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Teaching and Learning Negotiation in a Simulated Environment

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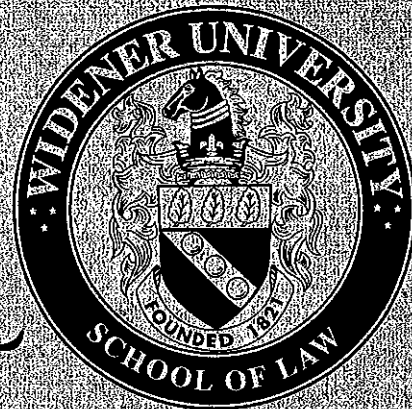
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Becky L. Jacobs *

*For the things we have to learn before we can do them, we learn
by doing them.*¹

—Aristotle

I. INTRODUCTION

Courses focused on negotiation theory and skill development have become curricular staples at North American law schools. Many of us in the academy are passionate about introducing our students to the various forms of alternative dispute resolution (ADR) and about improving their ADR-related knowledge and skills. We also are eager to stay current on developments and to learn from and share with one another how best to teach this important topic to our students.

Our peculiar passion for skills training, however, did not always endear us to mainstream legal academics. To illustrate this point, and to frame my remarks, I first want to share a story that I heard Vermont Law School's Professor Joan Vogel² relate at a meeting of the American Bar Association's (ABA) ADR Section. Professor Vogel asked us to imagine a negotiation or ADR course in which the professor could not use role plays or other interactive activities. The audience, composed primarily of ADR faculty, gasped in horror!

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¹ ARISTOTLE, THE NICOMACHEAN ETHICS OF ARISTOTLE, bk. II, pt. 1, at 28-29 (Sir David Ross, trans. 1969).

² Professor Joan Vogel is a Professor of Law at the Vermont Law School. Vermont Law School—Joan Vogel, <http://www.vermontlaw.edu/x6751.xml> (last visited Dec. 15, 2008).

Well, Professor Vogel lived this horror. Early in her teaching career, before joining the faculty at Vermont, Professor Vogel taught a survey ADR course at another law school. At the time, it apparently was the practice of professors at this institution to use either the Socratic or lecture format in non-clinic courses rather than to engage in classroom simulations or exercises. In order to be consistent with this practice, Professor Vogel assigned students in her large class to engage in simulations outside of the classroom. Students were not familiar with this type of exercise, and, as one would predict now, both Professor Vogel and her students were quite unhappy and frustrated with the experience.

Never fear, though, as the story has a happy ending. At Vermont, Professor Vogel is once again a full-fledged member of the zealous ADR professorial ranks, and she, like nearly all of us who teach in this area, relies heavily on simulations, role plays, and other interactive classroom activities. And they lived happily ever after.

I relay this vignette to emphasize the importance of experiential learning to the pedagogical process in negotiation courses. Several of us³ had an opportunity to engage in a roundtable discussion on this and other issues relevant to teaching negotiation at the 2007 Annual Meeting of the Southeastern

³ I want to thank Professor Kelly Feeley from Stetson University College of Law, Stetson Law, Biography: Kelly M. Feely, <http://www.law.stetson.edu/tmpl/faculty/memberProfile.aspx?id=1272> (last visited Dec. 15, 2008), for doing such a great job of organizing our panel and to thank my fellow panelists with whom I was very proud to be included: Professor Robert Downs of the University of Missouri-Kansas City School of Law, UMKC School of Law, <http://www.law.umkc.edu/faculty/Downs.htm> (last visited Dec. 15, 2008); Professor Richard Reuben of the University of Missouri-Columbia School of Law, University of Missouri School of Law: Richard C. Reuben, <http://law.missouri.edu/faculty/directory/reubenr.html> (last visited Dec. 15, 2008); and Professor Erin Ryan of the College of William and Mary, Marshall-Wythe School of Law, Erin Ryan, Associate Professor of Law, William and Mary School of Law, http://law.wm.edu/faculty/fulltime/ryan_e.php (last visited Dec. 15, 2008). The Southeastern Association of Law Schools (SEALS), SEALS Member Schools, <http://sealslawschools.org/member-schools.html> (last visited Dec. 15, 2008).

Association of American Law Schools (SEALS).⁴ This essay is based upon my contribution to this discussion.

II. TEACHING AND LEARNING NEGOTIATION IN THE LAW SCHOOL

Those of you who know me know that I am a raving ADR fanatic, but happily my ravings are no longer on the fringe. Indeed, ABA Standard 302(a)(4) mandates that law schools require that each student receive substantial instruction in "other professional skills."⁵ This Standard has made courses in negotiation and other ADR topics much more attractive to U.S. law schools.

