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## Teaching Students to Negotiate Like a Lawyer

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### I. INTRODUCTION

Lawyers negotiate all the time. Okay, they do not actually negotiate *every* waking moment, but they negotiate much more than one would think from taking most law school courses, including negotiation courses. Many lawyers, academics, faculty, and students think of negotiation as an activity designed only to resolve key substantive differences in finally settling litigation and arranging transactions. In addition to efforts to ultimately resolve such issues, negotiation involves a lot of activity before people try to resolve the ultimate issues.<sup>1</sup> Even during the course of litigation, much of lawyers' activity involves negotiation.<sup>2</sup>

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1. This Essay uses the term "ultimate" negotiation to refer to the final negotiation of a settlement or transaction.

2. *See infra* Part II.B. The main arguments in this Essay do not rely on a particular definition of negotiation. Reactions to an earlier draft of this Essay demonstrate that there is a wide range of views about what should or should not be considered negotiation. Some favor a narrow, legally-based definition that essentially focuses on a process leading to an enforceable contract. On the other end of the spectrum, some see negotiation as communication to promote agreement for an exchange or performance of agreed activity, but which does not necessarily involve an explicit or identifiable quid pro quo. For example, if two lawyers agree on a series of procedural matters in a lawsuit, some people would consider this to be negotiation even if the particular agreements are not contingent on each other or legally enforceable. Indeed, if a plaintiff grants a defendant an extension of time to file an answer and later the defendant accommodates the plaintiff regarding a discovery issue, in part because of the plaintiff's prior "favor" regarding the extension, some would consider that to be a negotiation. For a collection of a wide range of definitions of negotiation and authoritative quotations reflecting a broad scope of activities considered negotiation, see Robert S. Adler & Elliot M. Silverstein, *When*



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Just as law school generally presents a distorted image of lawyers' work by focusing disproportionately on litigation (especially appellate litigation), law school negotiation courses often convey a distorted image of legal negotiation by focusing disproportionately on the final stages of negotiation. In addition, negotiation courses typically focus only on the dramatic positional and interest-based approaches to negotiation, with little or no discussion of a less romantic and perhaps more common approach to negotiation in ordinary legal practice.<sup>3</sup>

Improving teaching of negotiation can improve legal education more generally. Every law professor and law student is familiar with the cliché that law school teaches students to “think like a lawyer.” Although that certainly is an important element of legal education, students need instruction in other areas as well. In recent years, there has been increasing recognition of the importance of reforming the curriculum to focus more on teaching students how to “act like a lawyer,” i.e., develop practical skills in performing legal tasks. The *Carnegie Report* also highlights the importance of what it calls the “apprenticeship of identity,”<sup>4</sup> or what might be called learning to “be like a lawyer.” Considering how much of lawyers' work involves negotiation, in an ideal world, law schools should require every student to have extensive negotiation instruction. This Essay focuses, however, on the narrower issue of how, in negotiation courses, instructors can teach students to think, act, and be good negotiators. Since so much of lawyers' work involves negotiation, these courses teach a critically important component of being a good lawyer.

This Essay is personally significant to me because, while I was drafting it, I planned to teach negotiation for the first time and writing this Essay helped me plan my course.<sup>5</sup> It is also something of a sequel

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*David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 4 nn.4–5 (2000). Articulating a single, general definition of negotiation is beyond the scope of this essay.

3. See *infra* Part II.A for discussion of the different approaches to negotiation.

4. WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 27–33, 194–97 (2007) [hereinafter CARNEGIE REPORT].

5. Although I have taught a variety of dispute resolution courses since 1995, I have not previously taught a negotiation course. This semester I also taught Family Law Dispute Resolution, which was also based on the principles described in this Essay. *Dispute Resolution*



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to a chapter entitled *Principles for Designing Negotiation Instruction* that I co-authored in a volume of the *Rethinking Negotiation Teaching* (RNT) series.<sup>6</sup> While that chapter was mostly a literature review of publications in the RNT project, this Essay is much more prescriptive. It grows out of a decade of my work culminating in the publication of my book, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money*.<sup>7</sup> I assigned the book in my course, which focuses on planning and conducting negotiation starting from the outset of a matter.

This Essay is intended to help instructors plan and teach negotiation courses, recognizing that every course should be tailored to fit the interests, capabilities, resources, and constraints of the instructors and students.<sup>8</sup> Some of the ideas in this Essay will not work well in particular courses and even I did not incorporate them all. Although these suggestions are specifically designed for law school courses, instructors teaching in other contexts may get some helpful ideas for their courses as well.

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*Syllabi*, UNIV. OF MISSOURI SCHOOL OF LAW, DISP. RESOL IN LEGAL EDUCATION, [http://www.law.missouri.edu/drle/DR\\_syllabi.htm](http://www.law.missouri.edu/drle/DR_syllabi.htm) (last updated Jan. 24, 2012) (providing links to syllabi for the author's courses).

6. John Lande et al., *Principles for Designing Negotiation Instruction*, in EDUCATING NEGOTIATORS FOR A CONNECTED WORLD (Christopher Honeyman, James Coben & Andrew Wei-Min Lee eds., forthcoming 2012). Hamline University School of Law, in cooperation with the JAMS Foundation and the ADR Center Foundation (Italy), sponsors the RNT project to "critique contemporary negotiation pedagogy and create new training designs." *Rethinking Negotiation Teaching*, HAMLINE UNIV. SCH. OF LAW, <http://law.hamline.edu/rethinkingnegotiation.html> (last visited Jan. 30, 2012). The RNT project published two volumes on teaching negotiation in 2009 and 2010 and is in the process of publishing two more volumes. *Id.* The publications can be downloaded on its website.

7. JOHN LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY (2011). This book suggests generic lawyering and negotiation techniques based on my analysis of mediation and collaborative law and insights from interviews with outstanding lawyers.

8. Instructors have various goals for their negotiation courses and obviously the courses should be tailored to achieve those goals as much as possible.

Some common goals are for students to (1) increase their understanding of different negotiation approaches and perspectives, (2) become more careful observers of negotiation process, goals, tactics, and effects, (3) enhance negotiation skills, (4) change their attitudes about particular negotiation approaches, (5) understand policy issues about negotiation, and (6) learn to learn (or "metacognition").

Lande et al., *supra* note 6.



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Part II of this Essay describes how lawyers negotiate in practice and lists a variety of negotiations that lawyers regularly engage in. Part III identifies some problems with the contemporary use of negotiation simulations, which are central components of most negotiation courses. Part IV suggests ideas for overcoming these problems. The main suggestion is to use multi-stage simulations in addition to single-stage simulations. Part IV also discusses debriefing of simulations and other elements in negotiation courses.

## II. HOW LAWYERS NEGOTIATE

### *A. Nature of Ordinary Legal Negotiation*

Obviously, negotiation instructors should portray legal negotiation as realistically as possible. This, however, is easier said than done. Professor Leonard Riskin notes: “All models are wrong but some are useful.”<sup>9</sup> In many contexts, there is no perfect model of reality and thus theoreticians’ goal is to develop increasingly useful models. To analyze negotiation, some legally-trained Alternative Dispute Resolution (ADR) academics use familiar concepts from contract law such as “bargained-for exchanges” of promises and/or performances.<sup>10</sup> Others use concepts from ADR theory such as interest-based and positional negotiation (or numerous variations of these terms).<sup>11</sup> These concepts can be useful to determine legal consequences of certain behavior and to develop effective negotiation strategies. However, they are incomplete because they miss important parts of how many lawyers negotiate in real life.<sup>12</sup>

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9. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 3 (2003) (quoting statistician George Box).

10. See RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981) (“A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.”).

11. In interest-based negotiation, negotiators (who may be parties and/or their lawyers) identify parties’ respective interests and options that would satisfy both parties’ interests. In positional negotiation, negotiators exchange a series of offers so that each negotiator tries to maximize his or her own side’s interests. See Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13–16 (1996) (collecting sources and noting variety of terms used to distinguish interest-based and positional approaches to negotiation).

12. See *supra* note 2 for discussion of possible definitions of negotiation.



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Just as Professor Carrie Menkel-Meadow criticized “litigation romanticism,”<sup>13</sup> many ADR academics engage in what might be called “negotiation romanticism.” Romantic narratives of negotiation involve a single, dramatic settlement event to resolve the ultimate issues at stake. One version—a legalistic and positional narrative—involves an extended series of strategic offers and counter-offers, often involving hard bargaining to maximize negotiators’ respective partisan advantages. Protagonists approach negotiation as a kind of high-stakes poker game in which they may win or lose great sums depending on how shrewdly they “play their cards.” The second version, an interest-based narrative, involves an explicit and systematic identification of parties’ interests and options with the goal of identifying solutions that would maximize both parties’ interests.<sup>14</sup> The heroes of the interest-based stories use good communication and clever problem-solving tactics to save their clients from unnecessary impasse or suboptimal agreements, thus creating value, efficiency, and satisfaction for both parties.

