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Lessons from Teaching Students to Negotiate Like a Lawyer

John Lande

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Lessons from *Teaching Students to Negotiate Like a Lawyer*

John Lande*

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I. INTRODUCTION

The legal education system is in a major crisis now, in part because law schools do not prepare students adequately to practice law. Law schools should do a better job of teaching negotiation, in particular, because it is a significant part of the work of virtually every practicing lawyer. This includes lawyers who handle civil and criminal matters and lawyers who do litigation as well as those who do transactional work. Negotiation is

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especially important because most litigated cases are settled and virtually all unstandardized transactions are negotiated.

Most law school negotiation courses rely primarily or exclusively on simulations in which lawyers “parachute” into a case just before the final negotiations. In real life, however, negotiations grow out the preceding activities such as interviewing and counseling clients, obtaining necessary information, conducting legal research, and performing case management procedures. For law students to understand how lawyers actually negotiate in the real world, it is important that they understand how negotiation fits into the “big picture” of legal practice. This article describes how my negotiation course provided students a more realistic experience of negotiation.

I wrote *Teaching Students to Negotiate Like a Lawyer*¹ (“*Teaching Negotiation*”) when I was preparing to teach negotiation for the first time.² That article integrated several threads of my work. First, it built on ideas in an article I co-authored cataloguing suggestions from the Rethinking Negotiation Teaching project.³ It also incorporated some of my views about legal education⁴ and lawyering⁵ more generally. *Teaching Negotiation* was a vehicle to develop some theories about better preparing students to practice

¹John Lande, [Teaching Students to Negotiate Like a Lawyer](#), 39 WASH. U. J.L. & POL’Y 109 (2012).

²Since 1995, I have taught various dispute resolution courses, primarily focusing on mediation, dispute system design, and general lawyering skills.

³John Lande et al., [Principles for Designing Negotiation Instruction](#), 33 HAMLINE J. PUB. L. & POL’Y 299 (2012).

⁴See 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 (2010); John Lande, [Reforming Legal Education to Prepare Law Students Optimally for Real-World Practice](#), 2013 J. DISP. RESOL. (forthcoming). I have been a member of the executive committee of the [Legal Education, ADR, and Problem-Solving](#) (LEAPS) Project of the A.B.A. Section of Dispute Resolution Law Schools Committee.

⁵See JOHN LANDE, [LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY](#) (2011).

law, which I tested in the Spring and Fall 2012 semesters at the University of Missouri School of Law.

This article reports my observations from teaching those courses and offers suggestions for future efforts to improve legal education, particularly through negotiation and other dispute resolution courses. My experience supports the (1) focus on negotiation in a wide range of situations in addition to the final resolution of disputes and transactions (“final negotiation”),⁶ (2) addition of “ordinary legal negotiation”⁷ to the two traditional theories of negotiation, and (3) use of multi-stage simulations in addition to traditional single-stage simulations.⁸ These approaches were critical in providing students with a more realistic understanding of negotiation. This article also describes experiments with other teaching techniques in my courses.⁹

Of course, one should be cautious about reaching definite conclusions based on a limited set of experiences. I encourage other faculty to experiment with these techniques and develop models that can be readily used or adapted in their courses. Faculty who have previously taught negotiation and are fully satisfied with their courses may feel that there is little need to change their teaching methods and/or that their other commitments (such as producing scholarship) are higher priorities. On the other hand, faculty teaching negotiation (or other courses) may find the suggestions in this article to be helpful if they are planning new courses and/or if they want to consider modifications of prior courses to better prepare students for their negotiations after graduation.

Part II provides an overview of the courses in which I used the approaches described in *Teaching Negotiation*. Part III describes negotiation

⁶The term “final negotiation” refers to the ultimate settlement event where negotiators try to resolve all the major issues in a matter. For further discussion of final negotiation, see *infra* Part III.

⁷For a definition and description of ordinary legal negotiation, see *infra* Part IV.

⁸For discussion of multi-stage simulations, see *infra* Part V.C.

⁹I would be happy to provide copies of the materials I developed to other faculty. In particular, I have zip files for multi-stage simulations that other faculty may find helpful. To request any of these materials, email landej@missouri.edu.

in contexts in addition to final negotiation in litigation or transactions. Part IV describes the teaching of negotiation theory, including “ordinary legal negotiation” in addition to the traditional positional and interest-based models of negotiation. Part V describes the simulations used in the courses, particularly contrasting the use of multi-stage simulations with single-stage and improv simulations. Part VI discusses course assignments and other aspects of the courses. Part VII is the conclusion.

II. EXPERIENCE USING *TEACHING NEGOTIATION* APPROACHES

In the Spring 2012 semester, I taught two courses using approaches outlined in *Teaching Negotiation*. One was a general three-credit Negotiation course, with 20 students, and the other was a three-credit Family Law Dispute Resolution (“FLDR”) course,¹⁰ with 9 students. In the Fall 2012 semester, I taught the general Negotiation course,¹¹ with 12 students. These courses met twice a week for 75 minutes. They are part of an extensive dispute resolution curriculum including a two-credit course, *Lawyering: Problem-Solving and Dispute Resolution*,¹² that all University of Missouri students are required to take in their first semester of law school. That course surveys lawyer-client relationships, interviewing and counseling, negotiation, mediation advocacy, and other dispute resolution processes. So I assumed that Negotiation and FLDR students had this basic foundation and did not repeat much of the material from the *Lawyering* course.¹³ The FLDR course integrated

¹⁰For the course syllabus, see Resources for Legal Education, Univ. of Missouri School of Law Center for the Study of Dispute Resolution, [Family Law Dispute Resolution](#).

¹¹For the course syllabus, see Resources for Legal Education, Univ. of Missouri School of Law Center for the Study of Dispute Resolution, [Negotiation](#).

¹²For the course syllabus, see Resources for Legal Education, Univ. of Missouri School of Law Center for the Study of Dispute Resolution, [Lawyering: Problem-Solving and Dispute Resolution](#).

¹³Although the fact that students had taken the *Lawyering* course enabled me to proceed without repeating some introductory material that students had already been taught, the approaches described in this article can be adapted for

instruction in legal doctrine and practice skills, as Family Law was a prerequisite and it focused on specialized family law issues.

As described in Parts V and VI, the Fall Negotiation course worked much better than the Spring Negotiation and FLDR courses for several reasons.¹⁴ For one thing, during the Spring semester, these courses were two new “preps” and I was developing new teaching plans and materials as the semester progressed. I was also overly ambitious in the Spring, trying to accomplish too many goals in the courses. This put a great burden on me and led to frustration by many students. By the Fall, I had revised the course to avoid most of the problems from the Spring and I used the simulations that I had developed in the Spring, with only minor revisions. In revising the course requirements, I focused on my highest priority learning objectives and omitted the rest.¹⁵

courses in which students have not previously had such instruction.

¹⁴Assessments of the courses described in this article are based on students’ responses to mid-semester feedback surveys, formal end-of-semester evaluations, students’ comments in class and in their assigned papers, as well as my observations generally. In addition, in January 2013, I conducted a focus group with three of the twelve students in my Fall 2012 Negotiation course. Students completed questionnaires about various aspects of the course and we had a candid discussion about valuable aspects of the course and possible improvements. The students’ comments generally were consistent with my perceptions, though some of their comments, pro and con, surprised me. Obviously, this group was a small self-selected sample from a small class, so one should not make too much of their responses. Nonetheless, they gave me more confidence in my assessment.

¹⁵In the Spring courses, students were required to: (1) prepare plans setting individual learning goals and proposing major projects to advance those goals, (2) take an oath to comply with course rules, (3) write a few paragraphs describing the reputations that they wanted to develop with other lawyers and actions they could take to develop those reputations, (4) write a general letter to clients or law firm webpage describing their approach to practice, (5) complete one-page self-assessment forms after most simulations, (6) prepare certain documents for use in multi-stage simulations, (7) participate in an end-of-semester survey about their classmates’ reputations, (8) write a major project based on their individual learning plans, and (9) write an assessment of what they learned in the simulations and their individual projects and how well they achieved their course goals

One should be careful in comparing the experiences between the two semesters. The frustration experienced by many students in the Spring may have led to poorer results. In addition, the Fall class was smaller and the students generally seemed to be more motivated,¹⁶ possibly coloring their attitudes.

III. MULTIPLE CONTEXTS OF NEGOTIATIONS

My work on what I call “lawyering with planned early negotiation”¹⁷ led me to appreciate the importance of analyzing final negotiations in the context of an entire matter starting from the outset of a case. In real life, final negotiations necessarily flow from the preceding interactions. In matters involving represented parties, the clients retain lawyers, who conduct factual investigations, research relevant legal authorities, develop relationships with their counterpart lawyers, possibly engage in litigation procedures, and orchestrate the negotiation. Lawyers may not engage in some of these stages and some of the efforts may be perfunctory, but the process preceding the final negotiation almost inevitably affects how it unfolds. In some cases, especially where the preliminary process involves tough battles, the final negotiation may be unnecessarily difficult and produce sub-optimal results. On the other hand, when lawyers have a cooperative relationship, they are

In the Fall course, students were required to: (1) write a 4-6 page assessment of a simulation early in the semester, (2) take brief quizzes about course readings, (3) follow certain routines when performing simulations including closing their eyes before doing simulations and write brief self-simulations as in the Spring, (4) prepare a smaller number of documents in multi-stage simulations than in the Spring, and (5) at the end of the semester, write a 12-15 page assessment of a simulation.