Interpretation 302-2 clarifies:

Each law school is encouraged to be creative in developing programs of instruction in professional skills related to the various responsibilities which lawyers are called upon to meet, using the strengths and resources available to the school. Trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting are among the areas of instruction in professional skills that fulfill Standard 302 (a)(4).⁶

How best to comply with this Standard and best practice analyses have been topics of discussion for law faculties nationwide and at academic conferences.⁷ However, I mention it

⁴ The Southeastern Association of Law Schools (SEALS), SEALS Member Schools, <http://sealslawschools.org/member-schools.html> (last visited Dec. 15, 2008). SEALS is a very active regional association of law schools. Do not let the acronym fool you. While the Association is comprised of approximately eighty law schools in the southeastern region of the United States, it also has a number of affiliate members from other regions of the country, as well as several foreign law schools. *Id.* Its annual meetings attract academics from around the world. *Id.*

⁵ STANDARDS FOR APPROVAL OF LAW SCHOOLS Std. 302(a)(4) (2008), available at
<http://www.abanet.org/legaled/standards/20082009StandardsWebContent/Chapter%203.pdf> [hereinafter ABA STANDARDS].

⁶ *Id.* Std. 302 cmt. 302-2.

⁷ For example, those attending the 2007 SEALS conference heard more about this standard from a separate panel, and it was discussed at the University of

only to help put my remarks in context and also to justify some of the more alarming aspects of my personality, at least those that relate to this topic.

Tennessee's Legal Clinic's sixtieth anniversary symposium. Southeastern Association of Law Schools, Annual Meeting, <http://www.nsulaw.nova.edu/seals/program%2007July10.pdf> (last visited Dec. 15, 2008); The University of Tennessee College of Law, Legal Clinic, <http://www.law.utk.edu/news/07CLINANIV.pdf> (last visited Dec. 15, 2008). At 2007 SEALS, University of South Carolina School of Law's Professor Roy Stuckey, Roy T. Stuckey: Faculty, University of South Carolina School of Law, <http://law.sc.edu/faculty/stuckey> (last visited Dec. 15, 2008), chaired a panel entitled, "How Do Law Schools Comply with the ABA's New Mandate Requiring Significant Instruction in Professional Skills to All Students?" Southeastern Association of Law Schools, Annual Meeting, <http://nsulaw.nova.edu/seals/program%2007July10.pdf> (last visited Dec. 15, 2008). Panel members included Dean Daisy Hurst Floyd of Mercer University School of Law, Mercer University School of Law; Daisy Hurst Floyd, <http://www.law.mercer.edu/faculty/bio.cfm?staffid=290> (last visited Dec. 15, 2008); Dean Joseph Harbaugh of Nova Southeastern University, Shepard Broad Law Center, Professor Joseph D. Harbaugh-Shepard Broad Law Center, <http://www.nsulaw.nova.edu/faculty/profiles/index.cfm?ID=48> (last visited Dec. 15, 2008); and Professor Harriet N. Katz of Rutgers, The State University of New Jersey School of Law, Camden, Harriet N. Katz, <http://catalogs.rutgers.edu/generated/cam-law/pg24432.html> (last visited Dec. 15, 2008). Southeastern Association of Law Schools, Annual Meeting, <http://nsulaw.nova.edu/seals/program%2007July10.pdf> (last visited Dec. 15, 2008). The complete program for the 2007 SEALS conference is available at <http://www.nsulaw.nova.edu/seals/program%2007July10.pdf>. The topic also was addressed in September 2007 at the University of Tennessee College of Law's Charles Miller Legal Clinic symposium in honor of its sixtieth year of continuous operation. University of Tennessee College of Law, Legal Clinic, <http://www.law.utk.edu/news/07CLINANIV.pdf> (last visited Dec. 15, 2008). The event explored the future of clinical legal education—"Looking Forward—the Next 60 Years of Clinical Legal Education." *Id.* The complete program for the symposium is available at <http://www.law.utk.edu/news/07CLINANIV.pdf>, and a webcast of the event can be found at <http://mediabeast.ites.utk.edu/mediasite4/Catalog/Front.aspx?cid=1759f059-f6a3-46dd-a8ff-8d843d4285f6>. The *Tennessee Law Review* also published a symposium edition commemorating the event. See Symposium, *Looking Forward: The Next Sixty Years of Clinical Legal Education*, 75 TENN. L. REV. 183 (2008).

As Interpretation 302-2 perhaps recognizes, participatory learning has become a standard component of most negotiation courses, the incorporation of which enables students to assimilate more thoroughly the more didactically presented theoretical material.⁸ However, in order to ensure that interactive exercises actually are educationally valuable, as faculty we must take care that our exercises are well designed and executed, that we provide students with appropriate and thorough preparation for each exercise, and that we engage in effective and thoughtful debriefing. This not only allows students to have an increased understanding of the relevant theoretical material, but it also provides them with improved competencies necessary to be successful in their practice. I also believe that student learning in negotiation courses can be enhanced by incorporating content related to cultural competency or sensitivity and that there is immense value in teaching negotiation across the curriculum. My comments will focus on these five points.

A. Text Book Selection

The first point that I would like to address pertains to text book selection. "What does this have to do with simulations?" you might ask. Well, one thing to consider when selecting a text is whether the text offers "pre-packaged" simulations. Fortunately, many negotiation casebooks have excellent teacher's manuals chock-full of well-designed exercises and role plays. The appendix to this essay lists many of the plethora of casebooks and texts that are available for use in negotiation courses.⁹ Also, most of us supplement our texts with articles or with readings from more generic ADR casebooks, like the Riskin *Dispute Resolution* text, which has an excellent chapter on negotiation.¹⁰ Many of the books on this list come complete with exercises that have been

⁸ See, e.g., Ian McAndrew & Virginia Phillips, *Documenting Play: Using Videotaped Interviews to Debrief Collective Bargaining Games*, 15 HUM. RESOURCES MGMT. REV. 214, 214 (2005).

