THE FORGOTTEN COMPONENT OF LEGAL NEGOTIATION: A PROPOSAL TO IMPROVE EDUCATION ON LEGAL NEGOTIATION PREPARATION IN AUSTRALIAN LAW SCHOOLS

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DEDICATION

This thesis is dedicated to my Mum. You have always encouraged me in the pursuit of education and have supported me unconditionally from the very beginning. You have always been my inspiration. Without your support I would never have started the PhD journey, and without your unwavering love I could never have completed it. With my deepest gratitude and love, thank you.

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THESIS SUMMARY

Legal negotiation is a fundamental skill, used daily by legal practitioners. Consequently, it is an important part of legal negotiation education. However, Australian legal education currently mandates legal negotiation training *only* during postgraduate pre-admission studies.[1] Further, key scholarship on legal negotiation is riddled with unclear terminology,[2] and lacks precise definitions of the terms *legal negotiation*, *legal negotiation preparation*, and *legal negotiation ethics*. This creates significant challenges for law students learning about legal negotiation preparation. My research rests on the premise that, due to the current lack of clarity in this field, law students do not have the requisite skills to prepare for a legal negotiation and are consequently poor legal negotiators.[3] Indeed, the current curriculum in Australian Law Schools requires law students to prepare for a legal negotiation while 'properly having regard to the circumstances and good practice,'[4] but does not provide definition or guidance about these terms.

My thesis is situated in the field of negotiation legal education. It analyses the important role that legal negotiation takes in legal education and addresses the deficiencies in legal negotiation education in four ways. I first explore definitions of legal negotiation, examining the divergent history that has led to the acceptance of legal negotiation definitions in the absence of clear rationale. I conclude that an all-encompassing definition would fail to recognise the nuances inherent in legal negotiation, and I instead propose a Taxonomy of Legal Negotiation that that situates legal negotiation in legal practice. Through this analysis, I identify three interconnected factors that are foundational to legal negotiations conducted by legal practitioners: preparation, ethics, and client-centrality.

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1 Law Admissions Consultative Committee, *Practical Legal Training Competency Standards for Entry-Level Lawyers* (2015) ('*PLT Standards*').

2 Andrea Kupfer Schneider, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (2002) 7 *Harvard Negotiation Law Review* 143, 151-2.

3 See, eg, David Spencer and Marilyn Scott, 'ADR for Undergraduates: Are We Wide of the Mark?' (2002) 13(1) *Australasian Dispute Resolution Journal* 22. See also: Nadja Alexander and Jill Howieson, *Negotiation Strategy, Style, Skills* (LexisNexis Butterworths, 2nd ed, 2010) 106; Roger Fisher and Danny Ertel, *Getting Ready to Negotiate: The Getting to Yes Workbook* (Penguin Books, 1995) 4.

4 Law Admissions Consultative Committee, *PLT Standards* (n 1) [5.10] 'Lawyers' Skills' Element 6.

Second, I create the Legal Negotiation Preparation Framework, a framework of 'good practice,' informed by original data from 146 law student entrants in Legal Negotiation Competitions, surveyed about their legal negotiation preparation. I conclude that, while law students understand *some* of the requirements of legal negotiating preparation, including the importance of client-centrality, they struggle with practical application. Law students also fail to appreciate that legal negotiation ethics is critical to legal negotiation preparation and must be explicitly embedded in this process. This leads to my analysis of legal ethics, through which I integrate extant literature with my data to pinpoint the difficulties in applying legal ethics to legal negotiation, exemplified through a case study on deception, which again underscores client-centrality.

My research culminates in the development of a Conceptual Framework that synthesises legal negotiation preparation, ethics, and client-centrality in a way that has never been done in Australian legal education. I use this Conceptual Framework to operationalise legal negotiation preparation by identifying a series of specific legal negotiation minimum competencies that law students must achieve to reach the standard of entry level legal practitioner. I develop questions to prompt client discussion, thereby centralising the client in the legal negotiation preparation process. My original contribution to legal education, therefore, is the creation of a novel way of teaching and guiding legal negotiate preparation, to enable law students to become competent legal negotiators for the purposes of admission to legal practice.

DECLARATION

I certify that this thesis:

1. does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and
2. to the best of my knowledge and belief, does not contain any material previously published or written by another person except where due reference is made in the text.

Signature

18 December 2020

Date

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LIST OF ABBREVIATIONS

Academic Areas	Law Admissions Consultative Committee, *Prescribed Academic Areas of Knowledge* (2016)
ADR	Alternative dispute resolution
ALSA	Australian Law Students' Association
BATNA	Best alternative to a negotiated agreement
Conduct Rules	Law Council of Australia, *Australian Solicitor Conduct Rules* (2015)
DR	Dispute resolution
EANTs	Ethically ambiguous negotiation tactics[1]
LACC	Law Admissions Consultative Committee
LCA	Law Council of Australia
LSA	Law Students' Association
Legal Practitioner Legislation	Collectively, the *Legal Profession Act*, or its equivalent, in each Australian jurisdiction[2]
NADRAC	National Alternative Dispute Resolution Advisory Council
PLT	Practical Legal Training
PLT Standards	Law Admissions Consultative Committee, *Practical Legal Training Competency Standards for Entry-Level Lawyers* (2015)
SBREC	Flinders Social and Behavioural Research Ethics Committee
WATNA	Worst alternative to a negotiated agreement
ZOPA	Zone of potential agreement

1 John Wade, 'Ethically Ambiguous Negotiation Tactics (EANTS): What are the Rules Behind the Rules?' (Conference Paper, Law Society of Saskatchewan CPD Seminars, 12 May 2014).

2 *Legal Profession Act 2006 (*ACT); *Legal Profession Uniform Law 2014* (NSW); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (QLD); *Legal Practitioners Act 1981* (SA); *Legal Profession Act 2007* (Tas); *Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession (Admission) Rules 2009* (WA).

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I am extremely grateful for the HDR Coordinators who have been there for me throughout the research process: Dr Caitlin Hughes, Dr Maria Giannacopoulos, Dr Esther Erlings, Dr Marinella Marmo and Dr Nerida Chazal. Thank you as well to my colleagues at Flinders Law for their support and constant – and unwaveringly encouraging – reassurance. The Flinders Office of Graduate Research has also been a wonderful resource; and the professional development programs they run, including those by Dr Maria Gardiner and Dr Hugh Kearns, have been invaluable.

My friends and family have been incredibly supportive throughout this whole process – asking about my thesis (or not asking, depending on the day); providing encouragement in the form of chocolate, coffee, tea, long chats, and hugs when I needed them; and being generally amazing people. In particular, I would like to thank my family: my Grandmaman; my aunts, uncles, and cousins; and my extraordinary neighbour Wanda, who even at 92 years of age asked about my thesis. Thank you also to the friends who have supported my journey, who are too numerous to name here. Particularly, thank you to Catherine, Esther, Jemma, Rhys, and Kimberley for always being there for my thesis rants (and breakdowns) over the past few years; helping me to keep motivated; and for encouraging me through the rough patches and joining me to celebrate the wins. A special thanks also to Ellie and Gracie, who have been the best feline supervisors I could have asked for.

I was the fortunate recipient of both an Australian Government Research Training Program Scholarship, and a Higher Degree Funding Grant from Flinders University, without which I would have been unable to do my research.

Thank you to the participants in the ADR Research Network for providing constructive critique on my original conceptions of legal negotiation, and for encouraging my first presentation on my research at the 2018 ADR Research Network Round Table. At this conference I first began to develop confidence in my research, and to develop the work that has now become my Conceptual Framework. I give thanks, also, to the participants in my study. Without you, my research would not have had the same level of depth or offered such insight into law student legal negotiation preparation. Likewise, I owe a debt of gratitude to the Law Students' Associations that so generously allowed me to recruit participants from their Legal Negotiation Competitions, and who collected questionnaires for me in sometimes the most adverse of situations (asking a stressed law student competitor to undertake a questionnaire in the final minutes before competing in a Legal Negotiation Competition can be quite the harrowing experience).

Last but not least, thank you to my students, particularly my current Honours students, Keelie and Sarah. Your passion for study; your excitement for the 'jigsaw puzzle' of legal research; your hard-work, diligence, and desire to create the best work that you can; and your ability to put up with all of the examples from my own research is incredible. All of my students inspire me every day.

CHAPTER ONE: INTRODUCTION

I INTRODUCTION

This thesis is concerned with the role of legal negotiation in legal education, specifically, the legal negotiation preparation skills that law students are required to attain prior to admission to legal practice. Legal negotiation is an essential professional skill, which forms the basis for the vast majority of legal work.[1] Considering that legal practitioners engage in legal negotiation daily,[2] clients expect them to be competent legal negotiators. However, this is often *not* the case, particularly for law graduates.[3] One of the most crucial components of legal negotiation, and often the most lacking skill, is legal negotiation preparation.

My research determines that, together, preparation, ethics, and client-centrality form the foundation of legal negotiation. To examine these three themes and to consequently address the current shortfalls in legal negotiation education, I analyse and synthesise extant literature with original data, culminating in a Conceptual Framework that sits at the intersection of legal negotiation preparation, ethics, and client-centrality. I propose that this Conceptual Framework can be used to better instruct law students in how to prepare for a legal negotiation. To provide practical guidance for law students, in Chapter Six I use this Conceptual Framework to operationalise legal negotiation preparation through the creation of Minimum

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1 Law Society of New South Wales Commission of Inquiry, *The Future of Law and Innovation in the Legal Profession* (2017) ('FLIP Report'). Negotiation has also been recognised more generally as the basis of many professional fields: Avil Beckford, 'The Skills You Need to Succeed in 2020', *Forbes* (Web Article, 6 August 2018) <https://www.forbes.com/sites/ellevate/2018/08/06/the-skills-you-need-to-succeed-in-2020/#4d53d46288a0>.

2 See, eg John Lande, 'Teaching Students to Negotiate like a Lawyer' (2012) 39(1) *Washington University Journal of Law and Policy* 109, 109; Charles B Craver, 'Classic Negotiation Techniques' (2016) 52(2) *Idaho Law Review* 425, 427 ('Classic Negotiation Techniques'); Alvin B Rubin, 'A Causerie on Lawyers' Ethics in Negotiation' in Carrie Menkel-Meadow and Michael Wheeler (eds), *What's Fair: Ethics for Negotiators* (John Wiley & Sons, 2004) 350-365, 351.

3 See eg David Spencer and Marilyn Scott, 'ADR for Undergraduates: Are We Wide of the Mark?' (2002) 13(1) *Australasian Dispute Resolution Journal* 22.

Competency Tables, which law students can use to achieve the requisite legal negotiation preparation competence at the standard of an entry-level practitioner.[4] My thesis unites the fields of legal negotiation and legal education. I therefore begin this introductory chapter by justifying the importance of legal negotiation as a core skill in legal practice. Following this, I describe the structure of Australian tertiary legal education, to both contextualise the teaching of legal negotiation in Australia, and to explain the current standards that Australian law students must meet. My analysis of these standards highlights the deficiencies therein, and, consequently, identifies the gap in legal negotiation education that my research seeks to fill. This lays the foundation for my research and leads into an explanation of my research questions and methodology. I conclude this introductory chapter by explaining the way I have structured my thesis to address my research questions, and by outlining the contribution that my research makes to legal negotiation and legal education scholarship.

II THE IMPORTANCE OF LEGAL NEGOTIATION

Dispute resolution is the bedrock of the legal system – the process of parties resolving their disputes by using various processes including mediation, arbitration, facilitation and, of course, litigation. These processes each have legal negotiation at their core. Legal negotiation is consequently an inherent part of legal practice – if legal practitioners are unable to competently perform this task, they bring not only their own reputation, but that of the legal profession into disrepute. While there are various understandings of legal negotiation in the literature and in legal practice – typically characterised as negotiation conducted by a legal practitioner – there is no clear delineation about what does, and what does not, constitute a *legal* negotiation. Given that legal negotiation is a foundational skill of legal practice, and various reports that insist legal practitioners *must* have this skill,[5] it is time that legal negotiation was

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4 Law Admissions Consultative Committee, *Practical Legal Training Competency Standards for Entry-Level Lawyers* (2015) ('*PLT Standards*').

5 See, eg, Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 90 (2000); Department of Justice and Attorney General, Government of New South Wales, *ADR Blueprint Draft Recommendations Report 1: Pre-Action Protocols and Standards* (2009); National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (September 2009) ('*The Resolve to Resolve*'); Sally Kift, Mark Israel and Rachael Field, 'Learning and Teaching Academic Standards Project: Bachelor of Laws Learning and Teaching Academic

afforded clear definition. This is needed to not only emphasise the importance of legal negotiation itself, but to give clear acknowledgement that it has been accepted in the field of law. While legal negotiation – and dispute resolution – has long been recognised as a *soft* skill when compared to litigation, by providing clear definition my thesis takes a crucial step towards solidifying legal negotiation as an important process, and one that law students must learn prior to entering legal practice. Further, it is imperative that a legal practitioner appreciates the legal and ethical obligations of engaging in legal practice. Having a proper understanding of what constitutes a legal negotiation will enable further clarity and guidance about how – and when – these strict ethical obligations must be met. This is particularly important given the increasing ways in which law graduates are utilising their legal skills:[6] it is essential that they are able to distinguish between legal negotiations that are strictly regulated by legal ethics, and negotiations that might fall within other fields. My research enables this differentiation through the development of a Taxonomy of Legal Negotiation.[7]

Dispute resolution was initially introduced as the mutually exclusive alternative to litigation.[8] Legal professionals consequently considered dispute resolution to be the weaker option.[9] Even as the legal profession slowly began to embrace dispute resolution,[10] Australian Government consultancies showed that legal practitioners were not always aware of the available dispute resolution options, rendering them unable to meet their ethical obligation to inform clients of relevant and suitable

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Standards Statement December 2010' (Report, Australian Learning and Teaching Council, 11 February 2011) 1; *FLIP Report* (n 1) 78 Table 6.1.

6 See, eg, Angela Melville, 'It Is the Worst Time in Living History to be a Law Graduate: or Is It? Does Australia Have too Many Law Graduates?' (2017) 51(2) *The Law Teacher* 203; Michael McNamara, 'University Legal Education and the Supply of Law Graduates: A Fresh Look at a Longstanding Issue' (2019) 20(2) *Flinders Law Journal* 223.

7 See below Chapter Three.

8 Warren Pengilley, 'Alternative Dispute Resolution: The Philosophy and the Need' (1990) 1 *Australian Dispute Resolution Journal* 81, 92.

9 See general discussion in Pengilley (n 8) 93. Now, however, this direct contrast between dispute resolution and litigation is seen to be 'confining to both dispute resolution and litigation': Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2002) 77 ('*Dispute Resolution in Australia*').

10 See Chapter Three for a brief analysis of dispute resolution.

dispute resolution alternatives.[11] Government-commissioned reports[12] and profession-based reports[13] alike emphasise the need for future legal practitioners to have interpersonal and professional skills, as well as skills in advocacy and negotiation. These sources provide a clear message that law graduates are expected to be able to negotiate,[14] supporting the argument that legal negotiation is an important and relevant skill. The Australian Government further confirmed this by increasing the amount of legislation that either mandates the use of dispute resolution processes or proposes optional dispute resolution processes,[15] imposing sanctions on legal practitioners who fail to comply with these provisions.[16] Of particular note is the enactment of the *Civil Dispute Resolution Act 2011* (Cth),[17] which was created, in part, to increase the speed with which a dispute is resolved, and to conserve court

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11 Australian Government Productivity Commission, *Inquiry into Access to Justice Arrangements* (2014) Vol 1, 247. Legal practitioners have an ethical obligation to advise their clients 'about the alternatives to fully contested adjudication of the case which are reasonably available to the client': Law Council of Australia, *Australian Solicitor Conduct Rules* ('*Conduct Rules'*) (2015) 7.2.

12 Australian Law Reform Commission (n 5); Department of Justice and Attorney General, Government (n 5); National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve* (n 5). The Victorian Government also launched an investigation into the civil justice system, which culminated in recommendations to increase access to justice: Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, January 2008).

13 *FLIP Report* (n 1) 78 Table 6.1.

14 *FLIP Report* (n 1) 77. In this context, I argue that legal negotiation is the foundation of all forms of dispute resolution, an argument that will be built further throughout the remainder of Chapter One and revisited in Chapter Three.

15 For example, through the use of counselling and conferences in the *Family Law Act 1975* (Cth), and the amendment of this Act to introduce primary dispute resolution: *Family Law Reform Act 1995* (Cth), and family dispute resolution: *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

16 *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys* [2012] FCA 282 (23 March 2012) ('*Superior IP International*'). See also Tania Sourdin, 'Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts' Australian Centre for Justice Innovation, Monash University (2012) 5.62.

17 The *Civil Dispute Resolution Act 2011* (Cth) requires parties to take genuine steps that 'constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute': s 4(1a). Genuine steps include dispute resolution: s 4. There are strict process requirements, including that the Applicant must file a Genuine Steps Statement that outlines which steps were taken: s 62(a) Form 16; or the reason for which no steps were taken: *Federal Court Rules 2001* (Cth) r 503(1). Respondents must file their own Genuine Steps Statement prior to hearing, either agreeing with the applicant's statement or explaining the reasons for disagreement: *Civil Dispute Resolution Act 2011* (Cth) s 7; *Federal Court Rules 2001* (Cth) r 5.03(3). Parties whose matter falls within excluded proceedings are not required to take genuine steps towards the resolution of the dispute: *Civil Dispute Resolution Act 2011* (Cth) s 15.

resources as a last resort.[18] This Act was also implemented to ensure 'people take genuine steps to resolve disputes before certain civil proceedings are instituted.'[19] This includes options for both alternative dispute resolution,[20] *and* negotiation.[21] Under the *Civil Dispute Resolution Act 2011* (Cth), legal practitioners must 'advise [clients] of the requirement [to file a Genuine Steps Statement]'[22] and 'assist [them] to comply with the requirement'.[23] Although proceedings are not invalidated if a party omits to file a Genuine Steps Statement or Response,[24] or if their lawyer fails to comply with the obligations imposed on them by the legislation,[25] these failings can result in costs determinations against the legal practitioner.[26]

In addition to the creation of legislation incorporating mandatory dispute resolution provisions, the Australian Government directly confronted the shortcomings identified in legal practitioner knowledge of dispute resolution processes. They intended to investigate these claims, and to rectify any inadequacies through changes to legal education.[27] To determine how potential amendments could best be approached, in 2011 the Australian Government commissioned a dispute resolution taskforce: the National Alternative Dispute Resolution Advisory Council ('NADRAC'). NADRAC examined Australian Law Schools' dispute resolution

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18 Tania Sourdin and Naomi Burstyner, 'Cost and Time Hurdles in Civil Litigation: Exploring the Impact of Pre-Action Requirements' (2013) 2(2) *Journal of Civil Litigation and Practice* 66, 75.

