPE)

ABILITY: PROBLEM ANALYSIS

Components or

- Criteria:*
- Get all of the relevant information by
 - Rephrasing the question or problem to see if new issues emerge
 - Listing the key problem issues
 - Considering other possible sources of information
 - Identify possible causes
 - If necessary, obtain additional information
 - Evaluate the information to insure that all essential criteria are met
 - Restate the problem considering new information
 - Determine what criteria indicate that the problem or issue is resolved

—NASSP Developmental Program for School Principals

ABILITY: EMPLOYMENT OF COHERENT SYSTEM FOR DECISION-MAKING

Components or

- Criteria:*
- Defines issues to be decided
 - Demonstrates attentiveness by incorporating all legal and factual issues into a decision and articulates reasons
 - Permits all parties to be adequately heard
 - Demonstrates that all conflicting evidence has been evaluated
 - Demonstrates knowledge and appreciation of the law and jurisprudential techniques for arriving at a decision

—Michigan Judicial Institute, 1991

²⁰ Each example developed in collaboration with faculty from Alverno College, Milwaukee, WI.

**FURTHER DEFINING AND REFINING THE ABILITIES OF AN
OUTSTANDING JUDGE AND
LINKING ABILITIES TO EFFECTIVE PERFORMANCE**

Learning Outcomes

- To further define and refine judicial abilities and criteria in the context of one's own professional performance:
 - Which abilities do I personally think are most important?
 - Which of them do I want to check out against what I think I do (espoused theory) and what I actually do (theory in use)?
- Begin individually to think about which abilities you'd like to work on.
- Practice linking your abilities and criteria to effective performance by completing the *Interview for Creating a Performance Log: Situation 1*.
- Anticipate *Performance Log: Situation 2*, which assists you in identifying and describing a complex situation or incident you are currently experiencing on-the-job that is compelling and difficult to resolve, where you have been effective to an extent, but that is now stretching your personal and professional abilities.
- Practice application of new ideas and concepts you are learning from the seminar sessions.
- Begin your *Performance Log* that will result, by the fourth day, in a personal *Action Plan for Practicing Judicial Abilities*. The *Action Plan* enables you to:
 - identify abilities and criteria you are already demonstrating
 - identify abilities and criteria you hope to develop in order to move your current situation or incident toward resolution
 - incorporate new ideas and concepts you learned this week
 - share your action plan (to the degree possible, given confidentiality concerns) with a colleague on the fourth day (2 hours), and ask for feedback
 - provide feedback on a colleague's action plan

Second day: Small group exercise (1 hour): **How can we judge abilities in performance?**

**FURTHER DEFINING AND REFINING THE ABILITIES OF AN
OUTSTANDING JUDGE AND
LINKING ABILITIES TO EFFECTIVE PERFORMANCE**

Second day, Small group exercise (1 hour): **How can we judge abilities in performance?**

1. Introductory Presentation (Presenter)

- Linking Abilities to Effective Performance
- The Interview for Creating a Performance Log (p. 14)
 - nature
 - purpose
 - choosing an ability
 - choosing a problem situation

2. Interview for Creating a Performance Log: A Demonstration
Judge Facilitators

3. Small Group Exercise

- Prepare individually (p. 14) *(10 minutes)*
 - In dyads, interview each other (p. 15)
and analyze the interview (p. 16) *(15 minutes for each interview and analysis)*
4. Turn in record of abilities and criteria inferred from performance log to presenter so it can be added to the large group list (p. 16).
5. Begin to think about choosing Situation 2 for the third day's session.

INTERVIEW FOR CREATING A PERFORMANCE LOG²¹

Summary of the Procedure

- The interview is best accomplished in an atmosphere of informality and low pressure.
- The interviewer needs to get the interviewee talking specifically about his/her own behavior.

For each Situation

1. Past Situation: "Can you think of a situation when you were particularly effective?"...(get situation)... "Could you walk me through the situation from the beginning?" (time sequence is important)

Current Situation: "Can you think of a situation that has caused you undue difficulty, where you want to ease the burden of the problem situation?"

2. *Situation*: what happened, what led up to situation?
3. *Who* was involved?
4. What did you *think, feel, want to do*?
5. What did you *do*?
6. What was the *outcome*? what happened, how did you feel?

[Process: "be an investigative reporter." *Probe* "how?," get *facts*.]

[Further Process: Try to get enough situations to show a range of behavior in a variety of situations.]

Things to Avoid

- Jumping to conclusions and reflection. Don't put words (yours) in his/her mouth (e.g., "So you tried to *influence* him...") or paraphrase what the respondent says (e.g., as do nondirective counselors). Rather, be intrusive, *investigative*.
- *Phrasing questions that get general or hypothetical answers*. Move "down" into *facts*, not "up" into abstractions (e.g., what not to ask: "What could you have done?" "So your strategy usually is...").
- *Letting the interviewee take charge*. Rather continually clarify (e.g., respondent: "So we did..." Interviewer: "*We*? Who *specifically*?").
- *Getting off into what should be done*. Rather, focus on what the interviewee did.

²¹ Adapted from Guide to Behavioral Event Interviewing (1978), McBer and Company, 116 Huntington Avenue, Boston, MA.

**FURTHER DEFINING AND REFINING THE ABILITIES OF AN
OUTSTANDING JUDGE AND
LINKING ABILITIES TO EFFECTIVE PERFORMANCE**

PERFORMANCE LOG: SITUATION 1 Name _____

CHOOSE AN ABILITY: _____

CHOOSE A SITUATION that called for this ability, where you have demonstrated effective performance.

Where did the situation or incident occur?

Who was involved?

WHAT HAPPENED?

What led up to it?

What did you think, feel, want to do?

What did you *do*?

What was the outcome?

**FURTHER DEFINING AND REFINING THE ABILITIES OF AN
OUTSTANDING JUDGE AND
LINKING ABILITIES TO EFFECTIVE PERFORMANCE**

PERFORMANCE LOG: SITUATION 1

Name _____

CHOOSE AN ABILITY: _____**CHOOSE A SITUATION** that called for this ability, where you have demonstrated effective performance.

Where did the situation or incident occur?

Who was involved?

WHAT HAPPENED?

What led up to it?

What did you think, feel, want to do?

What did you *do*?

What was the outcome?

ANALYZING PERFORMANCE AND SELF ASSESSING JUDICIAL ABILITIES**Learning Outcomes**

- To complete your *Performance Log* and *Practice Abilities of an Outstanding Judge*.
- To identify abilities and criteria you are now demonstrating, and those you intend to work toward in moving your current situation toward resolution.

Third day, (1 hour) Workgroups: **How can we analyze and self assess a performance log for abilities?**

Exercise:

- 1) Briefly review “Abilities of an Outstanding Judge” that have been created so far by participants (obtain from presenter).
- 2) Create your *Performance Log: Situation 2* for the “problematic” situation that you identified the second day in your Workgroup.
- 3) Small Group Exercise
 - Prepare individually (p. 19) (10 minutes)
 - In dyads, interview each other (p. 20) and analyze the interview (p. 21) (15 minutes for each interview and analysis)
- 4) Use the abilities and criteria defined and refined so far to analyze your performance log. Identify criteria you have demonstrated. What abilities/specific criteria will you need to demonstrate in order to move the situation(s) toward resolution?
- 5) Turn in abilities and criteria to presenter so they can be copied and added to the list of abilities and criteria.
- 6) *Practicing Abilities of an Outstanding Judge: Performance Log* by Hon. Casper Grathwohl.
- 7) *Practicing Abilities of an Outstanding Judge: Performance Log* by Hon. Sandra Silver.

PRACTICING ABILITIES OF AN OUTSTANDING JUDGE:
PERFORMANCE LOG AND SELF ASSESSMENT

What Ability/Criteria Might I Choose?

It is most useful to choose an ability you wish to develop.