These two stories are part of an established canon of negotiation that most ADR instructors teach, myself included.<sup>15</sup> As described below, however, much of lawyers’ negotiation in their daily work probably is more routine and less dramatic than these stories suggest and is invisible in most negotiation courses.

There is not an extensive body of recent data that describes the extent to which lawyers actually use the various negotiation approaches, so it is difficult to provide an accurate portrayal of empirical reality; obviously, instructors should do the best they can.<sup>16</sup>

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13. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2669 (1995) (referring to “empirically unverified assumptions about what courts can or will do”).

14. For the classic versions of these stories, see ROGER FISHER & WILLIAM URY WITH BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 3–95 (Penguin Books 3d ed. 2011) (1981).

15. See Lande et al., *supra* note 6 (describing the “canon of negotiation”).

16. There is a large body of experimental research about negotiation, often using students as subjects, which is valuable in explaining some general dynamics in negotiation. To provide more confident understandings of how lawyers actually negotiate in practice, research should be based on data focusing on lawyers’ actual negotiations. Lawyers’ use of different negotiation approaches is likely to vary substantially across many variables such as case type, relevant legal practice culture, and relationship between lawyers in particular matters, among others. Thus it is



To be sure, some research indicates that the more dramatic stories sometimes do occur in the real world. For example, Professors Milton Heumann and Jonathan Hyman interviewed New Jersey lawyers who said that the positional method was used entirely or almost entirely in 71 percent of civil cases, a problem-solving<sup>17</sup> method was used entirely or almost entirely in 16 percent of cases, and a combination of methods was used in 17 percent of cases.<sup>18</sup> The statistics apparently give a misleading impression of how often lawyers actually use interest-based negotiation, however. The data is based on lawyers' self-reports, which suggest that they use interest-based negotiation in up to 33 percent of their negotiations, but when the researchers observed actual settlement negotiations, they "seldom" heard "stories about the interests of the parties."<sup>19</sup> In interviews, the lawyers told the researchers "little about the underlying real-world interests of their clients and the opposing parties."<sup>20</sup> Moreover, despite the fact that 61 percent of lawyers expressed a preference for greater use of an interest-based approach,<sup>21</sup> the researchers were "struck . . . by how little discussion there is about problem-solving negotiation in these lawyers' descriptions of what it means to be cooperative."<sup>22</sup> This study suggests that lawyers typically do not focus on parties' interests explicitly, let alone systematically identify them and a range of options that might satisfy those interests.

Empirical research also suggests that positional negotiations as portrayed in the dramatic narrative do occur, but perhaps less frequently than one might think. In Professor Herbert Kritzer's book,

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difficult to provide strong generalizations about the use different negotiation models and techniques.

17. In this Essay, the terms "interest-based" and "problem-solving" negotiation are used interchangeably. *See supra* note 2.

18. Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want,"* 12 OHIO ST. J. ON DISP. RESOL. 253, 255 (1997).

19. *Id.* at 306.

20. *Id.*

21. *Id.* at 255.

22. *Id.* at 284; *see also id.* at 295–302. Parties may use an interest-based approach more often in family mediation than unmediated negotiation by lawyers of civil matters. Family mediation lends itself to an interest-based approach because many family mediators believe in it, parents with young children typically need to maintain good relationships, and lawyers often do not attend family mediation sessions.



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*Let's Make a Deal: Understanding the Negotiation Process in Ordinary Litigation*, he analyzed data collected by the Civil Litigation Research Project (CLRP).<sup>23</sup> The study involved interviews with lawyers in randomly selected cases in five federal judicial districts.<sup>24</sup> Based on this research, Kritzer described three general patterns of negotiation: (1) “maximal-result, concessions-oriented” (MRCO), (2) “appropriate-result, consensus-oriented” (ARCO), and (3) “*pro forma*” negotiation.<sup>25</sup>

MRCO negotiation is essentially the same as positional negotiation, where both sides start with extreme positions and exchange a series of offers to extract maximal concessions from the other side.<sup>26</sup> Although each side may consider legal norms in setting expectations and making arguments, negotiators make offers and use negotiation tactics designed to persuade the other side to make the greatest possible concessions rather than to simply replicate legal norms.<sup>27</sup>

ARCO negotiation involves an assessment of the facts of the case to determine the appropriate result given the applicable legal norms.<sup>28</sup> For example, in civil cases where the parties agree on liability, “the discussions concerning damages may be less a series of offers and counteroffers and more a process of exchange of information intended to place the instant cases in the context of presumed going rates.”<sup>29</sup> Note that legal norms reflect practice culture, which is affected by, but not limited to, black-letter rules. Thus, for example, in a state with the “same” rules throughout the state, there may be regular and substantial variations in personal injury awards or child custody arrangements for comparable cases in different areas.

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23. HERBERT M. KRITZER, *LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION* 14 (1991). Although the cases were selected based on federal judicial districts, the data includes cases from both federal and state cases. *Id.*

24. *Id.* at 14–17.

25. *Id.* at 118–27. *Pro forma* negotiation involves relatively low stakes (especially compared to transaction costs) and focuses on disposing of cases efficiently much more than when negotiators seek maximal or appropriate results. *Id.* at 124–27. See *infra* Part II.B for examples of situations where lawyers engage in *pro forma* negotiation.

26. See KRITZER, *supra* note 23, at 118–19.

27. See *id.*

28. See *id.* at 120–21.

29. *Id.* at 121.



Although Kritzer suggested that the ARCO approach is similar to problem-solving negotiation,<sup>30</sup> an ARCO approach seems different—a cooperative joint case assessment based on legal norms. Interest-based negotiation, rather than trying to approximate the likely court outcome, involves an explicit analysis of parties' respective interests and creative development of options to maximize both parties' interests. Moreover, the theory of interest-based negotiation contemplates generating a wide range of options, including options that courts would not typically order.<sup>31</sup>

Kritzer's analysis of his data suggests that in ordinary litigation, an ARCO approach is more common than a MRCO approach. He argued that demands and offers in an ARCO negotiation, unlike in a MRCO negotiation, would be close to lawyers' perceptions of the actual amount at stake. His research shows that 52–69 percent of initial offers and demands reflected the parties' assessments of an appropriate resolution (i.e., an ARCO approach) whereas only 13–32 percent of initial demands and offers reflected a MRCO approach.<sup>32</sup> In MRCO negotiations, one would expect numerous exchanges of demands and offers but Kritzer found that there were few exchanges in most negotiations.<sup>33</sup> The number of exchanges was positively

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30. *See id.* at 120.

31. *See FISHER ET AL.*, *supra* note 14, at 58–81. Kritzer found that in cases where parties exchanged demands and offers, 9 percent were nonmonetary only and 18 percent included both monetary and nonmonetary elements. Kritzer, *supra* note 23, at 42. Although inclusion of nonmonetary elements in negotiation may be an indicator of an interest-based process in some cases, it is certainly possible to include nonmonetary elements in positional negotiation.

32. Kritzer wrote:

For purposes of discussion, let us presume that offers of 75 percent or more of defendant's view of stakes and demands of 133 percent or less of the plaintiff's view of stakes indicate an effort to make an initial demand or offer in the "appropriate" range. In contrast, presume that demands of 200 percent or more and offers of 50 percent or less indicate initial moves in the "tactical" range aimed at result maximization. Approximately 52 percent of the initial offers reported by the lawyers in the CLRP survey fell in the appropriate range, and 69 percent of the reported initial demands fell into the reciprocal appropriate range. In contrast, only 32 percent of the offers and 13 percent of the demands fell into the tactical range.

Kritzer, *supra* note 23, at 122 (endnote omitted). Kritzer did not report percentages of *pro forma* negotiations, perhaps because such negotiations may not be framed in terms of offers as such.

33. *See generally id.* at 36–40. Lawyers may use a MRCO approach more often in mediation of civil cases than unmediated negotiation. Cases selected for mediation may





related to the amount at stake, but even for the largest cases, less than a third of these cases had three or more exchanges of demands and offers.<sup>34</sup>

Consistent with Kritzer's description of the ARCO approach, Professor Lynn Mather and her colleagues' research on divorce lawyers in Maine and New Hampshire found that many lawyers followed a "norm of reasonableness" in negotiation.<sup>35</sup> This norm entails realistically understanding the likely legal outcomes in particular cases and counseling clients to "accept[] . . . settlement close to the typical result."<sup>36</sup> Reflecting this norm, lawyers reported that they do not start with "extreme" or "ridiculous" positions that are "inconsistent with what 'everyone knows' about divorce."<sup>37</sup> Lawyers said "they didn't want to be 'labeled' as one who makes outrageous offers, takes unreasonable positions, or is going to 'bullshit' the other lawyers."<sup>38</sup> Although lawyers using an ARCO approach try to be cooperative, that does not necessarily involve an explicit and systematic analysis of parties' interests and options, the hallmarks of true interest-based negotiation.<sup>39</sup>

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generally be more difficult to settle, perhaps because there is a substantial gap between the parties' positions. In more routine cases, lawyers may believe that they can settle the cases without the help of a mediator. Of course, some easier cases may be ordered into mediation, though lawyers who want to use an ARCO approach can settle on their own to avoid mediation.