19 *Civil Dispute Resolution Act 2011* (Cth) s 3.

20 Ibid s 4(1)(d).

21 Ibid s 4(1)(g).

22 Ibid s 9(a).

23 Ibid s 9(b).

24 Ibid s 10(2).

25 *Superior IP International* (n 16).

26 See, eg *Superior IP International* (n 16) in which Justice Reeves considered the lawyers' non-compliance under the *Civil Dispute Resolution Act 2011* (Cth) and *Federal Court of Australia Act 1976* (Cth) s 37M(1) and joined the lawyers to the proceedings to determine costs. His Honour found that the *Civil Dispute Resolution Act 2011* (Cth) in its current form was difficult to comply with given the specific corporations-related issues in this matter. Since neither client wished to seek costs against either of the lawyers, Justice Reeves concluded that the lawyers would not be liable for costs in this instance: *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys (No 2)* [2012] FCA 977 (6 September 2012) ('*Superior IP (No 2)*'). It can, however, be difficult to separate the conduct of a legal practitioner from that of their client in determining who receives the sanction: see discussion in Tania Sourdin, 'Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts' Australian Centre for Justice Innovation, Monash University (2012) 5.62; and, particularly, Question 4 at Appendix E 146, cited in Sourdin and Burstyner (n 18) 83.

27 Australian Government Productivity Commission (n 11) Chapter 7.

curricula, with a view towards law schools increasing their dispute resolution-related offerings.[28] As a result, some components of legal education were amended in 2015 to include greater reference to dispute resolution.[29] Interestingly, legal negotiation was not included in the changes, remaining embedded only in the Practical Legal Training component of legal education, rather than throughout all components.

It is clear from the brief synopsis above that the field of dispute resolution has become fundamental to legal practice, both as part of daily legal practice and transactional practice. While there were initial challenges inherent in the litigation-dispute resolution divide, all dispute resolution processes are now firmly entrenched in – and embraced by – the legal field. As a core component of all forms of dispute resolution, legal negotiation is fundamental to law. Legal negotiation, however, has been lost in the literature, and remains undefined. Indeed, the literature has moved beyond a definition, instead assuming that all interpretations of legal negotiation are consistent. Addressing this significant issue is one of the ways in which my thesis makes an original contribution to knowledge. I bring legal negotiation to the fore, and specifically highlight the utility of a Taxonomy of Legal Negotiation to guide legal education, as well as law student and legal practitioner understanding and behaviour in this field. This Taxonomy, and the definition of legal negotiation that lies at its core, lays the foundation for my research into what constitutes good practice in relation to legal negotiation preparation and legal negotiation ethics.

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28 See below Chapter One Part III for an explanation of NADRAC's results. See below Chapter One Part III for an overview of the Australian law curriculum.

29 See below Chapter One Part III.

III LEGAL EDUCATION IN AUSTRALIA

My research addresses the Australian tertiary legal education system, particularly the way in which legal negotiation is currently taught. Understanding the structure and content of the Australian legal education system is crucial for my research, as I argue that the current delineation of legal education standards for legal negotiation is deficient and warrants significant attention. While my research primarily focuses on preparation for legal negotiation, legal negotiation ethics is inextricably intertwined with preparation – as is client-centrality – thus forming the foundation of legal negotiation. As such, in this section I provide insight into the structure of tertiary legal education in Australia, emphasising all topics related to legal negotiation and legal ethics.

Admission to the legal profession in Australia is regulated by the Law Council of Australia's Law Admissions Consultative Committee through the *Model Admission Rules* (2015), which have been adopted by every State and Territory in Australia.[30] To become a legal practitioner in Australia, a law student must:[31]

1. be over 18 years of age;

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30 Law Admissions Consultative Committee, *Model Admission Rules* (2015) ('*Model Admission Rules*'); Law Admissions Consultative Committee, *Prescribed Academic Areas of Knowledge* (2016) ('*Academic Areas*'); Law Admissions Consultative Committee, *PLT Standards* (n 4); Law Admissions Consultative Committee, *English Language Proficiency Guidelines* (2018) ('*Language Guidelines*'); Law Admissions Consultative Committee, *Disclosure Guidelines for Applicants for Admission to the Legal Profession* (undated) ('*Disclosure Guidelines*'). Each jurisdiction has adopted these Rules using slightly different methods, though this is typically done through embedding them in the jurisdiction's Legal Profession Act and Regulations/Rules or the Supreme Court Act and Regulations/Rules, many of which include a set of Admission Rules. NSW and Victoria have specifically implemented the *Legal Profession Uniform Law 2014* (NSW), *Legal Profession Uniform Law Application Act 2014* (Vic), *Legal Profession Uniform Admission Rules 2015* (NSW) and *Legal Profession Uniform Admission Rules 2015* (Vic), although these have not been taken up in this format by the other jurisdictions. Western Australia is the only state to specifically adopt the Law Admissions Consultative Committee, *Model Admission Rules* (2015), rather than embedding these Rules within existing legislation or creating their own version of the Rules. In South Australia and Tasmania, the Rules also relate to bodies governing legal education: *Legal Practitioners Education and Admission Council Rules 2018* (SA), previously of 2004, and *Legal Profession (Board of Legal Education) Rules 2010* (Tas).

31 These requirements are governed by the Law Council of Australia's Law Admissions Consultative Committee, and their recommendations have been adopted by each State and Territory in Australia. For more detailed citations that outline the relevant legislation in each State and Territory see Appendix A.

2. have completed an approved Australian law degree of at least three year's duration,[32] which contains the prescribed Areas of Academic Knowledge ('Academic Areas');[33]
3. have completed the Practical Legal Training Competency Standards for Entry-Level Lawyers ('PLT Standards');[34]
4. have met the English proficiency requirements;[35] and
5. have met the character-based (suitability) requirements.[36]

Upon meeting these five requirements, the Supreme Court[37] of the relevant jurisdiction will admit the law student as an 'Australian legal practitioner' in that jurisdiction.[38]

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32 Law Admissions Consultative Committee, *Statement on Duration of Legal Studies* (2013); Law Admissions Consultative Committee, *Model Admission Rules* (n 30) r 2(1). These rules have been adopted in each State and Territory in Australia. Compliance with these standards is additionally enforced by the Law Admissions Consultative Committee, which reviews these standards to ensure their effectiveness and relevance to the admission of practitioners to the Supreme Court: Law Admissions Consultative Committee, *Accreditation Standards for Australian Law Courses* (2014) ('*Accreditation Standards*').

33 Law Admissions Consultative Committee, *Academic Areas* (n 30) adopted in each Australian State and Territory. Giddings and McNamara describe this as the first stage of legal education. For an excellent summary of the development of the legal training system in Australia see: Jeff Giddings and Michael McNamara, 'Preparing Future Generations of Lawyers for Legal Practice: What's Supervision Got to Do with It?' (2014) 37(3) *UNSW Law Journal* 1226.

34 Law Admissions Consultative Committee, *PLT Standards* (n 4) adopted in each Australian State and Territory. Giddings and McNamara describe this as the second stage of legal education: Giddings and McNamara (n 33) 1238.

35 Law Admissions Consultative Committee, *Model Admission Rules* (n 30) r 8; Law Admissions Consultative Committee, *Language Guidelines* (n 30).

36 Law Admissions Consultative Committee, *Disclosure Guidelines* (n 30).

37 *Legal Profession Act 2006* (ACT) s 26(2); *Legal Profession Uniform Law 2014* (NSW) s 16(1); *Legal Profession Act 2006* (NT) s 25; *Legal Profession Act 2007* (QLD) s 35(2)(a); *Legal Practitioners Act 1981* (SA) s 15; *Legal Profession Uniform Law Application Act 2014* (Vic) s 16; *Legal Profession Act 2007* (Tas) s 31; *Legal Profession Act 2008* (WA) s 26.

38 An Australian legal practitioner is 'an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate' *Legal Profession Uniform Law 2014* (NSW) s 6; *Legal Profession Act 2006* (NT) s 6(a); *Legal Profession Act 2007* (QLD) s 6(1); *Legal Profession Uniform Law Application Act 2014* (Vic) s 6; *Legal Profession Act 2008* (WA). In the ACT and Tasmania the definition does not specify the need for the practising certificate to be current: *Legal Profession Act 2006* (ACT) s 8; *Legal Profession Act 2007* (Tas) s 6. In South Australia, 'legal practitioner' is someone who 'has been admitted and enrolled as a barrister and solicitor in the Supreme Court' or 'an interstate legal practitioner who practises the profession of the law in this state' *Legal Practitioners Act 1981* (SA) s 5. Someone who has been so admitted is eligible to apply to the Supreme Court for a practising certificate under s 16, and would consequently meet the definitions in the other states and territories. An Australian Lawyer is 'a person who is admitted to the legal profession under this Act or a corresponding law': *Legal Profession Act 2006* (ACT) s 7; *Legal Profession Act 2006* (NT) s 5(a); *Legal*

Below, I examine the positioning of legal negotiation, dispute resolution, and legal ethics in Australian tertiary legal education. Although my focus is particularly on legal negotiation, where this has not been included in legal education my attention shifts to broader *dispute resolution*. I first address the requirements of the Academic Areas,[39] with particular emphasis on NADRAC's 2011 evaluation of dispute resolution education in law schools as well as the 2015 Review of the Academic Areas ('the Review'), each of which considered further inclusion of dispute resolution in undergraduate training. Part A is separated into two components, the first of which addresses where legal negotiation/dispute resolution education is specifically situated in the Australian tertiary legal education curriculum; the second addressing where legal ethics topics are situated in the curriculum. After this, in Part B, I examine the role of legal negotiation education in postgraduate Practical Legal Training, which is the capstone that law students must complete to be eligible for admission to legal practice.

A The Areas of Academic Knowledge

Law students must pass eleven substantive Academic Areas.[40] Education institutions have discretion as to how they teach these, as long as students are satisfactorily taught each area.[41] Law students are first exposed to dispute resolution in a topic called *Civil Dispute Resolution*, or a variant of this. The Academic Areas mandate that *Civil Dispute Resolution* addresses '[d]isposition without trial, including the compromise of

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Profession Act 2007 (QLD) s 5(1); *Legal Profession Act 2007* (Tas) s 5; *Legal Profession Act 2008* (WA). In NSW and Victoria, rather than indicating the lawyer was admitted under *this* Act, s/he must instead have been admitted in 'this jurisdiction or any other jurisdiction': *Legal Profession Uniform Law 2014* (NSW) s 6; *Legal Profession Uniform Law Application Act 2014* (Vic) s 6.

39 Law Admissions Consultative Committee, *Academic Areas* (n 30). The Academic Areas are colloquially referred to as the 'Priestley 11'. These include eleven substantive areas of law: Criminal Law and Procedure, Torts, Contracts, Property, Equity, Company Law, Administrative Law, Federal and State Constitutional Law, Civil Dispute Resolution, Evidence, and Ethics and Professional Responsibility.

40 Law Admissions Consultative Committee, *Academic Areas* (n 30).

41 Law Admissions Consultative Committee, *Accreditation Standards for Law Courses* (n 32) ('*Accreditation Standards*') that were initially created to complement the Council of Australian Law Deans, *CALD Standards for Australian Law Schools* (2009): note the introduction comments at [1] which indicate that the *CALD Standards* lacked precision to ensure standardised admission outcomes, resulting in the creation of the *Accreditation Standards*.

litigation'[42] and '[a]lternative dispute resolution.'[43] While this does not explicitly reference legal negotiation, it is implicit in both 'the compromise of litigation' and '[a]lternative dispute resolution'. Legal ethics is contained in *Ethics and Professional Responsibility*. Law students must understand '[p]rofessional and personal conduct in respect of a practitioner's duty…to clients',[44] which emphasises the important duty that legal practitioners have to their clients. This both underpins legal practice and forms a foundational aspect of my research.[45]

The inclusion of dispute resolution in legal education has had a fraught history that requires consideration before assessing the way in which it positions dispute resolution and legal negotiation. In 2011 – over 20 years after the introduction of dispute resolution in Australia – the Australian Government sought to increase the focus on dispute resolution. Its taskforce, NADRAC, found that, in 2012, only eight of 27 Australian Law Schools included dispute resolution as a mandatory topic. Twenty-five offered an elective topic on dispute resolution.[46] Fifteen Law Schools aimed to increase their dispute resolution skills training by 2017.[47] In 2014, the Australian Government Productivity Commission noted that there was no formal requirement for law students to undertake training in dispute resolution,[48] proposing that changes must be made to legal education to help embed dispute resolution in the

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42 Law Admissions Consultative Committee, *Academic Areas* (n 30) 'Civil Dispute Resolution' 5 (point 7).

43 Ibid 'Civil Dispute Resolution' 5 (point 12).

44 Ibid 'Ethics and Professional Responsibility' 6.

45 See below Chapters Five and Six.

46 National Alternative Dispute Resolution Advisory Council, *Teaching Alternative Dispute Resolution in Australian Law Schools* (2012) 9 ('*Teaching ADR*').

47 Ibid 18, Figure 4.1. Unfortunately, NADRAC was disbanded shortly after this report was provided, so was unable to conduct supplementary research into this area. NADRAC was disbanded to 'simplify and streamline the business of government': Australian Government Attorney-General's Department, *Alternative Dispute Resolution* (Web Page) < https://www.ag.gov.au/legal-system/alternative-dispute-resolution>. NADRAC's publications remain available through the Attorney General's Department Website and on TROVE. For a dispute resolution academic's perspective on the disbanding of NADRAC, see Becky Batagol, 'Australia, all the way with ADR. Or are we?', *The Australian Dispute Resolution Research Network* (Blog Post, 7 April 2014) < https://adrresearch.net/2014/04/07/australia-all-the-way-with-adr-or-are-we/>.

48 At the time of this report there were fewer requirements to include dispute resolution in the law curriculum. This changed in December 2016 as a result of the Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession* (2015) ('*Review of Academic Requirements*').

'legal psyche'.[49] This was intended to ensure that lawyers understand all dispute resolution processes available to their clients.[50] Many academics agreed, arguing that dispute resolution must be included in the Australian Law School Curriculum due to its overwhelming benefits to students in terms of legal understanding, development as future practitioners, and mental health and wellbeing.[51]

The 2015 Review was intended to determine whether the Academic Areas could be more reflective of the knowledge and skills required by graduates.[52] As part of this Review it was strongly argued that *Civil Procedure* is fundamental to the curriculum, has evolved to encompass dispute resolution, and is vital to client-centred practice.[53] It was further proposed that incorporating dispute resolution itself in the Academic

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49 Australian Government Productivity Commission (n 11) 247.

50 Ibid.

51 James Duffy and Rachael Field, 'Why ADR must be a Mandatory Subject in the Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-Believer' (2014) 25(1) *Australasian Dispute Resolution Journal* 9, 23: Duffy and Field argue the majority of Australian law schools are fundamentally failing future practitioners, and the future of the legal profession more broadly, by only offering dispute resolution as an elective subject, thereby highlighting the disconnect between the law school curriculum and 21st century legal practice. Rachael Field received a 2010 Australian Learning and Teaching Council Teaching Fellowship for Stimulating Strategic Change in Legal Education to Address High Levels of Psychological Distress in Law Students. See also: David Weisbrot, 'What Lawyers Need to Know, What Lawyers Need to be Able to Do: An Australian Experience' (2001) 1 *Journal of the Association of Legal Writing Directors* 21; Sally Kift, '21st Century Climate for Change: Curriculum Design for Quality Learning Engagement in Law' (2008) 18(1-2) *Legal Education Review* 1 ('*Curriculum Design*').

52 This was reinforced by comments sought as part of the Law Admissions Consultative Committee, *Review of Academic Requirements* (n 48), such as from the Large Law Firm Group, which represents the nine largest multi-jurisdictional law firms in Australia, that 'law schools do not adequately prepare law students for future practice', and that a widening gap exists between the skill sets required by the profession and those developed in tertiary institutions… [students need to] possess a high degree of commerciality, emotional intelligence, critical reasoning, legal technical skills, interpersonal skills and strong communication skills.': Large Law Firm Group, Submission No 18 to Law Admissions Consultative Committee, *Review of Academic Requirements*, 2015, 1.

53 School of Law at the University of Western Sydney, Submission No 16 to Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession*, 2015, 4.

Areas,[54] ideally as a standalone topic,[55] would highlight the importance of dispute resolution 'in Australia's legal landscape.'[56] Although some submissions to the Review suggested that both *Civil Procedure* and *Dispute Resolution* are more suited to postgraduate Practical Legal Training rather than the undergraduate curriculum,[57] this argument failed to recognise that the core requirement of Practical Legal Training is to develop students' practical abilities, which requires students to have already grasped the theoretical foundations associated with those practical skills.[58] The outcome of the Review did acknowledge some of the arguments in favour of including *dispute resolution* in the Academic Areas, but failed to recognise the importance of including *legal negotiation* itself in the Academic Areas. As a result of the Review, *Civil Procedure* was rebranded as *Civil Dispute Resolution*, which better aligns with the equivalent PLT topic,[59] and was broadened to include two additional components:

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54 Griffith Law School, Submission No 12 to Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession*, 2015, 2 [6.1]; Australian Law Students' Association, Submission No 19 to Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession*, 2015, 2 [6.11] ('*Submission 19*'); Professor Peta Spender, Submission No 21 to Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession*, 2015, 2-3; Academic Lawyers Engaged in Teaching and Research on Civil Dispute Resolution, Submission No 15 to Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession*, 2015, 2-4.