What Kind of Situation Might I Choose?

Choose a situation where you think practicing this ability could enhance performance. What kind of situation or incident might be most helpful (a) for inferring abilities already demonstrated, (b) for applying new ideas and concepts, (c) for self assessing my performance log, and (d) for practicing the abilities of an outstanding judge?

The most useful kind of situation (or set of related situations) has a number of dimensions:

- is compelling
- may appear unresolvable now
- is currently taking up your personal and professional attention
- is causing you undue difficulty and you want to ease the burden of the problem
- you want to move the situation toward resolution in order to benefit other persons or groups
- you may be somewhat effective so far; but the problem is really stretching your abilities

The situation might be a problem that is related to the general topics addressed in this seminar. **The situation can be—but it need not be—a legal case.** Either way, plan to develop your *Performance Log* to preserve confidentiality of institutions, persons, or cases where appropriate. Also consider where you are able to share information from your performance record and self assessment in order to develop an action plan.

The attached materials assist you in describing and analyzing your situation to create a performance log, and in self assessing your performance. The better you describe and analyze the situation, the more helpful your *Performance Log* can be in assisting you to identify the abilities you are already using and those you choose to develop in order to achieve movement toward problem resolution.

PERFORMANCE LOG: SITUATION 2

Name _____

CHOOSE AN ABILITY: _____

CHOOSE A CURRENT AND CONTINUING SITUATION that has caused you undue difficulty, where you want to ease the burden of the situation: Select one where you may have been somewhat effective so far, but that is now stretching your personal and professional abilities. Describe it briefly here.

Where is the situation occurring?

Who is involved?

WHAT HAPPENED?

What led up to it?

What have you thought, felt, and intended so far?

What have you *done* so far?

What has the outcome been so far?

PERFORMANCE LOG: SITUATION 2

Name _____

CHOOSE AN ABILITY: _____

CHOOSE A CURRENT AND CONTINUING SITUATION that has caused you undue difficulty, where you want to ease the burden of the situation: Select one where you may have been somewhat effective so far, but that is now stretching your personal and professional abilities. Describe it briefly here.

Where is the situation occurring?

Who is involved?

WHAT HAPPENED?

What led up to it?

What have you thought, felt, and intended so far?

What have you *done* so far?

What has the outcome been so far?

PERFORMANCE LOG: SITUATION 2 (continued) Name _____

Note and explain differences between what you wanted to do and what you actually did.

What ideas or concepts might be applied to move the situation toward resolution?

You may describe abilities/criteria that account for your effectiveness so far, but attend to those that might be needed to move the situation toward resolution. Identify those below.

Turn in this page to presenter to be copied so abilities and criteria can be added to *Abilities of An Outstanding Judge* prepared for distribution to participants.

PRACTICING THE ABILITIES OF AN OUTSTANDING JUDGE**Learning Outcomes**

To complete your *Action Plan for Practicing Judicial Abilities* for carrying out after the seminar. In the Action Plan, you:

- identify abilities and criteria you are already demonstrating from your performance log
- identify abilities and criteria you hope to develop in order to move your current situation or incident toward resolution
- incorporate the new ideas and concepts you learned this week
- share your action plan (to the degree possible, given confidentiality concerns) with a colleague and ask for feedback
- provide feedback on a colleague's action plan on abilities, learning strategies, likelihood of improved effectiveness

Fourth day (2 hours): How can we practice abilities in future performance?

During the last session, *Exploring Judicial Behavior*, you had an opportunity to analyze four videotaped trial excerpts. You also worked to infer abilities and criteria that were linked to effective performance in the judicial performance portrayed in the excerpts.

- 1) Review *Abilities of an Outstanding Judge* developed in this seminar, if you wish.
- 2) Use your *Performance Log and Self Assessment* (Situation 2) that you began the third day.
- 3) In your group, briefly share one ability that, if practiced, might move the situation toward resolution.
- 4) Complete the self assessment of your Performance Log: Situation 2 (p. 24).
 - Which abilities have you demonstrated?
 - What abilities/criteria will you need to demonstrate in order to move the situation toward resolution?

5) Complete your *Action Plan for Practicing Judicial Abilities* (p. 25).

- ask your colleague for feedback
- briefly summarize your own performance from your *Performance Log and Self Assessment* in a way that respects confidentiality concerns
- share your *Action Plan for Practicing Judicial Abilities*
- give your colleague feedback using the same process

6) Review *Practicing Abilities Toward Outstanding Judicial Performance: Performance Log and Self Assessment*, a learning strategy you can use **after** the seminar to continue improving your performance.

Materials

Your Performance Log from the second and third days

Abilities of an Outstanding Judge (Handout from Presenter)

Your *Action Plan for Practicing Judicial Abilities*, that enables you to summarize and to record feedback from your colleague.

PERFORMANCE LOG: SITUATION 2 (continued) Name _____

SELF ASSESS YOUR PERFORMANCE IN YOUR SITUATION 2:

What abilities and criteria identified in this seminar, if applied, might assist you to move this situation toward resolution, toward positive benefit for those involved?

Ability _____	Ability _____
Criteria _____	Criteria _____
Criteria _____	Criteria _____
Criteria _____	Criteria _____

You may use the *Abilities of an Outstanding Judge*, Michigan Judicial Institute, 1991 developed by judges during a previous seminar to self assess your performance in Situation 2.

What abilities and criteria, if applied, might assist you to move this situation toward resolution, toward positive benefit for those involved?

Ability _____	Ability _____
Criteria _____	Criteria _____
Criteria _____	Criteria _____
Criteria _____	Criteria _____ etc.

Turn in this page to presenter to be copied so abilities and criteria can be added to *Abilities of An Outstanding Judge*.

PRACTICING THE ABILITIES OF AN OUTSTANDING JUDGE:
ACTION PLAN FOR PRACTICING JUDICIAL ABILITIES

Fourth day (2 hours):

Given my *Performance Log* and *Self Assessment*, these are the abilities/criteria I now demonstrate:

Given my *Performance Log* and *Self Assessment* these are the abilities/criteria I plan to develop:

Learning strategies I intend to use are:

As I develop these abilities/criteria, I expect this result:

Feedback from my colleague on my *Action Plan for Practicing Judicial Abilities* suggests that I also consider:

IDENTIFYING, DEFINING, AND PRACTICING THE ABILITIES OF AN OUTSTANDING JUDGE

Learning Outcome

- To reflect on our learning and to give feedback on the course and on the judicial abilities

Fifth day (1 hour): **Reflections on Our Learning: What have we learned? What's next?**

What is the most important thing you have learned this week?

The course was most effective when:

The course could have been more effective if:

Review the abilities generated during the week. Improve the criteria and note developmental level (beginning, developing, advanced) or level of proficiency where appropriate.

Which abilities, if developed, might advance the judiciary as a whole?