34. *See id.* at 39–40. In cases with stakes over \$50,000, there were three or more exchanges in 32.6 percent of cases. *Id.* The data was collected in 1970–1980; \$50,000 in 1980 is the equivalent of \$137,275 in 2011. *CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=50000&year1=1980&year2=2011> (last visited Feb. 8, 2012).

35. LYNN MATHER, CRAIG A. McEWEN & RICHARD J. MAIMAN, *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 48–56 (2001). Of course, some lawyers did not follow a norm of reasonableness. *See id.* at 51.

36. *Id.* at 48–49.

37. *Id.* at 127–28.

38. *Id.* at 128.

39. As Heumann and Hyman point out, "one can negotiate positionally by using a pleasant, amicable outward 'style' while still using a highly positional 'strategy' of making and holding to settlement positions." Heumann & Hyman, *supra* note 18, at 283; *see also* Charles B. Craver, *The Inherent Tension Between Value Creation and Value Claiming During Bargaining Interactions*, 12 *CARDOZO J. CONFLICT RESOL.* 1, 6 (2010) (describing a "competitive/problem-solving" approach in which negotiators "strive for competitive objectives—maximization of their own side's returns—but work to accomplish this goal in a non-adversarial way").

A study of lawyers' characterizations of negotiation behavior provides an illustration of how people may use the term "problem-solving negotiation" to refer to cooperative behavior



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If a substantial portion of lawyers' real-life negotiation is an ARCO process as Kritzer described, it might be called "ordinary legal negotiation" (OLN).<sup>40</sup> With its primary orientation to legal norms, an OLN approach seems distinct from both power-oriented positional and interest-oriented negotiation models.<sup>41</sup>

One distinction between these approaches may relate to the lawyers' goals. In the Mather study of divorce lawyers, when researchers asked lawyers whether their primary goal was to reach a fair settlement or to get as much as possible for their clients, 35 percent chose fair settlement, 23 percent chose the best result for their clients, and 42 percent gave a combined choice such as "reaching a settlement fair to my client."<sup>42</sup> Although these frequencies may not be

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that does not necessarily involve an effort to satisfy both parties' interests. Based on a survey of lawyers, Professor Andrea Schneider identified some lawyers as having been "true problem-solvers" in a recent negotiation. Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 172-75, 180-84 (2002). This label was based on adjectives describing lawyers' negotiation approach, apparent goals, and certain actions they engaged in. *See id.* Almost all of these characterizations refer to cooperative behavior but do not necessarily involve the use of interest-based procedures. For example, in lists of twenty behaviors associated with "true problem-solving," only one behavior suggested that the lawyers *might* have used actual interest-based procedures, namely, "view[ing] negotiation as possibly having mutual benefits." *Id.* at 173, 182. Although one of the goals associated with "true-problem-solvers" is "[m]eet[ing] both sides[]" interests," presumably many lawyers using an ARCO approach also have this goal. *Id.* at 175, 183.

40. To clarify the distinctions between the different approaches, we might use the term "ordinary" legal negotiation, reflecting my hunch that lawyers generally use it more than truly strategic positional negotiation or a process involving substantial explicit analysis of parties' interests and options.

Although this concept derives from research on dispute negotiation, it is probably applicable to transactional negotiation as well. In many transactions, lawyers probably cooperate in working out arrangements primarily by referring to applicable legal and business norms as opposed to hard bargaining or explicit analysis of parties' interests and options.

41. This is somewhat analogous to the distinction between dispute resolution systems based on power, rights, and interests. *See* WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 3-19 (1988). Lawyers use positional negotiation (especially the dramatic form) to achieve their objectives by intimidating opponents. Obviously, interest-based negotiation is designed to reach agreement based on the parties' respective interests. OLN is based on legal norms, which derive from legal rights. Lawyers using this approach may not explicitly invoke "rights" as such, however, because that may seem to threaten adversarial litigation, which is often counterproductive in trying to reach agreement.

42. *See* MATHER ET AL., *supra* note 35, at 114.



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typical of lawyers in many contexts,<sup>43</sup> the goals may be typical of aspirations in interest-based, positional, and ordinary legal negotiation, respectively. In OLN, lawyers presumably try to get good results for their clients and believe that they are more likely to do so through cooperative conversation than through hard bargaining or systematic analysis of interests and options.

Table 1 summarizes the approaches in the three negotiation models. In practice, negotiation often extends over significant time periods and combines elements of different models. Thus, like most theoretical models, this table simplifies and distorts reality to some extent. For example, lawyers may consider legal norms and parties' interests in each of the models. Moreover, there is not a perfect relationship between negotiation *models* and negotiation *styles*, and lawyers using each of the models may be more or less cooperative, effective, trustworthy, and so on.<sup>44</sup> Even so, taken with a grain of salt, the models may be useful in identifying the predominant character of many negotiations, while noting different elements at particular moments in a process.

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43. The proportion of lawyers in this study stating the goal of fair settlement is higher than one might expect and the proportion stating that the goal of securing the best result for the client is lower than one might expect. The researchers suggested that this may be due to various factors related to divorce practice including the need to prevent future disputing. *See id.* at 115–17. The proportions also may be related to the presence or absence of a strong mediation culture. The researchers found that the 28 percent of the New Hampshire lawyers in the study chose fair settlement, 33 percent chose the best result for their clients, and 38 percent gave a combined choice. *See* Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 *LAW & SOC'Y REV.* 149, 178–79 (1994) (analyzing data from the same study). The researchers suggested that the difference between the Maine and New Hampshire lawyers may be partially due to the Maine lawyers' experience with divorce mediation that the New Hampshire lawyers lacked. *See id.* at 178. For the purpose of this Essay, the key point is that a substantial proportion of lawyers probably adopt some combination of the goals and use an OLN approach in many cases.

44. *See* Nancy A. Welsh, *The Reputational Advantages of Demonstrating Trustworthiness: Using the Reputation Index with Law Students*, 28 *NEGOTIATION J.* 117, 126–39 (2012) (summarizing social science research indicating that negotiators using different negotiation models may be perceived as effective, procedurally fair, and trustworthy, among other characteristics).

TABLE 1. GOALS, ASSUMPTIONS, PROCESS, AND USE OF LEGAL NORMS IN POSITIONAL, ORDINARY LEGAL, AND INTEREST-BASED NEGOTIATION BY LAWYERS

	POSITIONAL NEGOTIATION	ORDINARY LEGAL NEGOTIATION	INTEREST-BASED NEGOTIATION
Lawyers' Goals	maximum partisan advantage for their clients	good result for their clients	good result for both parties
Key Assumptions	negotiation is zero-sum and clients must take tough positions to achieve their goals and avoid being disadvantaged	most cases can be settled based on legal norms, which can produce good results and help preserve lawyers' and parties' relationships	lawyers can achieve optimal, positive-sum, results by jointly analyzing clients' interests and a range of options
Process	lawyers exchange offers, starting with extreme positions, and make small and slow concessions	lawyers exchange information to figure out an appropriate result given the norms in their legal practice community	lawyers and parties explicitly identify parties' interests and numerous options to select the option best satisfying the parties' interests
Use of Legal Norms	lawyers use legal norms in tactical arguments to achieve the most favorable partisan result, ideally far exceeding legal norms rather than accepting legal norms as their goal	lawyers use legal norms as the initial and principal standard in negotiation, which may be adjusted due to parties' needs and other factors	lawyers use legal norms to calculate their "best alternative to a negotiated agreement" to serve as an outer limit on acceptable agreements (adjusted by factors such as transaction costs, risk preferences, and concerns about privacy, reputation, and relationships)



If OLN actually is fairly common in practice, then negotiation instructors should devote substantial coverage to it in addition to positional and interest-based models of negotiation.<sup>45</sup> Thus, in covering the range of negotiation experiences that students are likely to encounter in practice, instructors can teach that, instead of viewing negotiation solely as a dramatic settlement event to resolve the ultimate issues in a matter, sometimes it is a low-key process that sounds more like normal conversation. Moreover, negotiation can be presented as a process that sometimes occurs over an extended period of time without necessarily involving explicit quid pro quo offers or an interest-and-option analysis. For example, “opposing counsel” (or “counterparts”<sup>46</sup>) may have a series of telephone conversations in which they generally discuss a matter and reach agreement based on converging understandings about what they believe is reasonable and acceptable to their clients. In such negotiations, the early conversations in the series are important parts of the negotiation process itself and are not merely preparation for an ultimate settlement event.

### *B. Contexts of Lawyers’ Negotiation*

Negotiation instructors should not only depict general negotiation models realistically, they should also provide a realistic portrayal of the range of situations in which lawyers regularly negotiate. In addition to ultimate negotiations to settle a lawsuit or conclude a deal,

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45. Instructors properly consider many factors in designing their courses and there is no single formula that is best for all courses. Thus this Essay does not recommend a specific prescription for the amount or nature of coverage of what I call “ordinary” negotiation.

