

USING AN INTERVIEWING, COUNSELING, NEGOTIATING, AND DRAFTING SIMULATION IN THE FIRST YEAR LEGAL WRITING PROGRAM

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To my astonishment I was informed on leaving college that I had studied navigation!—Why, if I had taken one turn down the harbor I should have known more about it.

-Henry David Thoreau, WALDEN¹

[T]he syllabi for the best legal writing classes we encountered focused on learning tasks that are typical of legal work. The instructor led students through a sequence of writing projects that began with interviews, progressed to situations that simulated letters of counsel, then negotiation, and, finally, the construction of full-scale legal briefs—all critical skills of legal practice that receive little or no attention in the doctrinal courses of the first year. The emphasis was on learning legal doctrine by putting it to use in drafting legal documents. By learning to analyze facts and construct arguments in use, students were also being taught how to strategize as a lawyer would. They were beginning to cross the bridge from legal theory to professional practice.

-The Carnegie Report²

This article is based on a presentation that I made in November 2012, at the Emory University School of Law Transactional Drafting Conference in Atlanta, Georgia, which I was deeply privileged to attend and for which I was invited to write an article for presentation. The following describes and attempts to provide a pedagogical construct for a six-week simulation that my colleagues and I have used at the University of North Dakota School of Law and, before that, at the Howard University School of Law to effectively teach interviewing,

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¹ HENRY DAVID THOREAU, WALDEN 37 (Courage Books 1990) (1854).

² WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATIONS FOR THE PROFESSION OF LAW 105 (HB Printing 2007) [hereinafter CARNEGIE REPORT].

counseling, negotiating, and drafting skills within the context of a first-year, year-long, Lawyering Skills or legal writing course. This article will lay out the theoretical framework for the exercise. It will then explore the exercise's importance as well as its teaching and learning goals. It will then walk through how we conduct the exercise. Finally, it will conclude with a reflection on its outcomes. Through this, it is my hope to both persuade my fellow law professors who are not already doing so of the worth of trying such an experience in their own classrooms and provide at least the beginnings of a useful blueprint for how they might go about it.

One of the major themes of several of the important recent critiques of legal education is that law schools need to increase opportunities for experiential learning for students.³ This article concerns itself with one such form of experiential learning: the use of an extended simulation in a first-year legal writing class. Professor Paul Ferber defines simulations as:

1. the performance of a lawyering task;
2. [the use of] a hypothetical situation which emulates reality; and
3. a “significant” (relative to the task to be performed) period of time to perform the task.⁴

He further breaks simulations down into three categories: simple, complex, or extended.⁵ An extended simulation involves “[t]he creation of a complex world and a simulation which runs over a significant period of time, seeking to approximate the same duration as in the real world, and requiring students to engage in multiple tasks.”⁶

³See *id.* See also ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 165 (2007) (defining experiential education as “integrat[ing] theory and practice by combining academic inquiry with actual experience,” and leading the discussion of experiential learning in law schools by recommending the implementation of experiential courses, which he defines as “those courses that rely on experiential education as a significant or primary method of instruction. In law schools, this involves using students’ experiences in the roles of lawyers or their observations of practicing lawyers and judges to guide their learning.”).

⁴ Paul S. Ferber, *Adult Learning Theory and Simulations—Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417, 418 (2002).

⁵ See *id.* at 419-28 (describing the three categories of simulations).

⁶ *Id.* at 423. However, while mirroring reality in many ways, simulations may actually be, in some ways, a better learning opportunity than reality, as students often get the more instant gratification of being able to more immediately ascertain the consequences of their plans and activities. *Id.* at 431. See also Don Peters, *Using Simulation Approaches in Large Enrolment Law Classes*, 6 J. PROF.

The University of North Dakota School of Law (“UND”) has been conducting this exercise for eight years, and I have conducted it for twelve years. My experience with a version of it started at Howard University, where I credit the original idea to Professor Stephen Jamar, who was the Director of Legal Writing at the Howard University School of Law at that time. When I came to UND as the Director of the then Legal Writing, now Lawyering Skills,⁷ program, I had the good fortune of having more-or-less a free rein to build a curriculum for the legal writing program from scratch, with an emphasis on incorporating pedagogy and exercises that would facilitate my and the rest of the faculty’s intention to transform UND’s program from a “research and writing” basis to a “lawyering skills” program featuring the teaching of a broader array of practice-readiness skills.⁸ Thus, I had the opportunity to import the simulation, expand upon it, and organize a second semester of the first year legal writing program that included it. I never had to have the experience that many of my colleagues at other schools describe of having to persuade their faculty colleagues of the importance of doing client-centric simulations in order to secure its inclusion in the program as something new, nor did I have to “shoehorn” it into an already crowded syllabus.

However, an explanation of why I felt that its inclusion in the first-year legal writing program was so important is warranted. It is also important to note that, while we at UND employ this simulation in a legal writing course,⁹ the underlying legal subject matter of the extended simulation is always derived from a first-year doctrinal course, and this teaching exercise could be employed

LEGAL EDUC. 36, 37 (1988) (“Students also must assume more responsibility for their learning because simulations create consequences. These consequences are often immediate since outcomes such as negotiation results can be identified and compared with other group in the class.”).

⁷ Throughout this article, I will refer to “legal writing” programs and courses as perhaps the most widely used and recognized nomenclature for these courses. However, our program and first-year course is referred to as “Lawyering Skills” to reflect a broader and more holistic approach to the skills taught and emphasized in our curriculum.

⁸ See Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?* 100 DICK. L. REV. 245, 250 (1996) (describing the transition from “research and writing” courses to “legal skills” courses).

⁹ This is perhaps the most organic place to put a simulation of this kind. CARNEGIE REPORT, *supra* note 2, at 108 (“Many students with whom we spoke noted the ways in which their writing courses accelerated their progress in legal reasoning in their doctrinal courses [I]t also serves as a bridge between the learning of legal thinking and the mastery of the skills demanded in order to practice law.”).

effectively in many casebook courses,¹⁰ where such simulations are “a vehicle for illuminating and synthesizing the doctrines in basic substantive law.”¹¹ Indeed, Professor Roy Stuckey recommends that simulations be incorporated into every first year course.¹² Professor Paul Ferber asserts that this method “can be used to help students learn virtually anything.”¹³ To accommodate time concerns, a simulation could be used in a truncated, simple form or in a complex format with much of the activity done outside the classroom or through the use of a “flipped” classroom.¹⁴ In a casebook course, a simulation-based model could be interspersed with more traditional doctrinal teaching or might make an ideal intersession experience or one-credit, add-on practicum to another course.

Another approach to doing this simulation amongst an already crowded syllabus, whether in a legal writing or casebook classroom, would be to execute only a part of what takes UND twelve hours of in-classroom instructional time and at least as many out-of-class hours. Pieces of it are very easily adaptable. Approximately one third of that instructional time concerns building the attorney-client relationship, including client interviewing, which could be a unit. Then we do a unit on letter drafting, which includes as a bit of frolic and detour, a discussion of demand letters. Finally, the last part would be the negotiating and drafting experience, which is a unit that could be taken separately, for instance, if a professor desired to do it in a first-year contracts class. And it would be useful to do so.

In these days following Carnegie, simulations of this kind are an effective means to simultaneously integrate the teaching of skills, doctrine, and ethics,¹⁵

¹⁰ See Phyllis G. Coleman & Robert M. Jarvis, *Using Skills Training to Teach First-Year Contracts*, 44 DRAKE L. REV. 725, 725-26 (1996) (stating that they utilized a simulation because they wanted to “correct what [they] believe is a critical flaw in the typical Contracts class: students complete the course without ever negotiating, drafting, or even seeing a contract.”).

¹¹ Jay M. Feinman, *Simulations: An Introduction*, 45 J. LEGAL EDUC. 469, 469 (1995).

¹² STUCKEY ET AL., *supra* note 3, at 277.

¹³ Ferber, *supra* note 4, at 420.

¹⁴ K.K. DuVivier, *Goodbye Christopher Columbus Langdell?*, 43 ENVTL. L. REP. 10475, 10480 (“Flipped classroom pedagogy is also called ‘inverted classroom’ or ‘reverse instruction.’ It describes a situation in which the teacher converts what is traditionally considered classroom teaching, such as lectures, into podcasts or short videos for students to review at home. Then, students do problem-solving exercises in class that might traditionally be done for homework.”) (internal citations omitted).

¹⁵ See Ferber, *supra* note 4, at 424 (“The extended simulation is useful for multiple, as well as highly complex, learning goals. Every extended simulation I have used has involved issues in all three major learning categories: substantive law, professional skills, and professionalism.”); Robert C.

consistent with the Report's paradigm of apprenticeship,¹⁶ particularly in the first year curriculum. "[T]he authors of the Carnegie Report stated that the best legal writing classes they studied focused on learning tasks and contexts that were reflective of and simulated actual legal work because 'the pedagogy [of lawyering skills] is . . . performative and learned in role.'"¹⁷ Moreover, in the wake of the recession, with greater scarcity of law jobs, there is increased pressure on law schools to implement the changes suggested in the Carnegie Report,¹⁸ most

Illig et al., *Teaching Transactional Skills Through Simulations in Upper-level Courses: Three Exemplars*, 10 TRANSACTIONS: TENN. J. BUS. L. 15, 35 (2009) (describing the use of simulations to assist in the formation of professional identity in a transactional setting).

