GETTING REAL: ENHANCING THE ACQUISITION OF NEGOTIATION SKILLS THROUGH A SIMULATED EMAIL TRANSACTION†

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Getting Real: Enhancing the Acquisition of Negotiation Skills Through a Simulated Email Transaction

John C. Kleefeld and Michaela Keet

Abstract

The authors first review the widespread use of role-plays and simulated exercises in response to the challenges of learning and teaching negotiation—in particular, the need to integrate theoretical and skills-based instruction. Drawing on their experience in the classroom, they present a simulation adapted to redress common deficiencies of role-playing. Law students in different provinces were paired to negotiate a commercial transaction between law firms. Working with basic background facts and a stranger on the other side, the students were free to use their own names and choose their own negotiating styles, thereby reducing the artificiality experienced by role-players who have to assume roles and pretend not to know their counterparts. The exercise allowed for the development of a negotiation relationship over the course of a week, in contrast to the one-time nature of many in-class simulations. The negotiation also took place solely by email and invited students to explore the impact of this mode of communication. Using excerpts from student learning journals, the authors discuss the results under six headings: (i) initiating the relationship and managing written communication; (ii) making fundamental choices and dealing with dilemmas; (iii) adapting strategy; (iv) attempting to influence outcomes through anchoring; (v) managing information; and (vi) constructing negotiator identity. The authors conclude from the degree of student reflection and critical thinking that such simulations can contribute to better integration of skills and theory, and perhaps even to transformational learning.

Introduction

Teaching negotiation typically involves role-plays and simulations to illustrate concepts, stimulate critical reflection, and integrate theory and practice. The most common vehicle is face-to-face negotiation exercises. Though effective at many levels, such exercises also suffer from shortcomings: they don't address the increasing reality of electronic modes of communication; they typically focus on a single meeting rather than developing a negotiation relationship over time; and they can seem artificial, particularly when students already know each other yet are pretending to have met for the first time.

We aimed to address these shortcomings by pairing students in two Canadian law school negotiation courses in the fall of 2008: Kleefeld's course at the University of British Columbia, and Keet's course at the University of Saskatchewan. These are foundational courses for further courses in dispute resolution, including mediation, arbitration and multi-party negotiation. In the exercise, students negotiated the interprovincial sale of a law firm's book collection over the course of a week, doing so entirely by email, with each of the students submitting a transcript of the negotiation from start to finish. They received feedback from each other, from other students in the courses, and from us. The experiment deepened both the learning and the teaching experience, and we expanded it to include over 200 law students from four Canadian universities in 2009-2010.

In this article, we describe the simulation and discuss our results, as well as some lessons not typically learned in face-to-face simulations. The experiment goes some way to addressing the deficiencies of role-playing and to integrating skills that students need to become adaptable, professional negotiators. Using student reflections on the exercise, we analyze both functional and conceptual adjustments that students made during their negotiations. We saw evidence of deeper critical thinking about party orientation in a negotiation and the difficulties around issues like anchoring, information exchange, and the construction of

negotiator identity. The degree of student reflection is encouraging, and suggests that such simulations can contribute, not only to the integration of skills and theory, but even to transformational learning. And, yes, we also had fun doing it and learned from each other in the process.

The Learning and Teaching Challenge

The challenges of learning negotiation often come as a surprise to students. After all, it's just a *skills* course, isn't it? Such impressions are quickly toppled when theory meets practice. As Don Peters explains:

> Students starting to negotiate as lawyers frequently encounter a bewildering array of stimuli as they confront tasks that need to be accomplished quickly and successfully. Even a seemingly simple, single issue, buy-sell negotiation requires making challenging decisions about strategic orientation, information disclosure, exchange tactics, argument framing, question phrasing, and listening. These challenges can confuse students who often expect professional skills courses to be much less theoretically rigorous.[1]

One of Peters' students nicely encapsulates what we've found to be a common reaction to the learning that goes on:

> [W]hen I signed up for the course, I didn't really think that I was going to learn a whole lot. . . . I felt that I would get practice honing some skills, but I had no idea the amount of theory and preparation that enter into . . . every negotiation.[2]

The challenge of teaching negotiation is that it is "paradoxically both dangerously easy and dangerously hard."[3] It is easy "because we love the subject and so do our students;" hard, because "[i]t is one thing to help students understand something *about* negotiation [but] quite another to teach students to internalize that understanding, to actually *think* and *behave* differently."[4] As Bruce Patton has said, "[c]onnecting what we know and what we do—becoming reflective and aware in the moment—requires hard work and practice to build the new neural pathways that underlie [skills] development."[5]

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1. Don Peters, "Mapping, Modeling, and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling" (1996) 48 Fla. L. Rev. 875 at 892.
2. *Ibid*.
3. Michael Wheeler, "Is Teaching Negotiation Too Easy, Too Hard, or Both?" (2006) 2 Negotiation Journal 187 at 187.
4. *Ibid*. at 187-188.
5. Bruce Patton, "The Deceptive Simplicity of Teaching Negotiation: Reflections on Thirty Years of the Negotiation Workshop" (2009) 4 Negotiation Journal 481 at 482.

To meet both sets of challenges and integrate practice with theory, negotiation teachers rely on simulations that are based more or less on real problems. Paul Ferber sees law school simulations as having three elements: (i) performance of a lawyer's task; (ii) in a hypothetical situation that emulates reality; and (iii) taking a significant amount of time to perform relative to the task at hand.[6] The last element, says Ferber, distinguishes simulations from the kind used in Socratic teaching, where students assume roles (a lawyer for a party, a judge, etc.) and respond to a hypothetical problem. No matter how realistic the problem, "the immediacy of performance removes a sense of reality and prevents the kind of learning which occurs when the time to perform mirrors the time a lawyer has for the task."[7] That time, says Ferber, should also include time for planning and for debriefing and reflection after the simulation ends. Leading negotiation teachers similarly conclude that "[c]arefully structured debriefings with clear analytic lessons are crucial to the effective teaching of negotiation skills."[8]

In addition to simulations, teachers of negotiation and mediation also use role-plays—for example, to teach skills like open-ended questioning or reframing negative, past-oriented statements into positive, future-oriented ones. Again, though, the focus tends to be on immediate practice of a concrete skill rather than applying it to a problem that unfolds over time. Games are a third type of exercise. They generally have a set of rules that limit possible solutions, and are often scored, which facilitates comparison of results, though not the processes by which results are achieved. Simulations have been characterized as combining elements of both games and role-plays. In practice, the distinctions are blurry: simulations and games typically involve role-plays, and most games and role-plays aim to simulate some aspect of the real world.

