



## **Bridging the gap: a joint negotiation project crossing legal disciplines**

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# Bridging the Gap: A Joint Negotiation Project Crossing Legal Disciplines

Karen E. Powell

Lauren E. Bartlett

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# BRIDGING THE GAP: A JOINT NEGOTIATION PROJECT CROSSING LEGAL DISCIPLINES

KAREN E. POWELL<sup>1</sup> & LAUREN E. BARTLETT<sup>2</sup>

## INTRODUCTION

This article discusses the creation and implementation of a cross-discipline negotiation simulation project designed by two law professors at Ohio Northern University Claude W. Pettit College of Law. The project bridged the gap between podium classes and clinical experience, exposing two separate groups of students to new subject areas. Professors Lauren E. Bartlett and Karen E. Powell brought together two distinct law classes, one doctrinal tax class and one pretrial litigation skills class, to exercise legal skills, and learn substantive and procedural law from their classmates, while acting as an attorney or a client in a simulated negotiation.

This article begins by addressing the vision and goals behind the joint negotiation project and links it to experiential learning and adult learning theories, as well as the current movement in legal education towards graduating practice-ready lawyers. Next, the article describes the specifics of the project, including planning, assignments, and the 360-degree post-project assessment. Lastly, the article makes suggestions for using a similar experiential learning project format across various legal disciplines.

## I.

### THE CREATION OF A JOINT NEGOTIATION PROJECT BY FORMER LEGAL PRACTITIONERS

“I got a letter from the tax authority. Can you help me?”  
Spoken by a client, these words strike fear into the hearts of many

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<sup>1</sup> Senior Lecturer and Director of Teaching at Deakin University School of Law, former Assistant Professor of Law at Ohio Northern University Claude W. Pettit College of Law.

<sup>2</sup> Director of Legal Clinics and Assistant Professor of Law at Ohio Northern University Claude W. Pettit College of Law. Both Professors Powell and Bartlett would like to thank research assistants David Savage and Heidi Weatherly. Many thanks to Professor Karen Hall, Ohio Northern University College of Law, for her support and willingness to share materials. Also we thank Professors Allison Korn, UCLA School of Law, and Patience Crowder, University of Denver Sturm College of Law, for their thoughtful review.

general practice attorneys. Two law school professors at Ohio Northern University Claude W. Pettit College of Law wanted to provide their students with the simulated experience of navigating that situation. Professor Bartlett and Powell designed a joint negotiation project, integrating practical legal skills training and doctrinal tax law into a single unique and highly well-received project. Students from two law school classrooms (one doctrinal tax class and one pretrial litigation skills class) worked together in negotiating and drafting a settlement agreement incorporating specific tax implications. This article addresses the vision behind the project, the specifics of the project, and the assignments and feedback, as well as suggestions for using a similar project format across various disciplines.

Professors Powell and Bartlett are both new to the legal academy, yet bring more than twenty combined years of legal practice to their teaching. New Professors Powell and Bartlett believe the law school experience can leave a divide between doctrinal or podium classes and practical legal skills training.<sup>3</sup> Professors Bartlett and Powell envision that law schools can produce graduates that are closer to “practice-ready”<sup>4</sup> through the integration of experiential learning<sup>5</sup> across the

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<sup>3</sup> See Phyllis Goldfarb, *The Way to Carnegie: Practice, Practice, Practice, — Pedagogy, Social Justice, and Cost in Experiential Legal Education: Symposium Article: Back to the Future of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 279, 283-84 (2012) (“Law school has long had a dual identity—or, less charitably, a split personality. . . Since the mid-nineteenth century, law schools have lived in the creative tension between the intellectual and practical with varying degrees of success.”). See also SUSAN BRYANT, ELLIOT S. MILLSTEIN & ANN SCHALLECK, *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* 34 (2014) (“Students may have been introduced to other challenging lawyering tasks including problem solving, persuading fact finders and policy makers, developing facts, and negotiation but lack the integrative knowledge that is necessary to pull all of these tasks and skills together to provide representation to clients.”).

<sup>4</sup> See, e.g., ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP* 18 (Clinical Legal Association 2007); Robert J. Condlin, “*Practice Ready Graduates*”: *A Millennialist Fantasy*, 31 *TOURO L. REV.* 75, 98 (2014); William D. Henderson, *A Blueprint for Change*, 40 *PEPP. L. REV.* 461, 462 (2013); Mitchell D. Hiatt, *Changes in Legal Education and Legal Ethics: Note: Why the American Bar Association Should Require Law Schools to Increase and Improve Law Students’ Practical Skills Training*, 45 *CREIGHTON L. REV.* 869, 871-72 (2012).

<sup>5</sup> As defined in the inaugural volume of this journal, “‘Experiential Learning’ refers to methods of instruction that regularly or primarily place students in the role of attorneys, whether through simulations, clinics, or externships. Such forms of instruction integrate theory and practice by providing numerous opportunities for students to learn and apply lawyering skills as they are used in legal practice (or similar professional settings). These learning opportunities are also designed to encourage students to begin to form their professional identities as lawyers, through experience or role-playing with guided self-reflection, so that they can become skilled, ethical, and professional life-long learners of the law.” David I.C. Thomson, *Defining Experiential Legal Education*, 1 *JOURNAL OF EXPERIENTIAL LEARNING*, no. 1, art. 3 at 4 (2015).

law school curriculum. Their design of a joint negotiation project was meant to test whether joint projects across classrooms can help bridge the gap between podium classes and clinical experience. Professors Powell and Bartlett's joint vision is to merge doctrinal and skills learning through real-world experiential problem solving using all of the modern tools of education learning theory.

Now at the Deakin University School of Law (Australia), Professor Powell taught tax law classes at Ohio Northern College of Law during the 2015-16 year after presiding over state tax matters for over eight years as a tax judge as well as working as a mediator and civil litigator, with more than 15 years of legal practice. Professor Bartlett teaches Introduction to Civil Practice and supervises the in-house clinics and externships at Ohio Northern University College of Law after seven years of work as a legal aid and human rights attorney.

During the fall of 2015, Professors Powell and Bartlett jointly developed a project for the spring 2016 semester requiring students to negotiate against and work together with students from differing legal disciplines. Their joint negotiation project provided opportunities for law students to learn from one another, experience an unfamiliar area of law, develop negotiation, interviewing, and other practical legal skills, and draft or review a negotiation settlement agreement.

The project required the State and Local Tax students to research the statutory and procedural requirements relating to a spouses' tax liability, when the spouse may be unknowing of criminal financial dealings by the other spouse (an "innocent spouse claim"). At the same time, students in the Civil Practice class studied the art of negotiations. In the following weeks, the classes were then assigned to groups mixed by classes, were provided a fact pattern, and were required to meet ahead of the joint negotiation class to discuss the specifics of tax law and prepare a negotiation strategy. The Tax students provided tax expertise to the students negotiating the innocent spouse claim. The Civil Practice students provided expertise in negotiations and anticipating the risks of proceeding with litigation. The students then negotiated to settlement, and drafted a settlement agreement.

The project was highly successful; demonstrating that the use of two differing law classes provided more elements of real-world negotiations often lacking in simulated negotiation settings. Students provided and received 360-degree assessment from all of their peers, as well as feedback from the professors.

II.  
TOWARDS PRACTICE-READY LAW GRADUATES:  
INTEGRATING EXPERIENTIAL LEARNING INTO  
EDUCATIONAL GOALS FOR  
LAW STUDENTS

United States law schools typically provide a three-year graduate course of study for college graduates to prepare those students for the practice of law.<sup>6</sup> Accredited law schools generally have a set course of study for the first year students that include only doctrinal classes, and allow students to choose from a variety of courses for their second and third year studies.<sup>7</sup> Historically, law students have not taken courses that include experiential learning until their second and third year of law school.<sup>8</sup> Upon completion of a three-year course of study from an accredited law school, students may apply to sit for a state bar exam.<sup>9</sup> Upon passage of a state bar exam, graduates will be licensed to practice law in a particular state.<sup>10</sup>

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<sup>6</sup> Stuckey, *supra* note 4, at 11.

