A HYBRID MODEL FOR TEACHING SETTLEMENT SKILLS

Debra Berman* and Catherine Greene Burnett**

ABSTRACT

For decades, legal educators have grappled with ensuring that law school curriculum continues to fulfill its foundational role in a student's life-long legal education while adjusting to evolving learning expectations and needs. Educators weigh several educational goals when developing curriculum and focus on three major learning categories: doctrinal knowledge, skills and competencies, and values and professionalism. This Article addresses the tension between authentic experience and ensuring skills development in creating Alternative Dispute Resolution (ADR) curriculum for law students. ADR classes provide educators an opportunity to emphasize the development of specific skillsets through controlled simulated environments whereas clinics or competitions may offer more "real-world" experiences at the cost of a professor's ability to foster skills development. This Article advocates for a hybrid approach to ADR curriculum which combines traditional simulation experiences with traditional clinical experiences. The Authors are not advocating for the elimination of traditional in-class simulations but instead propose that their proposed system can serve as an enhancement to simulated experiences. The Authors argue that a hybrid approach will fill the holes in ADR curriculum by providing meaningful opportunities for real-world settlement practice that simulation classes frequently lack while fostering skills development in ways clinics and competitions typically do not.

INTRODUCTION

For more than fifty years, legal educators have explored what a law school curriculum must entail to fulfill its role as the critical foundation in the continuum of life-long legal education.[1] At the most basic level, these goals center on considerations of what we want law school graduates to know, to do,[2] and to be.[3] We frequently group these considerations into three major buckets: doctrinal knowledge, skills and competencies, and values and professionalism. Simultaneously, the past half-century has seen us explore options that would best realize these goals—to identify the most effective delivery methods[4] and, more recently, to meet a new generation of law students where they stand as adult learners weaned on a digital world.[5]

---

* Professor of Law and Director of the Frank Evans Center for Conflict Resolution at South Texas College of Law Houston.

** Professor of Law and Dean for Experiential Education at South Texas College of Law Houston.

1. AM. BAR ASS'N SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM*, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP *265* (1992) [hereinafter *MACCRATE REPORT*].

2. *Id.* at 135 (listing ten "fundamental lawyering skills": problem-solving; legal and analysis and reasoning; legal research; factual investigation; oral and written communication; counseling; negotiation; understanding the procedures of litigation and alternative dispute; organization and management of legal work; and recognizing and resolving ethical dilemmas); Marjorie M. Schultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 L. & SOC. INQUIRY 620, 630 (2011) (listing twenty-six factors identified as most important for lawyering effectiveness); DEBORAH JONES MERRITT & LOGAN CORNETT, BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE (2020); ALLI GERKMAN & LOGAN CORNETT, FOUNDATIONS FOR PRACTICE: THE WHOLE LAWYER AND THE CHARACTER QUOTIENT 29 (2016) (Executive summary of national, multiyear survey designed to clarify the legal skills, professional competencies and characteristics that make lawyers successful).

3. MACCRATE REPORT, *supra* note 1, at 140-41 (linking the following core values to fundamental lawyering skills: providing competent representation; striving to promote justice, fairness and morality; maintaining and striving to improve the legal profession; and professional self-development).

4. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT] (following an intensive two-year study of American and Canadian law school teaching and student learning). When contrasted with medical profession training, the report found that legal education typically paid relatively little attention to direct training in professional practice. As a result, law students had fewer opportunities to think like an apprentice, novice practitioner and remained, instead, in "student" thinking mode. *Id.* at 6.

5. Christine Cerniglia Brown, *Professional Identity Formation: Working Backwards to Move the Profession Forward*, 61 LOY. L. REV. 313, 320-21 (2015) (noting the divide between millennials' status as digital natives and traditional use of casebook method). With each new generation of law students, there are more areas of difference between the student learner and the law school educator.

Historically, negotiation skills development takes place in the controlled setting of simulation classes as well as actual legal settings facilitated through clinics and field placement programs. It also takes place through participation in negotiation competitions, both within the law school and externally among schools,[6] whether as extracurricular or co-curricular activities.[7] Decades of thoughtful work have gone into creating controlled simulated environments within the traditional time and space that Alternative Dispute Resolution (ADR) classes allow. Through these simulations, countless students have gained valuable exposure to many facets associated with the art of settlement negotiation. Despite this valuable exposure, there are substantial constraints and limitations associated with the conventional format of teaching settlement skills through simulations.[8] In actual legal settings, clinics and related opportunities also provide students with very instructive experiences. However, professors' inability to control many aspects of these real-world student experiences exemplifies the constraints and limitations of using clinic-related experiences to foster skills development for settlement negotiations.[9] ADR competitions present many of the same limitations found in a semester-long ADR class, often with even less opportunity to scaffold skills development.

This article proposes a hybrid enhancement for the twenty-first-century law student—an enhancement to current learning platforms that combines attributes of the traditional simulation course with those of the traditional in-house clinic. The result? A model built on four pillars that provides authentic, real-world cases in a delivery format that mirrors contemporary practice environments. The four pillars around which we recommend

---

Kari Mercer Dalton, *Bridging the Digital Divide and Guiding the Millennial Generation's Research and Analysis*, 18 BARRY L. REV. 167, 174-77 (2012).

6. *E.g.*, *The ABA Negotiation Competition.*

7. Some law schools award academic credit for participation in external negotiation competitions. *E.g.*, *Negotiation Competition*, UNIV. OF GA. SCH. OF L., https://www.law.uga.edu/courses/negotiation-competition [https://perma.cc/9XF6-F7NE] (last visited July 2, 2022). With course credit often comes a different degree of professor and peer critiquing, coaching, assessing, skills scaffolding and expanded time horizon than found in strictly extracurricular competition efforts.

8. Much has been written on negotiation training and the benefits and limitations of simulations. The focus of this article, however, is on the specific subset of negotiations that concern dispute settlement as opposed to reaching consensus in transactional negotiations.

9. Paul F. Kirgis, *Hard Bargaining in the Classroom: Realistic Simulated Negotiations and Student Values*, 28 NEGOT. J. 93, 102 (2012) (noting that clinics are an inefficient way of teaching negotiation).

professors in simulation classes build their teaching would require students to:

1) Negotiate using multiple modes of communication outside the classroom over a period of time;
2) Negotiate real cases using actual court documents;
3) Negotiate with people outside of their class; and
4) Engage in thoughtful self-reflection.

We do not propose eliminating traditional face-to-face, in-class hypothetical simulations. Rather, we propose using these pillars to supplement standard simulations. Doing so can enhance existing classes because these elements work to foster an experience that is more representative of the way settlement discussions occur between attorneys every day. The first three elements represent the core substantive extensions we are advocating. The fourth element—thoughtful self-reflection—is not unique to course experiences that incorporate the three substantive elements. However, self-reflection based on an experience that includes the three substantive elements can help students better internalize attributes of the settlement negotiation process that they are more likely to encounter as practicing attorneys.

This article proceeds in three parts. First, we review the deficiencies in the more traditional simulation format that ADR courses often employ. With these limitations in mind, Part II provides an overview of two recent ADR initiatives designed to mitigate some of the limitations of traditional simulation experiences while maintaining the beneficial aspects of instructor control over the learning experience. In Part III, we review each of the recommended core elements in depth and how students responded to these after participating in each of the initiatives. Some concluding thoughts follow.