⁹ See *infra* Appendix, at 110-12.

¹⁰ LEONARD L. RISKIN, JAMES E. WESTBROOK, CHRIS GUTHRIE, TIMOTHY J. HEINSZ, RICHARD C. REUBEN & JENNIFER K. ROBBENOLT, *DISPUTE RESOLUTION AND LAWYERS* 157-285 (3d ed. 2005).

tested and refined and that can be used by those who adopt the text for their class.

For example, the teacher's manual for the Folberg and Golann book *Lawyer Negotiation: Theory, Practice, and Law* has an extensive set of exercises designed to teach specific skills and concepts, such as recognition and avoidance of commitment bias and cognitive barriers, distributive versus integrative bargaining, and the like.¹¹

If you do not elect to use a casebook that offers ready-made activities, there are numerous resources available for finding canned simulations and role plays. For example, Willamette University College of Law Center for Dispute Resolution has a fantastic simulation bank,¹² and the ADR Section of the AALS website, which is hosted by the University of Missouri-Columbia School of Law, also offers a number of excellent exercises.¹³ The Clearinghouse: Program on Negotiation (PON) at Harvard Law School¹⁴ and the Electronic Hallway Case Teaching Resources, administered by the Daniel J. Evans School of Public Affairs at the University of Washington, are further valuable resources for educators.¹⁵

A note of caution on trying to design your own simulations: while this can be an excellent way to illustrate a certain technique or to target a particular skill, as those of us who have tried this or who have coached teams in competitions where problems have been hastily drafted know, it also can go horribly wrong. It is my

¹¹ See generally JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW: TEACHER'S MANUAL* (2006) (providing an extensive selection of exercises).

¹² Center for Dispute Resolution—Simulation Bank, <http://www.willamette.edu/wucl/cdr/simbank/login.cgi> (last visited Dec. 15, 2008).

¹³ Alternative Dispute Resolution Section, http://www.law.missouri.edu/aalsadr/teaching_materials.htm (last visited Dec. 15, 2008).

¹⁴ Program on Negotiation: Clearinghouse Teaching Materials and Publications, <http://www.pon.harvard.edu/education/teaching.php> (last visited Dec. 15, 2008).

¹⁵ The Electronic Hallway, <http://hallway.org/index.php> (last visited Dec. 15, 2008).

experience that law students are very harsh critics and, with regard to the work of others, can sniff out even the most obscure error or ambiguity. Therefore, you want to make sure that you find a way to test your creations and, if possible, work out the bugs in advance. I have used my colleagues and my clinic students as guinea pigs for testing purposes, often to great hilarity.

B. Preparation

On to the second point that I would like to discuss: it is essential to provide students with appropriate and thorough preparation for each exercise. I want to focus on one aspect of pre-exercise preparation, that of emphasizing to students that every successful negotiation involves extensive and painstaking planning. I am sure that you all have experienced that nearly universal perception among students that negotiation is primarily intuitive and that they already are expert negotiators. There also are those students who expect you to provide them with a foolproof, immutable, prescriptive formula of four to five steps for guaranteed negotiating success. While scholars do agree that "negotiation is a comprehensible social process" that "can be analyzed, understood, and modeled," it is an emergent and contextual process, and it is widely acknowledged that "[n]egotiators are made, not born."¹⁶

There are numerous ways to address students' preconceived notions, just one of which is instructing students in the art and science of negotiation planning. This includes not only teaching students common theories, definitions, and terminology such as positions versus interests, BATNA (best alternative to a negotiated agreement) and WATNA (worst alternative to a negotiated agreement, and reservation points or bargaining zone), but also introducing them to various methods, strategies, and technical

¹⁶ Roy J. Lewicki, *Teaching Ideas: Challenges of Teaching Negotiation*, 2 NEGOTIATION J. 15, 16 (1986); see, e.g., DEEPAK MALHOTRA & MAX H. BAZERMAN, NEGOTIATION GENIUS: HOW TO OVERCOME OBSTACLES AND ACHIEVE BRILLIANT RESULTS AT THE BARGAINING TABLE AND BEYOND 4-5 (2007); MICHAEL WATKINS & SUSAN ROSEGRANT, BREAKTHROUGH INTERNATIONAL NEGOTIATION: HOW GREAT NEGOTIATORS TRANSFORMED THE WORLD'S TOUGHEST POST-COLD WAR CONFLICTS, at xviii (2001).

tools used for negotiation planning. For example, many of the more complicated simulations provided by casebooks require that students engage in some planning, and several negotiation texts provide charts or worksheets that students can use as a guide to structure their planning efforts.¹⁷

Websites and software also are available that allow students to actually practice planning skills, such as performing a decision tree analysis. For example, products such as those offered by TreeAge¹⁸ and Vanguard Software¹⁹ systemize decisions. There also are commercially available software programs and websites that can help students learn to identify their negotiating styles and those of their negotiating counterparts; to identify BATNA, reservation points, and so on; to help design concessions; to predict negotiation outcomes; and to engage in negotiating planning simulations.²⁰ As with all things technical that we do in class, you would of course, want to familiarize yourself with any program that you would plan to demonstrate in class and, perhaps, design a problem to use to avoid technical glitches.