<sup>7</sup> E.g., Ohio Northern University College of Law's first year curriculum allows for no elective courses. *First Year Curriculum*, OHIO NORTHERN UNIVERSITY PETTIT COLLEGE OF LAW, [http://law.onu.edu/academics/first\\_year\\_curriculum](http://law.onu.edu/academics/first_year_curriculum) (last visited Sept. 20, 2016). *But see* Myra Berman, *Portal to Practice: A Multidimensional Approach to Integrating Experiential Education into the Traditional Law School Curriculum*, 1 JOURNAL OF EXPERIENTIAL LEARNING, no. 1, art. 10 (2015), discussing the "Portals to Practice" model adopted by Touro Law School, in which students are introduced in their first semester of law school to basic lawyering skills and participate in simulation activities; *The Leader in Experiential Education*, NORTHEASTERN UNIVERSITY SCHOOL OF LAW, <https://www.northeastern.edu/law/experience/index.html> (last visited Dec. 1, 2017), that provides information about the Cooperative Legal Education Program employed by Northeastern University School of Law. Moreover, many law schools have recently begun to allow students to take elective classes in their first year of study. *See, e.g., Curriculum*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, <https://www.wcl.american.edu/admiss/curriculum.cfm> (last visited Dec. 1, 2017); *First-Year Students Get Prized Freedom of Choice*, COLUMBIA LAW SCHOOL (Jan. 14, 2010), [https://www.law.columbia.edu/media\\_inquiries/news\\_events/2010/january2010/electives-firstyear](https://www.law.columbia.edu/media_inquiries/news_events/2010/january2010/electives-firstyear); *Elective Course Option*, CHICAGO-KENT COLLEGE OF LAW, <https://www.kentlaw.iit.edu/academics/jd-program/11-your-way-program> (last visited Dec. 1, 2017); *Your 1L Year*, NYU LAW, <http://www.law.nyu.edu/about/whynylaw/distinctive-11-year> (last visited Dec. 1, 2017).

<sup>8</sup> This has been at least partially due to the fact that experiential courses like law clinics have and should require prerequisites. *See e.g.,* ABA Standards and Rules of Procedure for Approval of Law Schools 2016-2017, Standard 304 (e), *available at* [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_standards\\_chapter3.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter3.pdf).

<sup>9</sup> Stuckey, *supra* note 4, at 12.

<sup>10</sup> There are exceptions to this general path; for example, Virginia, Vermont, California and Washington allow people to sit for the bar exam and become lawyers without attending law school. Sean Patrick Farrell, *The Lawyer's Apprentice; How to Learn the Law Without Law School*, N.Y. TIMES (July 30, 2014), [http://www.nytimes.com/2014/08/03/education/edlife/how-to-learn-the-law-without-law-school.html?\\_r=0](http://www.nytimes.com/2014/08/03/education/edlife/how-to-learn-the-law-without-law-school.html?_r=0).

For hundreds of years, law school study has been an institutionalized experience, with a history of lecture by podium professors, followed by use of the Socratic method<sup>11</sup> to instill in students the ability to respond to immediate and unprepared questions. The Socratic method and court decision analysis (also referred to as “case method” or “case-method dialog”)<sup>12</sup> have been the signature methods of legal instruction used since 1870 to teach reasoning skills and intellectual process.<sup>13</sup> These teaching methods, however, are both focused on teaching legal doctrine and reasoning skills. Moreover, in the court decisions used for case analysis in law school, the facts are settled and the focus of procedure is appellate law-based. Court cases that are still in process or without a judicial determination of fact and law are seldom used in traditional academia.<sup>14</sup> In their first year, most law students are not exposed to the chaos of representing clients, unsettled facts, and other realities of lawyering.<sup>15</sup>

Over time, this teaching structure has been challenged and research has demonstrated that it may not comply with adult learning methods for a variety of students.<sup>16</sup> Additionally, a growing chorus of detractors of legal education claimed that too many students were not practice-ready when graduating from law school, having had little or no experience with the actual practice of law.<sup>17</sup> In response to such criticisms, law schools have increasingly provided students with

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<sup>11</sup> The Socratic Method is a teaching tool used to engage a large group of students in a discussion, while using probing questions to get at the heart of the subject matter. Students are usually called by a professor and asked to analyze and expand on the legal analysis through a series of questions. See e.g., Christopher W. Holiman, *Leaving No Law Student Left Behind: Learning to Learn in the Age of No Child Left Behind*, 58 HOW. L.J. 195, 215-16 (2014); Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?*, 43 CAL. W. L. REV. 267, 272-73 (2007).

<sup>12</sup> Case method requires students to closely and critically read a court’s decision (often edited for length) in preparation for the classroom discussion and analysis of the particular facts, law and legal precedent(s). See Goldfarb, *supra* note 3, at 285; WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 2* (2007).

<sup>13</sup> George S. Grossman, *Clinical Legal Education History and Diagnosis*, 26 J. LEGAL ED. 162, 163 (1974); Fernand N. Dutille, *Introduction: The Problem of Teaching Lawyer Competency*, in *LEGAL EDUCATION AND LAWYER COMPETENCY: CURRICULA FOR CHANGE 1* (Fernand N. Dutille ed., 1981).

<sup>14</sup> This may be, in part, owing to the nature of the doctrinal professor who is often been in academia for an extended period of time, with less knowledge of a practitioner’s perspective on legal education. For additional criticism of these teaching methods, see *id.*

<sup>15</sup> See Goldfarb, *supra* note 3, at 289 (“[L]aw students become lawyers when they enact their understanding and analysis of legal principles in repeated lawyering performances.”).

<sup>16</sup> MALCOLM KNOWLES, *THE ADULT LEARNER: A NEGLECTED SPECIES* 57 (1990). See also Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37 (1995).

<sup>17</sup> See Stuckey, *supra* note 4, at 1; Hiatt, *supra* note 4, at 71-2.

clinical and externship opportunities designed to provide them with experiential legal training in both litigation and transactional settings.<sup>18</sup>

While the case method is one teaching method, other teaching methods are employed in most legal experiential-based courses such as law clinics and externships. Students may be taught more specific “practice” skills, including training to ask a series of open and closed questions to clients to elicit general and specific information, as well as practicing legal writing to solidify and repeat gained knowledge.

Research and trends in clinical pedagogy have led to the development of a widely-used structure for law clinics that includes rounds, direct supervision, and a classroom component.<sup>19</sup> Students in law clinics are also often assigned to work collaboratively in pairs or groups on cases.<sup>20</sup> Developing the ability to self-evaluate and self-regulated learning are also stressed in clinical pedagogy.<sup>21</sup>

In teaching practical legal skills, clinical law professors often draw on cognitive science and adult learning theory, providing opportunities for students to learn while performing or observing performance in a particular role and giving those students feedback to help them improve performance.<sup>22</sup> For example, students may be asked to participate in simulations to practice a particular legal skill in the context of role-playing as an attorney.<sup>23</sup> Those and other learning methods and tools help a legal practitioner to develop the skills needed for practice, including building relationships with clients and colleagues, negotiations, drafting and filing pleadings with the court, and developing facts and legal theories. These necessary legal skills are taught entirely differently than the analysis of set facts and law in case-dialogue method.

It is the dual abilities of analyzing legal principles and problem-solving in a particular case or matter with a particular client that is the

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<sup>18</sup> Thomson, *supra* note 5, at 3.

<sup>19</sup> See Bryant *supra* note 3, for more on this triad approach.

<sup>20</sup> See *id.*; Michael I. Meyerson, *Law School Culture and the Lost Art of Collaboration: Why Don't Law Professors Play Well with Others?*, 93 NEB. L. REV. 547, 583-84 (2015); Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175, 199 (1996).

