Lawyering Outside Lawsuits: Incorporating Negotiations, Settlements, and Mediations Into the legal Writing Curriculum

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Legal education is built around a core irony: almost no human disputes are resolved via trials, and yet we dedicate years to teaching law students how to resolve disputes via litigation.

I. Recalibrating Our Teaching Scales—from Litigation to Negotiation

A. Litigation—Law School Norm but Real-World Anomaly

We in law school do a pretty good job of teaching law students how to resolve their clients’ problems via litigation. For three long years, every one of their substantive courses supports this trial focus because casebooks are filled with precisely that—cases. Law students who are fed an exclusive diet of cases come to believe that cases are the sole method to resolve clients’ problems.

And the legal writing curriculum perpetuates this trial-centeredness: we show our students how to find the court rules and civil procedures in our problem’s jurisdiction; we and teams of law librarians and Westlaw® and LexisNexis® representatives train them rigorously in legal research so they can unearth those fossils of prior disputes that are legal opinions; we spend months in class and in conferences showing students how to draft that trial brief with finesse; our students sweat bullets learning how to make the most cogent of oral arguments before the judge; finally, when the court rules against them on that trial brief, they’re taught to write appellate briefs for the next level of court.

The problem is, trials are a statistically irrelevant way of resolving human disputes.

To begin with, there are, of course, many human dilemmas that have no legal dimension. But even if we focus on conflicts that lawyers can and do help their clients to resolve, the vast majority of such “litigable” conflicts are instead resolved otherwise, through direct negotiations, avoidance,
But the most important skills we can teach our students may not be how to succeed at trial, but rather how to settle, how to negotiate, and how to be effective mediation-advocates.

B. An Apprenticeship in Negotiation-Lawyering

Legal reality demands that our students become experts in negotiation by the time they graduate. Although the first-year legal writing class cannot and should not be a course in negotiation, the class can jump-start this training by teaching students a few basics. We would be remiss to allow students to believe that negotiation is just courtroom advocacy moved to a different location. Instead negotiation-lawyering is different from litigation-lawyering in that it incorporates the law but includes different interests, relies on a different cast of players, and uses different procedures and tactics than litigation.

The following three differences are the most important ones that distinguish negotiation-lawyering from litigation-lawyering, and students readily perceive and integrate these differences when we explain them.³

**Different Interests.** The first distinctive feature of negotiation is that it is much broader in the interests that it responds to. It includes the law, but extends to personal, emotional, financial, reputational, moral, and time-frame issues that pure law does not recognize. Yet, despite this broad focus, all negotiation is “local”; whatever peculiar, outlandish, or reasonable motivations are at play in the lives of the particular parties to this dispute, these issues will enter into negotiations. For example, a wronged employee may best be made whole not by damages, but by an apology from higher-ups, instituting new negotiations. For example, a wronged employee may best be made whole not by damages, but by an apology from higher-ups, instituting new academic, professional, social, and political relationships.

1 No precise accounting has been attempted to measure exactly what percentage of “conflicts” become formal “disputes.” However, conflict theory has long recognized that almost all conflicts are resolved outside of the litigation system. Richard Abel, The Politics of Informal Justice (1982); William L.F. Felstiner, Richard L. Abel & Austin Sarat, The Emergence and Transformation of Disputes: Naming, Blaming, Claiming … (15 L. & Soc’y Rev. 631 [1980–1981]).

2 The most famous study is perhaps the one conducted by Marc Galanter for the American Bar Association in 2004, and although later studies have quibbled about whether trials are truly “vanishing,” the numeric data remains consistent. Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 11 J. Empirical Legal Stud. 459, 461 (2004); John Lande, Shifting the Focus from the Myth of “The Vanishing Trial” to Complex Conflict Management Systems, or, I Learned Almost Everything I Need to Know About Conflict Resolution from Marc Galanter, 6 Cardozo J. Conflict Resol. 191 (2005); Wayne D. Brazil, Should Court-Sponsored ADR Survive?, 21 Ohio St. J. on Disp. Resol. 241, 243–44 (2006); Gerald R. Williams & Charles B. Craver, Legal Negotiating (2007).