I. SIMULATION CONSTRAINTS AND LIMITATIONS

Hypothetical roleplays[10] have long been the go-to teaching tool for experiential courses.[11] Roleplays serve an important role in bridging theory to practice, and there is no doubt that roleplays can be effective. Increasingly, however, scholars and clinical educators have been thinking critically about methods for offering practical experiential opportunities in negotiation classes.[12] Some have questioned the efficacy of the standard roleplay and argued for a revamping and modernization of the roleplay due to the challenges they can pose.[13] In 2008, 2009, and again in 2011, negotiation scholars from around the world came together to discuss ways to redesign negotiation training. The participants compiled a comprehensive four-volume set of articles.[14] Several called for diversifying the teacher's toolbox by adding in multiple types of experiential learning and changing how roleplays are approached.[15] We agree and would argue that more authentic simulations should be used, particularly in settlement negotiation training, if one of the principal goals in using simulations is to provide real-life experiences.

10. "Roleplay" and "simulation" are used interchangeably in this article.

11. Nadia Alexander & Michelle LeBaron, *Death of the Role-Play*, in 1 RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE 179 (C. Honeyman et al. eds., 2009) [hereinafter RETHINKING NEGOTIATION TEACHING] (suggesting that "[u]sing role-plays in negotiation training has become as common as Santa at Christmas").

12. *See, e.g.*, John Lande, *Teaching Students to Negotiate Like a Lawyer*, 39 WASH. U. J.L. & POL'Y 109, 124-27 (2012).

13. *See, e.g.*, Alexander & LeBaron, *supra* note 11, at 186 (observing that participants often overly dramatize or exaggerate their roles which undermines the effectiveness of the experience for the whole group); *see also* Daniel Druckman & Noam Ebner, *Games, Claims, and New Frames: Rethinking the Use of Simulation in Negotiation Education*, 29 NEGOT. J. 61, 68 (2013) (noting that students may not be prepared, or they may over-identify with their roles to the detriment of the group); Daniel Druckman & Noam Ebner, *Enhancing Concept Learning: The Simulation Design Experience*, *in* 2 RETHINKING NEGOTIATION TEACHING: VENTURING BEYOND THE CLASSROOM [hereinafter Druckman & Ebner, *Simulation Design*].

14. *See* 1-4 RETHINKING NEGOTIATION TEACHING, *supra* note 11. Although the chapters primarily examined what is taught in executive style negotiation trainings with global audiences, the ideas are nonetheless transferable to law school settlement negotiation courses.

15. *See, e.g.*, Alexander & LeBaron, *supra* note 11, at 192-94 (listing twenty-one ways to improve roleplays); *see also* Noam Ebner & Kimberlee Kovach, *Simulation 2.0: The Resurrection*, *in* 2 RETHINKING NEGOTIATION TEACHING, *supra* note 13, at 252-62.

There are many ways to alter the traditional simulation model, each offering a range of potential benefits,[16] tied to the alteration's objectives. For purposes of the Model, the main objective is to create a framework that mimics real-world experiences to the greatest extent possible. Thus, the first step in designing the framework is to identify the ways that traditional in-class simulations are not representative of settlement negotiations and assess the potential consequences of these disconnects. That assessment provides the building blocks to design a potentially more optimal experience. The remainder of Part I reviews several limitations of the traditional in-class simulation and the ways that these limitations impact the educational value of these exercises. These limitations can include highly artificial timeframes, limited communication mediums, the way facts and litigation records are conveyed, and practice alongside or versus a group of people with similar training and against the backdrop of fairly fixed relational dynamics.

A. Time is Artificially Truncated

One constraint of an in-class simulation is the potential artificiality associated with the exercise's timing. In real world legal negotiations, participants certainly do not have unlimited time to reach a resolution; time is something that needs to be considered. However, in-class negotiation simulations often operate under very artificial time constraints in which parties may only have two hours or less to reach a resolution. Such a constraint can impact the negotiation process in different ways. From a problem-design perspective, it can impact the composition and complexity of the exercise, where a simulation designer might have to sacrifice more realistic aspects of the exercise because the negotiators have very limited time to reach a resolution. From the student perspective, the condensed timeline can impact strategic choices and objectives that they may have otherwise pursued in a more realistic setting. Certainly, there can be

16. *See* JOHN LANDE, SUGGESTIONS FOR USING MULTI-STAGE SIMULATIONS IN LAW SCHOOL COURSES (2014), *available at* https://ssrn.com/abstract=2236244 [https://perma.cc/8UHC-FPP5] (arguing for the use of multistage simulations, which better reflects the realities of legal negotiation); *see also* Druckman & Ebner, *Simulation Design*, *supra* note 13, at 272-76 (describing the benefits of involving students in drafting their own simulations).

particular skills-based benefits associated with a narrower time frame;[17] nevertheless, it creates significant potential for negotiation frameworks that do not comport to how negotiations often take place in practice.

B. Communication Channels are Restricted

Related to the impact of an overly constricted timeframe during in-class simulations is the manner and medium through which the negotiation is conducted. In-class simulations ordinarily require face-to-face negotiation interactions. The skills learned from face-to-face negotiations are unquestionably important and valuable. Nevertheless, they only represent a small percentage of the manner through which settlement negotiations are actually conducted in practice.[18] A significant percentage of negotiations partially or fully takes place via email, phone, video conferencing, or a combination of these.[19] In-class simulations simply fail to expose students to many of the mediums they will use when negotiating in practice.

C. Factual Basis Can Be Disconnected from Practice

Traditional simulation exercises often present the hypothetical facts in a narrative form, which once again does not typically comport to actual practice. Thus, one limitation of using in-class hypothetical simulations is that they do not accurately represent how attorneys acquire information about a case, nor how relevant facts and law are used to prepare for a negotiation or are presented during settlement discussions. Hypothetical narratives convey facts in an artificially streamlined form which can also impact the mindset of students. Even when students do their best to

17. For example, an exercise might have as its narrow learning objective: how to determine the negotiation agenda.

18. Noam Ebner et al., *You've Got Agreement: Negoti@ting via Email*, in RETHINKING NEGOTIATION TEACHING, *supra* note 11, at 89, 90-92 (finding that astonishing amounts of negotiation are now conducted by e-mail); *see also* Noam Ebner, *Negoti@ting via Email*, in THE NEGOTIATOR'S DESK REFERENCE 171, 172 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017) (noting that email negotiations have become "ubiquitous and unavoidable.").

19. KELD JENSEN & INT'L ASS. OF CONT. & COMM. MGMT., HOW TECH HAS DISRUPTED NEGOTIATION, AND WHAT TO DO ABOUT IT (2020), https://www.worldcc.com/Portals/IACCM/resources/files/11048_iaccm-tech-negotiation-article-v2.pdf [https://perma.cc/9KMH-AWCG] (surveying 700 negotiators globally about whether email was an effective medium for negotiation). The authors report that face-to-face contact is "almost dead." *Id.* at 1.

approach a hypothetical narrative as being indicative of a real-world experience, they know that it is not.

