

ESCAPING THE APPELLATE LITIGATION STRAITJACKET: INCORPORATING AN ALTERNATIVE DISPUTE RESOLUTION SIMULATION INTO A FIRST-YEAR LEGAL WRITING CLASS

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Many articles have been written about efforts to incorporate inter-disciplinary approaches into law school classes. While often intriguing, and even inspiring, such efforts tend to lack staying power. Faculty composition changes, curriculum components change, and, perhaps, the work needed to maintain the project is too burdensome.

This Article will address one particular inter-disciplinary effort at Hamline University School of Law that has had real staying power: an introduction of Alternative Dispute Resolution (ADR)¹ concepts into the first-year Legal Research and Writing

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1. This Article will use the acronym “ADR” to refer to the broad range of options other than traditional litigation that are available to parties seeking to resolve a dispute. From among the options in this range, such as arbitration, neutral fact finding, and summary jury trial, this Article will focus, in particular, on mediation. But it should be acknowledged that exactly which of these options any given commentator intends to reference by using the ADR acronym may vary. It should also be noted that some commentators have suggested that “alternative dispute resolution” is not necessarily the best “translation” for this acronym. See e.g. Leonard L. Riskin & James E. Westbrook, *Integrating Dispute Resolution Into Standard First-Year Courses: The Missouri Plan*, 39 J. Leg. Educ. 509, 510, 510 (1989) (noting that the authors and others prefer the expression “appropriate dispute resolution”).

(LRW)² fall-semester curriculum³ through the students' participation in a simulated mediation. In addition to the apparent educational benefits of incorporating this simulation into our LRW class, the faculty and students at Hamline derive real personal satisfaction from this change of pace during the first year. In fact, as we do the final edits for this Article, we are about to embark on the sixteenth year in which our students will participate in this exercise.

What follows is an explanation of the practical and pedagogical bases for this exercise, plus the nuts-and-bolts of how to do it. Throughout, we explore why this exercise has staying power: despite various changes over the last couple of decades in legal education and at Hamline, the core practical and pedagogical rationales for the exercise survive; the effort required to continue its use is not daunting; and it fits naturally into the LRW curriculum. Finally, this detour from the appellate-level litigation approach that dominates the first-semester law school experience opens new vistas and is personally satisfying from both the instructor and student perspectives.

Part I of this Article briefly explains the history and current scope of ADR processes and reviews the historical underpinnings for incorporating ADR into non-ADR law school classes Part II examines the current pedagogical theories supporting such incorporation through the use of simulations. Part III discusses why the exercise fits well within the LRW curriculum. Part IV addresses the nuts-and-bolts of the exercise, and Part V offers our observations and conclusions about the exercise, including discussion of student feedback obtained through an assessment instrument.

2. Law school courses that teach writing skills now have a wide variety of names and some variation in coverage. For a discussion of the general coverage of such courses, see David S. Romantz, *The Truth about Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. Kan. L. Rev. 105, 139 n. 203 (2003) (including a partial list of some of the different course names used). The course at Hamline is known as "Legal Research and Writing," so the acronym "LRW" is used in this Article. The foremost source for the expected content of legal writing programs also uses this acronym. See Commun. Skills Comm., Sec. Leg. Educ. & Admis. to B., *Sourcebook on Legal Writing Programs* 5 n. 5 (Eric B. Easton ed., 2d ed., ABA 2006 [hereinafter *Sourcebook*] (noting the Sourcebook's use of "LRW" to refer to "the basic course in legal research and writing"). The ideas discussed for our LRW course could apply equally as well, in most instances, to the variety of basic writing skills classes offered.

3. Hamline's required LRW course covers three semesters, the first two of which meet during the fall and spring semester of the first year.

I. A BRIEF OVERVIEW: THE HISTORICAL INTERACTION OF ADR AND LEGAL EDUCATION

In the latter nineteenth century, when Christopher Columbus Langdell developed the basis for what remains the core law school curriculum for most schools,⁴ ADR was not yet a component of formal legal practice or education,⁵ and the situation remained that way for many years.⁶ But, as addressed below, developments in practice and educational theory over the course of the twentieth century led legal educators to change the law school curriculum to acknowledge that much of a lawyer's work in resolving disputes happens outside the courtroom setting.

A. Growth of ADR in Legal Practice in the United States

The notion of resolving disputes in a non-courtroom setting has its roots in centuries of local community, religious, and cultural practices.⁷ But the development of ADR as an integral part of modern legal practice in the United States is generally recognized as having its roots in the ADR movement of the late 1960s and broader institutional developments in the 1970s.⁸ Numerous sources point to the Pound Conference on the Popular Dissatisfaction with the Administration of Justice, held in St. Paul, Minnesota in 1976,⁹ as a seminal event in this development.¹⁰ From the

4. See *infra* nn. 66–73 and accompanying text (discussing the observations in the 2007 *Carnegie Report* about the standard law school curriculum).

5. See generally Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* 35–72 (U.N.C. Press 1983). For a more succinct overview of the history of legal education in this country that includes a focus on LRW programs and brings the story forward into the twenty-first century, see generally Romantz, *supra* n. 2. The case-dialogue method, of course, focuses on cases that have not settled, and is therefore dependent on the absence of dispute resolution outside the courtroom setting.

6. Robert Stevens's book about legal education, *supra* n. 6, published in 1983, for example, makes no mention of ADR.

7. See e.g. Jacqueline M. Nolan-Haley & Maria Volpe, *Teaching Mediation as a Lawyering Role*, 39 *J. Leg. Educ.* 571, 574, 574 nn. 15–19 (1989).

8. See e.g. *id.* at 574–575; James J. Alfani et al., *Mediation Theory and Practice* 1–33 (Lexis 2001) (providing an overview of mediation in the United States since the late 1960s).

9. See generally *The Pound Conference: Perspectives on Justice in the Future: Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (A. Leo Levin & Russell R. Wheeler eds., West 1979). Excerpts from the Pound Conference proceedings are found in Frank E.A. Sander, *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 *F.R.D.* 79 (1976).

10. See e.g. Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the*

presentations at this conference, commentators focus in particular on that of Frank E. A. Sander, who spoke of what came to be known as the “multi-door courthouse” concept.¹¹ This concept rested on the idea that a variety of dispute-resolution processes should be available to parties seeking the services of our legal system.¹² In the decades that followed, the courthouse that Professor Sanders envisioned came to offer basically three types of “doors”: facilitative, evaluative, and adjudicative dispute-resolution processes. Within these categories, a process may be either binding or nonbinding, depending on the parties’ agreement or the particular rule or contract that brought them to the table.

In a facilitative process, a neutral third party facilitates communication between the parties to help them arrive at a solution. Neutrals may not impose their own judgments on the parties or offer any substantive opinions but instead work to bring the parties to consensus. The main ADR facilitative process is mediation. In facilitative mediation, mediators help the parties identify areas of concern, understand each other’s perspective, and create mutually acceptable solutions.¹³

In an evaluative process, a third-party neutral evaluates the case and offers a candid assessment of each side’s strengths and weaknesses. This evaluation may occur within the context of evaluative mediation, where it will theoretically help the parties arrive at an agreement.¹⁴ It may also occur in the context of liti-

Lawyer’s Philosophical Map? 18 Hamline J. Pub. L. & Policy 376, 376 n. 3 (1997); Carrie Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 U.C.L.A. L. Rev. 1613, 1616 (1997); Dorothy Wright Nelson, *ADR in the Federal Courts—One Judge’s Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public*, 17 Ohio St. J. on Dis. Res. 1, 1 (2001); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?* 11 Ohio St. J. on Dis. Res. 297, 309 (1996).

11. See e.g. Stempel, *supra* n. 10, at 324–334 and accompanying footnotes. Professor Stempel used this phrase at various places in his article, which reviewed Professor Sander’s 1976 presentation and concepts twenty years later.

12. See Sander, *supra* n. 9. Professor Sander noted, as part of his presentation, that “[b]y and large we lawyers and law teachers have been far too single-minded when it comes to dispute resolution,” *id.* at 112, and that “I suspect if we asked a random group of law students how a particular dispute might be resolved, they would invariably say ‘file a complaint in the appropriate court,’” *id.* at 114–115.

13. See Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7, 28–29 (1996).

14. See *id.* at 26–28.

gation, where a third-party neutral's evaluation can help narrow the dispute and shape the discovery process, possibly encouraging settlement. In this context, the process is called early neutral evaluation or neutral fact finding.¹⁵

Adjudicative ADR processes result in evidence-based decisions made by third-party neutrals outside of court and most closely resemble in-court litigation.¹⁶ In arbitration, probably the best-known adjudicative ADR process, the parties present evidence and arguments to an impartial third party who makes a decision, much like a judge.¹⁷ Usually, the parties have voluntarily agreed to be bound by the arbitrator's decision. In a summary jury trial, an advisory judge presides over an advisory jury and issues a nonbinding opinion on liability, damages, or both.¹⁸

The decades that saw the maturation of the multi-door courthouse concept into this broad range of dispute-resolution processes (and others) also saw a dramatic increase in the institutionalization of ADR in our modern legal system.¹⁹ In fact, by the spring of 1997, "in nearly every state, at least one local state and/or federal court ha[d] incorporated ADR in some manner."²⁰ Thus, ADR has become an important aspect of twenty-first century legal practice.

B. ADR Becomes Part of the Law School Curriculum

As ADR became more firmly entrenched in United States legal practice, various law schools started to incorporate ADR train-

15. See Douglas H. Yarn, *Dictionary of Conflict Resolution* 163 (Jossey-Bass, Inc. 1999).

16. See *id.* at 6.

17. See *id.* at 28.

18. Other examples of adjudicative ADR processes include a) the mini-trial, in which counsel for the parties present an abbreviated "best case" to a panel consisting of representatives for each party, neutral third parties, or both, to define the issues and establish a basis for settlement negotiations; and b) the moderated settlement conference, in which a neutral panel of lawyers, usually legal experts on the particular issues involved, offers a nonbinding opinion about the case, which in theory encourages the parties to reach a settlement. See *id.* at 295, 302.

19. See McAdoo & Welsh, *supra* n. 10, at 376. For more information about the history of ADR during those decades and a critique of where things stood by the mid-1990s, see Stempel, *supra* n. 10.

20. McAdoo & Welsh, *supra* n. 10, at 376. In Minnesota, the Minnesota Supreme Court had promulgated General Rule of Practice 114 in 1993, following Task Force recommendations that the Rule require, *inter alia*, "attorneys to consider ADR in every civil case." *Id.* at 380; see also *id.* at 378–380 (describing the history of the adoption of Rule 114).

ing into the curriculum.²¹ Schools used a variety of approaches, sometimes developing stand-alone courses focused on ADR or a particular ADR process, sometimes adding an ADR component to an existing course, and sometimes attempting integration of ADR across the curriculum.²²

In the fall of 1992, Carrie Menkel-Meadow delivered a series of talks at Georgetown Law School about developing an “ADR consciousness” in law schools.²³ Her talks, which she summarized in a subsequent article, provided an overview of the rationale underlying the developments in this area. Among other things, she noted that an ADR curriculum would emphasize “professional skills and behaviors”:²⁴

[D]ispute resolution study provides a valuable way to incorporate experiential learning in legal education. By participating in exercises designed to put students in role, students experience the tasks of creative problem-solving, ethical responsibilities and the relation of theory to practice. Professional judgement [sic] and decision making requires [sic] the kind of thinking or action that only reflection after role-playing or actual practice provides. . . . Case studies and problem sets, either with real or “simulated” clients, broaden, open and deepen the texts of study, beyond the appellate

21. See e.g. Menkel-Meadow, *supra* n. 10, at 1616 (“By the early 1980s we had a field, at least of teaching and with some scholarship developing.”); Robert A. Baruch Bush, *Using Process Observation to Teach Alternative Dispute Resolution: Alternatives to Simulation*, 37 J. Leg. Educ. 46, 46–47 (1987) (noting that ADR “has become the focus of considerable attention in legal scholarship, practice, and education” (footnotes omitted)); Frank E.A. Sander, *Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles*, 34 J. Leg. Educ. 229, 229 (1984) (opening the article by saying, “[d]uring the past decade we have witnessed an extraordinary rekindling of interest in alternative forms of dispute resolution” (footnote omitted)); see also Nolan-Haley & Volpe, *supra* n. 7, at 571 (“Over the last decade, mediation has become part of the curriculum in a growing number of law schools.”).