The problem-based focus of simulations can motivate learning in at least three ways. First, students learn actively, rather than passively; second, the quasi-real-world context of simulations increases the relevance of what is to be learned; third, simulations are *different* from lec-

6. Paul S. Ferber, "Adult Learning Theory and Simulations: Designing Simulations to Educate Lawyers" (2002) 9 Clinical L. Rev. 417.
7. *Ibid*. at 419.
8. Lawrence Susskind and Jason Corburn, "Using Simulations to Teach Negotiation: Pedagogical Theory and Practice" in Dietmar Herz and Andreas Blätte, eds., *Simulation und Planspiel in den Sozialwissenschaften: eine Bestandsaufnahme der internationalen Diskussion* (Münster: LIT Verlag, 2000) 63 at 81.

tures, with the different mode alone enhancing learning.[9] Of course, a simulation isn't real—it resembles what a lawyer does, "but it is not the thing itself."[10] Yet simulations—and their pedagogical cousins, games and role-plays—may provide even better learning opportunities than more real-world experiential learning such as clinical education, internships and externships. As Ferber explains, simulations can alter temporal constraints, so students needn't wait days, weeks or months to learn the consequences of their strategic choices[11]—though *too* much alteration runs counter to Ferber's criterion that simulation time should mirror real-world time. Further, because simulations aren't real, students can take risks that might beget disastrous results for real clients (with students often gaining visceral lessons about what *not* to do in the real world). Finally, because simulations are designed, rather than occurring by happenstance, they can focus on particular learning goals.[12]

Simulations and role-plays aren't without their critics. In "Death of the Role-Play," a chapter in a book on 'second generation' negotiation teaching, Alexander and LeBaron characterize the relentless use of role-plays as a limiting feature of negotiation training; essentially, they say, role-plays are linked to learning rote, mechanical skills.[13] Susskind and Corburn also heard concerns about role-plays in interviews with leading teachers.[14] For example, Michael Wheeler told them that he was troubled by role plays that saddled participants "with assumptions that are not their own," thus "trivializ[ing] the complexity of the issues and mask[ing] important questions of identity, relationship, and even ethics," while Deborah Kolb doubted that role-plays were good for looking at gender issues "because they take some of the things that might be gendered to the world out by programming it in, by telling people what they are looking for."[15] Alexander and LeBaron argue that such complexities are the very challenges facing today's negotiators, who must navigate cultural and social difference across communicative and cognitive barriers. In this setting, imagination, creativity and resourcefulness may be more important than 'concrete' negotiation skills.

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9. See David Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (New Jersey: Prentice-Hall, 1984) and Ferber, *supra* note 6.
10. Jay M. Feinman, "Simulations: An Introduction" (1995) 45 J. Legal Educ. 469 at 469.
11. Ferber, *supra* note 6.
12. *Ibid*.
13. Nadja Alexander and Michelle LeBaron, "Death of the Role-Play" in Christopher Honeyman, James Coben and Giuseppe De Palo, eds., *Rethinking Negotiation Teaching: Innovations for Context and Culture* (St. Paul, MN: DRI Press, 2009) 179.
14. Susskind and Corburn, *supra* note 8.
15. *Ibid*. at 79.

Yet despite their provocatively titled piece, Alexander and LeBaron conclude that reports of the role-play's death, like those of Mark Twain's, have been exaggerated,[16] and conclude with 21 resuscitative recommendations, several of which track the advice of Ferber and others. They include admonitions to make the experience as close to real life as possible, with specific learning objectives; to give time for conceptual background learning; to allow improvisation rather than literal adherence to a script; to create roles that resonate for the participants; to balance a spirit of play with a spirit of seriousness; and to schedule comprehensive debriefing.

According to Holtom, Gagne and Tinsley, current business environments also warrant negotiation simulations that are increasingly dynamic—that challenge students with new information and perspectives throughout.[17] Patton also reviews the role-play's development over the last 30 years, noting the shift from exercises that supplement negotiation objectives by including instructions on the role player's mental state ("You're very angry about what happened and tend to say exactly what you're thinking"), to those that avoid telling participants how to think or act, focusing instead on a compelling story that is likely to make certain perceptions or approaches appropriate.[18] And he notes that doing so takes a lot of work!

What We Did: Designing & Implementing the Books Transaction

While neither the Alexander-LeBaron chapter nor Patton's article were available when we started, several of their points were also ones that animated us. The cross-university collaboration required some unique planning.[19] Rather than build an exercise from scratch, though, we adapted a simulation from Folberg and Golann's *Lawyer Negotia-*

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16. Twain's quip, "The report of my death was an exaggeration," is from Frank Marshall White's interview, "Mark Twain Amused / Humorist Says He Even Heard on Good Authority That He Was Dead / Cousin, Not He, Sick / New Book Just Finished, and It Will be Called ____" *New York Journal* (2 June 1897) 1, rep'd in Gary Scharnhorst, ed., *Mark Twain: The Complete Interviews* (Tuscaloosa: University of Alabama Press, 2006) at 317-18.
17. Brooks C. Holtom, Katharine C. Gagné and Catherine H. Tinsley, "Using 'Shocks and Rumors' to Teach Adaptive Thinking" (2010) 26 Negotiation Journal 69.
18. Patton, *supra* note 5 at 485.
19. For a useful discussion of a similar exercise, see Brooks C. Holtom and Amy L. Kenworthy-U'Ren, "Electronic Negotiation: A Teaching Tool for Encouraging Student Self-Reflection" (2006) 22 Negotiation Journal 303. We learned of their work only after we had already conducted our own exercise and were preparing this article for publication.

tion,[20] which Kleefeld has used as a text and which comes with a teacher's manual full of exercises and suggestions for their implementation.

In the simulation, a law firm is reorganizing and wants to sell 300 books from its library to another firm. In the original scenario,[21] the books related to Japanese law. This is a plausible niche practice for a West Coast firm, and when Kleefeld first ran the exercise with his own class, he placed the selling and buying firms in Vancouver, Canada and Seattle, Washington, respectively. For the interprovincial version between UBC and U of S, we switched from Japanese law to Canadian resource and environmental law. Again, this seemed realistic, since both provincial economies are heavily resource-based. However, the selling firm is getting out of resource law; the buying firm is just beginning a practice in that area. The students assume the roles of new lawyers at each firm, assigned the task of getting the best possible deal for their principals. We thought this role would resonate for students, as some have already had summer law firm jobs, and others are close to graduating and working for firms. The simulation's transactional nature also develops skills not typically covered in law school—skills that require students "to think as builders rather than fighters, to think creatively about ways to achieve their clients' goals and allow the other side to do [so] as well."[22]

We gave each negotiating counterpart a confidential fact sheet. According to the seller's facts, the firm's librarian says that the books were acquired over many years for about $6,000 and it would cost about $8,000 to buy all of them new, not including transaction or 'hassle' costs. The buyer (potential buyer, actually) received similar information: the cost to buy a set of books like these from a used book dealer would be between $5,000 and $6,000, excluding transaction costs, and the firm has imposed an $8,000 expenditure cap. Neither firm, though, knows what information the other firm has. In particular, there is no information in the original scenario about the book titles, just that the books are in good condition and valuable to a resource law practice. The seller's best alternative to a negotiated agreement—its 'BATNA' in negotiation parlance[23]—is to sell the books to a clearinghouse for $3,000, including pickup costs. Thus there are several objective criteria to assess an