¹⁶ See Kirsten A. Dauphinais, *Sea Change: The Seismic Shift in the Legal Writing Profession and How Legal Writing Professors Will Keep Legal Education Afloat in its Wake*, 10 SEATTLE J. SOC. JUST. 49, 69 (2011) [hereinafter *Sea Change*] (quoting CARNEGIE REPORT, *supra* note 2, at 25-28):

When it was released in [2007], the Carnegie Report reintroduced into the working lexicon of legal education the centuries-old notion of "apprenticeship, with its intimate pedagogy of modeling and coaching." However, this latter-day apprenticeship was to be improved over the "arbitrary and often haphazard nature of old-time apprenticeships"—to be effectuated now by legal educators trained in effective teaching methods. The Carnegie Report proposed three apprenticeships to be implemented in the legal education: the *theoretical* apprenticeship of the "intellectual and cognitive [which] focuses the student on the knowledge on [sic] way of thinking of the profession;" the *practical* apprenticeship of "expert practice shared by competent practitioners;" and the *ethical* "apprenticeship of identity and purpose, [which] introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible."

¹⁷ *Id.* at 102 (quoting CARNEGIE REPORT, *supra* note 2, at 105-108).

¹⁸ See Karen Sloan, *Reality's Knocking as Law Schools Provide More Practical Training*, NAT'L L.J. (Sept. 11, 2009), [available at http://www.law.com/jsp/article.jsp?id=1202433723740&slreturn=20131026162832](http://www.law.com/jsp/article.jsp?id=1202433723740&slreturn=20131026162832) ("A lot of the changes are in response to the marketplace," said David Van Zandt, dean of Northwestern University School of Law. "Students are concerned about getting jobs, and everybody wants to be relevant.") Graduates face stiff competition for law firm positions, and clients are balking at footing the bill to train new attorneys. Consequently, law schools leaders consider it more important than ever to send students into the profession armed with practical skills, not just extensive knowledge of case law and legal theory. More law schools are modifying coursework and adding practical classes to help students develop the skills past graduates had the luxury of learning on the job. See also R. Michael Cassidy, *Beyond Practical Skills: Nine Steps for Improving Legal Education Now*, 53 B.C. L. REV. 1515, 1516-17 (2012) (discussing the growing expectations of law firms that graduates "should be better trained during law school on the skills necessary to practice law.").

particularly ramping up education in practical skills.¹⁹ Through the use of simulations, students learn analysis and problem solving, creativity, and the ability

¹⁹ See Adam Cohen, *With the Downturn, It's Time to Rethink the Legal Profession*, N.Y. TIMES, Apr. 2, 2009, at A26, available at <http://www.nytimes.com/2009/04/02/opinion/02thu4.html> (discussing how law schools may become serious about curriculum reform).

[I]n 2005 Gerry Hess and Stephen Gerst conducted a survey of the Arizona Bar. They asked those lawyers and judges to assess the importance of various professional skills to the success of an associate at the end of the first year in practice in a small, general practice firm. Twelve skills were rated by more than 70% of the respondents as “essential” or “very important,” and three more were rated that highly by more than 50% of the respondents.

1. Legal analysis and reasoning (96%).
2. Written communication (96%).
3. [L]egal research (library and computers) (84%).
4. Drafting legal documents (92%).
5. Listening (92%).
6. Oral Communication (92%).
7. Working cooperatively with others as part of a team (90%).
8. Factual investigation (88%).
9. Organization and management of legal work (88%).
10. Interviewing and questioning (87%).
11. Problem solving (87%).
12. Recognizing and resolving ethical dilemmas (77%).
13. Pretrial discovery and advocacy (64%).
14. Counseling (58%).
15. Negotiation (57%).

STUCKEY ET AL., *supra* note 3, at 78 (citing Gerry Hess & Stephen Gerst, Phoenix Int'l School of Law, Arizona Bench and Bar Survey and Focus Group Results (2005)). Every one of these fifteen skills identified as the most important are used by our students in the UND simulation. The simulation also teaches 24 out of the 26 skills identified by Professors Marjorie Schultz and Sheldon Zanuck that make lawyers effective. See STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS* 4-5 (2d ed. 2003) (including building client relationships and providing advice and counsel; strategic planning; creativity and innovation; practical judgment; listening; integrity and honesty; developing relationships; self-development; diligence, passion, and engagement; ability to see the world through the eyes of others; networking and business development; stress management; organizing and managing your own work; and organizing and managing others (staff or colleagues)). In 1992, The American Bar Association identified several of these necessary skills in the influential MacCrate Report. See AM. BAR ASS'N, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* 135, 240, 259-60 (1992). The author of a leading textbook in the field, Professor Craver, puts negotiation, one of the marquis skills of the UND simulation, at the top of the list of necessary skills for a practicing lawyer and laments its virtual absence from most law school curricula:

Most legal practitioners use their negotiating skills more frequently than their other lawyering talents. They negotiate when they don't even realize they are negotiating. They do so when they interact with their partners, associates, legal assistants, secretaries, prospective clients, and current clients, yet they only think they negotiating when they deal with other lawyers on behalf of current clients. Despite the critical nature of bargaining skills, few attorneys have received formal education pertaining to the negotiation process. Most law

to adapt.²⁰ With regard to ethics, in addition to teaching client-centric lawyering, which I will discuss in more detail later, simulations provide an opportunity for budding lawyers to explore their personas as lawyers, perhaps for one of the first significant times in law school, with an emphasis on learning how to achieve justice and what that means, particularly in situations that, like almost all lawyering scenarios, involve “moral complexity and ambiguity.”²¹

Simulations promote experiential learning opportunities,²² facilitating the full cycle of preteaching learning goals and performance expectations and table-setting, followed by practice, and then by reflection.²³ At its most basic level,

schools now include limited-enrollment legal negotiating course in their curricula, and many states provide continuing legal education programs on this important subject. Nonetheless, the vast majority of practicing attorneys must regularly employ talents that have not been explored or developed in any organized manner.

CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* vii (2012) [on file with author]. *See also* Cassidy, *supra* note 18, at 1519 (“Oral communication skills are especially relevant to interviewing and counseling clients, a task performed by virtually all practicing attorney.”); CARNEGIE REPORT, *supra* note 2, at 114 (“[N]egotiation [has become] increasingly identified with specifically professional functions that could be marketed by law firms.”).

²⁰ Ferber, *supra* note 4, at 430 (discussing the many benefits of simulations).

²¹ *Id.*

²² *See* D.F. Chavkin, *Experience is the Only Teacher: Meeting the Challenge of the Carnegie Foundation Report*, 15 LEG. EDUC. DIG. 48, 49 (2007) (stating that the Carnegie Report recognized that “experiential learning was necessary to achieve the goals of the second [skills] and third [ethics] apprenticeships.”) [on file with author].

²³ Professor Ferber describes a more macro, lifelong learning cycle carried out by experiential learning:

1. The learner engages in concrete experience. I see, hear, feel, read, smell something in the here and now.
2. The learner then engages in reflection and observation on that concrete experience. I think about what I experienced and make observations about that experience.
3. This then leads the learner to form abstract principles, concepts, and generalizations based on the reflective observations of the experience. Based on my concrete experience and my reflective observation about the experience, I generalize and create concepts to organize my raw experience in the future.
4. The learner then actively experiments with the implications of those principles, concepts or generalizations in new situations, active experimentation. I take the concepts or generalizations I developed in the prior three stages and use them in new situations to test their validity.

Ferber, *supra* note 4, at 429. *But see* STUCKEY ET AL., *supra* note 3, at 166 (“Optimal learning from experience involves a continuous, circular four stage sequence of experience, reflection, theory, and application.”).

experiential learning stands for the proposition that people learn from their every day experiences.²⁴ This is particularly true in our professional life.²⁵

Additionally, simulations are excellent vehicles for multi-model teaching and learning.²⁶ I have a scholarly interest in Howard Gardner's multiple intelligences theory;²⁷ so, throughout this article, I will engage in some discussion of his theory and elaborate on how various intelligences are engaged by the different facets of the simulation.²⁸ Simulations promote the development of more intelligence in one fell swoop than does podium-based legal education.²⁹

Finally, a word should be given to why, in particular, I felt it important that we do a simulation accentuating legal negotiation, one of a myriad skills that law students need for practice-readiness. As Professor Carrie Sperling states, "By now the legal community has come to understand the importance of legal negotiation and mediation. The evidence is undeniable—very few cases reach trial Perhaps because of this realization, law schools are offering more classes and clinical opportunities in negotiation and mediation"³⁰

²⁴ Ferber, *supra* note 4 at 428 ("Experiential learning theory is an intellectual recognition of the simple fact that people learn from their every day life experiences.").

²⁵ *Id.* ("Learning how to learn from experience is an integral part of professional life.").

²⁶ STUCKEY ET AL., *supra* note 3, at 97 (stating that multi-modal pedagogy in the law school classroom is a best practice and recommending the reduction in the classroom reliance on the case or Socratic method).

²⁷ See, e.g., Kirsten A. Dauphinais, *Valuing and Nurturing Multiple Intelligences in Legal Education*, 11 WASH. & LEE RACE & ETHNIC ANC. L. J. 1 (2005) [hereinafter Dauphinais, *Multiple Intelligences*].

²⁸ Harvard Education Professor Howard Gardner has identified the following intelligences:

1. Logical-Mathematical
2. Linguistic
3. Spatial
4. The Personal Intelligences
5. Musical
6. Bodily-Kinesthetic
7. Natural
8. Spiritual
9. Existential

Id. at 5.

²⁹ Ferber, *supra* note 4, at 38-39 (discussing the benefits of simulations for students who do not succeed under the traditional case or Socratic method).

