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EVALUATING NEGOTIATION BEHAVIOR AND RESULTS: CAN WE IDENTIFY WHAT WE SAY WE KNOW?*

*Mary-Lynne Fisher***
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For professors in skills or clinical courses, grading student work is a troubling and time consuming process. For example, when a professor grades students in negotiation courses on criteria other than the result of the negotiation exercises, she must design comprehensible grading standards, observe the student in a real or simulated exercise, critique the student's performance, and grade the student based on those standards. Some professors, however, do grade solely on the results the students obtain in the negotiation problems. Each student is compared to other students who negotiate the same side of the problem in what is called a "duplicate bridge" format. Other teachers use a subjective standard. Rather than grade on the result, these teachers evaluate the way each student handles the problem. A third method is pass/fail grading. Finally, some professors use a combination of these methods. None of these methods is entirely satisfactory.

Grading students on results encourages students to be too competitive. If her grade depends entirely on the bottom line, she will be more concerned with winning than with how she got there. Result grading does not allow the instructor to control for the relative skills of opponents. Furthermore, students will pay less attention to the professor's critique of their perform-

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ance if the basis of their grade has nothing to do with how well they negotiated.

Subjective evaluation without clearly articulated standards frustrates students because they do not know the bases for the professor's evaluation. The students find it difficult to learn how to improve, or even how to prepare for, their graded performance. Finally, an undefined grade will not reinforce the professor's teaching goals.

As much as professors might like to believe otherwise, students tend to ignore or at least do minimal work in courses graded on a pass/fail basis. Given the pressures of law students' lives, this attitude is not surprising. Moreover, grading a skills class on a pass/fail basis may only reinforce the ideas that the theory taught in class has nothing to do with successful negotiation or that the professor is actually unable to distinguish different levels of competence.

A good grading system must be credible to the students, that is, students must feel that their grades are consistent with their professor's teaching. No matter which techniques or theories about negotiation are taught in class, students should be evaluated on their ability to use them. In addition, credibility depends on the consistent application of the same standards to each student. The very personal nature of grading an individual's live performance makes it susceptible to charges that students are graded on their personality rather than on objective criteria. Moreover, since grading can extend over several weeks, students may feel that the professor does not evenly and consistently apply the same standard to each performance.

From the professor's vantage point, the system must be manageable, i.e., neither cumbersome nor unduly time-consuming. Part of the attractiveness of both result-only grading and pass/fail grading is their ease of application. Similarly, a holistic grading method, without clearly defined criteria, is also relatively easy to use. The system should enhance the learning experience of the exercise by revealing to students their particular strengths and weaknesses and how the students can improve.

In this article we will describe our attempt to devise a grading system for simulated student negotiations. Our goals in designing the standards were to measure negotiation skills, to explain how the skills are responsible for the outcome of the negotiation, and to demonstrate consistency between the values we teach and the grades we assign. Our grading system reduces negotiations into four parts: preparation, opening phase, strategy, and agreement. We will describe the identifying characteristics of effective and ineffective negotiators for each part.

Our system uses a devised scale that delineates the negotiation characteris-

tics to be graded. The professor watches a videotaped negotiation and correlates particular dialogue with the descriptions on the scale by noting a letter that codes each negotiation issue and the number on the tape counter where the dialogue occurs. Thus the professor prepares a relatively detailed analysis of the negotiation that is broken down into discrete elements on which to base her critique and her grade, without having to write substantial comments that can delay the viewing. The student then knows what was effective and ineffective in his negotiation, can relate his performance to what was taught in class, and can identify areas for improvement.

This article consists of five parts. The first describes and criticizes the various grading systems that law professors have used. The second explains our reasons for and goals in designing our system. The third discusses the theoretical basis for the different elements of our scale as found in both the legal and social science literature. The fourth describes the system. The fifth shows how we use the system in one simulated negotiation and explains how our method avoids the objections to other grading methods.

I. Review and Critique of Grading Methods

Over the last thirty years several teachers of legal negotiation have described their courses and, to a greater or lesser extent, their grading methods. While recognizing that these teachers' grading methods may have changed, we include a summary of the methods others have used, as well as a description of their courses, to establish the range of grading methods and to compare the advantages and drawbacks.

Teachers differ not only in how they grade but in what they grade. Of six negotiation instructors who used simulated exercises as a primary teaching tool, all graded either wholly or partially on the students' performance in the exercises. Some also evaluated the students on traditional objective tests of the course material or on written critiques of the negotiations. Those who graded substantially or exclusively on the exercises differed markedly in whether they judged the performance by their results or by subjective analysis.[1]

In the 1950's, Professor Mathews developed a practical course in negotiation with "active student participation under conditions so well simulated as to convey a sense of actuality, of real loss or gain, of stakes seriously at

1. By "subjective" we do not mean to imply "arbitrary." Instructors who report using subjective methods describe some well-articulated components of the negotiation process on which they base their grades. We use "subjective" to mean personal to the instructor. The authors admit to having used subjective grading for several years until they began working on a more fully-articulated grading tool, which we call "process" grading to differentiate it from result-based and subjective grading.

issue."[2] The ten or twelve students in his class each negotiated one of five or six problems during the semester before the entire class. Students were graded on three types of assignments: their negotiation performance, which counted approximately forty-five percent; their written critique of their own performance, which counted about twenty percent; and their written critiques of their classmates' performances, which counted about thirty-five percent.[3] Professor Mathews considered the following factors in grading the negotiations: "command of the facts; perception of the limitations of bargaining position; . . . organization and plan of presentation; clarity; effectiveness on offense and defense; dialectical skills and insights into their appropriateness, and mobility in adjustment."[4] Although he did not mention whether he granted any fixed weight to each of these factors, the result obtained ("effectiveness on offense and defense") is only one of several grading factors.

Student negotiators received considerable feedback from classmates and their instructor during a "post mortem" at the next class. The written critiques of other students' exercises also included a settlement agreement that could range from a straightforward release of a tort claim to a complex marital settlement or collective bargaining agreement. The critiques served as objective tests of the student's mastery of the course material. Similarly the self-critiques gauged, at least in theory, the students' ability to learn from their experience.

As a grading system, Mathews' method has distinct advantages. Students are evaluated on a combination of intellectual mastery and practical ability. Having seen all the negotiations themselves, they are in a position to appreciate the fairness of the grading, both in terms of even-handedness toward particular students and adherence to the standards taught in the class. But the system has drawbacks as well. Some students apparently conduct their negotiations as long as ten weeks after other students and, therefore, have the advantage of having seen several negotiations and heard several post mortems. A conscientious instructor can attempt to compensate for this advantage, but quantifying the compensation is extremely difficult. Another drawback is that each pair of students negotiates a different problem. Unless the problems are carefully ordered to increase in difficulty as the course progresses (itself a subjective judgment) the disadvantage of negotiating order can be compounded. In a larger class than Mathews' ten or twelve students,

2. Mathews, *Negotiation: A Pedagogical Challenge,* 6 J. LEGAL EDUC. 93, 99 (1953).

3. *Id.* at 100.

4. *Id.*

it is questionable whether watching every negotiation is an effective use of nonparticipating students' time.

In the mid-1960's Professor White used a far different grading system based on different goals.[5] Drawing from the practice of duplicate bridge tournaments, the twenty-four students in his class were divided into sides that negotiated four problems simultaneously at various times during the course. The student's grade was based in part on relative success in the negotiation. Each student received confidential instructions in which various points were assigned to the clients' goals. The student's point score was ranked with that of all others representing the same client. Failure to reach agreement on at least one item on the agenda earned students a failing grade on that exercise. The more items the students reached agreement on, the higher their point total.

Professor White chose an "objective and unambiguous standard to stimulate the student's motivation to acquire that grade and to remove any fear that the instructor . . . might apply a more subjective standard."[6] Moreover, "because each student on the same grading curve negotiated the same side of the same problem, grade deviation, to the extent possible, measured manipulative skill, not deviation in the strength of the various cases."[7] He recognized that the grade was not a perfect measure of the student's manipulative skill because it also reflected the ability of the "opposing counsel." This defect was mitigated by changing opponents for each negotiation. A portion of the student's grade was apparently determined by a term paper based on assigned readings in negotiation process and interpersonal relations.[8]

The merits of this system are that it gives students a measure by which they can compare their skill level to that of their classmates and that it defines success to be meeting as many as possible of the client's multiple objectives. Linking the points achieved in the negotiation to the relative importance clients place on each of several issues in negotiation forces the students to negotiate from the client's priorities rather than their own. It also rewards students who seek to learn their opponent's priorities.[9] But the system has obvious weaknesses as well. Besides being dependent on the va-

5. *See* White, *The Lawyer as a Negotiator: An Adventure in Understanding and Teaching the Art of Negotiation,* 19 J. LEGAL EDUC. 337 (1967).

6. *Id.* at 341.

7. *Id.* at 343.

8. *Id.* at 338.

9. In this sense, the grading system appears slanted toward cooperative rather than competitive behavior—but in an unrealistic way. Since the student is evaluated only in comparison with other students representing the same client, she can increase the points scored by sharing information regarding the clients' presumably differing priorities and by striking mutually beneficial deals wherever possible. Since each student's real opponents are the students she is

rying skill of the opposing student,[10] it does not instruct students how to improve their performance in subsequent negotiations, and it penalizes the student who rightly concludes that stalemate is preferable to his opponent's final offer. The system also does not recognize that in many cases, two of the client's goals are interconnected and the client would prefer settlement on neither to settlement on only one.

Basically, the system measures manipulative skill, i.e., the ability to persuade opposing counsel to agree to the negotiator's demands. Manipulative skill, even if by that term we include the skill of persuading one's opponent to cooperate for mutual gain, is either only one of many skills a successful negotiator needs or it is an undifferentiated combination of many essential traits and subskills. It is a conclusion rather than an analysis.

White's "duplicate bridge" method is ultimately a highly result-focused grading system that reveals little to the instructor or the student about how and why the particular result was obtained. Although some commentators argue that duplicate bridge scoring can be used to demonstrate and reinforce the utility of cooperative negotiation strategy,[11] they admit that its successful use requires an enormous time commitment to problem development and negotiator debriefing.[12]

Further, the point system itself has serious limitations. If points are awarded solely on the monetary value of the agreement, many factors crucial

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competing against for a grade (i.e., those representing the same client), there is an incentive to cooperate with the opposing counsel that is not present in actual practice.

10. Of course the system can be fine-tuned to compensate for differing skill levels of opposing counsel. Most simply, those who score well in comparison to other students representing the same client, when negotiating with students who have also scored well in comparison with students representing the other client, will have their grades increased to reflect the greater skill shown. Those who score well only when negotiating with those who scored poorly will have their score lowered because their success was presumably due in part to their opponents' lack of expertise. If a student negotiates with four different students whose mean abilities are "average" for the class, there should be no impact on the student's score. But if she has repeatedly been assigned to negotiate against skilled or unskilled students (because it is virtually impossible for the instructor to predict performance), the grade will be adjusted to compensate for the opposing student's skill.

Another way to adjust for the problem of differing skill levels among student negotiators is to devise a problem that several of them can negotiate seriatum with the same opposing counsel. The problem would have to be one in which all facts, including client priorities, were already known to both sides so that the opposing student did not gain information in the early exercises that could be used against later negotiators. The opposing student should have a skill level sufficiently above that of the students to prevent her becoming increasingly skilled as she repeatedly negotiated the problem. Such an exercise might be designed using a computer as the unchanging opponent.

11. Suskind, *Scorable Games: A Better Way to Teach Negotiation?*, 1 NEGOTIATION J. 205, 207 (1985).

12. *Id.* at 208.

to a successful settlement, such as ease and certainty of enforceability and anticipation of future problems that will endanger the settlement, are not evaluated. The point system tests the best paper agreement, which does not necessarily result from the best lawyering. On the other hand, if a sophisticated point system covering the other criteria of a successful agreement were devised and circulated to the students in advance, it would reveal (or impress further on them, since this concept was presumably covered in class discussions) the importance of detailed, long-range planning. The ability to perceive and take into account the complexities of a negotiation problem often distinguishes between ephemeral and long-term success. If this ability is neutralized by instructing the students to consider (or not to consider) such complexities, the exercise is reduced to little more than a measure of manipulative skill.

Shortly after Professor White reported on the use of the duplicate bridge grading method, Professors Peck and Fletcher adopted his basic model in their legal negotiation course,[13] but added a subtle new component. Professor White had assigned problems that contained all necessary facts either in general information made available to all students or in confidential information made available only to students representing a particular client. Professors Peck and Fletcher provided students with limited information and instructed them to develop the case through fact and evidence gathering. All students who asked the same question received the same information. But not all students asked the same questions. Thus, the negotiators often met, as in real life, with unequal knowledge about their cases. In at least some negotiations this must have affected the outcome. Although Peck and Fletcher used the same grading method as White, they clearly measured investigative skills as well as manipulative ability. Both are important components of negotiation. A result-based score may or may not reflect a thorough factual investigation. Much depends on how the opposing counsel responded and how evenly matched the negotiators were in other abilities. What is clear is that the score itself, without a thorough post mortem between the negotiators or with the instructor, does not provide the students with sufficient feedback to discern what difference superior investigation made.

All instructors who used the duplicate bridge model revealed the students' rankings to them after each negotiation problem and used the differences in the settlements obtained as a springboard to class discussion. The students naturally wanted to know how what they had done or failed to do affected

13. Peck & Fletcher, *A Course on the Subject of Negotiation,* 21 J. LEGAL EDUC. 196 (1968).

their results. This discussion of the negotiation process is crucial to effective teaching. Students who do less well for their clients want to know how others obtained a better deal. But such a discussion can bring the grading systems' weaknesses to the fore.

For example, consider a discussion where one successful negotiator explains the argument she made that she thinks was most responsible for her good result. Her opposing counsel agrees. But then another student, who represented the opposing side, claims he would not have conceded based on that argument and makes an impressive counterargument. His opponent concludes he could not have done as well as the first negotiator because he had a sharper opponent than she did. Then he begins to question the fairness of his lower grade. Another likely scenario involves the high-scoring student who negotiated too good a deal. His opponent's client cannot afford to pay the negotiated price for the widgits over the contract period and will default.[14] The opponent, spurred to refurbish her tarnished image, will point out that the economic problems caused by the negotiated agreement will eventually injure both parties. The entire class realizes that the highest scoring negotiator did not get the "best" deal over the long run.

An even knottier problem is one Professors Peck and Fletcher mention in their article but do not relate to their grading system—the effect of ethical violations on the negotiated agreement. Very simply, a student who achieved a high score may have misrepresented key facts to induce his opponent's agreement. Class discussion will reveal the falsehood, but how does the instructor modify the grading system?[15]

One possible solution is to treat ethical violations similarly to the way Peck and Fletcher apparently treated unsettled negotiations. They sent unresolved cases to "trial," an evaluation by the instructors of how the case would have been decided by a judge or jury on the basis of the evidence the students had previously developed.[16] They did not so state, but presumably they then awarded grade points on the same basis as they would have for achieving the same result through negotiation less the costs of trial. For an ethical violation by misrepresentation, one could "try" a case for rescission or reformation of the contract before the class or, as Professor Ortwein[17] and

14. This could result from the purchaser's negotiator exceeding her authority or from a miscalculation of the actual cost agreed to.