22. See e.g. Baruch Bush, *supra* n. 21, at 47 (noting different approaches schools have taken); Nolan-Haley & Volpe, *supra* n. 7, at 571–572 (discussing the different approaches taken and advocating for a separate mediation course in the law school curriculum); Sander, *supra* n. 21 (surveying different approaches being taken and suggesting additional possibilities). For a description of an effort to integrate ADR across the first-year curriculum, see section I(C), *infra*.

23. See Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 S.M.U. L. Rev. 1995, 1995 n. 1 (1993).

24. *Id.* at 1995–1996.

case and its fixed facts to the more realistic human dynamics of fluid and differentially experienced “facts.”²⁵

C. The Missouri Project and Hamline

While Hamline started incorporating ADR into its curriculum in the 1980s,²⁶ the particular project that brought the mediation simulation exercise to Hamline’s LRW program was the Missouri Project. In 1985, with the support of several grants,²⁷ University of Missouri-Columbia School of Law started work on incorporating various aspects of ADR²⁸ into “standard” first-year courses.²⁹ The program placed “substantial reliance”³⁰ on simulations. In addition to developing the coursework for Missouri, the project focused on developing course materials that could be used at other schools.³¹ By contacting schools where he anticipated interest in participation and soliciting proposals, Project Director Leonard L. Riskin subsequently lined up, for a follow-up project, six schools interested in “integrating dispute resolution into the standard first-year curriculum”:³² DePaul University, Hamline University, Inter-American University, The Ohio State Universi-

25. *Id.* at 1996 (footnotes omitted).

26. Professor Bobbi McAdoo joined the HUSL law faculty in 1984 and also was the executive director of a local mediation center for four years beginning in 1985. She started teaching a basic ADR overview course at Hamline in 1987 or 1988. Further, she started the Hamline Dispute Resolution Institute in 1991, and she directed the Institute from 1991 to 1998. Professor James R. Coben came to Hamline in 1988 as a clinician and received a Department of Education grant to begin an ADR clinic in 1990. In addition to teaching many ADR courses since 1990, he directed the Dispute Resolution Institute from 2000 to 2009.

27. Two grants were from FIPSE (the United States Department of Education Fund for the Improvement of Post-Secondary Education). The National Institute for Dispute Resolution also provided support. Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses: A Report on a Collaboration with Six Law Schools*, 50 Fla. L. Rev. 589, 590–591 (1998).

28. *Id.* at 591 (discussing “interviewing and counseling, negotiation, mediation, arbitration, ‘mixed’ processes, and how to build or choose a process”).

29. *Id.* The concept of ADR was introduced at the start of the year in Legal Research and Writing through a reading, a videotape, and a writing assignment. *Id.* During the rest of the year, students learned about various aspects of ADR in Contracts, Civil Procedure, Criminal Law, Criminal Procedure, Property, and Torts. *Id.* at 592.

30. *Id.* at 596.

31. *Id.* at 590–591.

32. *Id.* at 598.

ty, Tulane University, and the University of Washington.³³ The work of these schools started with a conference in 1995.³⁴

At Hamline, Professor James R. Coben was the Project Director. The first-year curriculum integration plan was developed by Hamline's working group under his direction, and various faculty members at Hamline implemented it. The plan involved incorporating a mediation simulation into all of the LRW classes, creating special teaching modules for certain first-year doctrinal classes, incorporating a year-long simulation that involved the use of multiple ADR techniques into one of the civil procedure classes, and adding a restorative justice presentation to one of the criminal law classes.³⁵ The working group for the project established the following overall goals for the project:

- (a) emphasize the importance of ADR by formally recognizing it as "substance";
- (b) help students confront the standard philosophical map of lawyers and promote an "alternative" definition of lawyer as "problem-solver";
- (c) provide a baseline familiarity with rule vs. interest and position vs. interest distinctions; and
- (d) provide a definitional overview of ADR processes and ways they differ from the traditional litigation model.³⁶

More specific goals for the mediation simulation in the LRW classes were to "1) introduce fundamentals of mediation (includ-

33. *Id.* at 602.

34. *Id.* at 598.

35. See James R. Coben, *Summer Musings on Curricular Innovations to Change the Lawyer's Standard Philosophical Map*, 50 Fla. L. Rev. 735, 744-46 (1998). Professor Coben's article delves more deeply into the concepts used to express these goals, but in short, as explained by Professor Coben, *id.* at 735 n. 1, the concept of the standard philosophical map is based on the work of Leonard L. Riskin, specifically in his article, *Mediation and Lawyers*, 43 Ohio St. L.J. 29, 43-44 (1982). That article explained two assumptions underlying the map: "(1) that disputants are adversaries—i.e., if one wins, the others must lose—and (2) that disputes may be resolved through application, by a third party, of some general rule of law." Riskin, *supra* n. 35, at 44. The "rule vs. interest" and "position vs. interest" analyses looks at how the parties' *interests*—the real-life things or consequences that people actually want—may well differ from the dictates of the legal *rules* that they rely on, or the strategic *positions* they take, when disputes are resolved through litigation. See Coben, *supra* n. 35, at 736 n. 5.

36. *Id.* at 736.

ing the role of the lawyer in preparing for and participating in the process); and 2) highlight the distinction between rule and interest.”³⁷

The simulation itself, in broad outline, directly involved the first-year students as role-players in the mediation, acting out the roles of client and lawyer for each side of the dispute, with the mediator role played by a professional mediator. Students went into the simulation knowing the scenario well because it was the same scenario used for a research memorandum they had just completed.³⁸

While not all aspects of the Missouri project became a long-term part of the curriculum at Hamline, the LRW mediation simulation quickly became “institutionalized”³⁹ and has remained a part of the LRW curriculum.

D. Hamline’s Approach to the Mediation Simulation and LRW

The general idea of teaching about ADR, and more specifically, mediation, through the use of simulations was not a unique approach at the time of the Missouri project.⁴⁰ In 1992, for example, Beryl Blaustone at CUNY Law School at Queens College had called specifically for “the [mandatory] study of mediation in law school as part of a ‘modern’ lawyering curriculum.”⁴¹ She addressed, specifically, the approach of teaching mediation through

37. *Id.* at 744.

38. The details of the mediation simulation, which has changed very little from its original conception, are covered *infra*, section IV.

39. Coben, *supra* n. 35, at 750.

40. See e.g. Nolan-Haley & Volpe, *supra* n. 7, at 582–585 (describing the use of a simulation about the “Adoption of Allison” as a way of teaching about the ethical aspects of mediation in a mediation class); Leonard L. Riskin, *Mediation in the Law Schools*, 34 J. Leg. Educ. 259 (1984) (advocating for the use of simulations to teach about mediation). For a small sample of materials from this period about the use of simulations in ADR education, about which many articles beyond the scope of this article have been written, see, for example, Sander, *supra* n. 21, at 230 (noting, as part of a discussion of different methods of teaching about ADR, “The basic theoretical material can be combined with some simple simulations that serve to give the student a real ‘feel’ of the characteristics of different processes”), and Gerald R. Williams, *Using Simulation Exercises for Negotiation and Other Dispute Resolution Courses*, 34 J. Leg. Educ. 307, *passim* (1984) (providing suggestions “for the content, design, and sequence of simulation problems”). For an article about an alternative approach, see Baruch Bush, *supra* n. 21, at 47 (noting, in an article about the use of observations to teach about ADR, that “while simulation may be a very good way of concretizing understanding of ADR processes, it is not the only way”).

41. Beryl Blaustone, *Training The Modern Lawyer: Incorporating the Study of Mediation into Required Law School Courses*, 21 Sw. U. L. Rev. 1317, 1317 (1992).

incorporation of education and training about mediation into an upper-level required course in the law school curriculum.⁴² In her view, such training would instill “critical thinking skills about process and roles”⁴³ and teach the law student to be a “capable problem solver and advisor.”⁴⁴ A fundamental part of the training, as presented at CUNY, was student participation in a mediation simulation.⁴⁵

The Hamline approach to the LRW simulation took the general idea of a mediation simulation and tailored it to the goals of the Missouri project and to a powerful vision of the lawyer as problem-solver. While Professor Blaustone expressed some hesitation about whether “the critical lawyering agenda associated with this material [a mediation simulation] is too advanced for beginning first-year students,”⁴⁶ Hamline (and the Missouri project as a whole)⁴⁷ embraced the idea that such concepts should be introduced as early as possible in law school, before views of the lawyer’s role become fixed.⁴⁸ Introducing them as part of the LRW curriculum, in particular, familiarized students with the concepts

42. *Id.* at 1318. Blaustone’s article described the use of a mediation learning unit incorporated into a larger course, “Lawyering and the Public Interest,” offered at CUNY. *Id.* The course also covered “evidence, an introduction to trial practice skills, case planning, and related issues of professional responsibility in trial advocacy settings.” *Id.* at 1319. While the learning unit constituted a larger portion within the curriculum (five or six “regular” classes and four exercise sessions), *id.* at 1334, than does Hamline’s mediation simulation within the LRW curriculum, the article promotes the notion that incorporating a unit on mediation into a larger curriculum can be an effective way to get students to think about mediation and to gain “a critical lawyering perspective,” *id.* at 1319, on other topics they are learning about in law school.

43. *Id.*

44. *Id.* at 1317–1318; *see also id.* at 1325–1329 (describing ten learning objectives achieved through the use of the mediation simulation).

45. Professor Blaustone’s article devotes a substantial portion of its coverage, both in the article and through materials included in an appendix, to an explanation of the *Smith v. Jones* hypothetical, which is the basis of one of the simulations used in her teaching.

46. Blaustone, *supra* n. 41, at 1319–1320.

47. *See Riskin & Westbrook, supra* n. 2, at 510 (noting the faculty committee designing Missouri project “readily agreed that the first-year curriculum is the best place to emphasize dispute resolution. The professionalization process is strongest then, and the students most impressionable.”). For additional information about the Missouri project, *see Riskin, supra* n. 27; Ronald M. Pipkin, *Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri-Columbia*, 50 Fla. L. Rev. 609 (1998); Leonard L. Riskin, *A Response to Professor Pipkin*, 50 Fla. L. Rev. 757 (1998).

48. Coben, *supra* n. 35, at 737 (“We are faced with the monumental task of encouraging critical examination by first year students of . . . foundational assumptions of professional identity.”).

at an appropriately early stage.⁴⁹ Furthermore, unlike many simulation lesson plans based on observation of a mediation with a focus on the mediator's role, the Hamline approach brought students directly into the mediation and focused on various roles in the simulation, including the lawyer's role. Finally, rather than simply watching a demonstration mediation following a general lesson about mediation, the Hamline students were directly part of a mediation based on a scenario with which they were thoroughly familiar.⁵⁰ As expressed by Professor Coben, the goal was "to 'bust' the students out of the 'narrow' legal frame they had been using to date in the dispute"⁵¹ and to design an exercise "uniquely tailored to the first-year experience and to the task of being a great lawyer."⁵²

As of 1996, therefore, when Hamline first started incorporating a mediation simulation into LRW classes, there were already many indications in the law school community that such an approach made sense because it would broaden students' exposure to the range of dispute-resolution options available to practicing attorneys and expand students' understanding of the career parameters that awaited them.