For further discussion of the course requirements, see *infra* Part VI.

¹⁶Many of the students in these classes were third-year students and perhaps part of the difficulty with the Spring courses was that 3L students had less interest in law school, focusing more on life after graduation. Although I repeatedly described how issues we covered would help them get and perform jobs, some 3L students may have tuned out of law school generally.

¹⁷*See supra* note 5.

likely to handle their cases efficiently and use satisfying processes that provide good results for their clients. Since most litigated cases and unstandardized transactions are negotiated, it is wise for lawyers to plan for negotiation from the outset of a matter. The multi-stage simulations in my courses were very effective in helping students get a more realistic experience of negotiation, as described in Part V.

In real life, lawyers negotiate in many contexts in addition to the final negotiation of disputes and transactions. These contexts include a range of negotiations with clients,¹⁸ counterpart lawyers,¹⁹ service providers,²⁰ and even judges.²¹ Although such negotiations may not be as long, difficult, or dramatic as final negotiations,²² students can learn valuable lessons by simulating them. For one thing, it is important for students simply to

¹⁸Negotiations with clients involve matters such as engaging the lawyer, establishing a fee arrangement, managing the representation (including negotiation about the negotiation with the other side), and adjustment of legal bills. Lande, *supra* note 1, at 122-23.

¹⁹Lawyers negotiate with counterparts over procedural matters including “acceptance of service of process, extension of filing deadlines, scheduling of depositions, [and] resolution of discovery disputes.” *Id.* at 123.

²⁰Lawyers negotiate with “process servers, investigators, court reporters, technical experts, tax and other financial professionals, and dispute resolution professionals such as mediators and arbitrators.” *Id.*

²¹Lawyers negotiate with judges about procedural matters and in settlement conferences. *Id.*

²²In getting feedback on drafts of *Teaching Negotiation*, I learned there is a wide range of views about what even constitutes “negotiation.” Some think of it as being limited to bargaining over options intended to result in a legally-enforceable exchange whereas others conceive of it as communications involving exchanges that are not limited to identifiable quid pro quos. *See* Lande, *supra* note 1, at 109 n.2. Based on empirical research about lawyers’ negotiation, I described what I called “ordinary legal negotiation,” which fits into the broader definition as it is more of a conversation than bargaining over options leading to an exchange of consideration. *See id.* at 112-21. For further discussion of ordinary legal negotiation, see *infra* Part IV.

recognize the wide range of contexts in which they use negotiation knowledge and skills. And students can gain valuable insights and skills from practicing negotiation in these other contexts. So I believe that preparing lawyers to negotiate in a variety of contexts is an important educational goal.

In my Negotiation classes, most of the simulations were oriented to final negotiations but I included simulations in other contexts including negotiation of a lawyer-client fee arrangement, resolution of a discovery dispute, planning dispute resolution arrangements related to negotiation of a partnership agreement, and an employment negotiation between a third-year law student and a prospective employer. In my FLDR course, in addition to negotiation or mediation of the ultimate issues, students simulated interactions with parent coordinators, child custody evaluators, and judges about the plans for the families. This provided simulations of a valuable mix of negotiation and advocacy by the lawyers. Based on my observations and students' reactions, these other negotiation simulations added significant value to the students' learning. As I anticipated, they developed a much more realistic understandings of the range of activities that lawyers engage in. As most law students probably are not exposed to these activities in other courses, it is appropriate to include them in negotiation courses.

While negotiation faculty understandably focus primarily on final negotiations, they might consider whether there are diminishing returns in focusing *exclusively* on final negotiations throughout the entire course and whether there may be sufficient benefit from including one or more simulations in other contexts.

IV. NEGOTIATION THEORY INCLUDING ORDINARY LEGAL NEGOTIATION

I have become increasingly dissatisfied with the traditional negotiation theory, which identifies only two approaches: positional negotiation (PN) and interest-based negotiation (IBN).²³ Over the years, as

²³In positional negotiation, negotiators try to get as much (or pay as little) as possible for themselves, typically by starting with extreme demands (or offers) and making a series of concessions. See LANDE, *supra* note 5, at 58-65. In interest-based negotiation, negotiators try to develop agreements satisfying the key interests of both sides by identifying parties' interests, generating options for satisfying the

I have heard law students talk about the approaches they used in simulations, they generally used the term IBN referring to interactions where the negotiators act nicely toward each other and may refer, in passing, to parties' interests. In conversations with some academics specializing in dispute resolution, they have expressed similar views about what constitutes IBN. These references to IBN are comparable to the loose talk that Professors Milton Heumann and Jonathan Hyman found in their study of New Jersey lawyers. Although lawyers reported that they used IBN in up to 33 percent of the cases, when the researchers observed actual settlement negotiations, they "seldom" heard "stories about the interests of the parties" and when they interviewed lawyers about the cases, the lawyers described "little about the underlying real-world interests of their clients and the opposing parties."²⁴ The researchers found that "[e]ven the word 'need' was turned to positional, not problem-solving, use," typically referring to "what dollar amount would be sufficient to settle the case."²⁵

In my view, these references by some students, academics, and lawyers, do not signify real IBN, which requires a fairly explicit focus on the parties' actual interests, options to satisfy those interests, and analysis of the options leading to selection of options best meeting both parties' interests. The IBN concept loses its meaning if it encompasses any congenial process

interests, and agreeing on an option that best satisfies the parties' interests. *See id.* at 65-71. In real life, negotiators may use a combination of negotiation approaches.

Scholars have developed numerous terms that are generally synonymous with PN and IBN. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 13-16 (1996) (noting variety of terms synonymous with PN and IBN).

²⁴Milton 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, 306 (1997). In the study, the researchers asked lawyers how frequently they used problem-solving negotiation (a term that is often used synonymously with IBN), which was defined as "a mutual discussion of the underlying needs and interests of each side." Lawyers reported that this method was used entirely or almost entirely in 16 percent of cases, and a combination of methods was used in 17 percent of cases. *Id.* at 255.

²⁵*Id.* at 306.

in which negotiators seek agreement without exchanging an extended series of counter-offers. Although real negotiation generally is a complex set of interactions that does not fit neatly into theoretical concepts, these concepts become incoherent if they deviate too much from the behavior they are intended to represent. Many people in the dispute resolution field, including me, want to promote the benefits of IBN when it is appropriate. Although stretching the concept of IBN to encompass behavior that does not readily fit the model may seem appealing, it actually undermines the project of promoting IBN. Instead of distorting comfortable notions, we can provide a greater service for theorists, students, and practitioners by developing concepts that better approximate empirical reality.

In some cases, the IBN and PN models do provide good approximations of actual negotiation processes but, based on empirical research on lawyers' actual negotiation patterns, there seems to be a fundamentally different third model that is not merely some combination of these two basic models in negotiation theory. I coined the term "ordinary legal negotiation" (OLN) referring to a process in which lawyers try to reach a fair agreement based on shared norms. Social scientist Herbert Kritzer studied ordinary civil litigation and found a very common pattern where "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."²⁶ Consistent with Kritzer's description of this approach, Professor Lynn Mather and her colleagues' research found that many divorce lawyers in Maine and New Hampshire followed a "norm of reasonableness" in negotiation.²⁷ Under this norm, lawyers realistically analyze the typical legal outcomes in their cases and advise clients to accept "settlement close to the typical result."²⁸ Thus

²⁶HERBERT M. KRITZER, *LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION* 121 (1991).

²⁷LYNN MATHER, CRAIG A. McEWEN & RICHARD J. MAIMAN, *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 48-56 (2001).

²⁸*Id.* at 48-49.

lawyers said that they do not start with “extreme” or “ridiculous” positions that are “inconsistent with what ‘everyone knows’ about divorce.”²⁹

In OLN, lawyers typically use legal norms³⁰ but the norms may be from other sources such as normal business practices in a particular industry.³¹ Clearly, these norms – the “going rates” and “typical results” described in the preceding studies – are not the same as the parties’ interests. For example, counterpart lawyers may share an expectation that the likely outcome of trial of a personal injury case would be a \$100,000 verdict give or take \$20,000. Or in a divorce case, the lawyers might expect that the court would order a parenting plan in which minor children would primarily live with the mother and would spend alternate weekends and one night a week with the father. In an OLN process, the negotiations would be oriented to these expectations and both lawyers would advocate their respective clients’ interests by trying to get a deal that is somewhat more favorable than the expected court result and is acceptable to both sides.

In practice, OLN may look like a normal conversation where people are trying to solve a problem together in a reasonable way, focusing primarily on what they see as applicable norms. This contrasts with IBN, which focuses primarily on what the parties actually need, rather than making adjustments to the most likely court results. Indeed, in both IBN and PN, the negotiators focus on the parties’ *interests* although these two models differ about whether the negotiators seek to satisfy *both parties’ interests* (i.e., IBN) or only *each party’s own partisan interests* (i.e., PN). In IBN, negotiators discuss the parties’ interests and options for satisfying the interests whereas PN negotiators exchange a series of offers where each side tries to pressure the other side to accept an agreement maximizing its own interests. If negotiators are primarily oriented to making decisions by reference to applicable norms, then making adjustments to the norms based on some exchange of offers and/or reference to parties’ interests does not make the

²⁹*Id.* at 127-28.