³⁰ Carrie Sperling, *Priming Legal Negotiations Through Written Demands*, 60 CATH. U. L. REV. 107, 111-12 (2010). Professors Krieger and Neumann present the following compelling statistics:

Some scholars estimate that as much as 90% of the legal matters handled by lawyers eventually involve negotiation. One study of tort, contract, and real

In the interests of providing some more specific guidance to professors who are interested in conducting an extended simulation in their own law classrooms, following is a description of how the UND simulation unfolds every spring. Approximately half of the second semester of our first-year lawyering skills class is conducted in the extended six-week simulation model. Preceding this, the first semester of our Lawyering Skills program is probably a rather traditional kind of legal writing class for the most part, where we are teaching legal analysis, legal writing, and legal research, primarily through the vehicle of drafting an objective memo, although we have some strong accents of experiential learning through in-class exercises and capping off with a simulated “partner presentation,” where students orally present their research results. But the second semester focuses on persuasion. What better entrée into instruction on persuasion could there be than actually getting into a client-based simulation, advocating for the client’s interests against an opponent?

From the first day back from winter break, my students are divided into two equal-sized law firms,³¹ one firm representing the potential plaintiff and the other firm representing the defendant. They maintain that role, including the

property cases in urban state trial courts found that 61.5% of cases were disposed by a settlement or voluntary dismissal. Approximately 57% of criminal cases are disposed with guilty pleas. In federal courts, 85% of criminal cases end in guilty pleas, presumably negotiated.

KRIEGER & NEUMANN, *supra* note 19, at 269.

³¹ Typically:

This type of group learning may somewhat fly in the face of a law school culture that has “a tradition of individual performance and competition among students.” However, the work of Richard Delgado, among others, supports the notion that doing more to support group learning may be valuable. “Law practice today is much more cooperative than it was in the past, emphasizing a team approach, use of paralegals, and negotiation.” “The benefits of collaborative exercises are multiple. They give students an opportunity to form social bonds that decrease their feelings of alienation,” as well as giving them an opportunity to learn from one another.

Dauphinais, *Multiple Intelligences*, *supra* note 27, at 36 n.213 (internal citations omitted). Indeed, Professor Stuckey recommends that training in working in collaborative groups should be a part of every law school’s first-year curriculum. STUCKEY ET AL., *supra* note 3, at 277. Professor Cassidy cites the group work business school paradigm as one law schools should consider, Cassidy, *supra* note 18, at 1518-19; and Professor Hess asserts that group work increases a student’s grasp of the importance of diversity, assuages the isolation that many law students experience, and aids in building their conflict-mediation skills. Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 94-95 (2002).

obligations of confidentiality,³² for the entire semester. The students have law firm meetings in which they select firm leaders and firm names, which begins the process of giving them an exciting sense of ownership over the learning experience. In the table-setting classes, we have extensive discussions about both the ethics and the rules of professional conduct that would be applicable to the kinds of client representation that they will be undertaking, including an emphasis on the obligations of confidentiality. The students must obtain releases from their client in order to disclose information during the course of the negotiation, as would be required by the canons of ethics in practice.

Generally speaking, the problem we use is litigation-based,³³ so we are bringing that legal writing, litigation-based orientation to the table, although with the additional transactional element of culminating in a final settlement negotiation. For the last three years, we have used a tort problem as a basis for the simulation, usually either a slip and fall or medical malpractice claim, although we previously have experimented with using an employment discrimination case. However, the model that we use could just as easily be applicable in many transactional or deal-based settings, and it would be valuable to do so. I was not a transactional attorney in practice, so I have been trying to bring myself up to speed in this area including by participating in the outstanding Emory conference, so our program could potentially be utilizing a more transactional simulation in the future.

On the first day of class in the spring, we open the class with a thorough review of the parameters and expectations for the simulation.³⁴ Next, the

³² MODEL RULES PROF'L. CONDUCT. 1.6 (stating that "[a] lawyer shall not reveal information relating to representation of a client" with several enumerated exceptions, including informed consent from the client, client authorization, disclosure to prevent "death or substantial bodily harm," and defense against a malpractice suit by the client.). Although not directly relevant to our particular simulation, while discussing the ethics of client interviewing and representation, we also raise the lawyer's obligation not to collude with the client to create false testimony. See KRIEGER & NEUMANN, *supra* note 19, at 100-01 (discussing special ethical problems in client interviews). We refer specifically to the famous *Anatomy of a Murder* scenario in which an attorney subtly coached his client into substantiating an insanity defense at trial. *Id.* (citing ANATOMY OF A MURDER (Columbia Pictures 1959)).

³³ Several scholars emphasize the desirability of using simulations instead in a transactional context, as litigation is overemphasized in the first year curriculum and transactional work would give students a different problem-solving experience in the first year, including the promotion to the students of the notion of being a "builder," not a "fighter." Ferber, *supra* note 4, at 426.

³⁴ Professor Stuckey recommends:

Student learning is enhanced when students understand why they are performing an activity and the rules and procedures are clear. The . . . teacher who creates a simulation must establish the rules and communicate them in

students receive a letter from their respective clients detailing a legal problem. The problem is articulated in lay language, requiring the students to spot the legal issue. They are called upon to identify what the client's needs are. The client does not walk in and say, "I want to sue someone for intentionally inflicting emotional distress." They say instead, "I have this problem." The students have to get together in their law firm teams and diagnose it. This really stimulates their traditional, logical,³⁵ and linguistic³⁶ intelligences.

The students then gather to hold firm meetings where they begin by deciding upon roles within the firm and allocating research responsibilities, both

advance to the student participants. An important role of the instructor . . . is to ensure that students have actual notice of what is entailed . . . the instructor should seize every available opportunity to inform potential students that the simulation is difficult and time-consuming, that it may be stressful, and that it involves teaching methods and subject matter which are radically different from those found in other courses The opening class should include an overview of the simulation and some explanation of the instructor's goals and methods

STUCKEY ET AL., *supra* note 3, at 185 (internal citations and quotations omitted).

³⁵ HOWARD GARDNER, INTELLIGENCE REFRAMED: MULTIPLE INTELLIGENCES FOR THE 21ST CENTURY 42 (1999) [hereinafter GARDNER, INTELLIGENCE REFRAMED] ("[T]he capacity to analyze problems logically, carry out mathematical operations, and investigate issues scientifically."). Logical intelligence is the intelligence most commonly associated with lawyering and law school:

Lawyers use logical mathematical intelligence when they construct legal or factual arguments and analyze or strategize about legal situations. Courts and other legal institutions use logic to legitimize and guide their exercise of authority Law school pays particular attention to logical-mathematical reasoning [L]ogical thinking is the key aptitude every lawyer needs.

Ira Weinstein, *Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam*, 8 CLINICAL L. REV. 247, 255-56 (2001).

³⁶ GARDNER, INTELLIGENCE REFRAMED, *supra* note 35, at 41 ("[S]ensitivity to spoken and written language, the ability to learn languages, and the capacity to use language to accomplish certain goals."). This intelligence is key to law school pedagogy because:

Intrinsic to lawyering is the expression of ideas in written and oral form. A person with superior linguistic aptitude is able to choose and sequence words to persuade and educate others, to remember and use information Language is used by lawyers to excite, stimulate, convey, and convince. Sensitivity to word choice is used in drafting and interpreting legal documents. Last, Professor Gardner also states that certainly individuals are helped if they have good linguistic intelligence because so much negotiation involves speaking and listening. In short lawyers use language to educate others about the complicated legal issues we are charged to champion.

Dauphinais, *Multiple Intelligences*, *supra* note 27, at 7 (internal quotations omitted).

for initially familiarizing themselves with the implicated law in preparation for the client interview³⁷ and for planning the long haul of the project. We always ensure that we give them a problem that implicates a significant amount of research not traditionally “legal” to reflect the realities of the kind of research that lawyers in practice do as a matter of course.³⁸ So, with the medical malpractice case or a personal injury cases that we frequently use, our students regularly use the medical school library. Within their law firm research groups, they might be reviewing medical journals or calling doctors: the students are quite enterprising.

The next week, the students formulate their law firm strategy and then plan³⁹ and conduct an intake interview of an actual “client”—tapping into their linguistic, kinesthetic,⁴⁰ interpersonal,⁴¹ intrapersonal,⁴² spiritual,⁴³ and existential⁴⁴

³⁷ KRIEGER & NEUMANN 19, *supra* note, at 85-86 (advocating an attorney to look at the obvious relevant parts of the law prior to the client arrival).

³⁸ Silecchia, *supra* note 8, at 272-74. See also Judith Wegner, *The Changing Course of Study: Sesquicentennial Reflections*, 73 N.C. L. REV. 725, 744 (1995) (“Lawyers increasingly need to understand the details of financial dealings, welfare bureaucracies, medical procedures, and environmental regulation in order to afford clients competent representation.”).

³⁹ Their planning includes not only the obvious of framing appropriate questions in light of their preliminary research, but also the organization of the interview itself, including the set-up of the room, planning “ice-breakers,” and formulating information-gathering, goal-identification, strategizing, and appropriate closure. KRIEGER & NEUMANN, *supra* note 19, at 84-85.

⁴⁰ HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE* 9 (1993) [hereinafter GARDNER, *THEORY IN PRACTICE*] (“[T]he ability to solve problems or fashion products using one’s whole body, or parts of the body.”). This intelligences is also important for new lawyers to develop:

Kinesthetic intelligence is applicable to the acting skills that are required of all attorneys, including how we use facial expressions, posture, gestures, eye contact, and our voices. How we position ourselves in front of a client, a judge, a jury, or a classroom involves gross motor skills and is crucial to how persuasive we are.