49. Hamline was not the only school involved in the Missouri project to incorporate a mediation simulation into a required first-year LRW course; the University of Washington also tried its own take on this approach. See Kate O'Neill, *Adding an Alternative Dispute Resolution (ADR) Perspective to a Traditional Legal Writing Course*, 50 Fla. L. Rev. 709 (1998). Professor O'Neill at Washington reported that the Washington experience was successful. See *id.* at 717 n. 13 (citing the more detailed description of the case analysis work found in Kate O'Neill, *Using an "ADR" Perspective to Teach Introductory Case Analysis in a Legal Writing Class*, in Leonard L. Riskin et al., *Instructor's Manual for Dispute Resolution and Lawyers* 258 (2d abridged ed., West 1998)). Her program's efforts had included doing case analysis "from an ADR perspective," *id.* at 714, observing a simulation mediation, participating in a negotiation, and "directing research and writing assignments to legal issues about ADR," *Id.* at 717. Professor O'Neill reported positive results from the case analysis work and writing assignments, and, strikingly, noted in particular that the mediation simulation "[was] very successful." *Id.* "[T]he first-year students [got] a vivid example of how many 'interests' can emerge during the mediation that are as, or more, central to the parties' concerns than the legal claims that the first-year students analyzed in an earlier memo." *Id.*

50. These observations are based on Professor Coben's explanation of conscious decisions that were made at the time of the introduction of the simulation mediation into the curriculum. See Email from James R. Coben, Prof., Hamline U. Sch. of L., to Mary B. Trevor, Assoc. Prof., Hamline U. Sch. of L., *Comments on History of Mediation Simulation Exercise at Hamline* (Aug. 29, 2011) (copy on file with the Authors).

51. *Id.*

52. *Id.*

II. EDUCATIONAL UNDERPINNINGS FOR INCORPORATING A MEDIATION SIMULATION INTO THE LAW SCHOOL CURRICULUM

In addition to the practical outcomes addressed in the preceding section, current legal educational theory and commentary also support the inclusion of ADR simulations in the law school curriculum. We believe that the mediation simulation exercise has become an important and successful part of our curriculum in part because it responds directly to the needs identified in this broad range of educational literature. In particular, it results in the incorporation of additional practical skills training into the first-year curriculum; it lays a foundation for the incremental and developmental assessments expected from schools that employ learning outcomes assessment practices; and it employs a pedagogical technique—simulation—recognized as a valuable teaching tool, particularly for adult learners.

A. Critiques of Legal Education

The mediation simulation is an important addition to the first-year curriculum because it incorporates needed practical skills training. In recent years, three influential reports on legal education have advocated for incorporating more practical skills training, like that involved in the mediation exercise, into legal education. The first of these, the 1992 *MacCrate Report*,⁵³ was a watershed moment in legal education. The report criticized legal education for providing theory-oriented rather than practice-oriented instruction and called for significant reforms. It specifically recommended that law schools place greater emphasis on skills instruction, including clinics, externships, and simulations. Included among the ten “fundamental skills” identified in the report were Alternative Dispute Resolution procedures.⁵⁴

53. ABA Sec. Leg. Educ. & Admis. to B., *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (ABA 1992) [hereinafter *MacCrate Report*].

54. *Id.* at 135–141. According to a 1998 comprehensive bibliography of literature related to the *MacCrate Report*, out of twenty-three articles related to “MacCrate skill” number eight, “litigation and alternative dispute resolution procedures,” only four related to teaching ADR procedures. See Arturo Lopez Torres, *MacCrate Goes to Law School: An Annotated Bibliography of Methods for Teaching Lawyering Skills in the Classroom*, 77 *Neb. L. Rev.* 132, 181–188 (1998). While more articles on ADR processes have been added

The *MacCrate Report* also recommended that law students be afforded the opportunity to practice these skills with feedback and be required to reflect on their performance as part of the learning process.⁵⁵ The report identified simulations as one tool available for teaching these skills.⁵⁶

Best Practices for Legal Education, published by the Clinical Legal Education Association fifteen years later, in 2007, essentially reiterated the message of the *MacCrate Report*.⁵⁷ *Best Practices* argued that to become effective practicing lawyers, students must have opportunities during law school to engage in legal problem-solving activities, either in hypothetical situations or real legal contexts.⁵⁸ The *MacCrate Report* set out principles law schools should apply to achieve excellence in legal education. Several of these principles support the inclusion of practice simulations throughout the curriculum. Specifically, the curriculum should

- Integrate[] the teaching of theory, doctrine, and practice;⁵⁹
- use multiple methods of instruction and reduce reliance on the Socratic dialogue and case method;⁶⁰
- employ context-based education throughout the program of instruction;⁶¹
- use context-based instruction to teach theory, doctrine, and analytical skills;⁶² and
- use context-based instruction to teach how to resolve human problems and to cultivate “practical wisdom.”⁶³

Regarding instruction during the first year of law school, *Best Practices* stated that “[s]imulations should be incorporated into every course to strengthen students’ understanding of legal concepts and to give them opportunities to assume professional

to the literature since 1998, this gap demonstrated the greater emphasis on litigation skills and the need for further exploration of ADR skills.

55. *MacCrate Report*, *supra* n. 53, at 242–243.

56. *Id.* at 243.

57. Roy Stuckey et al., *Best Practices for Legal Education: A Vision and a Road Map* (Clin. Leg. Educ. Assn. 2007) [hereinafter *Best Practices*].

58. *Id.* at 132–157.

59. *Id.* at 97.

60. *Id.* at 132.

61. *Id.* at 141.

62. *Id.* at 146.

63. *Id.* at 149.

roles.”⁶⁴ While students learn best when they are given multiple opportunities to practice and receive feedback, and cannot be expected to achieve proficiency through “first-level” or one-time-only simulation exposure, the *Best Practices* authors recognized that even basic exposure through short simulations at least raises student awareness of the skills employed in the lawyering process. This increased awareness accomplishes the two-fold objective of affording skills-learning the same importance as other law school subjects and encouraging students to seek out specific advanced skills courses later in their education.⁶⁵

The third substantial legal education critique, the *Carnegie Report*⁶⁶ (also published in 2007), referred frequently to *Best Practices*. Like the earlier two reports, the *Carnegie Report* discussed the gap between theory and practice in legal education, and argued that law schools should strive to provide a more integrated legal education that will bridge that gap.⁶⁷ This Report identified clinical and practical legal training as “weakly developed” in comparison to the “signature pedagogy” of law schools, the case dialogue method.⁶⁸ Further, this weakness in practical training is in “striking” contrast with training in other professions, such as medicine and architecture.⁶⁹

The *Carnegie Report* offered a thorough critique of the case-dialogue method. The authors recognized that while this method effectively teaches some aspects of lawyering—specifically case analysis skills—legal education in general would be greatly improved if the method were supplemented more regularly with other pedagogies, such as simulation experiences.⁷⁰ Alternative pedagogies such as simulations provide the context students need to understand the implications of the legal analysis they are learning. They also move students closer to becoming “experts” who can perform the tasks of practicing attorneys.⁷¹

64. *Id.* at 277.

65. *Id.* at 182 (quoting Jay M. Feinman, *Simulations: An Introduction*, 45 J. Leg. Educ. 469, 470 (1995)).

66. William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007) [hereinafter *Carnegie Report*].

67. *Id.* at 12–13.

68. *Id.* at 23–24.

69. *Id.* at 24.

70. *Id.* at 58–82.

71. *Id.* at 58–59, 82.

LRW classes warranted special recognition in the *Carnegie Report* as a place where students learn through alternative pedagogies and are able to integrate the conceptual and the practical.⁷² Specifically, “the best” LRW classes observed by the report authors

focused on learning tasks that are typical of legal work
By learning to analyze facts and construct arguments in use, students were also being taught how to strategize as a lawyer would. They were beginning to cross the bridge from legal theory to professional practice.⁷³

Like the three reports discussed above, and, in fact, drawing heavily on those reports, the curricular change literature generally takes the position that the case-dialogue method of pedagogy does not sufficiently prepare law students to become practicing lawyers.⁷⁴ While students learn basic case analysis skills through this method, they are usually not explicitly taught how to integrate those skills into a larger set of lawyering skills, in particular those identified as fundamental in the *MacCrate Report*.⁷⁵ Further, while reading and analyzing cases, the focus of most law school classes, are important lawyering skills, they represent only a small portion of what lawyers actually do.⁷⁶ Consequently, these commentators advocate for teaching legal skills as they are used in their real-world context, not merely as abstract ideas, and for integrating theoretical analysis and practical skills.⁷⁷

72. *Id.* at 99, 104–105.

73. *Id.* at 105. In fact, the mediation simulation exercise used by the Authors of this Article was given special recognition by the *Carnegie Report* authors as an example of establishing a connection between theory and practice in legal education. *Id.*

74. See e.g. Kara Abramson, “Art for a Better Life”: A New Image of American Legal Education, 2006 BYU Educ. & L.J. 227, 227–229; Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 34 (1992); Larry O. Natt Gantt, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 Campbell L. Rev. 413, 419–420 (2007); Nancy B. Rapoport, *Is “Thinking Like a Lawyer” Really What We Want to Teach?* 1 J. ALWD 91, 105 (2002) (“[T]raditional legal education runs the risk of becoming irrelevant to the practice of law.”); Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. Rev. 121, 129–130 (1994); Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake’s Ladder in the Context of Amy’s Web*, 38 J. Leg. Educ. 243 (1988).

75. See Gantt, *supra* n. 74, at 421–423; Rapoport, *supra* n. 74, at 91–94; Spiegelman, *supra* n. 74, at 251.

76. Rapoport, *supra* n. 74, at 103–104.

77. See e.g. *id.* at 104–105; Spiegelman, *supra* n. 74, at 243.

B. Learning Outcomes Assessment

The mediation simulation exercise also establishes a base for incremental and developmental assessments expected from schools that employ learning outcomes assessment practices and helps achieve goals established by learning outcomes assessment theory. Over the past two decades, to improve student learning and educational effectiveness, law schools have joined other higher educational institutions in implementing, or at least considering, learning outcomes assessment practices.⁷⁸ In a learning outcomes assessment program, an institution identifies its mission, plans its curriculum to achieve that mission, and then develops assessment tools to measure its success or failure in meeting the student and institutional outcomes⁷⁹ established by the mission statement.⁸⁰ Measurement occurs both at the student level (did the students in this course acquire the knowledge, skills, and values the course intended to convey?) and at the institutional level (does the overall curriculum educate students in a way that achieves the goals identified by the mission?).⁸¹

Law schools have been heavily criticized for lacking coherent educational missions and for having no means of assessing whether they accomplish what they ostensibly intend to accomplish.⁸² More particularly, the prevailing “case method” of instruction in law schools, at least standing alone, is criticized as ineffective in training law students to become practicing lawyers.⁸³ Thus, although most law schools say they intend to train students to become practicing lawyers, many fall short of that goal, leaving students to learn various fundamental lawyering skills on the job or elsewhere. Further, many make no effort to

78. Gregory S. Munro, *Outcomes Assessment for Law Schools* 3 (Inst. for L. Sch. Teaching 2000).

79. Student outcomes are defined as “the abilities, knowledge base, skills, perspective, and personal attributes” the school wants students to acquire by graduation. *Id.* at 17. Institutional outcomes are defined as “those goals and objectives which a law school has set for itself in serving the people it has chosen to serve.” *Id.* at 18.

80. *Id.*

81. An effective assessment program implements, among others, principles that “1) [s]tudent learning is a primary purpose of an educational institution; 2) [e]ducation goes beyond knowing to being able to do what one knows; 3) [l]earning must be active and collaborative; 4) [a]ssessment is integral to learning.” *Id.* at 67.

82. *See id.* at 57–59.

83. *See supra* n. 74 and accompanying text.

assess their success or failure in training lawyers.⁸⁴ In theory, learning outcomes assessment programs have the potential to improve legal education by requiring law schools, first, to identify the knowledge, skills, and values students need to practice law, and, second, to assess whether students actually acquire them during law school.