Finally, negotiation requires a skillful wielding of the various interests, knowing when to use the law, emotions, people, disclosures or obfuscations, and silence or information.

Different Players. The second distinctive aspect to negotiation is its incorporation of nonlegal players. Whereas litigation is a drama featuring lawyers, judges, courtrooms, and legal personnel, negotiations include clients, mediators, and the presence of nonparties’ interests. The most important nonlawyer in the room is, of course, the client. After all, it is the client’s business, or marriage, or life, or rights, or property that is at stake. Although law school gives the false impression that it’s all about the law and the lawyers, in reality it’s the clients who are in pain or who hope to make a business deal; it is they who hire a lawyer to help them and they who decide whether to take that deal or continue the fight. So the first strange power shift our law students need to anticipate in negotiations is that they will step out of the limelight that litigation shines upon them and instead will be their client’s collaborator.

Even stranger for the law student is the presence of “outsiders” in a negotiation; such people may be physically present or their presence may be merely incorporated by reference as the client considers their needs or preferences. For example, divorce negotiations are regularly peopled with financial advisers, accountants, real estate agents, grandparents, and new lovers, some of whom come to the negotiating table and some of whose advice or interests are driving the negotiations from a distance. Similarly, in civil cases parties would never negotiate without considering the interests and reactions of their underwriters, financiers, merger partners, regulators, investors, or customers, or without considering the impact of the current settlement options on pending or potential related lawsuits.

What is most surprising for law students who have been trained to exclude all but the “parties in interest” is the realization that these “third parties” are not tertiary in the least, but indeed central to negotiating the issue. If power sharing is strange vis à vis the client, how much more strange it is to accommodate “third-party principals” in the negotiation, either physically or implicitly.

Different Tactics. The final distinction of negotiation is tactical; litigation is intensely tactical too, of course, but negotiation tactics are somewhat broader and different in nature from those used in litigation. On the one hand, negotiation requires creative brainstorming, thinking outside the box, and collaboratively working with the other players toward shared interests, and yet doing so in the client’s best interest. On the other hand, a negotiator needs to be levelheaded and objectively reasonable and able to evaluate the merits of a solution, balance risks, and compare costs and benefits. Finally, negotiation requires a skillful wielding of the various interests, knowing when to use the law, emotions, people, disclosures or obfuscations, and silence or information.

4 The field of collaborative negotiation theory is vast and ever growing. The foundational text is Fisher & Ury, supra note 3.

5 There is definitely a science to negotiation, whatever its creative component. This quantitative, objective aspect will appeal to the law-and-economics inclined, but should be understood by even the least mathematically adept. Raiffa, supra note 3.

6 The current trend in negotiation theory and practice is to recognize that this is a multifaceted skill, and that the best negotiation lawyering is problem solving—ethical, efficacious, and prepared. Andrea Kupfer Schneider, Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style, 7 Harv. Negot. L. Rev. 143 (2002); Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev. 754 (1984).
After completing our legal writing class, our 1Ls will no more be experts at negotiation-lawyering than they are experts at trial advocacy. However, our role is to begin their apprenticeship and show them how these tools are used in combination.

II. Integrating Negotiation and Mediation into the Legal Writing Curriculum

In the real world of human problems, negotiations can occur at any and every stage of a dispute. For pedagogical efficiency, however, we have chosen to schedule negotiations at the most critical and common junctures in the evolution of a dispute: 1. when the memo is completed, the point at which the students know enough law and facts to evaluate whether it’s worth it to go further with the case; 2. when the trial brief is completed and the students understand the litigation value of their case; and 3. when the case is appealed.

A. Preparing to Negotiate

In training 1Ls to negotiate their legal writing problem, we start with emphasizing the three essential differences between negotiation-lawyering and litigation-lawyering mentioned above. First, students must understand that they are their client’s agent and that this is the client’s life; yet they are also the client’s fiduciary, and the client is relying on the attorney for essential advice. Second, students must recognize how the real world they left behind when entering law school will return with a vengeance in negotiations—emotions, ulterior motives, and nonmonetary and extralegal values may be the most potent factors in a negotiation. The law, however, is never absent: they must know the law inside and out, but they must appreciate its place within the totality of factors at play in the negotiation. Finally, students must become comfortable wielding the tools of negotiation, which include a big-picture mind-set, creativity, and brainstorming abilities; strong advocacy skills; appropriate power sharing with the appropriate players in the drama; and a genius for tactics, strategy, and people sense.