See Dauphinais, *Multiple Intelligences*, *supra* note 27, at 11.

⁴¹ HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* 239 (1983) [hereinafter GARDNER, *FRAMES OF MIND*] (“[T]he ability to notice and make distinctions among other individuals, and, in particular, among their moods, temperatns, motivations, and intentions.”); GARDNER, *INTELLIGENCE REFRAMED*, *supra* note 35, at 43 (“[T]he capacity to understand intentions, motivations, and desires of other people and, consequently to work effectively with other.”). Additionally:

“A lawyer uses interpersonal intelligence to interact with clients, judges, adversaries, witnesses, experts, and law enforcement. The lawyer relies on interpersonal intelligence to be an effective counselor who communicates, listens, and empathizes with a client. A lawyer then uses interpersonal intelligence to negotiate, mediate, persuade and otherwise advance her client’s interests.” An attorney who has insight into others’ emotional states is better

able to collaborate with colleagues, work with or against adversaries and persuade others. Professor Gardner himself lauded the interpersonally gifted lawyer—“one who can speak eloquently in the courtroom, skillfully interview witnesses and prospective jurors, and display an engaging personality. . . . Interpersonal intelligence is arguably the most important skill for a lawyer whose practice setting involves client contact, group work, or oral advocacy.”

Dauphinais, *Multiple Intelligences*, *supra* note 27, at 8-9 (internal citations omitted).

⁴² GARDNER, INTELLIGENCE REFRAMED, *supra* note 35, at 43 (“[T]he capacity to understand oneself, to have an effective working model of oneself—including comprehending one’s own desires, fears, and capacities—and to use such information effectively in regulating one’s own life.”). The effective lawyer uses intrapersonal intelligence to do so through:

Self-awareness, self-confidence, self-discipline, and motivation. At least one scholar states that “discipline, intelligence, commitment, and motivation to succeed . . . may be more important to success in [law] school [than a high score on the LSATs].” Another concurs that “[l]awyers and law students must have the motivation, self discipline and insight required to carry out complex, long term projects.” Other commentators focus on the moralistic aspect of the intelligence, finding that “[a] lawyer must use intrapersonal intelligence to listen to her conscience as she has a unique responsibility to be ethical and to exercise good judgment.” Still others embrace the significance of the maxim, “know thyself” in asserting that “[s]elf-knowledge can also be a powerful tool in making predictions and interpreting the motivations and actions of others. As we better understand ourselves, we can use that knowledge to interpret others.” Professor Gardner tells us that this ability to “know one’s own needs and desires and modes of operation” can be invaluable in the negotiation tasks that most lawyers are called upon, at one time or another, to do. Additionally, a lawyer can use intrapersonal intelligence to aid her in coping with the stresses, psychological and otherwise, that inhere in the legal profession and in law school. Perhaps most significant is the fact that “there are many in law school who succeed more by regular and steady effort than by brilliance.”

Dauphinais, *Multiple Intelligences*, *supra* note 27, at 9-10 (internal citations omitted). Professor Stuckey recognized the significance of nurturing this intelligence in the first year of law school:

Students should also receive instruction in how to be expert self-regulated learners so they develop the skills of controlling their learning process; managing their workload, time, and stress; self-monitoring their learning process while it is in progress; and reflecting on their learning afterward, thereby continuously improving themselves as learners. Students should be required to maintain reflective journals in at least one course.

STUCKEY ET AL., *supra* note 3, at 277 (internal citations omitted). Our program at UND accentuates all of these skills, including, specifically, journaling, which I will talk about at length later in this article.

⁴³ GARDNER, INTELLIGENCE REFRAMED, *supra* note 35, at 54 (“[C]oncern with cosmic or existential issues.”). The applicability of this intelligence to lawyering may not be immediately clear:

However, it is not absurd to assert that being at peace with oneself would be an asset to anyone in our profession. Equally beneficial to attorneys is the capability of deep thought and the leadership and charisma embodied by great

intelligences. To prepare for the interview, we spend some time in class on client interviewing strategies and client relations,⁴⁵ including introducing concepts of client-centered lawyering;⁴⁶ focusing on diagnosing the problem;⁴⁷ actively listening⁴⁸ to ascertain the problem from the client's perspective; cognizant of cultural differences⁴⁹ and sensitive where the client might potentially be embarrassed;⁵⁰ employing cognitive techniques to maximize client recall;⁵¹ actively involving the client in crafting a solution; ascertaining and acknowledging the client's feelings and values,⁵² and, perhaps most significantly, goals;⁵³ and

spiritual leaders. Perhaps, most significantly, true understanding of moral concepts that are applicable to the law, such as justice, mercy, liberty, and truth, should be valued by our profession.

Dauphinais, *Multiple Intelligences*, *supra* note 27, at 13 (internal citations omitted).

⁴⁴ GARDNER, INTELLIGENCE REFRAMED, *supra* note 35, at 60 (“[C]apacity to locate oneself with respect to the furthest reaches of the cosmos and existence.”); *see also* Dauphinais, *Multiple Intelligences*, *supra* note 27, at 13 (“As with spiritual intelligence, the capacity for ‘big picture thinking,’ or for looking beyond the present imbroglio to future ramifications, is an asset for any lawyer. The ability to grasp philosophy and cosmology aids one in determining the proper placement and order of individuals and concepts in the universe.”).

⁴⁵ The principal text we use to teach client interviewing, counseling, and, later on in the unit, negotiating, is STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS* (2011).

⁴⁶ KRIEGER & NEUMANN, *supra* note 19, at 16 (defining client-centered lawyering as “focusing our efforts around what the client hopes for (rather than what we think the client needs) and treating the client as an effective collaborator (rather than as a helpless person we will rescue.)” (citing DAVID A. BINDER & SUSAN M. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977)). Professors Krieger and Neumann continue: “Clients are not helpless, and even if they were, only rarely could we rescue them. A better view is this: the client is a capable person who has hired us to help the client accomplish a particular goal.” *Id.*

⁴⁷ *Id.* at 25.

⁴⁸ *Id.* at 41-42.

⁴⁹ *Id.* at 49-53 (discussing how “[a] lawyer can be effective only if the lawyer understands cultural differences and knows how to recognize and deal with them.”).

⁵⁰ *Id.* at 101-02 (discussing how to handle private or embarrassing material).

⁵¹ *Id.* at 74-77 (discussing several cognitive interviewing techniques that can help a client or witness remember certain facts). The question of the flaws of witness recall is a fascinating one, but is beyond the scope of this article. For basic information on the topic, please consult another article I co-authored: Richard A. Wise, Kirsten A. Dauphinais & Martin A. Safer, *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 848-51 (2007).

⁵² Kimberly E. O’Leary, *When Context Matters: How to Choose an Appropriate Client Counseling Model*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 103, 106 (2001) (discussing client-centered counseling).

establishing a healthy attorney-client relationship⁵⁴ with good rapport and, as much as possible, realistic expectations on the part of both the client and lawyer, both immediately and long-term.⁵⁵ Teaching assistants generally play the clients, although occasionally my poor husband has been dragooned into playing a client. At our school, unfortunately, time only permits us to organize it as a group interview to which all firm members contribute questions and formulate strategy, but which is generally conducted by students selected by the firms in front of the others.⁵⁶ The student teams decide the room arrangement for the interview,⁵⁷ how best to make the client comfortable, and how to conduct a cognitive interview to maximize the useful information obtained from the client regarding the sensitive matter.

On a related note, an important tenet of the realism of our simulation is that, throughout, the students are responsible for getting the information they need from the client in order to conduct the representation.⁵⁸ Generally speaking, our practice is to reflect real practice in that the students do not receive any information that they do not research themselves or directly request from the client; thus, they have to ask the clients the right questions in order to get the information that they need to do the negotiation and have to ask the clients for any documents that they may require. Occasionally, we will take pity on them and give them something that they did not think to ask for because they will not be

⁵³ KRIEGER & NEUMANN, *supra* note 19, at 89-91 (discussing the importance of ascertaining the client's goals). Primary among the considerations are whether the client is primarily interested in monetary concerns or whether there are other imperatives and whether there is a pressing question of time in attaining relief. *Id.* at 89.

⁵⁴ *See id.* at 80 (describing the three levels on which an attorney-client relationship is formed).

⁵⁵ *See id.* at 80 (describing how to reduce the client's anxiety without being unrealistic).

⁵⁶ If I ever incorporated this kind of experience into an upper-level skills class, my hope would be to facilitate individual client interviews.

⁵⁷ The interview takes place within the confines of a large lecture-style classroom. I am happy to report that the North Dakota Legislature recently allocated funds for a large expansion to our law school, so hopefully teaching spaces more appropriate to our simulation will be available in the not-too-distant future.

⁵⁸ An essential part of this process, of course, is for the student attorneys to help the client help herself: Many clients have only a rough idea of what they need. Others may have very specific ideas, some of which may be legally unfeasible. The attorney helps the client understand which outcomes are achievable in the particular context. To bring about these outcomes, the attorney must also help the client understand how to help the attorney. MARGARET TEMPLE-SMITH & DEBORAH E. CUPPLES, *LEGAL DRAFTING: LITIGATION DOCUMENTS, CONTRACTS, LEGISLATION, AND WILLS* 3 (2013) [on file with author].

able to analyze the client's legal issue or negotiate on their behalf unless they get it. For the most part, however, the onus is on the students, subjecting their linguistic, interpersonal, and intrapersonal skills to an exacting test. The client interview itself is also quite kinesthetic; they are actually getting in there and doing it. In the end, the students are responsible for identifying what the client's goals and priorities are.