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20. Jay Folberg and Dwight Golann, *Lawyer Negotiation: Theory, Practice and Law* and *Lawyer Negotiation: Teacher's Manual.* New York: Aspen, 2006).
21. *Ibid*., *Teacher's Manual* at 146-153.
22. Ferber, *supra* note 6 at 426.
23. Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, 2nd ed. (New York: Penguin, 1991), c. 6.

offer's fairness,[24] and a 'ZOPA' or zone of possible agreement[25] of about $5,000 (i.e., between $3,000 and $8,000). There are also interests other than price, some diverging and some converging. For example, a divergent issue is that the selling firm needs to get the books out quickly due to an impending move, while the buying firm needs to delay receiving the books or keep them in storage until it can expand its library space to accommodate the purchase.

To make the simulation more realistic, we created a 'representative list' of 30 or 40 of the books, using real titles obtained from the law school library catalogue. The facts said that the list had been supplied by the firm's librarian, who was too busy to provide a complete list. We also added a book not from the catalogue: Dr. Seuss's *Horton Hears a Who!*,[26] later switched to *The Lorax*[27] for its environmental message. Apart from the spirit of play that we hoped this might engender, we wanted to see what students would do with the information, as it in some way mirrors the experience of clients presenting lawyers with 'inconvenient' facts. We gave the list to the seller's associates as an electronic Microsoft Word document and said they could do whatever they wanted with it. The buyer's associates had a different ethical issue to consider: they were told that they could keep any savings out of the $8,000 as a bonus for the time spent negotiating the purchase,[28] thus creating an agency dilemma of sorts as well as an incentive to not spend the whole $8,000 just for the sake of a deal.[29]

To help the students prepare, we assigned readings on negotiating modes (face-to-face, by telephone, in writing, etc.) and their pros and cons. In honing the exercise over the last two years, we have put more emphasis on the readings on *email* negotiation. Topics can include the pros, cons and ethical risks of email negotiation;[30] building rapport

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24. *Ibid*., c. 5.
25. Brad Spangler, "Zone of Possible Agreement (ZOPA)" in Guy and Heidi Burgess, eds., Beyond Intractability (Boulder: Conflict Research Consortium), online: <http://www.beyondintractability.org/essay/zopa>.
26. Dr. Seuss, *Horton Hears a Who!* (New York: Random House, 1954).
27. Dr. Seuss, *The Lorax* (New York: Random House, 1971).
28. We thank Vivian Hilder of the University of Manitoba, who added this wrinkle to the buyer's facts.
29. The agency dilemma or principal-agent problem arises when a principal and agent have differing incentives and information. It is a common problem for a lawyer working under a contingency agreement and having to advise a client whether to accept a settlement offer or go to trial.
30. See, e.g., Lynn A. Epstein, "Cyber E-Mail Negotiation vs. Traditional Negotiation: Will Cyber Technology Supplant Traditional Means of Settling Litigation?" (2001) 36 Tulsa L.J. 839 and Anita D. Bhappu and Zoe I. Barsness, "Risks of E-mail" in Andrea Kupfer

through 'small talk';[31] and even teaching reflections.[32] As the editors of *Rethinking Negotiation Teaching* deplore, "[a]stonishing amounts of negotiation are now conducted by email—often with scant regard for underlying strategy, or even common courtesy."[33] Apparently there is a need for some niche instruction.

As the readings explain, email is a lean or low-context mode of communication, lacking even the imprimatur of a law firm's letterhead. The absence of higher-context negotiating clues like nonverbal behaviour and tone of voice, coupled with the tendency of email senders to bundle multiple arguments in a single message, makes it cognitively harder for email recipients to process those messages.[34] Yet email offers many benefits. For example, negotiators can combine the thoughtfulness that goes (or ought to go) into written communication with the speed of the Internet, thereby eliminating mail delays, time zone differences and the pressure of having to think on one's feet. Email also cuts out voicemail gamesmanship ('I never answer the phone: I call back on my own time and terms'), as well as timeworn face-to-face tactics like feigning boredom or making a show of picking up one's papers as if to leave the bargaining table. Email also leaves a precise, time-stamped communication trail, since even deleted messages are potentially recoverable with the right technology.[35] Several of the readings discuss these aspects of email negotiation and present practical ways to surmount communication barriers.

We assigned the exercise roughly midway through a one-semester course, after the students had already done face-to-face simulations in which they had opportunities to apply readings in both integrative (value-creating) and distributive (value-claiming) bargaining. We wanted

Schneider and Christopher Honeyman, eds., *The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator* (Washington, DC: ABA Section of Dispute Resolution, 2006) 396.

31. Janice Nadler, "Rapport in Legal Negotiation: How Small Talk Can Facilitate E-Mail Dealmaking" (2004) 223 Harv. Negot. L. Rev. 9.
32. Noam Ebner *et al.*, "You've Got Agreement: Negoti@ting via Email" in Honeyman, Coben and De Palo, *supra* note 13, 89.
33. Honeyman, Coben and De Palo, *ibid.* at 89.
34. See Ebner *et al.*, *supra* note 32.
35. The precision of the communication trail needs to be qualified. We assume here that content integrity is maintained (in fact, email text can be more easily manipulated–intentionally or accidentally–than traditional written correspondence); we also assume that the sender's and receiver's computer time clocks are correct or that any differences between them (e.g., due to time zones) can be reconciled. In real life, these can be matters of some importance, especially when it comes to questions of offer and acceptance.

to ensure that the students had at least some practice in things like exploring interests, experiencing anchoring effects (i.e., attempts to influence the bargaining zone through the amount of an opening offer or demand), or trying a concession strategy (e.g., beginning by trading low-cost items for one side that have high value to the other side). This turned out to be essential: when one of us subsequently tried to hold the exercise earlier in the term before such things had been learned, feedback on the exercise's learning value was less favourable.

We created 16 cross-university negotiating teams, but since Keet's class had 20 students rather than Kleefeld's 16, four of her students doubled up into two 2-person teams. All the students in one class had the seller's instructions; all those in the other had the buyer's instructions. The students used their own names, rather than assuming a role-play name. We gave them each other's email addresses—though as we later learned, it was more convenient for the 2-person teams on one side of the negotiation to create a common email address for the exercise that they could both access.[36] We told the students to carry out the whole negotiation by email, with no phone, text messaging or other forms of communication permitted. They were to save all emails relating to the negotiation and create a transcript by copying and pasting the messages into a Microsoft Word document in chronological order, numbering each email to facilitate future reference.[37] Like Holtom & Kenworthy-U'Ren,[38] we found the transcript essential to a thorough debriefing after the exercise as well as the chief means of assessing student performance.