One final thought about the actual simulation process before I continue: negotiation instructors play multiple roles. We are educators, classroom managers and referees, mediators, and

¹⁷ See, e.g., FOLBERG & GOLANN, *supra* note 11, at 110-12.

¹⁸ TreeAge Pro, <http://www.treeage.com/products/index.html> (last visited Dec. 15, 2008).

¹⁹ Decision Tree Analysis, <http://www.vanguardsw.com/products/planning-and-analysis/decision-tree-analysis> (last visited Dec. 15, 2008).

²⁰ See, e.g., ExpertNegotiator: Planning and Management Software, <http://www.expertnegotiator.com> (last visited Dec. 15, 2008); Francis Su, Francis Su's Fair Division Page, <http://www.math.hmc.edu/~su/fairdivision> (last visited Dec. 15, 2008); Negotiator Assistant, <http://www.icasit.org/negotiator> (last visited Dec. 15, 2008); Negotiator Pro Co.: Negotiation Role Play Training Games & Software, <http://www.negotiatorpro.com> (last visited Dec. 15, 2008); The Negotiation Institute, Inc., The Art of Negotiating Software, <http://www.negotiation.com/aonsoftware.html> (last visited Dec. 15, 2008); Welcome to Smartsettle Home, <http://www.smartsettle.com> (last visited Dec. 15, 2008); Win Squared Negotiation and Sales Software, <http://www.winsquared.com> (last visited Dec. 15, 2008).

counselors, and we sometimes even must participate in our exercises.

C. Debriefing

The multitasking that negotiation instructors must perform during classroom simulations is one reason to emphasize my third point; which is the importance of engaging in effective and thoughtful debriefing after each exercise. Students occasionally miss the point of the exercise or lose track of it as they immerse themselves in role playing, and unless we are using fishbowls or have access to a Time-Turner à la Hermione Granger,²¹ we cannot be everywhere in a room to monitor all of our students during an exercise. Thorough debriefing allows you to reinforce and synthesize the concepts, skills, and perhaps even the substantive law that an exercise was designed to demonstrate. You also can use debriefing time to debate the relative effectiveness of different approaches used during the simulation or the results of any particular problem.

When students compare their individual results or techniques with the class's collective experience, it can be a powerful vehicle through which to demonstrate the economic and psycho-social dynamics involved in the negotiation process.²² Too, debriefing sessions are useful for clearing up any lingering questions students may have and for probing ethical or policy issues raised by the simulation. Debriefing can take many forms:

²¹ A Time-Turner is the magical object used by Hermione Granger in J.K. Rowling's *Harry Potter and the Prisoner of Azkaban* so that she could enroll in more classes than time would normally allow. J.K. ROWLING, *HARRY POTTER AND THE PRISONER OF AZKABAN* 394-96 (1999).

²² Roy T. Stuckey, *Preparing Students to Practice Law: A Global Problem in Need of Global Solutions*, 43 S. TEX. L. REV. 649, 664-65 (2002). Professor Stuckey cites one of the seminal authorities on this topic, Donald A. Schön. *Id.* at 664 n.48 (citing DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (Basic Books, Inc. 1983) and Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 CLINICAL L. REV. 231 (1995)).

- Class or small group discussions. I try to ask open questions that encourage reflection: "If you had to do this negotiation again, in practice, what would you do differently? What did you or a colleague do that you felt was particularly effective or ineffective?"
- Presentation-style or group reporting. This has the added benefit of giving students an opportunity to practice their public speaking skills.
- Some sort of written activity, such as a journal entry, memorandum to file, client letter, or questionnaire. These activities not only reinforce the lessons of the negotiation learning exercise, but they also provide an opportunity for students to continue to develop their writing skills.²³

Reflective inquiry is itself a professional skill, critical for assimilating learning experiences. By changing the formats that you use for reflection, you are able to reinforce the experience with all of your students, regardless of an individual's learning style.

D. Cultural Competency

My fourth point actually gets us a bit away from simulations. However, I did want to mention one skill that I try to incorporate into all of my class activities, not only those in my ADR-related courses, and that skill is cultural competency or sensitivity. First, a caveat: because we could endlessly debate the notion of culture, this summary obviously will be very superficial. For purposes of this essay, let us use Professor Kevin Avruch's concise description: "[C]ulture refers to the socially transmitted values, beliefs and

²³ My colleague Professor Carol Parker is a strong advocate of providing students with opportunities to gain competence in written communication skills throughout the curriculum. Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561, 562, 600 (1997) ("Writing activities that encourage conscious awareness of the process of interpretation require students to confront their understanding of legal issues and their own roles in the legal system. Journals and reflection papers that ask students to reflect . . . provide vehicles for connecting the study of law to personal experience and for examining their own values." (citations omitted)).

symbols that are more or less shared by members of a social group."²⁴ Consider too that, while culture is generally considered on the national level, cultural differences exist intra-culturally among both multiracial and monoracial societies, across gender, age, religious, socioeconomic, and professional lines.²⁵