D. Relationship Dynamics are Distorted

Another potential constraint of the in-class simulation relates to the people that students are negotiating against—namely, other students in the class. Every student in a negotiation class presumably studies and practices the same type of negotiation style. During in-class simulations, they will inevitably negotiate against a student who is using the same style. As a result, in-class simulations may not expose students to the range of negotiating styles they will confront in practice. Moreover, students might have prior relationships with peers in their class, further exacerbating the artificiality of the experience and impacting the dynamics of their interactions. To be sure, attorneys in practice might also know their opposing counsel; certainly, knowing how to negotiate against someone with whom you have some sort of prior relationship is important. Nevertheless, negotiating against one's peers in an environment where both parties know they are involved in a negotiation with a classmate with whom they regularly interact is still a limitation.

In short, traditional in-class simulations suffer constraints and limitations that reduce the extent to which they represent settlement negotiations in practice.

II. RECENT ADR INITIATIVES CREATED TO ADDRESS THESE LIMITATIONS

Two recent innovative experiential ADR initiatives were developed with the goal of overcoming many of the limitations discussed above. The first initiative is the South Texas College of Law Houston Inter-School Negotiation Practicum ("Practicum"),[20] designed to incorporate all four of our recommended elements. The purpose of the Practicum is to provide students the opportunity to enhance their skills in an environment that more

20. *See* INTER-SCHOOL NEGOTIATION PRACTICUM, https://www.stcl.edu/academics/center-for-conflict-resolution/inter-school-negotiation-practicum/ [https://perma.cc/7PX7-2ZC5].

closely aligns with practice.[21] Since its inception in 2019, through the fall of 2022, almost 2,400 students from forty-four law schools have participated. On average, approximately 400-500 students participate each semester. The second experiential initiative is one that the ABA Section of Dispute Resolution Legal Education in Dispute Resolution ("LEDR") Committee created in 2021 to provide students in mediation clinics the opportunity to participate in a simulation with students from other schools.

A. The South Texas College of Law Inter-School Negotiation Practicum ("Practicum")

The Practicum is a fully centralized, cross-school, one-on-one settlement negotiation exercise. To counter the potential artificiality of narrative fact patterns, the Practicum uses the actual litigation documents of a real pending case. To understand the relevant facts and law, students must review a document library that could include a variety of motions, discovery documents, and other filings. Participants are paired with a student from another law school, typically from a different region of the country. This dynamic is used to expose students to relational dynamics that in-class simulations likely cannot provide. The paired participants must negotiate via email, phone, and video over a one-month period. These features were incorporated to address the time and medium constraints mentioned above. Students have complete autonomy in determining how many times to communicate overall, how many times to utilize each communication method, how to structure their negotiations, and which style to use. Additionally, student interactions are not being watched, judged, or formally scored, which is a significant difference between the Practicum, in class simulations, in-house clinic negotiations, and extracurricular ADR competitions.[22]

After the month-long negotiation, professors debrief the exercise in their classes. Students are required to complete a substantial post-negotiation questionnaire regarding their final agreement, first offer, justifications, negotiation strategy, preferred communication modes, and more. The questionnaire is the springboard for individual self-reflection.

21. Propositions regarding the South Texas College of Law Houston Inter-School Negotiation Practicum are based on Berman's supervisory role of the program since its inception in 2019.

22. *See id.*

After the questionnaire results are compiled, the data is provided to all participants and their professors. It includes, among other things, the average dollar settlement amounts, the most popular non-monetary agreements, preferences regarding communication modes, and examples of what students report they would have done differently.[23]

B. The ABA Clinical Cross-School Mediation Simulation

One of the authors of this article was co-chair of the LEDR committee and helped spearhead the initiative.[24] This Clinical Cross-School Mediation Simulation was offered on one day in the fall of 2021, spring of 2022, and fall of 2022; 107 students representing eleven law schools have participated thus far. Students were assigned the role of co-mediator, attorney, or client. There were students representing three different law schools in each Zoom room during the two-hour mediation simulation. During mediation simulations that occurred in the fall and spring of 2022 and fall 2022 mediation simulations, students were required to mediate an actual pending wrongful termination lawsuit, and they were provided the Complaint, Motion to Dismiss, Opposition to the Motion to Dismiss, Joint Rule 26(f) Report, and Scheduling Order.

Like the Practicum, this is not a competition and students are not judged or scored. Rather, it is simply a chance for students to practice their mediation and advocacy skills with students from other schools and receive feedback from people outside their own school. Unlike the Practicum, a professor observed and led a debrief in each room for thirty minutes.[25] Following the exercise, students were asked to complete an anonymous survey. The LEDR simulation had a different design from the Practicum but, like the Practicum, it also sought to foster certain skills development that traditional in-class simulation exercises are generally not designed to impart.

---

23. The questionnaire results have provided us with thought-provoking and timely insights, some of which we will discuss in the next section.

24. Debra Berman co-chaired the committee. Toby Guerin, a member of the committee, lead the effort with her.

25. The professor was not affiliated with any of the schools represented in the room they were assigned to observe.

III. THE PROPOSED MODEL

Experiences from these two initiatives, and lessons learned from each, inform our recommendation for a similar, deliberate, structured enhancement for traditional settlement negotiation courses (hereinafter the "Model"). This section considers each of the four pillars of the Model in turn. For the first three pillars, each section will review its role in the larger model, highlight the pedagogical benefits of including it in instructional design, address potential implementation concerns, and review student feedback that demonstrates how each of the particular pillars contributed to the educational experience. The last section will then review the fourth pillar on self-reflection as a means to maximize student learning.

A. Students Should Negotiate Using Multiple Modes of Communication Outside the Classroom Over a Period of Time

Proficiency in advocacy using multiple communication modes is absolutely critical for this new generation of lawyers. In a rapidly changing technology environment, today's "just-in-time"[26] students need and want to master the skills, tools, and strategies needed for future success.[27] In contemporary law practice, face-to-face negotiations are the exception and not the norm.[28] Even prior to the COVID-19 pandemic, the majority of settlement negotiations occurred remotely. According to a pre-pandemic International Association of Contract and Commercial Management (IACCM) White Paper from 2020, the authors found that email is the predominant and preferred negotiating method in today's world.[29] The IACCM study revealed that 70% of negotiations were executed virtually by

26. We are using "just-in-time" in juxtaposition to "just-in-case" to describe learner orientation. An approach of, "If I need to know the answer, I'll google it right now" is illustrative of a "just-in-time" approach.

27. Linda S. Anderson, *Incorporating Adult Learning Theory Into Law School Classrooms: Small Steps Leading To Large Results*, 5 APPALACHIAN J.L. 127, 130-31 (2006) (noting that current law students are not motivated by the lure of knowledge mastery, having seen the struggles of prior generations in their attempts stay current with information and ideas that quickly become outdated, outmoded, and irrelevant).

28. *See* Ebner et al., *supra* note 18, at 90-92 (discussing the prevalence of email negotiations); *See also* Ebner, *supra* note 18, at 172 (same).

29. KELD JENSEN & INT'L ASS. OF CONT. & COMM. MGMT., *supra* note 19, at 1.

email, phone, and video.[30] Of the 70% of negotiations done virtually, on average 41% were conducted by email, 38% by phone, and 21% by video conferencing.[31] The pandemic only served to increase that percentage by requiring law firms, courts, and administrative agencies to move online.[32] Traditional negotiation simulation exercises, however, typically rely on only one communication channel involving in-class, face-to-face contact;[33] while exposure to the skills developed in this type of negotiation environment are important and valuable,[34] they fail to expose student apprentices to the mediums they are most likely to use as practitioners.