55 Wellness Network for Law, Submission No 20 to Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession*, 2015, [4] and [4.4] discussing NADRAC's support for this. See also Laurence Boulle and Rachael Field, *Australian Dispute Resolution Law and Practice* (LexisNexis, 2017) [1.58]-[1.62].

56 Academic Lawyers Engaged in Teaching and Research on Civil Dispute Resolution (n 54), 3.

57 The Honourable J C Campbell, Submission No 3 to Law Admissions Consultative Committee, *Review of Academic Requirements*, 2015, 1, 15-16; Professor Margaret Thornton, ANU Research Fellow, Submission No 30 to Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession*, 2015, [6.2].

58 See, eg, Corporate Law Teachers Association, Submission No 8 to Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession*, 2015, 3 [6], though the focus of this submission was on the potential removal of company law from the academic areas of knowledge. See also: Queensland Law Society, Submission No 24 to Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession*, 2015, [2a]; Law Admissions Consultative Committee *PLT Standards* (n 4) 4.4; Bar Association of Queensland, Submission No 6 to Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession*, 2015, 1-2 (1a); Australian Law Students' Association, *Submission 19* (n 53) 1.

59 Law Admissions Consultative Committee, *Model Admission Rules* (n 30) Schedule 1, 10.

12. Alternative Dispute Resolution

13. Obligations of parties and practitioners relating to the resolution of disputes.[60]

This change recognises the importance of dispute resolution while further acknowledging the Threshold Learning Outcomes that run parallel to the Academic Areas.[61] While the Threshold Learning Outcomes are not binding on either the Law Admissions Consultative Council or Law Schools in the development of legal pedagogy, both dispute resolution and legal negotiation are specifically included as part of the law Threshold Learning Outcomes of knowledge; thinking skills; and communication and collaboration,[62] emphasising their importance to legal education.

While the Review of the Academic Areas did improve the landscape of dispute resolution in undergraduate legal education, the lack of specific inclusion of legal negotiation is problematic. While a deeper analysis of the inclusion of legal negotiation or dispute resolution more broadly in the Academic Areas goes beyond the scope of this thesis, I concur with arguments for specific inclusion of both dispute resolution *and* legal negotiation at each level of tertiary legal education. Indeed, legal negotiation is a critical skill and if students are not required to wrestle with its nuances while gaining their academic knowledge of law, they will not have a strong foundation on which to build when learning practical skills during Practical Legal Training.[63] While there is merit to the argument that practical skills such as dispute resolution should *only* be taught during Practical Legal Training, it is worth noting that, while students *must* complete Practical Legal Training to be admitted to legal practice, many students do not go on to complete Practical Legal Training, instead

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60 Ibid.

61 The 2010 Learning and Teaching Academic Standards Project ('LTAS Project') was conducted by the Australian Teaching and Learning Council and endorsed by the Council of Australian Law Deans and included detailed examination of the Australian Qualifications Framework, and in-depth consultation, obtaining considered feedback from key stakeholders in legal practice, legal education, and beyond. The LTAS Project culminated in the development of threshold learning outcomes ('TLOs'). The TLOs for the Bachelor of Laws covers six areas: knowledge; ethics and professional responsibility; thinking skills; research skills; communication and collaboration; and self-management: Kift, Israel and Field (n 5) 1.

62 Kift, Israel and Field (n 5) TLO 1 Knowledge: at 15; TLO 3 Thinking Skills: at 19 and 21; TLO 5 Communication and Collaboration: at 23.

63 I concur with the submissions provided by: Wellness Network for Law(n 55); Academic Lawyers Engaged in Teaching and Research on Civil Dispute Resolution (n 54); School of Law at the University of Western Sydney (n 53); and Australian Law Students' Association, *Submission 19* (n 54).

moving into another career.[64] These students are unable to hold themselves out as practising legal practitioners because they have not been admitted to legal practice and therefore do not hold a Practising Certificate. However, many still work in roles that encompass aspects of negotiation or providing advice to clients about negotiation as a form of dispute resolution.[65] These students, too, must be proficient in these skills.[66] The failure to include legal negotiation as a component on which law students must be educated as part of the Academic Areas is the first deficiency of legal negotiation education.

Since the 2015 Review, there have been further calls for change to the Academic Areas, particularly in response to investigations in the legal profession. On 28 March 2017, the NSW Law Society Future Committee released the *Future of Law and Innovation in the Profession Report* ('FLIP Report').[67] The Future Committee evaluated, in depth, the future directions of the legal profession, with a focus on the role of technology and innovation. It also considered legal education, and how this can help to build the legal profession for coming generations. Most relevantly, the Future Committee emphasised client-focussed services.[68] Although some client-focussed services are driven by technological advancements, clients also seek alternatives to court, typically through dispute resolution. To meet their ethical obligations to clients, a legal practitioner must competently prepare for dispute

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64 Recent data shows, however, that increased numbers of law graduates are pursuing different fields. McNamara (n 6) notes that of 2016 law graduates in NSW, only 79.2% 'intended to complete practical legal training and of these only 71% intended to practice law' at 229, citing Law Society of NSW, *Future Prospects of Law Graduates – Report and Recommendations* (2015): at 228. See also: Melville (n 6). Melville notes that jobs available for lawyers have decreased in response to economic downward trends and changes in the structure of the legal profession (at 218-219) and concludes that the law degree may be starting to be considered as a generalist degree, indicating that in 2014, 21.6% of law graduates ended in industry/commercial positions: at 220-221. See also Amanda Carrigan, 'Why Alternative Dispute Resolution Skills are Essential for Business Students' (2012) 5(1-2) *Journal of the Australasian Law Teachers Association* 115.

65 See below Chapter Three.

66 National Alternative Dispute Resolution Advisory Council, *Teaching ADR* (n 46) 12.

67 The FLIP Report was based on a Commission of Inquiry conducted throughout 2016, drawing from oral evidence from 103 people, written submissions and separate interviews. This included testimony from members of the NSW Law Society Future Committee, comprised of lawyers, as well as 'a legal academic, a senior court official and a technology expert': *FLIP Report* (n 1) 2.

68 *FLIP Report* (n 1) 7. Also see, eg, Katherine R Kruse, Bobbi McAdoo and Sharon Press, 'Client Problem Solving: Where ADR and Lawyering Skills Meet' (2015) 7(1) *Elon Law Review* 225.

resolution processes, have sound knowledge of legal negotiation theory, and have skills in legal negotiation practice. They will consequently be able to streamline processes and therefore reduce costs for clients. This, in itself, is a strong argument for ensuring that all law graduates are competent legal negotiators.

In specific relation to legal negotiation, the Future Committee determined that 'advocacy/negotiation skills' are imperative for future legal practice.[69] It noted that professional skills are often the focus of Law School Competitions, and that such skills are typically 'taught at the PLT [Practical Legal Training] stage and to a lesser degree at the university and CLE [Continuing Legal Education] stages.'[70] While the Committee remarked that 'there [was] no uniformity in how law schools approach the teaching of practice skills',[71] there was a strong focus on law schools and Practical Legal Training courses producing 'practice-ready' graduates who can undertake entry-level practitioner tasks in legal practice, such as client interaction. Upon admission to legal practice, therefore, legal practitioners must understand and be able to engage in legal negotiation. This underscores the importance of legal negotiation in legal education, and speaks to the benefit of developing a series of minimum competencies for legal negotiation preparation, which law students must meet in order to attain admission to legal practice. These must be based on good practice and identify the difference between entry-level legal practitioners and experts.[72]

The Future Committee acknowledged, and further critiqued, the difficulties associated with including dispute resolution in an already 'crowded curriculum',[73] but nonetheless encouraged legal educators to include practical skills throughout 'the various stages of legal education so as to build on and reinforce earlier stages of learning without unnecessary repetition.'[74] Consequently, it appears that the Law Admissions Consultative Committee is in a challenging position. On one hand, dispute resolution is touted by academics and practitioners alike as being vital to a

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69 *FLIP Report* (n 1) 78 Table 6.1, Recommendation 8.

70 Ibid 78 Table 6.1.

71 Ibid.

72 Gayle Gasteen, 'National Competency Standards: Are They the Answer for Legal Education and Training' (1995) 13(1) *Journal of Professional Legal Education* 1, 10.

73 *FLIP Report* (n 1) 77.

74 Ibid 78 Table 6.1.

law student's legal education. On the other hand, the Academic Areas already create a very detailed curriculum, with little room for implementing other compulsory topics.[75] The only alternative solution to this would be to find unique ways to include negotiation in existing Academic Areas, though this is likely to result in budget, class size, and staffing issues.[76] Alternatively, if the requirements for legal negotiation training were set out in greater detail, this might make them easier to incorporate throughout legal education, despite the 'crowded curriculum'.[77] While there is merit to the argument that practical skills should be contained during Practical Legal Training, the skills associated with legal negotiation preparation relate to various aspects of client-centred lawyering and client interaction. These skills are foundational to legal practice and could be embedded within the Academic Areas if specific guidance was available. Such inclusion would increase law students' ability in this area.[78]

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75 Despite the 'crowded curriculum', some universities include specifically legal non-Priestly compulsory topics. One example includes LLAW1213 Introduction to Public Law [Group Work] at Flinders University and LLAW1504 Principles of Public Law at the University of Adelaide. These topics are not strictly Priestly 11 topics, though do cover some requirements of Constitutional Law. Flinders University, 'LLAW1213 Introduction to Public Law [Group Work]' (Web Page) <https://www.flinders.edu.au/webapps/stusys/index.cfm/topic/main?subj=LLAW&numb=1213 > in 2020 this was replaced by Flinders University, 'LLAW1311 Introduction to Law and Justice' (Web Page) <https://www.flinders.edu.au/webapps/stusys/index.cfm/topic/main?year=2021&subj=LLAW&numb=1311&title=&aims=&fees=Y>; University of Adelaide, 'LAW 1504 – Principles of Public Law' (Web Page) < https://cp.adelaide.edu.au/courses/details.asp?year=2021&course=104991+1+4120+1>. Flinders University has also found room to include non-legal mandatory topics, introducing a suite of Innovation topics and technology topics introduced in 2020 during a curriculum refresh: Flinders University, 'New Law Courses Equip Tech-Savvy Graduates' *Flinders University News* (*Blog Post*, 28 October 2019) < https://news.flinders.edu.au/blog/2019/10/28/tech-savvy-law-courses-equip-our-graduates/>

76 See National Alternative Dispute Resolution Advisory Council, *Teaching ADR* (n 46). NADRAC found that these were the main barriers for Law Schools in encouraging dispute resolution skills teaching: at 13-16. NADRAC noted specifically in relation to financial matters that it is possible for dispute resolution topics to attract different funding/support to other Priestley 11 topics: at 16.

77 *FLIP Report* (n 1) 77.

78 While I add my voice to the calls to reconsider the exclusion of legal negotiation from the academic areas, my research specifically focuses on determining the minimum competencies law students need to meet prior to admission to legal practice. This will provide guidance and clarity to law students.

Above, I outlined various calls for change to the Academic Areas, to include further training on dispute resolution and legal negotiation. I also noted NADRAC's investigation, in which 21 Law Schools agreed that they would include more dispute-resolution skills-based training across the subsequent five-year period, four disagreed, two did not respond,[79] and six were uncertain.[80] To determine any change in the offerings of dispute resolution topics as a result of LACC's 2015 Review, in 2018 I analysed the 38 Australian Law Schools' curricula (as available online on the university websites). My analyses focus on legal negotiation and dispute resolution, as well as legal ethics.[81]

1 *Legal Negotiation and Dispute Resolution*

My 2018 analysis shows that every Australian Law School offers at least one mandatory topic that focuses on *Civil Procedure* and/or *Dispute Resolution*, totalling 51 compulsory courses at Australian tertiary institutions. While this is a vast improvement on NADRAC's 2012 findings,[82] it is also unsurprising given the change in Academic Areas to include dispute resolution as part of the new description of *Civil Procedure*.[83] I further analysed the material available online about each Law School's curriculum in relation to *Civil Procedure* topics, to determine whether the descriptions specifically mentioned *negotiation*, *alternative dispute resolution*, or *dispute resolution*. This is depicted in the figure below.

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79 National Alternative Dispute Resolution Advisory Council, *Teaching ADR* (n 46) 18, figure 4.1.

80 Ibid 18, figure 4.1. The main challenges listed were staffing issues (6 responses), budget issues (10 responses) and class sizes/student demand (8 responses).

81 See Appendix B for *Civil Procedure* topics and Appendix C for *Ethics and Professional Responsibility* topics.

82 Fourteen Law Schools indicated they already included interest-based negotiation as part of a mandatory topic, and 28 as part of an elective topic (either undergraduate or in the Juris Doctor): National Alternative Dispute Resolution Advisory Council, *Teaching ADR* (n 46)Appendix B: Survey Results, 23-24

83 Indeed, 22 Law Schools only have one mandatory topic that contains dispute resolution, entitled *Civil Procedure, Civil Dispute Resolution, Civil Litigation, Civil Procedure and ADR, Civil Litigation and Procedure, Resolving Civil Disputes,* or *Civil and Criminal Procedure.*

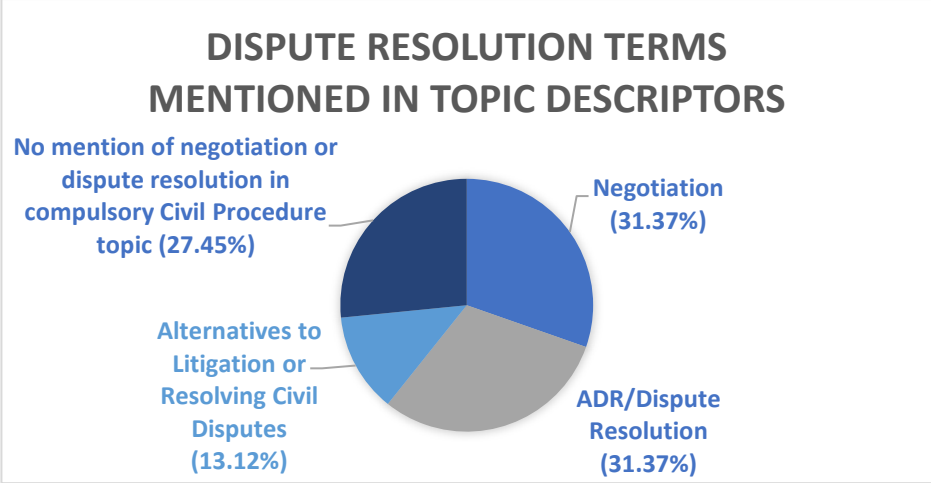

Figure 1: Dispute Resolution Terms Mentioned in Topic Descriptors.

Sixteen law programs offer a compulsory topic that mentions *negotiation* (31.37%) and 16 further law programs include a compulsory topic that does not mention negotiation but does include *alternative dispute resolution* or *dispute resolution* (31.37%). It is highly likely that the alternative dispute resolution topics do also include negotiation, but that this is omitted from the online topic descriptor because *negotiation* is not one of the fields mandated by the Academic Areas. The fact that only 16 programs specifically mention *dispute resolution* is surprising after the December 2016 changes to the Academic Areas, which require all Law Schools to teach dispute resolution. This could be explained in two ways: law programs could have been going through internal re-accreditation processes when I accessed their online data; or perhaps dispute resolution *is* actually taught within the topic/s but is omitted from the online topic descriptor.[84] Although the Academic Areas provide suggested topic titles, not all institutions align their topic names with these suggestions. It is also important to note that some law programs incorporate dispute resolution in another subject, which would have been missed during my analysis of topic names.[85] Dispute resolution could be easily included within substantive law topics, such as *Contract* or *Torts*.

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84 While the use of online topic descriptors has been useful to gather general information about each topic, I note that for accreditation purposes with Law Admissions Consultative Committee each Law School must provide much more detailed information. It would be beneficial to analyses the information taught in each topic and re-run the analysis above based on this.

85 For example, Flinders University, 'LLAW1221 Professional Skills and Ethics [Ethics I]', *Flinders University Topics* (20 January 2019)

Most law programs offer compulsory *Civil Procedure/Dispute Resolution* topics towards the end of the degree, depicted below. It is encouraging to see, however, that some of these topics are offered in first or second year, to lay law students' foundation in these areas.

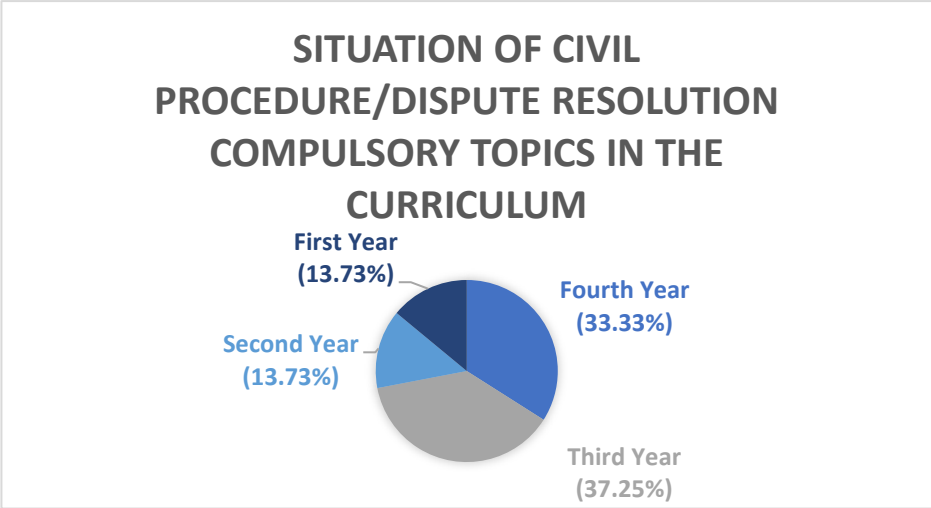

Figure 2: Situation of Civil Procedure/Dispute Resolution Compulsory Topics in the Curriculum.