The students had a little over a week to do the negotiation, after which they were to email the transcripts to us, along with forms summarizing key outcomes such as price, delivery and payment terms, and any other agreements reached. Within 24 hours of doing so, they were also to email their negotiating counterparts, copying us, and give their counterparts feedback on their negotiation performance. We thought it important to prepare the students for this first level of peer review—for some of

36. Giving students each other's email addresses can raise privacy concerns. We addressed such concerns by asking students' permission to share their addresses with each other or, alternatively, asking that they create course-specific addresses that they would be willing to share. An alternative approach, and one that would allow instructors to monitor email negotiations in real time, would be for the instructor to create course-specific email accounts for each student, to which the instructor would also have password access.
37. We have also provided instructions on how to save emails in html format, which can make it easier to include message header details in a file.
38. *Supra* note 19.

them, their *only* experience with peer review in law school—by giving some instructions on constructive criticism. Essentially, these instructions mirrored what we try to do in class ourselves: identify one or more things that we think were done well, and why; and identify one or more things that could be improved in the next negotiation, along with suggestions for alternative approaches. We also built in a second-level of peer review: for each negotiating pair, we emailed their transcript to the next negotiating pair on our list, and asked the recipients to review the transcript and give feedback to both counterparts of the pair—again, copying us.[39] Finally, we provided a further level of review ourselves, ranging from individual commentary on the transcripts to group debriefings that took up the better part of a three-hour class.

A set of materials for the exercise, updated to include student feedback from our various iterations over the last two years, is available from the authors.[40]

What We Learned: Lessons Surpassing the Role-Play Experience

Of the 16 original negotiations, 15 resulted in a deal. In the one that didn't, the student acting for the buying firm concluded, on his own research, that many of the books were too out of date to justify the price being demanded by the seller, and was unable to convince the seller of his position. This student took the exercise very seriously, as though he really was charged with buying books for his firm, and refused to reach a deal just for the sake of the exercise. However, this also suggests that we ought to have made the representative list more current, and points out a basic problem with "getting real" in simulations—there is a tension between making facts too simple and making them too complex. Too simple, and the simulation lacks an air of reality; too complex, and it becomes realistic enough to pose new problems and remove the focus from key teaching objectives.[41]

Of the 15 who reached a deal, most settled on a purchase price between $5,000 and $6,000, with varying terms for shipping or storage costs; the elapsed time to conclude a deal was generally between five and six days.[42] In several cases, the sale price and other terms were

39. In the fall of 2010, we changed this so that the students themselves emailed their transcripts to the next team on the list, eliminating the need for instructor management at this stage.
40. Contact the first author at <john.kleefeld@usask.ca>.
41. See Feinman, *supra* note 10.
42. Kleefeld has since begun keeping statistics. In the most recent iteration of the exercise for his class (n=20), the mean time to reach a deal (based on times of the first and

based on outside research, with students referring to costs of books on eBay or Amazon or to shipping costs from websites of companies like UPS, Fedex or Purolator. Students who cited such information did so on their own initiative and had to make various assumptions, such as the weight and condition of the books. Injection of such elements appeared to give more buy-in to the exercise and generally resulted in more thoughtfully constructed deals, with a variety of terms used to address uncertainty and risk—exemplifying the notion of adaptive thinking.[43] Some students avoided the problem of shipping costs by landing on facile solutions, such as delivering the books themselves. Yet even these solutions were sometimes accompanied by other interest-based rationales, such as building networks with lawyers in another city and a neighbouring province. Some of the more creative deals included things like a satisfaction guarantee with a return policy (a response to the uncertainty of buying books sight unseen) or an agreement to refer future business between the two firms.

Sixteen different negotiations, in this case, meant 36 different subjective encounters, with the similarity in outcomes belying the diversity of experiences inside each process. This relatively simple exercise gave students an array of choices at multiple levels: practical, conceptual, ethical, and philosophical. They found it both enjoyable and eye-opening:[44]

> I want to say that it was one of the most enjoyable exercises in all of law school. Unlike some assignments where I admittedly have completed them only for the sake of recording a grade, I became completely absorbed by, and dedicated to, the e-negotiation.
>
> I found the e-mail negotiation exercise to be extremely helpful. . . . I am someone who likes to think on his feet, and the email negotiation was a completely new arena for me. However, I learned to adapt to this new media and approach this negotiation in a more organized fashion than I would have done for a telephone or in-person negotiation.

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last email) was 4.41 days (SD=1.45 days); the mean sale price was $5542; and the median sale price was $5500—also the exact midpoint of the bargaining zone. Much of the variation around the mean sale price (SD= $667) can be explained by other negotiated terms, such as shipment or storage costs, since a buyer willing to pick up such costs can bargain for a lower purchase price. After accounting for this source of variance, it is surprising how closely the central tendency of these results (whether measured by mean or median) matches what economic theory would predict.

43. See Holtom, Gagné and Tinsley, *supra* note 17.
44. Student comments and reflections come from students' end-of-term journals for the 2009-2010 academic year. This material is included with each student's consent and pursuant to a research ethics review process.

> The idea of cross-university learning was something completely new and something that has never been done in any of my classes. . . . I know a lot of the students really enjoyed this exercise and appreciate the time it took to conceive of the idea and prepare for its execution.

We found the biggest contrasts in approaches to information disclosure and techniques used to establish the bargaining zone. Some used a gradual trust-building approach to revealing information; others took a ‘lay it all out from the beginning’ approach and focused openly on interests. Others consciously limited information-sharing and used control over information to gain leverage. In some cases, negotiators used objective criteria to help establish the bargaining zone, while others focused more on polarized anchors at either end of the monetary spectrum. Some used a hybrid approach (“The cost of the books is about $8000, but we aren’t looking to get quite that much”). This continuum of strategies is another reflection of real life.

Our students could have approached the exercise with an exclusive focus on the mechanics of negotiating a deal. While it engaged students on that level, their journals reveal them as also engaged in a process of “making meaning.”[45] Their negotiations were organic, creative, and, for the most part, principled. Though not required to write self-analyses of the exercise, most chose to do so in their journals, using the simulation to explore deeper challenges facing them as negotiators. Students’ comments about the experience suggest some shared assumptions going into it:

- that distributive and integrative models present a simple binary choice;
- that rational problem-solving will dictate the outcome;
- that communication—as long as explicit—is straightforward; and
- that agreement is the central measure of success.