Most negotiations take place through a variety of different modes of communications, but they do not necessarily take place all at once, much less in an artificially constricted amount of time.[35] As such, traditional in-class simulations and extracurricular competitions may not reflect practice reality. Thus, an ideal simulated experience would incorporate not just the multiple modes of communication that students could confront in practice,

30. *Id.*

31. *Id.* at 2.

32. As a result of the pandemic, Zoom was adopted as the primary platform for EEOC mediations. A 2021 EEOC survey of 139 mediators found that online dispute resolution is an effective alternative to in person mediation and is "arguably superior and clearly preferred by the mediators." *See* E. PATRICK MCDERMOTT & RUTH OBAR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATORS' PERCEPTION OF REMOTE MEDIATION AND COMPARISONS TO IN-PERSON MEDIATION (2022), https://www.eeoc.gov/equal-employment-opportunity-commission-mediators-perception-remote-mediation-and-comparisons [https://perma.cc/Q7YU-2R7Q].

33. Some professors utilized email negotiation exercises even prior to the COVID-19 pandemic. For several years, UC Hastings College of Law had been coordinating email negotiations between law school negotiation classes.

34. Skills developed in face-to-face interactions include a heightened awareness of nonverbal communication cues which are transferrable to other lawyering activities such as interviewing and counseling. Repeated exposure using these skills in role-plays has value for the novice learner. Multiple opportunities to undertake a task and subsequent transferability of the acquired skill or knowledge are cornerstones of professional training. We are not urging that these interactions be abandoned, only that they be supplemented with experiences that comport to practice realities in the settlement sphere.

35. In-class simulations and extracurricular competitions have a timeframe of usually no more than two hours. In fact, many competition rounds are even shorter than that. For example, rounds in the ABA Negotiation Competition are fifty minutes and rounds in the National Sports Law Negotiation Competition are forty-five minutes. *See* A.B.A. YOUNG LAW. DIV., 2022-2023 NEGOTIATION COMPETITION RULES: FOR IN-PERSON AND VIRTUAL COMPETITIONS 12, (2022), https://www.americanbar.org/content/dam/aba/administrative/law_students/competitions/2022-2023-negotiation-competition-rules-host-guide.pdf. *See also* CTR. FOR SPORTS L. & POL'Y, T. JEFFERSON SCH. OF L., NAT'L SPORTS L. NEGOT. COMP. COMP. RULES 7, (2019).

but also, time frames that more adequately represent the full range of potential experiences.

For this pillar of the Model, we recommend that students select their communication modes from the following four options, in any sequence they prefer: email, phone, text, and face-to-face (including videoconferencing or in-person, if applicable).[36] Each pair of students must use multiple modes of communication; we believe that students should be required to use at least three of the four modes, thus ensuring that at least one real-time, interactive communication occurs.[37] Regarding the timing of the exercise, we believe that four weeks is ideal, but shorter time frames of two to three weeks would be effective as well. Anything much more abbreviated both poses a challenge for student scheduling and becomes less like the expanded, albeit not unlimited, time frame encountered in practice. Regarding the means and timing of communications, students schedule and conduct their own interactions, with no professor involvement at this stage.

i. Pedagogical Benefits

The reality of practice is that negotiations may involve several sessions. Each discrete negotiation session raises the possibility that different communication modes will come into play. Which communication mode is best suited for which session involves consideration of myriad factors, including the session's length, scope, and purpose. Client demand and cost restrictions may also play a significant role. We want students to make deliberate choices in their future practice, based on the advantages and disadvantages they experience when using a particular communication mode now.[38]

---

36. The framework for this pillar applies most directly to negotiations without a mediator. For mediation classes, professors should consider incorporating several simulations on a video conferencing platform.

37. Although requiring students to use at least three modes of communication will set a floor for the number of interactions students may have, professors may certainly require a higher number of minimum interactions.

38. As skills professors caution student learners considering venue in the negotiation space, "[I]n deciding on a mode to use, you need to be aware that the communication medium you use is neither passive nor neutral. It affects what information you and the other attorney share and how it is conveyed, received, and interpreted." *See* Stefan H. Krieger et al., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 410 (6th ed. 2020) (citing Ebner, *supra* note 28, at 115, 116).

Although research seems to support a conclusion that the form of communication is not outcome determinative,[39] each has advantages and drawbacks. For example:

Face-to-Face: The synchronous nature of face-to-face bargaining (whether in person or virtually) provides the visual and vocal cues that inform much personal contact, which in turn can have either positive or negative impact.[40]

Telephone: Negotiation by phone can have many of the positive features of face-to-face negotiation in terms of trust and rapport building, while also giving the parties a different degree of control.[41]

Email*:* Exchanges by emails provide flexibility both for timing and deliberative content, but also may increase the risk of being misunderstood.[42]

Text: More common with younger negotiators, with near synchronous and interactive exchanges creating rapport but having the potential for insufficient consideration of options.[43]

We recognize that digital-age students may enter our courses with preferences already formed and default to their preferred communication tool, which is increasingly one that does not require face-to-face communication or even voice-to-voice interaction.[44] As a result, requiring

39. Shira Mor & Alexandra Suppes, *The Role of Communication Media in Negotiations*, *in* NEGOTIATION EXCELLENCE: SUCCESSFUL DEAL MAKING 391, 403-05 (Michael Benoliel ed., 2d ed. 2014) (finding little impact whether adversarial or problem-solving negotiation styles are used).

40. Krieger et al., *supra* note 38, at 411 (contrasting the opportunity to develop trust and rapport with the potential for exploitation by a domineering adversary).

41. *Id.* (cautioning that in contentious situations, the phone can be limiting when only one party is using a problem-solving approach).

42. *Id.* at 412 (warning of negative attribution, potentially increased competitiveness, and reduced inhibitions).

43. *Id.* at 413-14 (noting that helpful when attorney needs quick response to specific questions, and surprisingly richer in rapport than emails).

44. Laura P. Graham**,** *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation,* 41 U. Ark. Little Rock L. Rev. 29, 67-68 (2018) (noting that while Generation Z students claim to prefer face to face interactions, they want

that they use at least three forms of communication forces them to practice interactive styles that they may not ordinarily default to, and provides the basis for them to subsequently evaluate the efficacy of each in terms of both the discrete problem and their more global communication preferences.

The four pedagogical benefits from negotiating over an expanded time frame concern its adherence to practice reality, its counter to a significant cognitive bias challenge, its grounding in adult learning theory, and its impact for richer in-class follow up. Regarding practice reality, extending the negotiation period mimics how negotiations often take place in practice. The typical in-class negotiation simulation takes place in time blocks that vary from 50 to 120 minutes. This truncated time frame impacts the negotiation from both the professor and student perspective. First, it may affect the professor's design of the exercise so that realistic aspects of nuance and complexity are discarded in favor of simplicity or to address a narrowly targeted skill or aspect of negotiation theory when the parties have a limited time to reach resolution.[45] Second, it may affect how the student understands client objectives and crafts strategic choices resulting in students abandoning potential avenues for resolution. Negotiations conducted over an extended period correct the artificial constraints imposed on both professor and student learner. And they comport more realistically with practice reality where advocates involved in settlement negotiations often work with opposing counsel for weeks, months, or even years to settle a case.