At this point, it should be noted that the generation of documents requested by the law firm teams requires a massive effort;⁵⁹ and, at UND, the successful execution of our exercise is dependent on the hard work and creativity of all the legal writing faculty and on a fantastic team of teaching assistants⁶⁰ who take the laboring oar with their technology skills that far outstrip mine to generate credible looking documents. Thus, I pause to thank my legal writing colleagues, past and present, as well as over thirty legal writing teaching assistants who, over the years, contributed their genius and labor to create problem files that reflected the appropriate balance among realistic detail, challenging complexity, and pedagogical utility.⁶¹

At Howard University, where we had a three-semester legal writing program and were able to fit in a little more, the students would be required to memorialize their impressions of the case into the traditional vehicle of an intra-office memo to the file, utilizing their traditional intelligences.

At UND, however, we only have a two-semester program; so we contract the experience and skip right to the students communicating their impressions in an understandable and tailored way, with deep cognizance of audience, through a client letter,⁶² particularly tapping into their linguistic and interpersonal intelligences. In preparing for the client letter, we coach the students in their law firm teams in organizing the facts they gleaned from the interview, subsequent document requests, and their research into persuasive models of fact organization

⁵⁹ Feinman, *supra* note 11, at 479 (discussing the various institutional considerations when conducting a simulation).

⁶⁰ *See id.* (discussing the impact funding can have on the availability of student teaching assistants).

⁶¹ STUCKEY ET AL., *supra* note 3, at 186 (noting that simulation problem files need to have fidelity to the real world to facilitate "transference of learning from the exercise to the real world," but should not be so complex as to discourage the student participants).

⁶² Reflecting the practice-oriented nature of our Lawyering Skills program, we are pleased to be able to include a client letter among the forms of writing on which our students receive instruction in the first year, an experience offered by only 116 of the 190 law schools reporting in the last Association of Legal Writing Directors/Legal Writing Institute Survey. ASS'N OF LEGAL WRITING DIRS. LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY 2013 vii (2013), available at <http://www.lwionline.org/uploads/FileUpload/2013SurveyReportfinal.pdf>.

reviewed in the Krieger and Neumann text: arranging around legal elements, arranging chronologically, and framing into a narrative.⁶³ For teaching legal letter writing itself, we have principally used Richard Neumann's landmark text *LEGAL REASONING AND LEGAL WRITING*⁶⁴ with particular attention paid to the organization of the letter,⁶⁵ the importance of accuracy in making predictions,⁶⁶ and the utilization of the appropriate tone for the particular client,⁶⁷ whether she be a child or a corporate executive. Indeed, one of the essential goals of a simulation of this kind is to aid students in mastering how to communicate complicated legal concepts in a manner that their particular client can grasp.⁶⁸ In some years, we have promoted yet another of the practical aspect of legal communication in requiring the students to condense the client letter's legal advice into an email.⁶⁹

Next, their law firm ends, and they are mano-a-mano with an attorney from the other law firm to negotiate a settlement. Here, there is a bit of an artificial construct because we compel the students to come to a negotiated settlement; there is no option of walking away from the table and going to trial. We tell them, "Think of it this way. Your client has directed that you must settle this case because they do not want to go to trial. Your 18-year-old client is terribly nervous and does not want to testify in court. Your corporate client on the other side does not want the bad publicity. So you have been directed by your client that you must settle this case at all cost."

We have some ground rules. The students are required to meet in at least three in-person sessions, putting their kinesthetic, as well as traditional

⁶³ KRIEGER & NEUMANN, *supra* note 19, at 144-154 (discussing the chronology model of organizing facts). We particularly spend time delving into the possibilities of portraying the client's facts in the form of a persuasive narrative. There is a rich and burgeoning body of literature within the scholarship of legal writing exploring the power of storytelling for advocating for a client, yet another wonderful topic that will have to wait until the next article.

⁶⁴ RICHARD K. NEUMANN, JR. & KRISTEN KONRAD TISCIONE, *LEGAL REASONING AND LEGAL WRITING* 245 (7th ed. 2013) [on file with author].

⁶⁵ *Id.* at 246-49.

⁶⁶ *Id.* at 247-48.

⁶⁷ *Id.* at 246.

⁶⁸ Ferber, *supra* note 4, at 438 (discussing how the use of simulations can help students learn how to communicate complex legal concepts in less technical ways).

⁶⁹ Kendra Huard Fershee, *The New Legal Writing: The Importance of Teaching Law Students How to Use E-Mail Professionally*, 71 MD. L. REV. ENDNOTES 1, 1 (2011) (describing the importance of law students entering practice knowledgeable about email professionalism).

intelligences, on display through demeanor, word choice, and body language. In particular, the negotiation is a rigorous workout of the budding lawyer's interpersonal skills.⁷⁰ They can supplement as much as they want with telephone calls, emails, and text messages. But, to a large extent, they must simply sit down and knuckle it out. At this point, the students cannot communicate with the rest of their previous firm about how the negotiation is unfolding—each is on their own.

The entire negotiation experience is preceded by several lectures on negotiation strategy and tactics, principally utilizing the excellent Krieger and Neumann text.⁷¹ Chief among our topics for discussion is planning, including the identification of the client's and the opponent's interests, rights, and power;⁷² various approaches to the negotiation itself, principally the adversarial and problem-solving approaches;⁷³ the concepts of opening offers, bottom lines, and "BATNA or Best Alternatives to Negotiated Agreement";⁷⁴ and suggested

⁷⁰ See CRAVER, *supra* note 19, at vii (discussing how negotiations involve interpersonal transactions). We take this opportunity also to raise issues regarding professional identity, as the students always raise many questions about the persona they should adopt for negotiating. See KRIEGER & NEUMANN, *supra* note 19, at 298-300 (describing the process for selecting an approach to the negotiation). We generally counsel some version of being a confident version of themselves. It is also a handy moment for an ethics lesson and we further advise a generous dose of civility, which will be discussed more later in the article. Another lesson comes with our discussion of the line between "puffing," innocuous statements to support your client's case and point of view, and outright factual misrepresentation, which is unethical behavior for an attorney in a negotiation. RICHARD K. NEUMANN, JR., *TRANSACTIONAL LAWYERING SKILLS: CLIENT INTERVIEWING, COUNSELING, AND NEGOTIATION* 119 (2012) [on file with author] (citing MODEL RULES OF PROF'L CONDUCT R. 4.1(a)).

⁷¹ A description of best practices in negotiation, as well as the pedagogy of teaching negotiation, is also beyond the scope of this article. However, in addition to Krieger & Neumann, there are many fine texts on the subject. See, e.g., JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW* (2d ed. 2010). As a general matter, however, it should be noted that the CARNEGIE REPORT has lauded the increase in simulation-based teaching of negotiation in law schools. CARNEGIE REPORT, *supra* note 2, at 114 ("It is an important development that legal educators seem to have increasing appreciation for the usefulness of summations, through which negotiation seems particularly successful in broadening law students' awareness of the multiple dimensions of legal actions.").

⁷² KRIEGER & NEUMANN, *supra* note 19, at 295-97. Nuances of this discussion include the revisiting of the notion that the client may be interested in more than just money and that there are various techniques the savvy negotiator can use to increase her power. *Id.* at 312.

⁷³ *Id.* at 321-33. Indeed, we emphasize that a good negotiator will generally utilize both approaches in the course of one negotiation.

⁷⁴ *Id.* at 295 ("Your BATNA is your walkaway alternative. It's your best course of action for satisfying your interests without the other's agreement.").

approaches for exchanging of information, bartering, handling threats and anger, and closing the deal.⁷⁵ In addition, we have, for the last eight years, invited a federal judge with special experience in mediation to come and speak to the students more globally about settlement processes and alternative dispute resolution.⁷⁶ Thus, it is also a great experiential opportunity to bring in a judge for the students to hear from her own mouth that, yes, most cases actually are settled, as opposed to what they might have seen on television. The judge's visit is a very validating, cross-pollinating contribution to the experience.⁷⁷

This settlement session ends in a contract, trying the students' linguistic and logical skills. This is preceded by a contract drafting lesson that we developed in conjunction with the UND contracts professor. In the Carnegie age, where we have been talking about cross-curricular teaching, interdisciplinary teaching, and writing across the curriculum, we sat down with my then-Contracts colleague Professor William Johnson to figure out the puzzle of what one would teach about the principles of contracts and contract drafting if one only had two class sessions in which to teach it? What would the key tenets be? What would the key articles and teaching materials be – articles and teaching materials often written by members of the legal writing community – and what would be the forms to which you would point the students? With what do we send them out into the world?

We pull the materials from a number of different places. The leading source for the teaching of contract drafting is widely regarded as Tina Stark's book,⁷⁸ and we utilize that in developing the lesson plan and in developing criteria by which we evaluate the final contracts.⁷⁹ However, that well-nigh epic work is, in a number of ways, more sophisticated than what I would use for a first year

⁷⁵ *Id.* at 343-48.

⁷⁶ STANDARDS & R. OF P. FOR APPROVAL OF L. SCH. 403(c) (2013), *available at* <http://www.americanbar.org/groups/legal-education/resources/standards.html> (“A law school should include experienced practicing lawyers and judges as teaching resources to enrich the educational program.”)