Most students expressed surprise at the degree to which the simulation challenged one or more of these assumptions; they experienced their negotiations as much more complex and nuanced than these assumptions would allow. Some educational theorists would see such

45. Kenneth H. Fox, “Negotiation as a Post-Modern Process” in Honeyman, Coben and De Palo, *supra* note 13, 13 at 22.

an unanticipated complexity or "disorienting dilemma"[46] as a moment that can produce transformational growth. What follows is a sampling of students' reflections, many of which show how the experience challenged their ideas about negotiation, the other negotiator, and themselves.[47]

Initiating the Relationship & Managing Written Communication

Students clearly felt the impact of the shift in communication mode. Some wrestled with the mechanics of writing emails. Many experimented with "small talk"—albeit in *written* form—to initiate the relationship. Some fit this comfortably into their styles; others didn't. Animating these choices was the 'stranger' factor. Negotiating with an unknown person, using a medium that constrains the process of knowing, is intimidating. In the classroom, that would be a feeble observation; in our simulation, it was a powerful dynamic.

The students had already become familiar with negotiation models and communication techniques like active listening and attempting to craft solutions that meet the other party's interests. Introducing written correspondence as the exclusive form of communication cast this learning in a new light, challenging students to connect theory with practice using a new skill set. Law school is replete with writing exercises, but they typically require extended, academic, rights-based analyses. Conventions associated with email, along with its very different communicative function in negotiation, turned this expectation on its head. Students had to adjust, invite dialogue, and communicate goals in purposeful, uncomplicated and concise language. This proved to be harder than they expected:

> Perhaps the most unnerving part of the process was in the format itself. I am unforgiving when it comes to writing; I rewrite sentences over and over again in an attempt to crystallize whatever it is I wish to say. . . . Sentences become paragraphs, and subtleties are intertwined, themes arise and arguments take shape. But email doesn't lend itself to subtlety.
>
> My emails were simply too long. Even though this was a planned strategic approach, it did not seem to work as I intended it to. In reading the feedback from the buyers, they seemed to think that having such long emails became disingenuous and condescending. Although this was hard for me

46. Jack Mezirow, "Learning to Think Like an Adult" in Jack Mezirow, ed., *Learning as Transformation: Critical Perspectives On a Theory in Progress* (San Francisco: Jossey-Bass, 2000) 3 at 22.
47. See note 44.

> to wrap my head around originally (because I did feel I was doing a good job of explaining my interests and explaining why their interests were important to me) ultimately I understand that being flooded with text can be too much ...

Many students successfully used small talk to build rapport. Others struggled with it, discarding it as “fake,” “artificial and contrived,” choosing instead to “build a relaxed negotiating environment by using first names, being polite and avoiding overly formalistic language.” As one student explained, “I decided that I would start with a comment about the [books] getting used rather than collecting dust. I felt this was a good ice-breaker.” Others used small talk at certain points in the negotiation but dropped it elsewhere, or concluded in retrospect that it was alright to have done so:

> Although it was a bit contrived, I realized that bringing up the weather was an attempt by the other party to overcome the ‘lean’ aspect of email . . . and to create some rapport between us. I appreciated the effort, and played along for the first couple of emails. After that, I did feel that it was an inconvenience to try to keep up that ‘small talk’, but by then I thought it had served its purpose, so I dropped that aspect of the conversation. I had developed a good working relationship with the other side and we seemed to have a certain amount of trust between us, so we no longer needed to try to create good will.
>
> One of the comments that I got from a peer reviewer was that I used too much small talk. I know I made a conscious effort to start off each email with a little conversation to establish rapport and also to ‘ease’ them into my interests. However, following our class discussion, I realize that continuous small talk is not necessary throughout the negotiation.

The fact that the negotiators didn’t know each other changed the experience dramatically, compared to role-plays with classmates they knew well. Students more comfortable with high-context media felt unnerved and at least slightly unprepared:

> This . . . was an entirely different situation, where the students had no prior knowledge of me, and I had no prior knowledge of them. When I finally realized this point, I became extremely apprehensive, wondering if the other side was going to be harsh, friendly, competitive.

Simulations can operate as a sort of social laboratory, as evidenced by one student’s attempt to gather information about the other negotiators in advance, with mixed results:

> [S]hamefully, I 'googled' their names. While the negotiation went really well in my opinion, I think that my habit of researching people harmed me; when my feedback came back, I was told that more personal rapport should have been built. As a result of my research, I may have assumed to 'know' my negotiators' character, thereby bypassing the rapport building stage.

Similar assumptions appeared with some frequency and force during the inevitable starts and stops of email negotiation. Role-plays tend to overlook negotiation as an incremental process, and this feature of the simulation produced some important lessons for participants. Drawing out the simulation over time (even a week) introduced new anxieties:

> I was starting to feel like there might be something wrong. . . . When I did finally [hear from] my counterparts there was no acknowledgment of the delay or of my first two emails at all. It was like I hadn't even sent them.

A student who experienced Internet problems learned something about email etiquette under such circumstances, finding that it helps to apologize for delays, even those not of one's own making, because it shows consideration to the other side. Another student summed up his own analysis of the delay issue after the in-class debriefing:

> Some students clearly thought nothing of [a delay] and were not suspicious: law students are busy and they may have just not had time to respond. However other students thought the delay was done on purpose to create a specific negotiating climate or express an emotion such as frustration or arrogance. I believe that for the most part those students who imported reasons onto [*sic*] the delay were already feeling and perceiving flaws in the negotiation.

At the surface of their negotiations, students therefore faced many adjustments: in communication styles, in building rapport, and in managing silences and delays. Under the surface, students were also called to deeper levels of critical thinking.

Deeper Dimensions: Fundamental Choices and Dilemmas

The students generally approached this as a rational exercise. They planned and strategized, considered whether to anchor and if so for how much, and thought of how to maximize gains, if not for both sides then at least for themselves. In other words, they "gamed"[48] the exercise. But through their very real engagement with unknown negotiators, most

48. Fox, *supra* note 45 at 22.

moved towards a more contextual, inquisitive orientation. In exploring the value of that movement, we can draw on adult learning theory. Jürgen Habermas and Jack Mezirow, for example, have both distinguished *instrumental* and *communicative* phases in adult learning.[49] The distinction, applied here, makes sense. Students' original focus appears task-oriented: driven by individual goals and a concern to improve personal performance. Such instrumental learning occurs where students seek to control others and manipulate environments.[50] It is necessarily a self-centred phase. But effective learning environments move students to another phase—a relational or communicative one—in which they engage in "learning what others mean when they communicate with you," including "becom[ing] critically reflective "of the *assumptions* of the person communicating"[51] and searching for a shared understanding of what transpired.

This theory illustrates different depths of learning. The degree to which many of our students continued to process and analyze the exercise after it was done showed engagement in *both* instrumental and communicative learning. We found deeper levels of critical thinking in their observations about adaptations over the course of the negotiation, the impact of anchoring and information management strategies, and the construction of negotiator identity. In each of these areas, discussed below, reflective work pulled the students into different learning domains, towards an understanding of negotiation as a complicated and responsive dance rather than a unilateral performance—more art than science.