³⁰Legal norms in a particular legal community may be based on common results from trial, settlement, or plea bargains in comparable cases.

³¹For example, non-legal norms might be typical rates in particular types of agreements, such as sales, leases, or licensing agreements in specified markets.

process PN or IBN, nor is OLN simply a combination of these two familiar models.³²

In various dispute resolution courses over the years, I have found that students have had an especially hard time understanding the nature of IBN, in part because there has not been a generally-recognized alternative to IBN other than PN, which does not fit their experiences of negotiation through cooperative conversation. Even when I have described the process of explicitly identifying interests and options, many students seem to have a hard time grasping the concept. So in the Fall semester, I conducted an IBN with the class to demonstrate the concept. On the first day of class, after reviewing the syllabus, I negotiated with the students about the course structure. I asked them to identify students' and instructors' interests in the course which I listed and projected on a screen in the front of the class. Table 1 shows the students' and faculty's interests they identified. I started with two blank columns and filled in cells as students identified various interests. The entries in Table 1 have been edited and organized for clarity.

³²For further discussion of OLN and the distinctions from PN and IBN, see Lande, *supra* note 1, at 112-21.

Table 1. Students' and Faculty's Interests in the Negotiation Course

Students' Interests	Faculty's Interests
learn practical skills about lawyering and negotiation	provide opportunity for students to practice skills
learn to deal with difficult clients	prepare students to deal with difficult situations
increase understanding of negotiation approaches and policy interests	help students learn and learn from students
build confidence in abilities	produce good environment for open discussion and challenge students constructively
build rapport with professor	be respected by students
use teaching modalities that fit students' abilities and interests	use teaching modalities that fit students' abilities and interests
feel instructor is available to help	be available to students
have reasonable time commitment	have reasonable time commitment
get good grades	get good teaching evaluations, enjoy work, get paid, not get fired
enjoy class	enjoy class
make money from negotiation	prepare good, successful practitioners
use electronic learning devices appropriately, read notes, convenience, completeness, organization, bring notes from readings, practice using laptops without distraction	get students to pay attention, practice using handwriting, avoid distraction, contribute to class

To further illustrate the process, I asked students to pick an important interest to negotiate and we decided to focus on the interest of promoting students' skills and confidence. They brainstormed options for achieving

those interests, which are shown in Table 2. I had already planned to use most of the options on the list but several students expressed strong interest in having guest speakers, which I had not planned. Based on their suggestions, I invited lawyers who handle civil and criminal cases talk with the class. Table 2 includes the option of every student getting a perfect grade (100), thus illustrating the playful and creative dynamic of brainstorming.

Table 2. Options to Achieve Interest of Students Gaining Skills

Options for Teaching Techniques
simulations
self-assessments
classmates' assessment
instructor's assessment
multi-media options
use visuals to present information
have students try different approaches
learn from experience
guest speakers such as litigators and clients
feedback on class participation
engage students who don't volunteer
all students get a grade of 100

In the Fall semester, I started to prohibit students from using laptops in all my classes because students in my classes generally seem distracted by them. My first-year Lawyering students accepted this policy, but there were rumblings of discontent from my Negotiation students, most of whom were third-year students who were used to having laptops in their classes. So I used the process of identifying interests and options to negotiate this issue. The last row of Table 1 shows the respective interests about using laptops and

Table 3 shows the options we developed to handle this issue.³³ Using these options, I decided to permit students to use laptops on a provisional basis, with the understanding that students would remain engaged in class discussion. Students seemed very pleased with the agreement and largely complied. I had to remind students about it once or twice when they seemed too focused on their computers, but the deal generally worked well.

Table 3. Options for Dealing with Laptops in Class

Options Regarding Laptops
students can use laptops for debriefing but not during simulation
allow use of laptops for a trial period
students' class participation grade could be reduced if they are disengaged because they are using laptops
individual rules for different students
students who use laptops inappropriately would violate the honor code
[name of student] can't use a laptop

This exercise was very useful in illustrating real IBN (as well as increasing students' satisfaction with the course). When we discussed negotiation approaches later in the semester, I reminded them of this exercise as an illustration of IBN. Probably like most of the lawyers in the Heumann and Hyman study,³⁴ students in the course rarely, if ever, used IBN, despite my occasional encouragement to consider it.

In fact, students in my classes overwhelmingly seemed to use an OLN approach. There are several possible reasons why this may have happened. They were relatively small classes, many students previously knew each other, and even the students who did not previously know each other got to know each other well during the course. In addition, as an elective course, there may have been some self-selection by cooperation-oriented students. Conceivably, some students used this approach to please their instructor, who

³³Again, we approached the task playfully, adding the option that a particular student could not use a laptop.

³⁴*See supra* notes 24-25 and accompanying text.

developed the concept. Even so, students generally were appropriately assertive so I do not think that these explanations really explain their behavior. I repeatedly emphasized that their primary duty was to protect their clients' interests. Students understood that using an adversarial approach risked harming their clients' interests and that usually they were likely to better satisfy their clients' interests through cooperation. Students sometimes reported having PN interactions, which they generally found to be counter-productive and which is probably why they normally did not use PN techniques. They might have used IBN, but I suspect that they typically used OLN because it seemed easier and more natural than a more formal IBN process.

V. USE OF SIMULATIONS

Most negotiation courses probably rely almost exclusively on “single-stage simulations,” where student start to negotiate just before the final negotiation.³⁵ I used some single-stage simulations in my courses because handling final negotiations is an important and difficult task for lawyers. I also included some fishbowl (or “improv[izational]”) simulations, in which one or two students perform in front of their classmates, as well as two multi-stage simulations. I believe that my students benefitted tremendously from participating in the mix of these three types of simulations because each of these formats has advantages and disadvantages, so using some simulations with each format provides a mix of the advantages.

A. Single-Stage Simulations

Single-stage simulations are a staple in dispute resolution courses, dealing with numerous types of legal issues in dispute or potential transactions. Virtually all teaching manuals accompanying dispute resolution texts include numerous single-stage simulation exercises. Several law

³⁵Law school faculty teaching negotiation normally use simulations. See Daniel Druckman & Noam Ebner, *Games, Claims, and New Frames: Rethinking the Use of Simulation in Negotiation Education*, 29 *NEG. J.* 61, 63 (2013). The extent to which faculty use single-stage or multi-stage simulations is not clear. Based on responses to a listserv query to dispute resolution faculty, it appears that few faculty use multi-stage simulations other than some faculty who add a second stage in which lawyers meet with their clients shortly to plan negotiation strategy before the final negotiation.

schools sell such simulations and colleagues often share simulations with each other. These simulations present dilemmas in which the different sides have conflicting demands and generally include descriptions of the factual background for each party and/or lawyer along with goals for the negotiators. The instructions for the role-players typically describe some of the history of the situation leading up to the final negotiation, which the students enact. Focusing on the final negotiation obviously is very important and often quite challenging as students maneuver in the endgame of the process.

In my Negotiation classes, I used single-stage simulations dealing with personal injury and sexual harassment disputes, negotiation of an intellectual property licensing agreement, and negotiation for retention of a lawyer to represent a client in a divorce case. The purpose of these simulations was to focus on certain negotiation issues (choice of negotiation models, dealing with identity and cultural issues, apologies, and trust) rather than the particular legal issues in the cases. In my FLDR course, students performed several single-stage simulations, only one of which involved an ultimate negotiation, dealing with division of property in a divorce. The other single-stage simulations involved interviewing clients to screen for domestic violence as well as meetings with a child custody evaluator and a parenting coordinator.

Faculty can use many single-stage simulations in a course, providing multiple opportunities for students to negotiate in different roles and contexts and to focus on different issues in negotiation. A disadvantage is that these simulations often are fairly brief and thus students may have a hard time “getting into” their roles and simulating realistic negotiation dynamics. This problem can be addressed by having students do the simulation outside of class, though faculty have less control in these situations.

Another problem is that faculty cannot fully observe students simultaneously doing simulations, so it is harder to analyze the performances and give feedback. Faculty can require students to videotape negotiations, thus permitting such feedback, though that obviously requires much more time.³⁶ Some students can be assigned to observe complete single-stage simulations and give feedback, which avoids the problems of viewing short scenes out of context and it provides students the opportunity to focus only on observing, which can be a useful learning experience in itself. Of course, this reduces the number of opportunities for students to participate in

³⁶For further discussion of challenges in using videos of negotiation, see *infra* Part VI.G.

simulations and the quality of feedback would be quite variable, depending on the insightfulness of the observers.

B. Improv Simulations

I typically used improv simulations to focus on negotiations other than the final negotiations. The scenes ranged from less than a minute to perhaps five minutes in length. We did several improv simulations after first having done several single-stage simulations so that students could get comfortable with each other before “performing” in front of the class in the improv simulations. They included a simulation for resolution of a discovery dispute as well as difficult moments in an employment negotiation between a third-year law student and a prospective employer. I also used improvs in certain stages of multi-stage simulations, including negotiation of lawyers’ fee arrangements with clients, discussion of the legal authority in the case, and discussion of dispute resolution arrangements related to negotiation of a partnership agreement.