At both the university level and the law school level, Hamline University has implemented a learning outcomes assessment plan. The law school's "Learning Outcomes for Lawyer Achievement" (LOLA) include the goal that students will "learn, practice, and apply the skills and methods that are essential for effective lawyering."⁸⁵ Six specific outcomes follow this goal, including "graduates should be able to . . . advocate, collaborate, and problem-solve effectively in formal and informal dispute-resolution processes."⁸⁶

When first implemented in 1996, the stated learning outcomes of the mediation simulation were specifically declared to be

- 1) [t]o teach first year students that fully understanding a case requires information and analysis beyond a narrow legal formulation . . . [;]
- 2) [t]o link the question of party interests to an exploration of what dispute resolution process options might be appropriate to the case[; and]
- 3) [t]o introduce the process of mediation.⁸⁷

Thus, at the institutional outcome level, because it addresses these stated outcomes, the mediation simulation provides one of several steps that help our graduates achieve the goal of participating effectively in various dispute-resolution processes.

While the simulation does not provide an opportunity for all students to actually practice mediation skills, assessment experts recognize that "[t]he curriculum must provide for formation of student abilities in a manner that is incremental (performed in parts) and developmental (performed in tasks of successively in-

84. Munro, *supra* n. 78, at 56–57.

85. Hamline University School of Law Learning Outcomes for Lawyer Achievement (memorandum on file with Authors).

86. *Id.* These outcomes are consistent with, and are intended to implement, the *MacCrate Report*, *Best Practices*, and *Carnegie Report* recommendations. See *supra* nn. 53, 57, 66.

87. Mary Dunnewold et al., *Bartell v. King: A Legal Writing Exercise and Mediation Simulation*, in Riskin et al., *supra* n. 49 (citation omitted).

creasing complexity).”⁸⁸ Thus, while the simulation introduces first-year students to the basic concept of mediation, and addresses the other important outcomes noted above, the expectation is that second- and third-year classes will provide them with opportunities to develop, practice, and master the skills necessary for effective participation in dispute-resolution processes.⁸⁹ Further, although not all students in a class play active roles in the simulation, the entire class participates in the analysis and evaluation of the exercise. This participation reinforces students’ learning about mediation.⁹⁰

Law schools should have the institutional goal of preparing their graduates to participate effectively in the various kinds of dispute resolution currently available in the legal world. In this context, exposing students to a mediation simulation early in their legal education can help achieve this goal.

C. Adult Learning Theory

Finally, the mediation simulation is a good pedagogical tool for adult learners, and is thus an effective way to convey information about this necessary practical skill. Research on adult learning suggests that active learning pedagogies, including simulations like the mediation exercise, are essential educational tools at the post-secondary stage and in professional education in particular.⁹¹ Generally, students learn more when their participation goes beyond merely listening.⁹² The more students participate in a learning experience, the better their retention.⁹³ In

88. Munro, *supra* n. 78, at 97.

89. At Hamline, students have the opportunity to reinforce their skills by enrolling in one or more of an extensive selection of ADR-related classes and practice experiences, including classes in Arbitration, Mediation, Negotiation, Restorative Justice, Theories of Conflict, ADR and Technology, Arbitration Advocacy, Labor Arbitration, Family Mediation, International Civil Litigation, Negotiating International Business Transactions, and special-topic seminars; study abroad programs in London, Budapest, and Norway; and various clinics and competitions.

90. See generally Munro, *supra* n. 78, at 144–145 (discussing student participation in learning).

91. See e.g. Feinman, *supra* n. 65; Paul S. Ferber, *Adult Learning Theory and Simulations—Designing Simulations to Educate Lawyers*, 9 Clin. L. Rev. 417 (2002–2003); Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. Leg. Educ. 401 (1999); John Sosteng et al., *Learning by Doing: Preparing Law Students for the Practice of Law*, 21 Wm. Mitchell L. Rev. 111 (1995–1996).

92. Hess, *supra* n. 91, at 401.

93. See Sosteng, *supra* n. 91, at 399–400.

simulations, where students actively participate, learning occurs in a context that gives concrete meaning to the material being taught. This participation enables the learners to better “encode” learning, which allows for better integration into the learner’s existing body of knowledge.⁹⁴

Further, simulations combined with appropriate follow-up implement the learning process that cognitive theorists have identified as most effective for adult learners. According to cognitive theorists, adult experiential learning occurs in a four-stage cycle: 1) the learner participates in a concrete experience in which he sees, hears, feels, or reads something; 2) the learner reflects on the experience and makes observations about the experience; 3) the learner generalizes from the experience and stores ideas that will apply to future experiences; and 4) the learner actively applies those ideas in new situations, where their validity is tested.⁹⁵ Accordingly, a simulation followed by meaningful discussion and reflection, formulation of conclusions, and, later, concrete application can provide a valuable opportunity to learn professional skills.⁹⁶

In summary, critiques of theory-oriented law school curricula, developments in pedagogical theory, and implementation of learning outcome assessment strategies have all played a role in the dialogue about legal education in the past several decades. Incorporating a mediation simulation in the first-year curriculum responds to this dialogue, enhancing the educational experience for law students.

III. WHY USE THE LRW COURSE TO INTRODUCE ADR?

The sources just discussed establish that incorporating ADR skills training into the law school curriculum, particularly in the form of simulation learning experiences and as part of a general curriculum reform, is a good idea. And commentators have suggested that an effective way to focus on important ADR skills is

94. *Id.* at 396; Ferber, *supra* n. 91, at 433.

95. Ferber, *supra* n. 91, at 429.

96. While the case-dialogue method can foster active learning through questioning, discussion, note-taking, etc., see Hess, *supra* n. 91, at 401, 406–407, most writers in this area agree that simulations are “powerful methods” for learning “performance skills.” *Id.* at 410.

through using a mediation simulation. But why do this in a LRW class?

Our reasons for continuing to incorporate a simulated mediation into the LRW course are practical as well as theoretical. In most law schools, LRW is still the only first-year course organized around client cases or problems.⁹⁷ For the most part, other first-year courses are still taught using the case-dialogue method.⁹⁸ Thus, the LRW class offers a unique opportunity within the first-year curriculum to shift students' perspectives from appellate litigation, which is comparatively rare in practice, to ADR using a common fact pattern.

In the typical first-year LRW curriculum, students write a predictive research memo at the end of fall semester.⁹⁹ Through researching the problem and drawing conclusions about the likelihood of success in litigation, they have become intimately familiar with both the facts and law. Introducing an ADR exercise at this point provides an excellent opportunity to view the client's problem from a different perspective and to compare the litigation perspective with the ADR perspective. Thus, the answer to "why LRW class?" is, simply, it makes sense.

97. See generally the comparison of the approaches of legal writing courses and doctrinal courses in law school in the Professor Romantz's article, *supra* n. 2. Contrasting the approach of doctrinal classes with legal writing classes, Romantz noted,

Legal writing courses . . . instruct [] the student to identify, analyze, and resolve all the issues that came with the client. This client-centered focus on process over doctrine . . . helps students integrate the various first-year courses into one holistic schema that advances the significance of analysis over doctrine. It also introduces the 'human' aspects of lawyering, lost in most case method courses, to first-year students.

Id. at 143–144.

98. See *id.* at 106 (“[T]he legal academy continues to proudly and almost exclusively endorse some semblance of the case method,” and “traditional doctrinal courses, including Contracts, Torts, Property, and Criminal Procedure, enjoy contemporary relevance because of their Langdellian pedigree.”).

99. See *Sourcebook*, *supra* n. 2, at 17 (“[A]ll LRW courses require students to engage in objective analysis in preparation for the predictive office memorandum, written to a work supervisor. Here, students must figure out an analysis of the law that objectively evaluates the relevant authority and articulates a reasonable interpretation of that area of law. Students must then apply that interpretation without bias to the client's situation and predict the definite or possible outcomes before a future court.”). All 188 schools responding to the 2011 ALWD/LWI Survey reported requiring office memoranda to be written as part of their required LRW curriculum. ALWD & Leg. Writing Inst., *2011 Survey Results*, at question 20 (available at [http://2011_LWI_ALWD_Survey\[1\].pdf](http://2011_LWI_ALWD_Survey[1].pdf)).

Further, LRW classes tend more and more to be skills classes that go beyond basic research and writing.¹⁰⁰ It is increasingly common for LRW classes to incorporate interviewing, negotiating, and client counseling exercises.¹⁰¹ In this context, where students are receiving instruction about the many skills involved in addressing clients' problems, an ADR exercise is a natural next step.

There are some drawbacks to incorporating an ADR exercise into a LRW class. First, the LRW course tends to be a "dumping ground" for all the law school odds and ends that do not fit anywhere else. For instance, at the authors' institution, it is not uncommon for visitors from career services, law school clinics, and the local lawyers' support network program, among others, to ask LRW Instructors to give them "a few minutes" to talk about their programs. While overall these are worthy requests and are usually granted, including non-LRW topics in LRW classes risks sending the message that the "doctrinal" classes are too important to interrupt, but it is okay to take time away from LRW. Including ADR also risks devaluing the topic being introduced, for example, ADR, because students can draw the conclusion that ADR is apparently not worthy of class time except in the LRW class.¹⁰²

Second, giving up chunks of LRW class time to instruction in non-writing skills means less time for research and writing in-

100. See *Sourcebook*, *supra* n. 2, at 13–45 (covering content in first-year legal writing courses including oral advocacy, reports, and presentations, *id.* at 35–40, lawyering skills instruction (interviewing, counseling, negotiation, and ADR) and "norms of the profession" such as ethics, professionalism, and time management). Also, as noted *supra* note 72 and accompanying text, the *Carnegie Report* identified LRW classes as a place where students learn through alternative pedagogies and integrate theory and practice.

101. See *Sourcebook*, *supra* n. 2, at 33–35.

102. Interestingly, in response to reading these concerns, the student Fellow who worked on this Article with the Authors, Stef Hedlund, had the following reaction:

Since students seemed so impressed by the simulation and some stated that it was 'one of the best things we did all semester,' it is unlikely that students would see the simulation as . . . dumping ground [material]. Personally, I thought it fit very well into the class and didn't realize that it was not a normal part of all LRW curriculums until now. It didn't appear out of place at all, and almost seemed like our treat for finishing our memos. . . . [I]t is not detracting from research and writing instruction and practice because it is done on the day (or near the day) when students hand in their biggest assignment of the semester, which would typically not be a great day for teaching new material, [but] with this simulation students are prepared and participating.

Email from Stef Hedlund, Student & Bakken Fellow, Hamline U. Sch. of L., to Mary B. Trevor, Assoc. Prof. Hamline U. Sch. of L. & Mary Dunnewold, LRW Instr., Hamline U. Sch. of L. (Aug. 15, 2011) (copy on file with the Authors).

struction.¹⁰³ Introducing more and more skills that are only generally related to research and writing risks overloading the course and diluting the learning opportunities for the core skills: research and writing.¹⁰⁴ Most legal educators and practitioners agree that budding lawyers need more, not less, research and writing instruction and practice.¹⁰⁵ Thus, introducing an ADR exercise into the LRW curriculum could arguably be counterproductive.

Still, balancing these concerns against the advantage of expanding students' understanding of their future roles as attorneys, we think the exercise makes sense.¹⁰⁶ Of course, ADR exercises can also be introduced into first-year courses other than LRW,¹⁰⁷ or otherwise introduced into the first-year curriculum.¹⁰⁸

103. *Sourcebook*, *supra* n. 2, at 34 (warning that teaching skills such as ADR can be "quite time-consuming, especially if students' performance is to be evaluated for a grade, rather than simply required as an introductory exercise"). The mediation simulation at Hamline was designed, and has been implemented, as an ungraded, introductory exercise.

104. See Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? or More?* 100 *Dick. L. Rev.* 245, 287 (1996).

105. See e.g. Abramson, *supra* n. 74, at 283–284; Edwards, *supra* n. 74, at 63; Bryan A. Garner, *Three Years Better Spent*, *N.Y. Times* (July 25, 2011) (available at <http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/three-years-in-law-school-spent-better>).