IDENTIFYING, DEFINING, AND PRACTICING THE ABILITIES OF AN OUTSTANDING JUDGE**RESOURCE MATERIALS**

1. Mentkowski, M., Loacker, G., & O'Brien, K. (1998). Practicing abilities toward outstanding judicial performance: Performance log and self assessment, (Appendix C). *Ability-based learning and judicial education: An approach to ongoing professional development*. East Lansing, MI: The Judicial Education Reference, Information and Technical Transfer Project (JERITT) <http://jeritt.msu.edu>
2. Michigan Judicial Institute. (1991). Abilities of an outstanding judge determined by judges at the state level through an Ability-Based Learning process. In Mentkowski, M., Loacker, G., & O'Brien, K. (1998). *Ability-based learning and judicial education: An approach to ongoing professional development*. East Lansing, MI: The Judicial Education Reference, Information and Technical Transfer Project (JERITT) <http://jeritt.msu.edu>
3. American Bar Association. (1992). Excerpt of Lawyering Skills and Professional Values: The statement of fundamental lawyering skills and professional values. In *Legal education and professional development—an educational continuum* (pp. 135–141). Chicago: Author.
4. Mentkowski, M., & Rogers, G. (1993, Summer). Connecting education, work, and citizenship: How assessment can help. *Metropolitan Universities: An International Forum*, 4(1), 34–46.
5. Argyris, C., and Schön, D. A. (1975). Theories of action. *Theory in practice: Increasing professional effectiveness* (Chapter 1). San Francisco: Jossey-Bass.
6. Grathwohl, C. (1993, December). Medical malpractice case. In Mentkowski, M., Loacker, G., & O'Brien, K. (1998). *Ability-based learning and judicial education: An approach to ongoing professional development*. East Lansing, MI: The Judicial Education Reference, Information and Technical Transfer Project (JERITT) <http://jeritt.msu.edu>
7. Silver, S. (1993, December). Community relationships in a high-profile case. In Mentkowski, M., Loacker, G., & O'Brien, K. (1998). *Ability-based learning and judicial education: An approach to ongoing professional development*. East Lansing, MI: The Judicial Education Reference, Information and Technical Transfer Project (JERITT) <http://jeritt.msu.edu>

APPENDIX B

Seminar Materials

Defining Abilities for Effective Performance

Mentkowski, M. (1996, July). Defining abilities for effective performance. Seminar materials created for *The life of the law: The coexistence of logic and experience*. 56th Conference: Sixth Judicial Circuit of the United States, Mackinac Island, MI.

Permission is granted to copy these materials if they are cited as follows:

Mentkowski, M., Loacker, G., & O'Brien, K. (1998). *Ability-Based Learning and Judicial Education: An Approach to Ongoing Professional Development*. East Lansing, MI: Judicial Education Reference, Information and Technical Transfer Project (JERITT). <http://jeritt.msu.edu>

Defining Abilities for Effective Performance

Individuals at the highest levels of professional practice—that is, federal judges—inspire confidence in others and gain the public trust because they are effective and outstanding at what they do. Society looks to them to deal with issues that most people—including other professionals—find unresolvable. Often, however, federal judges must make complex decisions and take action in isolation, with little or no opportunity to reflect with a colleague before or afterward. Yet, reflecting on one’s judicial performance is essential to learning from one’s own experience, and to enhancing effectiveness in dealing with increasingly complex situations and problems. Reflecting on performance with colleagues is essential to building the future of a profession. This session is designed to provide for this kind of reflection.

Opportunities to learn new ideas in judicial seminars are helpful for broadening one’s perspectives. However, new knowledge and attitudes are learned best when one can think through whether and how they might be applied day-to-day. The language of “abilities” can assist expert professionals to critically analyze what they do now, to reflect on it, and to discuss with each other essential abilities that are needed now and in the future.

Abilities—identified by judges themselves—include the knowledge, skills, capacities or dispositions, self-perceptions and attitudes, qualities, and perspectives that shape what they do. Using these abilities means integrating the constantly developing knowledge base of the profession with the capabilities, skills, and values that are fundamental to its ethically responsible practice.

To use abilities, judges must first carefully infer them from their own or other judges’ performances—in relation to what contemporary and future practice requires. This session is designed so federal judges can identify a few of these abilities, drawing on their own knowledge and experience. These abilities can then be used via discussion as another way to reflect on actual practices, to think through what might enhance one’s own performance, to select areas to develop further, and to discuss with colleagues what might stretch the profession as a whole.

JUDICIAL ABILITIES, COMPONENTS, AND CRITERIA: EXAMPLES

An ability is a complex combination of components. For example, effective judicial decision-making is an ability. It is, no doubt, a key ability that defines the profession. That ability is made up of several aspects. What kind of knowledge of the law does decision-making require? What skills, or jurisprudential techniques are needed for arriving at a decision? What kind of motivation enables a judge to state a ruling clearly and concisely? What kind of personal qualities enable a judge to maintain composure when under attack? What dispositions, developed over time, enables a judge to meet the time limits for decisions that one has set? What kind of self-perceptions are necessary to imagine a competent performance that communicates respect for a belligerent witness? What kinds of attitudes enable one to express sympathy for all of the parties involved? What kind of actions or behavior, such as stating a holding up front, demonstrate appreciation of judicial communication and the law? What kind of values permit all parties to be heard?

Prior work by judges at the state level, at the Michigan Judicial Institute in 1991 and 1993, demonstrates that judges identify **abilities**. For example, some of the abilities state judges identified through consensus include:

ABILITIES:

- | | |
|--|------------------------------------|
| (1) decision-making; | (6) commitment to personal growth; |
| (2) listening and empathizing; | (7) fairness/impartiality; |
| (3) critical thinking (reflective and analytical); | (8) courage; and |
| (4) leadership; | (9) humility. |
| (5) exercise of patience; | |

Experience shows that an ability can be broken open into components that lead to specifying behavioral indicators or criteria that enable professionals to understand an ability and how it expresses itself in performance. Thus, **components** are identified and **criteria** are specified to enable professionals to practice for improved performance. For example, judges at the state level identified three components of the judicial decision-making ability:

ABILITY: EFFECTIVE JUDICIAL DECISION-MAKING*Components:*

- (a) employment of coherent system for decision-making;
- (b) oral communication of decision-making; and
- (c) written communication of decision-making.

Each ability component was further specified through five criteria.

ABILITY COMPONENT: EMPLOYMENT OF COHERENT SYSTEM FOR DECISION-MAKING

- Criteria:*
- Defines issues to be decided
 - Demonstrates attentiveness by incorporating all legal and factual issues into a decision and articulates reasons
 - Permits all parties to be adequately heard
 - Demonstrates that all conflicting evidence has been evaluated
 - Demonstrates knowledge and appreciation of the law and jurisprudential techniques for arriving at a decision

RESOURCE MATERIALS:

1. Chapter titled "Identifying Judicial Abilities" from the monograph, *Ability-Based Learning and Judicial Education: An Approach to Ongoing Professional Development* by Marcia Mentkowski, Georgine Loacker, and Kathleen O'Brien.
2. Chapter titled "Theories of Action" from the book, *Theory in Practice: Increasing Professional Effectiveness* by Chris Argyris and Donald A. Schön (Jossey-Bass, 1974).

Learning Outcomes and Exercises

Learning

Outcome 1. To understand how abilities enable professionals to perform effectively

Introductory Presentation (10 minutes)

- Conventions and assumptions
- The language of abilities—how professionals connect what they know with what they do
- Examples of complex judicial abilities specified with criteria (behavioral indicators)
- Linking abilities to effective performance

Learning

Outcome 2. To infer abilities and criteria from judicial performances

Individual Exercise (15 minutes)

- Watch video excerpt and record behavior (p. 4)
- Infer abilities from performance (p. 4)
- Read one situation: Situation I: “Medical Malpractice...” [p. 5] or Situation II: “Hearings on IRS Summons...” [pp. 6–7] or Situation III: “Settlement Negotiations...” [pp. 8–9]
- Note how abilities and criteria emerge from analysis of judicial performance

Learning

Outcome 3. To identify abilities and criteria you are now demonstrating, or those needed in moving a current situation toward resolution

Colleague Exercise (40 minutes total) (Guidelines pp. 10–11)

Part I: Prepare individually (p. 12) (10 minutes)

- Choose an ability(ies) and situation (A or B)
- Describe one situation and your performance

Note: In Part II, describe it to a colleague (to the degree possible, given confidentiality concerns). Your colleague will interview you, to help focus on performance. Together, analyze your performance. Infer abilities and criteria:

Part II: Interview your colleague (p. 13) (15 minutes for each situation and analysis)

- Together, analyze your colleague’s situation and performance (p. 14)
- Identify abilities and criteria you or your partner have demonstrated and those needed to move a situation toward resolution (p. 15)

Note: Incorporate new ideas and concepts you are learning in the other sessions, where applicable, in formulating abilities and criteria

Learning

Outcome 4. Define a set of abilities inferred from judicial performance at the federal level, and abilities that might stretch the profession as a whole—toward dealing with increasingly complex issues

Small Group Exercise (15 minutes)

- Produce group list of abilities with criteria (p. 16)
- Check each jurisdiction(s) where abilities apply, where appropriate
- Submit group list to presenter for synthesis and distribution at this conference

INDIVIDUAL EXERCISE**OBSERVING PERFORMANCE AND RECORDING BEHAVIOR FOR INFERRING ABILITIES**

As you observe the judge's performance, please note significant behaviors on the left. *After* your observation is complete, infer abilities and note them on the right.