15. We assume "how" rather than "whether" the grading system will penalize unethical conduct. As a matter of substantive contract law, the agreement that has been fraudulently induced may be rescinded or reformed. RESTATEMENT (SECOND) OF CONTRACTS § 205 comment a (1981).

16. Peck & Fletcher, *supra* note 13, at 199.

17. Ortwein, *Teaching Negotiation: A Valuable Experience,* 31 J. LEGAL EDUC. 108, 126 & n.67 (1984).

one of the authors once did, conduct a disciplinary hearing on the alleged misconduct with sanctions in the form of grade penalties. This modification of the duplicate bridge system may be considered a refinement of the result-focused grading system or a shift toward subjective grading. What is essential is to meet the goals the instructors expressed, i.e., to teach the students from practical experience "insights which might not have been developed in practice or, even if those insights might have developed in practice, so advanced them in their professional development as to make it worth the time and energy expended during their limited time in law school."[18]

The interesting question in critiquing the subjective grading system selected by Professor Mathews and the objective, result-focused system adopted by Professors White, Peck, and Fletcher is how their perception of legal negotiation as an ideal and as a real world phenomenon affected their choice of a grading system. Mathews viewed negotiation as "a process of adjustment of existing differences, with a view to the establishment of a mutually more desirable legal relation by means of barter and compromise of legal rights and duties and of economic, psychological, social and other interests."[19] In contrast, White defined negotiation as "the acquisition of a valued object by the manipulation of another person."[20]

Without knowing more about how the respective instructors taught their courses, it is impossible to conclude how consistent their grading practices were with their stated teaching objectives. What we can assert is the importance of maintaining that consistency. Result-focused grading reinforces the competitive, adversarial aspects of negotiation.[21] While that method can in some instances serve as an incentive for cooperation,[22] it can also stifle creative problem-solving because students will rely on orthodox, easily evaluated solutions rather than risk their grade on a creative but unquantifiable solution. For example, in the hypothetical set out in part V, family counseling would be an effective resolution to a visitation/child support dispute. The father has not been visiting the children recently because they have been rude and hostile. The mother wants him to visit frequently and regularly so that she can lead a life of her own. If she cannot count on his compliance with a visitation agreement, she wants more child support to defray her added expenses for meals, recreation, and baby sitters. Negotiators who know the points they will be awarded for various visitation and support levels can

18. Peck & Fletcher, *supra* note 13, at 205.

19. Mathews, *supra* note 2, at 94.

20. White, *supra* note 5, at 343.

21. Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 A.B.A. RES. J. 905, 932.

22. *See generally* Suskind, *supra* note 11.

choose to compete or cooperate in balancing time and money. But the best advocates will try to resolve the underlying problem by exploring why the children have been acting badly. How many points should an instructor give negotiators who agree to put the visitation and support issues on hold while they use their best efforts to get their clients and the children into counseling?

Several years after these reports on legal negotiation teaching, Professor Ortwein chronicled them and discussed the development of his negotiation course and grading methods.[23] He began by stressing that his objective was to promote students' awareness of the pervasiveness of negotiation; the technical aspects of the process; and the techniques, the interpersonal relations, and the ethical dilemmas inherent in the process.[24] He denied that his course was designed to teach students how to be "good" negotiators[25] and eschewed White's emphasis on developing or improving students' manipulative skills.[26]

Nevertheless, Ortwein adopted White's duplicate bridge grading system, using a point structure revealed to students as part of their confidential information.[27] Not surprisingly, Ortwein admitted dissatisfaction with this system.[28] He criticized its tendency to move students out of their lawyer role and back into their student role. "Students begin thinking not in terms of whether the concession can be afforded by the client but rather in terms of whether they will lose or gain points for agreeing as suggested by their opponent."[29] The competitiveness inherent in the method detracted from the overall objective of analyzing the entire negotiation process. He found that students who had become involved in highly emotional negotiations were less willing to explore them in subsequent classroom discussion and were

23. *See generally* Ortwein, *supra* note 17.

24. *Id.* at 114.

25. *Id.* at 113.

26. *Id.* at 114 n.32.

27. *Id.* at 118.

28. It should also be mentioned that it is not necessary that problems have a built-in point structure. I have attempted in the past to create problems with no point structure but with a general indication of priority of issues. I have discovered that while the students generally believe that this is a more realistic approach they nevertheless feel uncomfortable and somewhat insecure without the more positive direction of a point structure. Moreover, it is extremely difficult from the instructor's point of view to rank negotiations of this sort. It tends to make the process much more subjective. On the other hand, students seem to be much more relaxed about the process without the point structure. There is generally less hostility within the sessions and all the parties are more often personally satisfied at the outcome of the negotiation.

Id. at 118 n.42.

29. *Id.* at 120.

reluctant to take part in an analysis of the negotiation session.[30] He concluded that the increased competition so diminished the education advantages of the course that he shifted to pass/fail grading.[31] Yet after one year's experiment he found that student enthusiasm for the course had waned under pass/fail grading and returned to a graded course using a combination of a paper, a critique, and an exercise.[32]

The duplicate bridge grading method continues to attract adherents such as Professor Moberly, who described a labor-intensive, critique-oriented model for his negotiation course.[33] His goals were to develop student competence and effectiveness as negotiators and to educate them on the role of negotiation in society and the role lawyers play in avoiding and settling disputes as well as in litigating them.[34] Developing students' capacity to evaluate and learn from their own behavior as well as that of others was another important goal.[35] To meet these goals, Professor Moberly adopted a hybrid grading system in which the students' cumulative rank in four negotiations accounted for sixty to seventy-five percent of the course grade. Improvement throughout the semester, classroom participation, and instructor evaluation accounted for the remainder of the grade.[36]

Professor Moberly considered result-based grading both a reward and an incentive and noted that students worked harder in the course when they received letter grades than when the course was pass/fail. He also found that grade distribution based primarily on results did not differ greatly from

30. *Id.* at 121.

31. *Id.* at 122.

32. Other professors have tried a pass/fail or nongraded approach to their courses or the exercise parts of their courses, relying on examinations to test students on the course materials. While most students tend to react well to simulated exercises with their classmates, especially if their results are publicized within the class, the lack of grades tends to trivialize them. Given the competitive atmosphere of law schools and the busy schedules most students keep, it is not surprising that students would neglect nongraded exercises. Furthermore, testing mastery of content in a traditional essay or objective test also sends students the wrong messages: that effective lawyering can be equated with performance on pencil and paper tests and that the ability to comprehend and articulate theory correlates perfectly with the ability to apply it. Pass/fail grading may also give students the message that professors are unable or unwilling to articulate what constitutes a successful negotiation. Professors spend much of their class time analyzing different theories of negotiation, discussing the results of research in the area, identifying various approaches, critiquing videotapes and exercises, and developing good negotiation skills in their students. When they grade a student exercise, they should apply this information to the students' strengths and weaknesses. If they do not, they may be signaling that they lack faith in the validity of what they teach or that a good result in reality depends on no more than personality, style, or luck.

33. Moberly, *A Pedagogy for Negotiation,* 34 J. LEGAL EDUC. 315 (1984).

34. *Id.* at 316-17.

35. *Id.* at 319-20.

36. *Id.* at 324-25.

grades based on his subjective evaluation. As a final argument in support of the duplicate bridge method, he asserted that students prefer a grading system that includes a results component over one that relies heavily on professorial evaluation.[37]

But his explanation raises more questions than it answers. Professor Moberly did not explain what factors he considered in the subjective evaluation that, along with class participation, made up the remainder of the grade. It would be helpful to know what these factors were, whether the duplicate bridge method already measured the factors or could be modified to measure them, and how the subjective evaluation contributed to the students' learning. His statement that grade distribution based primarily on results did not differ greatly from grades based on his subjective evaluation is not surprising but intriguing. The similarity is not unexpected because the result-focused method and the subjective evaluation method undoubtedly measure many of the same factors, especially if the evaluating instructor has designed the point structure. The intriguing question is what does the instructor do when they differ? The students' instinctive reaction to attribute divergence to the professor's unconscious (or conscious) bias in favor of or against a student is only one of several plausible explanations. Possibly the instructor is using a measure of effectiveness, such as ease of enforcement or certainty of compliance, that the duplicate bridge method does not consider. Or the instructor may be including values taught in the course, such as honesty and courtesy, that the objective structure does not measure.

Professor Williams made the cogent point that "[g]rading policies are important determinants of what students learn from the course."[38] Grading on dollar value outcomes leads students to adopt competitive tactics, but grading without reference to outcomes implies that outcomes are not important. He recommended a scheme that balances these tensions and incorporates nonmonetary values into the outcome reporting system. Williams also stressed that feedback from instructors must "describe the kinds of behaviors they consider effective or ineffective, give reasons supporting their belief and help students recognize the differences between the two in evaluating their own performances."[39]

He concluded that "[u]ntil the instruments [for measuring behavioral objectives] become more advanced, we should use behavioral observations as feedback, but not as a basis for a grade, particularly when the observations

37. *Id.*

38. Williams, *Using Simulation Exercises for Negotiation and Other Dispute Resolution Courses*, 34 J. LEGAL EDUC. 307, 311 (1984).

39. *Id.* at 312.

are not made by the instructor."[40] He recommended a grading system based thirty to fifty percent on the dollar value of outcomes, noting that such a system is not far removed from the realities of law practice. Such a system could be structured to reward negotiators who achieve maximum joint outcomes rather than maximum individual outcomes,[41] although Williams did not explain how this would be done. A traditional final exam counted for another thirty to fifty percent of the grade. He candidly reported that "[w]hen students confront me . . . I admit that the grading system gives a slight advantage to individual maximizers, but I also unfailingly remind them that, in my opinion, they have a higher duty to fairness than to dollar or to grades. They never fail to protest the conflict this creates, but I believe it is a conflict they should face explicitly and early on."[42]

These statements contain two crucial challenges to negotiation instructors. The first is to develop better instruments for measuring behavioral skills and for explaining how the behaviors are or are not responsible for the outcomes. This measure would diminish student concern that grades are arbitrary while providing them with more structured feedback on how to improve their skills. The second challenge strikes more directly at the integrity of the grading system. Williams appears to say that his grading system produces an imperfect correlation between students' rank and his personal assessment of them based on the values he teaches, such as fairness and honesty. His answer is that these values should be more important than grades. His predicament echoes Professor Moberly's observation that measuring outcomes substantially coincides with the instructor's subjective evaluation.[43] But when it does not, professors owe their students a better answer than "life isn't fair." If grades do not reflect the values professors teach,[44]

40. G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT—TEACHERS' MANUAL 19 (1983).

41. The duplicate bridge system does not always reward maximum joint outcomes. Since each student representing a party is competing against all other students representing that party, an agreement with the opponent that maximizes joint outcomes may prevent either negotiator from ranking at the bottom of her group. However, it makes it difficult for either of them to rank at the top since most negotiation problems have some zero-sum items. Assuming the two sides' scores are later merged, any benefits gained from creative problem solving (enlarging the pie) will be diluted.

42. G. WILLIAMS, *supra* note 40, at 21.

43. *See generally* Moberly, *supra* note 33.

44. It is important to note that value sensitive grading must relate to values students display in the course, not outside it. For example, an instructor may personally value a student's meeting family responsibilities despite school pressures, but the instructor cannot ethically raise the grade of a student who has done inferior work because the student chose to devote time to family needs rather than to coursework. This is far different than failing to reward a student who has displayed values such as fairness and honesty in the coursework to the detriment of her dollar value outcome.

then they fool themselves either about what they teach or what they actually value.

II. GOALS OF A NEW GRADING SYSTEM

None of the grading systems described in the literature[45] about negotiation courses attempted to evaluate objectively both results and the students' negotiation skills. An effective system, however, must evaluate both elements. Furthermore, a grading system should reflect the professor's teaching about negotiation in particular and lawyering in general. If the professor is unable to arrive at a meaningful grading system, then students will either not bother to learn the material, suspect that the professor does not believe what she teaches or, worse yet, conclude that she does not know what she is teaching.

One reason a grading system must evaluate both skills and results is that the result achieved is not always consistent with the skill level shown, which will vary widely. Students who do only a small number of exercises may form an inaccurate impression of their abilities if they look solely at the "bottom line" without taking their opposing counsel's skill into account. In a small class devoted entirely to negotiation, this problem could be minimized by having each student negotiate with several different opponents. But in a larger class (more than twelve to sixteen students) or a class that combines negotiation with other skills such as interviewing and counseling, each student does a limited number of exercises. Explaining why a student who achieved a mediocre result is entitled to a higher than average grade is hard enough; it does not compare, however, to explaining to a student who "won big" why he merits no better than an average grade. To do this with any degree of credibility requires a grading system that incorporates every skill and value the negotiation professor teaches.

A. Fairness in Evaluating Various Negotiation Strategies

As discussed below, much of the scholarly and popular writing about negotiation in recent years has emphasized less competitive approaches to negotiation. While not abandoning the importance of achieving a good result, negotiation teachers and writers have emphasized that an integrative or problem-solving approach to negotiation can be equally successful in achieving that elusive "good" result. These teachers have suggested that students abandon the position-oriented, win-lose approach to negotiation, teaching that a wise result can meet the needs of both parties without sacrificing the

45. *See supra* notes 1-44 and accompanying text.

lawyers' ethics or their relationships with their clients.[46] Incorporating this message into a grading system has proven more difficult.

If professors believe that a good lawyer-negotiator can successfully take an integrative approach to negotiation, they should reward their students who adopt this approach with higher grades. A system that grades students solely on the result, either in a duplicate bridge format or on an exercise by exercise approach, will reinforce in the students' minds that the bottom-line is really the only important object.[47] Innovative or unusual solutions will be rejected in favor of traditional, easily measurable agreements that more closely gel with the professor's comparative rankings. Nonmonetary factors such as the quality of the parties' future relationship and the likelihood that the parties will voluntarily comply with the agreement are swept under the rug.

Most who teach the integrative model believe that it is the best approach for many types of legal negotiation. The competitive model and bottom-line grading may work well for negotiation courses devoted to zero-sum problems such as personal injury cases. But teachers who include business transactions and family law problems in their courses to expose students to a fuller range of problems they will confront in practice come to realize that integrative negotiation is inconsistent with competitive grading.[48] While undoubtedly grading on both process and results is more difficult and time-consuming, professors who teach other than a competitive model are obliged to do so to demonstrate that other approaches are equally effective.

B. Making Ethical Behavior More Than an Afterthought

Another difficulty with result-oriented and pass/fail grading systems is that ethical behavior may not be rewarded and unethical behavior may not be discovered. With the increased emphasis on teaching ethics in law school[49] and the clamor for raising ethical standards of the profession, professors should find the means to require their students to negotiate ethically. Result-oriented grading lets students negotiate in a vacuum without any constraints on their behavior and may even encourage them to ignore ethical norms in order to win. Without a clear standard insisting on ethical behavior, students may feel that they are at a competitive disadvantage if

46. *See* Menkel-Meadow, *supra* note 21, at 932-33 (reviewing negotiation texts suitable for law school use and critiquing the authors' negotiation theories).

47. *See generally* White, *supra* note 5.

48. *See supra* text accompanying notes 37-41.

49. Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility,* 29 CLEVE. ST. L. REV. 377 (1980); G. HAZARD & O. RHODE, THE LEGAL PROFESSION 1 (1985).

they are "too ethical." Finally, if a professor grades on a pass/fail basis, he may confront the dilemma of deciding whether to fail a student for an ethics violation.