The next teaching agenda is to show the students how to create those documents that facilitate negotiation. To that end we require the students to create a negotiation-preparation document prior to each negotiation, a step frequently taken by many attorneys. Negotiation preparation is a relatively individualized practice in the real world, and we therefore allow some idiosyncrasy in our students’ negotiation-preparation documents. They can take the form of a bulleted outline or be brief prose statements. Whatever the form, however, the students’ documents must concisely but completely address all six of the following issues:

1. The legal strengths and weaknesses of their case (with brief justifications as to why these are strengths or weaknesses);

2. The case’s nonlegal strengths and weaknesses;

3. The monetary value of the case as captured through various types of damages;

4. The nonmonetary value of the case and nonmonetary assets that might be negotiated;

5. The risk-value of the case, outlining as precisely as possible the likelihood of various outcomes; and

6. The settlement options that show some thoughtful brainstorming about how this dispute might be resolved.

We collect these negotiation-preparation documents, in part to ensure that the students have done the preparation, but mostly to provide feedback so they can learn for the next time around. We do not expect that each student will come to a single right answer or outcome, but there are “more-right” and “less-right” answers; our evaluation criteria focus primarily on how thorough and balanced a particular student’s preparation was with regard to the legal and

7 The basic and essential preparation questions are the six that we list here and that we require our students to address. Professional negotiators do far more, of course; for those who want to train their students toward that professional-level mastery or show their students how the pros do it, the following texts are particularly useful: David A. Lax & James K. Sebenius, 3-D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals (2006); Roger Fisher & Danny Ertel, Getting Ready to Negotiate (1995).
nonlegal issues at play, and how realistic and creative the strategies and solutions are.

B. Conducting Negotiations

Over the course of the legal-writing year, we schedule two pre-negotiation analyses, a negotiation simulation, a premediation statement, and a final mediation simulation. The first pre-negotiation analysis occurs at the end of the objective memo, in part because this is a common negotiation moment in the real world, and in part because this is the first time the students have a full legal understanding of the law and facts of their case. Because the entire class is working on the same side of the issue with the same client, we assign a negotiation-preparation document, but do not conduct the negotiation itself since no students are on the other side of the dispute. Our ultimate intention with this first document is to have the students begin thinking and preparing for negotiations. Even without an active negotiation, however, the results of their negotiation-preparation documents have been masterful. The students clearly show that they can move from the pure law of a memo to the big picture of negotiation, and whatever the problem we have worked on, they have consistently proposed sensible solutions to the dispute that show creative brainstorming and yet a realistic sense of the legal value of their case.

The second negotiation follows the trial brief—again, because that echoes the stage when negotiations often occur in reality and because by that time the students are well-versed in the litigation strength of their case. Because members of the class have been preparing to litigate opposite sides of the case, for this round the students do negotiate the dispute after turning in their negotiation-preparation documents. These negotiations have been a resounding success; indeed, this class may be the most excited and engaged moment during the entire year of legal writing. Students routinely say how much they love doing this negotiation. Not only does the negotiation provide excitement, but it also reveals the students’ growing skill with the procedure: the groups have settled at a rate that is comparable to the national rate for mediation at the trial level (approximately 65 percent); every one of their settlement results has been realistic and workable; and their negotiation-preparation documents are even more professional than they were the first time around at the memo stage.

Thus our experience has been that with some focused instruction in negotiation, our 1Ls love the process and can achieve realistic, creative results in their negotiations that mimic the outcomes achieved by negotiation-advocates in the real world.

C. Drafting a Settlement Agreement

Due to time constraints as well as teaching limitations, we do not have the students draft up their settlements as settlement agreements. However, for those whose curriculum allows the time to teach the intricacies of settlement agreements (which would be even more rewarding for the students if it were taught in conjunction with a contracts course), it would be an extremely useful exercise for the students to complete this negotiation component by learning how to write up their settlement.