Even if lawyers do not use an interest-based approach to a great extent, as suggested above, it is appropriate to teach students about its benefits and limitations and how lawyers might use it in appropriate cases. Indeed, instructors who want to encourage students to use interest-based methods might emphasize the difficulties in doing so to help them strategize about how they might use such methods when appropriate.

46. The term “opposing counsel” is somewhat misleading considering that lawyers representing different parties in litigation often cooperate with each other. I use the term “counterpart” attorneys to avoid this confusion. See John Lande, *Getting Good Results for Clients by Building Good Working Relationships with “Opposing Counsel,”* 33 U. LA VERNE L. REV. 107, 107 n.1 (2011). For a thoughtful discussion suggesting the use of the term “counterpart,” see Jonathan R. Cohen, *Adversaries? Partners? How About Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution,* 20 CONFLICT RESOL. Q. 433 (2003).



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lawyers routinely negotiate numerous other matters. Instructors who want to give their law students a realistic understanding of how lawyers actually negotiate should discuss the wide range of additional situations where negotiations occur.

The following is a list of some situations where lawyers commonly negotiate.<sup>47</sup> Although some of these negotiations are shorter and less challenging than others, lawyers may use similar principles and techniques in the simpler negotiations as they do in the more complex ones.<sup>48</sup> Instructors do not have the time to focus in depth on all of the different types of negotiation in their courses, but it is appropriate to educate students about the range of negotiation behaviors that they are likely to engage in.

Representation of clients is an ongoing process of negotiation. The process begins with a negotiation about whether lawyers will represent the clients, including negotiation of fee arrangements (assuming that the clients pay for legal services). During representation, lawyers and clients negotiate about the nature and

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47. This is certainly not a comprehensive list of situations where lawyers regularly negotiate. For example, even before lawyers represent their first clients, they engage in significant negotiation. Lawyers who work in law offices negotiate to be hired as an employee. Lawyers in solo practices typically negotiate with various people to set up their offices. These negotiations might involve landlords, utility companies, yellow pages representatives, website designers, and vendors of stationary and other office supplies, among many others.

Lawyers who work in organizations regularly need to negotiate with others in their organization. Lawyers negotiate with superiors, co-workers, and subordinates about many aspects of work and office life generally. For example, a lawyer may need to negotiate with a supervisor about the timing and content of a project assigned to the lawyer. Conversely, the lawyer may need to negotiate with paralegals about assignments that the lawyer gives to the paralegals. If the paralegals work for several lawyers in the office, then the lawyer may negotiate with colleagues about the priorities of different projects assigned to the paralegals. The lawyer may need to negotiate with office managers or librarians related to hiring of administrative staff, acquiring office furniture and supplies, or obtaining unusual legal resources.

48. Some of the negotiations described in this part are relatively simple and involve little or no real bargaining. In many negotiations, one person suggests a plan and the other agrees with little discussion or difficulty. Thus, there may be little to discuss or simulate in such negotiations. These would be examples of what Kritzer calls "*pro forma* negotiations." See *supra* note 25 and accompanying text. Although these are relatively simple negotiations, they probably constitute a regular and non-trivial part of lawyers' work.

Some readers may define negotiation narrowly and would not characterize some of the activities described in this Part as negotiation. Whether these activities should be considered negotiation is not critical to the main arguments in this Essay and such readers may nonetheless find the remaining parts of the Essay to be of value.



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timing of various tasks that each will do. When considering how to respond to the other side, lawyers and clients sometimes engage in challenging negotiations with each other “behind the table” because they have different ideas about the best way to interact with the other side “across the table.”<sup>49</sup> Lawyers and clients sometimes negotiate about the adjustment of the lawyers’ bills.

Lawyers negotiate with a wide range of service providers about the nature, scope, cost, and timing of their services. The list of providers includes process servers, investigators, court reporters, technical experts, tax and other financial professionals, and dispute resolution professionals such as mediators and arbitrators.

In litigation, lawyers commonly negotiate with each other for acceptance of service of process, extension of filing deadlines, scheduling of depositions, resolution of discovery disputes, and numerous other procedural matters. In negotiating transactions, lawyers negotiate over the exchange of information as well as the logistics of the negotiation and implementation of the transaction.

Lawyers regularly negotiate with judges. Most obvious is participation in judicial settlement conferences, where they trade ideas about which options would or would not be acceptable. More generally, the litigation process is full of negotiation with judges. Although judges have authority to make many unilateral decisions, they often seek lawyers’ agreement for many reasons. Judges may invite lawyers’ suggestions believing that it is the appropriate legal procedure, an appropriate professional courtesy, and/or an aid in making the litigation process work more smoothly. For example, trial judges often engage in extensive pre-trial case management by obtaining stipulations, working out discovery plans and schedules, referring cases to ADR procedures, and determining numerous other matters.<sup>50</sup>

In all these ways, among others, lawyers regularly negotiate and they can achieve better results by intentionally applying negotiation principles and techniques. Given practical constraints, instructors may choose not to cover all of these situations in depth. Addressing a

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49. See ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 178–223 (2000).

50. See, e.g., FED. R. CIV. P. 16, 26.



broad range of situations where lawyers negotiate, however, can give students a more realistic portrayal of lawyers' actual work experience.<sup>51</sup>

### III. PROBLEMS WITH SIMULATIONS IN NEGOTIATION COURSES

Most negotiation instructors rely heavily on having students perform simulated negotiations.<sup>52</sup> The benefit from simulations depends, in major part, on whether the simulations realistically portray important negotiation issues in a meaningful way.<sup>53</sup> Over the course of a semester, instructors generally should try to portray the range of legal negotiation behavior as realistically as possible.<sup>54</sup> As

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51. Indeed, instructors may want to assign this part of this Essay to provide background and stimulate discussion about what kinds of negotiation activities lawyers engage in. Part IV.A, *infra*, describes some methods used to teach students important aspects of negotiation in addition to negotiation of ultimate settlements or deals.

52. Professors Nadja Alexander and Michelle LeBaron provocatively proclaimed the "death of the role-play." See Nadja Alexander & Michelle LeBaron, *Death of the Role-Play*, in RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE 179 (Christopher Honeyman, James Coben & Giuseppe De Palo eds., 2009). To paraphrase Mark Twain, reports of the death of simulations as a teaching technique are greatly exaggerated. See Noam Ebner & Kimberlee K. Kovach, *Simulation 2.0: The Resurrection*, in VENTURING BEYOND THE CLASSROOM 245, 245 (Christopher Honeyman, James Coben & Giuseppe De Palo eds., 2010). Indeed, Alexander and LeBaron do not actually announce the death of simulations or even call for it, but rather recommend improvements as well as other activities to complement them. See Alexander & LeBaron, *supra*, at 186–94; see also Jennifer Gerarda Brown, *Deeply Contacting the Inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays*, 39 WASH. U. J.L. & POL'Y 189 (2012) (challenging aspects of Alexander and LeBaron's critique and advocating appropriate use of simulations).

53. See Noam Ebner & Yael Efron, *Using Tomorrow's Headlines for Today's Training: Creating Pseudo-reality in Conflict Resolution Simulation Games*, 21 NEGOTIATION J. 377, 379–80 (2005) (describing importance of realism in simulations); Paul F. Kirgis, *Hard Bargaining in the Classroom: Realistic Simulated Negotiations and Student Values*, 28 NEGOTIATION J. 93, 102–12 (2012) (suggesting techniques to make simulations more realistic); John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 264 (2010) ("Too often, law school courses treat clients as little more than walking, talking fact patterns for litigation hypotheticals.").

54. Some problems are relatively easy to fix. There is a convention in which some simulation writers try to be funny with the parties' names and fact patterns, which can undermine the message that the simulation is a serious learning experience. Similarly, some simulations involve facts that are unrealistic or not typical of the matters that students are likely to encounter in practice. Although students can sometimes get good learning experiences from atypical situations, generally they are likely to have better experiences from realistic scenarios. Indeed, some instructors use real companies essentially as parties, instructing students to get background information from the companies' websites. See, e.g., Interview with Sharon Press,





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this Part describes, the combination of simulations used in some negotiation courses does not optimally reflect the reality of the negotiations discussed in Part II.

Most negotiation instruction probably focuses on ultimate resolutions of matters with little attention to the context of the negotiations. This is reflected in the predominant use of simulations in which students portray lawyers who “parachute” into a case soon before the ultimate negotiation.<sup>55</sup> Some simulations require students to include a phase of lawyers preparing clients for negotiation, which provides greater context for the ultimate negotiation. Even so, students in these exercises do not simulate the critically important experiences that lead to the ultimate negotiation, particularly the development of lawyer-client relationships as well as relationships between the different sides in the matter.<sup>56</sup>

Many simulations provide little or no information about the relevant legal rules, exacerbating problems related to parachuting into a situation with little context. Understandably, some negotiation instructors believe that law school curricula devote a disproportionate amount of time to teaching legal doctrine and they do not want to sacrifice the limited amount of time in negotiation courses to deal with legal issues. Moreover, providing a substantial amount of doctrinal material may lead some students to focus too much on the legal issues, distracting them from critical negotiation issues. In addition, incorporating legal rules is difficult when students do

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Director, Hamline University School of Law Dispute Resolution Institute, in St. Louis, Mo (Dec. 2, 2011) (using simulations involving companies “similar” to certain real companies and directing students to their websites).