Having students do improv simulations in front of the class created the opportunity for immediate feedback and discussion. In addition, it provided the opportunity to redo scenes that did not work optimally or that might have different dynamics if one changed certain facts or negotiation techniques. In general, I had pairs of students work with each other in these scenes, though sometimes I played a role interacting with a student in a scene so that students got a chance to see how their instructor would handle certain situations. I used a “round-robin” process where certain students would do a scene, we would discuss it, and then other students would replace them to do the next scene. Often, the action would pick up where the last one left off, though sometimes we would “rewind the tape” and start over or change the facts in some way.

A major advantage of the improvs is that students generally *loved* them. At first, I was concerned that they would be too embarrassed to perform in front of the class, but this generally did not seem to be a problem.³⁷ I reminded students that when we analyzed the performance in a

³⁷One student in the focus group said that the improvs felt awkward and another said that she felt embarrassed doing the improvs at first, though she came to really like them. Students in the focus group (who were in the Fall Negotiation course) said that they generally were comfortable doing the improvs because they previously knew most of the other students in the class. The Spring Negotiation class had more students, who may not have known each as well as in the Fall, but

scene, the focus should be on what we all could learn from the experience, not on critiquing individuals' performances. Fortunately, the class generally seemed to be a safe environment and this worked well. Students had excellent observations and even when they pointed out problems, this generally did not seem to hurt students' feelings or undermine the supportive class environment.³⁸ Since I could see the entire interaction, I felt much more comfortable giving my own input than when I observed simultaneous simulations, where I inevitably missed important parts of each simulation.

The major disadvantage of the improv format is that only a small number of students get to do the simulation themselves. Of course, if students do a mix of other simulations that they all do simultaneously, that is not necessarily a problem. There is also a risk that the class dynamics may not work well if, for example, there is a substantial disparity in skill levels within the class, the instructor is not able to effectively promote a safe classroom environment, or some students are tactless and insensitive. I was also surprised to hear in my focus group that, although the students really liked the improvs, their minds sometimes wandered when they were not "on stage." This may have been related to their view that some scenes lasted longer than necessary.

C. Multi-Stage Simulations

I devoted about half of the Negotiation and FLDR courses to doing two multi-stage simulations. Doing two multi-stage simulations gave students the opportunity to experience negotiation of both a dispute and a transaction.³⁹ Students noticed significant differences in the dynamics of

generally seemed comfortable with the improvs. Indeed, in the Spring semester, students responded enthusiastically about the improvs in the mid-semester feedback survey.

For description of the focus group, see *supra* note 14.

³⁸I was surprised that students in the focus group felt that the comments about the improv performances were so positively framed that they felt that they did not receive feedback about areas for improvement. I thought that there was a lot of discussion about what might be done differently and it seemed ironic that the feedback was couched in such a constructive way that these students did not seem to hear the suggestions of possible alternative approaches.

³⁹In the FLDR course, one simulation focused on child custody and the other involved financial issues. The facts of one simulation were designed to

dispute and transactional negotiation, which is important because they generally had little experience dealing with transactional issues in other law school classes. Doing two multi-stage simulations also enabled every student to play both a lawyer and a client, which was important so that students could feel what it is like for clients to work with lawyers.

The multi-stage simulations worked extremely well. The quality of the interactions and student learning seemed to be exponentially higher than in the single-stage simulations because students got into their roles to a greater extent and had much more realistic lawyering experiences. Based on my experience, I strongly encourage faculty to include multi-stage simulations whenever it might be appropriate. Indeed, I suggest that negotiation faculty include at least one multi-stage simulation unless the decrease in learning by reducing use of other approaches clearly outweighs the benefits of multi-stage simulations. Of course, faculty using multi-stage simulations should tailor the number, length, and content of these simulations to fit their teaching goals, considering the range of teaching methods they want to use in a course. For example, faculty may decide to use only one such simulation with a different number of stages and focusing on different elements of a process than I did.

In my Negotiation course, the first multi-stage simulation involved a simple probate dispute between two siblings over the estate of their recently-deceased mother. The central legal issue is whether the mother's will was executed under undue influence. The dispute is colored by the relationships and events involving the parents and children. The simulation involved six stages, each taking place during a 75-minute class, plus a seventh class to debrief the simulation. For the first five stages, the class began with a discussion of the task for that day, including the lawyers' (and sometimes the clients') goals at that stage. After that discussion, the simulations of each stage typically took 15-30 minutes. After students completed the simulated task for the day, they completed a brief self-assessment form⁴⁰ and then the class debriefed the experience together.

In the first stage of the case, the lawyers interviewed their clients, with instructions to develop good relationships with the clients, elicit key

produce more conflict than the other, though it did not work out that way for some groups. The groups were more or less contentious based on the interactions of the students playing the particular roles.

⁴⁰For description of the self-assessment form and process for using it, see *infra* Part VI.D.

information about the case (including the clients' interests), and decide what additional information they need. Of course, in real life, lawyers almost always need to do some factual investigation and are not simply presented with the full set of facts as occurs in single-stage simulations (or the appellate case reports that students read in doctrinal courses). Shortly after the first stage, the lawyers were required to submit a list of additional information that they wanted to receive, which prompted them to think realistically and strategically about developing their cases. Soon afterward, I provided additional information, in part, based on the students' requests.

The second stage involved lawyers developing a good working relationship with each other by pretending to "have lunch" and getting to know each other personally. The assigned reading describes how this can make a big difference in the process and outcome of a case.⁴¹ Although conducting a simulation of lawyers having lunch together may sound very strange for a law school class, students really "got" the value of this process during that class and throughout the simulation.⁴²

In the third stage, pairs of lawyers had a conversation with each other about the applicable law, using the "improv" format. In real life, this conversation might take place early in the case and/or during the final negotiation. I informed the students that the key issue was undue influence and that they needed to research the law themselves. The purpose of this stage was for the students learn how to argue the law effectively in a negotiation as distinct from an adjudication context. In general, the lawyers' goal was to persuade their counterparts that the most likely court outcome is not as favorable or certain as their counterparts thought it was.

⁴¹See John Lande, [*Getting Good Results for Clients by Building Good Working Relationships with "Opposing Counsel,"*](#) 33 U. LA VERNE L. REV. 107 (2011).

⁴²For example, in an assessment of the simulation, one student wrote that he would have reacted very negatively toward his counterpart at a later stage in the process if he had not gotten to know her personally during the "lunch."

One student suggested that the experience would be enhanced if they actually did eat lunch together, which I plan to incorporate into the course in the future, as appropriate.

I decided to give the students an experience of working with a mediator, which is an important task for lawyers.⁴³ So in the fourth stage, the lawyers met with their mediator to plan the mediation process after having provided a mediation memo to get the mediator “up to speed.” While the lawyers and mediators met, I talked with all the clients as a group to reflect on what they learned by playing clients.

In the fifth stage, the lawyers met with their clients to prepare them for the mediation based on their conversation with the mediator.

The entire sixth class was devoted to mediation of the ultimate issues and in the following class, we debriefed the simulation.⁴⁴

The second multi-stage simulation involved six stages of a negotiation of a simple partnership agreement between two friends to run a new restaurant. The first stage involved an initial client interview similar to the probate simulation. Again, the lawyers submitted information requests and I provided additional information in response.

The second stage involved the negotiation of a fee agreement that might take place toward the end of the initial client interview. It is appropriate to include this issue in modern curricula because law firms are

⁴³I had mixed results in recruiting students to play mediators in the multi-stage simulations considering that the quality of their performance varied. I recruited students who had completed our Mediation course to serve as the mediators. To some extent, the problems may have been due to inadequate preparation of the mediators as I did not personally coach them. I required the lawyers in my class to submit mediation memos and meet with the mediators before the mediation and I assumed that this would be sufficient. In at least one simulation, the mediator reportedly did not read the mediation memos, which obviously is problematic. The experience using student mediators reflected the difficulty in controlling the mediators’ performance and providing a good experience for the Negotiation students. Although it would be nice to have students get the experience of working with mediators, this dilutes the benefit of having the lawyers manage the process themselves. In the future, I plan to dispense with the mediations and use only unmediated negotiations. In that situation, this stage will involve the lawyers meeting together to plan the negotiation process.

⁴⁴For more information about the simulation, see Resources for Legal Education, Univ. of Missouri School of Law Center for the Study of Dispute Resolution, [Multi-Stage Probate Dispute Simulation](#).

increasingly offering alternative fee arrangements,⁴⁵ which can have a significant effect on the lawyer-client relationship, how a matter is handled, and the clients' satisfaction. The students did this in an improv format and struggled with what they typically find to be a daunting task. This exercise prompted excellent discussions about tensions in lawyer-client relationships and strategies for dealing with the tensions.

In the third stage, the lawyers planned the agenda and other procedural matters for the final negotiation. While the lawyers met, the clients met separately to discuss the business aspects of the deal, such as the restaurant cuisine, location, hours, etc. The clients' discussion was important to lay the groundwork for their role in the final negotiation. In transactional negotiations over matters like partnership agreements, clients played a larger role than clients typically do in negotiations to settle litigated disputes because clients know more about the transactions than litigation issues and often engage in ongoing activities after the negotiation.