D. Preparing to Be Mediation-Advocates

Mediation is playing an increasingly important role in modern lawyers’ lives. There have always been attorneys and clients who have chosen to turn to mediation at some stage in their dispute or negotiation, but what has transformed the litigation universe of the past 20 years is the increasing use of court-ordered mediation. Indeed, mediation is mandated by state and federal courts throughout the country, at both the trial and appellate level, and for disputes ranging from civil to family, juvenile, criminal, and bankruptcy, and even those involving the current housing foreclosure crisis. There are those in the legal world who criticize court-ordered mediation as coercive, or contrary to due process rights, or antithetical to the very voluntariness that is at the heart of negotiation. However, the number of courts and the scope of cases being sent to court-ordered mediation have increased exponentially.

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*Excellent resources exist to teach the drafting of settlement agreements, the most thorough of which is Settlement Agreements in Commercial Disputes: Negotiating, Drafting and Enforcement (Richard A. Rosen ed., 2000).*
and all signs indicate that the increase will only continue because research shows, and the judicial system appears to believe, that settlement of cases via mediation is in the parties’ best interest and in the interest of justice by, among other things, reducing the courts’ caseload. Therefore, because our students will necessarily be required to mediate almost any case they litigate, the law school world and legal writing programs in particular should be training students for this professional reality and showing them how to be mediation-advocates.

Preparing for mediation is analogous to preparing for other negotiations: the attorney needs to evaluate the strengths and weaknesses of the case, brainstorm negotiation strategies and potential solutions, and consider both legal and nonlegal aspects of the dispute. Likewise, the mediation-advocate will prepare a document (usually called a “mediation statement” or a “premediation submission”) that captures this information, usually sending it to the mediator in advance of the mediation. As with negotiation-preparation documents, there is considerable flexibility in formatting these documents, but the content will be the same, generally addressing the six crucial issues listed above.9

The key difference between pure negotiations and a mediation is the presence of the mediator who facilitates the negotiations. Therefore, the key pedagogical difference in training students to be mediation-advocates is to alert them to the strategic and tactical advantages of using the mediator as their facilitator and intermediary.

In our program, we require all of our students to prepare for mediating their appellate problem, drafting a mediation statement as the final document of their spring problem. As with the negotiation-preparation documents that they created for earlier negotiations, we evaluate the mediation statements for their ability to skillfully address the six key issues mentioned above, and for their combination of creative brainstorming and their realistic assessment of the case. Because we conduct a mediation simulation (as described below) rather than individualized mediations, only one set of students participates as mediation-advocates, but all students draft a mediation statement. As befits any third document related to a specific skill set, these mediation statements are vastly superior to the students’ initial negotiation documents in the fall semester, and indeed the best documents are truly professional in quality.

III. A Mediation Simulation: Front Row Seats in the Inner Sanctum

A. Simulation as the Best Form of Reality

As law professors, we face an insuperable barrier to modeling mediation for our students: confidentiality. While students can go to court and visit real-life trials and watch expert practitioners in action, the same is not true of real-life mediations, which are absolutely private affairs. So confidential are they, that settlement and mediation discussions are universally prohibited from being disclosed under evidentiary rules, with only the narrowest of exceptions. Therefore, this major legal skill can never be seen by our students for them to model or experience before heading out into a legal world that will be filled with such mediations. To answer this dilemma, we have created a mediation simulation that is conducted in conjunction with our spring semester appellate problem.

In deciding to conduct a simulation, we use only one student-attorney per side (as is true in reality, of course), but this raises the pedagogical equity issue that very few students will be able to experience being a mediation-advocate from the inside. We have felt that the student-audience gains the different, but equally valuable experience, of witnessing the entirety of the drama, by knowing all of the facts that are confidential to each player in the drama, and by being privy to each side’s confidential caucuses with the mediator.