Adapting Strategy

Students were clear about their initial approach: whether to begin with a distributive/positional stance or an integrative/interest-based one. The choice isn't necessarily obvious. Bhappu and Barsness suggest that, with reduced awareness of the other's interests and emotional state, email negotiators might adopt more direct, confrontational and self-interested behaviour, reducing the chance for integrative outcomes.[52] Yet after comparing a simulation run in both email and face-to-face formats, Rachel Croson concluded that email negotiation,

49. Jürgen Habermas, *The Theory of Communicative Action,* vol. 1: *Reason and the Rationalization of Society,* T. McCarthy, trans. (Boston: Beacon Press, 1984) and Mezirow, *supra* note 46.
50. Mezirow, *supra* note 46.
51. *Ibid*. at 8-9.
52. Bhappu and Barsness, *supra* note 30.

especially when conducted over longer periods, might produce more integrative and equal agreements than face-to-face negotiations.[53] Carson speculated that a negotiator who isn't as "fast on his feet" or who is "less smooth" could give more considered responses when negotiating by email than when doing so in person.[54]

The students' challenge wasn't so much the initial choice of approach, but whether or how to stay committed to it. One student, whose negotiation was held up while he waited for a response, described how he struggled with his instinct to abandon a collaborative approach:

> Because of the delay, my strategy took a huge shift from interest-based to position-based negotiation. . . . Before I did this, however, I sat back and thought about the exercise. Would this work to my advantage to take a positional approach? I decided in the end that for the sake of the negotiation, I would step back a bit from my anger and try to shift back to interests, with a dash of positional bargaining. I think that actually worked more to my advantage than a strict positional approach. I was able to lay out exactly what I wanted to get out of the negotiation, while remaining open to offers from the other side. Had I let my frustrations do the talking I know we likely would not have reached an agreement.

Others had the opposite experience. After successfully creating a collaborative framework, these students found it hard to be firm on the deal's financial dimensions:

> I kind of accepted the offer way to[o] soon because I thought it was too reasonable to refuse.
>
> [B]ecause of the good rapport that we had built up I felt it was far more difficult to be assertive. I feel that by trying to hold onto the strong rapport . . . , I compromised my negotiating tactics. I felt almost as though I was dealing with a 'new friend' and I didn't want to do anything off the start to betray their trust or confidence in me.
>
> I could have been more firm in my position and countered the last offer instead of settling. The trust and rapport that had been developed made me more hesitant to be aggressive in my position; even though I didn't know the other party, by the end of the negotiation I felt like we had a relationship and I did not want to do anything to upset that.

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53. Rachel T.A. Croson, "Look at Me When You Say That: An Electronic Negotiation Simulation" (1999) 30 Simulation and Gaming 23.
54. *Ibid.* at 33.

Attempting to Influence the Negotiation Through Anchoring

Anchoring, in a negotiation context, is the attempt to influence the bargaining range in one's favour—for example, by making a high or low initial offer or demand. The anchoring effect, on which there is a vast literature,[55] predicts that final judgments of a deal's reasonableness will be biased by the initial value. But the question of whether to anchor with a monetary value at all, and if so, how to couch it, wasn't answered easily. Students wrestled with the question and its relationship to an interest-based or principled approach:

> I wanted to set a high yet reasonable anchor. I settled on $7500 as . . . I could easily justify it with objective criteria. I wanted to give the impression that I was reasonable and serious about negotiating in hopes that they would respond in kind.

> I wanted to influence the offer they would make. So, I used the librarian's objective criteria to establish [that] the books were worth $8,000 plus the time to round them up. . . . I suggested we would be prepared to accept less than that if the books were sold as a set and the purchasers paid shipping. My goal was to get $6,000 for the collection plus shipping. When the purchasers responded with this as their offer I had to decide if I wanted to try for more or just take it.

> I wanted to make sure I could anchor so I started off positional with the view that I would change my position as interests were introduced. However the risk with doing this is the other side may not freely disclose their own interests. So even though . . . all the interests came out and were discussed, I think it would have been safer for me to inquire about them right away, and I realize now I could have asked about interests while still setting an anchor price.

Many students experienced anchoring as having both ethical and substantive consequences:

> I anchored in my first email . . . by providing an asking price of $6000. My logic for choosing $6000 was that I wanted to anchor high. . . . Where my pre-planning went wrong was that I thought $6000 was a high anchor. I thought [that] asking my firm's costs on the books was asking a lot. . . . I had contemplated asking as much as $8000, but had a hard time justifying anything above $6000 as I saw it as overcharging and potentially unprofessional. Many of [the books] were used, many were old and dated, and some had questionable relevance (*The Lorax*, to name one). So how could

55. For a good starting point, see Amos Tversky and Daniel Kahneman, "Judgment Under Uncertainty: Heuristics and Biases" (1984) 185 Science 1124.

> it be reasonable and professional to ask more than the $8000 replacement cost? *More importantly, could I personally have asked more than $8000?* [emphasis added]
>
> [My friend] is giving me a hard time. He got $6500 and I only got $5500. He has been strutting around for days thinking he was so clever to anchor [very high]. . . . I am annoyed that the lesson he thinks he learned was 'play hardball until they fold' . . . and I don't have a superior outcome to him. I think it may have something to do with the people we negotiated against as well though.
>
> I thought I was being clever by anchoring at the higher end with my statement 'the books have been estimated to cost approximately $9,000 to purchase new' without actually stating who stated this figure. . . . In essence it was me personally estimating the cost based on the librarian's figure and a couple of thousand added on for the hassle of having to round up the books and purchase them new. I understand that this is 'pushing the ethical boundaries' but figured that it wasn't crossing the line since I made an effort not to put words in the librarian's mouth or attribute the $9,000 quote to anyone in particular.

Others examined anchoring and position-taking in terms of the distribution of power and resources between the parties:

> [T]here is nothing wrong with trying to sell the books for as much as possible. I guess it depends on the situation though. In this case, the other client was also a law firm, and therefore a 'sophisticated party.' As I understand it, they had their own estimates of what the books were worth and if not, they certainly have the means to find out. If the buyer had been an orphanage whose law library had been burned by a crazed arsonist (or something equally as tragic), my perceptions on the extremely high initial offer might change. It is strange to think that our ethics change depending on the context.
>
> The buyers were aware that the books could be purchased for $6000. Therefore, the seller could not lie and make a value that was ridiculously high, for instance $15,000. Doing so would only make the seller look wily and untrustworthy. However, if the seller was dealing with someone who didn't have the means to determine the market value of the books, he or she could set the selling price more freely: an obvious advantage or power in the negotiation. . . .This of course raises the ethical concern of why a seller in that position should refrain from abusing his or her power. In reality, there is no way to stop a party from setting the price too high or failing to disclose information honestly. However, as a lawyer, one can benefit from showing greater ethical concern when dealing with a supposedly "weaker" party for three reasons. Firstly, it is the morally right thing to not take advan-

> tage of a weaker person. Secondly, it is a matter of reciprocity. Today you might be able to take advantage of someone, but tomorrow, someone may be in a position to do the same to you. Lastly, it can help a lawyer build a good reputation.