In the fourth stage, the lawyers met with their clients to prepare for the negotiation. Lawyers and clients reported to each other about their meetings with their counterparts during the prior class. Based on this information, they strategized about how to handle the final negotiation. The lawyers can be assigned to write a negotiation plan and encouraged to start drafting the plan before this meeting to identify critical information and ideas for the planning.⁴⁶

⁴⁵According to a recent survey, "Of the 218 law firm respondents, only one reported that their firm does not employ alternatives to the hourly billing rate model other than discounting. On the legal department side, 18 percent of the 206 corporate respondents reported that they do not employ AFA [alternative fee arrangement] billing." *An "A" for Alternatives*, A.B.A.J., Nov. 2012, at 34, 34. The survey found that the use of AFAs has been increasing, company legal departments and law firms are generally satisfied with them, and they are "here to stay." *Id.* Although this survey suggests that many large firms use alternative fee arrangements in at least some of their cases, it is not clear how frequently these or other firms use such arrangements. Nonetheless, this survey shows that AFAs are recognized as legitimate in legal practice, suggesting that it is an appropriate subject to teach law students.

⁴⁶In my classes, I did not assign students to prepare negotiation plans, though I plan to do so in the future. I did assign students to write memos about dispute resolution options, which I will not continue to assign. For further discussion of these assignments, see *infra* Part VI.E.

The fifth stage involved a discussion between the lawyers to plan for dispute resolution in the operation of the business. The case involves uncertainty and differences in perspectives that could easily lead to disputes in the operation of a new business. In this discussion, students anticipated types of disputes that may arise, planned ways to manage the disputes informally, and considered dispute resolution provisions for the partnership agreement. We used an “improv” format, beginning with conversations between two lawyers on the same side, where one student played a lawyer handling the case who sought advice from another student, who played a senior partner in the same firm. After these preparatory scenes, lawyers from both sides met to plan dispute prevention and management.

The sixth stage was the final negotiation and the following class was devoted to debriefing the simulation.⁴⁷

A major advantage of multi-stage simulations⁴⁸ is that they help students get a more realistic feel for how negotiation typically unfolds from the outset of a matter, as described in Part III. Moreover, I think that students generally played their roles much more realistically because they developed a complex network of relationships *in role* over several weeks. Students playing lawyers generally demonstrated an appropriate mix of professionalism, advocacy, and cooperation.⁴⁹ One student in the focus group said that the multi-stage simulations made him feel “more like a lawyer” than in the single-stage simulations as he was more focused on the future

⁴⁷For more information about the simulation, see Resources for Legal Education, Univ. of Missouri School of Law Center for the Study of Dispute Resolution, [Multi-Stage Partnership Negotiation Simulation](#).

⁴⁸The multi-stage simulations in the FLDR course had a similar structure as the Negotiation course, though with some variations. One simulation involved a contentious child custody dispute that was mediated and the other simulation involved a dispute over child support and division of property. The custody case included a stage where the lawyers met with the judge in chambers to discuss the report of a child custody evaluator.

⁴⁹We frequently discussed how the lawyers’ posture toward the other side affected their clients’ interests. Students playing lawyers really “got” that it was normally in their clients’ interests to cooperate with the other side, while simultaneously making sure that they protected their clients’ interests in the process. It is generally very hard to convey how challenging it is to manage this tension in practice; using the multi-stage simulations was particularly effective in doing so.

ramifications of his actions instead thinking about only one thing in the single-stage simulations that would end in a short time.

The added realism was particularly helpful for students playing clients as they generally took on the emotions and relationships of their roles much more than they normally do in single-stage simulations. For example, in the simulation of the probate dispute, students playing the clients really seemed to enact the hurt, anger, and resentment one might expect in real life and the dynamics of the apologies (or lack thereof) made a huge difference in the way the process unfolded.⁵⁰ This is particularly noteworthy considering my experience that many law students pooh-pooh the significance of relationships, emotions, and apologies in legal cases.

In addition, multi-stage simulations also helped students focus on discrete elements of negotiation that would not otherwise be addressed. For example, students developed a real appreciation of the importance of lawyers' relationships with their clients and counterpart lawyers.

The major disadvantage of using multi-stage simulations is that they take more class time than single-stage simulations. Increasing the amount of time devoted to multi-stage simulations may reduce the amount of other material covered in the course.⁵¹ In addition, there are few multi-stage simulations available and it can require more time to develop multi-stage simulation materials. Moreover, if a student's participation in a multi-stage simulation is problematic, this increases the risk that the other students in the group will have a poor learning experience.

A general problem for all types of simulations is that law students may have a hard time getting out of a law student mindset enough to play clients and this can be particularly challenging at the end of a semester because they are too familiar with each other.⁵² Although this may lead

⁵⁰In a self-assessment after the simulation, one student wrote, "Trying to get into the role was tough, but as time went on, I felt myself becom[ing] more and more attached to what [my character] would want in the mediation."

⁵¹Comparing single-stage and multi-stage simulations is somewhat analogous to comparing climactic scenes in a movie or the entire movie. Watching only scenes, one can see a greater number and variety of movies but never see the full character or plot development of a whole movie. Of course, in simulations, students are active participants, not passive observers.

⁵²Students in the focus group said that they noticed the same problem for students in their trial practice course, where students had a hard time playing roles

students to act excessively cooperative, some students may develop personal antagonisms that could also reduce the value of later simulations. In my classes, students did not seem to act excessively cooperative, especially in the multi-stage simulations, where they seemed to display a realistic range of negotiation postures depending on the circumstances. To avoid this potential problem, faculty could recruit law students from other classes, theater students, or even paid actors to play the role of clients. This approach presents the risks, however, that the “clients” will not perform well. It also deprives students in the course of the opportunity to play the clients’ role, which is an important opportunity to learn how it feels to be on the receiving end of legal services and what techniques may or may not be particularly desirable. Students in the focus group suggested that repeated reminders about getting into the client role could help, especially if done in connection with a brief silent time for students to get into their roles.⁵³

VI. OTHER ELEMENTS OF THE COURSES

Although I think that the use of a combination of different types of simulations in these courses was generally very effective in both semesters, there were mixed results from other elements of the courses in the Spring semester. In hindsight, I included too many elements during the Spring semester and the cumulative effect of all the elements was problematic. In the Fall semester, I eliminated many of these elements, focusing instead on those elements that would meet my highest priority goals. This Part describes the elements I used in both semesters and my assessment of how well each one worked.

A. Learning Plans and Major Projects

In general, I think that law schools train students to be too reactive to graduation and course requirements and, as a result, many students do not take much responsibility for planning their legal educations beyond picking

other than lawyers.

⁵³For description of the process of having students close their eyes for a minute of silence before doing a simulated task, see *infra* Part VI.D.

courses and complying with requirements.⁵⁴ To prompt students to take more responsibility for directing their own learning, in my Spring courses, students were required to develop one-page learning plans. The plans specified what students wanted to learn in the course and identified a project that would help achieve their goals. The instructions for the assignment included long lists of knowledge and skills related to negotiation to illustrate possible goals for students to focus on, though students were invited to propose goals that were not on the lists. The instructions also suggested types of possible projects, though students were free to propose other projects that were not specifically identified. In any case, the projects were to include an analysis demonstrating how the projects helped achieve the students' goals. Students were also required to submit overall self-assessments at the end of the semester describing what they learned through the simulations and their individual projects and how well the students achieved their course goals.

Students undertook various types of projects, which seemed mostly unrelated to their stated learning goals. Most students seemed to treat the assignment as just another course requirement, which they would hopefully find interesting and would hopefully earn a good grade.⁵⁵ In fact, I have doubts about how much the projects added to the students' learning about negotiation or lawyering generally. The quality of the projects and overall course self-assessments varied greatly. Many students said that they did not understand what they were expected to do. Considering that the instructions

⁵⁴Law schools can encourage students to take more responsibility for planning their educations by using a system of portfolios, starting from their first year, to develop individualized learning plans based on their career goals. See generally Deborah Jones Merritt, *Pedagogy, Progress, and Portfolios*, 25 OHIO ST. J. ON DISP. RESOL. 7 (2010). For discussion of portfolios in negotiation courses, see Michelle LeBaron, *Portfolio Evaluation: Kaleidoscopic Insights Into Learning Effectiveness and Change*, in *ASSESSING OUR STUDENTS, ASSESSING OURSELVES* 283 (Noam Ebner et al. eds., 2012).

⁵⁵The most common type of project was writing simulations, which dealt with a personal injury case, plea bargaining, contract negotiation, sustainable development, and real estate disputes. Some students interviewed lawyers about negotiation tactics, reputations, and managing client expectations. One student analyzed three actual negotiations that he observed in his job. Students wrote research papers on developing a negotiation strategy for salary negotiation and the use of humor in negotiation. One student developed interview and survey instruments for getting input from clients before and after representing them. Another student developed a website design for a law office.

were quite detailed and I answered students' questions, I interpreted students' confusion as a reflection that this was very different from the expectations in other courses. Many of the students were in their last semester of law school and I suspect that some had little motivation to do anything unusual at that point in their law school careers. Indeed, some students said that they would have preferred a single standard assignment, perhaps so that they would have more confidence in the fairness of the grading. If the law school culture generally promoted more student initiative, perhaps my students might have responded differently. Part of these students' responses may be related to the fact that many students felt frustrated by the total amount of assignments and they may not have invested as much care as if they were not so frustrated.