Australian law students study several non-compulsory *elective* or *option* topics during their law degree. Some of these have the scope to include legal negotiation: *Alternative Dispute Resolution/Dispute Resolution/Dispute Management, Mediation, Family Law,* and *International Arbitration*. It was more difficult to analyse the elective topics in each law program because these are not always offered annually, and therefore not all topic descriptors were available. Nevertheless, in conducting an analysis of topic names I found that four universities (10.53%) did not offer an elective topic that covered *dispute resolution* or *negotiation*, but the remaining 34 offered students the option to study one or more of these elective topics.[86] Of course, just because these elective topics are offered does not mean that *all* law students will choose to undertake them, or that they will align with every study plan.

<https://www.flinders.edu.au/webapps/stusys/index.cfm/topic/main/?year=2019&subj=LLAW&numb=1221&title=&aims=&fees=Y> and University of Adelaide, 'LAW3501 Dispute Resolution and Ethics', *Course Outlines* (20 January 2019) <https://www.adelaide.edu.au/course-outlines/105020/1/sem-1/>.

86 See Appendix B for an outline of all Civil Procedure and ADR-related subjects offered at Australian Law Schools in 2018.

2 *Legal Ethics*

Legal ethics are fundamental to Australian legal practice and are strictly regulated.[87] They are also a foundational and pervasive component of legal negotiation. As a result, all students at Australian Law Schools must study *Ethics and Professional Responsibility*.[88] In accordance with the Academic Areas, this includes learning about:

> Professional and personal conduct in respect of a practitioner's duty:
>
> (a) to the law;
>
> (b) to the Courts;
>
> (c) to clients, including a basic knowledge of the principles relating to the holding of money on trust; and
>
> (d) to fellow practitioners.
>
> OR
>
> Topics of such breadth and depth as to satisfy the following guidelines:
>
> The topics should include knowledge of the various pertinent rules concerning a practitioner's duty to the law, the Courts, clients and fellow practitioners, and a basic knowledge of the principles relating to the holding of money on trust.[89]

None of the above components specifically address legal negotiation. They are, however, in part based on the Australian Solicitor Conduct Rules ('Conduct Rules'), which require a legal practitioner to be able to explain 'the alternatives to fully contested adjudication of the case which are reasonably available to the client'.[90] The Conduct Rules set out how a legal practitioner must behave before the 'court', which is defined to include, amongst other things, 'an arbitration or mediation or any other form of dispute resolution.'[91] The choice to include dispute resolution in the expanded definition of 'court' strongly indicates the regard that regulatory authorities give to dispute resolution processes, and the honesty required therein.[92] In the Academic Areas, any references to link dispute resolution and ethics are merely

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87 Law Council of Australia, *Conduct Rules* (n 11), *Legal Profession Act 2006* (ACT), *Legal Profession Uniform Law Application Act 2014* (NSW), *Legal Profession Act 2006* (NT), *Legal Profession Act 2007* (Qld), *Legal Practitioners Act 1981* (SA), *Legal Profession Act 2007* (Tas), *Legal Profession Uniform Law Application Act 2014* (Vic), *Legal Profession Act 2008* (WA).

88 Law Admissions Consultative Committee, *Model Admission Rules* (n 30) 11-12.

89 Law Admissions Consultative Committee, *Academic Areas* (n 30) 6-7.

90 Law Council of Australia, *Conduct Rules* (n 11) r 7.2.

91 Ibid Glossary (definition of 'court', para (h)).

92 This is analysed below in Chapter Three (in relation to legal negotiation constituting part of legal practice) and Chapter Five (in relation to legal ethics, and the nuance between legal dispute resolution ethics and legal negotiation ethics).

implicit. This is problematic, primarily due to the fundamental nature of ethics to legal negotiation. If the Academic Areas are held out as representing the matters that a law student *must* understand before progressing to Practical Legal Training, the link between legal negotiation and ethics must be included, and emphasised. Academics have long questioned how to best teach legal ethics, typically concluding that a standalone ethics topic is insufficient – legal ethics should also be embedded in specific law topics to 'encourage students into a deeper appreciation of what it means to be an ethical practitioner'.[93]

Across the 38 Australian Law Schools, there are 41 compulsory topic names that include *Ethics*, *Professional Responsibility, Practice*, or *The Legal Profession*. This is more aligned with the 2015 Review of the Academic Areas than the *Dispute Resolution* topics. Several of the *Ethics* topics are introductory-level topics that include ethics within the topic outline but not the title of the topic (eg *Legal Foundations*) or include ethics within a broader *Civil Procedure/Alternative Dispute Resolution* topic. Given the relevance of ethics to dispute resolution and legal negotiation, its inclusion in *Civil Procedure/Alternative Dispute Resolution* topics is commendable. Nevertheless, it is likely that minimal reference in the teaching itself is made to legal negotiation ethics, mirroring the lack of legal negotiation ethics literature in Australia.[94] Of the *Ethics* topics, those that contained a more detailed description of subjects included the list of required knowledge published in the Academic Areas. The majority of ethics related topics are situated in the latter half of the law degree, likely to prepare law students for Practical Legal Training and legal practice. This is depicted in the following figure.

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93 Michael Robertson, 'Embedding "Ethics" in Law Degrees' in Sally Kift et al, *Excellence and Innovation in Legal Education* (LexisNexis, 2011) 99, 103 [4.10].

94 See, eg, Mark J Rankin, 'Legal Ethics in the Negotiation Environment: A Synopsis' (2016) 18(1) *Flinders Law Journal* 77 *'*Legal Ethics in the Negotiation Environment*'*.

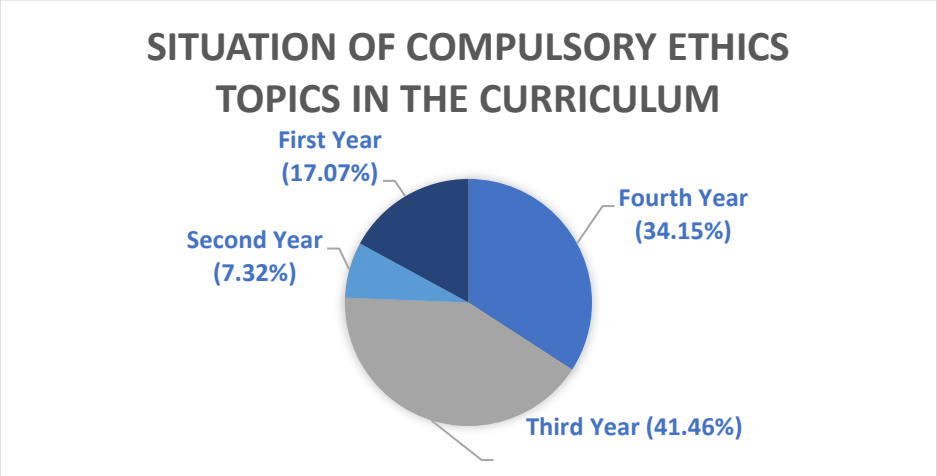

Figure 3: Situation of Compulsory Ethics Topics in the Curriculum.

While both *dispute resolution* and *ethics* are taught at the majority of law schools, it is disheartening to see that there is only rare mention of legal negotiation itself, and that typically any references are implicit. This is particularly problematic as legal negotiation is a very specific type of dispute resolution and requires a specific skill that readies law students for Practical Legal Training and legal practice.

B Practical Legal Training Competency Standards for Entry-Level Lawyers

In addition to the Academic Areas, all law students seeking admission to legal practice must complete Practical Legal Training in accordance with the PLT Standards.[95] The PLT Standards are created and regulated by the Law Council of Australia. As introduced above, Practical Legal Training is where legal negotiation skills education is brought to the fore.

[95] Law Admissions Consultative Committee, *Model Admission Rules* (n 30) r 3 and Schedule 2; Law Admissions Consultative Committee, *PLT Standards* (n 4). Practical Legal Training is to be 'provided at a level equivalent to post-graduate training': 4.4. Some universities offer Practical Legal Training as part of a law student's studies, at the end of the degree (eg Flinders University). Other Universities (eg the University of Adelaide) or providers (eg the College of Law) offer Practical Legal Training in the form of a Graduate Diploma in Legal Practice. Either of these qualifications is sufficient for admission under the Practical Legal Training Standards.

To comply with the PLT Standards, students must study:

1. skills (Lawyer's Skills; Problem Solving; Work Management and Business Skills, and Trust and Office Accounting); and
2. values (Ethics and Professional Responsibility); and
3. three compulsory practice areas (Civil Litigation Practice, Commercial and Corporate Practice, and Property Law Practice); and
4. one optional practice area (choosing between: Administrative Law Practice, Criminal Law Practice, or Family Law Practice); and
5. one secondary practice area (choosing between: Banking and Finance Practice, Consumer Law Practice, Employment and Industrial Relations Practice, Planning and Environmental Law Practice, or Wills and Estates Practice).[96]

Entry-level practitioners must be able to demonstrate competence in a variety of legal skills, including negotiation[97] and dispute resolution,[98] and must also be able to 'generat[e] solutions and strategies'.[99] Unlike the Academic Areas, the PLT Standards include specific requirements related to negotiation throughout,[100] though do not specifically mention *legal* negotiation.[101] The crucial inclusion of negotiation, however, is contained in the Lawyer's Skills component of the PLT Standards, centralising the importance of legal negotiation as a skill required in legal practice.[102] To meet the Lawyer's Skills requirement in relation to legal negotiation, and to consequently attain competence in legal negotiation as required for admission to legal practice, a law student must have met the four requirements depicted in the following table.[103]

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96 Law Admissions Consultative Committee *PLT Standards* (n 4) [3.1].

97 Ibid [5.10] Element 6.

98 Ibid [5.10].

99 Ibid [5.12] Problem-Solving, Element 4.

100 Ibid 'Lawyers' Skills' [5.3] Element 6; 'Consumer Law Practice' [5.5] Element 4; 'Employment and Industrial Relations Practice' [5.7] Element 3, although dispute resolution is a prominent theme throughout all elements. Dispute resolution processes are also prominent in the optional practice area of 'Family Law Practice' [5.9].

101 For the purposes of my thesis, however, I refer to the inclusion of negotiation in the *PLT Standards* as *legal negotiation*. This is further analysed below in Chapter Three.

102 Law Admissions Consultative Committee, *PLT Standards* (n 4) [5.10] Element 6

103 In the table I have included the quoted wording from the Law Admissions Consultative Committee, *PLT Standards* (n 4) [5.10] 'Lawyers' Skills' Element 6, but have included headings to separate the LCA Requirements into the key parts of the legal negotiation process.

Table 1: LCA Requirements

Pre-Negotiation
1. prepared, or participated in the preparation of, the client's case properly having regard to the circumstances and good practice.
The Negotiation Process
2. identified the strategy and tactics to be used in negotiations and discussed them with and obtained approval from the client, or been involved in or observed that process. 3. carried out, been involved in or observed, the negotiations effectively having regard to the strategy and tactics adopted, the circumstances of the case and good practice.
Post-Negotiation
4. documented any resolution as required by law or good practice and explained it, or been involved in the process of explaining it, to the client in a way a reasonable client could understand.[104]

Throughout my thesis, I refer to these four points collectively as the 'LCA Requirements'. While these inclusions take positive steps towards cementing legal negotiation within legal pedagogy, they do not go far enough. My research focuses primarily on the first LCA Requirement: legal negotiation preparation. In the section below I outline the specific deficiencies that my research aims to address, and the methodologies used to do this.

IV RESEARCH QUESTIONS AND METHODOLOGY

The representation of legal negotiation in the LCA Requirements, and thus in legal education, presents several deficiencies. First, legal negotiation remains undefined in both the LCA Requirements and in the PLT Standards that contain them. This is problematic because legal negotiation *also* remains undefined in relevant literature. This presents various difficulties, particularly because – as mentioned above – not all law graduates will become practising lawyers, but the vast majority of law graduates will, at some stage, engage in negotiation. Legal practitioner negotiators, of course, are required to meet more stringent ethical obligations than non-legal practitioner negotiators. Specific and clear guidelines are needed, that advise on when a legal negotiation is traditionally *legal*, and as such when a legal negotiator will be required

104 Law Admissions Consultative Committee, *PLT Standards* (n 4) [5.10] 'Lawyers' Skills' Element 6.

to comply with legal principles and legal ethical obligations, which could result in sanctions if breached. This necessitates consideration of what make legal negotiation *legal*, the role that legal ethics takes in legal negotiation, and the associated enforcement of legal practitioner conduct. My analysis of this draws on commentary from 1980s America, when Menkel-Meadow indicated the time was not yet right for a definition of legal negotiation.[105] Since then, the search for a definition has been stalled in the literature, which has diverged from finding a definition to instead focus on negotiation processes, approaches, and styles, resulting in an overabundance of terminology, causing 'label confusion'.[106] My research seeks to address this divergence, to give clarity to the search for a definition, and to determine the benefit of a definition of legal negotiation for key stakeholders.

The LCA Requirements address the three stages of legal negotiation: pre-negotiation, the negotiation itself, and post-negotiation processes such as drafting.[107] The first LCA Requirement reflects legal negotiation preparation: the most important component of legal negotiation,[108] and the one on which my research focuses. Law students are instructed to have 'regard to the circumstances and good practice.'[109] Various authors have created their own requirements for 'good practice' legal negotiation preparation. Therefore, factors that may constitute 'good practice', though not often defined as such, are abundant in the literature. Arguably, legal negotiation preparation literature suffers from similar 'label confusion' to the definitional challenges,[110] and requires clear and precise synthesis to identify 'good practice' as

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105 Carrie Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' [1983] (4) *American Bar Foundation Research Journal* 905, 928 ('Legal Negotiation: A Study of Strategies in Search of a Theory').

106 Andrea Kupfer Schneider, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (2002) 7 *Harvard Negotiation Law Review* 143, 151-2 ('Shattering Negotiation Myths'). This is explored in greater depth in Chapter Three.

107 Also commonly referred to as 'at the table', 'on the drawing board' and 'away from the table': David A Lax and James K Sebenius, *3-D Negotiation: Playing the Whole Game* (Harvard Business Review Press, 2003) ('*3-D Negotiation: Playing the Whole Game*'); Lax Sebenius LLC, 'Approach', *Creating Value Through 3-D Negotiation* (Web Page, 2020) <https://www.negotiate.com/approach/>.

108 See, eg, Nadja Alexander and Jill Howieson, Negotiation Strategy, Style, Skills (LexisNexis Butterworths, 2nd ed, 2010); Nadja M Spegel, Bernadette Rogers and Ross P Buckley, *Negotiation Theory and Techniques* (Butterworths, 1998).

109 Law Admissions Consultative Committee, *PLT Standards* (n 4) [5.10] 'Lawyers' Skills' Element 6.

110 Schneider, 'Shattering Negotiation Myths' (n 106) 151-2.

noted in the LCA Requirements. The first LCA Requirement, then, requires 'good practice' preparation without further indication on what this constitutes, or how law students might attain it, making this pedagogically unsound.

The second LCA Requirement, which focuses on identification of strategy and tactics, sits between the pre-negotiation and negotiation process stages. While it technically constitutes part of legal negotiation preparation, thorough preparation is required *before* strategies and tactics are identified. This second directive, however, is the only part of the LCA Requirements that addresses ethics and client-centrality – albeit implicitly. Legal negotiation ethics itself is scarcely addressed in Australian literature, although references to legal negotiation ethics, particularly deception, are abundant in America. The literature that does exist in Australia shows confusion about how legal ethical rules apply to the legal negotiation environment, and the types of unethical behaviour that can be enforced in this context. As such, legal negotiation ethics – and client-centrality – form a foundational part of legal negotiation preparation, before a legal practitioner even reaches the second LCA Requirement. My research, consequently, focuses on the first LCA Requirement of legal negotiation preparation, while also drawing on the implicit reference to legal negotiation ethics and client-centrality. My analysis of legal negotiation ethics, therefore, will include some discussion of the ethicality of using strategies and tactics in legal negotiation, although deeper analysis of relevant strategies and tactics is beyond the scope of my research.

1 *Research Questions*

My research seeks to improve legal negotiation education by addressing the inadequacies in the LCA Requirements, particularly as this pertains to legal negotiation preparation. My research is consequently underpinned by the following research question: what are the minimum competencies a law student must meet to demonstrate competent legal negotiation preparation prior to being admitted to legal practice?

To meaningfully respond to this question, my research addresses four key areas:

1. What is legal negotiation?
2. How is legal negotiation situated in the current Australian tertiary law curriculum?
3. What constitutes 'good practice' preparation for a legal negotiation? How do law students prepare for legal negotiations, and are there any deficiencies in this approach in comparison with the literature?
4. In which ways are legal ethics applied in the legal negotiation environment? Do law students consider legal negotiation ethics when preparing for legal negotiation? Are there any deficiencies in this approach in comparison with the literature?