Students had the unique opportunity of exploring cause-and-effect in their own negotiations and, by virtue of the peer review, in other students' negotiations. One student who led with a high anchor later reflected on how it felt to bump up against its limitations:

> Every time I saw a bid it felt reactionary. I went high, they went low. I went down, they came up. There was never any context behind their actions, nor any rationale behind their bids.

We can see from this that if we conceptualize ethics—and the teaching of ethics—as not just learning rules, but as learning "a process of reasoning that allows [students] to confront ethical problems in context and to resolve them,"[56] then it is crucial to offer simulations that give students the chance to experience that contextualization.

Managing Information

A fundamental tension in negotiation is between disclosing and withholding information. Disclosure is required to advance one's interests; but too much disclosure, or inappropriately timed disclosure, can harm one's bargaining position. James White goes so far as to contend that "a careful examination of the behaviour of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions,"[57] while Roy Lewicki insists, rather more charitably, that negotiators must learn to simultaneously deploy strategies for building trust and for managing distrust.[58] Students acting for both the buyer's and seller's firms grappled with this when deciding how to deal with the question of competing offers for the books:

> I also led the other side to believe that I had several competing offers when I really only had one. As I saw it, the situation had 'buyer beware' written all over it, and people are free to negotiate their own deals. Because I was

56. Mary Jo Eyster, "Clinical Teaching, Ethical Negotiation, and Moral Judgment" (1996) 75 Neb. L. Rev. 752 at 754.
57. James J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation" (1984) 4 American Bar Foundation Research Journal 926 at 927.
58. Roy Lewicki, "Trust and Distrust" in Schneider and Honeyman, *supra* note 30.

> pretty certain I would not be interacting with the other negotiators in the future, I was less hesitant about misleading, and as a result, I thought realizing short-term gains was probably fine in this situation.
>
> During the negotiation, my opponents alluded that it would be 'impossible' for me to find a firm willing to take the aggregate collection. I felt it was therefore necessary to advise them about my other offer, however, I did not disclose its low price. I believed that would have left me in a vulnerable spot. . . . Though my opponents did not ask how much my other offer was for, if they had, I would have pragmatically dodged the question. I believe the idealistic approach of telling the entire truth would have negatively affected my outcome. In retrospect, I maintained my integrity by not lying. Further, I pragmatically bolstered my power in the negotiation by using careful deception.[59]
>
> Neither party had to make an ethical choice in answering the question: Do you have any other offers (to buy or sell)? In my negotiation, both parties informed the other that there were alternatives and that was the end of the issue. I never asked about the price quotes they had received from other sellers, and they never asked me what price(s) that I had been offered from potential buyers. I think both of us realized that further questioning regarding alternatives was not necessary and would not benefit our negotiation. I think there was a mutual understanding that confidentiality regarding alternatives would prevail, and thus no potentially harmful probing was done.

As implied in this last quote, several students experienced the task of information sharing as triggering ethical dilemmas—which, true to life, they resolved in different ways. Some could clearly articulate their rationales around information sharing, shaped overtly by what they saw as ethical commitments as well as by negotiation strategy:

> I decided I would disclose the book list, the replacement cost and the purchase price if the potential buyers asked questions that led towards any of these. I had decided I would not reveal the competing offer, even if asked about it. I felt the competing offer was very low and I feared the potential buyers would make an offer slightly above [it], as that is what I would do in the same situation. There is clearly a tension here, and I feel that I have yet to fully resolve it. On the one hand I view a seller attempting to overcharge as unjust and unethical. On the other hand I didn't reveal the objective information I had about the books in my negotiation, so the potential buyers would have had no idea if I was overcharging or not. I knew I was acting in harmony with my own views, and perhaps that is what was most important to me.

59. The juxtapositional irony of the last two sentences is not lost on us.

> I had deliberately tried to be very open and honest about all the information that we had. I did not come into the negotiation with much distrust built for the other side, and in my initial dealings with the other side, did not believe them to have built in any kind of deceptions into their negotiating style. In short, I like to take others at face value, and to be taken at face value in return. . . . When I try to play deceptively or coyly, it often does not work out in my favour. For example, my attempts to be a little cagey around the price I would sell the books for meant that the other side managed to anchor for much less than I would have liked, and I had a great deal of difficulty pulling this price up to something a little more acceptable.
>
> I was intrigued at how many of my classmates felt doing certain things (like removing certain books from the representative list) in the email negotiation would borderline on 'unethical.' Upon reflection, I can understand why this may push the boundaries of what would be considered ethical, but this view overall somewhat concerns me. There appears to be a very slippery slope. It is my understanding that in a negotiation, information is a powerful tool, and whether or not one chooses to reveal that information is a decision that can drastically change the atmosphere, climate, and/or outcome of that negotiation. In my view, withholding or revealing key information at key times is simply the approach of a savvy negotiator.

As the last comment suggests, students wrestled with managing information that they saw as potentially damaging. A potent example was the choice of how to deal with *The Lorax*, the Dr. Seuss book—a well-known children's book with something of a cult following. There was a great deal of improvisation here. Some students deleted it before sharing the book list, later justifying that action in various ways (e.g., that it was in no way 'representative' of the collection). Some left it in and were silent about it. Others didn't notice it on the list and had to do some fast backpedalling when their negotiating counterpart drew it to their attention. Others raised it proactively with an effort to explain its presence on the list. Sometimes, this was done with panache and wit, as when one student acting for the seller characterized *The Lorax* as "a gag gift from a now departed associate" that referred to "issues of the sort encountered from time to time in resource law."[60]

All of this prompted a lively discussion in the debriefing. Although a range of appropriate responses were possible, they carried overtones of ethical responsibility, and the students' introduction of that into the discussion left some feeling defensive. As one student observed:

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60. This student even cited *Macmillan Bloedel Limited v. Simpson*, 1993 CanLII 2799 (B.C.S.C.), aff'd 1994 CanLII 1731 (B.C.C.A.) (contempt proceedings, with defendant environmental protester reading *The Lorax* into the transcript).

> Listening to people vehemently justify their actions (i.e., removing *The Lorax* from the representative book list) was interesting on two fronts: (1) the emotion put forth in the justification, and (2) the varying reasons behind their decisions.

Others tried to minimize any negative impact of open disclosure by looking for creative solutions:

> I dealt with the list of books and the fact that some of the books may not have been as useful by incorporating a 'no return policy.' My goal in adopting this policy was twofold: first I thought it would be a hassle for my firm to have to deal with any returned books, and second I avoided the ethical issue of selling somewhat questionable books.