In addition to adhering to practice reality, conducting multiple sessions over a period of time is also a recommended technique to counter the cognitive bias of decision fatigue.[46] The benefit to students in employing this aspect of the Model is to counterbalance the tendency to rush to resolution when confronted with a tighter window. Any rush to resolution

---

those encounters to be limited to five minutes, are unfamiliar or inept with emails, and rely heavily on texting to communicate).

45. For example, the learning objective for an abbreviated role-play may simply be how to make the first offer.

46. Dean Dastvar, *A Playbook for Overcoming Cognitive Bias*, ACC DOCKET (Apr. 13, 2021), https://docket.acc.com/playbook-overcoming-cognitive-bias (recognizing that decision fatigue can lead to assenting to terms that would normally be rejected were the negotiator less fatigued or irritated). Starting from the premise that both a negotiator's patience and mental will have limits, each time the negotiator must agree or disagree to a term, these finite resources are used "until, as a negotiator, your mental fuel runs out." *Id.* To mitigate this cognitive bias, one effective counter is to spread the negotiation over a number of sessions with time limits for each encounter. *Id*.

carries with it the danger that inappropriate concessions will be made. This becomes particularly important later in practice when clients are added to the settlement decision.[47] Pacing the exercise over a longer time period, and requiring multiple sessions, also serves to counter the American tendency to adjust the task to fit the time available to perform it. In monochromic cultures, such as the United States, there is an orientation that elevates the efficient use of time over the importance of the task itself.[48] The Model slows down the pace and give students experience in "chunking" negotiation into manageable units.

Allowing students to set the time and pace of their interactions also comports with adult learning theory because it provides ownership to the student learner and the experience of autonomous learning.[49] The Model provides sufficient space for this exercise in self-direction.[50] It does so while simultaneously opening class time for debriefing the exercise rather than conducting it, which speaks to the fourth pedagogical benefit of richer in-class follow-up.

ii. Addressing Implementation Concerns

One possible implementation concern is that students may not take the exercise as seriously if their professor is not monitoring them and they do not have faculty oversight related to using the full time-frame allotted. The response to this concern is two-fold: First, the real-world nature of this approach appears to provide students with a natural desire to engage; they can conceptualize the exercise as something that feels quite tangible and

47. A leading family law practitioner cautions, "as a trial approaches and client and attorney grow weary of the case, any resolution may seem appealing because it means the end is in sight." *See* Jennifer A. Brandt, *Preparing a Client for Settlement*, 37 FAM. ADVOC., Winter 2015, at 16, 18-19.

48. Adrian L. Bastianelli III et al., *Strategies for Successfully Navigating Cultural Differences in Construction Negotiation and Mediation*, 40 CONSTR. LAW. 11, 14 (2020).

49. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 93 (2007), http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf. Self-regulated learning includes self-monitoring for the effectiveness and efficiency of chosen strategies as well as subsequent reflection on the success of the process and how it might be applied to a similar task in the future.

50. Danielle R. Cover, *Of Courtrooms and Classrooms*, 27 B.U. PUB. INT. L.J. 291, 295 (2018) (tracing strains of adult learning theory—andragogy—over the past almost 100 years and their application to both traditional doctrinal and skills-based legal education).

relevant to actual practice. Second, like any exercise, ultimately, it is up to the professor to set expectations and develop compliance metrics.[51]

A second potential implementation concern is that the extended timeframe and multiple interactions that must occur within that time frame could present logistical problems. Time is always at a premium, it seems, in legal education. It blinks reality to ignore competing class demands when scheduled too close to finals or the competing school-related demands of on campus interviewing, advocacy competitions, and other aspects of student life. To a certain extent, requiring students to navigate the logistical issues concerning the exercise actually comports with practice and helps train them to navigate competing scheduling demands that are constantly vying for their time and that of their negotiating partner.[52] That being said, we recommend staging this multiple week exercise just prior to the semester mid-point. There is no ideal sweet spot, but a several-week period nestled around the semester's half-point seems to work best.

iii. Student Assessment

Survey data related to communication modes provides a tangible example of these benefits. In the Practicum's concluding survey,[53] students were asked to self-reflect on the following:

1) Before you began the exercise, what method of communication did you think you would feel the most comfortable using?

   Email: 52.5%
   Phone: 15.6%
   Video Conferencing: 31.85%

51. For example, professors could require a minimum number of interactions and have students submit their email transcripts and video recordings upon completion of the exercise.

52. One Practicum student specifically noted that the exercise "puts you in a real world setting because you have to work around each other's conflicts."

53. These results were compiled from the fall 2021 and spring 2022 Practicum Post Negotiation Questionnaires. A total of 997 students completed the Questionnaire. Data from both groups was very similar.

2) Now that you have completed the exercise, what method of communication do you think you would feel the most comfortable using for negotiations in the future?

   Email: 23.2%
   Phone: 19.3%
   Video Conferencing: 56.8%

3) In your opinion, which overall method of communication allowed you to advocate on behalf of your client most effectively (regardless of whether you felt most comfortable using it or not)?

   Email: 15.4%
   Phone: 17.1%
   Video Conferencing: 67.3%

4) Which method of communication did you like using the *least* to negotiate during this exercise?

   Email: 42.8%
   Phone: 42.0%
   Video Conferencing: 15.0%

According to the data, students initially thought they would be most comfortable using email. However, after completing the exercise, a majority found that they were now more comfortable using video conferencing. There was also a strong consensus that video conferencing allowed for the most effective advocacy. The changes in students' comfort level with and perception of different modes of communication highlight the importance of exposure. They show that working with a variety of communication modes allowed them to grow in their understanding and application of the wider scope of mediums they are likely to encounter in practice.

Several Practicum students took note of the value added by negotiating over an extended period of time. Most comments related specifically to the limited amount of time students have in class to explore issues, dive fully into negotiations, and take the time to re-strategize. For

instance, one Practicum student commented that, "I liked this exercise because my negotiation class is short (sixty-five minutes). Therefore, we only are able to negotiate for ten to twenty minutes, which isn't enough time to really practice your skills." Another student said, "In class, our professors have held us to a pretty strict time limit, so we have to leap and bound probably over a lot of details in order to meet the buzzer."[54] One student remarked specifically about the limited time allotted for negotiation during extracurricular competitions by saying, "In competitions, it is all in a sixty-minute window. This allowed us to have more of a real-world experience."[55]

B. Students Should Negotiate Real Cases Using Actual Court Documents

One of the most pedagogically significant features of the Model, and one that can easily be utilized in any skills-based experiential class (including civil and criminal clinics), is the opportunity for students to negotiate the settlement of an actual lawsuit as opposed to a hypothetical fact pattern. For this second pillar of the Model, we recommend providing students with a "documents library" containing material from an actual pending or previously settled lawsuit, along with a very short professor-drafted settlement memo indicating authority limits, if necessary. Case materials could include the Complaint and Motion to Dismiss or Motion for Summary Judgment (MSJ), together with other relevant documents such as disclosures, depositions and other discovery documents, and scheduling orders.[56]

54. Response of anonymous student, Spring 2020 Inter School Negotiation Practicum Post-Negotiation Questionnaire (disseminated Mar. 21, 2020) (on file with authors).