I answer these questions by analysing key literature, and by using primary data collected from Australian law students to provide insight into law students' perspectives on these issues. My analysis involves critique of existing theoretical perspectives related to legal negotiation definitions, preparation, ethics, and client-centred practice. It culminates in the development of a Conceptual Framework of Legal Negotiation Preparation that rests on the foundation of legal negotiation definitions, and the intersection of legal negotiation preparation, ethics, and client-centrality. The Conceptual Framework sets out a range of factors that, together, result in competent preparation for legal negotiation. This Conceptual Framework, however, does not provide a means through which these factors can be utilised by law students to attain competent preparation, nor criteria against which law student preparation can be measured. Consequently, I set out a series of minimum competencies against which a law student's legal negotiation preparation can be measured. This process of creating measurable variables is referred to as 'operationalisation' in social sciences literature, a term that I adopt throughout this thesis.[111] Operationalising the Conceptual Framework, as I have done, allows the relevant competencies to be embedded in legal education. While these minimum competencies seek to specifically operationalise legal negotiation *preparation*, this is impossible without clear reference to legal negotiation ethics and client-centrality. I embed each of these themes in the minimum competencies by highlighting the intersection between these key factors

[111] Matthew DeCarlo, *Scientific Inquiry in Social Work* (2018, Press Books) 9.3.

and developing questions relevant to each minimum competency that a law student can use to prompt client discussion, ensuring that key information is obtained.

C Methodology

The private nature of legal negotiations, and of most dispute resolution proceedings, means that it is difficult to collect primary data in this area. Consequently, much dispute resolution research is theoretical, focussing on exploring and developing theories and processes rather than gathering primary data. The majority of Australian data that has been collected in this field has focussed on specific contexts: for example, surveying students undertaking specific dispute resolution courses during tertiary law studies;[112] or participants involved in other dispute resolution processes, such as conciliation,[113] rather than legal negotiation.[114] My thesis rests on two types of research: literature-based, and primary data collection. My literature-based research utilises primary sources where available, but predominantly evaluates and synthesises secondary sources to examine three broad themes: legal negotiation definitions; legal negotiation preparation; and legal negotiation ethics. My research into these three areas guided the questions that I developed for my original data collection. It further allowed the identification of 'good practice' legal negotiation preparation,[115] against which I measured my results. While the majority of my research focuses on legal

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112 See, eg, Judy Gutman, Tom Fisher, and Erika Martens, 'Why Teach Alternative Dispute Resolution to Law Students? Part One: Past and Current Practices and Some Unanswered Questions' (2006) 16(1) *Legal Education Review* Article 7 ('Why Teach ADR Part 1'); Tom Fisher, Judy Gutman, and Erika Martens, 'Why Teach ADR to Law Students-Part 2: An Empirical Survey' (2007) 7(1) *Legal Education Review* 67 ('Why Teach ADR Part 2'); Donna Cooper, 'Assisting Future Lawyers to Conceptualise Their Dispute Resolution Advocacy Role' (2013) 24(4) *Australasian Dispute Resolution Journal* 242 ('Assisting Future Lawyers'); Rachael Field and James Duffy, 'Law Student Psychological Distress, ADR and Sweet-Minded, Sweet-Eyed Hope' (2012) 23(3) *Australasian Dispute Resolution Journal* 195; Pauline Collins, 'Student Reflections on the Benefits of Studying ADR to Provide Experience of Non-Adversarial Practice' (2012) 23(3) *Australasian Dispute Resolution Journal* 204 ('Student Reflections'); Spencer and Scott (n 3).

113 Terry Carney and Keith Akers, 'A Coffee Table Chat or a Formal Hearing? The Relative Merits of Conciliation Conferences and Full Adjudicative Hearings at the Victorian Intellectual Disability Review Panel' (1991) 2(3) *Australian Dispute Resolution Journal* 141.

114 There have been some studies that focus on legal practitioner negotiation behaviour, although these have been based in the United States of America: Schneider, 'Shattering Negotiation Myths' (n 106), Gerald R Williams, *Legal Negotiation and Settlement* (West Publishing Co., 1983). These studies are discussed further in Chapter Three.

115 Law Admissions Consultative Committee, *PLT Standards* (n 4) [5.10] 'Lawyers' Skills' Element 6.

education and legal negotiation in Australia, I also draw on resources from other jurisdictions. The field of negotiation has been more thoroughly developed in America, and the term 'negotiation' has been drawn into other Western legal jurisdictions, including Australia. As such, a significant amount of American literature influences my perspective. Where possible, and relevant, I also draw on international literature in my research, cognisant of any jurisdictional and cultural differences.[116]

The importance of original data collection in this area cannot be understated. There have been various studies that examine behaviour during negotiations, though these focus on areas of negotiation that are outside the ambit of this thesis. While some American studies have examined the characteristics that describe legal negotiator behaviours,[117] these surveyed legal practitioners rather than law students. Various Australian academics have researched law students' involvement in dispute resolution processes. However, their studies are typically intended to support the inclusion of dispute resolution skills in specific topics;[118] the ways in which these could be implemented;[119] and the associated assessment.[120] In contrast, my research identifies the legal negotiation preparation skills law students use, evaluates whether these skills are deficient in comparison to the 'good practice' requirements for legal negotiation preparation expressed in the relevant literature, and asses how legal negotiation

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116 For example, as relates to the definitions and practical application of legal negotiation ethics (a comparison between Australia and American is contained in Chapter Five), or culture and power dynamics of preparation (a comparison between Australia and Korea is contained in Chapter Four). See, eg, Yon Mi Kim and Kyung Hyo Chun, 'Do You Want an Efficient Negotiator or an Ethical One: Goal of the Negotiation Teaching in Law School' (2013) 11 *Asian Business Lawyer* 125.

117 Williams (n 114) 15-46; Schneider, 'Shattering Negotiation Myths' (n 106). Both Williams and Schneider classified negotiator approaches as *effective*, *average* or *ineffective*. This is further analysed in Chapter Six.

118 See, eg, Duffy and Field (n 51); Gutman, Fisher and Martens, 'Why Teach ADR Part 1' (n 112); Fisher, Gutman and Martens, 'Why Teach ADR Part 2' (n 112).

119 Other authors considered ways that negotiation skills could be embedded in the curriculum, typically by providing a theoretical background and then using role-plays and/or other simulations as part of the teaching process. See, eg, Melissa Conley Tyler, and Naomi Cukier, 'Nine Lessons for Teaching Negotiation Skills' (2005) 15(1-2) *Legal Education Review* 61; Kathy Douglas and Clare Coburn, 'Students Designing Role-Plays: Building Empathy in Law Students?' (2009) 2 *Journal of Australasian Law Teachers Association* 55.

120 See, eg, Judy Gutman and Matthew Riddle, 'ADR in Legal Education: Learning by Doing' (2012) 23(3) *Australasian Dispute Resolution Journal* 189.

education could be improved to address any shortcomings. To determine this, I conducted a thematic analysis of the relevant literature, and developed a set of questions that specifically ask law students about their preparation for a legal negotiation, situated in the context of Legal Negotiation Competitions. This is further explained below.

There are certain constraints on how to best situate legal negotiation research within the law school context. Despite the increasing popularity of dispute resolution both in the legal profession and in the Australian law curriculum, not all Australian law schools teach legal negotiation in a compulsory topic, as seen above. Further, topics in which legal negotiation *is* taught are not consistent from program to program. Given the lack of uniformity in legal negotiation teaching, it was impossible to find a topic offered at all Australian Law Schools in which I could embed a series of questionnaires to determine students' understanding of legal negotiation. Instead, I chose to embed the questionnaires in legal Negotiation Competitions offered by the Law Students' Association ('LSA') at each Law School, and nationally through the Australian Law Students' Association ('ALSA'). The Legal Negotiation Competition is structured almost identically at each LSA and by ALSA, which made this forum ideal for comparing questionnaire responses. This is explained further in Chapter Two, when I expand on my chosen methodologies.

D Scope of Research

My research focuses on legal *negotiation*. While I draw on broader dispute resolution literature to conceptualise legal negotiation, my primary aim is to determine how best to operationalise the minimum competencies of legal negotiation preparation, and consequently, how to use legal negotiation to guide law students to meet these requirements. As such, other dispute resolution processes are beyond the scope of my thesis, though are referenced when relevant as a point of comparison. Negotiation has a strong history in various disciplines, including international relations, psychology, business and management, and labour (union representation).[121] Evidently, literature from these disciplines assumed a significant role in the development of the field of legal negotiation, particularly in its early stages. While I will briefly examine the history of negotiation in order to fully conceptualise *legal* negotiation, my thesis is primarily concerned with legal negotiation, and how legal negotiations can be prepared for while still maintaining the ethical obligations imposed by a strictly regulated legal profession. Non-legal areas of negotiation are beyond the scope of this thesis.

While my research is focused on *legal* negotiation, the concept of law is very broad, and legal negotiation can arguably be relevant to any legal matter. My research is situated in civil negotiations, rather than those related to criminal matters (for example, plea bargaining). Although family law fits within the parameters of civil law, this does not form part of my thesis, because family law dispute resolution requirements are well-established by legislation, judicial determination, and mandated processes. Consequently, there is more rigour associated with their enforcement.[122]

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121 Such research has drawn out various theories of negotiation, including game theory, economic bargaining and social-psychological bargaining: Robert M Bastress and Joseph D Harbaugh, *Interviewing, Counselling, and Negotiating: Skills for Effective Representation* (Aspen Publishers, 1990) ch 15; and the five-level social and cognitive psychological analysis of negotiation: Leigh L Thompson, Jiunwen Wang, and Brian C Gunia, 'Negotiation' (2010) 61 *Annual Review of Psychology* 491. While this varied and diverse negotiation research is encouraging, interdisciplinary research is not as prevalent as it should be in such a versatile area: See comments in Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (Jossey-Bass, 2005) 513-514.

122 *Family Law Act 1975* (Cth) Pt II, Div 3. See also: Tom Altobelli, 'A Generational Change in Family Dispute Resolution in Australia' (2006) 17(3) *Australian Dispute Resolution Journal* 140; Rae Kaspiew et al, 'The Australian Findings of Family Studies' Evaluation of the 2006 Family Law Reforms: Key Findings' (2010) 24(1) *Australian Journal of Family Law* 5;

E Terminology

Throughout my thesis I use various terms to distinguish components of my research. Certain terms warrant initial discussion for the purposes of orientation to my research.

First, my research draws distinction between *negotiation* and *legal negotiation*, as identified above. The distinction is critically evaluated in Chapter Three, where I consider the need for a definition of *legal negotiation* and propose a Taxonomy that identifies the key definitional components of legal negotiation. This Taxonomy is intended to guide legal practitioner behaviour in the context of legal negotiation. Throughout my thesis I have adopted the phrase *legal negotiation* for ease of expression.[123] The literature itself lacks definition in this area, and often comingles definitions of various forms of negotiation that contain one or more legal elements. From Chapter Four onwards, when I refer to *legal negotiation*, I refer only to the central definition identified as the core of the Taxonomy I propose in Chapter Three: two lawyers representing clients in a legal negotiation, negotiating a legal matter with legal consequences.

The two other key themes of my research are legal negotiation *preparation* and legal negotiation *ethics*, in relation to how these intersect as part of legal negotiation education. In terms of preparation, my focus is on how law students (and legal practitioners) prepare for a legal negotiation. In comparison, preparing for a non-legal negotiation necessitates different focal points and negotiators must draw on a variety of non-legal approaches. This does not require the same compliance with legal and ethical frameworks. As such, when I discuss preparation, this is in the context of preparing for a *legal* negotiation. I refer to this as *legal negotiation preparation*. My chosen expression relating to legal negotiation ethics is similar. Ethics is a broad term – my focus is on a subset of legal ethics: those that pertain to legal negotiation.

Anthony Dickey, *Family Law* (Lawbook Co, 6th ed, 2014) ch 7; Patrick Parkinson, *Australian Family Law in Context: Commentary and Materials* (Lawbook Co, 7th ed, 2019) ch 8.

123 While the phrase *legal negotiation* is sometimes used in the literature, it remains undefined. For examples of its use, see: Russell Korobkin, 'A Positive Theory of Legal Negotiation' (2000) 88(6) *Georgetown Law Journal* 1789; Carrie Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 104); Carrie Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1983-1984) 31(4) *University of California Los Angeles Law Review* 754 ('Toward Another View of Legal Negotiation').

Throughout my thesis, I draw on the legal ethical obligations and duties owed by legal practitioners and apply these to the legal negotiation setting. I consequently refer to the ways in which such ethical obligations apply to legal negotiations as *legal negotiation ethics*, for ease of expression.

My research focuses on operationalising minimum competencies of legal negotiation preparation that *law students* must meet for admission to legal practice. I use the term *operationalise* to mean the process of setting out measurable, minimum competencies,[124] that can be used in legal negotiation education. To set the parameters for these minimum competencies, I analyse what is expected of a legal practitioner in this context, drawn from extant literature. Throughout my thesis I synthesise the literature (focusing on legal practitioners) with my original data (collected from law students) to develop these minimum competencies. As such, I refer to both *legal practitioners* and *law students* throughout my thesis. I use the terms *legal practitioner* and *lawyer* interchangeably, to refer to legal practitioners in Australia, or Australian lawyers.[125] I also refer to *law students*, by which I mean Australian law students, who are undergoing or have just completed their legal training in Australia. This means that my thesis moves between literature focussing on what legal practitioners do in legal negotiation, my original data determining what law students do to prepare for legal negotiations, and my Conceptual Framework, which provides advice to law students and to more clearly embed legal negotiation preparation in legal education.

V THESIS STRUCTURE AND CHAPTER OVERVIEW

Following this introductory chapter, my thesis is comprised of six further chapters. Chapter Two contains a more specific explanation of the methods utilised throughout my research, including the process of critical analysis used to examine the relevant literature on legal negotiation and non-legal negotiation in Australia as well as globally. I explain the methodology used to collect original data through the development of questionnaires for Australian law students participating in Legal

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124 Matthew DeCarlo, *Scientific Inquiry in Social Work* (2018, Press Books) 9.3.

125 For the purposes of this thesis, the distinction between barrister and solicitor is unnecessary, although solicitors are more likely to engage in legal negotiation and therefore 'solicitor' is synonymous with 'lawyer' and 'legal practitioner' throughout this thesis.

Negotiation Competitions. I outline the processes of thematic analysis and phenomenography that I used and provide an introduction and rationale for the main themes of my data: legal negotiation preparation, legal negotiation ethics, and client-centrality. I then critically analyse these themes, which includes the use of integrative literature reviews, thematic analysis and phenomenographic analysis in my three main discussion chapters: Chapters Three, Four and Five. I explain the way in which my original data informed my analysis of key literature in this area, drawing parallels between the legal negotiation skills the literature suggests Australian law students must have, and those they actually report. I summarise the Ethics Approval process, and the refinement of my survey instruments between the Pilot Study and the main study. Finally, I assess the benefits and limitations of my research, and recommend ways in which further studies could improve and expand on my research. In sum, Chapter Two outlines my methods of data collection, and provides context for the analyses I undertake throughout the remainder of my thesis.

In Chapter Three I begin to lay the foundation for my analyses and findings. I commence with a brief history of dispute resolution, before narrowing my focus to legal negotiation. I examine negotiation using a legal lens, contextualising negotiation in the legal landscape, and highlighting the divergent paths the definition has taken, and the 'label confusion'[126] inherent in this field. I evaluate whether a definition of *legal negotiation* as distinct from *non-legal negotiation* is necessary, specifically as it relates to defining the boundaries of legal practitioner involvement in legal negotiation. I identify the difficulties associated with an all-encompassing definition of legal negotiation and consider the multiple layers that a definition would require. I then propose the utility of a set of guiding parameters that relate specifically to legal negotiation, particularly addressing the ways in which legal qualifications and the strict regulation of legal practitioner behaviour impact legal negotiation. I conclude by creating a Taxonomy of Legal Negotiation that draws on both the literature in this field and my original data. I propose that this Taxonomy can beneficially guide legal practitioner – and law student – knowledge and behaviour, and can provide the first step for more soundly embedding legal negotiation in legal education. A central

126 Schneider, 'Shattering Negotiation Myths' (n 106).

definition of legal negotiation sits at the middle of this Taxonomy, and the remainder of my thesis rests on this central definition.

In Chapter Four I critically analyse the argument that law students neglect preparation for legal negotiation. I synthesise the literature on legal negotiation preparation to determine the elements that are considered part of preparation, and to determine what is required to meet 'good practice' as outlined in the LCA Requirements. I conclude that the principles of negotiation presented by Fisher and Ury in their seminal book, *Getting to Yes*, outline the overarching categories necessary for legal negotiation preparation.[127] I use extant literature to add further depth, from a legal perspective, to Fisher and Ury's principles, adding analytical nuance by also drawing on my original data. I use this synthesis to determine 'good practice' legal negotiation preparation, ultimately proposing a Framework of Legal Negotiation Preparation based on an amended and expanded version of Fisher and Ury's principles. I then use this Framework to critically evaluate my original data, to determine how law students *actually* prepare for legal negotiations, and to identify where any deficiencies lie. I conclude that law students *do* prepare for legal negotiations and *do* consider many of the relevant factors of 'good practice' legal negotiation preparation. However, their knowledge of these factors does not correlate with a proper understanding or ability to apply these preparatory components to a legal negotiation scenario. My conclusion to Chapter Four lays the foundation for the Conceptual Framework presented in Chapter Six, in which I suggest that changes to legal negotiation education could benefit law students.

Legal ethics in Australia operate to regulate legal practitioner behaviour. While the Conduct Rules are guided by ethical values and morals, legal ethics have diverged from traditional ethical principles. In Chapter Five I analyse the way in which Australian legal ethics apply to the legal negotiation environment, which has rarely been done in the Australian context.[128] I further examine the challenges inherent in applying the Conduct Rules, clearly intended to regulate behaviour in the litigation environment, to the legal negotiation context. I synthesise literature relating to the

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127 Roger Fisher, William Ury, and Bruce Patton (ed) *Getting to YES* (Random House, 2nd ed, 2003).

128 Notable exceptions include Rankin (n 93) and Jim Parke, 'Lawyers as Negotiators: Time for a Code of Ethics?' (1993) 4(3) *Australian Dispute Resolution Journal* 216.