Constructing Negotiator Identity

In our teaching, we invite students to explore lawyers' roles and professional identities. The exercise prompted some students to reflect about this at a more personal level. A discussion about ethics led some to introspect about 'who they are' in the negotiation process. As one student said, even engagement in small talk involves the choice of what image a negotiator wants to present, and how much personal information ought to be shared:

> [T]here are personal items that I will not use as a rapport building tool, and will not admit to unless I feel safe enough or forced to do so. Does this change me from being someone who tells the truth even if it involves some loss in position to someone who uses the truth liberally to advance their own position? I feel like this is a question that is larger than the exercise context in which it is used — am I fundamentally someone who refuses to disclose something major about herself for her own personal gain? And if so, how does this mesh with my own ethical standards? . . . I need to determine how much of 'me' others deserve to know about.

Some, who normally felt branded by race, gender, age, or other characteristics used to define personal identity, saw email as a liberating venue for reshaping their identity:

> I believe that withholding . . . personal information from my [negotiating counterparts] was best. I wanted professional interaction back and forth, purely business. I thought this arena—email—would provide the perfect opportunity for my identity to be purely professional.

On the other hand, even those who were comfortable in more distant identities found themselves drawn into a personal, and emotional, response as the negotiation progressed:

> [P]sychology played a major role for me. . . . I ended up distracted and frustrated by . . . 'emotional triggers'—my perceptions of not being taken seriously, not being heard, not being validated. In both cases my emotions and resulting distractions detracted from my ability to be effective in the negotiations, as a whole. . . . [B]y the time we got to negotiating on substance I was willing to take their offer, just to get out of the difficult relationship.

At one level, the capacity to project an identity of choice was seen as empowering:

> [They] never saw my face or heard my voice. Their impression of me was entirely within my control. I could show them whether I was diligent or lazy, friendly or aloof.

But from another angle, this caused frustration. Some found the malleability of negotiator identity and loss of normal identity cues to be barriers. Distilled to things like email address, content of small talk and conversational style, it was easy for students to form limiting assumptions about each other:

> When I was sending the first email I noticed [it] went to 'Law Guys.'[61] I was worried about what that meant and I was dreading that I was assigned to a couple of guys who wouldn't take it seriously. I will fully admit that I made some assumptions based on just that email name that affected my decisions. . . . I also accepted quickly and sort of wrapped it up in one quick final email because of the assumptions I made. . . . I just assumed that these were a couple of good old boys, probably taking ADR as an easy credit, plus I knew there was a big sports game on that weekend (Superbowl maybe?) and they would probably appreciate just being done. So I wrapped it up quick thinking I was doing them a favour. However, when I got my feedback they seemed a bit miffed that I had just accepted and hadn't taken the opportunity to try and haggle or find some creative shipping/storage options. . . . This really gave me the opportunity to reflect on the assumptions I had made and why.

Students will often be induced to think about questions of negotiator identity, and traditional role-plays may accomplish that too. However, here again, the adoption of a different communication mode, the matching of students with strangers, and the drawing out of the transaction over a longer period tended to intensify this aspect of the learning experience.

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61. The name has been changed to protect confidentiality.

What Next? Cross-University Challenges and Opportunities

Email is an essential reality of social and professional interaction in today's world. As such, it is far from unfamiliar. However, the exercise invited students, in a self-directed way, to apply readings and classroom learning about negotiation skills and theory—to connect "what we know and what we do"[62]—in a distinct electronic environment. This feature, along with the 'stranger factor' and extended time span, increased the potential for engagement, for creative disorientation, and for self-reflection.

In retrospect, we see the simulation as going some way to responding to the challenges and opportunities identified by Ferber, Alexander and LeBaron. An important element of the exercise is *time*: for planning, for performing the negotiation, for reflection, and for debriefing with other participants and the instructor. As Ferber might have anticipated, the 'real' time built into this simulation allowed students to strategize, take risks and learn the consequences of those risks. At some levels, the exercise encouraged improvisation and the spirit of play envisioned by Alexander and LeBaron. The students experienced it as a live exercise. And because it felt real for them, it was more likely to stir up authentic emotions, which are more likely to seal and sustain the learning experience.[63]

A cross-university collaboration made all of these goals more attainable. The matching of negotiators across different locations, and the reality of the distance between them, set the stage for important learning—and not only for the students. As teachers, we were enriched by the collaboration. With each run of the exercise, we have continued to consult with each other about ways to improve the experience—to streamline the logistics, to fine-tune the scenario, to better support the negotiation through readings. In settings that can tend to leave us isolated in our teaching activity, the opportunity to work in true partnership has been invigorating.

That is not to say that the collaboration doesn't generate challenges. Because students from both schools gave each other feedback, copying us via email, the number of students with whom we came into contact more than doubled. Information management and constructive, timely feedback was a challenge not only for our students, but for us too. The logistics of dealing with all the emails and documents alone was

62. Patton, *supra* note 5 at 482.
63. See Michelle LeBaron and Mario Patera, "Reflective Practice in the New Millennium" in Honeyman, Coben and De Palo, *supra* note 13, 45.

time-consuming, and we are looking at ways to do this better, such as creating document shells with file-naming conventions that make it easier to keep track of the various pieces of information involved in this exercise.

For students, negotiating with *strangers* became a defining feature of the exercise. This feature inextricably affected each choice they confronted: how to adapt strategies, whether and how to anchor, what information to withhold and what to disclose, what questions to ask, and how to build rapport and project negotiator identity. The simulation's real benefits surfaced first through each student's engagement with these choices, and again as the debriefing unfolded. Multiple layers of feedback helped stimulate the "constant reflection" advocated by Susskind and Corburn.[64] Comments from each student's negotiating counterpart, from another negotiation team, and from the instructor—as well as the opportunity to review an independent negotiation transcript and write about their own experience—made for a fairly well-rounded (though time-intensive) debriefing experience.

That each negotiation became a journey to assess or get to know the other negotiator is a fact that we can employ for greater learning in the future. Comments show students exploring their own assumptions and developing hypotheses as they critically analyze their negotiations. In the exercise's current structure, these conversations were only begun through the written feedback they gave each other. An experiment with a joint debriefing session by videoconference has inspired us to consider other ways that the students might 'meet' each other after the simulation.[65] Another idea is to design the scenario to include multiple potential buyers, sellers or both, a factor of choice that could make the simulation even more realistic.[66]

So, yes, teaching law students to negotiate is paradoxically both easy and hard. Part of it looks and feels like the development of rote skills. Yet skills are necessary, and when combined with theoretical readings and with the essential ingredients of creativity and collaboration, we can develop teaching and learning opportunities that accomplish much more—opportunities that encourage our students to be thoughtful, resourceful and adaptable negotiators. In short, to help them "get real," or at least as close as they can get to it as a simulated setting allows.

64. Susskind and Corburn, *supra* note 8 at 83.
65. In the second run of this exercise, Teresa Salamone (University of Saskatchewan) and Vivian Hilder (University of Manitoba) were able to schedule a videoconference debriefing between their classes.
66. See Patton, *supra* note 5.