<sup>21</sup> See Bryant, *supra* note 3, at 23-24. The recent changes to the ABA Standards also emphasize self-reflection. ABA Standards, Standard 303(a)(ii), 304(c)(ii) and 304(c)(v), *supra* note 8. See also, Patience Crowder, *Designing a Transactional Law Clinic for Life-Long Learning*, 19 LEWIS & CLARK L. REV. 413, 434-35 (2015); Elizabeth M. Bloom, *Teaching Law Students to Teach Themselves: Using Lessons from Educational Psychology to Shape Self-Regulated Learners*, 59 WAYNE L. REV. 311, 316 (2013).

<sup>22</sup> See Sullivan, *supra* note 12, at 100-102.

<sup>23</sup> *Id.*



key work of most legal practitioners.<sup>24</sup> More than 75% percent of U.S. lawyers are practitioners in private practice.<sup>25</sup> As the American Bar Association continues to increase its focus on experiential courses, reflecting the reality of the professional needs of future lawyers, law schools and law professors also recognize that the majority of lawyers will need strong practice skills.<sup>26</sup>

While law school provides students with hands-on learning opportunities in law clinics and externships, the legal academy, for the most part,<sup>27</sup> has not yet fully integrated podium teaching of doctrinal subjects with experiential learning.<sup>28</sup> Instead, it is typical that students take podium or doctrinal courses (e.g. contracts, torts, constitutional law) and separately participate in law clinics or externships. The current legal education provides little overt framework or guidance to link students' doctrinal knowledge of a particular subject to the experiential learning process.<sup>29</sup>

In addition, while extensive experiential education and clinical pedagogy have gained traction in law schools, there is still a divide between clinical and podium professors and there is a notion that the perceived cost of skills training can be higher than a lecture or

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<sup>24</sup> See Goldfarb, *supra* note 3, at 289. Please note that law clinics may provide both litigation-related services as well as transactional services to clients.

<sup>25</sup> The number of layers in private practice has continued to grow as data from the American Bar Association (ABA) shows the trending increases, though the latest data is over 10 years old. *Lawyer Demographics: Year 2015*, AMERICAN BAR ASSOCIATION (2015), [http://www.americanbar.org/content/dam/aba/administrative/market\\_research/lawyer-demographics-tables-2015.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf).

<sup>26</sup> The ABA recently changed its rules to require a minimum of 6 credits of experiential learning courses. See ABA Standards, Standard 303(a)(3), *supra* note 8. Law students particularly appreciate those courses and law school experiences which eased them into practice. See RONIT DINOVTZER ET AL., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL COURSES (The NALP Foundation for Law Career Research and the American Bar Foundation 2004), available at <http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf>; Sullivan, *supra* note 12, at 87. See also Ben Bratman, *The 25 Most Important Lawyering Skills?, A PLACE TO DISCUSS BEST PRACTICES FOR LEGAL EDUCATION* (October 8, 2015), <https://bestpracticeslegaled.albanylawblogs.org/2015/10/08/the-25-most-important-lawyering-skills-2/>; ALLI GERKMAN & LOGAN CORNETT, FOUNDATIONS FOR PRACTICE: THE WHOLE LAWYER AND THE CHARACTER QUOTIENT (The Institute for the Advancement of American Legal Systems 2016), available at [http://iaals.du.edu/sites/default/files/reports/foundations\\_for\\_practice\\_whole\\_lawyer\\_character\\_quotient.pdf](http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf).

<sup>27</sup> See *supra* note 7, for some examples of law schools that have attempted to integrate podium and experiential programming.

<sup>28</sup> See, e.g., Berman, *supra* note 7; Thomson, *supra* note 5; DEBORAH MARANVILLE, LISA RADTKE BLISS, CAROLYN WILKES KAAS & ANTOINETTE SEDILLO LOPEZ, BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 53-62 (2015).

<sup>29</sup> Berman, *supra* note 7, at 159 (“What we have not yet seen is curricular reform that transcended the traditional progression from doctrinal coursework to simulated work, to live-client work, not as a conceptual framework for an entire law school program.”).

podium-based classroom.<sup>30</sup> Further, without consideration of integration of podium learning and experiential learning, clinical education and podium education continue to occur without thoughtful interconnection.

Professors Powell and Bartlett believe in the need to help students to better connect podium and experiential learning in law school in order to better bridge the gap between law graduates and practice-ready lawyers.

### III.

#### VISION OF THE JOINT NEGOTIATION PROJECT

As law school educators, Professors Powell and Bartlett believe their responsibility is to help students become practice-ready lawyers. Professors Powell and Bartlett proffer a vision of the practice-ready lawyer that requires three particular sets of skills. First, lawyers must be able to analyze a set of facts, identify the key legal issues, and research, analyze and apply current law (or argue for an expansion or rejection of current law). Second, lawyers must be able to recognize and employ strong practice skills to establish a trustful relationship with their client, understanding procedural rules to competently file (or draft and advise)<sup>31</sup> and proceed with the case at hand. Third, lawyers must not miss critical auxiliary issues that may affect a client in a different aspect of their lives.<sup>32</sup>

Students begin to learn the first skill-set through case study, Socratic method interaction with professors, and exam assessments. However, by the second and third years of law school, Professors Powell and Bartlett saw that their students appeared to struggle with the application of their legal knowledge and reasoning to practice skills and auxiliary issues-spotting, even when students had previous exposure to a particular skill set or legal doctrine.<sup>33</sup>

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<sup>30</sup> See Dutile, *supra* note 13, at 4. See also Martin J. Katz, *Understanding the Costs of Experiential Legal Education*, 1 JOURNAL OF EXPERIENTIAL LEARNING, no. 1, art. 4 (2015), available at <http://digitalcommons.tourolaw.edu/jel/vol1/iss1/4>.

<sup>31</sup> This paper discusses a joint negotiation project, based on a litigation matter. However, many attorneys will work solely as transactional lawyers, requiring the same critical lawyering skills.

<sup>32</sup> We think our vision is in line with a study by the Institute for the Advancement of the American Legal System, which found that lawyers need “to have a blend of legal skills, professional competencies, and, notably, they require character.” GERKMAN & CORNETT, *supra* note 26, at 5. For example, characteristics such as integrity and common sense, professional competencies such as listening attentively, and legal skills such as issue spotting, all help to build a trustful relationship with a client. See *id.*

<sup>33</sup> See also Jennifer E. Spreng, *Spirals and Schemas: How Integrated Courses in Law Schools Create Higher-Order Thinkers and Problem Solvers*, 37 U. LA VERNE L. REV. 37, 41 (2015).

Professors Powell and Bartlett agreed that the combination of tax law and civil practice could focus students on developing the three skill sets necessary for practice. All attorneys must have a basic understanding of key tax issues to provide competent legal representation of their clients, regardless of their area of specialty.<sup>34</sup> For example, family lawyers must understand the tax effects of a division of assets, as well as child support and alimony payments, to competently represent a spouse in a divorce proceeding. Trial lawyers must understand the substantial tax differences in a settlement involving a physical injury versus a non-physical injury, and the differing tax effects of annuitizing a settlement. Attorneys with elderly clients must know basic tax effects of trusts, wills, and estate planning. Both Professors Powell and Bartlett heard some students state, however, that they avoid tax classes at all costs saying that they “hate tax” or “can’t do math,” even though the same students anticipated practicing as sole practitioners in a small town practice setting.

Advanced tax students also can benefit from working with civil practice students. Professor Powell saw that many of her advanced tax law students deeply enjoyed the complex analysis of tax statutes; however, they often struggled with applying those tax concepts. For example, corporate tax students struggled to draft a simple buy-sell agreement after discussing tax implications of a sale of real property. Income tax students also struggled to draft a settlement agreement after learning that the settlement language itself would determine the tax implications of a legal settlement.