Conduct Rules, legal ethical obligations, and legal practitioner ethical decision making. In so doing, I identify the confusion about applying these to the legal negotiation context, and examine similar confusion seen in my original data. I draw insight from legal practitioner publications as to how legal negotiation ethics are approached in legal practice. My analyses demonstrate that students do not have a full grasp of the way that legal ethics apply to legal negotiation and, similarly to their knowledge of legal negotiation preparation, are unable to apply this to legal negotiation scenarios. To exemplify this, I draw on the concept of deception, a frequently encountered legal negotiation ethical dilemma.[129] I use this as a case study through which to evaluate the Conduct Rules, ethical obligations, and components of legal practitioner ethical decision making. I conclude that a Code of Ethics specific to the legal negotiation environment would be highly beneficial in guiding the behaviour of law students and legal practitioners alike. In the absence of such a Code, law students must recognise, as part of the minimum competencies of legal negotiation preparation, the intersection between legal negotiation preparation and ethics, and the important role of the client in this process.

In Chapter Six I synthesise my findings from Chapters Four and Five to recognise the intersection of three concepts: legal negotiation preparation, legal negotiation ethics, and client-centred lawyering. In so doing, I advance a Conceptual Framework of Legal Negotiation Preparation. I then propose a way of operationalising this Conceptual Framework for use in legal negotiation education, proposing a series of minimum competencies to guide law students in their preparation for legal negotiation. These minimum competencies are set out in accordance with the categories I identify in the Legal Negotiation Preparation Framework proposed in Chapter Four. Each minimum competency includes reference to the relevant preparatory and ethics components, as well as at least one question to prompt legal practitioner-client dialogue on that particular component. In Chapter Six, therefore, I answer my primary research question by setting out minimum competencies that operationalise legal negotiation preparation and provide depth to the first LCA Requirement.

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129 John Wade, 'Ethically Ambiguous Negotiation Tactics (EANTS): What are the Rules Behind the Rules?' (Conference Paper, Law Society of Saskatchewan CPD Seminars, 12 May 2014) 9-10.

In Chapter Seven, I synthesise my research and my conclusions, and re-emphasise the importance of legal negotiation education, particularly relating to preparation for a legal negotiation. I explain that the definitional Taxonomy proposed in Chapter Three can serve as a starting point to guide legal practitioner behaviour during legal negotiations. This can then guide law students to develop and refine their legal negotiation skills, and therefore forms the foundation for my Conceptual Framework and resultant minimum competencies. I evaluate my research and propose avenues for further research that could provide additional insight into law students' legal negotiation preparation skills and the requisite minimum competencies they must meet. I conclude my thesis by providing recommendations to key stakeholders as to the next steps required to ensure that law students attain the minimum competencies required for legal negotiation preparation, on which they can build by developing and refining their skills.

VI CONTRIBUTION TO SCHOLARSHIP

My primary contribution to legal negotiation and legal education scholarship is to create a Conceptual Framework and a series of minimum competencies to operationalise legal negotiation preparation. I contribute to legal negotiation scholarship by developing key legal negotiation literature in light of original data that I collected from Australian law students, used to give a voice to law students' experiences with legal negotiation preparation and ethics. My Conceptual Framework of Legal Negotiation Preparation lies at the intersection of three pillars: legal negotiation preparation; legal negotiation ethics; and client-centred legal negotiation. These are the foundation of legal negotiation. I conclude that the first LCA Requirement, while inadequately addressing each of these components, also sits at this intersection. My synthesis of existing literature and original data contributes to legal education scholarship – specifically, legal negotiation education scholarship – through utilising my Conceptual Framework to give life to a series of minimum competencies related to legal negotiation preparation that law students must meet prior to admission to legal practice. These competencies prioritise legal negotiation preparation, while highlighting key legal negotiation ethics and emphasising the importance of legal practitioner-client dialogue, complete with specific questions that

can be used to prompt client interaction for each component of the Framework. This is a significant original contribution to knowledge in this field.

Through the development of my Conceptual Framework of Legal Negotiation Preparation, I make various other contributions to scholarship. I draw on existing theories of negotiation in the legal environment to develop a cohesive Taxonomy that gives clarity to the definitions of legal negotiation. This becomes the starting point for any analysis of legal negotiation and allows legal practitioners and law students alike to have a clear understanding of when their involvement in legal negotiation will attract more stringent ethical duties.

I distil the literature related to legal negotiation preparation, which is the foundation of legal negotiation. In this distillation, my contribution is threefold. I conduct a thematic analysis of the relevant literature to reduce the 'label confusion',[130] and to more precisely identify the key elements of 'good practice' legal negotiation preparation. I address comments that law students' ability to prepare for legal negotiations is deficient by analysing original data collected from law students about how they prepare for legal negotiations and contrasting this with existing literature. This analysis resulted in a determination of the key flaws in law students' ability to prepare for legal negotiation, and thus informed the minimum competencies that I created.

I further evaluate the minimal literature on legal negotiation ethics in Australia. I add value to the extant literature by using the lens of legal negotiation to examine the intersection of the Conduct Rules with legal ethical obligations, ethical philosophies of decision making, theories of bargaining ethics, and legal negotiation theories. I further consider legal negotiation ethics from a law student's perspective, in determining what law students need to understand about legal negotiation ethics, particularly with regard to the identification of potential ethical dilemmas.

I draw the threads of each of these themes together by developing a Conceptual Framework of Legal Negotiation Preparation, to operationalise legal negotiation

130 Schneider, 'Shattering Negotiation Myths' (n 106).

preparation and contribute to legal negotiation education. In so doing, I emphasise the importance of legal negotiation ethics in this field and intersect these components with the ethical obligation to the client and client-centrality in legal negotiation. After developing this Conceptual Framework, I make specific recommendations to key stakeholders regarding further development in this area, particularly in relation to developing and refining law students' legal negotiation preparation skills in absence of a set of ethical obligations pertaining to the legal negotiation environment.

VII CONCLUSION

In this chapter I have identified fundamental inadequacies inherent in legal negotiation education, in relation to preparing law students to achieve minimum competence relevant to legal negotiation preparation, as required for admission to legal practice. My research addresses this in five ways. First, I evaluate the history of legal negotiation to propose a Taxonomy of Legal Negotiation that classifies negotiations as legal or non-legal, and that consequently guides legal practitioners' knowledge and behaviour related to legal negotiation. Secondly, I use original data from Australian law students to inform analysis of whether and, if so, how law student skills in legal negotiation preparation are deficient. Thirdly, I analyse and synthesise literature on legal negotiation preparation and legal negotiation ethics in order to determine the requirements for 'good practice'. Fourthly, I synthesise theoretical perspectives across three domains (legal negotiation preparation, ethics, and client-centrality) to create a Conceptual Framework that contributes to legal negotiation education by using minimum competencies to operationalise legal negotiation preparation. Finally, I provide recommendations to key stakeholders about steps that should be taken to guide law students' knowledge of, and skills in, legal negotiation preparation. This will consequently produce legal practitioners who are both qualified and *competent* legal negotiators.[131]

[131] This distinction is further explained in Chapter Five Ethics, drawing from Boulle and Field (n 55) 471 [12.2].

CHAPTER TWO: METHODOLOGY

I INTRODUCTION

As noted above, it is particularly difficult to obtain information about legal negotiations, primarily due to their private nature. However, relying only on extant literature to inform the development of a Conceptual Framework of Legal Negotiation Preparation intended to assist law students in legal negotiation preparation skill development does a disservice to the field: to legal practitioners and law students alike. As such, my research employs multi-faceted techniques, including collecting original data as well as using literature-based research in two ways: thematic analysis and semi-systematic literature reviews used to inform the development of mixed-methods questionnaires; and integrative literature reviews to allow synthesis and critical analysis of relevant literature. Paired with my original data, my evaluation of the relevant literature resulted in the creation of a Taxonomy of Legal Negotiation,[1] the Legal Negotiation Preparation Framework,[2] and, ultimately, the development of a Conceptual Framework of Legal Negotiation Preparation and associated Minimum Competency Tables that operationalise legal negotiation preparation.[3] In this methodology chapter I provide a detailed explanation of the methodologies used, and the associated rationales. I place particular emphasis on my original data collection, including the selection of a research population, the use of thematic analysis to enable questionnaire development, and the processes of thematic analysis and phenomenography used to analyse the results. I also provide a brief introduction to the demographics of respondents to my questionnaires. I conclude the chapter by identifying the limitations of my research and providing recommendations about the scope of future research in this area.

Traditional legal research lies in the doctrinal analysis of legal texts.[4] However, the frequency of empirical studies, both qualitative and quantitative, is gradually increasing in law. Such studies typically involve adopting research processes from disciplines such as social science,[5] and is driven by the importance of reflecting societal views in legal processes.[6] My research,

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1 See below Chapter Three.

2 See below Chapter Four.

3 See below Chapter Six.

4 Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 85.

5 Willem H van Boom, Pieter Desmet and Peter Mascini, *Empirical Legal Research in Action: Reflections on Methods and Their Applications* (Edward Elgar Books, 2018) 2.

6 Ibid 3.

too, is informed by the views from a specific societal subset: law students. There have been various studies of law students in relation to legal negotiation, particularly related to legal dispute resolution education,[7] and legal practitioners' negotiation styles.[8] This shows that self-report data, collected through questionnaires or surveys, is a beneficial way of gaining insight into this field.[9] This approach, paired with detailed analysis of the key literature, presents a full picture of 'good practice' legal negotiation preparation and allows evaluation of whether law students are meeting this standard.

II LITERATURE RESEARCH

As introduced above, my thesis seeks to address the primary research question:

> What are the minimum competencies a law student must meet to demonstrate competent legal negotiation preparation prior to being admitted to legal practice?

I deconstructed this question into four key areas:

1. What is a legal negotiation?
2. How does legal negotiation fit within the current Australian tertiary law curriculum?
3. What constitutes competent preparation for a legal negotiation? How do law students prepare for legal negotiations, and are there any deficiencies in this approach in comparison with the literature?

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7 See, eg, Judy Gutman, Tom Fisher, and Erika Martens, 'Why Teach Alternative Dispute Resolution to Law Students? Part One: Past and Current Practices and Some Unanswered Questions' (2006) 16(1) *Legal Education Review* Article 7 ('Why Teach ADR Part 1'); Tom Fisher, Judy Gutman, and Erika Martens, 'Why Teach ADR to Law Students-Part 2: An Empirical Survey' (2007) 7(1) *Legal Education Review* 67 ('Why Teach ADR Part 2'); Donna Cooper, 'Assisting Future Lawyers to Conceptualise Their Dispute Resolution Advocacy Role' (2013) 24(4) *Australasian Dispute Resolution Journal* 242 ('Assisting Future Lawyers'); Rachael Field and James Duffy, 'Law Student Psychological Distress, ADR and Sweet-Minded, Sweet-Eyed Hope' (2012) 23(3) *Australasian Dispute Resolution Journal* 195; Pauline Collins, 'Student Reflections on the Benefits of Studying ADR to Provide Experience of Non-Adversarial Practice' (2012) 23(3) *Australasian Dispute Resolution Journal* 204 ('Student Reflections'); David Spencer and Marilyn Scott, 'ADR for Undergraduates: Are We Wide of the Mark?' (2002) 13(1) *Australasian Dispute Resolution Journal* 22.

8 Gerald R Williams, *Legal Negotiation and Settlement* (West Publishing Co, 1983); Andrea Kupfer Schneider, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (2002) 7 *Harvard Negotiation Law Review* 143 ('Shattering Negotiation Myths').

9 Due to previous undergraduate studies in behavioural science, I felt confident utilising this method of research, and cognisant of the relevant limitations – see below Part IV.

4. In which ways are legal ethics applied in the legal negotiation environment? Do law students consider legal negotiation ethics when preparing for legal negotiation? Are there any deficiencies in this approach in comparison with the literature?

To answer these questions, I first conducted a semi-systematic literature review,[10] which pursued the development of legal negotiation preparation literature since the inception of dispute resolution in law in 1980s America.[11] I used thematic analysis to identify relevant themes inherent in the literature.[12] I then used these themes to inform the development of a series of mixed-method questionnaires to determine how law students prepare for legal negotiations.[13] I chose a mixed-methods approach to give a 'more comprehensive understanding of the phenomenon under investigation'.[14]

I utilised integrative literature reviews to assist in the 'advancement of knowledge and theoretical frameworks…[to] generate a new conceptual framework'.[15] Integrative literature reviews were the most beneficial for my research as they allowed for the use of thematic analysis to identify key themes and relevant theoretical perspectives.[16] Due to the vast amount of theoretical perspectives related to legal negotiation definitions, preparation, and ethics, creating a Conceptual Framework was the most valuable way to highlight the interrelationships inherent in this area.[17] Understanding the interrelationship between these key themes is particularly important to developing law students' legal negotiation preparation

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10 Hannah Snyder, 'Literature Review as Research Methodology: An Overview and Guidelines' (2019) 104 *Journal of Business Research* 333, 336

11 See, eg, Marc Galanter, 'The Day After the Litigation Explosion' (1986-1987) 46(1) *Maryland Law Review* 3.

12 Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology, Qualitative Research in Psychology' (2006) 3(2) *Qualitative Research in Psychology* 77, 89. See Appendix O for the list of themes utilised in my research.

13 See below Part III.

14 Patricia Leavy, *Research Design: Quantitative, Qualitative, Mixed Methods, Arts-Based and Community-Based Participatory Research Approaches* (2017, Guilford Publications) 164.

15 Snyder (n 10) 336.

16 See, eg, Braun and Clarke (n 12); Snyder (n 10) 336.

17 My analysis describes the interrelationship between three themes: legal negotiation preparation; ethics; and client-centred legal negotiation. While I define these as *themes*, they could instead be defined as *domains*, particularly in the way that the intersection between these three *domains* 'foster[s] spheres of competence and expertise' through my development of a Conceptual Framework in Chapter Six. For further information about conceptual frameworks generally, including their basis in relating both concepts and domains, see Deborah J MacInnis, 'A Framework for Conceptual Contributions in Marketing' (2011) 75(4) *Journal of Marketing* 136, 142.

skills. While each of the methodologies listed above assumed an individual role in answering my research question, together they enabled me to synthesise and critique the existing theoretical frameworks, which in turn informed the creation of a Conceptual Framework of Legal Negotiation Preparation, which I used to operationalise the minimum competencies of legal negotiation preparation that law students must attain to be admitted to legal practice. Below, I explain the foundation for each theme of my research, particularly introducing the theoretical frameworks on which my research is based.

Legal negotiation is situated within the broader framework of dispute resolution. Many authors originally provided commentary to progress a definition of legal negotiation,[18] although the journey for a definition diverged away from a specific definition, developing a stronger focus on process requirements.[19] This area suffers from 'label confusion', which reflects that terminology in this field is not used consistently, with multiple labels for the same definitions, or multiple definitions for the same labels.[20] While this information is analysed in greater depth in Chapter Four, it provides important background to my analysis. My analysis canvassed literature from Australia, the United Kingdom, and America, although all of my original research is situated in Australia, in reference to Australian laws, rules, and regulations.[21] In 1994, leading American negotiation scholar Carrie Menkel-Meadow conducted a detailed analysis of negotiation theories, in the search for a theory of legal

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18 See, eg, Carrie Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' [1983] (4) *American Bar Foundation Research Journal* 905; ('Legal Negotiation: A Study of Strategies in Search of a Theory'); Carrie Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1983-1984) 31(4) *University of California Los Angeles Law Review* 754 ('Toward Another View of Legal Negotiation'); Melvin Aron Eisenberg, 'Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking' (1976) 89(4) *Harvard Law Review* 637, 664-665; Williams (n 8).

19 See, eg, Russell Korobkin, 'A Positive Theory of Legal Negotiation' (2000) 88(6) *Georgetown Law Journal* 1789 ('A Positive Theory of Legal Negotiation'); David Spencer and Tom Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook, 2005); David Spencer, Lise Barry and Lola Akin Ojelabi, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co, 4th ed, 2019); Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 6th ed, 2020) ('*Alternative Dispute Resolution Sixth Edition*'); Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2002) ('*Dispute Resolution in Australia*').

20 Schneider, 'Shattering Negotiation Myths' (n 8) 151-2.

21 Law Council of Australia, *Australian Solicitor Conduct Rules* (2015) ('*Conduct Rules'*), *Legal Profession Act 2006* (ACT), *Legal Profession Uniform Law Application Act 2014* (NSW), *Legal Profession Act 2006* (NT), *Legal Profession Act 2007* (Qld), *Legal Practitioners Act 1981* (SA), *Legal Profession Act 2007* (Tas), *Legal Profession Uniform Law Application Act 2014* (Vic), *Legal Profession Act 2008* (WA).

negotiation.[22] She concluded that the time for a specific definition of legal negotiation had not yet arrived.[23] After this research, progression of a definition of legal negotiation stalled, moving away from a specific definition and focussing instead on the negotiation theories that guide legal negotiator behaviour.[24] My research follows from Menkel-Meadow's commentary, while still acknowledging the subsequent divergent paths of legal negotiation. I critically analyse the relevant literature to determine how the theories of negotiation can be applied to *legal* negotiation, with a focus on the components that are most relevant to legal practice. I identify five key components: qualifications and representation; content and context; consequences and outcome; parties and their relationships; and ethics and accountability.[25]

My legal negotiation preparation research follows a similar process to that for legal negotiation definitions. This area, too, suffers from 'label confusion', although Schneider's term has not previously been applied in this domain. My legal negotiation preparation research involved detailed thematic analysis to detect the key components of preparation from the literature, in order to then identify the 'good practice' noted in the LCA Requirements.[26] Further detail regarding how my research into legal negotiation preparation resulted in the creation of my questionnaires is outlined in Part III(B) below.