55. Based on a review of teaching manuals for four major negotiation texts and responses to a query on the American Association of Law Schools ADR Section listserv, it appears that most negotiation courses involve single-stage simulations, though some include a step of preparation shortly before an ultimate negotiation.

56. Contrasting negotiation and mediation illustrates the problem. In non-family mediations with represented parties, real-life mediators essentially *do* parachute into the case shortly before the mediation session. Typically, before the mediation, the lawyers have been managing the case for some time and mediation is a fairly discrete event in the course of the case. In recent years, mediators have been increasingly involved in preparing the lawyers (and, indirectly, the parties) for the mediation session but this still typically occurs only after the case has been going on for a considerable time. Moreover, after mediation sessions, mediators typically do not remain involved in the case for an extensive period. Even when parties do not settle at mediation and the mediator continues working on the case, the mediator has a limited role that normally ends after a short time.



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numerous short simulations. Students often have a hard time absorbing all the factual information in a simulation and they can easily be overwhelmed if they must also integrate substantial legal information. Although these are legitimate concerns, the result is that the students' simulated experiences often lack this critical element in real-life legal negotiations. This is especially important in ordinary legal negotiation, but it is relevant to the other models as well.<sup>57</sup>

Furthermore, simulations also often provide insufficient information about the history of the dispute, which is a major factor affecting people's perspectives and motivations in negotiation. Professor Marc Galanter coined the term "litigotiation" to describe "the strategic pursuit of a settlement through mobilizing the court process."<sup>58</sup> Although no one uses the term in practice, it is probably lawyers' normal approach in most litigated cases. Most lawyers know that few lawsuits are tried and that many of their cases are likely to settle, a course of action likely to be in their clients' interest. They often use the threat of litigation procedures and trial to gain negotiating leverage to persuade the other side to reach an acceptable settlement. To make credible threats, lawyers need to act as if they actually would try the case. The "litigotiation" process thus requires a somewhat schizophrenic mindset in which lawyers believe that they must simultaneously take a tough partisan posture and also try to settle the case if possible.

Similar situations arise in transactional negotiations. The negotiation of a deal takes place in the context of overall business plans and operations for both parties. There is also ambivalence on each side, though somewhat opposite to that in litigation. In negotiating transactions, parties typically want to cooperate although there often is some tension because each side wants to get a "good deal" (or at least avoid getting a bad deal). Presumably, parties want to reach agreement but are prepared to walk away if they are not satisfied with the other side's best offer (especially if alternative

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57. See tbl.1, *supra*. The important but often indirect role of law in negotiation is reflected in the phrase "bargaining in the shadow of the law." See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

58. Marc Galanter, *World of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).



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negotiation partners are waiting in the wings). This illustrates that people often feel ambivalent in negotiations of both disputes and transactions

Given these common patterns of ambivalence, it is not surprising that there are often internal conflicts within each side.<sup>59</sup> If a party is an organization, then individuals within the organization may have differing perspectives based on factors such as their role in the organization, connection with the situation at issue, and individual personalities. Moreover, in many situations, lawyers and clients on the same side have different perspectives about the negotiation.<sup>60</sup>

Some negotiation simulations address these mixed motives by including information about the parties' perceived alternatives to a negotiated agreement and their attitudes about them (though many simulations provide little or no such information). However, this is generally not sufficient for students to get a realistic feel of the context as their characters would perceive it. To really "get" the parties' and lawyers' perspectives, students need to have more extensive interactions than are possible by simply "parachuting" into a single-stage simulation.

#### IV. TEACHING STUDENTS TO NEGOTIATE LIKE A LAWYER

This Part suggests ideas to address the problems identified in the preceding Parts. There is no single ideal way for instructors to do so, especially considering the variations in the context of each course and instructors' perspectives about substantive and pedagogical issues. Part IV.A suggests that instructors use multi-stage simulations in addition to one-stage simulations in order to provide more realism in students' role-play experiences. Part IV.B describes some problems in managing simulations and suggestions for preventing and dealing with those problems. Given the significance of simulations in negotiation instruction, Part IV.C briefly discusses the importance of

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59. For a thoughtful discussion of ambivalence by negotiators, see David A. Hoffman, *Mediation, Multiple Minds, and Managing the Negotiation Within*, 16 HARV. NEGOT. L. REV. 297 (2011).

60. See, e.g., AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 53–58 (1995) (describing multiple strategies that lawyers use to persuade clients to accept what is legally possible in negotiations).



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good debriefing of simulations. Part IV.D suggests possible assignments in negotiation courses.

*A. Adding Multi-Stage Simulations to Negotiation Courses*

This Essay's main suggestion is to use multi-stage simulations in addition to single-stage simulations. Multi-stage simulations provide opportunities to address the problems identified in Part III by more realistically simulating a whole case. Specifically, instructors can design multi-stage simulations that enable students to develop more robust relationships in their negotiating roles, engage in lawyer-client negotiations, identify needed information, conduct procedural negotiations with counterpart lawyers, conduct legal research and incorporate legal norms into the simulation, and experience the ambivalence that is endemic to much legal negotiation—in addition to conducting an ultimate negotiation. By using multi-stage simulations that extend over a considerable period of time, instructors can focus on each stage, one at a time, rather than having all stages collapse into a single, relatively brief, experience.

By making students responsible for “setting the stage” for the ultimate negotiation through a series of interactions in a case, the choice of negotiation model—possibly including ordinary legal negotiation—can flow naturally from the early stages of the simulation. Some stages might include: (1) initial client interview, (2) negotiation and drafting of a retainer agreement,<sup>61</sup> (3) developing a

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61. The retainer agreement is an important component of lawyer-client relationships. Even when lawyers and clients do not discuss the retainer in much detail, it can profoundly affect how lawyers and clients interact. In particular, the fee arrangements create certain incentives and color the relationship. Typically, clients want to pay as little as they can and lawyers want to receive as much as they reasonably can. Since clients normally cannot assess the value of particular legal tasks, they may be suspicious that lawyers who bill by the hour may perform unnecessary tasks or otherwise pad the bills. On the other hand, lawyers' typically feel entitled to be fairly compensated for their work, which, has traditionally been measured by the amount of time that they spend on a matter. Even when lawyers are paid under a contingency fee arrangement, there can be conflicts because lawyers and clients have differing perceptions and interests about the value of accepting particular offers or continuing to litigate. For an excellent discussion of these tensions, see MNOOKIN ET AL., *supra* note 49, at 74–84. For discussion and illustration of alternative fee arrangements, see LANDE, *supra* note 7, at 35–45, 231–35.



relationship with the counterpart lawyer,<sup>62</sup> (4) conducting factual investigation and/or legal research,<sup>63</sup> (5) working with their counterpart to plan the negotiation process,<sup>64</sup> (6) resolving discovery disputes, (7) preparing the client for negotiation sessions,<sup>65</sup> (8) conducting the ultimate negotiation, (9) engaging a mediator and/or mediating the matter, and (10) drafting a settlement agreement. This list illustrates some stages that could be included in simulations. Instructors might skip some of these stages and/or include others. Some stages may involve negotiations in themselves (such as procedural negotiations between counterpart lawyers) and others may

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62. Lawyers often can predict how well a case will turn out when they learn who their counterpart will be.

Your relationship with “opposing” counsel makes a big difference in how well a matter will be handled. If you have a good relationship, you are more likely to be able to exchange information informally, readily agree on procedural matters, take reasonable negotiation positions that recognize both parties’ legitimate expectations, resolve matters efficiently, satisfy your clients, and enjoy your work.

On the other hand, if you have a bad relationship with opposing counsel, a case can become your own private hell. Your counterpart may decline to grant routine professional courtesies (such as extensions of deadlines to file court papers), bombard you with excessive and unjustified discovery requests, file frivolous motions, make outrageous negotiation demands, yell and scream at you, and generally behave badly.

LANDE, *supra* note 7, at 48. For suggestions about developing good working relationships between counterpart lawyers, see *id.* at 49–54, and Lande, *supra* note 46, at 111–19.

63. Using simulations that extend over a substantial period provides time for students to research the legal issues. Some instructors may provide the universe of legal sources for students to rely on. Others might suggest sources for students to start with and leave it to their resourcefulness to find other persuasive legal authorities. Various students are likely to rely on different sources, which can lead to valuable discussions about how they found their sources and which ones were more or less persuasive.

Instructors can also arrange for students to do factual investigation, though the benefit of this simulated task may not outweigh the effort. Even if students do not actually conduct factual investigation, instructors may require them to identify information that they would try to obtain. In a multi-stage simulation, instructors can provide additional information in response to students’ requests. For example, in a simulation in my course, I provided a document with summaries of depositions of several witnesses.