⁷⁷ STUCKEY ET AL., *supra* note 3, at 158 (stating that judges “can give students a realistic view of the practice of law that they may not get from the full-time faculty”).

⁷⁸ TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2007) [on file with author].

⁷⁹ See M.H. Sam Jacobson, *A Checklist for Drafting Good Contracts*, 5 J. ASS'N LEGAL WRITING DIRS. 79 (2008) (providing a checklist for reviewing a contract in the simulation context). As recommended by Professor Jacobson, we encourage our students to follow a clear, easy-to-follow checklist similar to the one created by Professor Jacobson, supplemented with our own thoughts.

class, so we supplement it with an amalgamation of other articles, including the excellent “checklist” article created by M.H. Sam Jacobson,⁸⁰ and place a variety of form books on reserve in the library.⁸¹

The students are very excited and animated about engaging in the exercise. In the twelve years that I have been doing this exercise, I only have had one pair of students who broke down and needed me to “mediate” their settlement. I have had a few other groups who were able to complete their negotiation, but where I needed to have discussions with one or both of the partners about unprofessional behavior. For the most part, though, the students negotiate without a hitch. They decide what information they are going to release to the other side. They have to get permission from the client. And they decide what secrets they are going to trade off in order to get concessions.

The whole matter of confidentiality is an interesting one, providing some excellent teachable moments, especially in the early years. In my first years at UND, students would reserve conference rooms in the school to hold their law firm meetings, during which they would write things on the whiteboard and forget to erase them, leaving them there for all to see. We have an architecturally, strangely-designed library, soon to be rectified with our aforementioned new building project. Apparently, the designers thought, for air circulation purposes that the floors should not actually meet up with the floor-to-ceiling windows. Thus, there is effectively an airshaft that goes all the way up the four floors of the library that is a wind tunnel for both wind and conversation. We learned that, if a law firm is having a discussion on floor one, fellow students sitting on the third floor can hear everything that is being said. This is particularly problematic because we always design our problems to ensure that there is at least one “secret” or piece of proprietary information for each side, as we want the students to have the practice of guarding this information, preserving client confidentiality, and, with client permission, learning how to barter with these secrets during the negotiation. Unfortunately, in the very beginning, we had some problems with

⁸⁰ *Id.* As an additional note to enterprising legal writing professors out there: at a recent conference, a representative of a prominent publishing company with whom I spoke agreed that what is really needed is a text on how to teach a short interviewing, counseling, negotiating, and drafting unit of this kind in the first year, perhaps in the form of a 200-page, soft-cover book. If someone wrote it, I would adopt it for this class.

⁸¹ Suffice it to say that opining on the components of a properly drafted contract is, once more, beyond the scope of this article. However, topics of instruction on contracts during the UND simulation include options for formatting settlement contracts; preambles and recitals; definitions; manners of expressing obligations, promises, covenants, and rights; representations and warranties; recitations of facts; and choice of language with a particularly emphasis on clarity and the avoidance of legalese. STARK, *supra* note 78, at 35-293; Jacobson, *supra* note 79, at 79-114.

the secrets getting out. Generally, with a greater pedagogical emphasis on the importance of the ethics of client representation and confidentiality over recent years, the secrets have stayed fairly airtight. And when we do the big reveal at the end of the whole thing, they get the epiphanic, “I knew it!” experience, which makes them even more invested in the exercise.

Concerning the contract, the students are motivated to work together to complete it and create a good product because they are graded jointly.⁸² This creates a compelling dynamic in favor of collegiality because the students have to work together to create a good, airtight legal product. Strangely, their lot is thrown in together with the person that the students have just been negotiating against, and this scenario provides a valuable opportunity to teach an ethical lesson about civility in the practice of law, even, and especially, as regards opponents. The contract is the principal means by which the simulation experience is assessed.⁸³ I have been asked by legal writing colleagues about the challenges of assessing an exercise of this nature, and I agree there are certain challenges. At UND, we grade the client letter and the contract. After experimenting with different models over the years, we have settled on one that contains a bit of artificiality to it because we communicate in class and in the grading checklist that, for purposes of deriving a grade on the contract, we are more concerned about the quality of the drafting than the particular result they achieve for their client.⁸⁴ Our grading rubric criteria, which is provided to

⁸² See CRAVER, *supra* note 19, at 79 (stating that for negotiations in general, “[c]ongenial [r]elations [g]enerate [b]etter [r]esults.”).

⁸³ Feinman, *supra* note 11, at 478 (advocating the evaluation of the students’ performances through a written instrument).

⁸⁴ Gerald R. Williams, *Using Simulation Exercises for Negotiation and Other Dispute Resolution Courses*, 34 J. LEG. EDUC. 307, 311-12 (1984).

Grading policies are important determinants of what students learn from the course. For example, if grades are based on the dollar values of outcomes, students will adopt very competitive tactics, will become openly hostile to one another, and will be led to believe that negotiation is a zero-sum game in which there is always a winner and a loser. On the other hand, avoiding all comparisons of outcomes (with or without grades) threatens to undermine the importance of the exercises and implies to students that outcomes are not important. The ideal grading scheme should balance these tensions, taking into account that if dollars are accepted as the sole criterion for outcomes, then students will ignore other relevant human and societal values.

Id.

students in advance⁸⁵ is derived in large part from the Stark book⁸⁶ and the Jacobson article,⁸⁷ as well as several other sources. The grading rubric criteria emphasize not only legal soundness, but also the use of plain English.⁸⁸ On occasion, through their journals, which I will be talking about in a moment, I award one or two bonus points to a student if he or she manages to negotiate an extraordinary settlement for the client or if the journal reveals a unique intricacy and success in planning and execution.⁸⁹ However, this is the exception rather than the rule. The focus is on the draftsmanship of the settlement document itself.

Because the exercise is meant as a reflective experiential learning exercise, we end this process by requiring the students to submit a detailed, thoughtful “Negotiation Journal” with their contract, in which they explore their negotiation process, including the lead-in and planning process, discussion of their strategy, and a review of the outcome or “Monday morning quarterbacking.”⁹⁰ Professor

⁸⁵ *Id.* (describing the importance of publishing to students clear and consistent standards for the grading instrument).

⁸⁶ STARK, *supra* note 78.

⁸⁷ Jacobson, *supra* note 79.

⁸⁸ STARK, *supra* note 78, at 201.

⁸⁹ Feinman, *supra* note 11, at 478 (detailing a check, check plus, check minus scheme as a means to reward exceptional performance and penalize poor). While grading can be challenging to pinpoint and perhaps even raise ethical issues with assigning a numerical grade to an experience only a small portion of which might be fully apprehensible to the professor in reading the written documents produced, Professor Craver makes a strong argument for why assigning a letter or number grade is important:

At George Washington University, my Legal Negotiating students can take my course for a traditional letter grade or on a pass/fail basis. In 1998, I compared the negotiation exercise results achieved by graded students with the outcomes attained by pass/fail students. Although my students had often suggested that the pass/fail students had an inherent bargaining advantage since they could be more risk-taking when deciding whether to risk nonsettlements, I found that the graded students had achieved significantly higher results. This reflects the fact that successful negotiators generally work harder than their less successful cohorts. If students have to decide whether to spend an additional thirty minutes preparing for bargaining encounters or spend an extra hour trying to induce their opponent to give them what they want, the students receiving a letter grade are more likely to make this commitment than the students guaranteed a “pass” if they do the required work. Practitioners who wish to obtain optimal results for their clients must be willing to make the extra effort it takes to generate consistently beneficial outcomes.

CRAVER, *supra* note 19, at ix (internal citation omitted).

⁹⁰ Ferber, *supra* note 4, at 425 (describing the self-evaluative usefulness of journaling in simulation exercises). Professor Sonsteng states:

Feinman suggests that journals can take the form of a written journal or response to designated questions.⁹¹ In our program, we have traditionally provided students with the option either to answer a set of predesignated questions on the preparation, execution, and aftermath of the exercise⁹² or complete their journal in a looser, narrative format. The whole exercise is more intrapersonal than most other exercises that they will perform in law school.

At UND, the contract concludes the simulation experience. At the Howard University School of Law, where we had a bit more time, we took the whole simulation through the entire semester because, through some professor-created *deus ex machina*, the contracts ultimately were not signed, the negotiations broke down, and the students ended with writing a traditional memorandum in support of, or in opposition to, a litigation motion, usually a motion for summary judgment. We usually would effect this by killing the plaintiff, who would have some kind of tragic accident the night before the contract was supposed to be signed, and the plaintiff's next of kin would decide to carry on in his name. The motion is then orally argued in court, putting linguistic, kinesthetic, and interpersonal skills once again on display. Unfortunately, we do not have the opportunity to do this at UND, although I think it likely that we would do so if we ever had a three-semester legal writing program.

Throughout our process, we reflect and debrief on the simulation in class, sometimes all of us, sometimes within the law firms.⁹³ The whole experience

Journal writing is an important option for assessing the level of a students' learning In a journal, students can conduct a formal self-evaluation, which the instructors can then critique. "Journal writing is a highly-valued tool for reflection in a variety of adult educational contexts because journals have been shown to facilitate adults in the process of organizing their thoughts" and formal self-evaluation can spur reflection. A journal allows students to move through the cycle of experiential learning by themselves and is a good way for the instructor to gain an understanding of a students' thinking.

John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 406 (2007) (internal citations omitted). See also Feinman, *supra* note 12, at 478 ("Whatever the goals of the simulation, students' learning will be enhanced by reflecting on what they have learned and how they learned it.").

⁹¹ Feinman, *supra* note 11, at 478.