While the precise conception of culture is subject to academic debate, there appears to be little debate that the practice of law today is increasingly international in character,²⁶ not to mention that a lawyer's domestic client base is often quite diverse.²⁷ Therefore, cultural awareness will improve a lawyer's practice skills in virtually every aspect of practice, not only in the negotiation arena.²⁸ Yet there still are very few U.S. law schools that regularly offer dedicated courses pertinent to cross-cultural communication. In a 2005 survey, Missouri Professor Ilhyung Lee identified only three law schools that offered cross-cultural negotiation courses during the academic year: Pepperdine; Professor Richard Reuben's institution, Missouri-Columbia; and Northwestern.²⁹ According to Professor Lee, several law schools offered these types of courses in their summer programs abroad, including Tulane University and the University of Pittsburgh.³⁰ Since Prof. Lee's article, there likely are more such courses. For example, I taught a cross-cultural communication course in one of

²⁴ Kevin Avruch, *Culture as Context, Culture as Communication: Considerations for Humanitarian Negotiators*, 9 HARV. NEGOT. L. REV. 391, 393 (2004).

²⁵ See, e.g., Ilhyung Lee, *In re Culture: The Cross-Cultural Negotiations Course in the Law School Curriculum*, 20 OHIO ST. J. ON DISP. RESOL. 375, 375 (2005).

²⁶ See e.g., Christopher J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 VAND. J. TRANSNAT'L L. 931, 932-33 (2001).

²⁷ See, e.g., Joan B. Kessler, *The Lawyer's Intercultural Communication Problems with Clients from Diverse Cultures*, 9 NW. J. INT'L L. & BUS. 64, 65 (1988).

²⁸ See, e.g., *id.* ("Because of the large influx of immigrants into the United States from various parts of the world, many lawyers confront culturally dissimilar clients.").

²⁹ Lee, *supra* note 25, at 376.

³⁰ *Id.* at 376-77 & n.10.

the summer abroad programs with which my institution, the University of Tennessee College of Law, is associated: Georgia State University's Summer Legal and Policy Study in Rio de Janeiro, in consortium with Seattle University and the University of Tennessee.³¹

Not only are there very few cross-cultural negotiation courses that are offered, but there also are very few texts that devote significant attention to the topic. As Professor Avruch noted, the iconic *Getting to Yes* has less than two full pages on culture, and even those which are very generic.³² The popular negotiation casebooks nearly all have some material that addresses culture in some form, but coverage is uneven. Carrie Menkel-Meadow has an entire chapter titled, "Dealing with Differences: Culture, Gender, and Race,"³³ and Folberg and Golann have a chapter on "Gender, Culture, and Race."³⁴ There are some notable exceptions. For example, Professor Avruch has published a text, *Culture & Conflict Resolution*.³⁵ Other such texts addressing culture include Raymond Cohen's *Negotiating Across Cultures*,³⁶ Jeanne M. Brett's *Negotiating Globally: How to Negotiate Deals, Resolve Disputes, and Make Decisions Across Cultural Boundaries*,³⁷ and Jeswald W. Salacuse's *The Global Negotiator: Making, Managing,*

³¹ To learn more about this program, visit its website: <http://law.gsu.edu/rio>.

³² Kevin Avruch, *Culture and Negotiation Pedagogy*, 16 NEGOTIATION. J. 339, 339-40 (2000) (citing ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991)).

³³ CARRIE J. MENKEL-MEADOW, ANDREA KUPFER SCHNEIDER & LELA PORTER LOVE, *NEGOTIATION: PROCESSES FOR PROBLEM-SOLVING* 377-429 (2006).

³⁴ FOLBERG & GOLANN, *supra* note 11, at 227-53.

³⁵ KEVIN AVRUCH, *CULTURE & CONFLICT RESOLUTION* 39-48 (1998).

³⁶ RAYMOND COHEN, *NEGOTIATING ACROSS CULTURES: INTERNATIONAL COMMUNICATION IN AN INTERDEPENDENT WORLD* (rev. ed. 2004).

³⁷ JEANNE M. BRETT, *NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES* (2d ed. 2007).

*and Mending Deals Around the World in the Twenty-First Century.*³⁸

However, even in those commonly used texts that do address the topic, there is little to no consideration of the theoretical underpinnings of the scholarship on cultural analysis. This begs the question: how does one introduce this very important, yet complicated, subject within the context of a negotiation course?

First, I think it is imperative to recognize that, unless you are able to offer a course devoted to the topic, you can only hope to increase your students' awareness and self-awareness of cultural issues and perhaps whet their appetites to learn more. In my ADR-related classes, I have taken an approach similar to the one that Professor Lee outlines in his article *In re Culture: The Cross-Cultural Negotiations Course in the Law School Curriculum*,³⁹ and I have what I hope are the following very realistic goals:

- To engage students in thinking about the meaning of culture and to convey an understanding of the conceptual complexity involved in attempting to define the term;
- To demonstrate to students the impact that culture can have on the development, understanding, management, and resolution of disputes;
- To briefly introduce the various models of cultural characteristics posited by scholars, such as Geert Hofstede in *Culture's Consequences*,⁴⁰ Charles M. Hampden-Turner and Fons Trompenaar's *Building Cross-Cultural Competence*,⁴¹ and the work of Jeswald

³⁸ JESWALD W. SALACUSE, *THE GLOBAL NEGOTIATOR: MAKING, MANAGING, AND MENDING DEALS AROUND THE WORLD IN THE TWENTY-FIRST CENTURY* (2003).