I have come to believe that one of the most important things law schools should do is to teach students to "learn to learn."⁵⁶ It is impossible to teach students all the knowledge and skills they will need in practice and so it is important to prepare them to continue to learn throughout their careers. This seems particularly important in developing skills, which requires careful self-reflection. Promoting the process of learning to learn became my highest priority goal for this course.

In the Fall semester, I did not require students to submit learning plans or to specify learning goals or individualized projects. Nor were the students required to submit an overall assessment of what they learned in the course. Instead, the major assignments were assessments of simulation interactions.⁵⁷ During the third week of class, each student submitted a 4-5 page assessment of a single-stage simulation and, at the end of the semester, a 12-15 page assessment based on one of the multi-stage simulations. The first assessment was worth 20% of the grade and the final assessment was worth 60% of the

⁵⁶See Melissa L. Nelken et al., *Negotiating Learning Environments*, in *RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE* 199, 223-26 (Christopher Honeyman et al. eds., 2009) (emphasizing the importance of "learning to reflect on one's own *learning processes* (or "metacognition")").

⁵⁷These assignments are sometimes called "journals," a term I avoid because it suggests that students write a stream-of-consciousness diary rather than the structured analysis that I prefer. For an overview of using these assignments in negotiation courses, see Bobbi McAdoo, *Reflective Journal Assignments in Teaching Negotiation*, in *ASSESSING OUR STUDENTS, ASSESSING OURSELVES* 65 (Noam Ebner et al. eds., 2012). See also Charles R. Craver, *The Benefits to be Derived from Post-Negotiation Assessments*, 14 *CARDOZO J. CONFLICT RESOL.* 1 (2012).

grade (with the remaining 20% based on course participation). The purpose of the assignments was for students to practice self-analysis by reflecting on what they learned from a simulation about negotiation and/or themselves as negotiators. I provided instructions emphasizing that students should focus on a small number of challenging and important issues in depth rather than providing superficial description of a larger number of issues. Challenging issues were defined as those with more than one plausible way to handle the issue. The instructions encouraged students to candidly analyze the interactions, informing them that they would receive better grades for a candid and insightful analysis of problems than for a superficial presentation that avoided real analysis of problems. The instructions also required students to relate their analysis to some material from the negotiation literature.

Although students had some questions about what was expected and expressed some uncertainty about this, they generally figured out what was required. Indeed, the papers were some of the best I have ever received, ranging from pretty good to outstanding. This was probably due to the relative clarity of the assignment and the fact that students were very engaged in the simulations and readily found interesting issues to discuss. The papers focused on challenging experiences such as maintaining appropriate relationships with clients and counterpart lawyers, managing expectations, dealing with difficult emotions, developing trust, managing an exchange of apologies, managing client participation in negotiation, and choosing a negotiation approach. I was very impressed by the quality of students' introspection and pleased to read several papers describing students' surprise that they learned more than they expected at the beginning of the semester. This was a sharp contrast from my assessment of the learning generated by the major projects in the Spring semester.

Some students in the focus group said that they had a hard time filling 12-15 pages for the final self-assessment. Although some students did an excellent job without seeming to "pad" their papers, the focus group reaction may reflect a general discomfort writing papers of this length. Students in the focus group liked the idea of dividing a single large paper assignment into two shorter papers, which has the added benefit of providing additional feedback during the semester (though this obviously requires more faculty time). Students liked the idea of posting a good sample paper to give them ideas how to write their papers.

In the Fall semester, I also offered students the opportunity to write optional extra-credit papers to provide incentives for students who wanted to learn more about negotiation. If students wanted to write an extra-credit

paper, they needed to submit a proposal by a certain date in the middle of the semester. By submitting a proposal, students did not commit to writing a paper but they would be precluded from submitting one if they did not submit a proposal. Four students submitted proposals and one student submitted an extra-credit paper.

B. Course Rules, Reputation Goals, and Reputation Survey

I have participated in discussions with colleagues around the country about promoting ethical behavior in negotiation classes and heard how some faculty use reputation surveys to simulate the effects of social norms on lawyers' behavior. Some faculty conduct surveys of students at the end of the semester about the trustworthiness of their classmates, and some faculty use the survey results in assigning a small part of the students' grades.⁵⁸ In my Spring semester courses, I wanted to develop social norms from the outset of the course and use those norms in a survey at the end of the semester. At the beginning of those courses, students were assigned to write short paragraphs about (1) how they wanted other lawyers to think of them, (2) how their reputations would affect their interactions with lawyers, and (3) what they might do to generate their desired reputations. Students gave excellent responses, with the most common items including variations of being perceived as professional, competent, hard-working, well-prepared, reliable, timely, effective, firm, fair, reasonable, cooperative, dedicated to their clients' interests, respectful, respected, honest, and pragmatic. We had a very good class discussion about the importance of lawyers' reputations.

At the end of the semester, each student was required to confidentially nominate the two classmates whom they believed excelled in each of the following three categories: (1) acting professional, (2) acting appropriately firm, and (3) acting fair, reasonable, and cooperative.⁵⁹ They were required

⁵⁸For discussion of the use of reputation indexes, see Nancy A. Welsh, *Making Reputation Salient: Using the Reputation Index with Law Students*, in *ASSESSING OUR STUDENTS, ASSESSING OURSELVES* 173 (Noam Ebner et al. eds., 2012).

⁵⁹I did not ask students to indicate students who they thought acted problematically as I did not get the sense that students acted unethically or inappropriately. Although we discussed outcomes of negotiations, this was not the primary focus and students' grades were not based on the negotiation outcomes. So I think that students were not primed to act unethically. Students in the focus group

to write one or two sentences explaining specifically what the student did that prompted the nomination. Students gave very thoughtful comments and I think that the exercise was useful for all the students as it led them to reflect on their classmates' performances. I created a spreadsheet their responses and tallied the number of nominations of each student in each category. Although I collected only positive information, I did not want to provide the information to students who did not want it. So I told students that I would be happy to provide it if requested. No one requested it, perhaps because they were focused on other things at the end of the semester.

Considering that I had invested a lot of time compiling the responses with little student interest, I decided not to repeat the survey in the Fall semester. The lack of response suggested that students did not value getting such information and it was not worth my time to collect and distribute it. It turned out that students in my focus group from the Fall semester wished that they had received both positive and critical feedback from their classmates. They said that they had gotten such feedback in a trial practice course and found it to be extremely valuable – especially feedback pointing out their behaviors that they were not aware of.

For the Spring courses, I developed a set of course rules, adapted from the Model Rules of Professional Conduct. I planned to have students do some of the simulations outside of class and I focused the rules on diligently performing the simulations. A secondary purpose was to remind students about obligations of truthfulness in the simulations, to supplement the reputational pressure. On the first day of class, I reviewed the rules, took an oath to administer them fairly, and had the students stand and take an oath to follow the rules. Although I think that this is an intriguing idea, I suspect that it did not have much effect on students' behavior as typical student concerns may have taken precedence in their minds, if they remembered the oath at all. In a mid-semester feedback survey, most students said that they did not think that the course rules or emphasis on professionalism was helpful. In the Fall class, I omitted the course rules in an effort to streamline the course, especially since I decided to do all the simulations during regular class periods.

said that they did not think that any students in their class acted unethically, though this may have been partially due to the fact that so many of the students knew each other before the course.

C. Letter to Clients and Law Firm Webpages

For lawyers to negotiate effectively, it is very important that they have good relationships with their clients. Of course, lawyers differ in their approaches and I wanted students to develop approaches fitting their own personalities and philosophies. In the Spring semester, students were required to write approximately two double-spaced pages of material for a website or a general letter to clients explaining their philosophy of practice. I thought that this was a valuable exercise because it prompted students to think seriously about how they might communicate effectively with prospective clients to help set appropriate expectations. The instructions noted that the lawyer-client relationship depends on negotiation as lawyers need clients who are willing to hire them and continue to retain them if they go through difficult times together in their cases. So the assignment prompted students to think about what they could say that would make potential clients want to hire them and work together successfully. For example, lawyers might want to highlight legal knowledge, competence, integrity, or other qualities. The instructions pointed to examples in the reading assignment to stimulate their thinking. In the Fall semester, I did not require students to do this assignment because I was limiting the requirements and this was not a high enough priority for me. But I think it is a good exercise and if I were to do it again, I would require students to write a law firm website homepage after looking at actual law firm websites.

D. Simulation and Assessment Procedures

Students did exercises in almost all of the classes and I developed some routines relating to them.⁶⁰ Typically, we would start by discussing the theoretical issues and then the students' goals in the simulation. In the middle of the Fall semester, I started instructing students to close their eyes

⁶⁰In one of the only classes in which we did not do simulations, we focused on legal ethics by focusing on the "DONS" case, in which a client asks his lawyer to take various actions to misrepresent the facts during a negotiation. The fact pattern is based on a popular simulation and was the basis of a study by Professors Art Hinshaw and Jess Alberts. See Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95 (2011). I asked students what they would do in the situations and we discussed the results of the Hinshaw and Alberts survey. This class worked very well.

for 30 to 60 seconds before we started the simulation and think about the task they were about to perform. I did this to help students get into their roles, especially when they were playing people with very different experiences than theirs and especially when playing clients (as opposed to lawyers). For example, one simulation illustrating cultural differences involves a Chinese-American senior partner in a Seattle law firm who is negotiating a high-tech licensing deal with a hotshot senior associate who works in a Texas law firm. As one might expect, many students had problems imagining the perspective of the senior Chinese-American lawyer. I wanted students to develop a habit of mental preparation and I took time for this reflection before most of the simulations. Toward the end of the semester, I asked if students found this to be helpful. Although many students did not seem to feel strongly that it helped, when I asked whether to continue the practice, almost all indicated that I should do so. Students in the focus group suggested that, before starting the period of silent reflection, it would help to give a specific suggestion for students to try to get into the role of the client rather than lawyer or law student.