Ethical violations are most likely when negotiations occur out of the professor's view and are not videotaped. Even if the professor creates a procedure for handling ethics violations,[50] the victims of unethical conduct may hesitate to bring it to the class's attention for fear of being labelled "sore losers" or "squealers."[51] Additionally, a student may not recognize an ethical violation because she is unaware of the other student's facts or instructions or because she is simply uninformed about the ethics rule itself. Thus, the responsibility for maintaining ethical behavior must remain with the professor.

C. Encouraging Client-Centered Settlements

Negotiation must be taught in the context of the lawyer-client relationship and the role of client autonomy and decisionmaking. The authority of the client to accept or reject settlements is one of the clearest benchmarks of the division of responsibility between lawyers and clients.[52] Thus professors must teach that achieving the client's goals, i.e., meeting the client's needs, is the most important objective in a negotiation.

Result-oriented grading may distort this goal. While this system will clearly identify that a student has exceeded his authority, it may discourage creative results that take nonmonetary terms into account or incorporate unusual trade-offs. In real problems almost all clients have goals that cannot be translated directly into dollars. In a well designed problem a student may face a choice between one solution that meets some of his client's needs without exceeding his authority and an alternative that meets the client's needs more effectively but conflicts with other parts of his instructions. With result-oriented grading, a student may easily avoid the hard question of deciding which offer to accept. Students should be forced to make these judgments among issues and proposals, rather than rely upon artificially structured and possibly simplistic simulated problems that contain only dollar figures. Students should learn when it is wise to accept offers, subject to

50. *See supra* text accompanying notes 15-17.

51. This phenomenon, which one of the authors has observed in class, is a potential topic for an ethics class discussion on lawyers' duty to report unethical conduct and can give students insight into the burden of pointing a finger at another lawyer and labeling his conduct unethical.

52. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

their client's approval, rather than have their options limited by previously granted authority.

D. Achieving Fairness by Mirroring Course Content

A fair grading system is credible to the students. The students would understand the standards that the professor applies to their negotiation problem and exactly where in the negotiation the student meets or fails to meet those standards. Similarly, the student perceives that the professor's evaluation is based on the content of the course because the standards reflect that content. For example, depending upon a professor's objectives, a grading system could emphasize ethics, take a principled or problem-solving approach, or emphasize the more traditional competitive-cooperative, position-based styles of negotiation.

The separation of the good negotiators from the less skilled is equally important for securing student credibility. Since each negotiation varies enormously depending upon the students involved, it is crucial that the grader be consistent throughout the grading process. While consistency is a problem in grading any examination other than multiple choice or similar questions, grading live or videotaped negotiations exacerbates the difficulty because more than one student may participate, personality and style may overshadow substance, and the exhaustive nature of the grading process may require that the process be extended over several days or even weeks.

A fair grading system also provides flexibility for the instructor. This flexibility is particularly important in evaluating agreements that include non-monetary or unusual terms. A professor measures these agreements against the client's goals or needs and learn how these unusual terms were developed. If creativity and adaptability are to be encouraged, the system must reward them. A fair grading system also rewards the student who successfully navigates a particularly difficult situation or handles a challenging opponent.

E. Building in Theory and Experience

Designing a comprehensive grading system forces a professor to articulate the important elements of a successful negotiation. Using the system requires her to identify and standardize those parts of a student negotiation that contain or lack those elements. The instructor must build into her standards the theories, approaches, methods, tactics, and ethics she teaches in her class. Additionally, she must recognize and codify exchanges in the negotiation that exemplify these elements. This rating method prevents an instructor from hiding behind the more easily quantifiable comparison of

results, which obscures the components of good negotiation that she emphasized in her class, and keeps her from resorting to generalized, intuitive grading, which may lack clear standards, and hence, credibility. Furthermore, she will be forced to test the principles she teaches against her students' negotiations and determine whether those principles actually contribute to a "good" negotiation.

A comprehensive grading system, moreover, will incorporate information learned from other disciplines, research studies, writings, and the professor's personal experience in the field. The system's components should reflect this knowledge about negotiation. For example, concession strategy and communication theory can be used to determine whether the student is utilizing competitive or cooperative tactics. Similarly, principled or integrative negotiation will reflect the underlying needs of the parties.

Furthermore, a comprehensive system permits the professor to tell a student that a segment of the negotiation demonstrates a particular aspect or element of the process, that the student successfully or unsuccessfully handled the situation, and possibly that another approach may have worked equally well or achieved a better result. This process should enhance the quality of the student's and professor's dialogue about their negotiations. Instead of discussing vague generalities, the two would focus on particular parts of the negotiation process and attempt to determine how those parts relate to different theories or to the ultimate resolution of the negotiation. Both the student and the professor would share a better understanding of exactly what is being evaluated in the negotiation.

By focusing the discussion on clearly defined standards, this grading system lessens the threatening nature of individual criticism for both the student and the professor. The student will feel that the professor is not unduly harsh or merely evaluating his personality, appearance, or style. Rather, he will feel that the professor is applying objective criteria that are applied to all other students in the class.

F. Encouraging Student Self-Evaluation and Learning

Another goal of our grading system is to enable students to use the system themselves and learn from the process of evaluating themselves or others. The system should be sufficiently flexible and the principles must be easily recognizable so that a student, viewing his or another student's videotape would be able to evaluate the negotiation. A good negotiator develops only over time, and it is difficult to articulate one's strengths and weaknesses in a particular situation unless one has an organized framework for thinking about the experience. In a negotiation course, a student may participate in

several negotiations, not all of which the professor can observe and criticize. Transferring some of this responsibility for criticism to students through a self-evaluation mechanism will enhance the student's development by forcing the student to observe her performance more critically.

Even if the student does not do a perfect critique, the process of watching and analyzing a negotiation would be instructive. Not only will the student learn more about her own skills, she will also learn to recognize different behaviors and approaches used by other negotiators. For example, the student would be able to label an opponent's tactic that was used effectively against her, understand why it worked, and recognize it the next time it is used. Thus, the student will enhance her own skills and her understanding of the process by using this self-evaluation tool.

G. Reducing Labor Intensiveness

As a corollary to student self-evaluation and learning, the grading system may reduce the demand for direct instructor feedback. Professors may find it impossible to observe more than a small percentage of the negotiations they assign to their students. Instead, they may rely on critiquing one student's videotape in class to illustrate the lessons in the exercise. Of course, this has value to the entire class, and it has particular importance to the students whose negotiations are evaluated. The rest of the class is left to determine for themselves how their performance compares to the exercise discussed in class; they do not receive the benefit from an individualized critique.

Alternatively, the professor may rely on written student accounts of their results and possibly a history of the negotiation. This alternative might emphasize that the only truly important negotiation objective is the result and may adversely effect the teacher's goals. Using a self-grading tool will give the students more in-depth criticism without requiring the professor to spend additional time watching videotapes. If the students are required to use the tool several times during the course, they will have a tangible means of measuring their progress and trying different approaches or tactics in different situations. If a student who has conscientiously used the tool still has questions about her skills and/or grades, the professor will at least have the benefit of a more focused and less time-consuming discussion.

A grading tool that utilizes the tape counter on a video cassette recorder has an additional advantage in reducing feedback time. If a simulation is well-constructed, the negotiation will increase in realism the longer it continues. But the longer it continues, the less likely it becomes that the instructor will be able to view the entire tape. Negotiation sessions of an hour or more

can be videotaped and reviewed afterward by the students, who can note on the grading sheet the number on the counter when an event occurred. The instructor can test the student's understanding of negotiation theory (and good faith in reviewing the videotape) by asking the student to locate examples of particular tactics or behaviors on the tape. If the student has previously had difficulty with a particular facet of negotiation, the instructor can ask the student to identify that portion of the tape so that the instructor can evaluate the student's improvement.

III. THEORETICAL BASIS FOR SYSTEM

In designing our system, we have incorporated ideas and principles about negotiation from social science and legal writing on negotiation. Our purpose is to translate these concepts into concrete grading elements, thereby reducing the theoretical subject matter of the class to an understandable evaluation process. These elements, or standards, are arranged on a scale, and ideally, this scale will enhance the credibility of the grading procedure by basing grades on ideas that are grounded in research and experience.

We have chosen concepts that satisfy two criteria: (1) it must contribute to an understanding of how a negotiator's behavior relates to the process and result of a negotiation; and (2) it must divide negotiation into manageable elements for analysis and grading by identifying units of negotiation behavior or of the negotiation process. We also have attempted to organize the disparate ideas about negotiation into a limited number of categories through which a student can analyze his own skills, the skills of his opponent, and the negotiation process itself. While these concepts do not translate into "black letter" principles of what is good negotiation, they do suggest an alternative basis for a more rational evaluation of a complex process.

A. Preparation

While it is difficult to incorporate into a grading scale an activity that takes place before the negotiation itself, most of the literature[53] and the popular guides[54] on legal negotiation strongly emphasize the need for detailed and adequate preparation. A well-prepared student commands detailed

53. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41 (1985); Lowenthal, *A General Theory of Negotiation Process, Strategy and Behavior*, 31 U. KAN. L. REV. 69, 92-94 (1982); Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 818 (1984).

54. *See* H. COHEN, YOU CAN NEGOTIATE ANYTHING 101-13 (1982); R. FISHER & W. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 58-83 (1981); H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 119, 126-27 (1982).

knowledge of the facts and the governing law involved in her problem. She anticipates the legal arguments that the other side is likely to assert and the factual strengths and weakness of her own case.[55]

Good preparation also includes a detailed focusing on the client's needs and goals. These needs are both tangible and intangible. Tangible needs are monetary objectives and other concrete financial or economic considerations such as payment or sales terms, delivery schedules, guarantees, and indemnification. In litigation-related negotiation, they may include nonmonetary issues such as injunctive orders or other forms of equitable relief, releases, dismissals, and stipulations. A well-prepared negotiator considers his client's needs and priorities, analyzes their relationships, and determines how to protect his client's legal rights.[56]

Furthermore, intangible issues such as esteem, honor, or reputation may play an important role in reaching a solution for a client.[57] Determining how these difficult intangible issues may be translated into more tangible monetary and/or substantive resolutions is the benchmark of a well-prepared negotiator. When analyzing the full range of the client's needs, priorities should be established: which issues are most important, which issues are more easily compromised or even conceded away, and which issues require the client's direct consideration.

The analysis of the client's goals and objectives entails several subanalyses that will be reflected in the negotiation. A student must decide which issues lend themselves to a distributive result, i.e., a zero sum or "I win, you lose result," and which issues may best be solved by a problem solving or win-win approach. Today much of the popular writing on negotiation urges the adoption of a win-win approach to most, if not all, negotiation issues.[58] However, the important question for evaluating student negotiation is deter-

55. Lagoy, Senna & Siegel, *An Empirical Study on Information Usage for Prosecutorial Decision Making in Plea Negotiations,* 13 AM. CRIM. L. REV. 435, 461-63 (1976).

56. D. PRUITT, NEGOTIATION BEHAVIOR 187-88 (1981). Instead of analyzing negotiation in terms of particular styles, some writers advocate thinking of negotiation in terms of "flexible rigidity." This approach suggests that a negotiator should be flexible on means, but firm on goals. Translating this concept into action, a student should set and maintain very clear goals and priorities, but remain flexible on how those goals are met. Then she will be able to achieve the client's needs without becoming unreasonably attached to particular positions. *See also* R. FISHER & W. URY, *supra* note 54, at 54-55.

57. J. RUBIN & B. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION 130 (1975).

58. *See* H. COHEN, *supra* note 54, at 101-13; H. RAIFFA, *supra* note 54, at 7-9; R. FISHER & W. URY, *supra* note 54, at xii-xiii. These authors argue that the best solutions are those in which all sides have gained something from the agreement. Unfortunately, in some legal situations it may be unrealistic to think that all issues will lend themselves to this problem solving approach, e.g., typically tort litigation, where one-way monetary settlements are commonplace.

mining if a student has thought about which issues may be easily adapted to this approach and how the solutions are formulated.

A corollary issue is the estimation of value. Students must be prepared to put dollar values on their proposals. The negotiation is not the time to formulate values and set positions. Similarly, a well-prepared student will think in terms of the present and future value of money rather than just gross dollar amounts.[59]

In preparing for negotiation the student should develop a "theory" of her approach to the negotiation,[60] just as an advocate tries to develop a theory for his or her approach to a trial or litigated matter. This theory will be the basis for the student's overall formula, against which solutions to particular issues should be measured.[61] The successful negotiator will convince the opposing negotiator that her formula is the correct one. In developing this formula, she should consider her analysis of the client's needs and goals to be sure that they are protected.

Another element of preparation is the consideration of "strategy." A student should determine whether to adopt a competitive, collaborative,[62] or integrative[63] approach to the negotiation or to any of the issues. The student considers how to reveal or conceal the chosen approach. Moreover, she must anticipate how she will react to her opponent's style, as well as the effects a particular approach may have on her opponent. To carry out this strategy she must choose her tactics. If she follows traditional positional negotiation, she must develop a concession strategy.

Finally, a student should consider, in addition to the substantive agenda, special rules or processes that will govern the negotiation. Should she make express agreements about the negotiator's authority to settle on behalf of a

59. Greenberg, *The Lawyer's Use of Quantitative Analysis in Settlement Negotiations,* 38 BUS. LAW. 1558 (1983); G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 110-35 (1983).

60. *See* Zartman, *Negotiation as a Joint Decision-Making Process,* 21 J. CONFLICT RESOLUTION 619, 628-29 (1977). Zartman suggests that in the early stage of the negotiation, the parties attempt to reach an overall formula that sets the parameters of a solution and general guidelines that the parties will use to solve their dispute. *Id.*

61. *Id.* at 629. After the negotiators work out this formula, the individual issues are settled through a process of concessions and convergence. They work out the details of their dispute by measuring these details against this formula as a standard for fairness. However, these solutions must be consistent with the overarching theory.

62. *See generally* Lowenthal, *supra* note 53, at 92.

63. *See generally* Menkel-Meadow, *supra* note 53, at 758. Our term "integrative" refers to the same approach that Professor Menkel-Meadow calls "problem solving." *See also* Lax & Sebenius, *Interests: The Measure of Negotiation,* 2 NEGOTIATION J. 73, 80-89 (Jan. 1986) (detailing a description of interest analysis and trade-offs for oneself and one's opponents in problem-solving negotiation).

client or about the confidentiality of information? Will she make stipulations about discussions being off the record? Does she consider time constraints, effects on litigation, legal and ethical norms such as confidentiality and truthfulness?[64] Some questions of process and rules may be related to setting the agenda, but others may relate to the norms and values of the negotiation itself, as well as to the student's relationship with her "client."[65]

B. Opening Phase

The opening phase of a negotiation has certain unique characteristics. This stage is less likely to involve the discussion of substantive proposals than the establishment of the relationship between the parties and the exploration of the limits of the negotiation.[66] Negotiators may use this period to articulate their goals and discover something about their opponents' goals. In addition, each negotiator learns something about his opponent's personality and style.[67] This assessment can affect the negotiator's choice of strategy for the rest of the negotiation.[68]

In addition to a process of discovery about one's opponent, the opening stage often includes some tentative formulations of the negotiator's positions.[69] These positions may reflect a competitive, cooperative, or integrative strategy and, therefore, reveal important information about the approach and attitude of the negotiators.[70] On the other hand, if the positions are expressed in general terms, they may be initial attempts at reaching an understanding of the overall formula or the range of acceptable outcomes.[71] In any event, these early expressions of positions or goals are important opportunities for a negotiator to begin the dynamics of the process and to assess his opponent's range and strategy.