³⁹ Lee, *supra* note 25 at 392-93.

⁴⁰ GEERT HOFSTEDE, *CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS* 1-40 (2d ed. 2001).

⁴¹ CHARLES M. HAMPDEN-TURNER & FONS TROMPENAARS, *BUILDING CROSS-CULTURAL COMPETENCE: HOW TO CREATE WEALTH FROM CONFLICTING VALUES* 13-32 (2000).

Salacuse,⁴² Stella Ting-Toomey,⁴³ James Neuliep,⁴⁴ and others; and

- To cover the basic dimensions and orientations, including power distance,⁴⁵ individualism/collectivism,⁴⁶ universalism/particularism,⁴⁷ masculinity/femininity,⁴⁸ high/low uncertainty avoidance,⁴⁹ specificity/diffuseness,⁵⁰ achieved/ascribed status,⁵¹

⁴² See, e.g., Jeswald W. Salacuse, *Ten Ways that Culture Affects Negotiating Style: Some Survey Results*, 14 NEGOTIATION J. 221 (1998) (compiling a variety of ways culture affects negotiation styles).

⁴³ See, e.g., STELLA TING-TOOMEY, COMMUNICATING ACROSS CULTURES 9-21 (1999).

⁴⁴ See, e.g., JAMES W. NEULIEP, INTERCULTURAL COMMUNICATION: A CONTEXTUAL APPROACH 43-92, 173-188 (3d ed. 2006).

⁴⁵ Power distance measures the extent to which a culture expects and accepts unequal power distribution amongst individuals. See HOFSTEDÉ, *supra* note 40, at 83-84.

⁴⁶ Individualism and its antipode collectivism reflect a culture's views regarding the importance of the individual in the context of the group. *Id.* at 209-11. Individualistic cultures place a greater emphasis on individual goals rather than group goals; collectivistic cultures subordinate the individual to the group. See HARRY C. TRIANDIS, INDIVIDUALISM & COLLECTIVISM 2 (1995).

⁴⁷ Where a culture falls on the universalism/particularism continuum depends upon its reliance on rules of general applicability as opposed to considerations of individual circumstances or exception. See Linda Thorne & Susan Bartholomew Saunders, *The Socio-Cultural Embeddedness of Individuals' Ethical Reasoning in Organizations (Cross-Cultural Ethics)*, 35 J. BUS. ETHICS 1, 4 tbl.II (2002).

⁴⁸ Masculine cultures value competitiveness, assertiveness, ambition, and the accumulation of wealth and material possessions, whereas feminine cultures place more value on relationships and quality of life. *Id.*

⁴⁹ Uncertainty avoidance measures a culture's tolerance for uncertainty and ambiguity. *Id.*

⁵⁰ This dimension pertains to the level of detail preferred by a culture. TALCOTT PARSONS, THE SOCIAL SYSTEM, 81-82 (1951).

⁵¹ "In an achievement culture, your status is based upon what you have accomplished[;] . . . in an ascription culture, your status is a function of your position in society and at birth." Thorne & Saunders, *supra* note 47, at 4 tbl.II.

relationship inner/outer direction,⁵² high/low context,⁵³ and monochronic/polychronic time orientation.⁵⁴

Of course, any such superficial review runs the risk of being either too simplistic, absolutely worthless, or downright dangerous. I of course preface all of this with dire warnings about oversimplifications and, conversely, about over-reliance on stereotypes. However, students generally enjoy the material and find it revelatory. I always have students who experience "Aha!" moments when we discuss this material. These students often will share their personal stories in class, stories about one or more of the covered cultural traits or influences that they recognize in themselves or that they were able to recognize as having been present in individuals with whom they have interacted.

While I lecture and engage in discussion about most of this material, I also invite lecturers of various nationalities to talk to students or to engage in simulations. Like Professor Avruch, I am mistrustful of simulations in which students assume the roles of individuals outside of their own culture.⁵⁵ However, there are exercises specifically designed to demonstrate particular cultural characteristics that can be effective. I also have had some success bringing in guests to role-play their own culture or disability. For example, negotiating with a deaf or blind colleague or using

⁵² When a culture's source of motivation/values is external or environmental, members of that culture "strive to remain in harmony with their environment." Thorne & Saunders, *supra* note 47, at 4 tbl.II. However, when members of a culture are more internally focused, "individuals attempt to control their environment." *Id.*

⁵³ This dimension measures how cultures transmit and interpret information. See NEULIEP, *supra* note 44, at 58. High context societies focus on nonverbal, contextual, and shared cultural meanings, while the verbal code is the primary source of information in a low context culture. *Id.*

⁵⁴ Cultures with a monochronic time orientation emphasize schedules and segmentation of time. See Carol Kaufman-Scarborough & Jay D. Lindquist, *Time Management and Polychronicity: Comparisons, Contrasts, and Insights for the Workplace*, 14 J. MANAGERIAL PSYCHOL. 288, 291 (1999). Polychronically-oriented cultures, on the other hand, focus on relationships and on completion of transactions, rather than on strict adherence to an established schedule. *Id.*; cf. Hofstede, *supra* note 40, at 359. Hofstede uses long versus short term to describe these orientations. See Hofstede, *supra* note 40, at 359.