55. Response of anonymous student, Spring 2021 Inter School Negotiation Practicum Post-Negotiation Questionnaire (disseminated Mar. 19, 2021) (on file with authors).

56. In one of our recent mediation trainings, students mediated five actual lawsuits. For one of the mediations, students were provided with actual case documents from a pending trademark infringement, unfair competition action in the United States District Court for the Southern District of New York: Diesel S.p.A. v. Diesel Power Gear, LLC. Documents included the Complaint, MSJ, Opposition to MSJ, a Witness Declaration, and the cease-and-desist letter. After the simulation, we provided students with the actual Opinion and Order Granting in Part and Denying in Part Plaintiff's MSJ and a joint letter from the parties pursuant to that Order and proposals for the next phase of litigation.

Basing hypotheticals on a pending case or an amalgam of anonymized actual cases is not novel.[57] Trial advocacy classes have followed a similar methodology when compiling a faux case file and devising complaints, answers, deposition excerpts, expert witness reports, and potential demonstrative evidence and exhibits.[58] Hybrid clinics often blend supervised work on actual cases in the field with simulation exercises in a class setting.[59] What distinguishes the Model is that students are accessing a group of "live," unedited documents. We are not proposing that hypothetical simulations never be used. Of course, they still hold value since we can craft them to target specific points to address in our teaching. Ultimately, however, students should have the opportunity to practice negotiating real cases as well.

i. Pedagogical Benefits

In defining what a simulation course should contain, the American Bar Association stresses both its hypothetical nature (a substantial experience not involving an actual client) and its grounding in actual practice (reasonably similar to the experience of a lawyer advising or representing a client).[60] Clinicians focused on best practices have long recognized that fidelity of the simulation to its real world analog is critical both because of its potential for the transference of learning to future practice and its more immediate benefit of providing a motivation for students to fully engage in the exercise.[61]

57. In their joint class on legal and ethical issues based on a medical malpractice case, students from Touro Law School and New York Medical School explore those issues in the context of a New York state malpractice action culminating in a day of simulations. *Legal & Ethics Issues Medical Malpractice*, TOURO LAW CENTER, https://www.tourolaw.edu/Academics/coursedetails/537 [https://perma.cc/TJL4-X72C].

58. *See, e.g.*, ANDREW I. SCHEPARD ET AL., ALLEN V. ALLEN: DEPOSITION FILE, PETITIONER'S MATERIALS (2d ed. 2019).

59. *See, e.g.*, *Domestic Violence Prosecution Hybrid Clinic*, ALBANY LAW SCHOOL, https://www.albanylaw.edu/the-justice-center/domestic-violence-prosecution-hybrid-clinic [https://perma.cc/2QDU-G4KZ].

60. STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS., STANDARD 304(b) (AM. BAR. ASS'N 2022)

61. STUCKEY ET AL., *supra* note 49, at 137.

a. Authenticity and Professional Judgment Development

This Model provides students the very important opportunity of being exposed to and working with litigation documents. This may be a first in their legal education. And it is certainly what they will be doing if they go into any type of litigation practice. Even those students not intending a litigation practice benefit from exposure to the process through which attorneys gather information about a case and formulate strategies for settlement discussions with opposing counsel.

There can be a distinction in the motivation and lens through which students approach a settlement negotiation simulation when it is, in fact, an actual case. Students must first grapple with application of law to facts, make a judgment about the relative merits and likely outcomes, and then take action in the settlement arena based on their professional judgment. They are doing this in something approximating real time for a matter they know to be "live." They are aware that they are confronting the myriad decisions facing counsel in the pending case. While this aspect of the Model may lack some of the sense of personal responsibility found in a clinic's actual representation of a known client, students know they are confronting a real-world experience. According to learning theorists, adult learners need to see relevance in order to engage.[62] When simulation documents are effectively *ripped from the headlines* of an actual case, relevance is established.[63]

A related benefit for some students is that the Model addresses the potential gap in student understanding of the sheer volume and complexity of disputes and how to manage that information. This simulation exercise will not bestow mastery of information management, but its exposure to the messiness of an actual dispute conveys an effective counterpoint to the sanitized presentation of case facts found in heavily edited appellate opinions forming the basis of many first-year course books.[64] Mastery is

62. Cover, *supra* note 50, at 295 (relaying how "adults tend to orient their learning in very life-centered ways" and "are motivated to learn when they have a need or experience that learning will satisfy").

63. For example, the spring 2022 Practicum case involved a well-known series on Netflix, *The Queen's Gambit*.

64. WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW: SUMMARY 5 (2007), *available at* http://archive.carnegiefoundation.org/publications/pdfs/elibrary/elibrary_pdf_632.pdf (noting that the

built over time, to be sure, but the novice legal practitioner should have exposure, preferably through a law school experience rather than hoping it will occur through law-based employment during school.

b. Ownership

Another advantage the Model provides is the sense of ownership that participants experience as they determine not merely the substance of the negotiation, but the process, strategies and styles they will use.[65] Rather than have litigation documents summarized and presented to them in narrative form, which is the practice in many roleplays, the student becomes in part *the author* of the simulation—picking the critical facts from court documents and building the narrative that will drive negotiations. This echoes one critical advantage of in-person clinics which traditionally provide opportunities for students to maximize personal ownership as well as responsibility over their cases.[66]

ii. Addressing Implementation Concerns

If simulations based on actual cases can be such an effective learning tool, why are we not seeing them utilized more in classes and extracurricular ADR competitions?[67] We offer two theories.

---

case-dialogue method simultaneously "offers an accurate representation of central aspects of legal competence and a deliberate simplification of them. The simplification consists in the abstraction of the legally relevant aspects of situations and persons from their everyday contexts.").

65. In-house clinics balance giving students independence and responsibility with protecting client interests. STUCKEY ET AL., *supra* note 49, at 144. The Model addresses this first goal, without the tension of the second. It shares the recognition that experiential educations should strive to empower students to become their own lawyers. *Id.*

66. Serge V. Martinez, *Why Are We Doing This? Cognitive Science and Nondirective Supervision in Clinical Teaching*, 26 KAN. J.L. & PUB. POL'Y 24, 29 & n.17 (2016).

67. There has been only one ADR competition that we know of where students negotiated a real case using the relevant court documents. In 2022, the STCL Houston Energy Law Negotiation Competition required students to negotiate an actual case that was pending between two Texas energy companies. *Energy Law Negotiation Competition*, S. TEX. COLL. OF L. HOUS., https://www.stcl.edu/academics/center-for-conflict-resolution/energy-law-negotiation-competition/ [https://perma.cc/324V-JF5M].

a. Difficulty in Finding Cases

The first theory is grounded in the false assumption that it takes too much work to find appropriate cases. The response: Why attempt to make up hypothetical facts when there are millions of public and free cases available? Yes, it takes some time to search for cases, but no longer than to draft hypothetical fact patterns from scratch. Students could even assist with the case search since some have argued that involving students in the design of roleplays can be an effective pedagogical tool.[68] The same could be said here in terms of researching cases to use in class.

b. Too Much Focus on Substantive Law, Not Skills

The second reason advanced for not using actual cases is the fear that students will become too focused on the law and spend less time collaborating with opposing counsel or developing skills the simulation was designed to explore.[69] The response: This is no more true when actual cases are being used than when hypotheticals form the basis of the simulation. This tension between detail and manageability has been long recognized in simulation courses.[70] As scholars conclude, however, unlike the doctrinal class's Socratic method in which students argue different sides of a question, in simulation exercises, students are called upon to make a judgment about the relative merits of their position and then undertake action based on that judgment.[71]

Some focus on the law is not a negative. After all, we are teaching law students to represent clients in legal cases in which their settlement negotiations will inevitably involve legal arguments based on court documents.[72] If not prepared to analyze litigation documents and use legal arguments during settlement negotiations, these students will be in for a rude awakening in the real world. It is time to move them into the novice practitioner phase of training that involves practical application.