The third theme of my research examined legal negotiation ethics. Unlike my research into legal negotiation definitions and preparation, this involved analysis of both primary and secondary sources, particularly the Conduct Rules, the Legal Practitioner Legislation, and relevant judicial interpretation and scholarly commentary. Few Australian sources address legal negotiation ethics, and those that do typically consist of analysis of the legislative materials that guide legal ethics, or academic commentary that considers the role of ethics in

22 Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 18).
23 Ibid 928.
24 See, eg, Williams (n 8); Schneider, 'Shattering Negotiation Myths' (n 8).
25 See below Chapter Three for a more detailed analysis.
26 See Appendix O for the themes I identified during thematic analysis.

legal negotiation[27] or other dispute resolution environments.[28] Further literature draws on more specific ethical theories in relation to negotiation, including ethical philosophies of decision making and theories of bargaining ethics.[29] My research synthesises each of these theoretical perspectives, specifically as they relate to legal negotiation. I also analyse the governing Australian legislative requirements,[30] and the intersection between these primary sources and theoretical perspectives. While similar analysis was conducted by Avnita Lakhani through her doctoral studies, Lakhani's research concentrates on the ethical implications of legal practitioners' potentially deceptive conduct during negotiations, culminating in recommendations to develop a specific dispute resolution-focussed code of ethics.[31] My research focus differs, as my primary aim is to develop a Conceptual Framework that guides law student legal negotiation preparation and sits within legal negotiation education. Like Lakhani, I identified deception as the most relevant ethical dilemma arising in the legal negotiation environment, as confirmed through comments made by law students responding to my study, particularly noting uncertainty about the ethics related to lying during legal negotiations.[32] As such, I use deception as a specific case study to highlight the confusion and discrepancies that are present in the primary sources and ethical requirements indicated above. While I agree with Lakhani's conclusions that there is a need for a dispute resolution-specific Code of Ethics, which addresses *legal* negotiation, the primary goals of my thesis concentrate instead on providing guidance to Australian law students. To do this, I

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27 See, eg, Mark J Rankin, 'Legal Ethics in the Negotiation Environment: A Synopsis' (2016) 18(1) *Flinders Law Journal* 77 ('Legal Ethics in the Negotiation Environment'); and Jim Parke, 'Lawyers as Negotiators: Time for a Code of Ethics?' (1993) 4(3) *Australian Dispute Resolution Journal* 216.

28 See, eg, Bobette Wolski, 'An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making' (2017) 35(1) *Law Context: A Socio-Legal Journal* 64 ('An Ethical Evaluation Process for Mediators'); Judy Gutman, 'Legal Ethics in ADR Practice: Has Coercion Become the Norm' (2010) 21(4) *Australasian Dispute Resolution Journal* 218.

29 John Wade, 'Ethically Ambiguous Negotiation Tactics (EANTS): What are the Rules Behind the Rules?' (Conference Paper, Law Society of Saskatchewan CPD Seminars, 12 May 2014) ('EANTS'); Avnita Lakhani, 'The Truth About Lying as a Negotiation Tactic: Where Business, Ethics, and Law Collide…Or Do They? Part 1' (2007) 9(6) *ADR Bulletin* 101 ('The Truth About Lying Part 1'); Avnita Lakhani, 'The Truth About Lying as a Negotiation Tactic: Where Business, Ethics, and Law Collide…Or Do They? Part 2' (2007) 9(7) *ADR Bulletin* 133 ('The Truth About Lying Part 2'); Avnita Lakhani, 'Deception as a Legal Negotiation Strategy: A Cross-Jurisdictional, Multidisciplinary Analysis Towards an Integrated Policy Reforms Agenda' (PhD Thesis, Bond University, 2010) ('Deception Legal Negotiation Thesis').

30 Law Council of Australia, *Conduct Rules; Legal Profession Act 2006* (ACT); *Legal Profession Uniform Law Application Act 2014* (NSW); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (Qld); *Legal Practitioners Act 1981* (SA); *Legal Profession Act 2007* (Tas); *Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession Act 2008* (WA).

31 Lakhani, 'Deception Legal Negotiation Thesis' (n 29).

32 1401PNQF (Response to Pre-Negotiation Questionnaire, 2014) 3rd year student.

have drawn on Australian dispute resolution ethics literature where relevant, in order to highlight key differences between legal negotiation and other forms of dispute resolution. I also contrast literature from overseas, particularly from America, again identifying the key differences between jurisdictions. In order to critically analyse legal negotiation ethics literature, my integrative literature review draws on various theoretical perspectives, including ethical philosophies, theories of bargaining ethics, theories of legal practitioner decision making, and legal negotiation theories.A final theoretical perspective is relevant to the development of my Conceptual Framework. As a result of their leading studies of legal practitioner negotiator effectiveness, both Williams and Schneider utilised frameworks that assessed legal negotiator behaviour as 'effective', 'average', or 'ineffective'.[33] In the most recent study, Schneider asked participants to rate adjectives that classified a negotiator in one of these three categories, based on negotiation behaviour witnessed at the negotiation table.[34] In determining a need to address minimum competencies required for legal negotiation preparation, I drew inspiration both from the Australian PLT Standards that are based on the standards expected of an entry-level practitioner, as well as the 'average' negotiation behaviour determined by Schneider. Schneider's findings do not relate specifically to legal negotiation preparation but motivated my consideration of minimum competencies through the determination of 'average' or 'ineffective' legal negotiation preparation. In this sense, I would associate the LCA Requirements' 'good practice' with Schneider's 'effective' category; and the minimum competencies I use to operationalise legal negotiation preparation with the 'average' category.

33 Schneider, 'Shattering Negotiation Myths' (n 8) Appendix A.

34 See below Chapter Three.

III PRIMARY DATA COLLECTION

To address my primary research question, I first needed to analyse the relevant literature. This would identify the key components of legal negotiation preparation, and to determine whether these components were being considered by law students during legal negotiation preparation. This was a two-stage process that began with a semi-systematic literature review examining the key components of legal negotiation preparation and the development of this since the conceptualisation of legal negotiation in 1980s America.[35] I analysed relevant literature using thematic analysis, and identified 36 themes relevant to legal negotiation preparation.[36] Further critical analysis allowed me to group the 36 themes to fit within the four main principles proposed by Fisher and Ury in their seminal book on negotiation,[37] with the addition of an initial category that I identified from the literature:[38]

1. Preliminary considerations [my contribution]
2. Separate the people from the problems[39]
3. Focus on interests, not positions[40]
4. Invent options for mutual gain[41]
5. Insist on using objective criteria.[42]

My analysis of the literature on legal negotiation preparation is contained in Chapter Four, and takes the form of an integrative literature review. Throughout this analysis I further refine the five categories, however I used the categories above to develop a series of three questionnaires designed to capture information about how law students prepare for legal negotiations.[43] In the section below I outline the rationale and context for participant recruitment, the processes used to obtain ethics approval, and the amendments made after the Pilot Study.

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35 See generally Snyder (n 10) 335.

36 See Appendix N.

37 Roger Fisher, William Ury, and Bruce Patton (ed) *Getting to YES* (Random House, 2nd ed, 2003).

38 See below Chapter Four for detailed evaluation and critical analysis of the relevance of *Preliminary Considerations* as an initial, foundational, component of preparation.

39 Fisher, Ury and Patton (n 37) Chapter Two.

40 Ibid Chapter Three.

41 Ibid Chapter Four.

42 Ibid Chapter Five.

43 See below Part III(B) for an overview of the themes addressed in the questionnaires. The questionnaires themselves are contained in Appendices G, H I, J, M and N.

A Participants

I chose to recruit law student participants who had entered Legal Negotiation Competitions run by their LSA, rather than approaching Law Schools to incorporate my questionnaires in existing topics. My rationale to avoid embedding the questionnaires in an assessed law topic was threefold. As mentioned in Chapter One, legal negotiation is not a required subject in accordance with the Academic Areas but *is* required to be taught during Practical Legal Training. The majority of Australian law students study Practical Legal Training as a post-graduate course separate to the Academic Areas.[44] Consequently, surveying students who have studied negotiation as part of Practical Legal Training would mean that my results focus on students who are more likely to have made a decision to practice law (as Practical Legal Training is a pre-cursor for admission to legal practice).[45] I wanted to survey law students who are currently studying the Academic Areas, to reach a wider population of potential participants, and to obtain a more realistic view of law students' understanding of legal negotiation. I did, however, include a question to determine whether my respondents intended to practice law after graduation. I further decided not to embed the questionnaires in a specific law topic due to the lack of uniformity between the way legal negotiation skills are taught at Law School, and the topics in which they are taught. My decision to conduct my study separately to any assessed topics also distinguishes it from previous studies done in this field.[46] Although embedding questionnaires in a dispute resolution-related, graded subject would likely result in more serious responses and a higher completion rate, adding questionnaires into a graded subject would place increased pressure on participants.

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44 The exception is at Flinders University (South Australia) and Newcastle University (New South Wales), where Practical Legal Training is embedded throughout the degree, culminating with one year of Practical Legal Training subjects and a legal placement.

45 But see Michael McNamara, 'University Legal Education and the Supply of Law Graduates: A Fresh Look at a Longstanding Issue' (2019) 20(2) *Flinders Law Journal* 223; Jeff Giddings and Michael McNamara, 'Preparing Future Generations of Lawyers for Legal Practice: What's Supervision Got to Do with It?' (2014) 37(3) *UNSW Law Journal* 1226; Angela Melville, 'It Is the Worst Time in Living History to be a Law Graduate: Or Is It? Does Australia Have Too Many Law Graduates?' (2017) 51(2) *The Law Teacher* 203.

46 Studies conducted as part of specific topics include that at LaTrobe, which focuses on student attitudes towards a first-year mandatory alternative dispute resolution topic: Gutman, Fisher and Martens, 'Why Teach ADR Part 1' (n 7) and Gutman, Fisher and Martens, 'Why Teach ADR Part 2' (n 7): a similar study based on a compulsory first-year dispute resolution topic at La Trobe: Judy Gutman, and Matthew Riddle, 'ADR in Legal Education: Learning by Doing' (2012) 23(3) *Australasian Dispute Resolution Journal* 189; or a University of Southern Queensland study on evaluating an alternative dispute resolution course available to law students, Juris Doctor students and social science students: Collins, 'Student Reflections' (n 7).

Legal Negotiation Competitions consequently proved to be the most beneficial way to gather information about how law students prepare for legal negotiations. My data was enriched because many participants had limited knowledge of legal negotiation; merely what they had picked up during law studies and personal experiences. This allowed for deeper insight into how law students prepare for legal negotiations without having studied a specific legal negotiation topic. This law student insight is one of my original contributions to knowledge in the fields of legal negotiation and legal education.

2 *The Legal Negotiation Competition*

Legal Negotiation Competitions are administered by the LSA of each Law School. This section includes a brief overview of the structure and functioning of LSAs. Each Australian law school has one or more LSA, comprised of elected student volunteers from within that Law School. LSAs have the option to affiliate with ALSA, the national not-for-profit representative association for approximately 40,000 Australian law students.[47] ALSA provides various services for law students, including careers seminars, educational forums, and legal competitions, which are mirrored by each LSA at local level. The ALSA Committee is comprised of an elected Executive as well as the President and Vice President from each affiliated LSA, meaning that each LSA President and Vice President has clear insight into the happenings at all LSAs across Australia. ALSA runs a national annual conference in July, which rotates between Australian capital cities and unites law students from Australia, New Zealand and Singapore for a week of events, including legal competition championships. The winners of local, LSA-run competitions represent their Law School at ALSA's National Championships. In turn, the winners of the National Championships then represent Australia at international competitions.

All LSA-run competitions are facilitated by a Competitions Organiser.[48] My research focuses on the Legal Negotiation Competition, which was run at 26 of the 33 LSAs across Australia

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47 Australian Law Students' Association, 'What is ALSA?', *Australian Law Students' Association Website* (Web Page, 2020) <www.alsa.asn.au>. On 22 July 2017 the Australian Law Students' Association ('ALSA') represented 28,000 law students. On 4 July 2020 ALSA represents 40,000 law students.

48 Depending on the structure of the Law Student Association ('LSA'), the title given to the Competition Organiser can range from Vice President (Competitions), to Competitions Director, Competitions Representative, Competitions Team Member. I have used 'Competitions Organiser' as a catch-all term.

when I conducted my data collection across 2012-2016.[49] Since the Legal Negotiation Competitions administered by the ALSA and its affiliated organisations at each Australian Law School resulted in largely standardised structure and content,[50] I was able to survey a broad cross-sample of Australian law students.

The Legal Negotiation Competition requires law student competitors, in teams of two, to represent a hypothetical client. Each negotiation comprises two teams of two. Law students choose their own partner for the competition, and may enter regardless of their year of study.[51] Since competitors may be at any level of legal training, the Competition Organiser[52] typically provides competitors with preliminary information about the Legal Negotiation Competition. This usually involves running an Information Seminar; providing competitors with guidance about the competition structure and rules; and directing competitors to various sources that provide information and tips about negotiation in a law context. These include links to YouTube videos of ALSA Legal Negotiation Competitions; references to the leading Australian Textbooks;[53] and/or topic outlines or materials from units taught at that Law

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49 This information was taken from each LSA's website and was correct throughout the period of data collection. In 2020 there are now 42 LSAs affiliated with ALSA: Australian Law Students' Association, 'Member Associations?', *Australian Law Students' Association Website* (Web Page, 2020) <www.alsa.asn.au/member-associations>

50 While at Law School, I held the role of Competitions Director for my LSA for 2.5 years (2008-2011), and Competitions Director for ALSA for 18 months (2009-2011). Throughout these roles I led an overhaul of the Negotiation Competition Rules and Scoring, and associated documentation. This meant that I knew the relevant documentation intimately and felt very comfortable with creating a study that could fit around the existing competition structure without jeopardising competitor performance. I designed the questionnaires to be minimally intrusive, relying on rating scales or tick boxes where possible. This is explained and analysed in further depth in the remainder of this chapter.

51 While most Legal Negotiation Competitions run by LSAs are not restrictive in terms of year-level entry requirements, some LSAs run a junior negotiation (generally limited to students in the first couple of years of their degree) and a senior negotiation (generally limited to students in the final or penultimate year of their degree). Typically, the goal of the junior negotiation is to teach first- and second-year students how to negotiate, so that they can develop their skills and confidence to participate in the senior negotiation. Winners of the senior negotiation represent the LSA at the ALSA Negotiation Championship. ALSA Championships are not restricted by year levels.

52 Each LSA has a Competitions Team, comprised of a Competitions Director and various Competitions Coordinators. Usually, one member of this team will have sole responsibility for the organisation of the Negotiation Competition, but may be assisted by other members of the team. Each member of the Competitions Team reports back to the Competitions Director, who oversees the running of all competitions.

53 See, eg, Laurence Boulle and Rachael Field, *Australian Dispute Resolution Law and Practice* (LexisNexis, 2017); Spencer, Barry and Akin Ojelabi, (n 18); Sourdin, *Alternate Dispute Resolution Sixth ed* (n 19); Astor and Chinkin, *Alternative Processes in Australia Negotiation* (n 18).

School that encompass negotiation.[54] The basic information provided usually covers generic negotiation tips that focus on determining each client's interests and positions, and their best alternative to a negotiated agreement ('BATNA') and worst alternative to a negotiated agreement ('WATNA').[55]

As with all legal negotiations, the negotiation topic could be based on any legal area. Each team is given an identical set of agreed facts, outlining the scenario and providing a few issues on which parties *must* negotiate. Each team is additionally provided with confidential facts – instructions from their hypothetical client. The confidential facts may include information that is not to be disclosed to the other lawyers except under certain circumstances. There may also be confidential instructions as to relevant price-ranges, or other information to assist competitors in determining their client's interests and positions.[56]

3 *The Legal Negotiation Competition – Structure*

Each LSA's Legal Negotiation Competition consists of several rounds: one or two preliminary rounds, quarter final, semi-final, and grand finale. The ALSA National Championship has a similar structure, with the notable difference of including three preliminary rounds before progression to the quarter final.[57] Each negotiation is structured in three stages: pre-negotiation, negotiation, and post-negotiation. Every negotiation is judged by at least one judge (with a maximum of three), who are typically legal academics, legal practitioners, members of the judiciary, or senior students who have been successful in

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54 Australian Law Students' Association, 'ALSA Negotiation Competition', *Australian Law Students' Association Website* (Web Page, 2020) <https://alsa.asn.au/competitions/negotiation>.

55 This aligns with the information provided by ALSA: Australian Law Students' Association, 'ALSA Negotiation Competition' (n 53). Much of this information comes originally from Fisher, Ury and Patton (n 36). These steps are also mentioned in the leading Australian textbooks: Spencer, Barry and Akin Akin Ojelabi, (n 19); Sourdin, *Alternative Dispute Resolution Sixth Edition* (n 19); Astor and Chinkin, *Dispute Resolution in Australia* (n 19); Boulle and Field (n 53). I analyse these terms along with other components of legal negotiation preparation in Chapter Four.

56 Fisher, Ury and Patton (n 37).

57 Australian Law Students' Association, 'Negotiation Championship Rules' (2010) r 3 ('Negotiation Championship Rules 2010'). Although the Negotiation Championship Rules have been updated since 2010, the 2010 Rules were relevant during the initial design of my study. The 2020 version of the Rules are quite different in structure, though contain similar content. The Negotiation Championship in 2020 took a different format due to COVID-19 restrictions.

previous iterations of the competition or who have legal and/or professional experience with negotiation.[58]

The Legal Negotiation Competition Rules lay out the structure for the competition.[59] Competitors are provided with their negotiation scenario a minimum of two hours prior to the competition.[60] Teams typically begin preparing once they have received the question, although some will meet prior to start devising their general strategy.[61] The negotiation itself comprises a 50-minute period in which the two teams of negotiators are required to negotiate on the relevant issues.[62] During this time, each team may choose to take a five minute break, during which they can speak privately, to the exclusion of the other team and the judge(s).[63] The negotiation will conclude at the expiration of 50 minutes, regardless of whether the breaks have been taken, and regardless of whether final agreements have been reached or memorialised. After the negotiation, each team is given ten minutes to reflect on the negotiation,[64] to the exclusion of the other team.[65] During this time competitors are asked to address two questions:

1. In reflecting on the entire negotiation, if you were to be faced with a similar situation again, what would you do the same and what would you do differently?
2. How well did your strategy work in relation to the outcome?[66]

Following their reflection, each team meets individually with the judge(s) for ten minutes. Each team must answer the above questions, and any additional questions posed by the judge(s).[67] This period of self-analysis does not have a set structure and can be conducted in

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58 Ibid r 7. Although 'all judges must have a suitable legal qualification, or extensive relevant professional experience' at r 7.2, it is the nature of these competitions that often legally qualified people are not willing or not available to judge, particularly in the earlier rounds of competition. This has meant that often students with experience in legal negotiation are permitted to judge by the Competition Organiser.