From a clinical legal education perspective, Professor Bartlett found her students unable to connect their analysis of doctrinal law to lawyering performances, even doctrinal law that the students had already taken such as contracts and civil procedure. For example, she noticed that it was difficult for students to see that knowledge they gained from reading cases on jurisdiction and venue in civil procedure should be used when drafting a complaint in Civil Practice class. Professor Bartlett also saw too many students avoiding experiential classes and being unwilling to take clinic because of their focus on

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<sup>34</sup> William E. Foster, *Making the Plaintiffs Whole: A Tax Problem of Interest*, 64 OKLA. L. REV. 325, 328-29 (2012); Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ALWD 118, 128 (2008); David S. Dolowitz, *Features, Why You Need a Tax Expert*, 29 FAM. ADV. 28, 29 (2007); Colonel (USAR) Gene S. Silverblatt, *Legal Assistance Issues for Retirees: A Counseling Primer on Old Age, Disability, and Death Issues*, 2004 ARMY LAW. 19 (2004).

“bar classes”,<sup>35</sup> which hinders development of their professional identity and their understanding of the “human dimensions of practice”.<sup>36</sup>

Through their experience as educators and legal practitioners, Professors Powell and Bartlett believe that these views demonstrates the gap in legal education between doctrinal and experiential teaching.<sup>37</sup> Regardless of the growth of legal clinics, externship programs, and skills classes, too many law students continue to experience their classes in an educational vacuum or silo.<sup>38</sup> Practically speaking, although a student has excelled in a contracts course, she may not know where to begin in terms of drafting a contract from scratch. Furthermore, where a student may have had difficulty serving an opposing party in a clinic case, he may not have connected that difficulty to long-arm statutes or jurisdictional rules. When students cannot make those connections to areas of law they have already studied, they are challenged to apply those same learned skills to an area of law that is unknown.

Together, Professors Bartlett and Powell saw this joint negotiation project as a way to move their students closer to being practice-ready lawyers and to begin to bridge the divide between doctrinal and clinical teaching at Ohio Northern University College of Law. Their idea was to make connections between doctrinal theory and practice and interconnections between doctrines, specifically among civil procedure, contracts, and tax. The use of experiential learning theory provided the framework for developing a concrete joint classroom project where students could experience, or think, act, and reflect,<sup>39</sup> with regard to particular material being presented, specifically in the integration of legal practice skills and legal doctrine.

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<sup>35</sup> Students at Ohio Northern University College of Law refer to bar preparation classes, or classes that cover legal issues tested on their state’s bar exam as “bar classes”. Given that bar exam passage rates across the country have fallen to the lowest levels in decades, it is easy to understand why bar classes hold such importance for students. See Mark Hansen, “What to falling bar-passage rates mean for legal education—and the future of the profession?” ABA Journal (Sept. 1, 2016), available at [http://www.abajournal.com/mobile/article/legal\\_education\\_bar\\_exam\\_passage](http://www.abajournal.com/mobile/article/legal_education_bar_exam_passage),

<sup>36</sup> See Bryant, *supra* note 3.

<sup>37</sup> See Berman, *supra* note 7; Thomson, *supra* note 5; Maranville, *supra* note 28.

<sup>38</sup> *Id.*

<sup>39</sup> See DAVID KOLB, EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT (1984).

IV.  
GOALS OF THE JOINT NEGOTIATION PROJECT AND  
PROFESSIONAL SKILLS EXPLORED

When Professors Powell and Bartlett began talking about a joint project, with the end-goal of moving students closer to being practice-ready lawyers, they determined that developing a small cross-class project would fit this vision. Specifically, Professors Powell and Bartlett chose tax and civil practice because students can (and do) avoid taking tax in law school, but lawyers must know the basics of tax law to competently represent their clients. In addition, the tax students would be encouraged to use practice skills and would have to introduce complicated law to students with no tax background. By using a tax and negotiation simulation, the project exposed two separate groups of students to subject areas they had largely had no exposure to yet in law school. One of the main goals of the project was to demonstrate for the students that they could either navigate these sometimes difficult practice areas themselves, or at least know when and how to find the legal resources they would need to help their clients.

This joint negotiation project provided a unique opportunity for students at Ohio Northern University College of Law to explore various professional skills including: legal research and writing; collaboration; interviewing; counseling; negotiation; self-evaluation; providing feedback to peers; fact analysis; conflict resolution; document drafting; problem solving; representing another member of the legal profession; translating complicated legal issues to laypersons and attorneys without background with that area of law; and knowing when to bring in an expert.<sup>40</sup>

V.  
DESCRIPTION OF THE PROJECT: PLANNING, ASSIGNMENTS,  
DAY OF THE NEGOTIATION, EVALUATION

The choice to team-teach the negotiation project developed from the professors' joint belief that students learn best when exposed to a range of professional voices. The majority of students had not taken (and were not likely to take) classes from both Professor Powell and Professor Bartlett. Thus, a team-taught unit allowed students to experience differing legal perspectives and practitioners before leaving law school. Further, there seemed to be little opportunity at Ohio

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<sup>40</sup> This list of skills exercised by students participating in the negotiation project almost exhausts the professional skills included in Interpretation 302-1 of the ABA Standards. ABA Standards, Interpretation 302-1, *supra* note 8.

Northern University for law students to make specific links between law classes (whether doctrinal or clinical).<sup>41</sup> Using a team-taught approach for a crossover project provided the students with a new model of educational experience they had yet to see in a law school setting.

When creating materials for a joint project, it is preferable to make an exercise realistic, have some level of conflicting (or unknown) information to provide realism, yet also control the amount of variables and types of issues.<sup>42</sup> Some methods for providing a cohesive project for students involve developing sample legal documents and providing a set of stipulated facts or assumptions; any relevant legal precedent (if the students are not required to research their own); specific assignments for each participant (this is the area where uncertainty or conflicting assumptions may be introduced to the assignment); and any ground rules required.<sup>43</sup>

Assessment is also a critical component for learning.<sup>44</sup> In general, testing for specific legal doctrinal knowledge and legal analysis is fairly straightforward. Assessments such as basic legal issue- and fact-spotting exams can be used for analyzing and grading a large number of students. Assessment for a skills-development project is a more complicated process. The summative exam method is much less effective than other means of evaluation in a practice setting.<sup>45</sup> Professors Bartlett and Powell settled on a feedback method.

The joint negotiation project involved planning and preparation in the prior semester, including integration of the project into the syllabi, drafting fact patterns and assignments, dividing students into groups, and planning lectures to be given ahead of time. The majority of the planning and class design occurred before the semester began. During the semester, implementation of the project required supervision of the student negotiations on the day of the joint negotiation, evaluation of the project, feedback and grading.

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<sup>41</sup> This joint project was the first such project across the doctrinal-clinical divide that faculty at Ohio Northern University had completed in known history.

<sup>42</sup> See AMERICAN BAR ASSOCIATION, COORDINATING COMMITTEE ON LEGAL EDUCATION, TEAM-TEACHING OF SUBSTANTIVE LAW AND PRACTICE SKILLS IN SUBSTANTIVE LAW CONTEXTS : A MANUAL FOR "LEARNING-BY-DOING" EXERCISES IN LAW SCHOOL COURSES AND CONTINUING LEGAL EDUCATION WORKSHOPS (1996).

<sup>43</sup> See *id.* (Providing five sample problems addressing issues from family law to business law, and even constitutional law).

<sup>44</sup> For more on assessment in a skills class setting, see J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55, 69 (1996). See also Kelly S. Terry, *Embedding Assessment Principles in Externships*, 20 CLINICAL L. REV. 467 (2014).

<sup>45</sup> See *id.*

*a. Professor Pre-Planning*

Due to the compressed nature of the law school semester, Professors Bartlett and Powell recognized the project could not be implemented during a current semester, but would require integration into the syllabus and workload of the following semester. During the fall of 2015, prior to building their spring syllabi, Professors Bartlett and Powell agreed to an outline of the joint project, a delegation of workload for each professor in building the project, and a delegation of workload for the students in each class. Further, the professors agreed on a date and time for the joint negotiation, and drafted specific information about the project to list on each syllabus.