⁹² We use a form derived the one suggested by Professor Craver. CRAVER, *supra* note 19, at 210-12.

⁹³ Dauphinais, *Multiple Intelligences*, *supra* note 27, at 37.

demands the intrapersonal intelligence of stamina, insight, and discipline.⁹⁴ It also requires intelligences in the vein of spiritual, naturalistic,⁹⁵ and existential thinking—“the ability to prioritize and put matters in context, the ability to grasp far-reaching consequences, leadership skills, and demonstration of morality and diplomacy”⁹⁶—because, in our exercise, there are negative consequences to the professionalism grade they are assigned for the class for those students who can be proven to have called their opponents names or engaged in ad hominem attacks.

On the subject of aggressive tactics, we talk every year about the film *Dangerous Liaisons*.⁹⁷ There is a scene in which John Malkovich breaks up with one of his mistresses by repeatedly saying, “It’s beyond my control,” and refusing to budge from this mantra, as she pleads for him not to leave her. This short video clip is a fun and effective illustration of the principles of Boulwaristic negotiation and its negative consequences in modern-day negotiations, as well as in eighteenth century boudoirs.⁹⁸

⁹⁴ *Id.*

⁹⁵ GARDNER, INTELLIGENCE REFRAMED, *supra* note 35, at 49 (“[T]he core capacities to recognize individuals as members of a group (more formally, a species); to distinguish among members of a species; to recognize the existence of other, neighboring species; and to chart out the relations, formally or informally, among the several species.”). Additionally:

To apply naturalistic intelligence to the law, one might accept that the same gifts that aided our ancestors in the game of evolutionary roulette would aid the lawyer in the modern battles that he or she faces. The intelligence could aid the lawyer in detecting patterns, “making and justifying distinctions,” perceiving relationships, and making and understanding analogies, such as classifying materials.

Dauphinais, *Multiple Intelligences*, *supra* note 27, at 12 (internal citations omitted).

⁹⁶ *Id.* at 37.

⁹⁷ DANGEROUS LIAISONS (Warner Bros. 1988).

⁹⁸ Professors Krieger and Neumann have the following to say about Boulwarism:

Credibility problems can arise through “Boulwarism”—making only one offer, which you believe is reasonable and just, and telling the other side that you will settle on no other terms. Boulwarism is named after a former vice-president of General Electric who used this tactic in labor negotiations in the 1950s. Although his offers might be considered fair objectively, they generated controversy and friction and made settlement more difficult.

STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS* 357 (4th ed. 2011). Certainly, the “settlement” in *Dangerous Liaisons* did not turn out well: Michelle Pfeiffer dies of heartbreak in a convent hospital and John Malkovich gets run through by the sword of Keanu Reeves.

The entire exercise is extremely engaging; the students are very enthusiastic to participate.⁹⁹ Simulations motivate students to learn¹⁰⁰ because they “arouse curiosity and satisfy student desires for task involvement.”¹⁰¹ This has certainly been my experience - it is not unknown for students to call me at home at 11:00 PM to excitedly fill me in on their strategy for the next phase of the simulation. This is, first, because the learning is active rather than the passive learning often experienced in many other law school settings.¹⁰² Second, the simulation’s real-world context makes it relevant.¹⁰³ Over the years, students have reported that this simulation is often the experience that they have had in the first year of law school that most made them feel like lawyers. Finally, the simulation promotes a different learning style¹⁰⁴ for all students. In particular, some of the literature has posited that the life experiences of students of color have given them more experience with negotiation and they may thrive in situations involving group learning,¹⁰⁵ thus narrowing the grade gap that may sometimes exist between students of color and Caucasians. Women as well tend to perform

⁹⁹ Dauphinais, *Multiple Intelligences*, *supra* note 27, at 37.

¹⁰⁰ Ferber, *supra* note 4, at 431.

¹⁰¹ Peters, *supra* note 6, at 37.

¹⁰² Ferber, *supra* note 4, at 431; *see also* DuVivier, *supra* note 14, at 10476 (“[R]esearch shows that while lectures may allow a professor to present more than might be covered in an apprenticeship, most of that material does not get into each student’s notes or memory. Students have only a passive role in the lecture process, and cognitive psychologists have found that audiences have difficulty remembering information if it is conveyed only through listening.”). Additionally:

Finally, the Socratic Method is heavily dependent on a lecture style of teaching, which in turn requires a listening form of learning from the students, and “while most students have had extensive experience with aural learning, it usually is not the dominant mode for absorbing information.” In fact, as one commentator cleverly pointed out, for all but one person in the class actually being questioned, the Socratic Method is an exercise in listening, resulting in, at best, “vicarious participation.”

Dauphinais, *Multiple Intelligences*, *supra* note 27, at 28 (internal citations omitted).

¹⁰³ Ferber, *supra* note 4, at 431. *See also* Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. LEGAL EDUC. 402, 412 (1998) (“Role-playing exercises in which students put into context what they are learning help them understand why they will need the information and how they will use it.”).

¹⁰⁴ Ferber, *supra* note 4, at 431.

¹⁰⁵ Weinstein, *supra* note 35, at 282 n.100. Indeed, Professor Quigley asserts that group learning “when peers share experiences and insights” is both the most common and the best style of learning for ALL adults. Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLIN. L. REV. 37, 57 (1995).

better than they might in the traditional model, perhaps reflecting the simulation's increased emphasis on linguistic and interpersonal skills.¹⁰⁶ Moreover, the simulation-based model of pedagogy and assessment may provide an opportunity to value and encourage an entire group of students who are often left behind in the traditional law school classroom, but who could prove to be quite capable lawyers nonetheless.¹⁰⁷ A simulation-based model of pedagogy also may be a useful step in the journey to humanize legal education, as it is void of many of the distressing aspects that can be present with a teaching style dominated by the

¹⁰⁶ Andrea Kayne Kaufman, *The Logician Versus the Linguist—An Empirical Tale of Functional Discrimination in the Legal Academy*, 8 MICH. J. GENDER & L. 247, 257 (2002).

¹⁰⁷ Dauphinais, *Multiple Intelligences*, *supra* note 27, at 38-39. Professor Weinstein states:

The over-reliance on exams fails to identify the group of students whose simulation performance provides evidence of their indication of probable success in many lawyer roles If, for example, we accept that the personal intelligences are really independent valuable abilities in the world, we might begin to prize skillful client counseling more than we do. If we coupled that awareness with an effort to identify our students [sic] aptitudes in the personal intelligences, we could help students develop a professional role around their strengths. Students with those strengths might more often see direct client service as an important and challenging career, rather than a path for those who did not get jobs at the biggest law firms. They could make better informed decisions about whether or not to work to improve in some areas and how to plan and prepare for their particular careers as lawyers. Students with traditionally recognized strengths might also be a little more humble and learn that writing high scoring exams is one valuable aptitude among a constellation of abilities. We do our students, and the profession, a disservice by graduating many students who feel unrecognized and were in fact not educated as well as they could have been, by their law schools.

Weinstein, *supra* note 35, at 285-86. Moreover, with regard to prowess in the important skill of negotiation, Professor Craver has validated many of Professor Weinstein's opinions through empirical study:

During the years I have taught Legal Negotiating courses, I have frequently wondered whether there was any correlation between overall law school performance—measured by final student GPAs—and the results obtained on my simulation exercises. In 1986, I performed a rank-order correlation on the data I had for the previous eight years at the University of Illinois and the University of California at Davis. In 1999, I replicated this study for the thirteen years of data I had amassed at George Washington University. In both studies, I found the complete absence of any statistically significant correlation between overall law school achievement and negotiation exercise performance. This would certainly suggest that the skills imparted in traditional law school courses have little impact upon a student's capacity to obtain favorable results on negotiation exercises.

Craver, *supra* note 19, at viii (internal citations omitted).

Socratic Method.¹⁰⁸ The simulation also provides multiple, frequent,¹⁰⁹ and varied opportunities for assessment and feedback, as opposed to the single-shot examination model that prevails in many courses.¹¹⁰ This can only be a benefit in an era where the American Bar Association is placing a much stronger emphasis on the need for formative¹¹¹ assessment.¹¹²

Following is a specific scenario our program has used on several occasions.¹¹³ Just like other lawyering skills problems used in our first-year course, the ideas for the negotiation files have largely come from my days in practice, specifically from cases I worked on as a law clerk, borrowing a fundamental premise, but changing names and facts so that the scenarios are

¹⁰⁸ Cathaleen A. Roach, *A River Runs Through It: Tapping Into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 670 (1994) (advocating that law schools become more accountable to students for the creation of psychological distress). Professor Stuckey goes so far as to say that the Socratic Method should be used “sparingly” in the first year of law school. STUCKEY ET AL., *supra* note 3, at 276.

¹⁰⁹ Greg Sergienko, *New Modes of Assessment*, 38 SAN DIEGO L. REV. 463, 465 (2001) (“[F]requent assessment provides students with the information they need to improve, promoting student learning.”).

¹¹⁰ Dauphinais, *Multiple Intelligences*, *supra* note 27, at 30-31. Several highly authoritative resources support the initiative to increase opportunities for formative assessment in law school:

Feedback is provided primarily to support students’ learning and self-understanding rather than to rank or sort. Contemporary learning theory suggests that efficient application of educational effort is significantly enhanced by the use of formative assessment. For educational purposes summative devices have their place primarily as devices to protect the public by ensuring basic levels of competence. Formative practices directed toward improved learning ought to be primary forms of assessment.