To help students develop a habit of learning to learn, I developed a routine of having students complete one-page assessment forms after virtually every simulation so that they would develop a habit of reflection. The forms varied somewhat depending on the simulation, but they generally asked students: (1) if they reached agreement, (2) what was especially important in leading to or preventing agreement, (3) what they might have done to overcome barriers to agreement, (4) how satisfied they were with the result, (5) how satisfied they were with the negotiation process, (6) how well they performed overall, (7) what they did particularly well in the negotiation, and (8) what they might do differently in the future. I would generally give them several minutes to complete the forms and then debrief the simulation in a class discussion, focusing on some of these issues. Students kept these debriefing forms for their own records and did not submit them to me. I encouraged them to use these forms when writing the assessments that they submitted as their final paper, described above in Part V.A. Although I got mixed reactions from students about the usefulness of these brief self-assessments, I think they are worthwhile and plan to continue using them. I will remind students that many students have found this practice to be valuable and that the amount of value they receive depends on how much effort they invest.

E. Documents Prepared for Multi-Stage Simulations

In most U.S. law schools, students can graduate without ever having seen basic legal documents (such as complaints, motions, contracts, wills, mediation memos, and settlement agreements) let alone having drafted them. This is a significant shortcoming in legal education and I wanted to address it in my courses. In the multi-stage simulations during the Spring semester, students were assigned to prepare a number of legal documents. In the Fall semester, I substantially reduced the number of documents students were assigned to prepare as described below.

In all the multi-stage simulations, the lawyers prepared a list of information they wanted to get following their initial client interviews. I wanted students to get into a fact-gathering mindset from the outset of the simulation. Students did not prepare formal discovery documents because I did not want to instruct students on discovery procedure or require students to spend too much time on this activity. Instead, they prepared lists of desired information that generally were a half a page to a full page. Some of the lists were pretty basic and others reflected more thought about an information gathering strategy. Although students in the focus group thought that this assignment was not particularly valuable, I still think that it was. In the future, I will probably spend more time in class before the assignment “priming the pump” by talking about what lawyers might want to know and after class discussing these issues.

In the Spring semester, the lawyers in the probate dispute prepared five-page legal memos analyzing the legal issues in the case, which was designed to prepare them to discuss the law with their counterparts in an improv simulation. Students took this assignment seriously and generally did a good job. To reduce students’ workloads, I did not assign them to prepare legal memos in the Fall semester.

In both the Spring and Fall semesters, the lawyers in the probate dispute prepared mediation memos for the mediators and their clients. I think that this is an important assignment because these documents can be important elements of mediation advocacy in real life and students are not likely to see them elsewhere in law school. It was also an important mechanism for informing the mediators about the case. The mediators were student volunteers and this provided a useful educational experience for them. I think that the memos helped students analyze the case and generally were pretty well done. In the future, however, I plan to have the students

engage in unmediated negotiation of the probate dispute⁶¹ and the lawyers will prepare negotiation plans instead of mediation memos, though the content will be very similar.

In both semesters, the lawyers in the partnership agreement simulation were assigned to prepare a memo for their files analyzing options for handling disputes in the partnership. The memos were designed to prepare students to have a discussion with their counterpart lawyers about handling disputes in an improv simulation. The memos discussed the dispute resolution options pretty generally and did not consider the clients' interests as much as I hoped. The class discussions of dispute resolution options were pretty good and I expect that they will still work well even if students do not write these memos. Instead, I plan to assign the lawyers in this simulation to develop negotiation plans because the planning process is generally so important and this would provide lawyers in both multi-stage simulations the opportunity to prepare them.

In the Spring semester, pairs of counterpart lawyers drafted settlement agreements in the probate case and partnership agreements in the restaurant case. I gave them citations to forms in online form books that they could adapt to create their settlement agreements. The instructions told students to plug in the relevant provisions, use relevant boilerplate language, and delete irrelevant boilerplate. I told them not to worry too much about crafting the language as my goal was primarily for them to have some experience working with these documents. Indeed, it appeared that they did not generally invest much time in preparing these documents, though there may not have been a lot more that they might have done. I did not include these assignments in the Fall semester, as part of my effort to streamline students' workload. I feel ambivalent about this. On one hand, I think it would be very appropriate in a Negotiation course for students to have some experience drafting agreements. On the other hand, I am not sure how much students learned from this experience and whether it is a high enough priority to include the course.

⁶¹As described above, the experience using student mediators reflected the difficulty in controlling the mediators' performance and providing a good experience for the Negotiation students. *See supra* note 43.

F. Readings and Quizzes

I tried to keep the reading assignments to a minimum as I wanted the courses to focus primarily on developing skills rather than a deeper understanding of negotiation theory. The first half of the course focused on a series of discrete topics including theories of negotiation; ethics and law of negotiation; identity, emotions, and culture; trust and persuasion; power; justice; apologies; and handling problems in negotiation. Many of the reading assignments were short articles from an excellent symposium issue of the *Marquette Law Review* on the canon of negotiation.⁶² Most of the reading assignments for the second half of the course, when we did the multi-stage simulations, were from my book, *Lawyering with Planned Early Negotiation*.⁶³ For almost half of the classes, there was no reading assignment at all.

In law student culture, many students do not do reading assignments if they feel that they can get away with it. Obviously, students do not learn as much if they do not do the readings. And if it becomes apparent that a substantial number of students do not do so, it sends a signal to other students that they are foolish to read the assigned readings, possibly discouraging them from doing so. Some faculty call on students without warning to create an incentive for students to do the required reading and avoid embarrassment. I generally am uncomfortable with that approach and it is not effective when students can provide some plausible response without doing the readings as was often the case in my Negotiation courses. As the Spring semester proceeded, it appeared that a declining proportion of students completed the reading assignment. One day in class, I gave a one-question ungraded quiz that anyone who did the reading could have answered easily. Slightly more than half the class could not answer the question.

For the Fall semester, I decided to regularly use ungraded quizzes. The syllabus described the quizzes, stating that the purposes were to help identify what they learned from the readings, prepare them to discuss issues

⁶²See generally Christopher Honeyman & Andrea K. Schneider, *Catching Up with the Major-General: The Need for a "Canon" of Negotiation*, 87 MARQ. L. REV. 637 (2004).

⁶³LANDE, *supra* note 5.

in class, and motivate them to do the readings.⁶⁴ The syllabus stated that students' performance generally would not affect their grades, though repeated unusually good answers or inability to answer appropriately could affect their grades. This system worked very well. I gave about eight quizzes, which usually were a single question that could be answered easily in one or two sentences if the students had done the reading. Typically, the questions asked things like something in the reading assignment that would be most helpful in negotiation or the definition of the central concept in the reading. In the future, I may ask students to describe how they could apply concepts from the reading. Several students questioned the value of some readings (which I am convinced were very valuable), so this question may prompt them to think more about the applicability of the readings. Immediately after I collected students' answers, we had generally very good discussions in class. I read the answers after class and they gave me a good feel for what students got out of the readings.

In the second and third quizzes in the Fall semester, a quarter or a third of the students had not done the readings. I emphasized the importance of the readings and that students' grades could be affected if they repeatedly could not answer the questions. In some classes, I alerted students that there might be a quiz coming up, which may have prompted them to do the readings. Virtually all of the students were able to answer the questions in the rest of the quizzes. Students seemed to do virtually all of the readings, which led to better class discussions. So I think that this system of quizzes worked very well.

To my surprise, students in the focus group said that they liked the quizzes as it prompted them to do the reading. This suggests that they valued the readings but would not have done as much of the reading without the quizzes. They said that their satisfaction was related to the fact that the questions were reasonable – not specific “gotcha” questions – and that students were not penalized if they did not do the readings once or twice. They also appreciated my warnings that a quiz might be coming soon.

⁶⁴For a general discussion of quizzes in negotiation courses, see Noam Ebner & Yael Efron, *Pop Quiz: Do You Use This Evaluation Method?*, in *ASSESSING OUR STUDENTS, ASSESSING OURSELVES* 43 (Noam Ebner et al. eds., 2012) (focusing on quizzes designed to test objective knowledge).

G. Grading

Grading is one of my least favorite tasks in teaching, probably similar to most other faculty. It is very hard to validly reduce an evaluation of complex performance into a single score.⁶⁵ In law school culture, grades take on huge significance. Sometimes minute differences in grade point averages, can make a big difference in students' employment opportunities. Although grades in a particular course generally do not have such a practical effect, they can have a huge emotional power over law students' self-esteem. So I try to be as fair as I can, which puts emotional pressure on me as well.