Behaviors	Abilities

What abilities make for effective performance?

SITUATION I Medical Malpractice Case

Choose an Ability: Patience

Choose a Situation: Medical Malpractice Case

During peremptory challenges, the defendant's attorney preempted the only black juror on the panel. The black juror was asked only one question by the defendant's attorney and that was "could you be fair to the defendant doctor?" and the juror answered "yes." Plaintiff's attorney immediately asked for a hearing outside the presence of the jury and requested that the black juror remain seated pursuant to the *Edmons v. Leesville Concrete* case. (U.S. Supreme Court, 1991 59 US Law Week, 4574.)

After consideration, I told the black juror to remain in the jury box. We resumed jury selection. Defendant's lawyer requested to make a motion outside the presence of the jury. The attorney stated that my ruling in seating the black juror showed my bias and prejudice and asked that I disqualify myself. I refused the request and defendant's attorney said that he was appealing to the Chief Judge and since I was the Chief Judge, I could not hear the appeal.

I adjourned jury selection until the following day and contacted the State Court Administrator's Office in Lansing. The following afternoon a visiting judge heard and denied the motion to disqualify. Jury selection continued until a jury was seated.

Defendant's attorney said he could not continue because he had a migraine headache. I lost my composure! I yelled at him that he was attempting to disrupt the trial. I accused him of unprofessional conduct. The attorney jumped up and again asked me to disqualify myself and declare a mistrial. I was so exasperated that I declared a mistrial.

I still am upset about my response to the attorney's actions. Upon reflection, I could have done better.

Hon. Casper Grathwohl, Circuit Judge, Berrien County, Michigan

Judge Grathwohl's postscript:

After reviewing my situation during our seminar, Judge John Shepherd of the Michigan Court of Appeals (who was my college roommate) commented on my performance. He observed:

"You did fine up until the end. You might have taken a recess, calmed down, taken time to reflect, or consulted with a colleague. It's very possible the lawyer did have a migraine headache!"

What other abilities and criteria might help resolve this situation?

ABILITY: EXERCISE OF PATIENCE

- Criteria:**
- Shows self-constraint
 - Maintains sense of humor
 - Uses mediative techniques where appropriate
 - Tolerates a variety of communication styles
 - Takes time to review relevant decisions before rendering opinion
 - Allows statements to be completed
 - Allows sufficient time for thought, argument, situation to develop
 - Shows awareness of servant role

Michigan Judicial Institute, 1991

SITUATION II Hearings on IRS Summons Enforcement Actions

Choose an Ability: Listening
Communicating attitude of fairness
Self-Control

Choose a Situation... that caused you undue difficulty, where you wanted to ease the burden of the situation. In this situation, you may have been somewhat effective so far, but the situation is now stretching your personal and professional abilities.

Where is the situation occurring?
Who is involved?

In our district, we are often called upon to hear IRS summons enforcement actions, usually arising from the taxpayer's complete failure to file a return or pay taxes. The respondents are generally tax protesters and are sometimes members of citizens' militia groups. They hold unorthodox views about government and advance frivolous defenses, such as the unconstitutionality of the Sixteenth Amendment.

What happened?
What led up to it?
What did you think, feel, intend?
What did you actually do?

The typical situation involves an in-court hearing on an order to show cause why the summons should not be enforced. This typically involves an Assistant U.S. Attorney, an IRS revenue officer as witness, and the taxpayer/respondent representing himself. The respondent often attempts to raise meritless objections, present immaterial testimony, or make long statements of political philosophy irrelevant to the narrow issues at hand. At first, my approach was to sustain objections to such presentations and to attempt aggressively to confine the respondent to the issues. I soon learned that this approach was counter-productive, for a number of reasons: (1) I became embroiled in arguments with the pro se respondents, who were unfamiliar with court proceedings or the rules of evidence but wanted to make their points in their own way. (2) In explaining the reasons for my rulings, I was forced to make it clear that nothing the respondent thought was important really mattered. This would lead to anger and frustration by the respondents, who thought I was biased against them, was not giving them a fair hearing, and had prejudged the case before hearing their side. (3) Rather than saving time, I was causing the hearings to be protracted. By sustaining objections, I was encouraging the U.S. Attorney to make more of them, leading in turn to more lengthy arguments over the relevance of inconsequential issues. (4) The respondents' perception that they were not being heard engendered resistance to my ultimate decisions, leading to appeals, contempt citations, and a concomitant waste of more time.

What has the outcome been so far?

As a result, my usual practice of running a disciplined courtroom and sticking closely to the issues was having the opposite of its intended effect in these special situations. I was not being a peacemaker, one of the litigants left the courtroom with a feeling of grievance, and future litigation was virtually assured.

continued...

After reflecting on your performance, what did you do?

I now take a much different approach, as a result of asking myself how I would like to be treated if I were in the respondents' place. Regardless of the merits of their legal position, I begin by explaining the nature of the proceeding. I acknowledge that the respondents are probably unfamiliar with court proceedings and tell them that I will therefore give them latitude in presenting their case. I say at the outset that I am just going to listen at the hearing and that I will make no decisions that day, because I want to carefully consider the case. I make it clear that the hearing is devoted to factual issues only; legal issues and citation to authority (e.g., the Magna Carta, the Declaration of Independence) are better presented in writing, so each party will have seven days after the hearing to present written authorities. During the hearing, I generally allow the respondents to present whatever they want. Objections by the U.S. Attorney are either overruled or taken under advisement. (The U.S. Attorneys have now picked up on this approach, so they generally do not object.) I will often ask questions in a sincere tone, to show that I am trying to understand the respondent's position, and I will answer their questions, to the extent that I can. I try never to become angry or impatient, and I thank both parties at the end of hearing.

What is the outcome now?

This approach has several benefits. The respondents seem to be put at ease by the initial statements. Because they are allowed to make their presentation as they planned it, they are not likely to get angry or frustrated. By making the point that written arguments are a more effective way of approaching legal points, I am able to cut off long political speeches, not because they are irrelevant, but because the respondent would be better served by presenting such complicated points in writing. I now spend far less time in the hearing and the court system devotes less time to those cases as a whole. I believe this is because the respondents feel that they have received a fair hearing and that their positions were not prejudged.

What abilities did you demonstrate in this situation?

I believe that in this circumstance the abilities to control one's self, to create an atmosphere of fairness and to communicate the fact of listening has defused potentially tense and confrontational situations.

Hon. Joseph G. Scoville, Magistrate Judge, U.S. District Court, Western District of Michigan

What other abilities and criteria helped resolve this situation?

Taking Another's Perspective:

- Identifies similarities and differences between one's own perspective and those of others
- Examines ways in which one's performance is affected by reflecting on other perspectives
- Enters another's perspective by reasoning within that perspective; puts one's self into another's place and view how another would think, feel, act

—Leadership Institute in Judicial Education, April, 1990

SITUATION III Settlement Negotiations in a Complex Civil Case

Choose an Ability: Patience Communication Understanding of Human Nature

Choose a Situation... that called for these abilities, where you have demonstrated effective performance.

Where did the situation occur?