Another important aspect of the opening stage of the negotiation is the formulation of an agenda.[72] Frequently, identifying the issues gives the par-

64. *See* Perschbacker, *Regulating Lawyers' Negotiation,* 27 ARIZ. L. REV. 94-110 (1985).

65. *See* R. HAYDOCK, NEGOTIATION PRACTICE 16 (1984); Lowenthal, *supra* note 53, at 98-101.

66. *See* G. WILLIAMS, *supra* note 59, at 72-73; H. RAIFFA, *supra* note 54, at 36.

67. *See, e.g.,* Watson, *Mediation and Negotiation: Learning to Deal with Psychological Responses,* 18 U. MICH. J.L. REF. 293, 301-03 (1985).

68. Gifford, *supra* note 53, at 60-62 (indicating that choice of strategy depends most on opponent's strategy). For example, a competitive opponent who seems unwilling to alter his style may force an otherwise cooperative or integrative negotiator to change his style, or the latter may risk failure.

69. G. WILLIAMS, *supra* note 59, at 73.

70. *Id.* at 73-77.

71. *See generally* Zartman, *Negotiations: Theory and Reality,* 29 J. INT'L AFFAIRS 69 (1975).

72. C. KARASS, THE NEGOTIATING GAME 184-86 (1970).

ticipants an opportunity to evaluate each other and to present their own view of the problem and its potential solutions without engaging in substantive discussions of the issues. Either broadening or limiting the number of issues under discussion may determine the eventual success of the negotiation.[73]

C. Strategy

Strategy is one of most widely discussed topics in legal writing about negotiation.[74] Some of the recent literature advocates an integrative[75] approach instead of the more traditional dichotomy of competitive or collaborative approaches.[76] Regardless of which strategy a student adopts, an evaluator should be able to identify that strategy through close observation of specific dialogue in the negotiation, determine whether the strategy was successful in achieving the student's goals and see whether the student identified his opponent's strategy and used it to achieve his goals. The grading scale will help a teacher monitor this dialogue in great detail.

Certain types of language are indicative of each negotiation strategy. "Win-win" or collaborative approaches are identified by statements that keep close to the task at hand[77] or that use the process of log-rolling, or building on one issue or one solution to achieve the solution of other issues.[78] On the other hand, distributive bargaining is associated with statements that incorporate values, preferences, and support one's position. Problem-solving styles are characterized by attempts to enlarge the pie by incorporating issues so that the needs of each party can be resolved.

Additionally, patterns of communication can identify "hard or soft" nego-

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73. M. DEUTSCH, THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES 360-65 (1973); R. FISHER & W. URY, *supra* note 54, at 67-73; R. HAYDOCK, *supra* note 65, at 5. Including too many issues may make the matter too complicated for solution or bring in extraneous issues that only serve to exacerbate a competitive environment. On the other hand, eliminating too many issues may prevent trading and compromise on different issues as well as the potential for techniques such as "enlarging the pie," "incorporation," or "log rolling."

74. *E.g.*, Lowenthal, *supra* note 53; G. WILLIAMS, *supra* note 59.

75. *See, e.g.*, Menkel-Meadow, *supra* note 53, at 758; R. FISHER & W. URY, *supra* note 54, at 11; Weiss-Wik, *Enhancing Negotiators' Successfulness, Self Help Books, and Related Empiracle Research,* 27 J. CONFLICT RESOLUTION 706, 715 (1983); Gifford, *supra* note 53.

76. *See, e.g.*, Lowenthal, *supra* note 53; G. WILLIAMS, *supra* note 59; Murray, *Understanding Competing Negotiation,* 2 NEGOTIATION J. 183-84 (April 1986).

77. *See* Walcott, Hopmann & King, *The Role of Debate in Negotiation,* in NEGOTIATIONS, SOCIAL-PSYCHOLOGICAL PERSPECTIVES 204 (D. Druckman ed. 1977). The creators of one coding system call these statements cognitive, meaning descriptive or factual statements without expressions of preference.

78. Pruitt & Lewis, *The Psychology of Integrative Bargaining,* in NEGOTIATIONS, SOCIAL-PSYCHOLOGICAL PERSPECTIVES 164-65 (D. Druckman ed. 1977).

tiation styles. Threats, retractions, and commitments to fixed positions are indicative of hard negotiators. Initiations, accommodations to the opponent, and promises are indicative of a soft style.[79] Additionally, a competitive negotiator may discuss more intangible issues, such as the potential or real loss of esteem, face, honor, and reputation. But his opponent will feel that the competitor is threatening him with unjust demands, limited concessions, and lack of movement towards acceptable solutions.[80] Translating these more intangible issues into concrete issues indicates a more cooperative approach. Similarly, emphasizing a future-oriented approach to negotiations rather than dwelling on past errors and indiscretions denotes a more collaborative style.[81]

Social science researchers have studied the relationship between the size and rate of concessions and the negotiator's style. Avoiding early concessions and making small concessions throughout are signs of a harder, more competitive approach to negotiation.[82] Similarly, delaying concessions until the end of a negotiation—when the opponent may feel the pressure of deadlines—is another hallmark of a competitive negotiator. Finally, rearranging issues in a new package, but making concessions only on minor issues to test the opponent's response, is another indication of a more competitive negotiation approach. Additionally, an extreme opening position, which is far beyond the negotiator's minimum needs, also signals a competitive approach.[83] A more integrative or mid-range position, which attempts to incorporate both sides' needs, conveys cooperation. On the other hand, a minimal offer, which is close to a negotiator's minimum acceptable position, implies a soft, almost capitulating tone. Of course, a minimal offer may also reveal a serious miscalculation of the case's value.

D. Tactics

How a negotiator uses power and leverage and employs tactics[84] are other

79. Walcott, Hopmann & King, *supra* note 78, at 205.

80. J. RUBIN & B. BROWN, *supra* note 57, at 132.

81. M. DEUTSCH, *supra* note 73, at 360.

82. J. RUBIN & B. BROWN, *supra* note 57, at 270-78; *see* Donohue, *Analyzing Negotiation Tactics: Development of a Negotiation Interact System*, 7 HUM. COMM. RES. 273, 285 (1981) (the negotiator making the most concessions is less successful in distributive negotiation).

83. J. RUBIN & B. BROWN, *supra* note 57, at 268; Chertkoff & Conley, *Opening Offer and Frequency of Concession as Bargaining Strategies*, 7 J. PERS. & SOC. PSYCHOLOGY 181, 184-85 (1967). Some research shows that an extreme position risks deadlock because it may alienate one's opponent. On the other hand, it may communicate to an opponent that one has high expectations and that one will not concede below certain resistance points. *See* Donohue, *supra* note 82, at 283.

84. For example, several researchers advise against the use of threats because they risk deadlock and may make emotional issues paramount. *See* J. RUBIN & B. BROWN, *supra* note

identifying characteristics of negotiating strategies. Knowing her sources of power gives the negotiator the ability to test the other side, influence its behavior, and to resist the attempts made to influence her based on her opponent's power.[85] In analyzing power and tactics, researchers have focused again on the pattern and size of concessions[86] as well as on the strategy of an extreme initial offer, observing that early cooperative acts breed cooperation by one's opponent just as competition breeds competition.[87]

Other tactics described in the literature on integrative agreements include heuristic (or trial and error) tactics, in which one party attempts various formulations and proposals to test the responsiveness of the other side. When one side learns that she will not be able to achieve a particular goal, she abandons it.[88] Another tactic may be loosely termed "information exchange," in which the parties describe their goals and other factual information, thereby discovering each other's goals and formulating a solution. Finally, a negotiator can use the information, positions, or proposals presented by her opponent to reformulate a solution that reflects and respects those goals.[89]

Other researchers indicate that it may be important tactically to avoid concessions early in the negotiation.[90] Another important tactical pattern is that a negotiator will make smaller concessions as she approaches a resistance point beyond which concessions cannot be made.[91] In general, the pattern of concessions may be less significant than the size of the initial offer in determining strategy.

57, at 286. On the other hand, it is important that a student realize that threats convey information about one's goals and needs, *id.* at 279-80 and, therefore, can be used successfully. *Id.* at 283. Threats may also increase the chance of immediate compliance and force concessions. *Id.*

85. Tedeschi & Bonoma, *Measures of Last Resort: Coercion and Aggression in Bargaining,* in NEGOTIATIONS, SOCIAL-PSYCHOLOGICAL PERSPECTIVES 213-37 (D. Druckman ed. 1977); Weiss-Wik, *supra* note 75, at 715-16.

86. P. GULLIVER, DISPUTES AND NEGOTIATION: A CROSS-CULTURAL PERSPECTIVE 164 (1979). Reaching a solution on an individual issue may involve various concession strategies: cooperative, tough, principled, or in extreme cases, capitulation. Gulliver points out that the party who feels a greater need for agreement may make large concessions to avoid deadlock. *Id.*

87. J. RUBIN & B. BROWN, *supra* note 57, at 270.

88. D. PRUITT, *supra* note 56, at 175.

89. *Id.* at 169. Similarly, the invocation of shared norms and values by one party to press for agreement or the correctness of his viewpoint is another important tactic, particularly relevant to legal negotiation. *See* P. GULLIVER, *supra* note 86, at 192.

90. D. PRUITT, *supra* note 56, at 23.

91. *Id.* at 21.

E. Communication Skills

The literature also emphasizes the communication skills of the negotiator.[92] One social science researcher found that information gathering, an important communication element of any negotiation, is a process that occurs throughout the negotiation and does not identify any particular phase.[93] In addition, a competitive negotiator will use different communication approaches than an integrative or cooperative negotiator. The competitive negotiator is far more likely to attempt to persuade her opponent of the correctness of her position than are the other two.[94]

Different phases of a negotiation may call upon different communication

92. *E.g.,* Lowenthal, *supra* note 53, at 83-89.

93. Gulliver, *supra* note 86, at 81.

94. R. WALTON & R. MCKERSIE, A BEHAVIORIAL THEORY OF LABOR NEGOTIATIONS 59-82 (1965). Some researchers have developed elaborate mechanisms for evaluating the communications involved in negotiation. *See, e.g.,* Bednar & Currington, *Interaction Analysis: A Tool for Understanding Negotiations,* 36 INDUS. & LAB. REL. REV. 389 (1983). This interaction analysis entails a systematic analysis and coding of oral messages. Law professors and students can find this type of system very helpful in breaking down negotiation discussions into more manageable units and pinpointing their content and style. In using the system, the evaluator identifies individual "acts" or simple statements, and "interactions" or contiguous pair of statements, and measures their frequency to track exactly what transpires in a negotiation. Each act is broken down into a "report" or the message's content, and the "command" or the relational aspect of the communication which is more of a matter of style.

Content is categorized into substantive behaviors, which deal with initiations, acceptances, rejections, and retractions; strategic behaviors, which involve commitments, threats, promises, and demands; persuasive or affective behavior, which are warnings, predictions, supporting, and attacking arguments; task behaviors, which involve requesting information, reaction to information, providing information, or expressing the perception of what one sees or believes; and procedural behaviors, which deal with changing the subjects, procedural suggestions, agreements, disagreements, and clarifications.

The command or relational aspect of any message is also further coded into control bids in which one party attempts to dominate another party; deference bids, in which one submits to the other party; or equivalence, in which mutual identification is sought. The goal of this analysis is to code both the type of acts and interacts as well as the frequency of any number of acts and the contiguity of any pair of acts to determine whether or not any particular pattern of interactions lead to impasse or agreement. *Id.* at 398. It may be very important for students to learn that primary interactions identified in this research are characterized as mutually controlling interactions in which each party tried to dominate the other and that concessions or submissive behaviors do not necessarily lead to concessions from the other side.

These patterns also make it possible to distinguish between competitive and cooperative strategies. Different strategies are likely to be characterized by different types of communication. For example the "report" of a competitive negotiator's acts should contain more rejections, threats, and attacking arguments and the "command" should contain more control. For a student it is important to try to classify statements and exchanges so that she can to learn her own patterns of communication and how they may or may not affect her success as a negotiator. *Id.*

Donohue, *supra* note 82, at 278, coded statements two ways as a "response" to an opponent's previous statement and as a "cue" to the subsequent utterance.

skills. In the initial phase, the negotiators will discuss the agenda and try to establish a general framework with which to solve the various issues involved in the dispute. To reach this formula, each negotiator will try to adjust the values and perceptions of the other party so that the concept will more closely parallel his perception of the problem.[95]

After that formula is reached, the parties may reconnoiter and reshape their positions on various issues. Through a process of convergence and concession or through proposals that conform to the formula or principles agreed to, they will try to reach an agreement in accordance with the formula. During this phase of the process the abilities to listen carefully and to adjust one's ideas to the opponent's ideas will be crucial. Making good use of the information gathered and adopting a problem-solving rather than a persuasive style will be helpful in this phase.[96]

Evaluating law students on their handling of ethical issues is particularly important in negotiation. A law student must be sensitive to the distinctions, under the Model Rules of Professional Conduct or the Code of Professional Responsibility, between impermissible lying, the more acceptable "puffing," and the more subtle problem of misleading by omission.[97] Students must use statements and arguments that at least meet these minimum ethical standards. They also must be aware of the effect that fraudulent or misleading statements may have on the enforcibility of settlement agreements.[98] Moreover, students should be evaluated on how they react to statements that they recognize are not fully accurate.

For example, in the hypothetical divorce negotiation described in Part V, the husband's attorney asserts that the client cannot take the children overnight because he lives in an adult building and would be evicted. The facts of the problem, however, are only that he is living in a small apartment in an adult building. Because of the legal import of the assertion that he would be evicted, this statement has crossed the line between puffing and lying and should be coded as an unethical and ineffective competitive communication. The statement could also be coded as ineffective legal argument because a local ordinance prohibits landlords from discriminating against tenants with children; therefore, the husband could not be evicted. The wife's attorney fails to challenge the statement about eviction and shifts his ground in a continuing attempt to reach agreement on visitation. Although this typical competitor's tactic of changing "won't" to "can't" appears to work in this

95. Zartman, *supra* note 60, at 629.

96. *Id.* at 628-29.

97. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4), DR 7-102(A)(5) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1983).

98. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 205 comment c (1981).

instance, we would still consider it ineffective for two reasons. First, it will not work with more knowledgable opposing counsel, and second, it reveals that her client does not want to spend very much time with the children, which the client has told her to conceal until she locks in a low child support figure. The husband's attorney has avoided one ethical violation, misrepresenting her client's intention, only by committing another. The ethical and effective competitor would have maneuvered her opposing counsel into settling child support first and later tried to dissuade the wife's attorney from pressing for overnight visits by stressing the crowded conditions.

Attorney-client confidentiality can present other ethical problems. What information about a client can be revealed? How does a negotiator balance the needs to establish a positive negotiating atmosphere by being frank with the reality that once confidential information is revealed in negotiation, it is unlikely to be kept confidential despite any agreements to the contrary.[99] Does the student realize that while "offers" are privileged, information revealed in a negotiation usually is not? How does a student respond to a question he would prefer not to answer?