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9 The legal world has not evolved a rigid or expected format for mediation statements. The best concise explanation for young attorneys as to how to draft mediation statements is the following: Wayne Schiess, The Mediator, in Writing for the Legal Audience, ch. 7 (2003). An excellent and more thorough explanation can be found in John W. Cooley, Preparing the Case for Mediation and Mediation Preparation Checklist, in Mediation Advocacy, ch. 3, Appendix B (2d ed. 2002).
The core dispute can be related to any topic, but it must be one where the students know the law and the facts of the problem intimately.

B. The Building Blocks
Our primary intention in building the mediation simulation is for it to be as realistic as possible, while also as transparent as possible, so our students can perceive the otherwise hidden dramas that occur in a mediation. To that end, and as explained in more detail below, we have designed the simulation so that it will reveal the essential workings of a real-life mediation.

The Dispute. The core dispute can be related to any topic, but it must be one where the students know the law and the facts of the problem intimately. In our case, we have scheduled the mediation simulation to occur at the end of the spring semester’s advocacy training when the students have worked on the same dispute at both the trial and appellate levels, and have had oral argument experience with the dispute as well. It would be possible, however, to schedule mediation to occur at either the trial level, or the appellate level, or indeed at both stages in the litigation—in real cases, there are often multiple attempts at mediation over the course of resolving a dispute. Although any stage in a dispute can be and often is mediated, research into real mediations has shown (and our own experience has borne this out) that there is a difference between mediating prior to a trial decision and mediating at the appellate level. In a word, appellate mediations have a “loser” from the court below. Generally, 1L advocacy problems are carefully designed to achieve a legal equilibrium between the parties, but the “loser” component in an appeal often comes out at least rhetorically in mediation.

The Public Facts and the Private Facts.
Negotiations draw upon every relevant dimension in the parties’ lives, as explained above. In reality, no party or attorney is merely his or her one-dimensional legal self. Therefore, in simulating the multidimensionality that is at play in real negotiations, we create for each party and each attorney sufficient details to flesh out their professional, family, corporate, and personal lives and the financial, extralegal, and practical details that might be relevant to the dispute. When designing the confidential facts for each participant, they must be multidimensional in a way that reflects the lived reality that this participant might actually bring to the table. More than that, however, care must be taken to ensure some realistic conflict between the players’ hidden lives without indulging in melodrama on the one hand or building to an obvious, single-track solution on the other. In essence, these private facts must be designed, but not overdesigned, allowing for an unplanned evolution during the mediation.

Every player in the drama is provided with a packet that contains a one-page basic scenario setting out a summary of the case so far, as well as the public facts, which usually include commonly known financial data (depending on the case, this might be damage valuations, corporate financials, salaries, or property values). In addition, each participant receives a set of confidential private facts that are germane only to that participant, and which that participant is instructed to keep confidential except when or if it is felt that revealing a particular fact to a particular person at a particular moment in the mediation would be in his or her best interest. These facts include hopes, fears, “bad facts” (skeletons in the closet), and potential tradeable assets (whether financial or nonfinancial).

10 For an example of the types of public facts and private facts that we created for our mediation simulation, and their relationship to the information used in a set of spring appellate advocacy problems, see A.G. Harmon, The Complete Advocate: A Practice File for Representing Clients from Beginning to End (2010).
**The Attorneys.** A student is selected for each side of the case who has advocated for that side in the written component of the advocacy training. Ideally, each designated advocate should be a student who exhibited a particular mastery of the problem, who possesses good public speaking skills, and who will not be rattled by performing this new skill publicly in front of his or her peers and under the often emotional drama of settlement negotiations.

Some preparatory work needs to be done in advance. First, we require that each student-advocate prepare a confidential mediation statement ahead of time and send it to the mediator, as is usually the practice in real mediations. In addition, we recommend to our student-advocates that they meet with their clients briefly ahead of time to talk through potential mediation strategies, so they are not strangers to each other. Finally, we have found it helpful to have each student-advocate meet with the professor. This step is not to receive coaching from the professor (far from it), but to walk the students through a new process that they will be performing for the first time in their lives before all of their peers. It also allows the professor to deflect anything that might upset the negotiations out of ignorance (e.g., the student says he intends to threaten or propose X, Y, or Z, but being a 1L, does not know this is in fact illegal); if the professor can catch such missteps in advance, the student can avoid an ill-formed strategy.