---

68. *See* Druckman & Ebner, *Simulation Design*, *supra* note 13, at 272.

69. *See* Lande, *supra* note 12, at 125 (noting a reluctance by some professors to provide doctrinal material in simulations).

70. *See* STUCKEY ET AL., *supra* note 49, at 137 & n.595.

71. *Id.* at 132-38 (reviewing best practices for simulations).

72. *See* Lande, *supra* note 12, at 126 (recognizing that this is "a critical element in real life legal negotiations").

iii. Student Assessment

When students reflected anonymously about their exposure to actual case documents as the basis of their negotiation during the Practicum, they enthusiastically endorsed this aspect of the Model. Students noted that the court documents provided for a more in-depth experience, and they appreciated the use of realistic materials from which to draw facts and arguments. One student felt that it prepared them with real-world experience when it came to looking at all the facts for a negotiation. Another student even said, "It made me realize how much work goes into the preparation of a negotiation."[73] Similarly, students that participated in the 2022 Clinical Cross-School Mediation Simulation commented that they appreciated the opportunity to mediate a pending lawsuit. One student said, "The fact that this was a real case had an extra element of saliency."[74]

C. Students Should Negotiate with People Outside Their Class

There is no question that negotiating with classmates can make simulations less realistic. Having relationships already established may hinder the effectiveness of negotiation simulations. However, when students work with strangers, it provides a valuable opportunity to practice their skills in a more true-to-life way since lawyers often negotiate with opposing counsel they may not know. For the third pillar of the Model, we recommend that two students who are strangers to one another are paired for the exercise, one on each side of the dispute. They create their own schedules and select their own communication channels. The final "reporting" and self-reflection are individual assignments rather than a team submission.

73. Response of anonymous student, Spring 2022 Inter School Negotiation Practicum Post-Negotiation Questionnaire (disseminated Mar. 26, 2022) (on file with authors).

74. Response of anonymous student, Spring 2022 Cross School Mediation Simulation Evaluation Survey (disseminated Feb. 25, 2022) (on file with authors).

i. Pedagogical Benefits

The Model counteracts the distortion encountered when students negotiate with one another within the same class. Students in these upper division skills classes are likely to have ongoing relationships with at least some members of the class. This prior knowledge impacts how they interact with one another and highlights the artificiality of the negotiation simulation. Even in the absence of a prior relationship, students in the same class will continue to interact with one another throughout the semester, which further limits how they may approach the negotiation and the styles and strategies with which they might want to experiment. Further complicating "same class" simulations is the tendency for a class to adopt a particular style, whether based on professor preference, grading rubrics, textbook suggestions, or the subtle pressure of in-group thinking. Of course, in practice, students will confront a range of negotiating styles.

Many textbooks and simulations focus on the interest-based negotiation paradigm.[75] However, not all lawyers are going to utilize interest-based bargaining, and students should be prepared for that.[76] If in-class (and extracurricular competition) simulations focus exclusively on interest-based processes and outcomes, students will have a false impression about what happens in the real world. For example, one Practicum student expressed surprise at their counterpart's style by commenting, "I underestimated how much my opponent would resist any sort of collaboration. While I expected him to begin with positional bargaining, his complete unwillingness to take any of my client's interests into account ultimately doomed the negotiation."[77] This was an important learning opportunity for both students—for one to see that their collaborative approach will not always be reciprocated and for the other, hopefully a lesson learned that overly zealous and aggressive bargaining may not be in their client's best interest.

75. An example of a text commonly used in many negotiation courses is *Getting to Yes*. ROGER FISHER ET AL., GETTING TO YES (3d ed. 2011).

76. *See* Kirgis, *supra* note 9, at 109 (noting that students should learn strategies to deal with various styles while they are in school before having to face the pressure of representing real clients).

77. Response of anonymous student, Spring 2022 Inter School Negotiation Practicum Post-Negotiation Questionnaire (disseminated Mar. 26, 2022) (on file with authors).

ii. Addressing Implementation Concerns

Ideally, students would be paired across law schools so that their opposing counsel is a complete stranger. However, if that is not possible, professors teaching different classes at the same school could team up to pair their classes together. One example would be to have students from a negotiation class do a simulation with students from a mediation class, clinic, or other similar course that is happening during the same semester. Another idea is to pair students between classes that are not as similar in nature such as a negotiation class and a contract drafting class[78] or a mediation class and a trial advocacy class. If none of these options are available (and even if they are), professors could consider requiring their students to participate in the Practicum.

iii. Student Assessment

Most student feedback regarding negotiating with a stranger related to how it was much different than negotiating with a classmate since it allowed students to feel what it is like to negotiate as an attorney with an opposing counsel unknown to them. Countless students noted that it felt significantly more "real," and they took the simulation much more seriously since it was not with a classmate.[79] One student even said that they treated it as if they were already an attorney. Students also remarked that they appreciated seeing how different people approach negotiations. One student responded by saying, "This negotiation was beneficial, as it allowed me to witness

78. For example, Professor Alyson Carrel at Northwestern Law School paired her negotiation students with students from Professor Lindsay Brown's Contract Drafting class. Brown commented that, "Negotiation students practice dealmaking with unfamiliar counterparties, and drafting students learn how to memorialize a meeting of the minds. The friendly competition strengthens the students' learning while making the simulation fun." Professor Alyson Carrel, Professor, Nw. Pritzker Sch. Of L., Presentation at ABA Section of Dispute Resolution Annual Conference: Thinking Outside the Standard Simulation Box: Enhancing Skillsets & Collaborations (Apr. 29, 2022).

79. One student said, "It provided a unique opportunity to test skills across different methods of communication with a stranger, which resembles the 'real world' of negotiation more closely than a classroom, or a moot court exercise, where your partner is someone with whom you regularly interact. This exercise felt less restricted in that faltering or making errors felt less consequential – great for someone new trying to practice these skills." *Inter-School Negotiation Practicum,* S. TEX. COLL. OF L. HOUS., https://www.stcl.edu/academics/center-for-conflict-resolution/inter-school-negotiation-practicum/ [https://perma.cc/66L4-WSCU].

different negotiation styles other than the people I go to school with."[80] Many students from the Clinical Cross-School Mediation Simulation similarly commented that they appreciated the opportunity to see how students at other schools are trained to conduct mediations and that there are different approaches to mediation depending on how you have been taught.[81] For example, one student said, "I liked having this experience with students from other schools to see how they did their introductions and how they handled joint session and private caucus."[82]

Another common theme from the Practicum questionnaire responses centered around the opportunity students had to practice their skills in a low-stakes setting. Working with strangers provided them with a platform to explore techniques they would not have otherwise felt comfortable using with their classmates. One student specifically said, "I would want to be more aggressive next time. In a safe space such as this it would be nice to attempt something that I normally do not do."[83] Several students felt that this pushed them outside of their comfort zone which was something that they appreciated.