Each professor's syllabus contained the same initial language describing the project itself, the date and time for the joint project, and a separate paragraph describing the assignment for that particular class, as well as the grading expectations and percentages.<sup>46</sup>

Professor Powell and Bartlett met approximately four to five times regarding this project before and after the negotiation class occurred, for about thirty minutes each time, and both participated in teaching and assessing the joint negotiation session. Overall, the planning and preparation time was easily manageable with other teaching responsibilities. Specifically, the first meeting involved an informal discussion of our joint concerns relating to student experiences, and sparked the idea for the joint project. After conceptualization, each professor reviewed their draft syllabus to determine how the classes might work together on a joint project, and what the project might accomplish. The professors agreed that Professor Bartlett's negotiation class session would be the best fit for a joint project. Upon review of Professor Bartlett's previously used negotiation fact pattern, the professors determined that a new fact pattern including a tax aspect could be drafted by Professor Powell to successfully integrate civil practice and tax law.

During the fall, Professors Powell and Bartlett split the drafting of the assignment; Professor Powell drafted the original tax problem design and joint syllabus language for the project, while Professor Bartlett drafted the assessment tools and set the student groups for negotiation. Each professor reviewed and refined the drafts on their own time. Upon meeting in person next, the professors compared syllabi and determined a joint meeting date for the two classes. Once the joint syllabus language and date was finalized, the professors did not

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<sup>46</sup> To view and/or download a copy of the Civil Practice syllabus that was distributed to students, please visit <http://goo.gl/GVMC9r>. To view and/or download a copy of the State and Local Tax syllabus that was distributed to students, please visit <https://goo.gl/HJH82Q>.

meet again to discuss the project until the middle of the spring semester.

During spring semester, the two professors met to review and refine the assignment before providing it to the students. Both professors attended the joint negotiation class session, provided introductory comments to the class, and watched the negotiations. Professors met again after the assignment to jointly review the written student feedback. The remaining professorial time was spent in the individual classes to explain the project and individual grading of the project, discussed below.

#### *b. Student Experience & Assignments*

##### *Tax Class:*

Students enrolled in State and Local Tax study a variety of taxation frameworks and methodologies for business and personal taxation as well as Constitutional and statutory prohibitions against certain state taxation methods. Students in State and Local Tax generally already have an interest in taxation law, and enroll to further their understanding of tax law.

To further the student knowledge of particular tax matters, Professor Powell assigned a tax research project with the joint negotiation project.<sup>47</sup> The choice of tax law was specifically designed to address an issue that a general practitioner may confront within a general practice, an area of law that many law students choose not to take in law school, and that may not be intuitively solved by a lawyer in practice. For example, the specific issue of an “innocent spouse” allowed for an interesting hypothetical situation. Further, the innocent spouse provision is a tax issue that family law or criminal law attorneys may face in a general legal practice. Other issues that could be used include the tax implications in a divorce settlement or the tax implications of a physical injury settlement versus a non-physical injury such as mental distress or tortious claims.<sup>48</sup>

The State and Local Tax students were first required to research the statutory and procedural requirements relating to potential spousal tax liability when a spouse may be unknowing of criminal financial dealings by the other spouse (entitled “innocent spouse

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<sup>47</sup> To streamline a joint project, professors could provide students with the relevant law and not require any student research.

<sup>48</sup> See generally, 26 U.S.C. § 104 (2006). Section 104(a)(2) provides that physical injury settlement may be tax exempt. 26 U.S.C. § 104(a)(2) (2006). These sections would allow a negotiation team to draft a settlement deeply affected by language choices within the four corners of the document. The students would also consider also the tax effects of a divorce and property distribution versus alimony payments.



claims”).<sup>49</sup> This was the sole research assignment for the semester in the State and Local Tax class.<sup>50</sup> The research assignment represented 20% of a student’s grade in the State and Local Tax class, and was graded separately from the negotiations project.

The State and Local Tax students were required to research the statutory and procedural specifics of the innocent spouse claim in federal, state and local law,<sup>51</sup> and provide the results in memo format as if they were writing for a judge or senior law partner. Professor Powell uses a memo format to simulate projects that new lawyers are often asked to perform in a law firm or as a judicial clerk. She teaches students how to draft memos for readability and style to prepare students for employment as a lawyer. As part of the research project, Professor Powell, the Ohio Northern research librarian and the students discussed general tax research skills before the assignment, and students implemented those research skills in researching and drafting the assignment.<sup>52</sup>

The research assignment was designed in a fashion that required students to conduct research first to find the term “innocent spouse” and then to determine the substantive and procedural requirements related to the legal term in multiple jurisdictions. The innocent spouse research assignment was graded on the substantive research of federal, state and municipal law and procedure, as well as general readability of the memorandum.

To replicate the reality that tax law affects both federal and state tax liability, students were also required to research the state tax implications of the innocent spouse provision. As Ohio Northern University College of Law is located in Ohio, students researched the tax implications of innocent spouse claims in Ohio,<sup>53</sup> which does not use the term “innocent spouse” in its code, and has general income tax

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<sup>49</sup> The innocent spouse provision can be found in 26 U.S.C §6015. The section provides for the definition of the innocent spouse, and sets out specific substantive and procedural requirements for a spouse to be able to claim such a provision. For example, a taxpayer may only claim the provision if the taxpayer, now legally separated or not married, filed a joint return without knowing of the underreporting. Relief may be requested from the U.S. Tax Court.

<sup>50</sup> Along with this research project, students were graded on drafting two additional memos (analyzing differing areas of state and local tax law), as well as a take home exam.

<sup>51</sup> The innocent spouse provision is available under federal tax law, but may or may not be available in state and local jurisdictions. Terminology and procedural process varies greatly when determining whether federal tax provisions may be claimed on a state or local level.

<sup>52</sup> In an earlier assignment, Tax students learned about drafting legal memos and received extensive legal writing feedback.

<sup>53</sup> Ohio also allows for income taxation at a local or municipal level. *See* Ohio Rev. Code § 715 (West 2016). Professor Powell’s students were required to determine the tax effects of an innocent spouse claim on a municipal income tax return as well.

liability on both the state level and in certain municipalities. The State and Local Tax students had previously studied neither the doctrinal nor procedural areas of “innocent spouse” in tax law.

The State and Local Tax students submitted their tax research assignments about ten days before the negotiations meetings with the Civil Practice students. After the memos were submitted and before students met with the Civil Practice class, extensive class discussion of the innocent spouse claim was utilized to confirm that all students understood key tax doctrine and procedure, regardless of the quality or content of individual memos. Professor Powell also returned the memos with grading and comments prior to the negotiations meetings with the Civil Practice students.

In addition to the 20% of the class grade awarded to the Tax students for the research assignment, Tax students also received an additional 10% of their grade for participation in the negotiations process. Points for the negotiations process were awarded by Professor Powell based on student organization and attendance at the pre-meeting, their participation and preparation for the negotiations itself, their review and analysis of the settlement agreement, and whether they timely turned in the settlement agreement.

*Civil Practice Class:* The Introduction to Civil Practice class is designed to introduce students to the reality, challenges, and obstacles of pre-trial civil litigation and practice. The goals for the course include: exposing students to best practices; connecting doctrine and skills; starting students on the path towards developing a professional identity; and, developing legal practice skills including interviewing, counseling, negotiation, fact development and analysis, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.

The Introduction to Civil Practice class is a skills course,<sup>54</sup> and Professor Bartlett aims to have students participate in simulations and experiential learning exercises for at least 51% of class time. In previous semesters, the Civil Practice students had participated in an in-class negotiation, but with a much simpler set of facts and only involving other students in the class.