106. As suggested by Silecchia, *supra* n. 104, at 288–289, skills-related assignments that are incorporated into LRW classes should be logically related to the LRW assignments themselves. Here, using the same fact scenario for the office memo and the accompanying mediation simulation ties the two assignments directly to each other and allows for a variety of informative comparisons. See also Debra Harris & Susan D. Susman, *Toward a More Perfect Union: Using Lawyering Pedagogy to Enhance Legal Writing Courses*, 49 *J. Leg. Educ.* 185, 185–186 (1999). In discussing the incorporation of new lawyering skills—client interviewing and counseling—into the legal writing course at Brooklyn Law School, the authors noted,

[I]ncorporating lawyering methodologies into a legal research and writing course can enhance the writing program's effectiveness by improving student understanding of a document's rhetorical context (audience and purpose) and helping students grasp the important relationship between law and facts. A byproduct of this approach is that students are exposed to a variety of nonwriting lawyering skills early in their law school career.

Id.

107. See the discussion, *supra*, of the Missouri Project, notes 26–39 and accompanying text.

108. At Hamline, for example, as the result of recent curricular change, a new course—Practice, Problem-Solving, and Professionalism (known as P3), first taught in the Fall of 2010—has been added into the first-year curriculum to introduce students to a variety of lawyering skills early on in their legal studies. (For additional information about the course, see *Hamline University School of Law Blogs*, <http://law.hamline.edu/blogDetails.aspx?id=214784305&blogid=102> (Dean's Blog describing the course) and [http://law.hamline.edu/Content.aspx?id=404&terms=Practice%2c%20Problem-Solving%2c%20and%](http://law.hamline.edu/Content.aspx?id=404&terms=Practice%2c%20Problem-Solving%2c%20and%20)

But as a starting point, an ADR simulation fits logically into the syllabus of a standard LRW course.

IV. THE EXERCISE

By bringing practical ADR skills-modeling into the classroom through a simulation experience and allowing students the opportunity to then reflect on the experience, the mediation exercise responds to the calls for curricular change in legal education. As discussed below, the execution of the exercise also follows the four-stage cycle of learning posited by adult learning theory. The students first read information about the mediation and participate in the experience. The students next reflect on the experience in class by discussing the simulation they observed and the pros and cons of mediation. After the classroom portion of the experience, students can then determine whether they wish to pursue more information on ADR through mediation, negotiation, or arbitration classes. Finally, students who are interested in further education can participate in the ADR clinic, an ADR practicum, or another real-world experience.¹⁰⁹

As noted above, the simulation exercise came to Hamline's LRW Department in the mid-1990s—the fall of 1996, more precisely. The original conception of the assignment, which included role-play templates and the provision of background information for the professional mediators, has changed little over the years.¹¹⁰ The logistics and timing of the exercise have changed only minimally as well. Consequently, the following description applies not only to our current use of the exercise but also to the exercise as we have done it over time.¹¹¹

²⁰Professionalism (formal course description)). A mediation simulation would fit well into any similar first-year lawyering, professionalism, or skills course.

¹⁰⁹. See discussion of ADR coursework opportunities at Hamline, *supra* note 89.

¹¹⁰. The original version of the exercise was designed by Project Director James Coben and Legal Writing department faculty members Mary Dunnewold and Jacqueline Vlietstra. The exercise originally included an assigned reading in Leonard L. Riskin et al., *Dispute Resolution and Lawyers* (2d abridged ed., West 1998). See Dunnewold et al., *supra* n. 87, at 296. Since that time, we have developed our own background memorandum for the students to read, discussed below, which avoids the need to use outside text material and enables us to tailor the reading more closely to the situation in Minnesota.

¹¹¹. The original version of this exercise is described in more detail, including the original background and role-play instruction templates and the materials for the underlying LRW research memorandum assignment used that fall, in the Instructor's Manual for *Dispute Resolution and Lawyers*. *Id.* at 295–318.

A. The Setting

We introduce the exercise toward the end of the fall semester. The students have had a chance to write two objective office memoranda, and they have started to get a feel for the considerations that are relevant when advising a client about litigating a dispute. In particular, they are starting to grasp concepts such as developing a rule of law for a given issue, taking and asserting positions based upon that rule of law, and envisioning client outcomes based on the remedies available through the court system.¹¹²

We tie the exercise to an objective office memo assignment that the students typically receive in early October and submit in mid-November. The week that the students submit their memorandum, we conduct the mediation simulations during a specially scheduled two-hour block, so the students can observe a direct contrast between the way they have just been thinking and the way they need to shift their thinking when considering a mediated resolution.

Of course, we have to think about fact scenarios and issues that will work well for mediation when we design the accompanying research memo assignment. Typically, at this relatively early point in our law students' careers, we use assignments based on the legal concepts from the first-year curriculum; such legal concepts also tend to work well for a mediation scenario that students can follow. Some first-year topics do not lend themselves to a simulation: criminal law (absent a foray into plea bargaining), civil procedure, and constitutional law come to mind. But in our experience, tort scenarios, property scenarios, and contract scenarios work well. Other factual aspects that often help this exercise work more effectively include aspects such as an existing relationship between the parties and/or a desire to develop or continue a relationship; a situation in which an apology could realis-

112. Some commentators have noticed that students become so rapidly "indoctrinated" with the rights-based view of our legal system that it can be difficult to convince students to consider an interest-based approach even when it is introduced during the first year. *See e.g.* Coben, *supra* n. 35, at 737 (observing that "the traditional first year curriculum not only benignly imprints what Riskin refers to as the standard philosophical map of lawyering, but actually accomplishes something more maleficent. First year students become wrapped in a doctrinal straitjacket from which they (and we) need Houdini-like skills to escape."). But as a practical matter, it would be difficult to conduct the exercise at an earlier point in the law school experience.

tically help a party come to terms with a harm; a situation in which one or both parties wish to limit publicity; and a situation where one or both parties are concerned about litigation costs.¹¹³

During the week before the simulation, the students receive a background memorandum explaining ADR and the different methods of ADR, with a special focus on mediation. On the day of the simulation, during the first hour, a professional mediator conducts the mediation simulation, and student volunteers role-play the parties and their attorneys. During the second hour, the professional mediator leads a session to discuss mediation, the dynamics and goals of the mediation the students have just seen, and how resolution through mediation is different from the approach they have just analyzed in their memo: resolution through litigation. This discussion is guided by questions provided to the mediators, which are included in the Appendix to this Article. At the end of the session, students are also generally informed about the range of courses available to them in the curriculum if they wish to pursue ADR during their law school education.

B. Logistics of Planning for the Exercise

The planning for the simulations starts early in the semester. We determine the week that will fit with the due date for the research memo assignment, and we look at scheduling the two-hour blocks for the classes. Typically, the scheduling work is done by a fellow or administrator from Hamline's Dispute Resolution Institute, although such work could also be done by an administrator or assistant for the law school as well. This same person also pulls together the written materials that will be used for the mediation simulation, including the background memorandum on mediation that goes to all students, and the templates to be filled in and dis-

113. The fact that these factual aspects for mediation scenarios tend to work well is not surprising in light of commonly recognized advantages of mediation over litigation for various types of disputes. See e.g. Carrie J. Menkel-Meadow et al., *Dispute Resolution: Beyond the Adversarial Model* 266–271 (Aspen Publishers 2005) (defining mediation and discussing advantages of mediation, including cost savings over litigation, building and repairing relationships, giving parties a voice and allowing for apologies); Alfini et al., *supra* n. 8, at 419–420 (noting that preserving confidentiality is generally part of mediator standards of conduct in various United States jurisdictions and for various professional organizations in the United States).

tributed to the role-players (mediator, clients, and attorneys) for the simulation.¹¹⁴

Our Dispute Resolution Institute prepares and, as necessary, updates the background memorandum, which discusses ADR generally and mediation specifically. Minnesota Rule 114 has not changed significantly since its adoption, and the generally available ADR options otherwise have not changed significantly, and the same is likely to be true for many locations. So the memorandum, once developed for a particular program and state, is not likely to require extensive change. Our Dispute Resolution Institute also prepares the role-play instructions, with the fellow or administrator using information provided by the LRW faculty to fill in templates that were developed a number of years ago for this purpose.

The professional mediators who conduct the simulations usually are faculty members at Hamline who are involved with the Dispute Resolution Institute or mediators at the local Mediation Center.¹¹⁵ A school without such ready resources, however, should still be able to find mediators by working with the local bar to identify a local chapter of the ABA Section of Dispute Resolution or the Association for Conflict Resolution (ACR), or possibly to work closely with their alumni relations office to identify alumni who are qualified/practicing mediators.¹¹⁶ The fellow or administrator who schedules the class blocks typically contacts the potential mediators and sets them up for blocks that work with their schedule.

To help the mediators in their preparation, the LRW faculty provides each mediator with a copy of the office memorandum assignment the students have worked with. This enables the me-

114. See the Appendix to this Article for the templates. We have not included the memorandum because various aspects are specific to Minnesota and would need a fair amount of adapting for use in another state. The templates, on the other hand, are not jurisdiction-specific, and are filled in based on material from the associated research memo writing assignment. Readers interested in acquiring an electronic copy of the memorandum or of any materials included in the Appendix may contact the Authors.

115. The Mediation Center is affiliated with the Dispute Resolution Institute. For more information about the affiliation and the Mediation Center, go to http://law.hamline.edu/mediation_center/index.html and MediationCenterMN.org.

116. These suggestions come from Jessica Kuchta-Miller, the current Projects Administrator for the Dispute Resolution Institute who helps us set up the mediation simulations. Email from Jessica Kuchta-Miller, Projects Adminstr. Dispute Res. Inst., Hamline U. Sch. of L., to Mary B. Trevor, Assoc. Prof., Hamline U. Sch. of L., *Suggestions for Mediation Simulations* (Aug. 17, 2011) (on file with the Authors).

diator not only to learn the fact scenario, but also to see what legal claim(s) the students have been focusing on in their approach to the dispute so far. The LRW faculty also recruit student volunteers to act as role players for the mediation—a client and an attorney for each side in the dispute—by announcing in class the roles needed a few weeks in advance and generally encouraging participation. About a week before the simulation, the role-players on each side receive their confidential set of instructions. Client and attorney are encouraged to meet before the simulation to discuss their approach.

V. *OBSERVATIONS AND CONCLUSIONS*

Our informal assessment of incorporating the mediation simulation into the LRW course has been positive over the years. Because students respond enthusiastically and participate actively in the class, we have concluded that the exercise has had the “staying power” that justifies using valuable class time to repeat it every year.

Our attempts to formally assess the exercise over the years have varied, however. When we first implemented the mediation exercise in LRW classes at Hamline, we followed up with a general question on the end-of-semester course evaluation asking if students found the exercise worthwhile. The response was generally positive, if non-specific (usually a simple “yes,” with no explanation, despite an invitation to “explain.”) But as we strove to cut down our voluminous course evaluation form, we eliminated that question after a few years, satisfied that the students were learning from the simulation and that we should continue including it in the course.

For many years, then, we did no follow-up evaluation other than gathering informal comments from students. Informally, we concluded that our students considered the mediation simulation class to be time well-spent. Generally, as discussed above, we experienced excellent student participation in the question and answer period following the simulation, our role-playing students were enthusiastic and prepared, and the students seemed engaged—despite the fact that they had just completed their research memorandum assignment, the biggest assignment of the semester.