F. Relationship

The relationship between the two parties is another aspect of negotiation that has received emphasis in the literature.[100] If the negotiator wants to have a cooperative attitude and adopt a "win-win" approach to the negotiation, it is important that the parties develop trust between them. Researchers have learned that people who are cooperative rather than competitive are more sensitive to interpersonal concerns, react more acutely to interpersonal cues, and see people as a more diverse group.[101] Cooperative negotiators tend to believe that not everyone will be cooperative and, therefore, react more precisely to the negotiating opponent's behavior. On the other hand, competitive negotiators tend to assume that all people are competitors and react competitively even when they may be dealing with a cooperative person.[102]

The literature also indicates that if the parties demonstrate cooperation early in the negotiation, it will lead to further cooperation; similarly, if the early stages of the negotiation are marked by competition, it will only in-

99. M. WESSEL, THE RULE OF REASON, A NEW APPROACH TO CORPORATE LITIGATION, 130 (1976).

100. Lowenthal, *supra* note 53, at 89-92.

101. J. RUBIN & B. BROWN, *supra* note 57, at 184-85.

102. *Id.* However, one study indicates that an attack that provokes a concessionary or regressive move is not followed by another attack but rather by a more cooperative move. Donohue, *supra* note 82, at 285.

crease the level of competitive behavior throughout.[103] Matching cooperative behavior with cooperative behavior and competitive behavior with other competitive behavior may be the best means of building trust in a negotiation relationship.[104] Thus, a professor should evaluate how students develop or fail to develop a trusting, reciprocal relationship. If the professor codes student interactions, especially in the early phases of the negotiation, it should be simple to trace the progress of the relationship.

G. Legal Argument

In addition to the communication patterns that can be identified with particular negotiation strategies, the effective presentation of legal arguments and statements of positions is an important skill of the legal negotiator. While this skill may be more important in traditional positional negotiation than in principled negotiation, how well a negotiator can justify his position based on the law and the facts of the dispute will affect his persuasiveness. An effective argument justifies one's position in negotiation explicitly through the invocation of rules and policies as applied to the facts of the case.[105] Effective legal argument is especially important because it substitutes for a judicial determination to the dispute. One cannot accept or reject a settlement unless it is compared to the result likely to be obtained at trial. Thus, a legal negotiator's skill in persuading his opponent of the correctness of his prediction of the outcome on the legal issues is a significant aspect of his ability as a negotiator. As one commentator states, "[a]rgument is good to the extent that it advances reasons that are credible within an adversary's legitimate frame of reference."[106]

Rationality is the minimum requirement of good argument. In addition to rationality, lawyers are likely to be persuaded by detail, multidimensionality, balance, subtlety, emphasis, and emotionality. Detail convinces a listener of the integrity of the proponent's position. Arguments made from more than one of the perspectives of rule, policy, principle, analogy, consequence, and custom are multidimensional and more persuasive than arguments made

103. Donohue, *supra* note 82, at 263.

104. D. PRUITT, *supra* note 56, at 116. *See also* D. HOFSTADTER, METAMAGICAL THEMAS 715, 721 (1985), which reports on a computer tournament in which different game theories were pitted against one another to determine which was most successful in bilateral interactions. The theory that continually won was "Tit for Tat," the tactic of which was to "cooperate on move 1 thereafter do whatever the other player did the previous move." The success of the strategy was due to its ability to elicit cooperative behavior from the other player. *Id.* at 727.

105. Condlin, *"Cases on Both Sides": Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65, 69 & n.14 (1985).

106. *Id.* at 83.

from a single perspective. A balanced argument lets the adversary know that his position has been understood and considered in making one's own argument. Subtlety credits one's opponent's intelligence and avoids overkill by dwelling on what could safely be left unsaid. Emphasis of the most important points in a detailed argument shows that the negotiator understands her position. Finally, displaying emotion appropriate to the context furthers argument by taking it beyond logic and into the realm of morality.[107]

IV. DESCRIPTION OF THE GRADING SYSTEM

A. Characteristics of the Grading System

Our grading system is embodied in a scale, or chart, that organizes the negotiation process into four parts: preparation, opening phase, strategy, and agreement. We subdivide each part into what we believe are its most important identifying components. The most salient feature of the scale is its description of effective and ineffective standards for each of these components.[108] We use this scale while reviewing tapes of simulated negotiations with a finite number of issues by identifying each instance of a component with an issue and noting its location through the tape player counter number and commenting on important language from the tape. We complete one scale for each pair of negotiators. By comparing and analyzing the chart, we can then evaluate a student's results in terms of the effective and ineffective standards we noted.

Using opposite standards develops clearer grading criteria by forcing the evaluator to decide whether a student performs effectively or ineffectively at different points in the process. Thus, the grader must label an aspect of a student's conduct on a particular issue and determine whether she effectively used that strategy. Rather than merely coding particular tactics or determining a student's overall approach (tasks which are not simple in themselves), the grader needs also to distinguish between good and bad negotiation. Our scale articulates these differences in a format that is consistent across all phases of a negotiation.

In describing the opposing characteristics of each trait we have attempted to incorporate the ideas from the social science research and legal negotiation literature.[109] For example, we used the concepts about opening positions and concession patterns in the concessions and demands subsections of competitive and cooperative strategies.

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107. *Id.* at 84-89.

108. For example, in the strategy part, an effective competitive negotiator is characterized as having "high expectations," while an ineffective competitor has "unrealistic expectations."

109. *See supra* notes 53-107 and accompanying text.

We also distinguish between a "high initial demand" by an effective competitive negotiator and an "extreme initial demand" by an ineffective one. The latter is a demand that is so ridiculously high that it sours the atmosphere to the point that the process is either seriously delayed or permanently derailed. On the other hand, an ineffective cooperative negotiator starts with a "minimal initial demand" that is far below what she can achieve for her client because she either improperly evaluated her position or fears a breakdown in the process. In order to grade a student fairly the teacher should be able to distinguish this demand from the effective "integrative opening demand," which more accurately reflects the strengths of the two parties' positions while preserving the client's goals and interests.

The first parts of the scale evaluate preparation and the opening phase of the negotiation and precede the evaluation of the bulk of the negotiation. The middle phase is grouped according to strategies: competitive, cooperative, and integrative. The scale analyzes each strategy in the following categories: adherence to position, flow of information, communication modes, and relationship. Integrative strategy must be analyzed in the scale to reflect its burgeoning emphasis in recent legal writing[110] and changes in our own teaching. We expect that by giving integrative bargaining equal standing with the more traditional approaches we will enhance its importance in the eyes of our students.[111]

In order to achieve uniformity we have used the same categories for integrative strategy as we did for the competitive and cooperative strategies, even though these subsections were not designed with an integrative approach in mind. We have used them because we believe that Professor Lowenthal's four categories[112] (with the exception of "adherence to position") emphasize areas that are inescapably involved in any negotiation strategy, including one that follows an integrative approach. A useful grading mechanism needs to evaluate all these elements.

Undoubtedly, advocates of an integrative approach to negotiation would take exception to any subsection labeled "adherence to position," particularly if the scale includes a category entitled "concessions and demands." The theory of integrative bargaining rejects strict adherence to positions and

110. *See* Gifford, *supra* note 53 (containing separate descriptions of cooperative and integrative negotiation strategies).

111. However, if grading is to be honest, a student should not be rewarded merely for attempting this strategy, but for using it effectively. An ineffective integrative bargainer will revert to positional bargaining, reflecting her lack of understanding of the process or her inability to implement it. For example, she will not be accurate in stating his client's needs or will lack flexibility in finding means to achieve those needs.

112. *See* Lowenthal, *supra* note 53, at 73-92.

the swapping of concessions to reach agreement. Nevertheless, the concept of adherence to position is easily adapted for describing an effective integrative bargainer if nonpositional characteristics such as avoiding concessions and satisfying needs by expanding the "negotiation pie" are used. On the other hand, the flow of information and the nature of the relationship between the negotiators are as important characteristics of integrative negotiation as of competitive and cooperative negotiation, particularly because an effective or "wise" negotiator discovers and satisfies needs through open communication and does not harm the relationship between the parties.

We faced some difficulty in determining the effective and ineffective characteristics of integrative strategies. The writing in the area has described the approach in some detail and identified its major characteristics, however, describing which of those characteristics were ineffective had never been attempted. Nevertheless, we observed that failure with this negotiation type derives from two sources. First, the negotiator who is unfamiliar with the process will not search for the underlying interests of the parties and consequently will not discover solutions that meet these needs. Second, an ineffective negotiator will revert to positional negotiation. Her communication pattern is more argumentative and secretive, and she seeks concessions from her opponent instead of molding and adapting proposals to move the discussion forward.

Thus, characterizing an ineffective integrative negotiator is somewhat illusory because in certain ways she will be more like an ineffective cooperative negotiator. Because she does not focus on her client's needs, she may be too willing to accept proposals that do not meet them. On the other hand, because she will not engage in the brain-storming process required for creative solutions, she may resemble an ineffective competitor, unwilling to share information and proposals. Her ineffectiveness may manifest itself in both a lack of purpose and too much rigidity at the same time.

Another difficulty inherent in evaluating the middle, or strategy related, phase of the process is that it may be easier to identify ineffective rather than effective cooperative or competitive performances. Good performances are those characterized by successful results, effective legal and factual arguments, adherence to positions (or goals and needs), creative solutions, and good communication, qualities which cut across both models. The differences between effective competitive and cooperative negotiators may actually center on the level of demands, the concession patterns, and the quality of the relationship, with effective competitors emphasizing self-interest, limited concessions, and a more distant relationship than effective cooperators. On the other hand, the differences among ineffective negotiators may be greater

and easier to identify. The bombastic, unreasonable, and deceptive qualities of an ineffective competitor are easily distinguished from the timid, pliant, and obliging ineffective cooperator.

The flow of information and communication pattern sections on the scale emphasize the use of questions and the quality of the argument. It is our experience that students need to understand that these are important skills for any strategy. We have also incorporated into our scale the ideas from recent writing[113] on the structure of sound legal argument. Finally, we have specific criteria for evaluating terms ultimately agreed upon. These criteria can be adopted for evaluating written settlement agreements if they are part of the assignment. We have also tried to evaluate the agreement in terms of the strategy chosen.

B. Components of the Scale

1. Preparation

Preparation is an important part of any negotiation, regardless of which strategy the negotiator uses or the negotiation's subject matter. In our scale we emphasize both the substantive and operational elements of negotiation and give students an idea of the full range of preparation that negotiation requires. Substantive elements include the client's needs and goals as well as the negotiator's knowledge of the law and facts. Preparation on the law should also include consideration of the best legal arguments. Effective preparation will include evaluating the strengths and weaknesses of the facts as well as identifying the missing facts and developing a strategy for discovering them. Finally, substantive preparation involves developing the demands that the negotiator will make, basing her figures or other demands on the law, the facts, and the needs and goals of his client.

In the operational aspects of preparation, an effective negotiator will construct a theory to serve as the underlying rationale for her approach to the negotiation and to which she relates her positions and the responses she makes to her opponent. Furthermore, she will consider which strategy to adopt throughout the negotiation or on different issues, depending on different factors listed in the scale.[114] In order to develop a theory and choose a strategy, the negotiator must closely analyze her client's interests[115] and goals. Finally, thorough preparation will include an examination of her own needs in the negotiation: deadlines, reputation, and economic considerations.

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113. *See* Condlin, *supra* note 105.

114. *See* Gifford, *supra* note 53.

115. *See* Lax & Sebenius, *supra* note 63, at 73-92.

In general, ineffective preparation has characteristics opposite to these. The ineffective negotiator is uninformed on the law and facts, has not developed her legal arguments, and has failed to recognize the factual gaps in her knowledge. Furthermore, she will not know her client's underlying interests and will not have developed a theory of the negotiation to tie these goals to the strengths of her legal and factual position. Consequently, she will have not carefully decided on a strategy for the entire negotiation or for particular issues. Finally, she will not have considered her own needs in the negotiation. This lack of preparation revealed in the negotiation by statements such as "I can't give you a figure on that right now" or on an unquestioning reliance on the opponent's obviously self-serving calculations.

One problem with evaluating preparation is how to determine that these shortcomings result from unpreparedness rather than from some other cause. Nevertheless, the quality of preparation should be apparent from the negotiation itself.[116]

2. *Opening Phase*

The scale evaluates the opening phase of negotiation because we have found that virtually all negotiations go through an opening process of assessment and agenda formation before more substantive bargaining begins. In fact, by including this section we hope to encourage our students to engage in this process before jumping into more substantive discussions so that they will explore the full range of issues and observe their opponent and her approach to the situation. An effective negotiator will take advantage of this opportunity to set the stage to implement her own strategy and to effectuate her client's goals. An ineffective negotiator is unaware of this phase or lets her opponent take the initiative.

A significant part of this early stage is setting the agenda: determining which issues are under discussion and in which order the issues should be discussed. Some issues may require clarification or reformulation. An effective negotiator ensures that the agenda is fashioned so that her issues receive the treatment that she wants, or at least achieves a compromise that reflects her input on important issues. Finally, in the opening phase the effective negotiator may look for an overall formula for an agreement that reflects her theory of the negotiation.

On the other hand, an ineffective negotiator fails to advance her client's

116. Of course, instructors can require students to prepare a prenegotiation position paper that would incorporate the factors we have included in our scale as well as others. Furthermore, in simulated problems designed, or at least assigned by the professor, the grader should know the relevant law and facts.

goals or interests, to assess her opponent, or to shape the agenda to her advantage. She does not advance her theory as the basis for the overall formula.

3. Strategy

The bulk of the remainder of the scale is organized around the three strategies: competitive, cooperative, and integrative. We chose this organization for several reasons. Much of the writing about negotiation compares the differences and strengths and weaknesses of these approaches. Because discussion of this material is an important part of our classes, we wanted this to be reflected in our scale. Additionally, imposing a broad framework onto the scale focuses the critique of the student. After the professor completes the scale she will have an objective basis for determining which strategy the student tried to use and can then evaluate the student based on the strategy that the student chose.

Each strategy is divided into four sections: adherence to position, information flow, communication patterns, and relationship. Because it covers such a wide variety of topics, "adherence to position" is divided into four subsections: goals and expectations, issue selection, tactics, and concessions and demands. By "goals and expectations" we refer to the negotiator's level of commitment to achieving the maximum result for her client. "Issue selection" examines the negotiator's choice of strategy for a particular issue. "Tactics" describes some of the important maneuvers associated with a particular strategy. And finally, "concessions and demands" looks at a negotiator's pattern of making and responding to offers.

a. Competitive

(1) adherence to position

Overall, an effective competitive negotiator has high expectations and a strong commitment to achieving her goals. She knows her client's maximum goals and is determined to settle as close to them as possible. Typically an effective competitive negotiator chooses issues in which she can negotiate from a powerful position, such as zero-sum or distributive issues, because fewer options are available for reaching an agreement.

Not surprisingly, an ineffective competitor will choose the wrong issues on which to be competitive: those where she has a weak position or those which are nonzero-sum and allow for more creative solutions. Similarly, an ineffective competitive negotiator will miss opportunities for creative solutions by maintaining a competitive strategy when other options are available.