64. In practice, many lawyers probably do not invest much effort in planning their negotiations, which is unfortunate because careful planning can substantially improve process and outcome. Ideally, lawyers should jointly plan the negotiation with their counterparts. This discussion might “cover the substantive concerns of each party, procedural plans, potential problems in the negotiation, ideas for making the negotiation work successfully, and an agenda for a meeting with the parties.” LANDE, *supra* note 7, at 78. For procedures in planning a negotiation session, see *id.* at 80–92, 253–55.

65. For suggestions about preparing clients for a negotiation session, see *id.* at 86–89, 249–51.



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simply be important parts of a matter leading up to an ultimate negotiation (such as doing legal research or developing a negotiation plan).

Table 2 illustrates the stages I used in an extended simulation in my negotiation course as well as the tasks that my students were assigned. The case was a simple probate dispute between two siblings involving alleged undue influence by one sibling over the last surviving parent. We dealt with each of the eight stages in one 75-minute class. Since the class meets twice a week, the simulation extended over four weeks.

TABLE 2. STAGES IN A NEGOTIATION PROCESS AND ASSIGNMENTS IN A MULTI-STAGE SIMULATION

STAGE IN NEGOTIATION PROCESS	ASSIGNMENT AFTER CLASS
Interviewing client	Lawyers prepare discovery request
Developing relationship with counterpart	
Planning case with counterpart	Lawyers write legal memo
Making legal argument	
Planning with mediator	
Preparing client	Lawyers write mediation memo
Mediating	
Drafting agreement	Lawyers jointly draft settlement agreement

The simulation began by having the lawyers conduct intake interviews and decide what additional information they needed. They submitted a list of the additional information that they wanted and, in response to their requests, I provided a summary of depositions and other discovery materials. The next stage involved the counterpart lawyers getting to know each other personally so that they could develop a good working relationship. In a separate phase, the lawyers planned procedures for moving the case forward. The lawyers also simulated a discussion about the legal issues after writing brief



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memos summarizing the applicable Missouri law. The next several stages involved mediation, which is used in a substantial number of litigated cases. I recruited students who had completed a mediation or mediation clinic course to play the mediators. To prepare for the mediations, lawyers met separately with the mediator and their clients. Finally, everyone participated in the mediation. The lawyers were assigned to write a brief settlement agreement. Except for the mediation, all these stages occurred in class. I instructed the lawyers and mediators to schedule a 90-minute period for the mediation to take place outside of class.

Typically, we began each class by discussing the goals and techniques for the stage in the process that we were focusing on that day. Students would generally simulate the process in small groups for 15–30 minutes, complete a self-assessment form, and then the entire class would meet to debrief. Some phases involved only lawyers and while they were engaged in simulations, the students playing clients did various activities. For example, while the lawyers were getting to know each other, the clients were instructed to get to know other students in the class (but who were not the other party in this simulation) as if they were lawyers. In some classes, I met with the clients as a group to coach them in their role. In the class where we discussed the role of legal issues in negotiation, pairs of lawyers did the simulation as a fishbowl for a number of brief demonstrations, so the entire class observed and participated in the debriefing.

After completing the extended simulation of a probate dispute, we conducted an extended simulation of the negotiation of a partnership agreement to operate a new restaurant. Students switched roles so that those who played lawyers in the probate case played clients in the transactional negotiation and vice versa (though they worked with different students than in the probate dispute). The stages generally followed the sequence for the probate dispute with the major exception that there was no mediation in the transactional negotiation.

Before we did these two multi-stage simulations, we did a series of single-stage simulations. Much like musicians who start by practicing scales or athletes who start by doing calisthenics, negotiation students can benefit by starting with “building block” exercises, which could involve any of the stages listed above. In this



first part of the course, we covered the theories of negotiation and ethical rules relevant to negotiation as well as identity and culture issues, cognitive errors, trust, power, and fairness.<sup>66</sup> Table 3 shows the simulations we did in the course. These simulations involved a variety of legal matters, negotiation contexts, negotiation issues, and simulation models. In addition to simulating ultimate negotiations of matters, students also negotiated preliminary issues such as lawyer-client engagement, resolving a discovery dispute, and planning a mediation. In some simulations, students did short scenes in a fishbowl (or “improv”) format in front of the class.

TABLE 3. SIMULATIONS USED IN NEGOTIATION COURSE

LEGAL MATTER	NEGOTIATION CONTEXT	NEGOTIATION ISSUE	SIMULATION MODEL
personal injury	ultimate lawsuit negotiation	negotiation models	single-stage
intellectual property licensing agreement	ultimate transaction negotiation	identity and culture	single-stage
sexual harassment	ultimate pre-suit negotiation	cognitive errors	single-stage
divorce	lawyer-client engagement	trust	single-stage
employment	hiring lawyer	power	fishbowl
sexual harassment	planning mediation	fairness	fishbowl
shareholder derivative suit	discovery dispute	handling problems	fishbowl
probate dispute	litigation, using mediation	multiple issues	multi-stage
forming a partnership	transactional negotiation	multiple issues	multi-stage

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66. For a list of possible topics, see Lande et al., *supra* note 6.





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Instructors who want to add multi-stage simulations to their course and who now use only ultimate negotiation simulations would presumably continue to use some single-stage simulations, though they would probably reduce the number. All students in my course had previously taken a required first-year course, *Lawyering: Problem-Solving and Dispute Resolution*, which includes a brief survey of client interviewing and counseling, negotiation, and mediation. Thus, I did not cover some basic material that instructors might otherwise want to address. In such situations, instructors who want to include multi-stage simulations, might do only one such simulation and/or include fewer stages.<sup>67</sup>

There are complementary advantages and disadvantages of both single-stage and multi-stage simulations.<sup>68</sup> Using both types of simulations enables instructors to give students the benefits of both. Instructors can use single-stage simulations in the early classes to lay

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67. Some participants in the Washington University symposium wondered whether this course structure required more than a typical three-credit course or if it should be done only as an advanced course following a basic negotiation course. Instructors who now teach three-credit negotiation courses would not be able to do all the one-stage simulations they now do and also conduct one or more multi-stage simulations. Instructors who add multi-stage simulations to existing courses would need to compress or eliminate their treatment of some topics, possibly planning to address certain topics in the context of the multi-stage simulations. Instructors considering adding multi-stage simulations should consider whether the benefits of the multi-stage simulations outweigh the disadvantages of the changes they would need to make in their courses.

68. Single-stage simulations are relatively easy to plan and administer and can be used to focus on particular issues that instructors want to highlight. Some instructors may prefer to use a series of single-stage simulations to address a logical sequence of issues. On the other hand, single-stage simulations lack much of the realism possible in multi-stage simulations. Conversely, multi-stage simulations require greater planning and administration and may make it harder for instructors to devote as much time to focus on all the specific issues that they would like to cover. Students in multi-stage simulations get the benefit of more realistic negotiation scenarios and thus may give more authentic portrayals of their characters. Of course, if a student does a poor job as a role-player, then the other students in the simulation lose a valuable learning experience for a substantial part of the course. Obviously, instructors must set priorities in deciding what to include or emphasize and there are many legitimate choices.

Very few simulations now exist that involve more than one or two stages in a case, so it will take some time to develop multi-stage simulations. Instructors can do this starting with existing one-stage simulations and adding instructions and other material for additional stages of the simulations. If a critical mass of instructors develop and disseminate multi-stage simulations, then instructors would have an easier time using such simulations in their courses.



the groundwork for discussing the issues arising later in the course during multi-stage simulations.

I wanted to have students do two multi-stage simulations in my course to give each student the opportunity to play both a lawyer and a client in an extended simulation. Students can learn a great deal by being on the receiving end of legal services and I wanted every student to have that opportunity.<sup>69</sup> Doing two multi-stage simulations also gives students experience negotiating both a lawsuit and a transaction. There are important differences between the two negotiation contexts and students can learn important lessons by comparing the two. Moreover, law school curricula often do not provide much instruction in transactional matters and including a transactional negotiation would help address that imbalance.

In simulations of cases in litigation, students could be assigned to work together as pairs of lawyers, with one playing the role of litigation counsel and the other as settlement counsel. As the name suggests, settlement counsel are retained solely to negotiate and they may operate simultaneously with the clients' litigation counsel in the same matter.<sup>70</sup> For the purpose of a course simulation, separating the roles permits students to personify conflicting impulses. In particular, settlement counsel are likely to prefer a more cooperative, interest-based or ordinary legal approach to negotiation whereas litigation

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69. For some simulations, instructors may recruit people from outside the class to play necessary parties. For example, instructors can arrange for business students to play parties in business disputes, family studies students to play parties in family disputes, and theater students or actors to play parties in many other types of disputes. Some instructors recruit first-year students to play clients. Recruiting outsiders provides the potential for greater realism. On the other hand, it has the disadvantage of depriving negotiation students of the opportunity to get first-hand experience of the parties' perspectives. Of course, instructors could use different approaches in different simulations.

70. For descriptions of the role of settlement counsel, see LANDE, *supra* note 7, at 8, 54–56; John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 112–17 (2008). In some cases, clients retain only settlement counsel. In other cases, clients simultaneously retain both settlement and litigation counsel. When clients have both types of counsel in the same matter, litigation may be put “on hold” while settlement counsel focuses on negotiation, though sometimes the two lawyers vigorously proceed on their separate tracks at the same time. LANDE, *supra* note 7, at 45–56.