⁵⁵ See Avruch, *supra* note 32, at 344.

translators for non-English speakers in a negotiation simulation can be a compelling learning exercise if handled with sensitivity. One of the commercial negotiation software programs also has an international negotiation feature that introduces cultural differences in the process.⁵⁶

E. Cross-Curricular Negotiations

As you might guess, I am a strong proponent of using this material across the curriculum, which is a great transition to my fifth and final point: that there is immense value in teaching negotiation and other ADR processes and skills across the curriculum. The University of Missouri-Columbia School of Law pioneered the Missouri Plan around this concept when it, beginning in 1985, "systematically integrated the teaching of alternative dispute resolution into all standard first-year law school courses."⁵⁷ In numerous other law schools, professors incorporate dispute resolution into their non-ADR-related courses to introduce students to ADR processes.⁵⁸

There are several benefits to using negotiation exercises across the curriculum. For example, it creates a heightened awareness of ADR options among students, it provides students with increased opportunities to develop their negotiation skills, and it satisfies the ABA's mandate that "each student receive substantial instruction in . . . other professional skills generally regarded as necessary for effective and responsible participation in the legal profession."⁵⁹

⁵⁶ Negotiator Assistant, <http://www.icasit.org/negotiator> (last visited Dec. 15, 2008). For an article discussing this program, see Daniel Druckman, Richard Harris & Bennett Ramberg, *Computer-Assisted International Negotiation: A Tool for Research and Practice*, 11 GROUP DECISION & NEGOTIATION 231, 234-54 (2002).

⁵⁷ See Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses: A Report on a Collaboration with Six Law Schools*, 50 FLA. L. REV. 589, 590 (1998).

⁵⁸ *Id.* at 600-07; see also Robert B. Moberly, *Introduction: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges*, 50 FLA. L. REV. 583, 585-88 & n.24 (1998) (providing an overview of the incorporation of dispute resolution into non-ADR courses).

⁵⁹ See ABA STANDARDS, *supra* note 5, Std. 3-202.

I end with the thought that negotiation exercises can enhance the learning experience in other substantive areas of the law. The use of carefully crafted simulations allows students to work through substantive legal doctrines, theories, or concepts. For example, in a criminal law course, you might simulate a plea bargain negotiation. Similarly, you could explore the elements of tort claims in a simulated settlement conference.

Negotiation simulations are also an incredibly effective way to introduce students to deal design, structuring, and repair, as well as transactional planning, implementation, and the like, in business-related and tax courses. We do this at the University of Tennessee as part of our concentration in Business Transactions.⁶⁰ The students in this concentration must complete a capstone experience, one of which is a course entitled "Representing Enterprises."⁶¹ This class is comprised of a series of modules, taught by various full-time faculty and adjuncts, that "integrates prior course work in simulations of business transactions."⁶² In my module, students both negotiate and mediate a complicated contract dispute, and this often results in dazzling displays of analytical and interpretive brilliance. As you may have found in your classrooms, students often expend much more effort preparing for, and demonstrating their amazing analytical and interpretive skills in, exercises involving their fellow students than they might put forth for us mere professors.

This can be an effective way of reaching visual, social, and kinesthetic learners who may struggle more in a primarily lecture-

⁶⁰ University of Tennessee College of Law: James L. Clayton Center for Entrepreneurial Law, <http://www.law.utk.edu/CENTERS/ENTREP/centersclaytonc12.htm> (last visited Dec. 15, 2008). The University of Tennessee's James L. Clayton Center for Entrepreneurial Law offers a concentration in Business Transactions. *Id.* Students who are interested in careers in law and business may enroll in a curriculum that concentrates on the legal aspects of business and finance and emphasizes the needs of business concerns. *Id.*

⁶¹ University of Tennessee College of Law: James L. Clayton Center for Entrepreneurial Law, <http://www.law.utk.edu/CENTERS/ENTREP/claytoncourses.htm> (last visited Dec. 15, 2008).

⁶² *Id.*

oriented environment.⁶³ Research indicates that law students, like younger students, have very diverse learning styles.⁶⁴ Accordingly, we should always design our courses to incorporate a wide range of instructional methods that respond to these diverse learning styles.⁶⁵ Data suggest that a significant percentage of students enrolled in law school are tactile or kinesthetic learners; fewer than thirty percent of law students have strong auditory strengths, and fewer than ten percent are visual learners.⁶⁶ For those students who learn best by doing, role-play activities produce mental imprinting that allows them to retain important doctrinal lessons.⁶⁷

III. CONCLUSION

To conclude, I hope that I managed to convey my passion for the study and teaching of negotiation and for all things ADR. Unlike Professor Vogel's nightmarish experience at an institution