An effective competitor's tactics emphasize forcing the range of discussion

in her direction by slowly revealing her own position and working to change her opponent's perception of the problem. However, an ineffective competitor is unable to persuade her opponent because her arguments are unpersuasive and she stubbornly refuses to reveal her position.

High initial demands, reflecting her high expectations, and small concessions made late in the negotiation process on unimportant issues, mark the successful competitive negotiator. For example, in the hypothetical negotiation described in part V, the husband's lawyer first offers $400 in child support, a decrease from the temporary order described in the facts. She does not reciprocate her opponent's concessions. Her objective is her own unilateral gain and the success of her goals and theory.

Unrealistically extreme initial demands and the absence of any concessions, even small ones late in the process, mark the ineffective competitive negotiator. She is unaware of the importance of timing and creates unnecessary deadlock because of her inability to move on during the negotiation. Furthermore, she is so intransigent that a solution, even one that satisfies her client's highest goals, is impossible.

(2) information flow

A successful competitive negotiator reveals as little as possible about her authority, true position, or significant facts. She tries to stay on the offensive by repeatedly seeking further information and clarification from her opponent. While staying within the bounds of ethical conduct, she will feign cooperation and present false demands or positions.

Instead of controlling the flow of negotiation, the unsuccessful competitive negotiator is abusive of her opponent. She fails to disclose anything at all, misrepresents her authority, and repeats and hides her responses rather than takes the offensive to learn from her opponent. Her demands are impossible to meet and, rather than pretend to cooperate in the process, she disrupts it. Rather than ask questions to move the discussion forward, she phrases her questions unclearly and misses crucial information. Finally, she may deceive to the point of being unethical and either reveals too much or too little.

(3) communication patterns

The communication patterns of the effective competitive negotiator are also persuasive. She stresses the most favorable information, tries to imbue her side with positive values, puffs her position, and seeks to control the dialogue. She also threatens, pressures, evades, and remains adamant. Moreover, she skillfully uses emotional and intangible issues, such as the loss of face, to turn the discussion to her advantage.

For example, in our hypothetical, the husband's lawyer, while discussing attorneys' fees, makes the following statement:

> And, the attorneys' fees, I realize Betty wants David to pay them and that starts to look like it's his fault and he should pay for it. And rather than put a blame on someone by being punitive with the attorneys' fees, we should use them as a figure to use in our settlement. If he pays her attorney's fees, he's going to pay less child support.

Thus, the husband's lawyer, an effective competitive negotiator, transforms a simple financial issue into one of blame and punishment.

The effective competitive negotiator grounds her argument in the facts and/or law of the problem, from which she derives effective arguments. She takes appropriate risks in making her arguments and stating her positions, attaining her client's objectives without undermining the negotiation. Before taking those risks, she has evaluated her chances of success in an alternative forum if negotiation should fail. She also hides the weaknesses in her own position as much as possible.

Rather than persuasiveness, the ineffective competitive negotiator communicates unreasonableness: she misuses information, seems greedy and overreaching, lies instead of puffs, and denigrates her opponent rather than controls her. Her threats are not credible; she misrepresents her position and is belligerent and arrogant. When she addresses emotional issues, she is intolerant and tactless. Lack of careful consideration of her arguments and positions marks the ineffective competitive negotiator. She makes statements that have no compelling justification. She does not take advantage of important values and does not understand the risks involved in her statements. She is, moreover, unable to hide the weaknesses in her own positions.

(4) relationship

Self-interest is the hallmark of the effective competitive negotiator. She assumes that her opponent is equally competitive and, therefore, is wary, aloof, and even manipulative. In contrast, the ineffective competitive negotiator is so rigid that she loses sight of her own client's interests. To defend against any possible appearance of cooperation she is hostile, suspicious, sarcastic, and deceptive.

b. Cooperative

(1) adherence to position

An effective cooperative negotiator has goals that are fair: goals that reflect her opponent's interests as well as her own. In contrast, an ineffective

cooperative negotiator has minimal expectations and loses sight of her client's goals in a rush towards agreement.

The cooperative strategy is effective on nonzero-sum issues or on issues in which a negotiator may not have a position of superior strength. In distributive bargaining, an effective cooperative negotiator can still prevail. An ineffective cooperative negotiator chooses the wrong issues on which to be cooperative and, therefore, misses opportunities to achieve a better result for her client by cooperating when it is not necessary to do so. She is unaware that she has a dominating position or that she is dealing with a nonzero-sum issue where creative or innovative solutions are available.

The tactics used by an effective cooperator demonstrate fairness and adaptability. She seeks an agreement through the sharing of honest information and mutual concessions and tries to modify the discussion to reflect the information she learns from her opponent. On the other hand, an ineffective cooperative negotiator is too accommodating to her opponent, makes unilateral concessions, divulges information, stalls because of insecurity, and fails to utilize to her best advantage the information learned from her opponent.

The initial position of an effective cooperative negotiator is integrative, i.e., it integrates the opponent's interests without sacrificing the interests of the negotiator. Concessions are traded, and changes in position are realistic and based on clear reason and the overall formula reached in the early phase. The ineffective cooperative negotiator, contrarily, makes a minimal initial demand, concedes easily, and shifts position without good reason and without considering the formula reached in the early phase.

(2) information flow

An effective cooperative negotiator shares information in an honest and mutually beneficial exchange. Facts and limits on authority are traded; the presentation of information is organized and fair. Furthermore, she probes to find answers to her concerns. Like the effective competitive negotiator, she makes good use of questions and responds to her opponent's questions in an ethical and appropriate fashion.

An ineffective cooperative negotiator does not trade information to her advantage. Instead, she divulges important information without reciprocity and accepts without question her opponent's statements. Her questioning is unclear and off the point, and her responses are inappropriate or even unethical. She is unsure of important information and, therefore, concedes disputed points without reason. Moreover, she does not win concessions in exchange for her concessions.

(3) communication patterns

The communication patterns of an effective cooperative negotiator are marked by flexibility, exploration of ideas, and emphasis on cognitive and factual issues. Rather than threaten punishment, she promises cooperation and seeks equivalence rather than dominance. In her arguments, she is rational, straightforward, and task-oriented. She repackages proposals to overcome weaknesses in them and to incorporate her opponent's ideas.

Rather than exhibiting flexibility and rationality, an ineffective cooperative negotiator is obliging, unaware of both potential problems and her own strengths, and diffuse rather than focused on important issues. She is apologetic and pleading, seeking concessions without justification. As an example of the ineffective cooperative negotiator, in our hypotheticals, the wife's lawyer asks, in the course of a discussion on visitation: "Would he be, say, able to take the kids maybe once a month, on a weekend camping trip or on an outing of some sort like that?" His tone is almost that of a supplicant.

The factual and legal arguments of an ineffective cooperative negotiator suffer from the same weaknesses as those of an ineffective competitive negotiator.

(4) relationship

Trust is the foundation of the effective cooperator's relationship with her opponent. She seeks to develop rapport with her opponent and focuses on the future rather than the past. Assuming that her opponent might be cooperative as well as competitive, she overlooks possible slights or misstatements in order to build a trust relationship.

An ineffective cooperative negotiator overvalues the relationship; she trusts immediately, naively seeking to maintain the relationship between the negotiators at all costs. Because she is so concerned about being sociable, she is sensitive to any slight. Moreover, she puts expedience ahead of building a solid agreement for her client.

c. Integrative

(1) adherence to position

The effective integrative negotiator focuses on needs or interests rather than on positions. Her strategy is to develop solutions that satisfy these underlying needs or interests without engaging in the typical position-taking and trading of concessions. For example, in the hypothetical negotiation, one way to achieve a lasting "good divorce" would be to agree to family counseling to resolve the children's hostility to their father and to explore

the spouses' attitudes towards each other and how they could work together as parents. Financial issues, other than who pays for the counseling, could be put on hold until both parents know what the father's relationship with the children will be.

The effective integrator is aware that different issues are more important to her opponent than to her and permits her opponent to win on those issues while she wins on the issues that are important to her. Conversely, an ineffective integrative negotiator does not know her client's underlying needs and interests and, therefore, reverts to more traditional positional bargaining and concession making. Moreover, she does not see that she can win on her important issues while at the same time allowing her opponent to win on her important issues.

Effective integrative negotiation most ideally suits nonzero-sum, relatively equal power negotiations with multiple issues that lend themselves to innovative and creative solutions. In resolving the financial issues in our sample case, the parties and their lawyers first would determine why the house is not selling, when it can be expected to sell, and at what price. When both spouses know how much money they will net from the sale, they will be in better positions to plan their budgets and make support agreements. They may even want to reopen their agreement to sell the house and consider whether it would be preferable for the wife and children to remain there if the husband's financial interest could be protected. The ineffective integrative negotiator, however, may choose to argue zero-sum issues that do not fit this strategy or issues on which she lacks the strength to develop flexible or innovative solutions. Alternatively, the novice integrator may miss the fundamental role of the home's equity in shaping the financial settlement.

Tactically, an effective integrative negotiator avoids making a series of marginal concessions toward a mid-range between the two parties' original positions. Rather, she uses principled arguments and honest exchange to develop a mutually satisfying agreement, employing, if necessary, nontraditional solutions to meet the parties' needs. The effective integrative negotiator expands the range of options that respond to underlying interests and needs. She is flexible on the form that solutions might take so long as her client's needs are satisfied. For example, she might work on the child support aspect of our problem by using federal tax advantages (at least as they formerly existed) to maximize the support the wife receives while minimizing the husband's tax burden.

The tactics of an ineffective integrative negotiator more closely resemble traditional, positional negotiation. She narrowly focuses on her own positions, ignores a detailed exploration of both parties' underlying interest and

needs, and avoids an honest exchange. Similarly, she makes unprincipled arguments.

Again, an ineffective integrative negotiator misses opportunities to integrate her ideas with her opponent's. She is too governed by self-interest and a narrow focus on traditional solutions to develop innovative solutions to meet her client's needs. She limits the range of options rather than expands them. This failure can be viewed in part as a failure to prepare adequately. For example, a negotiator who is unfamiliar with the tax consequences of divorce settlements not only will miss the opportunity to initiate a settlement along such lines but may also be too skeptical of her opponent's suggestion of such a course to allow ready agreement.

(2) information flow

The information shared by an effective integrative negotiator focuses on her client's underlying needs and goals. She directly answers her opponent's questions to find the basis for an agreement. By using information from her opponent, she builds upon ideas to develop new resolutions. An ineffective integrative negotiator is unable to use information to avoid positional bargaining and to find solutions that meet the parties' underlying needs and goals. She is evasive, hesitant, and obscure in presenting information. Rather than embracing flexibility, she remains rigid and fixed.

(3) communication patterns

An effective integrative negotiator communicates solutions, needs, and issues. She explores ideas, does not waiver from the task at hand, and avoids personality issues. The two negotiators interact on an equal basis. In contrast, an ineffective integrative negotiator reverts to positional bargaining, reacting to or rejecting proposals rather than using them as opportunities to satisfy her client's needs. She focuses on her positions and mixes personality issues with the substantive ones.

(4) relationship

Keeping past interpersonal difficulties out of the negotiation as much as possible is the emphasis of the effective integrative negotiator. She focuses on the parties' future relationship, rather than trying to remedy past harms unless they are part of the substantive issues. She is sensitive to her opponent's needs and tries to solve a mutual problem rather than dominate a relationship. Unable to minimize the interpersonal issues, the ineffective integrative negotiator looks to maximize her short term gain rather than construct a stable future relationship. Because she lacks sensitivity to her

opponent's needs, she emphasized winning instead of creating a mutually beneficial solution.

4. Agreement

The final section of our scale has criteria for evaluating the written or oral settlement agreement. Since the scale is designed for use with any negotiation, it does not contain a checklist of necessary or standard terms. Rather, the scale's standards relate to how well the agreement reflects the client's goals, its effectiveness, and how it corresponds to the negotiator's strategy.

An effective negotiator reaches an agreement that is clear, within her authority, and benefits her client. Furthermore, the agreement is efficient and enforceable. At a minimum, the agreement does not harm the relationship between the parties or between the negotiators. If other constitutencies are concerned, their interests are also benefitted. Finally, if she cannot reach a good agreement, an effective negotiator deadlocks.

On the other hand, the agreement of an ineffective negotiator is unclear, beyond her authority, and provides no gain for her client. Moreover, because the agreement is costly and inefficient, the parties are unlikely to follow it. An ineffective agreement damages the relationship between the parties and does not consider other constituencies who may be involved. Finally, an ineffective negotiator reaches an agreement when deadlock is the better choice or she forces deadlock when a good agreement is possible.

The effective competitive negotiator reaches an agreement that maximizes her client's interests, while an ineffective one minimizes them. The effective cooperative negotiator reaches an agreement that is fair for both parties, while the ineffective cooperative negotiator reaches one that is fair for her opponent, but not for her. And finally, the agreement reached by the effective integrative negotiator satisfies the maximum number of the parties' interests and needs, while that of the ineffective integrative negotiator leaves many needs unmet.

V. Demonstration of Scale's Utility

A. Evaluating a Student Negotiation Using Our Scale

To appreciate how thorough an evaluation of a negotiation exercise the scale provides, consider a multi-issue problem with financial and relational components. One problem we have used in our courses is the dissolution of the marriage of a couple in their mid-thirties with two preteen children. We will first summarize the undisputed facts and law, then discuss the confidential facts, and finally relate the negotiators' instructions.

The husband is an architect and the wife has recently gone back to work

as a retail buyer. The wife and children are living in the family home, which is for sale. The husband is living in a small apartment in an adult building that he "sort of" shares with his girl friend. The couple have been separated almost a year and the husband, who earns twice as much as the wife, has been paying temporary child support at the level of the court's suggested guidelines. The husband's contact with the children has been limited and irregular. Both spouses have retained attorneys, but have postponed filing for dissolution in the hope that a settlement can be reached.

Applicable state law provides for no-fault divorces exclusively. All property earned by either spouse during the marriage is community property and must be divided equally at dissolution unless the couple agree otherwise. There is no gender preference for custody. The local courts have adopted guidelines for visitation and support, essentially placing the burden of proof on the party who seeks to depart from the guidelines. Standard visitation is alternate weekends from Friday evening to Sunday evening, one evening in the off week, half the holidays (alternating each year), and half the summer vacation. Standard child support for two children is twenty-five to thirty percent of the noncustodial parent's net income where she earns substantially more than the custodial parent and they have the standard visitation schedule.

The couple have reached some preliminary agreements: the wife will have custody of the children, the family home will be sold and the proceeds split to equalize the division of community property, the mortgage and other house expenses will be paid out of the community savings account, and all other community property has been divided.

The real issues of the negotiation emerge from each side's confidential facts. The wife is primarily concerned with ensuring that the husband will take the children off her hands at regular intervals so she can develop a social life. She wants him to agree to at least the standard visitation. Because she suspects he will not abide by the agreement, she has instructed her attorney to get some kind of financial guarantee that the husband will pay extra money for visitation he misses to defray her extra costs. She wants her child support to continue at the present level so she can qualify for a new home loan, but is not very concerned about an increase. She has been promised a large raise in a few months, which her husband does not know. Persuading the husband to pay part of her legal fees is a relatively minor concern.