Although lawyers act as settlement counsel in a relatively small proportion of cases, assigning students to these roles can be a useful pedagogical device and would educate students about a procedural option that could be valuable for clients in appropriate cases.



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counsel are likely to prefer a more adversarial, positional approach. In real life, lawyers embody both impulses, often causing them to feel trapped in a “prison of fear,” preventing them from suggesting negotiation early in a case.<sup>71</sup> Assigning students to roles of litigation and settlement counsel for each client adds logistical complexity. I decided not to do so in my course, but some instructors may want to do so, possibly in single-stage simulations.

Pairs of students could also be assigned to teams playing the “same” clients to reflect the internal conflict within a single client. For example, if the client is a business, then one student might be assigned to play the sales director and another could play the chief financial officer and they would have different perspectives and interests from each other. If one party is not a business, then “the” party could be a couple where the spouses have differing views. Again, while I did not assign pairs of students to work together as the “same” client in a simulation, some instructors may want to do so. Having students portray conflicting perspectives of lawyers and clients can lead to rich learning experiences. In particular, it can lead to thoughtful discussions about professional identity, as encouraged by the *Carnegie Report*.<sup>72</sup>

Instructors can assign students to perform some simulations inside class and some outside of class. Because there are complementary advantages and disadvantages of having students do simulations in and out of class using both methods provides the advantages of both.<sup>73</sup> In general, having in-class simulations permits more control

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71. LANDE, *supra* note 7, at 4–8. Although the same structural ambivalence is not present in transactional negotiations, role-play instructions could instruct one lawyer in a team to be more enthusiastic about a potential transaction and the other lawyer to be more cautious.

72. See *supra* note 4 and accompanying text.

73. When students do simulations in class, instructors can have more confidence that students are actually doing the simulations and instructors can observe students’ performances. In-class simulations permit more immediate analysis and feedback while the experience is fresh. On the other hand, in-class simulations are constrained by the length of the class period and students may have a hard time concentrating when many classmates are talking at the same time.

Having students do simulations outside of class gives students more time and flexibility to do the simulation in a congenial environment but permits the instructor less control and provides less opportunity to observe students. Students may lose some insights by the time the simulation is debriefed in class, though this problem can be mitigated if students write self-assessments soon after completing the simulations. Moreover, even when students do



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and immediate feedback and requires less logistical coordination. On the other hand, after students perform simulations outside of class, more time is available in class to do the simulation and debrief.<sup>74</sup> With increased time available for debriefing, students can focus in more depth on problems they experienced and/or issues that instructors and students want to address. In addition to gaining experience in the outside-class simulations, students can re-enact particular scenes in class to address certain issues, possibly with instructors playing some roles. Students can practice giving and receiving feedback on their peer's performances.<sup>75</sup>

### *B. Dealing with Problems in Simulations*

Instructors may face special problems when relying heavily on simulations. Students do not realize the full benefit of simulations if their classmates are not diligent in performing their responsibilities. Therefore instructors may need to implement strategies to prevent or minimize such problems. Instructors may accomplish this goal while teaching important lessons about legal ethics by requiring students to comply with rules of professional responsibility for the course, modeled after the ABA Model Rules of Professional Responsibility.<sup>76</sup> In particular, instructors may establish a rule of diligence such as: “A

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simulations in class, instructors cannot observe the entire simulations and, depending on the size of the class, may not be able to observe a substantial amount of any group's simulation.

Another option is to have students videotape their simulations, which increases the likelihood that they will take them seriously and permits detailed feedback and analysis. On the other hand, it requires a lot of the instructor's time, especially if this process is used for large classes and/or multiple simulations.

74. See *infra* Part IV.C.

75. See John Lande, *Guidelines for Giving and Receiving Feedback*, JOHN LANDE, <http://www.law.missouri.edu/lande/feedbackguidelines.htm> (last visited Feb. 9, 2012).

76. For example, instructors might establish rules regarding competence, confidentiality, fairness to opposing party and counsel, candor toward the instructor, truthfulness in statements to others, respect for the rights of third persons, and misconduct. Cf. MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.6, 3.3, 3.4, 4.1, 4.4, 8.4 (2009). The rules I used for my course are posted online. See UNIV. OF MISSOURI SCHOOL OF LAW, *supra* note 5.

Professor Charles Craver adopts the Model Rules in his negotiation course, with the threat of a trial and possible grade reduction, though he has never held a trial and has, instead, discussed problems with his class. See Charles B. Craver, *Negotiation Ethics for Real World Interactions*, 25 OHIO ST. J. ON DISP. RESOL. 299, 308–12 (2010); see also Art Hinshaw, *Teaching Negotiation Ethics*, 61/62 J. LEGAL EDUC. <http://ssrn.com/abstract=1748710> (manuscript at 13–17) (forthcoming 2012) (discussing use of rules in courses).



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student shall act with reasonable diligence and promptness in performing assignments in this course.”<sup>77</sup> In the first class, students can discuss why lawyers and students sometimes are not diligent, the consequences to clients and classmates, and how such problems can be avoided or resolved properly.

Instructors could establish a rule that requires students to report violations such as the following: “A student who reasonably believes that another student has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that student’s diligence, honesty, or trustworthiness shall promptly inform the other student, inquire about the situation, and, if appropriate, arrange to cure the problem. If this procedure does not rectify the problem, the student shall promptly report it to the instructor.”<sup>78</sup>

During the first class, instructors could swear in students as “officers of the class” by asking them to stand, raise their right hands, and state that they will comply with the rules of the course (just as lawyers, as officers of the court, take an oath to comply with their legal obligations). Instructors may also take an oath to fairly and impartially apply the course rules, simulating a judicial oath. This may be particularly appropriate if instructors themselves play roles in a simulation, such as a senior partner who provides advice to students acting as lawyers.

Instructors can direct students that when they cannot timely and competently perform an assignment, they should promptly notify all affected classmates and, if appropriate, the instructor. In real life,

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77. Cf. MODEL RULES OF PROF’L CONDUCT R. 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”). Comment 3 includes an important warning about the consequences of an unreasonable delay:

Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client’s interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness.

*Id.* cmt.3.

78. Cf. *id.* R. 8.3(a) (“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”).



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lawyers usually manage such problems informally. In some cases, however, lawyers who do not comply with these responsibilities face serious consequences including loss of clients, diminished reputations, loss of employment, court sanctions, professional discipline, and malpractice liability. In the course context, instructors could put students on notice that failure to comply with the rules could result in a reduction of their course grade.

Rules are blunt instruments that often are not enforced, so instructors may wish to supplement the rules with social pressure to comply. Some instructors use a system for measuring students' reputations for effective and ethical behavior by conducting a confidential student survey toward the end of the course. Instructors using these systems inform students, in appropriate ways (often privately), of their classmates' assessments and may base a part of students' grades on their "reputation index."<sup>79</sup> Such a system could teach students important lessons about the real world of negotiation as well as increase their diligence in complying with course requirements.

At the outset of my course, I announced that I would conduct a confidential reputation survey at the end of the course. I also assigned students to write a brief description of how they would like other lawyers to perceive them in practice, the consequences of such a reputation, and steps that they would take to achieve their desired reputations. I compiled the students' self-identified reputation goals into a composite list, which was the basis of a fruitful class discussion. The goals included being:

- professional, including being competent, hard-working, well-prepared, reliable, timely, effective, appropriately dressed
- dedicated to clients' interests
- firm, not letting others take unfair advantage

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79. For thoughtful discussions on using a reputation index based on a system developed by Professor Roy Lewicki, see C.K. Gunsalus, *Professionalism, Integrity and Reputation: Providing Opportunities for Consideration*, LAW TCHR., Spring 2005, at 14; Hinshaw, *supra* note 76 (manuscript at 17–20); Welsh, *supra* note 44.



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- fair, reasonable, cooperative, not taking unfair advantage of others
- respectful and respected
- honest and ethical, true to personal and religious values
- pragmatic, flexible, balanced, creative

During the course, I have referred to these goals, especially professionalism. These admonitions may have been more effective because these goals were generated by the students themselves. At the end of the semester, students completed surveys in which they each nominated the two students who they thought most demonstrated professionalism, appropriate firmness, and fairness. Students were required to write a sentence or two explaining their nominations. This produced a rich list of desirable qualities, which I presented to the class (without identifying the students who were nominated or made the nominations). This year I did not ask students to identify students exhibiting problematic behavior but I will probably do so next time.

### *C. Debriefing Simulations*

Since simulations are critical elements of most negotiation courses, debriefing is an especially important part of the educational process. Because some of the most important insights come only through careful reflection and discussion, students need to reflect on their experiences: “Without a debrief, the experience might as well be a game simply to play with friends. It can leave untouched the baggage of habits, cultural legends about negotiation, and poorly-understood basic concepts such as ‘win-lose’ or ‘win-win.’”<sup>80</sup> Without effective debriefing, students can easily learn the wrong lessons, such as making overgeneralizations from a single experience.