The joint negotiation came towards the end of the semester for the Introduction to Civil Practice students. The students had already studied interviewing, development of the client-attorney relationship,

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<sup>54</sup> The Civil Practice course is designated by Ohio Northern University College of Law as a “skills class”. This means that the law college has decided that qualifies as a simulation course under ABA Standard 304(a) and counts towards the 7 credits of skills classes required by Ohio Northern University College of Law for graduating students.

cross-cultural competencies, and investigations. Additionally, they had drafted multiple legal documents. To specifically prepare for the negotiation exercise, the Civil Practice class completed readings and received lectures regarding the art of negotiations and drafting settlement agreements.<sup>55</sup>

#### JOINT NEGOTIATION PROJECT ASSIGNMENT

Prior to the negotiations, Professors Bartlett and Powell divided the classes into groups that included a negotiator, a client, and a tax attorney.<sup>56</sup> These groups were designed to replicate relationships between clients and lawyers in an adversarial setting. As is typical in tax litigation, the groups were designated to be representing either the client or the state department of revenue. Professors Bartlett and Powell also drafted a hypothetical set of facts for the negotiation, replicated below. As is the practice in teaching legal negotiations, mediations and other alternative dispute resolution methodologies, the fact patterns included a common set of facts known to all parties, and additional, secret, facts known only to one party.<sup>57</sup> The assignment used for the joint negotiations project (distributed to students in both classes) read as follows:

This joint negotiations simulation assignment involves a pending tax dispute and includes students from Prof. Powell's State and Local Tax class, as well as Prof. Bartlett's Civil Practice class. Students will play various roles, including the part of tax attorneys, clients, and litigators. The learning objectives of this joint assignment are to give students experience with:

- 1) explaining and comprehending complicated tax issues;
- 2) collaborating with attorneys who have a different skill set or expertise;
- 3) participating in negotiations on behalf of a client; and
- 4) drafting and reviewing settlement agreements.

Attorneys, clients, and litigators will meet with their assigned teams outside of class time to prepare for the negotiations and to discuss client

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<sup>55</sup> See Civil Practice syllabus, *supra* note 46, for a list of readings.

<sup>56</sup> To view and/or download a copy of the assignment that was distributed to students in both classes, please visit <http://goo.gl/DrHUVt>. This assignment originally contained the names of the students that were assigned to each team and the names have been redacted. Please note that due to class numbers, some teams had an additional negotiator. The State and Local Tax class numbers were much lower than the Civil Practice class, so the grouping reflected the desire to have a tax attorney in each group.

<sup>57</sup> For example, the highly regarded Program on Negotiation at Harvard Law School takes this approach. *Program on Negotiation*, HARVARD LAW SCHOOL, <http://www.pon.harvard.edu/> (last visited Dec. 3, 2017).

needs, expectations and options regarding settlement, and strategy. Please note that the clients and Department of Taxation attorneys have received additional facts that they may or may not share with their attorneys. You should treat this meeting as a confidential interview and discussion between the tax attorney, the litigators and/or client.

For the purposes of this assignment, students in the State and Local Tax class will play the part of tax attorneys, either a private tax attorney or an attorney employed with the Ohio Department of Taxation. Students in the Civil Practice class will play the part of a litigator (who was known to have a special expertise in negotiations and settling lawsuits before trial) or the taxpayer client.

The assignment then divided the students from both classes into three groups<sup>58</sup> representing the individual taxpayer or the department of revenue (mixed by classes), and provided the common fact pattern as well as any additional facts appropriate to the group.

The assignment required the students from both classes to meet outside of class, and ahead of the joint negotiation class to discuss the specifics of tax law and prepare a negotiation strategy.

*Hypothetical:*

A local judge, Fred<sup>59</sup>, comes to the private tax attorney to assist him in a legal matter. Fred's sister Ann is in trouble. Ann jointly files taxes with her husband Bob. Ann thinks that Bob might have done something illegal. She thinks that Bob might have bilked a wealthy family out of \$10 million. She and her husband received a bill for \$3 million from the Ohio Tax Board. Ann hasn't seen or talked to her husband in a month, and last year she kicked him out of the house. The Ohio Department of Taxation sent Ann a notice that they are filing a lien against her, including a lien against their house. The private tax attorney advises Fred and Ann to hire some powerhouse litigators to assist with the settlement negotiations and/or litigation. Fred and Ann agree, and hire the litigators.

Facts known only to the taxpayer (in summary): the judge and his sister inherited a substantial amount of money that they have at their disposal. The judge is up for re-election and requires that this matter be kept confidential, and will pay almost any amount to settle the case.

Facts known only to the department of revenue (in summary): the revenue attorney knows that the sister has been driving a brand new

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<sup>58</sup> Teams were balanced to reflect a general balance of gender, race, class year and experience.

<sup>59</sup> Please note that consideration of culturally diverse names is appropriate in designing classroom projects.

car, as well as spending an excessive amount of money. The revenue attorney firmly believes that the sister does not meet the innocent spouse test, but the attorney's boss wants this case settled quickly.

During the preparation meeting and discussion of the negotiation strategy, the Tax students<sup>60</sup> provided tax expertise to the students negotiating the innocent spouse claim. The hypothetical facts differed from those in the Tax students' research assignment, but the substantive and procedural law was on point with the hypothetical provided so no additional research was required.

### *c. The Negotiation*

The negotiation itself took place during a two-hour period of designated Introduction to Civil Practice class time. The decision to hold the negotiation during Civil Practice class was made because of potential scheduling conflicts, as the Civil Practice class had twenty-three students and the tax class had seven students.

At the beginning of the negotiation itself, all students were gathered into one classroom together. Professors Powell and Bartlett urged students to sit with their negotiation groups. As soon as the students sat with their negotiation group, the Professors discussed the requirements of the project, discussed building locations for negotiations, provided the Negotiation Assessment forms,<sup>61</sup> and answered questions. Following this discussion, the students were provided with the names of their opposing group members for the purpose of the negotiation, which had not been disclosed in advance.<sup>62</sup>

The directions allowed students to be excused upon successful settlement between the parties and the return of the Negotiation Assessment forms from all group members. If no settlement was agreed upon, students were required to stay for the full class period, and either extend the meeting time or meet again until a settlement was reached between the parties.<sup>63</sup>

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<sup>60</sup> Tax students were encouraged to determine their own comfort level with participation in the litigation. While required to be present for the full negotiation, the Tax students were allowed to provide advice, while not being required to participate in the full negotiation. This directive was designed to allow the negotiator and tax lawyer to determine how much tax advice was required for a strong settlement position.

<sup>61</sup> To view or download a copy of the Negotiation Assessment Form used for this joint project, please visit <http://goo.gl/IJ29o8>.

<sup>62</sup> Students were not provided with the names of the opposing group in advance to prevent students from doing any opposition research on fellow classmates, thus requiring students to focus only on the facts and law provided within the hypothetical.

<sup>63</sup> The directions required the parties to reach a mutually agreeable settlement. The Civil Practice students were then to draft a settlement agreement based on what was discussed, to be reviewed by the Tax students and graded by the professors. Without a settlement, there would be no settlement agreement to draft (or grade).

Students utilized four separate rooms throughout the law building for their negotiations. Because the groups did not know their negotiation counterparts before the negotiations class, the negotiations began with determining a space for commencing negotiations. Professor Bartlett's class had already received instructions on the dynamics of negotiations as related to seating arrangements and balance of power, and thus those students could immediately put those learned power dynamics into play in the negotiation of location and seating arrangements.

During the negotiations, the professors alternated between the groups while observing the negotiations. Of the four groups, each had a different dynamic. The first group selected a very small, oblong-shaped room that is used as a student lounge. That group sat on opposite sides of the small room, yet close together to begin their negotiations. That group of students was very loud and contentious, with each side starting with a list of demands from the litigators, and butting heads among all parties. The tax attorneys participated in these negotiations, but not as lead negotiators. After about fifteen minutes, the group dynamics shifted dramatically, and the negotiation turned a corner.<sup>64</sup> The students seemed to realize that posturing was getting them nowhere and used their problem-solving skills to tune their demands to one another. After that, these groups were able to quickly agree to the settlement terms. The settlement reached by the first group was very high monetarily.