**The Clients.** In real disputes, it is the client’s interests or emotional dramas that are at stake, and in reality, as explained above, the lawyer must navigate the power sharing inherent in negotiations where the client makes the ultimate decisions. Still, the lawyer serves as the client’s guide and fiduciary. Therefore, it is an essential part of the mediation simulation that clients be present and that they be realistically “client-like.” Pedagogically, it is essential that the student-advocates experience dispute resolution with the client as an active participant at their side and as an active adversary on the other side of the table. And it is equally essential that the student-audience be able to witness the network of interactions between the various attorneys and clients as the mediation progresses.

For the clients, as for the attorneys, we create a set of private facts that expand beyond the “legally significant” facts that were at the core of the spring advocacy problem. These private facts, like the attorneys’ private facts, are intended to be both multidimensional and realistic for that client, whether corporate or private. The same fact-creation principles that we outlined above guide our creation of these facts, and doing so often requires that we consult, for example, real doctors or accountants or architects to get the necessary facts.

For the past two years, we have employed actors from our school’s drama department to be the clients. To begin with, these actors have no legal training whatsoever—as would typically be the case for real clients. In addition, their theater training has made them skilled at taking the outline of a persona and filling in the contours realistically, making them believable clients. Moreover, being actors, they are uninhibited in front of an audience and the believability with which they become the client is infectious, encouraging the student-advocates to interact with “their client” in an equally believable way. We have found it so successful to use actors to be our clients that even if our law school had no affiliated theater department, we would most likely contact a local college’s theater department or a local actor’s guild to find actors.

**The Mediator.** Our practice has been to invite an experienced mediator who is also a law professor to conduct the mediation. We have wanted someone skilled in mediation to conduct the simulation, as mediation is a difficult procedure to master.

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11 Client preparation, in reality, can be as extensive a process for mediation as it is for litigation. If there is time in the curriculum, it is possible to train the mediation-advocate in client-preparation techniques and then schedule at least one extended client-preparation session. For a useful outline about how to prepare clients for mediation, see Cooley, Preparing the Client for Mediation, in Mediation Advocacy, ch. 4, supra note 9.

12 See note 10, supra.
We have also wanted students to witness the best practitioners’ expertise. This individual should be someone who is comfortable working with law students, who knows how to push them in ways that will help them learn, and who can, during the debriefing at the end, explain what happened so that it makes sense. In any location with courts or law schools, there are likely to be many experienced mediators as well as ones who have worked with law students. Those we have contacted are quite willing to engage in this exercise, but a professor skilled in mediation could also conduct the simulation, if needed.

The Stage and the Audience. We have staged our mediation in the school’s moot courtroom, but any space would work where the parties, attorneys, and mediator could sit around a table when working together. However, the space should also afford an option for excluded parties to leave the room while the mediator is caucusing with the other side, and for the student-audience to be accommodated in an unobtrusive way.

The rest of the 1L class is the student-audience, sitting in darkened silence around the mediation that occurs at the spotlight center of the moot courtroom. These student-audience members are provided with a universal copy of the facts, both the public facts and all of the players’ private facts (and once the mediation is over, the players are provided with the same universal copy so that they can see where their private facts fit into the totality of all of the facts). By knowing all of the facts, the student-audience gains an intimate experience about how each side is using its facts strategically, which fears or motivations and which hidden assets or “bad facts” are being revealed in offers or rejections, and how ignorance of facts plays into the evolution of a dispute or its resolution. This is a pedagogical advantage to a mediation simulation that cannot be equaled by having each student conduct his or her own mediation of the dispute, and about which members of the student-audience have commented long after the mediation has ended.