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80. Ellen E. Deason et al., *Debriefing the Debrief*, in *ASSESSING OUR STUDENTS, ASSESSING OURSELVES* (Noam Ebner, James Coben & Christopher Honeyman eds, forthcoming 2012).



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Sometimes instructors debrief simulations only as “an afterthought or a rushed invitation for general comments.”<sup>81</sup> To maximize the benefit of simulations, instructors generally should plan to spend at least a quarter or half as much time debriefing as the students spend doing the simulation itself. Conducting effective debriefing may be especially challenging if instructors conduct simulations during class periods because there may be too little time to both conduct and debrief a simulation.<sup>82</sup>

Effective debriefing involves juggling many tasks at the same time. These include: (1) modeling good questioning and listening skills, (2) creating an atmosphere in which students feel safe to discuss their experiences, including problematic performances, (3) eliciting students’ participation, (4) managing the discussion so that all students participate (at least over a series of debriefs), (5) keeping focused on specific experiences related to the planned learning objectives of the simulation, (6) being open to students’ experiences (which may provide valuable learning experiences that are not related to the planned objectives), (7) relating students’ experience to theoretical issues discussed in readings or class, (8) helping students learn about their own philosophies and preferences, (9) summarizing “lessons learned,” and (10) celebrating positive experiences.<sup>83</sup> This is a lot to juggle at one time, especially when instructors want to address a number of issues in debriefing a simulation. Given the limited amount of time to debrief, instructors may feel particularly torn between addressing the issues they plan to cover and taking advantage of unplanned teachable moments based on students’ experiences. Professor Ellen Deason and her colleagues describe these as “deductive” and “inductive” approaches to debriefing, noting

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81. Alexander & LeBaron, *supra* note 52, at 194.

82. It can be tempting for both students and instructors to let simulations run so long that there is too little time for important debriefing. Students often enjoy doing simulations and want to continue until they reach agreement and instructors may be reluctant to stop them before reaching agreement.

83. See Deason et al., *supra* note 80.





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that there are advantages and disadvantages to both approaches and that many instructors use a combination.<sup>84</sup>

The debriefing process is especially important because students need to learn from their own experiences as law schools, CLE programs, and mentors cannot teach lawyers everything they need to know. Often, it is helpful for students and lawyers to write self-assessments as part of a debriefing process.<sup>85</sup> Good debriefing thus teaches students how to learn to learn.<sup>86</sup> For each exercise in my course, I distributed one-page self-assessment forms with about five questions (varying depending on the exercise) and I gave students a few minutes in class to answer the questions. The forms included an instruction to keep the forms to provide the basis for a summary assessment at the end of the course.

Deason and her colleagues have written an excellent guide for planning and conducting debriefings. Rather than repeat that material, I simply refer readers to it.<sup>87</sup>

#### *D. Course Requirements*

Instructors assign activities that promote achievement of their objectives for their students. For example, instructors who are most interested in teaching knowledge of legal doctrine and analytical techniques are likely to require students to take exams. Instructors

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84. *Id.*; see also Melissa Nelken, Bobbi McAdoo & Melissa Manwaring, *Negotiating Learning Environments*, in *RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE*, *supra* note 52, at 199, 228.

85. For checklists of questions about lawyering performances generally and negotiation specifically, see LANDE, *supra* note 7, at 285–88; see also Jared R. Curhan, Hillary Anger Elfenbein & Heng Xu, *What Do People Value When They Negotiate? Mapping the Domain of Subjective Value in Negotiation*, 91 J. PERSONALITY & SOC. PSYCHOL. 493 (2006) (describing empirically-derived instrument to assess negotiation experiences including questions regarding feelings about the outcome, negotiator him or herself, negotiation process, and relationship between the negotiators).

86. For a good discussion of learning to learn, see Bobbi McAdoo & Melissa Manwaring, *Teaching for Implementation: Designing Negotiation Curricula to Maximize Long-Term Learning*, 25 NEGOTIATION J. 195, 209–12 (2009); see also LANDE, *supra* note 7, at 129–35, 285–88.

87. See Deason et al., *supra* note 80.



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who want students to develop practical skills are likely to require students to demonstrate performance of those skills in person, on video, or through self-assessments.<sup>88</sup> Clinical and externship courses provide special opportunities to reflect on professional identity, one of the key “apprenticeships” identified in the *Carnegie Report*.<sup>89</sup>

Typically, instructors set course objectives and requirements assuming that all students should perform essentially the same activities, which is appropriate in many courses. Negotiation instructors may want to provide more options for assignments because there are many legitimate educational goals in negotiation courses. Instructors might require students, early in a semester, to describe their individual objectives<sup>90</sup> and then give students some choice in the activities used to achieve those objectives.<sup>91</sup> For example, some students may want to learn about how lawyers negotiate in practice and might propose to observe negotiations in hallways outside courtrooms and/or interview lawyers, mediators, or settlement judges. Some students may want to develop their own philosophy of negotiation practice and prepare materials for clients explaining their philosophies, which might be suitable for posting on

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88. I prefer the term “self-assessment” instead of “journals” because the latter has the connotation of unstructured, novelistic writing. I generally prefer to require students to address specific questions to keep them focused on analyzing issues that I am particularly concerned about (though some questions are open-ended, leaving discretion to focus on issues that are particularly salient to different students).

89. See *supra* text accompanying note 4.

90. Law students would benefit if they developed individualized learning plans based on their objectives for their legal education. “Portfolios” are tools to help students plan their legal educations in this way. See generally Deborah Jones Merritt, *Pedagogy, Progress, and Portfolios*, 25 OHIO ST. J. ON DISP. RESOL. 7 (2010). Students could use the same logic to plan their activities in a single course. Some students are likely to change their plans during the course of the semester, though it would still be useful to prompt students to start thinking about this from the outset.

91. For thoughtful analyses of the benefit of engaging students in designing their educational experiences, see Nelken et al., *supra* note 84; Andrea K. Schneider & Julie Macfarlane, *Having Students Take Responsibility for the Process of Learning*, 20 CONFLICT RESOL. Q. 455, 460–61 (2003).



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a law firm website.<sup>92</sup> Some might want to write simulations<sup>93</sup> or papers to carefully consider particular negotiation issues. Some may propose other suitable ideas. Of course, these activities should require substantial effort and analysis so that students get an appropriate amount of benefit from their work. For example, if students write simulations, they are likely to get the most benefit if they write careful analyses of the issues in the simulation and recruit people to do a “test run.”<sup>94</sup> For the final projects in my class, students proposed to observe negotiations, interview lawyers or judges, write simulations, write a practice manual, write a traditional paper, and develop a law firm website.

Even if instructors give students some discretion about what activities they would perform, instructors can also require all students to do certain assignments. For example, instructors might require all students to take an exam, submit videotaped negotiations, write self-assessments of simulation experiences, draft settlement agreements, or complete other assignments.

## V. CONCLUSION

Teaching students to negotiate effectively is central to their thinking, acting, and being like good lawyers. Virtually all lawyers in every type of practice spend much of their time negotiating. All individualized transactions and a large proportion of disputes are

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92. Lawyers sometimes provide prospective and actual clients with statements of their philosophies. Law firm webpages often include such language and some lawyers provide letters or other materials for clients generally. *See, e.g.*, LANDE, *supra* note 7, at 237–39 (reprinting general letter that Fort Myers family lawyer and mediator Shelly Finman sends to all of his legal clients). Students might write their own statements of practice philosophy at the beginning and/or end of a course. If students write such statements at the beginning of a course, they might reflect on how their views have changed by the end of the course.

93. There is evidence that students who write simulations learn more than students who merely participate in simulations. *See* Daniel Druckman & Noam Ebner, *Enhancing Concept Learning: The Simulation Design Experience*, in VENTURING BEYOND THE CLASSROOM, *supra* note 52, at 269, 272–80.

94. For an example of instructions for writing simulations, see John Lande, *Instructions for Writing Simulations*, UNIV. OF MISSOURI SCHOOL OF LAW, [http://www.law.missouri.edu/drle/Syllabi/lande\\_writing\\_simulations.htm](http://www.law.missouri.edu/drle/Syllabi/lande_writing_simulations.htm) (last visited Feb. 9, 2012). I have found that some students have an easier time learning from analyzing issues in a concrete situation than by writing a typical term paper.



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resolved through negotiation. So, it is important that law schools provide students with the best possible instruction about negotiation.

Instructors should present legal negotiation as realistically as possible. Empirical research indicates that lawyers sometimes use what I have called “ordinary legal negotiation” in addition to the traditional positional and interest-based models. Because lawyers normally do not “parachute” into a case right before the ultimate negotiations, instructors generally should plan their course simulations so that their students get the most realistic experience possible, ideally including negotiating the various steps leading up to the ultimate negotiation. Indeed, the process of working with clients and counterparts is full of negotiation. This Essay suggests that by using both single-stage and multi-stage simulations, interested instructors can better prepare students for the negotiations that they will actually conduct in practice.