Who was involved?

I conducted the settlement negotiations in a complex civil case which was assigned to another judge in our district. Trial was estimated to last four months. I participated a few weeks before the trial was scheduled.

The case arose out of the sale of the stock in a local radio company engaged primarily in selling television and radio time to various companies nationwide. An out-of-state purchasing company paid \$40 million, with future payments contingent on future earnings. The selling shareholders were: (a) the founder, who was president and majority owner of the company; (b) chief financial officer; (c) trusts established for the founder's family; and (d) the general counsel (also trustee for trusts). At the time of the sale, the founder entered into an employment agreement with the purchaser under which he would run the company for ten years.

What happened?

What led up to it?

What did you think, feel, intend?

The next year, the IRS and FBI seized the local company records in a widely-publicized raid. The company's founder, general counsel, and chief financial officer—along with 13 employees of the company's customers—were indicted and convicted of various offenses arising out of paying kickbacks to customers' employees in order to obtain and keep business.

The out-of-state purchaser sued the former shareholders, the general counsel's law firm, and another attorney who had participated in negotiations for the sale. The purchaser contended that defendants were guilty of fraud, in failing to disclose the kickbacks and earnings. Defendants asserted that there was no fraud, that the purchaser knew about the arrangements with customer's employees prior to the sale, and relied on independent information rather than that provided by the local radio company.

What did you do?

When my settlement efforts began seven years after the original sale of the stock, we were essentially dealing with a common law and statutory fraud case with extremely complex facts and some interesting legal issues about liability of the trusts. At an initial meeting of the parties, I decided that counsel for all parties, and the parties or their representatives needed to be present at settlement negotiations. During early negotiations, I realized that only the plaintiff's lawyers and representative and the founder and his lawyers needed to be present at the start.

The founder was the key figure in the litigation. He had served time in prison, but was still a very wealthy and proud man—and a masterful negotiator. The plaintiff distrusted him enormously. Nevertheless, the bulk of any settlement funds would have to come from him. He had greater personal exposure, and, other than the trusts, was the only one with enough money to pay a significant settlement. The founder set some of the settlement ground rules at the outset. He also insisted that the plaintiff negotiate with him for a total settlement amount (excluding funds to be paid by insurance companies). He thus assumed authority to negotiate on behalf of the trusts.

continued...

I wrote to the plaintiff encouraging acceptance: (“...My personal assessment of [the founder] is that he may well settle this case ultimately, but only through the negotiate and trade approach with which he feels comfortable. My personal preference was to avoid such an approach and to urge the parties to very quickly become quite candid about their ultimate positions with respect to settlement. This approach does not seem possible, however. Thus, it appears that we will all have to use [the founder’s] approach if we genuinely desire settlement. I realize that [your corporation] may feel some irritation...”). I also urged plaintiff to rely on the founder’s assurance that, if a total figure was agreed on for himself and the trusts, he would negotiate for the trust’s contribution. Plaintiff ultimately acquiesced in founder’s ground rules and approach.

We then began a slow process of moving toward a settlement figure. Plaintiff sought damages including the entire \$40 million purchase price, mandatory prejudgment interest under the state blue sky law, and punitive damages. The founder’s total assets were not more than \$15 million; trusts totaled \$12 million. Obviously, plaintiff could not hope to collect what they wanted, although they were properly enthusiastic about their prospects of success on their claims against the founder and the other defendants. Also, there was a real question as to the amount of any jury verdict.

After talking extensively with the parties together and separately, I concluded that the case could probably settle for somewhere between \$13 and \$20 million. The plaintiff attorneys and the founder let me know that they concurred. By this time the founder had agreed to pay \$12 million, and I was pretty certain he would pay \$15 million. Ultimately, I was able to identify \$15 million as a figure that plaintiff would accept, provided some contribution could be obtained from the insurance companies who had legal malpractice coverage for the lawyer defendants. Throughout, I was a conduit for communication and a neutral party who provided constant comment about the risks of litigation.

At this point, I turned my attention to the insurance companies. I was uncertain whether plaintiff would really refuse to settle if they didn’t contribute, but it seemed fair that they should. I went to them before a final agreement had been reached so they would feel some pressure to help achieve settlement. The companies initially resisted, partly because I simply told them that \$250,000 from each company would probably settle the case. Without much opportunity for negotiation, ultimately I convinced them to avoid a four-month trial of uncertain outcome.

What was the outcome?

Within a day or two, the insurance companies agreed to pay \$250,000 each, and the founder agreed to a \$15 million figure. The founder, as he had promised, obtained a portion of these funds from the trusts. Many details remained to be resolved, but the hard part for me was over. The parties continued to work on the details. I intervened when they encountered a problem or two that they could not resolve on their own. My role here was generally to throw out new ideas for discussion and to offer a gentle view as to which party might yield on a particular point.

The settlement resolved the federal litigation and related state litigation. The parties were pleased, and so were the judges involved. Overall, I felt that this settlement negotiation went well, although perhaps I could have used a bit more finesse with the insurance companies. The negotiation was quite time-consuming. I probably spent at least a week on it—still far less than the time needed for my colleague to try the case.

Hon. Julia Smith Gibbons, Chief Judge, U.S. District Court, Western District of Tennessee

What other abilities or criteria helped resolve this situation?

ABILITY: COMMUNICATION

- Accurately reflects the proposal of one person to another.
- Puts one person’s proposal in the “terms” of the other

ABILITY: NEGOTIATION

- Determines who needs to be involved
- Maintains control by giving it up
- Develops trust among negotiators who have reason not to trust

—Sixth Judicial Circuit of the United States, July 1996

GUIDELINES FOR COLLEAGUE EXERCISE: PART I

CHOOSING ABILITIES AND SITUATIONS

What Ability/Criteria Might I Choose?

It is most useful to choose an ability you wish to develop further, even though you are already effective at it.

What Kind of Situation Might I Choose?

Choose a situation where you think practicing this ability could enhance performance. What kind of situation might be most helpful (a) for inferring abilities already demonstrated, (b) for applying new ideas and concepts, (c) for inferring abilities needed to resolve current situations?

The most useful kind of situation (or set of related situations) has a number of dimensions:

- is compelling
- may appear unresolvable now
- is currently taking up your personal and professional attention
- is causing you undue difficulty and you want to ease the burden of the problem
- you want to move the situation toward resolution in order to benefit other persons or groups
- you may be somewhat effective so far; but the problem is really stretching your abilities

The situation might be a problem that is related to the general topics addressed in this seminar. **The situation or incident can be—but it need not be—a legal case.** Either way, plan to preserve confidentiality of institutions, persons, or cases where appropriate.

The better you describe and analyze the situation, the more helpful your performance can be in assisting you to identify the abilities and criteria you are already using and those needed to achieve movement toward problem resolution.

COLLEAGUE EXERCISE: PART II

INTERVIEWING A COLLEAGUE FOR A SITUATION AND PERFORMANCE²²

Summary of the Procedure

- The interview is best accomplished in an atmosphere of informality and low pressure.
- The interviewer needs to assist the interviewee to talk specifically about his/her own behavior.

For each Situation

1. Past Situation: "Can you think of a situation when you were particularly effective?"...(get situation)... "Could you walk me through the from the beginning?" (time sequence is important)

Current Situation: "Can you think of a situation that has caused you undue difficulty, where you want to ease the burden of the problem situation?"

2. *Situation*: what happened, what led up to situation?
3. *Who* was involved?
4. What did you *think, feel, want to do*?
5. What did you *do*?
6. What was the *outcome*? what happened, how did you feel?

[Process: "be an investigative reporter." *Probe* "how?," get *facts*.]

[Further Process: Try to get enough situations to show a range of behavior in a variety of situations.]