The husband is primarily concerned with limiting his monthly child support because he has incurred considerable expense in setting up his new apartment and entertaining his girl friend. He has not been getting along

well with the children and thinks they blame him for the divorce. Whether he exercises his visitation rights will depend on how well the children behave and how much time his girl friend is willing to spend with them. He has no intention of taking the children for weekends, but has instructed his attorney to trade off more visitation time for lower child support because he knows he cannot be forced to visit the children. He wants to claim the children as dependents on his tax return and wants both attorneys' fees paid from the house proceeds. If he gets his way on all other issues—limited visitation, tax exemptions, and attorneys' fees—he'll agree to a twenty percent increase in child support.

The exercise is designed to teach students how to handle monetary and nonmonetary issues simultaneously and to test their response to one client's request to misrepresent his commitment. The instructors' directions to the students are deliberately general to allow students the maximum latitude in choosing among negotiation styles and strategies. Students are told to "get the best deal you can for your client" and are left to determine for themselves what is the best deal. There is no fixed penalty for failure to settle on some or all issues. Part of the students' task is to determine the result most likely at trial and to weigh the cost of deadlock in terms of money and future relations between the parents.

The following section describes how we use the scale on five excerpts from student's negotiations. We also explain why we coded each section as we did and suggest how a professor might use the coding to discuss the performance with the students. Before starting to grade we code each issue for reference as follows: A (all issues); F (attorney's fees); H (house); P (penalty); S (support); T (taxes); and V (visitation). As we review the videotape, we note the issue code and the VCR counter number at the place on the scale that describes that part of the dialogue. We arrange the grading scale in front of us in the shape of a cross with the Preparation and Opening Phase section at top middle; the Competitive, Cooperative and Integrative Strategy sections from left to right across the center; and the Agreement section at bottom middle. We can see the entire scale at once without the need to flip pages. The full scale is contained in the appendix at the end of this article. For purposes of this discussion we have set out the dialogue of each discussion in the footnotes.

B. Opening Phase[117]

For the wife's lawyer this section is coded under "effective agenda setting,

117. Husband: Do you want to start in one area and hit them all off?
Wife: Well, I'd kind of like to start with visitation.

prioritizes issues"; for the husband's lawyer, it is coded under "ineffective agenda setting, cedes or no priorities." While neither student establishes the full range of issues before them, the wife's lawyer at least identifies the most important issue to him. The husband's lawyer's opening question to him indicates her total lack of consideration of the importance of clearly identifying the issues or seeing any relationship between them. She assumes that her issues are the same as his.

Later in the negotiation, the husband's lawyer's failure to set an agenda comes back to haunt her.[118] The wife's lawyer waits until all other issues are settled to bring up the most difficult and unusual agenda item, the "penalty" for the husband's failure to visit. This was effective on his part; the husband's lawyer is caught unprepared. She then is faced with the unhappy prospect of negotiating what she discovers will be an unpopular term for her client after having bargained hard for favorable results on the other terms. By our coding this later exchange under "ineffective agenda setting," the scale demonstrates to the student that the raising of this surprise issue relates back to the opening phase of the negotiation. The professor then has an excellent opportunity to point out to the husband's lawyer the dangers of jumping into the substantive negotiation without having fully identified all the issues.

1. Preparation[119]

This section is coded under "ineffective preparation, unprepared on demands, misestimates" for the wife's lawyer on the visitation issue. This is a clear example of a negotiator not thinking through an idea before he brings it up. He does not know the cost of his proposal, nor what he expects the husband to contribute. His lack of preparation may have cost him an opportunity to devise an effective solution to a thorny problem. A professor might use this example to ask the student to give a different response to his opponent's question to avoid losing momentum. Moreover, if a professor emphasizes an integrative strategy, this can serve as a springboard to a discussion of the type of preparation required for this strategy.

Husband: Okay, that's the first thing then. How does your client think about that?
Wife: Well, how does your client feel about . . . ?

118. Wife: Okay. I've got one more thing with the visitation. Let me just write this down.

119. Wife: Well, if Betty were to find, say, a friend at work or someone who would be willing to take the kids for the weekend, I think she would feel bad about imposing on her without maybe giving her some kind of compensation for it.
Husband: And would they split the cost of the babysitter or have David pay for it? What are you thinking?
Wife: Well, that's just an idea. I haven't really gone into it a lot. But it seems as though . . . .

2. Strategy

a. Competitive[120]

We code this section under both "effective competitor, communication patterns, persuasive arguments, puffing, and grounded in facts and law" and "ineffective competitor, communication patterns, unpersuasive arguments, lies, and lack basis" for the husband's lawyer on the support issue. Precisely because it fits in two contradictory categories it shows the usefulness of our scale in giving the teacher a tool that fully analyzes the student's performance.

On the one hand, the husband's lawyer makes excellent use of the facts at her disposal in describing the benefits of her client's health insurance plan to the wife. The first two and the last sentences of the dialogue are typical of the "puffing" that an effective competitor uses in making persuasive arguments. She phrases her statements in terms of the superior value to her opponent, trying to control the discussion.

However, when she claims that the policy will "cover their orthodontic, everything," she begins to lie. Nothing in her facts supports this statement. Thus, the teacher can point out how easily a negotiator may slip from puffing into lying and the possible risks of reaching an agreement based on a misrepresentation. (Imagine a subsequent negotiation after the wife has learned that the policy does not cover orthodontia *after* she has contracted for it for one of the children.) Since the scale places these categories opposite each other, it is easy to mark the statement in both places.

b. Cooperative[121]

This section contains several examples of effective cooperative negotiation

120. Husband: He pays $50 a month for that, which I think is a very good price, and the value to Betty is much higher than $50. I don't know if she could go out and find a medical-dental policy of that quality for much less than $100 a month for the two children. I mean this is going to cover their orthodontic, everything. It's a very good policy. So I think the value is higher than $50.

121. Husband: . . . but rather than pay $50 to Betty. He'll never go for that.
Wife: Okay, what would you suggest if something happens and he decides that he would rather not take them. Let's say he just doesn't want to, like he had a bad weekend last month so this weekend he's not going to take them. What assurances can Betty have?
Husband: Well, instead of, well if he can't take them one weekend, instead of one weeknight, we could make it four weeknights, or three weeknights, so that she could . . .
Wife: But if he doesn't take them that one weekend, what's to keep him from skipping out on the four week nights?
Husband: Well, we can't fine him.
Wife: Why not? It's just making an agreement to that effect. He's getting quite a bit here; he's getting the attorneys' fees out of the community property, he's claiming them both as dependents, and also he's kind of building his life separate from them. But what chance has

by the wife's lawyer in dealing with the "penalty" issue. We code his first statement under "communication patterns, good rational arguments, task oriented, and considers opponent's ideas" as well as "information flow, honest cooperation, shares goals, concerns." Using the scale helps the professor demonstrate how an effective cooperative negotiator responds to his opponent's initial rejection of a proposal: sticking to the issue under discussion, considering his opponent's reactions, and seeking further cooperation, rather than either abandoning his goal or arguing. In this negotiation this example was particularly instructive because earlier in the tape the student was ineffective in pursuing his objectives. Coding the different behaviors on opposite points on the scale enhances the contrast.

The second paragraph is coded for the wife's lawyer under "adherence to position, concessions and demands, measures against formula" and "information flow, probes, questions, responds appropriately and well-timed." He pursues his proposal rather than accept his opponent's alternative to his penalty clause because he realizes it will not solve his client's need for a guarantee that the husband will visit the children. Moreover, he keeps the ball in his opponent's court by pointing out, through an appropriate question, that her suggestion will leave his client in the same position as if the husband chooses not to visit. Thus, the professor can easily point out that negotiation statements serve more than one function; they both respond to what is said and shape the opponent's response.

4. Agreement[122]

This excerpt is coded under "Agreement, ineffective, unclear" for both lawyers and also under "beyond authority" for the husband's lawyer. The potential problems of each lawyer presenting the settlement to his or her client is obvious. The teacher may then discuss with the students the importance of working out the exact language of controversial and novel terms of any agreement. Moreover, coding this language in both categories for the husband's lawyer brings home the nexus between lack of clarity and her

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Betty got to build her life separate when she has got the children there and their responsibilities?

122. Husband: Okay. If Betty needs her child support to look larger on her loan applications, we can make it $500 and $450 if he takes the kids, but she can put down the $500 in her loan application. But I will put it in different terms for my client. I will say it is $450 and $500 . . . . You see?

Wife: Well, as long as they both understand what is going on. I don't want them having misunderstanding and then be at each other's throat.

Husband: Well, I just want to present this in a different way.

Wife: So then we are changing the child support to $500.

Husband: $500.

exceeding her authority on this issue. Since she knows that her client is likely not to visit the children, thereby invoking the penalty, she may be obligating him to pay more support than her authority permits. Thus, the professor has a clear record for both critiquing her ethics and the effectiveness of the terms of her settlement.

B. Advantages of a Process Grading System

1. Variable Weighting

One of the grading scale's advantages is that the weight assigned to each portion of the scale may be left to the judgment of the instructor. The scale is meant to be used both to analyze and to teach negotiation process as well as to evaluate students' performances. An instructor who is not result-oriented could emphasize whatever facets of negotiation had been emphasized in class by weighing those sections more heavily. On the other hand, an instructor who prefers a more result-based grading method would weigh more heavily whatever elements on the scale she judged most responsible for producing the result. For example, if one student's unreasonable demands, which were wisely resisted by the other student, were primarily responsible for producing a deadlock, the instructor would allocate more points to "Strategy-Adherence to Position-Concessions and Demands." The ineffective competitor would lose more points and the effective competitor would gain more points, thus producing a difference in their scores even if they performed equally well on other measures. Another way a result-oriented grader could use the scale would be to weigh the "Agreement" section most heavily.

One difference between the variable weight method and the fixed weight method is that the latter is constant for all students negotiating the same problem, whereas the former is specific only to each negotiation. The latter has the virtue of consistency and can be disclosed to students in advance. The former recognizes that each negotiation is unique and extremely difficult to evaluate in comparison with other negotiations; an articulated rationale for the weighting decision is necessary.[123]

123. For example, the American Bar Association Law Student Division 1985-1986 Negotiation Competition "Rules and Standards for Judging" breaks negotiation into seven components, each including descriptive statements of effective behavior in that phase. The seven components—preparation, opening, middle (strategy), agreement, relationship, self-critique, and ethics—are each weighed equally on a scale from one to five, with one being "unacceptable" and five "excellent." The rules do not include a discussion of the weighting decision. *See* AMERICAN BAR ASSOC. LAW STUDENT DIV., RULES & STANDARDS FOR JUDGING 1985-86 NEGOTIATION COMPETITION (1985). While such firm guidelines may be necessary for an intermural competition, they are not necessary in grading coursework.

Although it has several components, a negotiation exercise is different from a final examination composed of several essay questions. Most professors would agree that an instructor who intends to weigh the various questions unequally should inform the students. The students, if so informed would then allocate their time more efficiently because they know that their scores on essay questions often correlate highly with the amount of time allotted for each question. But a negotiation, although composed of several phases, is more like a single question examination. The essay answer may be expected to follow a typical format of "issue, rule, analysis, conclusion," but the number of points assigned to each component may vary depending on how instrumental each component was in producing the final answer. Time is not a major factor. Similarly, a negotiation has certain typical components, but how much time the negotiators devote to each one does not necessarily correlate with the quality of their product. For example, two students who know each other well and have already established a trusting relationship may negotiate a wise agreement without any visible communication related to establishing trust and testing for veracity or commitment. A grader who is unaware of the negotiators' relationship might wonder how they were able to produce an agreement so efficiently, but should still evaluate them highly if their product, the agreement, is clear, fair, and enforceable. Similarly, many times a student's answer to an essay question will omit an important portion of the issue, rule, analysis, or conclusion. Nevertheless, it will be absolutely clear to the instructor from reading the answer as a whole that the student knows and understands the missing portion and simply omitted it because of time pressure or because the student thought it was so obvious it need not be stated. Weight given to various components is not the crucial issue in grading the essay. The key is whether the student has communicated a mastery of the coursework. Grading negotiation exercises is really no different.

2. Variations in Skill Level

Another of the grading scale's advantages is how it allows the instructor to control for variations in the opposing counsel's skill level. Each negotiator is evaluated independently throughout the negotiation according to whether her tactics would be effective or ineffective against a competent, experienced opponent, rather than whether they are effective initially or in the long run with her particular opponent. (Naturally an effective negotiator will modify tactics that are clearly not working with a particular opponent.)

The scale is a useful device with inexperienced students, who it can be assumed will be conducting most of their early legal negotiations with more

experienced and competent adversaries. If a student is confronted with an especially skilled opponent, the constant effective/ineffective rating allows her to see what she did well, even though her result may be less impressive than other scores or lower than she had hoped for. A student who has faced a particularly unskilled opponent, and is flushed with her good result, will see the mistakes she made that would have been devastating against a skilled opponent. With students who are relatively evenly matched, process grading allows them to see how small differences in effectiveness, such as making an unreciprocated concession, can lead to significant differences in result.

This method resolves the problem Professors Peck and Fletcher encountered when they added an investigation component to the negotiation exercise but retained the duplicate bridge grading method,[124] i.e., their inability to measure what difference superior investigation actually made. If the negotiators are evenly matched on most skills, yet the result clearly favors one skill, the scale should also show either more effective preparation marks for the better negotiator and/or more ineffective preparation marks for the poorer negotiator. (This is also a way an instructor can test herself on learning to use the scale: her educated intuitive impression of how effectively the students negotiated will correlate with a large number of coded entries in the appropriate columns.)

3. Strategy Neutral

The scale is based on the assumption that there is no one correct approach to effective negotiation. The effectiveness of any approach or strategy will vary with each problem and the personalities of the negotiators. Therefore, the scale is neutral as to approach or strategy. Since good results earn a good grade only if they are the fruit of a good process, there is no incentive to compete, other than what is inherent in the problem. From examining the scale, students know that an integrative or cooperative approach will be evaluated equally with a competitive approach. While this may spur them to consider creative or unusual solutions, such as family counseling to resolve the visitation/support dispute, it does not divulge the particular desirable solution as a duplicate-bridge system would do by listing the number of points the solution is worth. Thus, the scale can be circulated to students in advance without the risk of its producing "cookie cutter" negotiations.

4. Comprehensiveness

The grading system also measures the utility of the agreement—its enforceability, i.e., how well it anticipates and avoids future disputes. By the

124. *See supra* text accompanying notes 13-14.

same token, it measures the effectiveness of deadlock in representing one's clients: rejecting an unfair offer is not failure as in Professor White's system.[125] The ultimate question is not "did you settle?" but "did you do everything possible to achieve a good settlement." As in the real world, the effective negotiator never comes away totally empty-handed. At the very least she gains valuable knowledge about her opposing counsel. She also gains the certainty that the stymied transaction is one that her client is better off avoiding or that this is one of those lawsuits that must be tried.

Process grading also provides an opportunity for dealing with unethical conduct because the offending statements will be preserved on tape, in context and retrievable by fast-forwarding the tape to the appropriate counter number. The instructor can also evaluate the other negotiator's response to the unethical conduct and gauge how it affected the result. This second aspect of unethical negotiation behavior is often overlooked. In their zeal to set the offending student straight, instructors may ignore the unwitting complicity of the opposing counsel whose incomplete preparation or failure to demand sufficient guarantees or penalties allowed the deceptive conduct to succeed.