Recent learning outcomes assessment research, discussed in Part II(D) above, has led us to more formally consider how the exercise fits into the law school curriculum and to evaluate whether it actually accomplishes what we intend to accomplish. Thus, in the fall of 2009, in preparation for this Article and in response to our University's learning outcomes assessment program, we included five questions about the mediation simulation on our course evaluation form.¹¹⁷ Students fill out the course evaluation form during the last class of the fall semester, so we had essentially 100 percent participation, although some students chose not to answer some questions. About 175 students completed evaluation forms. On the form, we asked the following questions:

1. Were you aware of alternative dispute-resolution processes before you were introduced to them in class?
2. If so, did you learn anything you had not known before from the background memorandum or the simulations?
3. Did anything about the mediation surprise you?
4. Now that you've seen a mediation session, are you interested in learning more about ADR processes?
5. Any other comments about the mediation simulation?

The following section synthesizes and summarizes student responses to these questions.¹¹⁸

Questions 1 and 2. Awareness and development of knowledge.

Most students were aware, or by self-reports, "vaguely aware," of ADR processes, although some students were not.¹¹⁹ In

117. Written questionnaires and surveys are recognized as valid ways to "gain information necessary to gauge and improve law school effectiveness." Munro, *supra* n. 78, at 118.

118. We made no attempt to gather data in a systematic, statistically significant way. We believe, however, that the anecdotal information garnered from the evaluation forms is useful in shaping the exercise and making decisions about its use in subsequent semesters.

response to question 2, many students commented that although they were aware of ADR processes, they appreciated the opportunity to see how mediation actually worked in a “hands on” setting. Thus, at a minimum, the exercise has some value in exposing students unaware of ADR to the very idea, and has additional value in demonstrating to all students the practical implementation of a core ADR process: mediation.

Question 3. Surprises about ADR.

Student responses to this question fell into basically three categories. First, students were surprised about the non-adversarial nature of mediation. Many students commented on the fact that the mediation was not about the legal arguments (which they had just spent six weeks developing), but was “relaxed and detached from the legal process.” Further, they were surprised, and sometimes alarmed, that mediation “seemed like therapy instead of a legal meeting,” and, accordingly, emphasized the feelings and needs of the parties rather than cases and rule of law.

Second, students were surprised at the roles played by the various parties to the mediation. Some students perceived that mediators had significant power to influence the parties. Others were surprised that mediators did not dominate the proceedings, but were direct with the parties, and worked in such close quarters, generally at a small conference table. Students also commented on the “minimal” role of lawyers, especially as advocates, and on the fact that parties were free to come up with their own solutions to their problems.

Third, general comments indicated surprise that the simulation was “more interesting than I expected,” that there are actually alternatives to litigation, and that mediation can be expensive. Alternatively, however, some students expressed surprise that the mediation “was boring” and that parties can mediate for a long time and not solve any problems or reach any agreement.

119. It is not surprising that most students who choose to attend Hamline are aware of ADR. Hamline specializes in ADR and is highly ranked in ADR education, which is a potential draw for students deciding which law school to attend. Further, because of the faculty expertise in ADR, ADR concepts are more or less “in the air” at Hamline.

Question 4. Interest in learning more.

Overwhelmingly, students expressed interest in learning more about ADR after experiencing the mediation simulation. Many said they would now be considering taking an ADR course, which they had not been considering before. Some also commented that, having learned about the prevalence of ADR processes, they would seek out opportunities to learn more so they could be prepared to encounter ADR in their practices.

Of the few students who answered “no” to question 4, many commented that they appreciated learning about mediation, but “it’s not for me.” Some remarked that they “like the adversarial litigation process more,” or that they came to law school because they want to pursue a career in adversarial litigation.¹²⁰

Question 5. General comments.

Responses to question 5 also fell into three basic categories: reactions to the experience as a whole, comments on the process or mechanics of the simulation, and feedback about the pedagogy of the experience.

Most students reacted quite positively to the experience as a whole. Comments like “a lot of fun,” “great idea—would like to do more,” and “one of the best things we did all semester” were common. Others described the experience as “helpful,” “insightful,” “eye opening,” and “wonderful.” On the other hand, a few students felt they could have learned the same information more efficiently from a lecture or reading (displaying preference for an alternative, but not universal, learning style¹²¹), or that the simulation was “not really necessary.”

120. These comments reflect, perhaps, some students’ initial lack of understanding, despite the materials distributed in connection with the simulation and the discussion that follows the simulation, that mediation and other ADR processes are an integral part of contemporary law practice. Sometimes students need to be exposed to a concept and its application multiple times before they grasp the lesson we are trying to teach. We hope that exposing our students to this aspect of contemporary law practice at an early stage in their legal education will make it more likely that all students, even those who don’t grasp the idea on their first exposure to the concept, will ultimately have a better understanding of the important role ADR processes play. See the discussion, *supra* notes 89–90 and accompanying text, indicating that assessment experts recognize that learning is both incremental and developmental.

121. M. H. Sam Jacobson, *Learning Styles and Lawyering: Using Learning Theory to Organize Thinking and Writing*, 2 J. ALWD 27, 34–36 (2004) (describing “verbal” and

Regarding mechanics of the simulation, some students expressed frustration that there was insufficient time to bring the mediation they viewed to completion. A few thought the experience (a two-hour class) was too long.¹²² Students from one section praised their particular mediator, while students from a different section suggested the mediator was biased.

Finally, a few students made notable observations about the place of the exercise in the first-year curriculum. Some were grateful to have been exposed to mediation in their first year because the information helped them think about courses they would take during their second and third years. One student said “it made me feel like I shouldn’t quit law school.” This student explained that she was having trouble with the adversarial focus of what she was learning, and she felt like a whole new world opened up to her with ADR.¹²³

Overall, the feedback on the mediation simulation was positive, and it supported the conclusion that students learned what we intended them to learn from the experience.¹²⁴ Even if the experience did not persuade some students to further explore me-

“aural” learners who learn best from reading text or listening to lectures).

122. Most of these comments came from the same LRW section, suggesting that perhaps something did not go well in that particular section.

123. As noted by Menkel-Meadow at the beginning of her article about working ADR into law school, “Many law students come to law school to learn how to solve problems, do justice and make the world a better place. They are often surprised at just how quickly they learn to maximize individual interests, and become adversarial gladiators and zealots for the litigation system.” Menkel-Meadow, *supra* n. 23, at 1995 (footnote omitted). Here at Hamline, James Coben noted a similar phenomenon with some frustration, as he wrote about the challenges of changing law student perceptions of the lawyer’s role, “the traditional first year curriculum not only benignly imprints what Riskin refers to as the standard philosophical map of lawyering, but actually accomplishes something more maleficent. First-year students become wrapped in a doctrinal straitjacket from which they (and we) need Houdini-like skills to escape.” Coben, *supra* n. 35, at 737. Our experience with the mediation simulation is that, for some students at least, the simulation is the first time during law school that they see some hope for their future as lawyers.

124. Interestingly, we also received a few unsolicited comments about our mediation simulation in the fall of 2010 through another course altogether. As discussed *supra* note 108, Hamline first offered the Practice, Problem-Solving, and Professionalism course that fall. The P3 class addresses a number of professional lawyering activities, including mediation. As part of the evaluations for that class, a few students included positive comments about the LRW simulation, including the comments that it was a “productive” experience and that the students “learned a lot about mediation theory and practice.” See Email from Sharon B. Press, Prof., Hamline U. Sch. of L. & Dir., Hamline Sch. of L. Dispute Res. Inst., to Mary B. Trevor, Assoc. Prof., Hamline U. Sch. of L. & Mary Dunnewold, LRW Instr., Hamline U. Sch. of L., *Evaluation Comments about LRW Mediation Simulation* (Aug. 15, 2011) (copy on file with Authors).

diation or other ADR processes, at a minimum, it effectively introduced them to the basic concepts, which they need to understand to be practicing lawyers.

CONCLUSION

The mediation simulation exercise introduces students to the fundamental concepts behind ADR processes. Because at least a basic understanding of these concepts is necessary to the current practice of law, the simulation is a worthwhile use of class time, and LRW class time in particular. Further, the exercise is supported by calls for changes in legal education and by recent educational theory. The exercise helps accomplish the institutional goal of familiarizing students with a range of dispute-resolution processes and at least provides a starting point for students to develop proficiency at actually using ADR processes.

On a more personal note, we believe that many of our students find the mediation simulation to be one of the best experiences of their first semester of law school. The simulation is one of the few times early in their education that students are asked to consider clients as people with problems and with feelings about those problems. Most students find this to be a welcome perspective, particularly at the end of the first semester when they have been focusing almost exclusively on learning how to construct legal rules outside the context of particular human problems. Further, the simulation gets many students excited about doing something “real”—a welcome break from their routine of first-year classes.¹²⁵

125. The student Bakken Fellow who worked on this Article with us, Stef Hedlund, added this personal observation about her experience with the mediation simulation in the fall of 2009:

[P]art of the appeal of the mediation simulation is seeing the “clients” as people and seeing how they are affected on a personal level by the problem at hand. Whether in a mediation or a litigation situation, any lawyer dealing with a client will need to be able to handle the client’s emotional response to the problem, and there is no way reading a casebook will prepare people for that reality. Through the simulation students are able to see or participate in the mediation and are able to see how a potential client might react to a legal problem. This was the only time in my law school career where the client’s desires, needs and feelings were discussed at any length, but I would imagine that a huge part of being a lawyer is being able to deal with a client sitting in your office sobbing about her ex-fiancé wanting the ring back (which was my mediation scenario).

In addition, the overriding focus on reading appellate-level cases in the first semester of law school can give students an unrealistic view of what lawyering is really about. The mediation simulation helps temper that view by adding clients and their individual problems back into the equation. Thus, students start to see themselves as problem-solvers with a range of skills to offer their clients.

As instructors, we also derive particular satisfaction from running the mediation simulation every year. In addition to the broadening of students' perspectives, we also see students bring creativity and energy to the exercise that we don't necessarily see in their other work, exposing a different side of them and enriching the teaching relationship on both sides.¹²⁶ For instance, students struggling with expressing their thoughts in writing may show great creativity in suggesting solutions during mediation. Other students may shine as actors in simulations; they may dress up elaborately to play their roles or be particularly good at portraying or responding to the emotions the "clients" express during the mediation. Some students ask particularly insightful questions in this new context or speak up when they have been "observers" in class for most of the semester.

We have been running the exercise in LRW classes successfully for sixteen years. We believe the exercise has been successful over this long term for several reasons. First, the exercise is consistent with educational theory and calls for change within the legal academy. Second, the exercise is not overly ambitious; it is easy to implement every year once the required templates are in place. Finally, the exercise fits well within the first semester LRW curriculum because, as an exercise, it is a natural and logical next step after the usual objective memo assignment. Thus, we believe that the effort required to set up the simulations, which in our experience diminishes after the first year, is well worth the resulting educational experience provided to our students.

Email from Stef Hedlund, *supra* n. 102.

126. Discussing his use of a video assignment in lieu of a final exam, Greg Munro notes that "I was haunted later by the realization that some people who tested so poorly in blue-book exams demonstrated high competence in this exercise." Munro, *supra* n. 78, at 146.

APPENDIX

The documents included in this appendix and described below are, in brief, the templates used to prepare the role players (students and mediators) for their roles in the mediation simulation; the memorandum distributed to all the mediators before the mediation simulation about conducting the debrief after the simulation; and the cover memorandum for the information packet distributed to all first-year students before the mediation simulation.¹²⁷ If you are interested in receiving electronic versions of any of these materials, please feel free to contact either Mary Trevor (mtrevor@hamline.edu) or Mary Dunnewold (mdunnewold@hamline.edu).

1. Mediation Simulation Information Template—Completed by the Legal Writing Instructors for each of the different research memo scenarios for which a mediation simulation will be conducted, then submitted to the administrator organizing the simulations.
2. Role Play Instructions: Plaintiff and Plaintiff's Attorney—Completed by the administrator, based on the material in the Information Template, and given to the role players on each side of the dispute. The example here is the form used for the plaintiff's side. It explains the phases of the mediation; overviews the interests, options, and bottom line for the plaintiff's side, and only the students who are role-playing the plaintiff or the plaintiff's attorney receive this information. The same form is used for the defendant's side, in the same way, with changes to the title, information provided, and distribution, as appropriate.
3. Role Play Instructions: Mediator—Completed by the administrator, based on the information in the Information Template, to overview both sides of the dispute for the mediator who will facilitate the mediation simulation.

