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.[3]

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,"[4] 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.[5] 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*

to a chapter entitled *Principles for Designing Negotiation Instruction* that I co-authored in a volume of the *Rethinking Negotiation Teaching* (RNT) series.[6] 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*.[7] 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.[8] 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.

Syllabi, UNIV. OF MISSOURI SCHOOL OF LAW, DISP. RESOL IN LEGAL EDUCATION, 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/rethinking negotiation.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.

typical of lawyers in many contexts,[43] 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.[44] 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).

broad range of situations where lawyers negotiate, however, can give students a more realistic portrayal of lawyers' actual work experience.[51]

III. PROBLEMS WITH SIMULATIONS IN NEGOTIATION COURSES

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

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,

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.[67]

There are complementary advantages and disadvantages of both single-stage and multi-stage simulations.[68] 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

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.[69] 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.[70] 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

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, *supr*a 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.

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.[71] 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*.[72]

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.[73] In general, having in-class simulations permits more control

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

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.[74] 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.[75]

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.[76] In particular, instructors may establish a rule of diligence such as: "A

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).

student shall act with reasonable diligence and promptness in performing assignments in this course."[77] 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."[78]

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,

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.").

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."[79] 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

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.

- 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 admoninitions 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.'"[80] Without effective debriefing, students can easily learn the wrong lessons, such as making overgeneralizations from a single experience.

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

Sometimes instructors debrief simulations only as "an afterthought or a rushed invitation for general comments."[81] 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.[82]

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.[83] 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

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.

that there are advantages and disadvantages to both approaches and that many instructors use a combination.[84]

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.[85] Good debriefing thus teaches students how to learn to learn.[86] 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.[87]

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.

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.[88] Clinical and externship courses provide special opportunities to reflect on professional identity, one of the key "apprenticeships" identified in the *Carnegie Report*.[89]

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[90] and then give students some choice in the activities used to achieve those objectives.[91] 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

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).

a law firm website.[92] Some might want to write simulations[93] 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."[94] 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

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 (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.

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.