The Schedule. We have scheduled the simulation for two hours, with 90 minutes devoted to the mediation itself and 30 minutes spent on debriefing at the end. In some cases, the dispute has resolved in that time, and, in other cases, it has all but resolved. It is true that real mediations for each of the disputes that we have worked on might last slightly longer (perhaps three hours, and of course mediations for large commercial disputes can last for several days) and indeed it might be possible to schedule a simulated one for slightly longer than we have if the school’s schedule and student patience could withstand it. It would not be useful, however, to schedule a simulation for much less than 90 minutes. Mediations are slow-evolving dramas on the whole and neither the student-advocates nor the student-audience would benefit from an overly truncated simulation.

Debriefing. After a settlement is reached, or after time has run out, the drama ends. Each year, we have asked the mediator to spend some time debriefing the process for the participants as well as the audience. He has explained the things that he witnessed throughout the mediation and why he said or did various things at various junctures and how that shaped the mediation, and he has offered pointers to the students. From the other side, we have also asked the participants to debrief each other and the audience as to why they did what they did, what private facts they had, and what hopes, strategies, or fears were motivating them to say or do what they did. This debriefing is also a time for the student-audience who knew all the facts but experienced none of the internal drama to ask questions and suggest their own take on the process. The debriefing is one significant advantage that the simulated mediation has over a real mediation. Even if our law students could gain entry into a confidential mediation, they would never have the internal workings of the process revealed to them—behind the confidentiality of all real mediations are the inner mysteries of strategies and intentions. The debriefing is a unique opportunity to see the anatomy of a mediation.

Recording. We have asked the information technology experts at the law school to record these simulations. (We get the necessary releases from all of the participants to permit the recording, with the understanding that the recording will only be...
used for instructional purposes within the law school.) We use the recording in teaching future classes about mediation advocacy, reassuring those students that their predecessors survived and even thrived, and alerting students to potential pitfalls in advance. But an equally important use of the recording is its cross-curricular potential: the recording provides a teaching tool for mediation courses in the law school, allowing those students to see a “real” mediation in a way they could never witness in confidential mediations occurring in the outside world.

Conclusion
Pedagogically, our experience has been that with just a bit of guidance, students can master the attitude, the negotiation skills, and the preparation documents they will need as attorneys when negotiating their clients’ disputes. Over the course of the year and via several negotiation documents and actual negotiations, the students evolve into admirably competent negotiation-advocates. The results of their negotiations are both professional and realistic, and their negotiation-preparation documents reveal creativity, a realistic sense of the legal and nonlegal value of their case, and a growing understanding of their professional ethics relationship with their client.

Likewise, the results of conducting a mediation simulation have been positive in every dimension and made the effort of staging the simulation more than worth the time put into it. To begin with, our students enjoy the simulation as a dramatic aspect of what has been a months-long, but essentially bookish enterprise. In addition, it has allowed them to see firsthand something that is otherwise unseeable. Another advantage of conducting a collectively witnessed simulation rather than individual mediations has been that it allows our student-audience an Olympian, total-knowledge view of the negotiation process; they have a unique opportunity to see the interplay of multiple parties’ facts, and to perceive the role of ignorance, strategy, and the mediator in the entire process. And finally, as we had hoped but could not have known in advance, the settlements coming out of each of the simulations have been analogous to the results that these same disputes would have produced in a real-life mediation, proving to our students that they really can be adept negotiators on behalf of their clients.

If 99 percent of their clients’ litigable disputes will ultimately be resolved via negotiation, our 1Ls have begun to master the skills and documents they will need as successful negotiation-advocates.

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Another Perspective

“Litigation is certainly different from baseball. Lawyers play critical roles in evaluating cases and are always cast as their clients’ advocates. In planning their next win, however, those advocates would do well to take Lincoln’s advice and spend part of their time planning outcome strategies that match the right people to the best dispute resolution process. Nearly 99% of filed cases are resolved without evidentiary rules at trial, yet far less time is generally spent designing dispute resolution processes and preparing for negotiation. Comparatively small amounts of time in negotiation preparation increase the prospects of a satisfactory deal. That preparation may be staged. Formal legal analyses outline the range of remedies based upon legal causes of action. Economic analyses help parties value the probabilities of various outcomes in an iterative way. Psychologists help us understand how different people process the same data differently, often in an irrational manner. Together, these disciplines help us better prepare for negotiations, whether that means purchasing a new car or resolving a litigated case.”