127. Additional guidance about conducting a mediation can be found in James J. Alfini et al., *Mediation Theory and Practice* 107–140 (2d ed., LexisNexis 2006). Chapter 3 of this book provides detailed guidance about each stage of the mediation process.

4. Memorandum to Mediator—Used each year, updated as necessary in light of changes in the law, to provide the mediators facilitating the mediations with the most current relevant information about mediation law, and to provide suggestions for conducting the debrief session after the simulation is completed.
5. Memorandum to Students—Used each year, updated as necessary in light of changes in the law, to provide all first-year students with a background about ADR and mediation. Included here is only the cover memo for the packet the students receive; we are happy to provide the full packet on request, as noted above.

MEDIATION SIMULATION INFORMATION TEMPLATE¹

For Students of _____

Legal Writing Sections and Mediation Simulation Rooms and
Times

General topic(s) and jurisdiction

1. A copy of the legal writing open memo assignment for your section (hard copy of this in DRI mailbox is fine)
2. List of characters involved in the mediation simulation AND the student who has volunteered to play the role (name and box number). NB: If you teach more than one section, please identify the section.
3. List of plaintiff's interests
4. List of defendant's interests
5. List of options plaintiff likely to propose during mediation
6. List of options defendant likely to propose during mediation
7. Plaintiff's bottom line—THINK: some overlap? Is settlement possible?
8. Defendant's bottom line—THINK: some overlap? Is settlement possible?

1. This form should be completed for each class participating in the mediation.

Role Play Instructions: Plaintiff and Plaintiff's Attorney¹

Thank you for volunteering to play a role in the upcoming mediation simulation. Mediation is just one of many alternative dispute-resolution processes. We have chosen to demonstrate it to the legal writing sections because, under state district court rules, more and more civil cases are using mediation than ever before. Mediation is a facilitative dispute-resolution process, defined by Minnesota District Court General Practice Rule 114 as

a forum in which a neutral third party facilitates communication between parties to promote settlement. A mediator may not impose his or her own judgment on the issues for that of the parties.

Thus, a mediator is not a judge and has no duty to “protect” either party’s interests. A key excerpt from a typical Agreement to Mediate states:

The mediator does not represent either party. The mediator has no duty to provide advice or information to a party or to assure that a party has an understanding of the problem and the consequences of his/her actions. The function of the mediator is to promote and facilitate voluntary resolution of the matter and the mediator has no responsibility concerning the fairness or legality of the resolution.

Please have fun playing your role! The following information summarizes how we expect the process to unfold in the fifty minute demonstration. Your specific role play instructions suggest things we want to make sure you say. However, feel free to act as you believe would be appropriate to make the part realistic. When in doubt, just follow the lead of the mediator, and answer his/her questions as you believe makes sense given your role play instructions.

Above all, don’t worry. No one is being graded or evaluated in any way. At the same time, in order to make this work well, please carefully review the role play material in advance. Many thanks again for volunteering.

1. Using this template, create one set of instructions for Plaintiff and Plaintiff's Attorney and one set for Defendant and Defendant's Attorney.

Case Summary:

Please refer to the original assignment distributed by your legal writing professor.

The Players:

Mediator:

Plaintiff:

Plaintiff's Attorney:

Defendant:

Defendant's Attorney:

Context for the Mediation:

Since neither party has deep pockets to litigate and both sides feel vulnerable on the law, the attorneys agreed to try mediation before litigation. The parties have jointly appointed the mediator and agreed to share the cost equally.

Plaintiff's Main Concerns/Interests:

[Include here the concerns and interests detailed on the Mediation Simulation Information Template. The information will be different for the Plaintiff's version and the Defendant's Version of this form.]

The Bottom Line:

[Include here the "bottom" line information detailed on the Mediation Simulation Information Template. The information will be different for the Plaintiff's version and the Defendant's version of this form.]

A Mediation Outline

Here are some suggestions for how to play out your roles, organized by phase of the mediation:

1. **Opening Phase—Introductions and Orientation:** The mediator will introduce everyone, describe how the process will work, and seek agreement from all to proceed. When

asked if you have read the attached ‘Agreement to Mediate’ and are ready to proceed, please answer “yes” and sign the “Agreement to Mediate.”

Attorney’s assignment: Listen attentively. Take charge when the mediator asks questions of your side.

Client’s assignment: Listen attentively. Defer to your lawyer during this introduction/orientation phase.

2. **Opening Statements Phase:** The mediator will ask each side to state the nature of the dispute, the issues to be decided, and the nature of settlement discussions to date.

Attorney’s Assignment: Approach this initial phase of the process as a mini legal argument. Succinctly state your main factual and legal arguments. You are trying to persuade the mediator and opposing parties that your view of the legal merits is correct. Assume there have been no meaningful settlement discussions to date. You will be civil but you want to make clear that you are confident of your legal case (but also willing to engage in settlement dialogue).

Client’s Assignment: Defer to your lawyer on legal arguments but don’t hesitate to take a role communicating critical facts or outlining your goals. Don’t hesitate to make clear that you want a serious settlement discussion today. Your goal is to fairly end the dispute, NOT just get a victory in litigation.

NOTE: There is no single approach to mediation advocacy. For purposes of this simulation, think of the lawyer’s role as helping the client to meet settlement objectives. The lawyer should certainly take the lead in outlining the case (especially as to legal merits) but be more inclined to defer to the client when the discussion turns more to overall settlement goals and options (IF the client is comfortable taking on such a role).

3. **Identifying the Interests Phase:** The mediator moves the focus from the facts and the precise (and narrow) legal questions to a more general discussion of the parties’ respective

interests. After some initial discussion in joint session, the mediator will likely caucus with each side, giving you an opportunity to candidly discuss your interests in a short private meeting with the mediator.

Attorney's assignment: This is the stage of the process where you begin to defer more to your client. Let him or her do more of the talking, but by no means become totally silent (after all, your client is paying you to participate in mediation). Your job is to help the client satisfy their interests; you should continue to raise legal arguments and why you will prevail in court only if you believe such assertions will give you a strategic advantage. Of course, don't push it too far -- you should ultimately yield to the direction of the mediator in getting you focused on the underlying interests of your client which are listed earlier in this memo.

Client's Assignment: Here is where you should really start to actively participate. Respond to the mediator's attempts to learn your interests, but don't just state them all at once.

Attorney and client: Don't be surprised if the mediator asks you in a private caucus to discuss the weaknesses of your case, as well as the strengths. This is typical mediator strategy and a frank discussion can be helpful in getting a case settled.

4. **Options Generation Phase:** After the mediator helps the parties to articulate their interests and summarizes them, the dialogue moves to specific solutions (probably back in joint session). In this phase, the mediator solicits suggestions from all parties and leads discussions on the merits/problems with each.

Attorney's Assignment: Listen carefully to what the other side AND the mediator has to say. Feel free to offer up any settlement options that make sense to you in light of your client's goals, and your understanding of what the other side can live with.

Client's Assignment: Like your lawyer, listen carefully to what the other side AND mediator have to say. Feel free to offer up any settlement options that make sense to you in light of your goals, and what you have heard from the other side.

In addition to what you can come up with on your own, here are some suggested solutions to consider putting on the table:

[Include here the options detailed on the Mediation Simulation Information Template. The information will be different for the Plaintiff's version and the Defendant's Version of this form.]

5. **Moving to Settlement Phase:** In this final phase of mediation, the mediator seeks agreement on solutions and "formalizes" the parties' respective understanding of all agreements.

Attorney's Assignment: Just follow the mediator's lead and reach whatever agreements you feel meet your client's interests (keeping in mind the bottom line outlined at the beginning of this memo).

Client's Assignment: Follow the mediator's lead and reach whatever agreements you feel meet your interests (keeping in mind the bottom line outlined at the beginning of this memo).

Post Mediation: The mediator or your legal writing professor (or both) will lead a simulation debriefing during the second class hour. The students observing the simulation will be asked to comment on what they observed. If questions are directed at you, please answer "in character."

Role Play Instructions: Mediator

Case Summary: See copy of writing assignment and sample memo.

The Players (all are volunteers from the first year legal writing section):

Plaintiff: [indicate student volunteer here with contact info]

Defendant: [indicate student volunteer here with contact info]

Plaintiff's Attorney: [indicate student volunteer here with contact info]

Defendant's Attorney: [indicate student volunteer here with contact info]

Context for the Mediation:

Since neither party has deep pockets to litigate, and both sides feel vulnerable on the law, the attorneys agreed to try mediation before litigation. The parties have jointly appointed the mediator and agreed to share the cost equally.

Conducting the Mediation:

Each simulation has been designed to be completed in approximately fifty minutes. Prior to the simulation, each first year student received my [date] memo and the attached ADR reference materials. In addition, the students playing roles in the simulation have received instructions similar to those provided here.

Begin the class by briefly explaining what mediation is, and why we are doing this mediation simulation. For suggested statements, see the [date] memo to the students.

Conduct the simulation more or less in accordance with the following outline, which includes a brief orientation, an initial joint session, a caucus with each side, and then a final joint session. You are free to use any mediator style you wish; although I would discourage you from being extremely "evaluative" or "directive" as to settlement, unless the parties really need help to get closure.

Hopefully, the parties will be able to reach a settlement in the time available. You can take the entire 50 minutes; formal debriefing will be in the second class hour.

A Mediation Outline

1. **Opening Phase—Introductions and Orientation**: You will introduce everyone, describe how the process will work, and seek agreement from all to proceed. Be sure to stress confidentiality. Confirm that each person has received and reviewed the Agreement to Mediate and is comfortable signing it. The role players have been instructed to answer “yes.” Have them sign the Agreement to Mediate (copy in the attached materials).
2. **Opening Statements Phase**: You will ask each side to state the nature of the dispute, issues to be decided, and the nature of the settlement discussions to date. The attorneys will at least initially focus on the legal issues and make largely positional arguments. Clients have been instructed to defer initially to their lawyers (but feel free to engage them as much as possible).
3. **Identifying Interests Phase**: You move the focus from the facts and the precise (and narrow) legal questions to a more general discussion of the parties’ respective interests. Even if the parties aren’t reluctant to candidly discuss their interests (they have been instructed to be a little coy), please call a short caucus with each side so that the first year students get a sense of what caucus might look like. During the caucus, you will talk separately with the parties on each side of the dispute, and the attorneys will more likely defer to their clients. However, don’t be surprised if the attorneys continue to focus on the legal issues; like any mediation, you may have to work a bit to get the parties directly involved and keep the discussion on interests as opposed to legal issues. Ideally, interests from the parties’ confidential role play notes will not be stated all at once, but with prompting, you will elicit from each side their respective interests, and the perceived strengths and weaknesses of their cases.

Plaintiff Will Articulate the Following Interests:

[Include here the Plaintiff's concerns and interests detailed on the Mediation Simulation Information Template.]

Defendant Will Articulate the Following Interests:

[Include here the Defendant's concerns and interests detailed on the Mediation Simulation Information Template.]

4. **Options Generation Phase:** After you help the parties to articulate their interests and summarize them, the dialogue moves to specific solutions (preferably back in joint session). In this phase, you solicit suggestions from all parties, and lead discussion on the merits/problems with each.

Plaintiff is Likely to Put the Following Options on the Table

[Include here the Plaintiff's options detailed on the Mediation Simulation Information Template.]

Defendant is Likely to Put the Following Options on the Table

[Include here the Defendant's options detailed on the Mediation Simulation Information Template.]

5. **Moving to Settlement Phase:** In this final phase of the mediation, you seek agreement on solutions and "formalize" the parties' respective understanding of all agreements.