In negotiation courses, faculty can base grades on several types of elements including negotiation knowledge, outcomes, skill, and learning. As described in Part VI.A, I have focused on measuring students' learning, primarily through end-of-semester papers. Although assigning students to choose their own learning goals and activities made sense in theory, it did not seem to work well in practice in the Spring semester. By contrast, students did much better in the Fall semester by writing assessments of their negotiation experiences using a somewhat standard set of directions. In particular, this assignment called on students to reflect on their own learning, advancing my primary goal of teaching students to learn to learn about negotiation. Fortunately, this approach seemed to work well, as the other approaches are problematic for me.

Although I would love for students to develop a lot of knowledge about negotiation theory and practice as reflected in the scholarly and practical literature, this is a low priority for me in a law school negotiation course. I think that students need as much practical training as we can provide given the current structure of the curriculum, which is heavily weighted toward acquisition of knowledge.

Some faculty base a portion of the grade on the outcome of simulations, so that students who negotiate more favorable agreements get higher grades. A variation of this approach is that some faculty base part of a grade on students' reputations with their classmates, as reflected by a survey conducted at the end of the semester.⁶⁶ These approaches are intended to

⁶⁵For an overview of evaluation in negotiation courses, see Noam Ebner, Yael Efron, & Kimberlee K. Kovach, *Evaluating Our Evaluation: Rethinking Student Assessment in Negotiation Courses*, in *ASSESSING OUR STUDENTS, ASSESSING OURSELVES* 19 (Noam Ebner et al. eds., 2012).

⁶⁶For description of reputation indexes, see *supra* Part VI.B.

simulate the importance of outcomes in real life and create incentives for students to improve their performance. Although I appreciate the goals of these approaches, I would not feel comfortable using them. Students' performances would be affected by their classmates' performances and reports of interactions related to reputations, which may not lead to valid measures of students' performances. Indeed, it feels as if it partially delegates an important faculty function to students, which feels very uncomfortable for me. I think that it also creates an incentive for students to focus too much on negotiation outcomes compared with other important elements of their performance.

In theory, I am much more comfortable evaluating students' skills and techniques. Indeed, much of the class discussion focuses on this and I think that students learn a lot about the likely effects of various negotiation tactics. I am wary, however, about basing students' grades on their demonstrated skill because I have doubts that I can provide valid and fair assessments. For one thing, there are many different skills involved in negotiation, including listening, questioning, counseling, developing rapport and trust with clients and counterpart lawyers, getting others to agree to negotiate, analyzing negotiation issues, developing and implementing effective negotiation strategies, overcoming barriers to agreement, avoiding common errors in negotiation, and dealing with cultural and other differences, to name a few. Assessing these skills involves a great deal of subjective judgment, with significant differences in philosophy within the field. I normally see only brief interactions in negotiation simulations, without getting the full context of the negotiation. Some faculty have students videotape their performance, which is an improvement, though it can lack context and also vary greatly depending on the actions of the other students in the simulation.

I compare the process of evaluating students' negotiation performances with the system used by university voice teachers, like my wife, Ann Harrell. At the end of the semester, music students give performances that are evaluated by a "jury" consisting of a panel of faculty. During the semester, students prepare specifically for these performances, which are not affected by the vagaries of other students' actions. Although I am told that this grading process has its imperfections, I think that it is much closer to an appropriate grading process than observations of student negotiations, even

by video. Watching videos is very time-consuming and, considering my lack of confidence in the resulting grades, does not seem worth the time.⁶⁷

I did not grade the documents that students produced for the multi-stage simulations⁶⁸ and I feel somewhat ambivalent about this. I wanted to take the pressure off students from having too many graded performances, give them a “taste” of certain tasks without going into depth, and replicate the fact of life that they will have to do many tasks in practice that are part of their work but do not get particular evaluation. I had not provided specific training or evaluation criteria for the tasks and so it would have seemed unfair to grade students on them. I have gotten mixed reactions from students about not grading these assignments. Some students appreciated the relief from having to do additional graded performances whereas others felt disappointed that they did not get “compensation” for their hard work or that they did not get individual feedback.

VI. CONCLUSION

Several years ago, at the Legal Educators’ Colloquium in the ABA Section of Dispute Resolution’s annual conference, I was on a panel with Professors Michael Moffitt and Nancy Welsh. I presented the argument from the article I co-authored with Professor Jean Sternlight recommending that faculty who specialize in dispute resolution should help colleagues teaching doctrinal courses to incorporate more practical problem-solving instruction in their courses.⁶⁹ Michael and Nancy spoke after I did, noting that most people in that audience probably agreed that faculty teaching doctrinal courses should change their instruction. They challenged the audience by

⁶⁷For a discussion of use of videotapes in negotiation courses, see Melissa Manwaring & Kimberlee K. Kovach, *Using Video Recordings: A Mirror and a Window on Student Negotiation*, in *ASSESSING OUR STUDENTS, ASSESSING OURSELVES* 95 (Noam Ebner et al. eds., 2012).

⁶⁸The syllabus addresses this as follows: “You will be required to submit some material that is not specifically graded, though unusually good or poor submissions may affect your grade. You will sometimes receive feedback about students’ performance as a group. I will be happy to provide individual feedback on your work on request.” For a description of the documents produced during the multi-stage simulations, see *supra* Part VI.E.

⁶⁹See Lande & Sternlight, *supra* note 4. The LEAPS Project was organized to promote these ideas. See *supra* note 4.

asking whether dispute resolution faculty should incorporate more doctrinal material in *our* courses, which sparked a spirited discussion with sharply differing views.

The ideas that Michael, Nancy, Jean, and I proposed are designed to advance this same goal – to better prepare law students for the real world of legal practice – but coming from different directions. Traditional doctrinal courses would incorporate more practical problem-solving instruction and dispute resolution courses would incorporate more elements from traditional legal practice.

Students are likely to learn a lot about actual legal practice by incorporating in dispute resolution courses various legal tasks such as interviewing, counseling, conducting factual investigation, and planning procedures in managing their cases. These tasks involve generic skills that are readily transferable from one area to another.⁷⁰ They provide opportunities for students to work closely with clients and counterpart lawyers to get a more realistic feel of what it is like to act like a lawyer – and also be on the receiving end of legal services. This was the primary focus of the multi-stage simulations, which worked extremely well.

While it is easy to imagine innovations in legal education, actually implementing them can be very hard, even on the course level (where faculty have great discretion) as opposed to making changes in a law school curriculum generally.⁷¹ Faculty who have taught particular courses a number of times may feel comfortable with their approaches and see little need for change. Changing a course is likely to require additional time and effort, competing with other claims on faculty's time. In particular, faculty

⁷⁰Another option is for faculty teaching dispute resolution courses to include legal doctrine in particular areas such as family law, commercial law, probate, or virtually any other subject area. This would enable students to incorporate more legal analysis in practicing dispute resolution skills. The benefit of this approach may be limited if the course does not generally focus on that particular area. For example, if a general negotiation course requires students to work with, say, family law doctrine, including a substantial amount of family law doctrine into the simulations is likely to have limited value for students with little background or interest in family law. Of course, some of the learning about using legal doctrine would be transferable to other areas of the law, though the benefit may be limited.

⁷¹For discussion of barriers to curricular reform, see Lande & Sternlight, *supra* note 4, at 269-75.

generally feel strong pressures to make scholarship a top priority throughout their careers, leaving less time to focus on their teaching. The Legal Education, ADR, and Problem-Solving (LEAPS) Project identified many reasons why faculty teaching doctrinal courses may be reluctant to incorporate more practical problem-solving in their courses.⁷² Faculty who teach dispute resolution courses may have comparable concerns about incorporating more legal tasks in their courses. The LEAPS Project recommended various strategies for faculty teaching doctrinal courses to address these concerns, many of which are relevant to faculty teaching dispute resolution courses as well. These include starting by making small changes, getting help from colleagues at their own schools or other schools, taking advantage of materials produced by others, seeking support from their dean to develop new materials, and developing appropriate assessment methods, among others.⁷³

The time is ripe for legal educational reform, in part because of demands from legal employers that law schools train “practice-ready” graduates as well as law schools’ competition to attract students who demand increased practical training.⁷⁴ In response to these pressures, many schools are adopting changes to improve their graduates’ ability to practice law soon after graduation. As dispute resolution has become increasingly institutionalized in law school curricula, faculty teaching dispute resolution

⁷²See LEAPS Project, A.B.A., [Overcoming Barriers to Teaching “Practical Problem-Solving”](#), *supra* note 4.

⁷³*See id.*

⁷⁴Professor A. Benjamin Spencer summarizes a widespread view that the American system of legal education is facing a “perfect storm” of challenges:

Legal education is under attack. The value of a law degree is being questioned given the deterioration of the traditional legal job market and the substantial and growing size of the student loan debt of recent graduates. Further, law schools are being charged with failing to prepare their graduates adequately for practice. Thus, we have what appears to be a perfect storm in legal education: Law school graduates are under-employed, over-indebted, and under-prepared for practice.

A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1951-53 (2012) (footnotes omitted).

have the opportunity to make important contributions to the larger project of preparing law students to serve their clients most effectively. The experiments in teaching my negotiation courses described in this article were designed to advance that goal. I hope that other faculty will find value in these efforts and build upon them.