Things to Avoid

- *Jumping to conclusions and reflection*. Don't put words (yours) in his/her mouth (e.g., "So you tried to *influence* him...") or paraphrase what the respondent says (e.g., as do nondirective counselors). Rather, be intrusive, *investigative*.
- *Phrasing questions that get general or hypothetical answers*. Move "down" into *facts*, not "up" into abstractions (e.g., what not to ask: "What could you have done?" "So your strategy usually is...").
- *Letting the interviewee take charge*. Rather, continually clarify (e.g., respondent: "So we did..." Interviewer: "*We*? Who *specifically*?")
- *Getting off into what should be done*. Rather, focus on what the interviewee did.

²² Adapted from Guide to Behavioral Event Interviewing (1978), McBer and Company, 116 Huntington Avenue, Boston, MA.

COLLEAGUE EXERCISE: PART I

PREPARE INDIVIDUALLY (10 minutes)

CHOOSE AN ABILITY(IES): _____

CHOOSE A SITUATION _____

- ☐ A. Choose a situation that called for this ability, where you have demonstrated effective performance

OR

- ☐ B. Choose a situation that has caused you undue difficulty, where you want to ease the burden of the situation. Select one where you may have been somewhat effective so far, but that is now stretching your personal and professional abilities

DESCRIBE ONE SITUATION AND YOUR PERFORMANCE

Where did the situation occur?

Who was involved?

WHAT HAPPENED?

What led up to it?

What did you think, feel, and intend?

What did you *do*?

What was the outcome?

COLLEAGUE EXERCISE: PART II

(15 minutes for each person's situation and analysis)

INTERVIEW YOUR COLLEAGUE

ABILITY(IES): _____

SITUATION _____

Check type of situation:

- ☐ A. Choose a situation that called for this ability, where you have demonstrated effective performance

OR

- ☐ B. Choose a situation that has caused you undue difficulty, where you want to ease the burden of the situation. Select one where you may have been somewhat effective so far, but that is now stretching your personal and professional abilities

Interview questions:

Where did the situation occur?

Who was involved?

WHAT HAPPENED?

What led up to it?

What did you think, feel, and intend?

What did you *do*?

What was the outcome?

COLLEAGUE EXERCISE: PART II CONTINUED

TOGETHER, ANALYZE YOUR COLLEAGUE'S SITUATION AND PERFORMANCE.

INFER ABILITIES AND CRITERIA

Note and explain differences between what you intended to do and what you actually did.

What did you do that enabled a resolution?

OR

What might you *do* to move a current situation toward resolution?

Infer abilities and criteria that account for your effectiveness. If appropriate, also attend to those that might be needed to move the situation toward resolution. **Use p. 15 to record abilities and criteria.**

COLLEAGUE EXERCISE: PART II CONTINUED

Table # _____

What abilities and criteria moved situations toward resolution, toward positive outcomes?

Ability _____

Criteria _____

Criteria _____

Criteria _____

Criteria _____

Check all jurisdictions where ability applies: ☐ appellate ☐ district ☐ bankruptcy ☐ magistrate

Ability _____

Criteria _____

Criteria _____

Criteria _____

Criteria _____

Check all jurisdictions where ability applies: ☐ appellate ☐ district ☐ bankruptcy ☐ magistrate

Ability _____

Criteria _____

Criteria _____

Criteria _____

Criteria _____

Criteria _____ etc.

Check all jurisdictions where ability applies: ☐ appellate ☐ district ☐ bankruptcy ☐ magistrate

To help with the typing of the synthesis, please attach this page to your small group's final set of abilities and criteria (page 16).

SMALL GROUP EXERCISE

Table # _____

What abilities and criteria, if applied, might assist federal judges to move situations toward resolution, toward positive benefit for those involved?

Ability _____

Criteria _____

Criteria _____

Criteria _____

Criteria _____

Check all jurisdictions where ability applies: ☐ appellate ☐ district ☐ bankruptcy ☐ magistrate

Ability _____

Criteria _____

Criteria _____

Criteria _____

Criteria _____

Criteria _____

Check all jurisdictions where ability applies: ☐ appellate ☐ district ☐ bankruptcy ☐ magistrate

Ability _____

Criteria _____

Criteria _____

Criteria _____

Criteria _____ etc.

Check all jurisdictions where ability applies: ☐ appellate ☐ district ☐ bankruptcy ☐ magistrate

Turn in this page to presenter so selected abilities and criteria may be included in *Defining Abilities for Effective Performance* for distribution at the end of the conference.



APPENDIX C

Exercise

Practicing Abilities Toward Outstanding Judicial Performance: Performance Log and Self Assessment

This is a performance log and self assessment exercise. It is designed for use by participants in an Ability-Based Learning course or seminar as a strategy for documenting, analyzing, self assessing, and improving performance using abilities. Only the participant decides whether to share any part of their log with a colleague.

Permission is granted to copy these materials if they are cited as follows:

Mentkowski, M., Loacker, G., & O'Brien, K. (1998). *Ability-Based Learning and Judicial Education: An Approach to Ongoing Professional Development*. East Lansing, MI: Judicial Education Reference, Information and Technical Transfer Project (JERITT). <http://jeritt.msu.edu>

**PRACTICING ABILITIES TOWARD OUTSTANDING JUDICIAL PERFORMANCE:
PERFORMANCE LOG AND SELF ASSESSMENT**

CHOOSE AN ABILITY: _____

What Ability/Criteria Might I Choose?

It can be useful to focus on an ability and criteria you wish to develop. However, sometimes the press of the situation argues for identifying and describing the situation first and then inferring abilities from your performance. You may then choose from those abilities.

CHOOSE A CURRENT AND CONTINUING SITUATION: _____

What Kind of Situation Might I Choose?

Choose a situation where you think practicing this ability could enhance performance.

What kind of situation might be most helpful (a) for inferring abilities already demonstrated, (b) for applying new ideas and concepts, (c) for self assessing my performance record, and (d) for practicing the abilities of an outstanding judge?

The most useful kind of situation (or set of related ones) has a number of dimensions, is compelling, may appear unresolvable now, and is currently taking up your personal and professional attention. This situation is causing you undue difficulty and you want to ease the burden of the problem. You want to move the situation toward resolution in order to benefit other persons or groups. You may be somewhat effective so far; but the situation is really stretching your abilities. This situation might also be a problem that is related to the general topics addressed in the seminar.

The situation can be—but it need not be—a legal case. Either way, plan to develop your *Performance Log* to preserve confidentiality of institutions, persons, or cases where appropriate. Also consider where you are able to share information from your performance log and self assessment in order to discuss your action plan with a colleague.

The attached materials assist you in describing and analyzing your situation to create a performance log, and in self assessing your performance. The better you describe and analyze the situation, the more helpful your *Performance Log* can be in assisting you to identify the abilities you are already using and those you choose to develop in order to achieve movement toward problem resolution.

What are the Questions?

Here are the key questions around which a performance log is organized:

- Where did the situation occur?
- Who was involved?
- What led up to it?
- What did you think feel, want to do?
- What did you *do*?
- What was the outcome?

Practicing Abilities of an Outstanding Judge: Performance Log and Self Assessment

Note on confidentiality: Professionals understand that meaningful analysis of a situation requires detail. However, they understand that it is important to preserve confidentiality of institutions or persons involved, and they consider this in deciding to share parts of this record with colleagues.

WHERE DID THE SITUATION OCCUR?

Type of Setting—(e.g., courtroom, conference room):

Location—(e.g., office, courtroom, receptionist's desk, etc.):

WHO WAS INVOLVED?

Your position—(e.g., Justice, Judge, or other court personnel):

Positions of all other persons involved in the situation—(e.g., Court Reporter, Witness, Attorney, Secretary, Colleague):

How typical is this situation or incident in your experience? ☐ Typical ☐ Atypical

The questions in this column are questions to guide your thinking; you may or may not "answer" all of them as you tell your story.

WHAT HAPPENED?