Finally, the scale has the advantage of minimizing students' defensiveness to detailed critiques.[126] With the grading scale in front of them, it becomes easier for them to see that it is their performance, not their personality, that is being evaluated. The grading scale thus serves the same function as well-annotated instructor comments on a bluebook or term paper in explaining a grade by pointing out numerous strengths and weaknesses, in providing an analysis of the product's quality rather than a mere conclusion.

VI. CONCLUSION

Defining good negotiation and testing the means of producing it are inseparable parts of teaching a skills course in legal negotiation. Process grading spans the differences between those who advocate result-based grading and those who rely on more subjective methods. As Professors Cort and Sam-

125. *See supra* text accompanying notes 5-10.

126. One method the authors have used successfully to decrease students' defensiveness to personal criticism is to require them to review the videotape of their performances with a small number of classmates before the meeting with the professor. Having lived through the experience twice, most students come to the critique with a more realistic appraisal of their performance. Unwarranted pride in their performance is tempered by the comments of their classmates, which the authors suspect are more candid in the instructor's absence. Having accepted that her performance did not meet her expectations, the student meets the professor more interested in discussing "why" than "whether" there were problems.

mons remarked in explaining an analogous system for determining clinical students' competence:

> The key point is that evaluations are directed to behaviors that are denotable, providing the evaluator and student with the opportunity to focus on a mutually understood problem area. Ratings may still be subjective, but they are derived from data that can be perceived, examined and analyzed by both parties. The essence of competency-based diagnosis and evaluation is explication or demystification, not metaphysical objectivity.[127]

127. Cort & Sammons, *The Search for "Good Lawyering": A Concept and Model of Lawyering Competencies,* 29 CLEV. ST. L. REV. 397, 426 (1980) (footnotes omitted).

APPENDIX

PROCESS GRADING SCALE

	Neg. 1		Neg. 2	
I. PREPARATION	Issue	#	Issue	#
EFFECTIVE				
A. knowledge of law				
B. prepared on demand figures				
1. estimates $ ranges				
2. uses present value				
C. knowledge of facts				
1. assesses strong and weak				
2. hypothesizes unknown				
D. articulated goals/needs				
E. articulated theory				
F. clear legal arguments				
G. choice of strategy				
1. issue				
a. relative power				
b. zero/non-zero sum				
2. personalities				
a. yours				
b. opponent's				
c. client's				
3. type of negotiation				
a. subject matter				
b. norms of behavior				
4. reveal by choice				
H. Lawyer's needs				
1. economic return				
2. good reputation				
II. OPENING PHASE				
EFFECTIVE				
A. setting agenda				
1. identifies issues				
2. prioritizes issues				
3. reformulates issues				
B. sets goals				
1. articulates own				
2. discovers opponents				
3. chooses opening strategy				
4. evaluates subject matter				
C. assesses situation				
1. opponent's strategy				
2. opponent's personality				
3. tone				
4. clarifies, probes				
5. creates doubt in opponent				
6. separates tangibles/ intangibles				
D. reaches for overall formula				
1. clarifies issues to own advantage				
Issue Code:				

	Neg. 1		Neg. 2	
	Issue	#	Issue	#
INEFFECTIVE				
A. unsure of law				
B. unprepared on demands				
1. misestimates/no estimates				
2. fails to use				
C. unsure of facts				
1. no assessment of strong and weak				
2. no hypotheses				
D. vague goals/needs				
E. uncertain of theory				
F. weak arguments				
G. no strategy				
1. issue				
a. unsure of strength				
b. no distinction				
2. personalities				
a. no self-knowledge				
b. no research				
c. lacks rapport				
3. type of negotiation				
a. no distinctions				
b. unaware				
4. obvious/haphazard				
H. Misses lawyer's needs				
1. unaware of return				
2. ignores own reputation				
INEFFECTIVE				
A. setting agenda				
1. cedes issues				
2. cedes or no priority				
3. accepts opponent's form.				
B. lacks goals				
1. unclear				
2. does not learn				
3. follows opponent's strategy				
4. ignores subject matter				
C. oblivious to dynamic				
1. fails to discern				
2. no assessment				
3. opp. sets				
4. accepts as given				
5. too reassuring				
6. confuses				
D. avoids/misses formula				
1. does not clarify to own advantage				

	Neg. 1		Neg. 2	
	Issue	#	Issue	#
III. STRATEGY				
COMPETITIVE				
EFFECTIVE				
A. ADHERENCE TO POSITION				
1. Goals and Expectations				
a. high expectations				
b. commitment to goals				
2. Issue Selection				
a. high power				
b. zero-sum (distributive)				
3. Tactics				
a. forces settlement range				
b. uses deadlines				
c. risks deadlock				
d. changes perceptions				
e. slow to reveal position				
4. Concessions and Demands				
a. high initial demand				
b. few concessions				
1. small and late				
2. unilateral gain				
c. cedes throwaways				
d. measures against formula				
B. INFORMATION FLOW				
1. minimal disclosure				
2. conceals authority				
3. seeks control				
4. probes, questions				
a. seeks clarification				
a. frames appropriately				
c. well-timed				
d. renews, rephrases				
e. responds ethically				
f. responds appropriately				
5. pretense				
a. false demands				
b. feigns cooperation				
C. COMMUNICATION PATTERNS				
1. credible threats				
2. evasion				
3. adamant				
4. pressures				
5. persuasive arguments				
a. use of favorable information				
b. value-oriented				
c. seeks control				
d. puffing				
e. ground in facts and law				
6. emotional, intangible issues				
7. takes appropriate risks				
8. hides weakness of position				
9. good legal argument				
a. detailed; fully developed				
b. multidimensional				
c. balanced				
d. structured; focused				
e. subtlety				
f. emotional content				
D. RELATIONSHIP				
1. self-interest				
2. aloof				
3. wariness				
4. assumes competition				
5. manipulates				

	Neg. 1		Neg. 2	
	Issue	#	Issue	#
INEFFECTIVE				
A. ADHERENCE TO POSITION				
1. Goals and Expectations				
a. unrealistic expectations				
a. intransigience				
2. Issue Selection				
a. low power				
a. non-zero sum				
3. Tactics				
a. creates deadlock				
b. breaks deadlines				
c. uncontrolled risks				
d. unpersuasive				
e. refuses to state				
4. Concessions and Demands				
a. extreme initial demand				
b. no concessions				
1. unaware of timing				
2. breakdown				
c. cedes nothing				
d. no assessment to formula				
B. INFORMATION FLOW				
1. no disclosure				
2. misrepresents authority				
3. abusive				
4. hides, repeats				
a. accepts statements				
b. unclear; off-point				
c. misses opportunities				
d. accepts first answer				
e. deceives				
f. reveals too much or too little				
5. deception				
a. impossible demands				
b. disruptive				
C. COMMUNICATION PATTERNS				
1. non-credible threats				
2. misrepresentation				
3. belligerent				
4. arrogant				
5. unpersuasive argument				
a. misuse of information				
b. misues law; values				
c. denigrates opponent				
d. lies				
e. lacks basis				
6. intolerant, tactless				
7. inappropriate risks				
8. fails to meet weakness				
9. poor legal argument				
a. cursory; incomplete				
b. unidimensional				
c. unilateral				
d. diffuse				
e. simplistic				
f. lacks conviction				
D. RELATIONSHIP				
1. rigidity				
2. hostile				
3. suspicious				
4. sarcastic				
5. deceptive				

	Neg. 1		Neg. 2	
	Issue	#	Issue	#
COOPERATIVE				
EFFECTIVE				
A. ADHERENCE TO POSITION				
1. Goals and Expectations				
a. fair expectations				
b. seek convergence				
2. Issue Selection				
a. equal power				
b. zero sum				
3. Tactics				
a. seeks fair solution				
b. adapts to new information				
c. seeks agreement				
d. mutual concessions				
e. shares honest information				
4. Concessions and Demands				
a. integrative initial demand				
b. trades concessions				
c. realistic changes				
d. measures against formula				
B. INFORMATION FLOW				
1. fair exchange				
2. trades facts/authority				
3. organized				
4. probes, questions				
a. seeks clarification				
b. frames appropriately				
c. well-timed				
d. renews, rephrases				
e. responds ethically				
f. responds appropriately				
5. honest cooperation				
a. shares goals/concerns				
b. cooperates				
C. COMMUNICATION PATTERNS				
1. promises				
2. discussion of issues				
3. explores proposals				
4. flexible				
5. good rational arguments				
a. considers opponent's ideas.				
b. task-oriented				
c. seeks equivalence				
d. straightforward				
6. cognitive, factual issues				
7. repackages or restates proposal to meet weaknesses				
8. good legal argument				
a. detailed; fully developed				
b. multidimensional				
c. balanced				
d. structured; focused				
e. subtlety				
f. emotional content				
D. RELATIONSHIP				
1. trust				
2. future oriented				

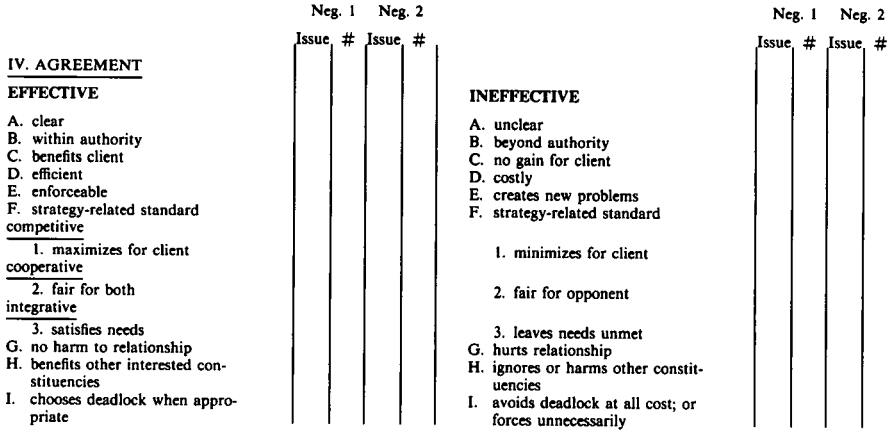
	Neg. 1		Neg. 2	
	Issue	#	Issue	#
INEFFECTIVE				
A. ADHERENCE TO POSITION				
1. Goals and Expectations				
a. minimal expectations				
b. loses sight of goals				
2. Issue Selection				
a. high power issue				
b. non-zero sum				
3. Tactics				
a. accommodates opponent				
b. misses new information				
c. stalls				
d. unilateral concessions				
e. divulges information				
4. Concessions and Demands				
a. minimal initial demand				
b. concedes easily				
c. shifts without reasons				
d. no assessment against formula				
B. INFORMATION FLOW				
1. reveals all				
2. divulges facts/authority				
3. unsure				
4. hides, repeats				
a. accepts statements				
b. unclear; off-point				
c. misses opportunities				
d. accepts first answer				
e. deceives				
f. reveals too much or little				
5. concessions				
a. discloses all				
b. concedes				
C. COMMUNICATION PATTERNS				
1. forgives				
2. pleads his cause				
3. unaware of problems				
4. obliging				
5. poor argument				
a. asks for freebie				
b. sociable				
c. minimizes own position				
d. underplays strength				
6. diffuse				
7. fails to adjust to meet weaknesses				
8. poor legal argument				
a. cursory; incomplete				
b. unidimensional				
c. unilateral				
d. diffuse				
e. simplistic				
f. lacks conviction				
D. RELATIONSHIP				
1. overvalues relationship				
2. expedient				

	Neg. 1		Neg. 2	
	Issue	#	Issue	#
3. seeks rapport				
4. assumes diversity				
5. overlooks slights				

	Neg. 1		Neg. 2	
	Issue	#	Issue	#
3. trusts immediately				
4. idealistic/naive				
5. reacts personally				

	Neg. 1		Neg. 2	
	Issue	#	Issue	#
INTEGRATIVE				
EFFECTIVE				
A. ADHERENCE TO POSITION				
1. Goals and Expectations				
a. satisfies needs				
b. avoids concession-making				
2. Issue Selection				
a. non-zero sum				
b. equal power				
3. Tactics				
a. non-positional bargaining				
b. honest statements				
c. principled/rational				
d. creates solutions				
e. free exchange				
4. Concessions and Demands				
a. expands pie				
b. flexible on means				
c. seeks common ground				
d. integrative solution				
B. INFORMATION FLOW				
1. open exchange				
2. honest				
3. shares goals/concerns				
4. probes, questions				
a. seeks clarification				
b. frames appropriately				
c. well-timed				
d. renews, rephrases				
e. responds ethically				
f. responds appropriately				
5. log-rolling				
6. adaptive; creative				
C. COMMUNICATION PATTERNS				
1. offers solutions and ideas				
2. discusses opponent's needs				
3. explores proposals				
4. flexibility				
5. avoids arguing position				
a. considers opponent's ideas				
b. task-oriented				
c. seeks equivalence				
6. cognitive				
7. good legal argument				
a. detailed; fully developed				
b. multidimensional				
c. balanced				
d. structured; focused				
e. subtlety				
f. emotional content				
D. RELATIONSHIP				
1. separates from issues				
2. future-oriented				
3. incorporate other's needs				
4. moves toward problem-solving				
5. sensitive to cues				

	Neg. 1		Neg. 2	
	Issue	#	Issue	#
INEFFECTIVE				
A. ADHERENCE TO POSITION				
1. Goals and Expectations				
a. obscures needs				
b. seeks concessions				
2. Issue Selection				
a. inappropriate zero-sum				
b. low power				
3. Tactics				
a. reverts to positions				
b. misstates needs				
c. no fixed principles				
d. focuses narrowly				
e. irrelevant exchange				
4. Concessions and Demands				
a. limits pie				
b. flexible on needs				
c. misses chances				
d. self-interest only				
B. INFORMATION FLOW				
1. obscure; evasive				
2. hesitant; evasive				
3. hides goals;				
4. hides, repeats				
a. accepts statements				
b. unclear; off-point				
c. misses opportunities				
d. accepts first answer				
e. deceives				
f. reveals too much or too little				
5. positional				
6. rigid				
C. COMMUNICATION PATTERNS				
1. reacts or rejects				
2. ignores opponent's needs				
3. accepts as presented				
4. misses opportunity				
5. argues positions				
a. makes no use				
b. sociable				
c. minimizes own needs				
6. diffuse				
7. poor legal argument				
a. cursory; incomplete				
b. unidimensional				
c. unilateral				
d. diffuse				
e. simplistic				
f. lacks conviction				
D. RELATIONSHIP				
1. emphasizes				
2. short-term gain				
3. avoids other's needs				
4. remains positional				
5. insensitive				


Neg. 1
Issue
#
Neg. 2
Issue
#
IV. AGREEMENT
EFFECTIVE
A. clear
B. within authority
C. benefits client
D. efficient
E. enforceable
F. strategy-related standard
competitive
1. maximizes for client
cooperative
2. fair for both
integrative
3. satisfies needs
G. no harm to relationship
H. benefits other interested constituencies
I. chooses deadlock when appropriate
INEFFECTIVE
A. unclear
B. beyond authority
C. no gain for client
D. costly
E. creates new problems
F. strategy-related standard
1. minimizes for client
2. fair for opponent
3. leaves needs unmet
G. hurts relationship
H. ignores or harms other constituencies
I. avoids deadlock at all cost; or forces unnecessarily