CARNEGIE REPORT, *supra* note 2, at 189; see also STUCKEY ET AL., *supra* note 3, at 125 (emphasizing the importance of consistent and timely feedback for law students and frequent formative assessment); LAW SCH. SURVEY OF STUDENT ENGAGEMENT, STUDENT ENGAGEMENT IN LAW SCHOOL: ENHANCING STUDENT LEARNING 2 (2009), *available at* http://amlawdaily.typepad.com/LSSSE_Annual_Reprt_2009.pdf (“Students who got prompt feedback spent more time preparing for class and worked harder to meet faculty expectations This year’s report once again finds that feedback is critical to effective learning. . .”).

¹¹¹ Sergienko, *supra* note 109, at 465 (“[F]ormative evaluation takes place during the course and provides the students and instructors with feedback on how well students are learning.”), *id.* (“Summative evaluation is given at the end of the course and examines how well students have achieved the course goals.”)

¹¹² Dauphinais, *Sea Change*, *supra* note 16, at 122.

¹¹³ I am happy to provide anyone interested this whole problem file and others that we have worked up upon request.

unrecognizable from a real case. Beyond identification purposes, the facts are always changed to make them more balanced between plaintiff and defendant, to make them more interesting to students, and to optimize their learning.

This particular file involves a group of teenagers going to a shopping mall, including a superstar high school baseball player, Egbert “Scooter” Magruder, who has received a full scholarship to the fictitious Wheeler University¹¹⁴ and anticipates a glorious pro baseball career. He trips on a ripped carpet, falls and fractures his leg in multiple places, and will never play baseball again.

In this problem, the plaintiff’s “secret” is that he had been drinking; the defendant shopping mall’s “secret” is that they knew about the tear in the carpet before the accident and failed to fix it. It is always interesting to find out later how many of the students ended up trading off these secrets in exchange for information from the other side.

Each law firm receives a series of documents, most which they have to ask for in order to receive. Documents that, in the normal course of things, would be confidential to one side are given to that side only; and they are responsible for guarding them and bartering them as needed in the negotiation. Students often learn the hard lesson that one has to give something in order to get something. Documents that are normally public, such as press clippings about Scooter’s baseball prowess, are given to both sides.

In the Scooter case, the defendant receives an intro “issue spotting” type letter from the president of the shopping mall, a simple statement regarding insurance coverage so the defense knows how high they can go in settling, an incident report, a repair estimate for the carpet, demonstrating their foreknowledge of the defect, a bill for its repair, and a description of the mall layout. The plaintiff also gets an introductory letter from the client, his medical and ambulance bills, his medical records, which include a measure of his Blood Alcohol Content, and a statement from one of his friends. Both sides receive

¹¹⁴ How we ended up with a fictitious university name is the subject of an interesting anecdote that illustrates the zeal and level of engagement of our students in doing this exercise. Originally, we had Scooter receiving his baseball scholarship from the highly prestigious program at Stanford University, and the file received by plaintiffs contained a letter of acceptance from there, awarding him his scholarship. My entrepreneurial students actually called the athletic department of Stanford University to get details about the nature of the baseball program, what Scooter would be missing, and how likely are their graduates to go on to the Major Leagues. Thus, because I actually heard from Stanford University in good-natured puzzlement about the calls, we opted, going forward, to make it “Wheeler University”; and our hard-working Teaching Assistants generated made-up data about the program’s success to give to the students.

newspaper articles attesting to Scooter's baseball greatness. Both sides need to do quite a bit of not strictly legal research, into the medical expenses, the nature of his injuries, and the projected income of a pro baseball player and Scooter's likelihood of becoming one. This gives the students a realistic sense of aspects of research into a legal case not often emphasized in first-year legal writing.

As previously mentioned, one of the key matters that both sides need to consider at this point, and a matter that we emphasize in class when talking about client relations and preparation for negotiation, is that litigation settlement negotiations are not just about money. There are other kinds of interests on both sides. We have psychological interest on the part of the plaintiff—Maslow's hierarchy of needs types of interest.¹¹⁵ The defendant, a large business dependent on the goodwill of the public, is always interested in protecting its reputation and privacy, so a confidentiality provision is usually at play in the negotiation process.

The file is perhaps bit preciously over-exaggerated for pedagogical purposes; however, with facts changed to protect the identities of parties, it has its roots in an actual case that I worked on when I was an appellate law clerk.

In the end, the project is not only enjoyable¹¹⁶ and educational for the students, but also it provides a safe space for the students to practice these

¹¹⁵ The basic concept here is that, following the principles of the mid-twentieth century psychologist Abraham Maslow, an attorney should address a client's needs in order of their priority or urgency beginning with the first level, physiological, pertaining to needs that are necessary for survival, such as food, water, air, and sleep; moving onto security needs, such as shelter, employment, and health care; proceeding to social needs like companionship and sense of community; then addressing self-esteem; and then, at last, considering self-actualization needs, like personal growth. Kendra Cherry, *Hierarchy of Needs: The Five Levels of Maslow's Hierarchy of Needs*, ABOUT.COM PSYCHOLOGY, available at <http://psychology.about.com/od/theoriesofpersonality/a/hierarchyneeds.htm?p+1> (last visited July 30, 2013). Professors Krieger and Neumann, in turn, speak at this stage of preventing "The Three Disasters . . . : (1) accepting a client who creates a conflict of interest, (2) missing a statute of limitations or other deadlines that extinguishes or compromises the client's rights, and (3) not taking emergency action to protect a client who is threatened with immediate harm." STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS* 105 (4th ed. 2011).

¹¹⁶ Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 262-63 (1992) ("In my experience, most first-year students love the problem method. Students go to law school not to read cases, but to become lawyers. The problem method lets them become lawyers—all right, play lawyers—right away! They like it, they put more work into it, they learn more."); see also Dauphinais, *Multiple Intelligences*, *supra* note 27, at 32 (citing F.L. Dembowski, *The Use of the Rigor/Relevance Framework in the Training of School Administrators*, AASA PROFESSOR 23, 23 (1999) ("There should be a movement away from legal education as a spectator sport, where students are relegated to the role of onlooker, while the instructor performs before the class.")).

essential skills when the interests of an actual client are not at stake.¹¹⁷ This interviewing, counseling, negotiating, and drafting unit is an important introduction to the lawyering skills it teaches, but it is only a beginning. Law schools should also endeavor to expand their experiential and client-oriented skills offerings in the second and third years to give students an even richer opportunity to gain experience and education in practice-readiness,¹¹⁸ perhaps moving toward the medical school model of integrating lectures with practice rotations, culminating in a “residency-like” apprenticeship.¹¹⁹

In the end, whether by tackling an introduction first-year simulation or creating a widespread culture of upper-level simulation and live client work, “[b]y incorporating experiential learning into the core curriculum, rather than just as an

¹¹⁷ Susan M. Chester et al., *Teaching Multiple Skills in Drafting and Simulation Courses*, 10 TRANSACTIONS: TENN. J. BUS. L. 221, 227 (2009); see also Ferber, *supra* note 4, at 431 (“[B]ecause simulations are not real, the learner can take risks which might produce disastrous results for a client in the real world and learn from them without causing harm”). As the former American Bar Association President Charles A. Beardsley stated:

Learning draftsmanship in the school of experience exclusively is costly to clients; it is costly to the public, and it is costly to the lawyer. It is like learning surgery by experience—it is possible, but it is tough on the patient and tough on the reputation of the surgeon.

Charles A. Beardsley, *Beware of, Eschew and Avoid Pompous Prolixity and Platitudinous Epistles!*, 16 CAL. ST. B.J. 65, 65 (1941). See also Peters, *supra* note 6, at 36 (advocating simulations as an effective opportunity to “evaluate the social and economic consequences of [legal] principles in the real world of legal practice.”).

¹¹⁸ Indeed, many law schools seem to be adopting widespread simulation as the signature pedagogy of the future. Dauphinais, *Sea Change*, *supra* note 16, at 103 n.246. See also Karen Sloan, *Reality’s Knocking: The Recession is Forcing Schools to Bow to Reality*, NAT’L L.J. (Sept. 7, 2009), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433612463> (describing the simulation model adopted by Washington and Lee’s law school for the third year). See also Cohen, *supra* note 19, at 2 (stating that the Carnegie Report “urged law schools to make better use of the sometimes-aimless second and third years.”). Professor Stuckey recommends:

Emphasis in the second year should be placed on helping students develop their knowledge and understanding about professional skills and values, including sensitivity to client-centered practice. Basic introductory courses in professional skills, especially transactional and pretrial skills, should be offered to all students during both semesters. Instruction in legal writing, drafting, and research should continue . . . More sophisticated, complex, and challenging problems and simulations should be used in all courses.

STUCKEY ET AL., *supra* note 3, at 279. For the third year of law school, he recommends that “[m]ost courses could be organized as simulated law firms in which students work individually and in groups to resolve legal problems . . . Students should be required to write reflective journals or papers in all experiential education courses.” *Id.* at 279.

¹¹⁹ Cassidy, *supra* note 18, at 1517.

elective for a small subset of students, the divide among ‘skills,’ ‘theory,’ or ‘substance’ courses can be eliminated.”¹²⁰ “[I]t is time to pierce the Socratic veil. An active learning alternative should become a part of every professor’s teaching method.”¹²¹

¹²⁰ Sonsteng, *supra* note 90, at 402.

¹²¹ June Cicero, *Piercing the Socratic Veil: Adding an Active Learning Alternative in Legal Education*, 15 WM. MITCHELL L. REV. 1011, 1024 (1989).