What led up to it?

What did you think feel, want to do?

What did you *do*?

What was the outcome?

Provide a detailed description of:

- The circumstances or events that led up to this situation;
- The situation itself, including the activities and conversations of those involved;
- And especially what you did and said as a participant in the situation.
- What was the outcome or result of this situation in terms of decisions made, conclusions reached, agreements or disagreements, etc.?

Describe your situation here (as it comes to mind, using the guide questions to stimulate your thinking).

**WHAT DID YOU THINK
AND FEEL AT THE
TIME?**

- What were you thinking *during the time* the situation was occurring?
- What did you feel about the part *you* played in this situation?
- What did you feel about the parts played by *others* in this situation?
- How did you feel about the *outcome* of this situation?

WHAT WAS INTENDED?

- *Why* did you act as you did in this situation? What did *you* intend to accomplish through your actions at the time?
- Why do you think *others* acted as they did in this situation and what do you think they intended to accomplish through their actions?

**WHAT DO YOU THINK
AND FEEL NOW?**

- As you look back on this situation, why do you think things happened the way they did?
- What do you think and feel *generally* about situations like these that occur in your work?

**WHAT IDEAS AND
CONCEPTS WERE
INVOLVED?**

- How did ideas or concepts guide your actions in this situation? How were they used or applied in your actions?
- Looking back on situations like this one, what ideas or concepts seem to apply best *now*?

WHAT DID YOU LEARN?

- What do you feel you have learned from your experience in this situation?
- As you look back on this situation, how do you think you could have improved your performance or

ANALYSIS OF PERFORMANCE LOG

SELF ASSESSMENT OF PERFORMANCE LOG

Use abilities you think are characteristic of outstanding judicial performance.

**WHAT ABILITIES
AND CRITERIA WERE
INVOLVED?**

- What abilities and criteria did you demonstrate in this situation?
- What abilities and criteria might be developed to perform more effectively in situations like this?

SELF ASSESSMENT OF PERFORMANCE LOG CONTINUED

As I review my *Performance Log*:

Did I:

- ☐ Focus on performance—what to do
- ☐ Focus on how to perform—strategies for doing
- ☐ Focus on thinking about performing—theory of action
- ☐ Focus on thinking about the context where one is performing and how it impacts possible outcomes

Did I choose a situation?

- ☐ choose a situation where I could learn from my performance, where I could apply new ideas and concepts and where I could infer abilities and criteria
- ☐ focus on series of situations in my professional performance that can enable me to generate long range strategies and action plans for practicing my abilities
- ☐ preserve confidentiality of the institution/persons/case involved in the situation where appropriate

Did I describe my performance?

- ☐ organize experiences into a coherent narrative showing thought, feeling, action, and result
- ☐ describe what happened in the situation rather than abstractions
- ☐ describe behavior of self and others, rather than interpretation of that behavior
- ☐ separate feeling and thinking responses in the situation from those I had afterward
- ☐ describe other's perspective using evidence, rather than just describing my interpretation of the other's motivation from my own point of view
- ☐ describe explanations of my own and others' behavior from multiple perspectives and points of view
- ☐ see patterns in my own behavior
- ☐ demonstrate analytical thinking by looking for relationships among behaviors rather than explaining behaviors using clichés

Did I analyze my performance?

- ☐ identify ways to improve my performance or ways of thinking about my performance
- ☐ relate ideas and concepts from the seminar or other sources and use them to inform my analysis
- ☐ infer concepts, abilities, and criteria from situations—see relationships and create a theory of action

Did I self assess and practice abilities of an outstanding judge?

- ☐ self assess for abilities and criteria
- ☐ identify examples of abilities and criteria I already demonstrate
- ☐ identify examples of abilities and criteria I am working to develop performance
- ☐ show improved performance in further situations

APPENDIX D

Abilities

Abilities of an Outstanding Judge Determined by Judges at the State Level Through an Ability-Based Learning Process

These abilities were created by thirty-nine Michigan judges as part of *Identifying, Defining, and Practicing the Abilities of an Outstanding Judge*, conducted by Dr. Georgine Loacker and Dr. Kathleen O'Brien of Alverno College, Milwaukee, Wisconsin, as part of a judicial seminar, *Minding the Courts Into the 21st Century*, designed by the Michigan Judicial Institute, Dr. Dennis Catlin, Executive Director. This seminar was held at the Radisson Resort and Conference Center, Ypsilanti, Michigan, November 27–30, 1990 and February 7–8, 1991.

Michigan Judicial Institute. (1991). *Abilities of an Outstanding Judge*. East Lansing, MI: Author.

Michigan Judicial Institute

ABILITIES OF AN OUTSTANDING JUDGE 1991 ²³

JUDICIAL ABILITIES

In Action

Underpinnings

DECISION-MAKING

- Employment of coherent system for decision-making
- Communication of decision-making

LISTENING → EMPATHIZING

CRITICAL THINKING
(REFLECTIVE/ANALYTICAL)

LEADERSHIP

- Managing
 - Proceedings, environment
 - Self
- Exercise of responsibility
 - Maintaining of public image
- Teaching

EXERCISE OF PATIENCE

COMMITMENT TO PERSONAL GROWTH

- Awareness of individual strengths, biases, areas to work on
- Willingness for continual self assessment
- Openness to knowledge
- Openness to change

Personal Characteristics

FAIRNESS/IMPARTIALITY

COURAGE

HUMILITY

²³ These abilities were created by thirty-nine Michigan judges as part of *Identifying, Defining, and Practicing the Abilities of an Outstanding Judge*, conducted by Dr. Georgine Loacker and Dr. Kathleen O'Brien of Alverno College, Milwaukee, Wisconsin, as part of a judicial seminar, *Minding the Courts Into the 21st Century*, designed by the Michigan Judicial Institute, Dr. Dennis Catlin, Executive Director. This seminar was held at the Radisson Resort and Conference Center, Ypsilanti, Michigan, November 27–30, 1990 and February 7–8, 1991.

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ABILITIES OF AN OUTSTANDING JUDGE 1991 (continued)

ABILITY: EFFECTIVE JUDICIAL DECISION-MAKING

ABILITY: EMPLOYMENT OF COHERENT SYSTEM FOR DECISION-MAKING

- Criteria:*
- Defines issues to be decided
 - Demonstrates attentiveness by incorporating all legal and factual issues into a decision and articulates reasons
 - Permits all parties to be adequately heard
 - Demonstrates that all conflicting evidence has been evaluated
 - Demonstrates knowledge and appreciation of the law and jurisprudential techniques for arriving at a decision

ABILITY: COMMUNICATION OF DECISION-MAKING

Oral:

ACTIONS

- Criteria:*
- Defines role of participants and assures appropriate perception of judge's role
 - Explains that both sides were considered
 - Explains evidence, burden of proof and why certain evidence has or has not been persuasive
 - Discusses issues, law and cites authority where appropriate
 - Compliments attorneys and witnesses where appropriate
 - Keeps appropriate balance between empathy and objectivity withholding and exercising judgment
 - Explains holding at the end so that non-lawyers understand the reason for the decision before they quit listening
 - States ruling clearly and concisely, expressing sympathy for the parties (making palatable that which is distasteful)

QUALITIES

- Criteria:*
- Uses language that is understandable to the audience for which it is intended
 - Avoids ambiguity
 - Does not say more than is necessary
 - Shows a good command of the English language (rules of grammar)
 - Monitors use of improper non-verbal communication (tone of voice/body language)

Written:

ACTIONS

- Criteria:*
- States holding up front
 - Meets the time limits one has set

QUALITIES

- Criteria:*
- Uses language that is understandable to the audience for which it is intended
 - Avoids ambiguity
 - Does not say more than is necessary
 - Shows a good command of the English language (rules of grammar)

Michigan Judicial Institute

ABILITIES OF AN OUTSTANDING JUDGE 1991 (continued)