Following their in-class debrief, professors had an opportunity to comment anonymously about the skills their students gained from participating in the Practicum. Most comments related to the value of negotiating with a stranger. Almost all professors felt their students benefited from negotiating with students from other law schools and that the exercise allowed their students to use the skills they have been learning in a more true-to-life way. As one professor said, "It gave them the feeling of being a lawyer, which they liked."[84]

80. Response of anonymous student, Spring 2022 Inter School Negotiation Practicum Post-Negotiation Questionnaire (disseminated Mar. 26, 2022) (on file with authors).

81. For instance, some mediation clinics focus exclusively on mediating in joint session, while others encourage the use of private caucuses. *Id.*

82. Response of anonymous student, Fall 2021 Cross School Mediation Simulation Evaluation Survey (disseminated Oct. 29, 2021) (on file with authors).

83. Response of anonymous student, Spring 2022 Inter School Negotiation Practicum Post-Negotiation Questionnaire (disseminated Mar. 26, 2022) (on file with authors).

84. Response of anonymous professor, Spring 2022 Inter School Negotiation Practicum Professor Feedback Survey (disseminated April 4, 2022) (on file with authors).

D. Students Should Engage in Thoughtful Self Reflection

In some respects, this fourth pillar of the Model is its capstone. Its goal is to enhance insight and complex self-directed learning. With the addition of this fourth pillar, the Model functions as a key component in developing professional judgment. This pillar centers on self-evaluation and assessment of the attempt to persuade a stranger, based on an actual controversy, over an extended time frame, using different types of communication. Students selected their strategies. They selected their communication modes. They were the architects of their individual negotiation plan, and they had to pivot and adapt as the process unfolded. The period of self-reflection assesses *all* those choices. This helps students transition from the more passive posture of "grade recipient" or "competition score recipient" to the dynamic posture of the assessor. Doing so helps students internalize their active role in the learning process.

It is undisputed that self-reflection plays a critical role in professional development.[85] This principle has been recognized in every major examination of legal education from the 1990s to the present day.[86] This last pillar of the Model calls for students to complete a reflective post-simulation questionnaire or draft a self-reflection paper with professor-provided prompts. For example, student self-reflection as captured in the Practicum's questionnaire invited an assessment and examination of choices in paired question groups such as:

- What principled justification did you use when presenting your first demand/counteroffer?

85. STUCKEY ET AL., *supra* note 49, at 93 ("Law school graduates will continue learning for the rest of their professional careers.").

86. MACCRATE REPORT, *supra* note 1 (recognizing professional self-development as one of four core values of the legal profession); CARNEGIE REPORT, *supra* note 4 (identifying reflective practice in clinical situations as a key approach for developing professional identify); STUCKEY ET AL., *supra* note 49, at 93-94; Rebecca B. Rosenfeld, *The Examined Externship Is Worth Doing: Critical* Self-Reflection *and Externship Pedagogy*, 21 CLINICAL L. REV. 127, 145-46 (2014) ("It is invaluable for a lawyer to be able to dispassionately and accurately assess her own performance to correct her course.").

- Looking back, would you have started at a different number? Why?[87]

As indicated above, students were asked about their communication mode preferences along with explanatory comments about these preferences such as:

- Why do you believe this mode of communication allowed you to advocate most effectively?
- Why did you like this mode of communication the least?

Lastly, the questionnaire invited student participants to imagine a "do over":

- If you had to do this negotiation over again, what would you have done differently?[88]

Role plays are most effective in increasing student learning when combined with opportunities for reflection and feedback.[89] Self-evaluation is a needed skill for "competent and ethical participation in the legal profession."[90] It also has the benefit of being an adult learning best practice because it encourages students to be independent learners.[91] Because negotiations are

87. A critical component of skills mastery is transferability. Questions probing how a student would approach the event were they able to secure a "do over" helps students to internalize their role in the learning process.

88. Reflecting on the experience and analyzing it helps the student to identify potential future approaches to negotiation. It assists in transforming the student from a passive recipient of a third party's evaluation to being the author themself.

89. RETHINKING NEGOTIATION TEACHING, *supra* note 11, at 190.

90. American Bar Association's Standards for the Approval of Law Schools, Standard 302 provides: "A law school shall establish learning outcomes that shall, at a minimum, include competency in the following: . . . (d) Other professional skills needed for competent and ethical participation as a member of the legal profession." STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS., STANDARD 302 (AM. BAR. ASS'N 2022). To provide context for the "other professional skills" requirement, the ABA's Interpretation 302-1 specifically includes self-evaluation. The illustrative list echoes the ten fundamental skills of the MacCrate Report, including interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.

91. Filippa M. Anzalone, *Education for the Law: Reflective Education for the Law*, *in* HANDBOOK OF REFLECTIVE INQUIRY: MAPPING A WAY OF KNOWING FOR PROFESSIONAL REFLECTIVE INQUIRY 85-99 (2010) (reviewing how reflective practice aids students in developing their ability to transfer learning and apply it in new situations).

dynamic and fluid by nature, each encounter is unique.[92] Attorneys must be able to respond to changing dynamics and transfer learned experiences to new situations.[93] Self-reflection is the tool that allows them that mastery.

CONCLUSION

We are not suggesting that the addition of this Model to the standard simulation class will automatically transform class participants into effective, practice-ready negotiators.[94] We are suggesting that it will provide meaningful exposure to critical aspects of real-world settlement practices in ways that traditional simulation classes, competitions, and other experiential activities typically do not, as Figure 1 shows below.

Figure 1. Comparison of Experiential Opportunities

Type of Experiential Opportunity	**Multiple Methods of Communication**	**Over Time**	**Real Cases**	**With People They Do Not Know**	**Required Self-Reflection**
Typical Class Simulation					Varied
Extracurricular Competitions				x	
Inter-School Negotiation Practicum	x	x	x	x	x
Clinical Cross School Mediation Simulation			x	x	x
The Model	x	x	x	x	x

When students are in part the drivers of their educational experience, their learning moves from passive to active. The Model provides a vehicle for student self-learning by creating protocols and structures for an

92. Rebecca Hollander-Blumoff, *It's Complicated: Reflections on* Teaching Negotiation *For Women*, 62 WASH. U. J.L. & POL'Y 77 (2020).

93. Regardless of the discipline, optimal learning from experience involves the same loop: experience, reflection**,** theory, application. *See* STUCKEY ET AL., *supra* note 49, at 122.

94. Richard E. Redding, *The Counterintuitive Costs and Benefits of Clinical Legal Education*, 2016 WIS. L. REV. 55, 58 ("Clinics are unable to provide students with anything close to the kind of sustained and consistent practice across a variety of contexts, necessary for students to develop complex legal skills.").

immersive experience that bolsters how students understand and reflect on contemporary settlement practices.