Plaintiff's Bottom Line

[Include here the Plaintiff's "bottom line" detailed on the Mediation Simulation Information Template.]

Defendant's Bottom Line

[Include here the Defendant's "bottom line" detailed on the Mediation Simulation Information Template.]

And finally . . .

If the parties actually reach agreement, be sure to carefully summarize all terms and do some “reality-checking.” Have the parties agree on who will draft the final settlement documents, timeline for completion, etc.

After the mediation completed, move on to the debriefing during the second class hour. A set of debriefing notes is attached. Many thanks!!!

MEMORANDUM TO MEDIATOR

TO: Volunteer Mediator

FROM: Mediation Simulation Administrator

RE: Debriefing Your Mediation Simulation

Date: _____

You have 50 minutes to debrief the simulation. Please keep in mind the following key objectives of the exercise:

1. to introduce students to ADR
2. to introduce the concept of parties' interests as controlling outcome, rather than legal rights or norms
3. to encourage students to critically evaluate the role of attorneys in "solving" complex problems.

A Suggested Debriefing Outline

1. Briefly review the reference material attached to my [date] memo to the first year students.¹ Here are some key "talking points" for each part of the [date] packet:

—**The "Key Elements of ADR Processes"** and **"ADR Process Glossary"** give students a refresher overview of the ADR processes listed in Minnesota Rule 114. Key point here: there are numerous forms of ADR, including facilitative (where the neutral promotes the parties' self-determination by facilitating a settlement conversation); evaluative (where the neutral's opinions of the strengths and weaknesses of the case and the neutral's prediction of outcome, help drive settlement), and adjudicative (where the neutral renders a decision).

1. For example purposes, we have retained references to Minnesota-specific materials included in the student background reading packet. Modify this information to reference the state-specific information you have included in the reading packet for students.

You might ask students to consider how a lawyer and client should decide which of the three basic categories of ADR is/are appropriate for a specific dispute. There are two basic paradigms often cited: 1) evaluate the barrier to settlement and utilize the process that best overcomes it (e.g., poor communication and need to express emotion might suggest mediation is a good alternative; conflicting views on the law might call for an evaluative form of ADR); or 2) evaluate the main objectives your client has (e.g. the need for confidentiality, speed, cost reduction and desire to improve relationship with opposing party might suggest the propriety of mediation; a need for vindication and/or setting of precedent might call for an adjudicative form of ADR).

—The **“Detailed Description of the Typical Commercial Mediation Process”** is an outline summarizing the key phases of a typical mediation. I wouldn’t spend any time on this. If you refer to it at all, use it as an outline to talk about the simulation itself.

—The **“Agreement to Mediate”** highlights several key points about mediation.

Paragraph 1: individuals with settlement authority must attend

Paragraph 2: participation in mediation is voluntary (although courts can compel attendance at an initial mediation session against a party’s wishes, the court has no authority (at least under existing law) to force parties to stay at the table

Paragraph 3: mediator does not have settlement authority; mediator is not “responsible” for settlement terms; mediators have a special obligation to be aware of conflicts of interest

Paragraph 4: the mediation process (with limited exceptions) is a confidential one.

Paragraph 5: mediation usually isn’t free (most lawyer/mediators charge lawyer hourly rates); Rule 114 presumes equal cost-sharing

Paragraph 6: Civil Mediation Act disclosures (see next paragraph for background)

—The “**Minnesota Civil Mediation Act**” (see especially section 572.35) states that a settlement reached in mediation is enforceable under principles of law applicable to contract EXCEPT that a mediated settlement is NOT BINDING: 1) unless it says expressly that the parties intend it to be a binding agreement and the parties were advised IN WRITING of three things: a) the mediator has no duty to protect their interests or provide them with information about their legal rights; b) signing a mediated settlement agreement may adversely affect their legal rights; and c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights; OR, 2) they were otherwise advised of the conditions in clause 1. The act has been interpreted narrowly. A Minnesota Supreme Court case, *Haghighi v. Russian American Broadcasting*, 577 N.W.2d 927 (Minn. 1998), negated a mediated settlement where the written settlement document failed to affirmatively state the parties’ intention to be bound (notwithstanding that both parties had lawyers and a lower court had determined that they had actually reached a settlement).

—The “**Mediation Privileges**” are actually quite confusing when examined carefully.² So for purposes of the debriefing, just introduce the concept of an evidentiary privilege and indicate the legislature’s intent to “insulate” the mediation process so as to encourage settlement. You might want to emphasize to students that the court rules and statutes about

2. For example, Minnesota Statutes § 595.02, subdivision 1(m) mediation privilege covers all persons (mediators and parties) and applies in both criminal and civil proceedings, but arguably only applies to mediation occurring pursuant to an agreement to mediate. Under this privilege, an exception to confidentiality (but only for the parties) exists for actions to set aside or reform a mediated settlement agreement. In contrast, the more recently enacted ADR confidentiality rule (Minnesota Statutes § 595.02, subdivision 1(a)) covers only the ADR neutral (and appears to be a competence rule rather than a privilege rule) but is not restricted by the need to have an agreement to mediate. There are three exceptions to the bar on a neutral’s testimony (criminal acts; professional misconduct; acts which could lead to discipline for lawyers).

confidentiality relate to the question of when statements or documents used in ADR proceedings can be introduced into subsequent legal proceedings. These rules and statutes DO NOT, for example, bar a party from talking about mediation outside of the mediation. Sometimes parties contract privately for such confidentiality.

2. Provide a little background information on Minnesota Rule 114. Here are five key points to highlight (some of which I covered in my intro memo distributed to all students):

—the Rule requires consideration of the (but DOES NOT mandate) use of ADR in most state district court cases³ (parties are required to confer about ADR options and inform the court within 60 days of filing a case, what form of ADR, if any, should be utilized);

—the Rule gives judges authority to compel non-binding forms of ADR even against parties' wishes (some judges use a "presumptive mediation" rule—meaning that every case is court-ordered into mediation);

—the Rule lists 10 different ADR processes; however, mediation and arbitration are far and away the most commonly used processes in Minnesota

—parties are free to choose their own neutral (or leave the decision to the court); however, the neutral must be on the roster of neutrals maintained by the court (to get on the roster, neutrals must take state-certified training)

—[Local state practice rule] presumes that the parties split the cost of ADR (cost is market determined—lawyer neutrals typically charge lawyer rates (\$100–350/hr); social worker neutrals charge therapist rates (\$50–\$100/hr).

3. Exceptions include conciliation and housing court, public assistance appeals, implied consent proceedings; juvenile court, probate court, civil commitment, harassment cases, and election contests.

3. Move on to discuss the mediation simulation itself. You might consider using the “**Detailed Description of the Typical Commercial Mediation Process**” two-page outline to guide this discussion. The outline gives you a structure to examine the different phases of the simulation: a) setting the stage; b) focusing on issues, and interests and reasons to settle; and c) generating settlement options.

Consider asking the following questions:

1. What did the mediator do to make the parties comfortable with the process?
2. How did the mediator encourage the parties to move away from a rights/rules based approach to the conflict? Be specific, ask the students to identify what statements or questions they found most helpful in getting the parties to focus on their needs and interests, rather than legal positions.

INTERESTS are the needs, desires and/or concerns that motivate someone in negotiation. Interests are not the same as POSITIONS, which are best defined as the assertions, demands and offers that parties might make during a negotiation. Keep in mind that a position is but one way of satisfying an interest.

For example, let us assume that a party in mediation is an employee who was fired after complaining about alleged sexual harassment. The employee’s initial bargaining position or offer might be a monetary demand for \$100,000. The set of interests that underlie the monetary demand may include many things, including the need for retraining, the need to cover medical and/or counseling expenses, a desire to punish the employer, and the necessity of obtaining a settlement that allows counsel to be paid (1/3 of an apology may not be enough). The job of the mediator is to encourage the parties to be candid about underlying interests. Such candor can dramatically “expand the pie” for possible settlement. Effective problem-solving lawyers help their clients identify their actual needs for the same reason!

3. What interests of the parties were identified during the mediation simulation? Do you think that “real” parties in the same case would have similar interests? Others that you can think of? Are the interests you’ve identified easily satisfied through litigation?
4. Did the mediator maintain neutrality? How directive and/or evaluative was the mediator? Could you tell how he or she felt about the problem presented?

A HOT issue in mediation circles these days is the role of the mediator. Some mediation theorists welcome a wide range of mediator behavior ranging from purely facilitative to highly evaluative. Others claim that evaluative mediation is an oxymoron—the mediator who injects his or her ideas on the strengths and weaknesses of the case is undermining the parties’ self-determination.

5. How did the law and predicted legal outcome inform the mediation process? How did the settlement options discussed in mediation compare with the likely ultimate resolution of the dispute obtainable through litigation?
6. If a settlement was reached in the simulation, how would you characterize the settlement in terms of fairness and in comparison to your prediction of the likely justiciable outcome? Should we be troubled if mediation settlements differ greatly from likely justiciable outcomes?

MEMORANDUM TO STUDENTS

TO: First-Year Students
FROM: Mediation Simulation Administrator
RE: First-Year Legal Writing Mediation Simulations
DATE: _____

In your legal writing class during the week of [date], you will be observing a simulated mediation of the problem you wrote about for your closed and research memo assignments.

The practice of ADR is now a regular feature of virtually every contemporary lawyer's work. Recall, Minnesota General Rule of Practice 114, which became effective July 1, 1994, subjects most state district court cases to ADR processes, including mediation. The rule requires that parties be advised of ADR options immediately after a case is filed, obligates parties to confer about ADR possibilities, and authorizes the court to consider the possibility of early referral of cases to non-binding ADR with or without the parties' agreement. Mandated use of ADR in courts is a national phenomenon. Equally dramatic is the increased use of ADR by lawyers out of court. For example, ADR clauses are now common in commercial contracts for sale of goods, real estate contracts, and employment agreements.

In light of such universal application, basic knowledge of ADR is now part of the baseline professional obligation of all lawyers to provide "competent" representation under professional responsibility rules.

1. This is an example cover memo to distribute with background reading materials to students. The memo should be revised to discuss the state-specific materials included in your students' reading packet. We have not included the actual reading materials as part of this Appendix.

2. [To Students] Please read this memo and the attached reference material prior to observing the simulation.

Mediation is considered a facilitative dispute-resolution process, defined by Minnesota State District Court Rule of Practice 114.02(a)(7) as

A forum in which a neutral third party facilitates communication between parties to promote settlement. A mediator may not impose his or her own judgment on the issues for that of the parties.

While mediation is just one of many ADR processes, it is increasingly the alternative of choice to replace traditional litigation both because it represents an extension of the negotiation process (familiar to lawyers and parties in litigation) and because it maximizes the ability of disputing parties to create settlements that best meet their respective needs.

A mediator does not represent either party and has no duty to provide advice or information. Rather, the function of the mediator is to promote and facilitate voluntary resolution of the matter at hand; mediators typically have no responsibility to the parties concerning the fairness or legality of the resolution.

In mediation, parties are not bound to reach agreements that approximate the justiciable outcome of their dispute. Yet, the possible legal outcome is certainly relevant as a benchmark of what might be obtainable from the legal marketplace. Thus, not surprisingly, predictions of legal outcome profoundly shape the context of some mediations. But, in the end, it is the parties' interests (as they define them), not the rule of law, that is most important in determining the ultimate outcome of mediation.

Attached for your review is some basic information about ADR that you may find helpful:

Key Elements of ADR Processes, pp. 3–4
Conflict Resolution Glossary, pp. 5–10
Detailed Description of the Typical Commercial Mediation,
pp. 11–12
Agreement to Mediate, pp. 13–14

Minnesota Civil Mediation Act (Minn. Stat. §§ 572.31–
572.40), pp. 15–16

Minnesota Mediation Privilege/Rule of Competency (Minn.
Stat. § 595.02(1)(l), (1)(a), pg. 17

You will be discussing this material during the debriefing of the mediation simulation.