The second group selected a room in the library with a large rectangular table. They designated speakers (litigators) to negotiate and the other students remained relatively quiet, providing input only occasionally. This group was the first to take a break, step outside and discuss their positions amongst themselves, a tactic taught during the negotiations lecture. One of the tax attorneys in this group actively negotiated for her group's side. The settlement reached by this second group was mid-range monetarily and provided for a payment plan over five years with interest.

The third group selected a small moot court room and sat at the tables used for counsel. This group used only Civil Practice students at the negotiations table. The tax attorneys sat separately and did not directly participate in the negotiation. This lack of direct participation may be due to the group having the two most senior Tax students, both of whom were third year students with significant tax and accounting expertise. This group had the least effective negotiation

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<sup>64</sup> The groups were generally balanced in terms of gender, race and experience, and teams were allowed to determine their own leaders and negotiation styles.

activity, the Civil Practice students did not understand the tax ramifications of their negotiations, and they did not as effectively use their tax counsel. The group's settlement agreement was for the least amount of money and did not include a confidentiality provision, unlike the other two groups' agreements. Professors Bartlett and Powell observed the Tax students attempt, at several junctures, to slow the negotiations and provide specific tax advice, but the litigators did not appear to be interested in tax implications or assistance from tax counsel.

Each group completed their negotiations within the allotted two hours of class time, and two of the three groups finished their negotiations in less than one hour.

After the student groups reached a settlement agreement, they were instructed to write down the terms of settlement, and fill out and turn in their Negotiation Assessment forms. The Civil Practice students were designated to jointly draft a settlement agreement and then share it with their tax attorneys for comments and review for compliance with tax requirements. The Tax students were then to submit the settlement agreement to Professor Powell on a date and time certain.

#### *d. 360-degree Evaluation*

Timely feedback on a skills project is a critical component for experiential learning.<sup>65</sup> Feedback may include a professor determining whether the student understands the fundamental framework for the project and can understand and use of the tools provided.<sup>66</sup> The particular de-brief and feedback given may or may not relate to the assessment or grading aspect of the project.<sup>67</sup>

For this negotiation project, Professors Powell and Bartlett agreed that the most effective feedback would come from both self-reflection and peer review— student's reflection and assessment of each other — as well as feedback from the professors. Thus, each student that participated in the project provided and received 360-degree assessment from the professors and their peers, and provided feedback on the project itself.

To implement the 360-degree evaluative process, students from both classes were required to fill out Negotiation Assessment forms<sup>68</sup>

<sup>65</sup> Stuckey, *supra* note 4, at 256. See J.P. Ogilvy, *supra* note 44.

<sup>66</sup> Deborah A. Maranville, *Infusing Passion and Context into the Traditional Curriculum through Experiential Learning*, 51 J. LEGAL EDUC., no. 1, 2008, at 73 (discussing generally the feedback options in legal experiential projects).

<sup>67</sup> See *id.* at 74 (discussing the difference between de-brief and assessment).

<sup>68</sup> See Negotiation Assessment Form, *supra* note 61.

at the end of the negotiation. The form required students to disclose offers made by their team, offers made by the opposing team, and the agreed-to settlement agreement terms. In addition, the feedback form required students to do a self-assessment and an assessment of their teammates' (both in their class and in the other class) performances during the initial team meetings and at the negotiation.

The idea for the self-assessment portion of the feedback form came from Professor Bartlett's goal of teaching students in her Civil Practice class how to develop self-evaluation and self-directed learning skills, and how to seek additional information or training in areas that need improvement.<sup>69</sup> Professors Bartlett and Powell also wanted to require students to provide feedback on their teammates performances. Their reasoning for requiring peer feedback included both getting students used to the idea of reflecting and thinking critically about the behavior of legal professionals, but also preparing students for mentoring roles. It is a very important professional skill to be able to reflect and provide feedback to legal colleagues.<sup>70</sup>

The students evaluated themselves and their colleagues very positively, for the most part. However, there was some criticism of the tax class students' ability to explain tax law to the Civil Practice class, as well as some criticism of the negotiating abilities and strategy of the Civil Practice class students. Some students also mentioned that they wished the fact pattern were more detailed.

Later, a week after the negotiation and after the draft settlement agreements were turned in for grading, both Professor Powell and Bartlett heard verbal criticism from the Tax students regarding the lack of specificity and depth of thought in the draft settlement agreements prepared by the Civil Practice students.

Professors Powell and Bartlett also individually assessed the students' performance on the preparatory assignments and during the negotiation, as well as the draft settlement agreements.

Professor Powell's assessment of the negotiation reviewed student attendance and participation in the pre-negotiation meeting, student participation and preparation for the negotiation itself, student analysis of tax implications on the settlement agreement, and whether

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<sup>69</sup> See Elizabeth M. Bloom, *A Law School Game Changer: (Trans) Formative Feedback*, 41 OHIO N.U.L. REV. 227, 230-33 (2015); Susan L. Brooks, *2012 Clinical Legal Education Symposium: Symposium Article: Meeting the Professional Identity Challenge in Legal Education Through a Relationship-Centered Experiential Curriculum*, 41 BALT. L. REV. 395, 434-35 (2012); Timothy W. Floyd et al., *Beyond Chalk and Talk: The Law Classroom of the Future*, 38 OHIO N.U.L. REV. 257, 300-01 (2011); Donald A. Schon, *Educating the Reflective Legal Practitioner*, 2 CLINICAL L. REV. 231, 243-47 (1995).

<sup>70</sup> *Id.*



students timely turned in the settlement agreement. Professor Powell also reviewed the Civil Practice student assessment forms in which they reviewed their fellow Tax students.

Professor Bartlett's assessment of the Introduction to Civil Practice students only comprised 5% of the total grade for the class. Professor Bartlett gave three points for participation in the negotiations and two points for the completion of a draft settlement agreement. If the students showed up and completed the assignments, they received full credit from Professor Bartlett.

## VI.

### REFLECTION ON THE JOINT NEGOTIATION PROJECT: ROOM FOR IMPROVEMENT

Ultimately, the joint negotiation project implemented the spiral experiential learning goals of experiencing, reflecting, thinking, and acting<sup>71</sup> in reflection as applied to tax law and civil practice.

The negotiations were highly successful; they demonstrated that the use of two different classes (with no student crossover) provided an element of real-world negotiation often lacking in simulated negotiation settings. The students from both classes enjoyed the project<sup>72</sup> and several spoke positively of the project in Professor Bartlett's final teaching evaluations at the end of the semester.

In reflecting on the project itself, both professors considered that several improvements might be made. For the original project, Professors Bartlett and Powell provided specific, but not in-depth information on the taxpayer's financial situation to allow the parties to focus on negotiation skills. In a practice setting, lawyers perform many negotiations without having all of the preferred documentation and factual development. Originally, Professors Powell and Bartlett believed that the project would allow students to become accustomed to the uncomfortable experience of negotiating on behalf of a client without having all of the desired information. Professors Powell and Bartlett shared with students this concept when providing the facts to the students.

In hindsight, there is some question about whether the students could have benefitted from having additional financial information. Providing some additional financial background might have allowed the students more comfort in certain negotiations, but would not allow

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<sup>71</sup> See Kolb, *supra* note 39.

<sup>72</sup> Negotiation Assessment forms filled out at the time of the negotiation included the following statements: "This was fun." "Was a great experience." "This was a fun activity." "I thought this was a really helpful activity." "Great job by both sides." "We reached a better agreement than originally planned."

students to experience the real-world negotiation of pre-litigation settlement negotiations.<sup>73</sup> While Professors Bartlett and Powell provided students with an explanation of the materials, it is possible a deeper explanation of the purposeful nature of the lack of information might have assisted the students in negotiations.

Both professors agree that the fact pattern used could be elaborated on and fine-tuned to provide more clarity to the students. In addition, facts could be added so that the students would be driven to negotiate longer, and get more use out of the “secret” or undisclosed facts.<sup>74</sup>

Second, the differential in the weight of the negotiation project in final grades for the students in the tax class versus the Civil Practice class likely led or at least partially led to the poor drafting of the settlement agreements. If Professors Powell and Bartlett were to do this type of joint project again, they would match the grading in terms of weight so that the students from both classes would feel equally invested in the project. For example, Professor Bartlett would make the project worth at least 15% of the total grade for the class.