⁶³ While there are numerous "learning style" models, these labels correspond to the neuro-linguistic programming model (NLP), which focuses on how individuals process information. *See, e.g.*, MICHAEL GRINDER, *RIGHTING THE EDUCATIONAL CONVEYOR BELT* 1-2 (2d ed. 1991). NLP models measure three basic sensory modalities and categorize students as visual, auditory, or kinesthetic (VAK) learners. *Id.* at 15-37. For an example of a system utilizing the NLP models, see RITA DUNN, KENNETH DUNN & GARY E. PRICE, *LEARNING STYLE INVENTORY* 9-10 (1981). Other models used to research learning styles include: the Myers-Briggs Type Indicator (MBTI), *see* ISABEL BRIGGS MYERS & PETER B. MYERS, *GIFTS DIFFERING: UNDERSTANDING PERSONALITY TYPE* 139-147 (1995); the Felder-Silverman model, *see* Richard M. Felder & Linda K. Silverman, *Learning and Teaching Styles in Engineering Education*, 78 *ENGINEERING EDUC.* 674, 674-81 (1988); and Howard Gardner's multiple intelligence model, *see* HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* 8-11 (2d ed. 1993).

⁶⁴ Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 *ALB. L. REV.* 213, 216 (1998); *see also* Kirsten A. Dauphinais, *Valuing and Nurturing Multiple Intelligences in Legal Education: A Paradigm Shift*, 11 *WASH. & LEE RACE & ETHNIC ANCESTRY L.J.* 1, 1-2, 5-9 (2005) (applying Howard Gardener's multiple intelligence model to legal education).

⁶⁵ *See* M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 *SEATTLE U. L. REV.* 139, 139-141 (2001).

⁶⁶ Boyle & Dunn, *supra* note 64, at 251 app. 2.

⁶⁷ *Id.* at 231-32.

that once upon a time seemingly frowned upon experiential learning, I am fortunate to be on the faculty of a law school that not only values diverse teaching and learning styles but also tolerates—nay, encourages—my eccentricities. Those of us in the academy who share this passion have become part of the mainstream, and there now are many more resources available upon which we can draw to enhance not only our knowledge and skills but the learning experience of our students.

APPENDIX

*Negotiation Casebooks & Texts*⁶⁸

**ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991).

**DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* (1989).

**ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000).

**G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* (1999).

**DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (Penguin Books 2000) (1999).

ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* (1990).

GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: NEGOTIATION* (1981).

CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (5th ed., 2005).

⁶⁸ This list references texts that focus solely or primarily on negotiation. The first five, which are starred (**), are books that my co-panelists and I have used at our institutions. There are many excellent casebooks and texts that address ADR topics more broadly and that include extensive material on negotiation, for example, LEONARD L. RISKIN, JAMES E. WESTBROOK, CHRIS GUTHRIE, TIMOTHY J. HEINSZ, RICHARD C. REUBEN & JENNIFER K. ROBBENNOLT, *DISPUTE RESOLUTION AND LAWYERS* (3d ed. 2005).

ROGER FISHER & SCOTT BROWN, *GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE* (Penguin Books 1989) (1988).

ROGER FISHER & DANNY ERTEL, *GETTING READY TO NEGOTIATE: THE GETTING TO YES WORKBOOK* (1995).

ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005).

JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW* (2006).

STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARA RUDOLPH COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (5th ed. 2007).

G. NICHOLAS HERMAN, JEAN M. CARY & JOSEPH E. KENNEDY, *LEGAL COUNSELING AND NEGOTIATING: A PRACTICAL APPROACH* (2001).

RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* (2002).

STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION AND PERSUASIVE FACT ANALYSIS* (3d ed. 2007).

CARRIE J. MENKEL-MEADOW, ANDREA KUPFER SCHNEIDER & LELA PORTER LOVE, *NEGOTIATION: PROCESSES FOR PROBLEM-SOLVING* (2006).

MELISSA L. NELKEN, *NEGOTIATION: THEORY AND PRACTICE* (2d ed. 2007).

ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT PEPPET, *NEGOTIATION* (3d ed. 2006).

E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, *MEDIATION AND NEGOTIATION: REACHING AGREEMENT IN LAW AND BUSINESS* (2d ed. 2007).

WILLIAM URY, *GETTING PAST NO: NEGOTIATION YOUR WAY FROM CONFRONTATION TO COOPERATION* (rev. ed., 1993).

CHARLES B. WIGGINS & L. RANDOLPH LOWRY, *NEGOTIATION AND SETTLEMENT ADVOCACY: A BOOK OF READINGS* (2d ed. 2005).

GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983).

Sample Resources for Simulations, Role Plays, and Exercises

Alternative Dispute Resolution Section of the Association of
American Law Schools,
<http://www.law.missouri.edu/aalsadr/index.htm> (last visited Nov. 8, 2008).

Program on Negotiation: Clearinghouse Teaching Materials
and Publications,
<http://www.pon.harvard.edu/education/teaching.php> (last visited Nov. 8, 2008).

The Electronic Hallway, <https://hallway.org/index.php> (last visited Nov. 8, 2008).

Willamette University College of Law: Center for Dispute
Resolution—Simulation Bank,
<http://www.willamette.edu/wucl/cdr/simbank/login.cgi> (last visited Nov. 8, 2008).