ABILITY:	LISTENING	→	EMPATHIZING
Criteria:	<ul style="list-style-type: none"> • Exhibits body language that shows attentiveness and openness to speaker • Allows statements to be completed • Allows thought/argument/situation to develop • Asks pertinent questions or further develops what speaker communicates • Withholds judgment • Minimizes interferences <ul style="list-style-type: none"> — physical — mental shifts • Listens carefully enough to identify legal and factual issues participants need to address 		Criteria: <ul style="list-style-type: none"> • Treats each litigant/attorney/employee as an individual • Allows litigants to express their emotions (within reason) • Accommodates those with special needs: the physically or mentally challenged, and children • Clearly explains rulings (especially for benefit of losing party) • Provides positive feedback to litigants and attorneys • Expresses appreciation of staff and colleagues • Lightens up where appropriate

ABILITY: CRITICAL THINKING (REFLECTIVE/ANALYTIC)

- Criteria:
- Identifies and isolates issues
 - Conducts research before forming initial opinion
 - Seeks out issues and main concerns of each party
 - Assembles all relevant and admissible evidence from all sources
 - Seeks opinions from judicial colleagues
 - Relates history to the present
 - Takes context into consideration
 - Synthesizes the data
 - Assesses prima facie case burden of proof
 - Evaluates credibility
 - Distinguishes fact from opinion
 - Distinguishes relations between conclusions and arguments
 - Questions unwarranted assumptions
 - Questions authority and identifies it
 - Develops and applies coherent judicial philosophy, putting each decision in context of larger society
 - Shows sensitivity to evolving facts and law
 - Identifies law applicable
 - Attends to personal biases and prejudices
 - Acknowledges gulf between the judge and the litigant (e.g. radically different backgrounds)
 - Evaluates evidence and burden of proof
 - Comprehends “hidden agendas” (if any)
 - Makes decision

Michigan Judicial Institute

ABILITIES OF AN OUTSTANDING JUDGE 1991 (continued)

ABILITY: LEADERSHIP (Part 1)

ABILITY: MANAGING

PROCEEDINGS/ENVIRONMENT

- Criteria:
- Uses power responsibly
 - Shows knowledge of correct procedures and/or the law
 - Applies court rules and the law
 - Administers staff effectively
 - Efficiently controls docket and courtroom
 - Differentiates between threatening and non-threatening courtroom behavior
 - Uses appropriate responses
 - Establishes/maintains respectful attitude among all involved
 - Provides appropriate courtroom setting including personal grooming of judge and staff
 - Demonstrates attitude/demeanor through authority
 - Insists on quiet, order, talking in turn
 - Limits speaking to fresh and new material (do not ramble, do not allow hostile behavior, give opportunity to speak, use voice appropriately, use understandable/common language)
 - Does not allow argument to be reduced to vulgarity
 - Decides as quickly as possible once record is concluded

SELF

- Criteria:
- Conveys image of independence
 - Maintains objectivity
 - Maintains graciousness of manner
 - Shows sense of dignity
 - Shows restraint
 - Shows self confidence
 - Shows appreciation of humor in life
 - Withstands pressures
 - Effectively deals with misperceptions created by media
 - Handles stress without being destructive to self
 - Grows a thick skin

Michigan Judicial Institute**ABILITIES OF AN OUTSTANDING JUDGE 1991 (continued)****ABILITY: LEADERSHIP (Part 2)****ABILITY: EXERCISE OF RESPONSIBILITY**

- Criteria:*
- Remains at work for optimal hours
 - Establishes and implements case management criteria (group cases, etc.)
 - Shows punctuality in promptness of decisions, bench time, control of docket
 - Pays attention to detail
 - Acts dependably and consistently (as appropriate)
 - Protects and defends judicial independence
 - As public servant, shows awareness of where power is derived
 - Maintains current knowledge of legal developments
 - Establishes a coherent judicial philosophy
 - Maintains a positive public image
 - Observes ritual and decorum in courtroom
 - Takes care with humor and casual comments on and off the bench
 - Keeps accurate record
 - Maintains appearance of impartiality by controlling body language, expressions and emotions
 - Acts in timely manner with caution and consideration
 - Maintains good contact and interaction with all court staff
 - Confronts problems in the court or with other judges without engaging in loose criticism of other judges
 - Encourages appropriate uniformity between judges
 - Deals appropriately with false perceptions created by media

ABILITY: LEADERSHIP (Part 3)**ABILITY: TEACHING**

- Criteria:*
- Inspires and encourages others to grow and act
 - Sets standards by example
 - Establishes goals and expectations for staff
 - Works with staff to buy in to this vision but listens to others so vision can be changed
 - Builds *esprit d'corps* among employees
 - Exercises judgment constantly

ABILITY: EXERCISE OF PATIENCE

- Criteria:*
- Shows self-constraint
 - Maintains sense of humor
 - Uses mediative techniques where appropriate
 - Tolerates a variety of communication styles
 - Takes time to review relevant decisions before rendering opinion
 - Allows statements to be completed
 - Allows sufficient time for thought, argument, situation to develop
 - Shows awareness of servant role

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ABILITIES OF AN OUTSTANDING JUDGE 1991 (continued)

ABILITY: COMMITMENT TO PERSONAL GROWTH

ABILITY: AWARENESS OF INDIVIDUAL STRENGTHS, BIASES, AREAS TO WORK ON

- Criteria:*
- Practices introspection
 - Shows recognition of fallibility
 - Identifies limitations
 - Identifies personal biases
 - Shows self awareness of being stressed out

ABILITY: WILLINGNESS FOR CONTINUAL SELF ASSESSMENT

- Criteria:*
- Establishes criteria under which one is operating
 - Reviews own court practices
 - Establishes uniform work and personal limits for your performance
 - Develops and prepares a checklist for periodic review of attitudes, behaviors, mannerisms, and activities to identify problems
 - Seeks advice, assistance, and evaluation from others
 - Shows ability to accept criticism

ABILITY: OPENNESS TO KNOWLEDGE

- Criteria:*
- Maintains current knowledge of legal developments
 - Reads professional literature
 - Attends professional training

ABILITY: OPENNESS TO CHANGE

- Criteria:*
- Improves own court practice
 - Corrects problems where identifiable and to the extent necessary and inquire of others for confirmation
 - Discusses techniques for improvement with colleagues, mentors
 - Uses checklist for periodic review of attitudes, behaviors, mannerisms, and activities to identify problems

Michigan Judicial Institute**ABILITIES OF AN OUTSTANDING JUDGE 1991 (continued)*****ABILITY: FAIRNESS AND IMPARTIALITY***

- Criteria:*
- Uses system for handling docket that shows no preferences
 - Explains court procedures and rulings to uninformed
 - Assumes fair day in court to all litigants, with or without representation
 - Treats attorneys and PP litigants alike on similar issues
 - Maintains the focus on the real issue in the case
 - Corrects misconceptions and errors
 - Identifies and sets aside personal biases and prejudgments related especially to attorneys at the litigant's appearance and social status
 - Depersonalizes own values
 - Maintains distance
 - Shows familiarity with community mores
 - Listens to both sides
 - Studies both sides
 - Evaluates both sides, even if disliked
 - Assures fair settlements
 - Identifies the impact of own decision on the litigants

ABILITY: COURAGE

- Criteria:*
- Confronts personal limits and fears
 - Controls recklessness
 - Shows willingness to take risks

ABILITY: HUMILITY

- Criteria:*
- Acts as a servant not a master
 - Shows appreciation for sanctity of power entrusted to one
 - Shows sense of humor regarding human condition as well as self
 - Shows sense of own strengths and weaknesses
 - Admits fallibility
 - Shows gratitude where appropriate
 - Shows respectful consideration to others, particularly those with whom one disagrees
 - Seeks to improve as a person and judge