Finally, the students might have benefitted from more extensive discussion of their settlement documents. Professors might consider how much time to allow for classroom discussion and feedback in implementing a similar project, and those professors may weigh whether to discuss the verbal negotiation skills against time spent discussing and providing feedback for a written settlement agreement.

On a positive note, both professors noted that the negotiations portion of the exercise exceeded expectations. Students were enthusiastic at the time of negotiation, particularly focused and prepared. The students were highly engaged and creative, and stayed within their roles.

As noted, the student settlement agreements, however, were not very well drafted. In fact, in comparison to the negotiations, the majority of drafted settlement agreements were particularly disappointing in length, complexity and spotting or analyzing settlement effects on a client. Further, within the context of written settlement agreements, the tax implications were neither well thought out nor properly framed by students. This may have been a timing factor (requiring Civil Practice students to draft the agreement and timely

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<sup>73</sup> Feedback from the student Negotiation Assessment forms included “More facts please” and “Hard to negotiate with limited information.”

<sup>74</sup> While the project could have been extended, neither Civil Practice nor State and Local Tax class were designed to teach in-depth negotiations skills. The particular project provided sufficient depth for the goals of the designed joint project, and can be successfully integrated into a class without requiring extensive classroom time.

return it to Tax students,) but more likely most of the Civil Practice students did not prioritize this drafting project due to the fact that it had such a small impact on their grade. Off-hand comments by Civil Practice students and feedback from Tax students supports this analysis. Additionally, several Tax students failed to turn in their drafting assignments on time. Certain students claimed they failed to note the assignment date, and others indicated that Civil Practice students failed to timely provide the settlement document to the Tax students. As drafting was not the focus of the project, professors implementing this type of project could shift a focus to drafting instead of negotiation.

## VII.

### REPLICATION AND ADAPTION FOR OTHER SUBJECT MATTERS AND JOINT PROJECTS

This project could be easily replicated at other law schools and across various legal disciplines. The assignment and feedback forms have already been created and the planning and preparation time for the joint project was easily manageable alongside other teaching responsibilities.

As an example of a similar negotiation project, during Fall Semester 2016, Professor Bartlett partnered with Karen Hall, Director of the Democratic Governance and Rule of Law LL.M and Assistant Professor of Law at Ohio Northern University College of Law on a parallel joint negotiation project, focusing on cross-cultural competency in negotiations.

Professor Bartlett's Civil Practice class (30 JD students) and Professor Hall's American Legal System class (17 international LL.M students) participated together in a joint negotiation project developed from the original Professor Powell and Bartlett negotiation project. The goals of the Professor Bartlett and Hall joint negotiations project were to help students gain:

- 1) understanding of the role of negotiation and settlement in civil litigation;
- 2) experience collaborating with attorneys who have a different skill set or expertise;
- 3) cross-cultural competency;
- 4) experience participating in negotiations on behalf of a client or as a client; and
- 5) experience drafting and reviewing settlement terms.

Professors Bartlett and Hall met only once in person to plan the joint project, for less than an hour, approximately 2 weeks before the negotiation assignment was handed out to both classes. Professors Bartlett and Hall spent an additional 2-3 hours each separately preparing the class materials and debrief questions for the joint class.

A different, non-tax based, factual problem was used, although the same basic instructions and Negotiations Assessment Form were used. The factual problem was developed by Professor Hall and elaborated on by Professor Bartlett, and focused on a dispute between two business partners.<sup>75</sup> Professors Hall and Bartlett chose not to use the tax problem because most of the students in both classes had not yet taken any tax classes, and therefore there were only a few “tax experts” available. The emphasis of the project remained on cross-cultural competency and focused less on the connection between doctrinal law and experiential learning.

In addition to a change in fact pattern, Professors Bartlett and Hall eliminated the written settlement agreement portion of the assignment, and increased the number of negotiating teams. Instead of teams of 5-6, the students were assigned to smaller groups of 2-3 students each, and each group was made up of one client and 1-2 attorneys. The idea behind the smaller groups was to give the students closer interaction with their teammates, requiring the students to exercise more cross-cultural communication skills.

Parallel to the original negotiating project developed by Professors Bartlett and Powell, the students were required to meet with their group to interview their clients, discuss goals and negotiation strategies, and otherwise prepare for the negotiation. The students were not told which team they were negotiating against until the day of the negotiation.

There were three specific educational reasons behind not telling the students who they would be negotiating against until the day of the negotiation. First, given the limited time, student focus on interviewing their clients and discussing goals and strategies for the negotiations was the most important aspect of the project. Second, Professors Bartlett and Hall wanted students avoid any temptation to spend time exchanging documents or offers ahead of time. Third, to simulate real-life negotiations where most of the time attorneys may not know opposing counsel at all, or at least not know their negotiations styles and strategies that well, Professors Bartlett and Hall

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<sup>75</sup> A copy of the Fall 2016 Negotiation Assignment distributed to Professor Hall and Professor Bartlett’s students is available here: <https://goo.gl/7NYr6G>. Please note that student names and group assignments have been redacted from this document to protect student privacy.

wanted the students to have to prepare to deal with all types of personalities and negotiation strategies.

Professors Bartlett and Hall gave the groups only 1 hour and 15 minutes to complete their negotiations, and then had the students return for a 40 minute debrief session. Based on comments made during the debrief session and on the Negotiation Assessment forms, students' struggles seemed to focus on working with more or less experienced group members (some of the LL.M students made it clear to the JD students that they had a great deal of experience negotiating as attorneys in their own countries and were rigid in their choice of negotiation strategies). However, very interestingly, the students all seemed in agreement that though some of them were nervous about working with group members from another culture at first, they did not believe that the cross-cultural communications played a factor in the outcome of their negotiations whatsoever.<sup>76</sup>

One additional important difference between the spring and fall assignments was that students were not asked to draft settlement agreements this fall. Professor Bartlett made the decision to eliminate the settlement drafting portion of the negotiation assignment. This decision was based on the feedback from students in the spring suggesting that more time, energy, and a heavier weighted grade would be needed for the drafting portion of the exercise to be successful. Given the other material that needed to be covered and the other assignments that she wanted the Civil Practice students to complete, the settlement drafting was not a priority and so it was removed.

Overall this second joint negotiation project was very well-received by the students and based on the discussion in the debrief session, a great learning experience as well. Eliminating the settlement drafting allowed for less impact on the syllabus, and may be a useful model for additional negotiation simulations across disciplines.

Other ideas for collaboration on a joint negotiations project could be between clinical and externship seminar classes, business organizations and tax classes, family law and pretrial litigation classes, and more. In addition to using negotiation, this type of project can be replicated for litigation projects or transactional projects. For example, a transactional clinic course could work with a contracts drafting or corporations class to jointly develop a contract on behalf of a hypothetical client with specific legal needs. A family law class could partner with a lawyering skills class to negotiate a divorce. The complexity of the fact pattern, considering whether the married couple had signifi-

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<sup>76</sup> During the debrief session, one JD student in the debrief session said that "working with an LL.M student was just like working with an attorney practicing in the U.S."

cant assets or children, could be altered to suit a particular set of student skills. Because the joint project model is moderately limited in time and scope, a joint project may also be considered between a senior faculty member and junior faculty member or adjunct faculty member.

#### CONCLUSION

As experiential learning offerings in law schools continue to grow along with pressures to keep costs down and the need to produce practice-ready law graduates, the joint negotiation project discussed in this article offers one example of how to bridge the divide between doctrinal and clinical teaching with relatively little cost and faculty time. Given the success of the project for both students and the professors, joint negotiations projects will continue at Ohio Northern University Claude W. Pettit College of Law. There is much more that can be done, but this article should help seed ideas for small but impactful experiential learning projects across classrooms and legal disciplines.