59 Australian Law Students' Association, 'Negotiation Championship Rules 2010*'* (n 57) r 3.

60 The timing associated with the release of LSA-run Negotiation Competition questions often differs, based on LSA policies. Typically, the questions are released two-to-24 hours prior to the competition. The Preliminary Round questions for the ALSA Championship are released at least one week in advance of the Conference: Australian Law Students' Association, 'Negotiation Championship Rules 2020' r 4. The general convention is that all competitors entered in a particular round of competition should receive the same amount of time to prepare, such that no competitors are disadvantaged or inconvenienced.

61 In my experience, many students who are inexperienced negotiators also use the time before receiving the question to read the competition rules and to read some materials on negotiation.

62 Australian Law Students' Association, 'Negotiation Championship Rules 2010' (n 57) r 6.1.

63 Ibid r 6.2.

64 Ibid r 6.3.

65 Ibid.

66 Ibid r 6.4

67 Ibid r 6.6.

any way that the competitors wish, or that the judge(s) deems appropriate. Judges are generally willing for the competitors to set their preferred structure during earlier stages of the competition, though towards the final rounds judges typically have additional questions or comments that drive the structure.

B Questionnaires

To capture information about how law students prepare for legal negotiations, I developed a series of three questionnaires to be administered before and after Legal Negotiation Competitions.[68] My proposed study received conditional ethics approval from the Flinders Social and Behavioural Research Ethics Committee ('SBREC') on 12 August 2012. SBREC raised two concerns relating to the proposal, which were addressed as follows. SBREC was primarily concerned that I had a casual tutoring role at Flinders University, where I was also undertaking data collection. This was addressed by carefully drafting all documentation to reassure potential participants that their participation was voluntary and did not count towards any of their university studies or influence their success, failure, or progression in the negotiation competition. These documents also clarified that participation in the study did not affect participants' standing in the negotiation competition, in the LSA, the law school, or the university. I further adopted an arms-length approach to all components of the negotiation competition: I was not involved in advertising the study or competition; distributing or collecting questionnaires; writing competition questions, or judging rounds of the competition in which data was collected. SBREC's second concern was that my study would overlap with the LSA's own research. This was clarified by a description of the LSA's role, which does not include any research, other than gathering basic data about the demographic of students who enter their competitions or attend their events. Final ethics approval was received on 21 August 2012.[69]

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[68] I have explained the rationale behind my questionnaire development below. The full text of all questionnaires is located in Appendices G, H I, J, M and N.

[69] In September 2012, my supervisor approached the ALSA President to gain her support for my study. In the October quarterly ALSA Council Meeting (comprised of LSA Presidents and Vice Presidents from ALSA-affiliated LSAs), the Flinders LSA President approached ALSA members on my behalf, providing initial information about the study and gauging interest. While there was strong interest, as each Law School elects their LSA committee annually, and therefore any initial support garnered in October 2012 did not bind future committees, whose term typically commences in December.

1 *Questionnaire Development*

As explained above, I used thematic analysis to inform five broad categories of questions asked to law students and judges involved in the Legal Negotiation Competition. The primary aim for my research, originally, was to collect data about how law student competitors prepared for a legal negotiation, and their reflections about the quality of their preparation. To do this, I needed to obtain two sets of data from competitors: one after their preparation but before the negotiation commenced (the 'Pre-Negotiation Questionnaire'); and one after the negotiation concluded (the 'Post-Negotiation Questionnaire'). I designed the Pre-Negotiation and Post-Negotiation Questionnaires to obtain qualitative data in the form of responses to open-ended questions. I also obtained quantitative data by using Likert scales,[70] with multiple options,[71] indicated by specific anchors on each scale.[72] I further designed a Judge Questionnaire, to determine the views of the person who judged each negotiation. For the Pilot Study, I designed the three questionnaires so that the questions contained in each questionnaire covered the same themes.[73] I originally intended that each Competition Organiser would code the responses provided, preserving respondent anonymity yet still enabling a direct comparison of competitor and judge responses for each negotiation. This intersection was designed to increase test-retest reliability and to enable a comparative analysis of each participant's pre-negotiation and post-negotiation responses with their judge's comments. The ability to do this deeper analysis was hampered by problems inherent in volunteer distribution of the questionnaires; by competitor participants' unwillingness or inability to complete both questionnaires; and by judges either not being approached to complete the questionnaires, or preferring not to do so.[74] I therefore chose to abandon the cross-referencing and intersection of results after the Pilot Study. My amendments to the questionnaires and the data collection process are outlined in Part III(C) below.

In developing the questionnaires, my emphasis was on legal negotiation. All ethics documentation approved by SBREC made it abundantly clear that participants were being surveyed about their involvement in the Legal Negotiation Competition, and that my study

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70 Brett W Pelham and Hart Blanton, *Conducting Research in Psychology: Measuring the Weight of Smoke* (2007, 3rd ed, Thomson Wadsworth) 99.

71 Julie Pallant, *SPSS Survival Guide* (2016, 6th ed, Allen & Unwin) 9.

72 Pelham and Blanton (n 70) 97-99.

73 Pre-Negotiation Questionnaire (see Appendix G); Post-Negotiation Questionnaire (see Appendix I) and Judge Questionnaire (See Appendix M).

74 See below Part III(E) and Part IV.

focussed on *legal negotiation*.[75] Despite this, I did design some questions to relate to the nature of the competition itself. This was done partly in light of my experiences with law students and Legal Negotiation Competitions, particularly my knowledge that while some students compete for skill development purposes, many compete to win.[76] In the justification and analysis below I have noted questions that may have been interpreted as having a dual meaning – related to both legal negotiation *and* the idea of competition – and the ways that I attempted to mediate this during question design so that value could still be garnered from these results.

I carefully planned the administration of the questionnaires to be least disruptive to participants and organisers. Since competitors usually arrive at the venue approximately ten minutes before their negotiation commences, I designed the Pre-Negotiation Questionnaires to be completed during that ten-minute waiting time, on paper forms. I knew participants would only have a short time to fill in the questionnaires, so I minimised any question intricacies, collecting quantitative data (using rating scales) wherever possible. This was supplemented by collecting qualitative data to enhance the quantitative responses when necessary, though the majority of qualitative questions were for respondents to provide additional information if they thought it relevant. Despite my attempts to minimise the time necessary for completion, some participants did report that they did not have enough time to comment fully,[77] or that the questionnaire was too long.[78]

The majority of questions were designed to collect quantitative data, asking law student respondents to determine the extent to which they prioritised various factors relevant to legal negotiation preparation. In the Pre-Negotiation Questionnaire, respondents were asked to assign priority ratings on a scale of (1) *very high priority* to (5) *very low priority* for each

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75 The focus on legal negotiation was specified in all documentation, including: the Letter of Introduction from my Supervisor (see Appendices F and L); the Information Sheet (see Appendix E and K); and Administration Protocols (see Appendix D).

76 This approach was supported by comments raised during the Pilot Study about why competitors had entered the competition: because my partner made me do it': 1227PNQF (Response to Pilot Study Pre-Negotiation Questionnaire, 2012); 'I was bullied by the coordinator': 1205PNPR (Response to Pilot Study Pre-Negotiation Questionnaire, 2012); I entered to win; (1210PNPR, Response to Pilot Study Pre-Negotiation Questionnaire, 2012); I entered for 'fun, pride, fame, women': 1213PNPR (Response to Pilot Study Pre-Negotiation Questionnaire, 2012); I tailored my strategy because 'first years, nerves to exploit': 1213PNPR (Response to Pilot Study Pre-Negotiation Questionnaire, 2012).

77 1407PNPR (Response to Pre-Negotiation Questionnaire, 2014).

78 1441PNPR (Response to Pre-Negotiation Questionnaire, 2014).

factor. In the Post-Negotiation Questionnaire, I instead asked participants to indicate the factors on which they would have liked to be more prepared. Qualitative questions provided respondents with the opportunity to outline further detail to justify their quantitative rating, or comment about their preparation choices. In developing the questionnaires, I recognised that the fictional nature of the Legal Negotiation Competition, in a staged setting where competitors are unable to consult with their client, made it difficult to answer certain questions. I highlighted this point specifically by asking respondents to identify the least realistic feature of the competition.[79]

2 *Question Development*

As indicated above, I primarily asked questions that fit within the five categories of legal negotiation preparation in the literature. However, I also drew question categories from the LCA Requirements themselves, incorporating questions related to legal negotiation ethics, and client-centred negotiating. In the section below I introduce the questions I developed for each of these categories. My justification for the categories themselves forms part of my detailed analyses in Chapters Three, Four, and Five.[80]

In order to best capture untainted data regarding students' preparation, I began the questionnaires with open questions before asking about specific factors relevant in preparation. This decision was influenced by phenomenography, a qualitative field of research that intends to 'ascertain the qualitatively different ways in which individuals experience and understand aspects of the world around them.'[81] It is most commonly used in research pertaining to education, particularly to gain information about how different students perceive the same phenomenon.[82] By using phenomenographic methods in relation to my

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79 *Post-Negotiation Questionnaire*, Question 21; *Judges Questionnaire*, Question 12. Students typically identified the least realistic feature of the competition as: ethics (17.6%), time frame (11.8%), no client contact (11.8%) and the competitive nature of negotiations (11.8%).

80 For a full replication of all questionnaires, see Appendices G, H I, J, M and N.

81 Anas Hajar, 'Theoretical Foundations of Phenomenography: A Critical Review' (2020) 10.1080/07294360.2020.1833844: 1-16, 1.

82 See, eg, Hajar (n 81), Gerlese S Åkerlind, 'Variation and Commonality in Phenomenographic Research Methods' (2012) 31(1) *Higher Education Research and Development* 115, Ference Marton, 'Phenomenography – Describing Conceptions of the World Around Us' (1981) 10(1) *Instructional Science* 177, and Malcolm Tight, 'Phenomenography: The Development and Application of an Innovative Research Design in Higher Education Research' (2016) 19(3) *International Journal of Social Research Methodology* 319. Tight, particularly, notes that 12,093 academic publications identify the use of this research method: at 326.

qualitative data, I was able to determine how a collective group – law students – respond to the relevant phenomena, specifically, how they prepare for a legal negotiation. Although phenomenography typically utilises data from interviews, it has been extended to open-ended survey questions.[83] The qualitative questions influenced by a phenomenographical approach asked students how they had prepared for the legal negotiation,[84] and why they had prepared in that way.[85] I also asked participants to record, using Likert measures, how prepared they felt before the negotiation.[86] The corresponding questions in the Post-Negotiation Questionnaire focused on how effective participants found their own preparation,[87] and their opposing counsel's preparation.[88] They then considered which parts of their preparation were most and least effective;[89] and how their preparation could have assisted them to reach a more effective outcome.[90]

After the initial questions, I used my preliminary thematic analysis of the literature to identify key areas of legal negotiation preparation, and asked questions specifically related to these themes. Using an approach that embraces both phenomenography and thematic analysis enabled me to understand law students' approach to legal negotiation preparation both individually and collectively,[91] and to contrast the data I obtained with my analysis of the relevant literature. In the sections below I have provided more detail about questions relating to each theme from the literature, and in part III(F) I introduce the process of data analysis used.

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83 Tight (n 82) 320; C S Zygmont and A V Naidoo, 'Phenomenography – An Avant-Garde Approach to Extend the Psychology Methodological Repertoire' (2018) *Qualitative Research in Psychology* https://doi.org/10.1080/14780887.2018.1545061: 1:19, 7 quoting Gerlese S Åkerlind (2005) 'Learning about Phenomenography Interviewing, Data Analysis and the Qualitative Research Paradigm' in JA Bowden and P Green (eds), *Doing Developmental Phenomenography* (2005, RMIT University Press) 63.

84 *Pre-Negotiation Questionnaire*, Question 2.

85 *Pre-Negotiation Questionnaire*, Question 3.

86 *Pre-Negotiation Questionnaire*, Question 1.

87 *Post-Negotiation Questionnaire*, Question 1.

88 *Post-Negotiation Questionnaire*, Question 2.

89 *Post-Negotiation Questionnaire*, Question 6.

90 *Post-Negotiation Questionnaire*, Question 7.

91 Hajar (n 81) 14.

(a) *Preliminary Considerations*

Preliminary considerations involve the overarching knowledge of all components relevant to the legal negotiation, including the identification of key stakeholders, and the relevant facts.[92] Although these steps are inherent in Fisher and Ury's four principles, they warrant particular attention in the process of legal negotiation preparation, specifically for law students who may not appreciate their importance unless precisely identified. To assess these preliminary considerations, I asked law students how they planned to use the agreed and confidential facts during the negotiation,[93] and how they did actually use these facts.[94]

As will be highlighted in Chapter Three, negotiation theories are a prominent theme in the literature.[95] This has been studied most notably in America, originally by Williams,[96] and replicated and refined by Schneider.[97] The terminology Schneider uses to define each style is clear and well explained, resulting in four categories that distinguish between the two prominent theories in the literature (competitive negotiation and cooperative negotiation).[98] These four categories are: 'true problem solving', 'cautious problem solving', 'ethical adversarial', and 'unethical adversarial.'[99] I adopted Schneider's terminology to distinguish between the two predominant theories. I also provided an opportunity for respondents to list an alternate style. I asked competitors to rate the priority given to considering their negotiation style;[100] and to characterise both their negotiation style[101] and that of opposing counsel.[102] I further asked them to consider whether (and how) their negotiation style assisted

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92 See below Chapter Five.

93 *Pre-Negotiation Questionnaire*, Question 10.

94 *Post-Negotiation Questionnaire*, Question 15.

95 See, eg John Lande, 'Taming the Jungle of Negotiation Theories', in Chris Honeyman and Andrea Kupfer Schneider (eds) *Negotiator's Desk Reference* (Dri Press, 2017) 87 ('Taming the Jungle of Negotiation Theories'); Carrie Menkel-Meadow, 'Lawyer Negotiations: Theories and Realities – What We Learn from Mediation' (1993) 56(3) *Modern Law Review* 361 ('Lawyer Negotiations'); Menkel-Meadow, 'Toward Another View of Legal Negotiation' (n 18); John S Murray, 'Understanding Competing Theories of Negotiation' (1986)(April) *Negotiation Journal* 179.

96 Williams (n 8).

97 Schneider, 'Shattering Negotiation Myths' (n 8).

98 Schneider updated the terminology used in Williams' study, as she critiqued Williams' lack of clarity and definition. Schneider's characterisations clearly separate problem solving from adversarial negotiation. The further classification allowed problem solving negotiators to be separated into true problem solvers and cautious problem solvers; and adversarial negotiators to be either ethical or unethical, resulting in four distinct styles: Schneider (n 7) 152-3 (introduction of terminology); 162-184 (analysis of results).

99 Schneider, 'Shattering Negotiation Myths' (n 8) 152-3.

100 *Pre-Negotiation Questionnaire*, Question 4; Post-Negotiation Questionnaire, Question 8.

101 *Pre-Negotiation Questionnaire*, Question 6; Post-Negotiation Questionnaire, Question 9.

102 *Post-Negotiation Questionnaire*, Question 10.

in producing an effective negotiation.[103] Although competitors may not be familiar with Schneider's specific terminology, even those least-well-versed in negotiation theory would be able to comprehend the concept of adversarial negotiation and problem solving negotiation, due to the typically adversarial nature of Law School, and the way that this is taught and explored in early Law topics.

(b) *Separate the People from the Problem*

The relationship between parties involved in a legal negotiation can have a significant impact on the outcome. There are some legal negotiations in which the relationship between parties must continue, and must remain professional or even cordial where possible, whereas other legal negotiations may not require an ongoing relationship. Given the size and nature of the legal community, lawyers may work together frequently, and will develop a reputation based on their dealings with others. As such, it is important for legal practitioners to maintain a professional relationship, even if this is not possible between clients. To address this, I asked competitors to rate the priority given to various relationships, including relationships between key stakeholders;[104] between competing teams; and between clients.[105] I further asked competitors to rate the priority given to *their relationship* with their teammate,[106] and that given to *working with* their teammate.[107] This nuance was to separate the task of working together from the professional relationship. In the Post-Negotiation Questionnaire I asked whether the relationship between the competitor and their partner (their teamwork) enhanced or detracted from the effectiveness of the negotiation;[108] how effective the competitor and their teammate were during the negotiation;[109] and how effective the other team was.[110] Finally, I asked competitors to rate the priority given to thinking about power imbalances,[111] though I did not specify whether this was in terms of the legal negotiation itself, or the competition. This was again moderated by the same questions relating to whether the competitor knew who their opposition was and had tailored their strategy accordingly.

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103 *Post-Negotiation Questionnaire*, Question 11.
104 *Pre-Negotiation Questionnaire*, Question 7; *Post-Negotiation Questionnaire*, Question 12.
105 *Pre-Negotiation Questionnaire*, Question 11; *Post-Negotiation Questionnaire*, Question 17.
106 *Pre-Negotiation Questionnaire*, Question 11; *Post-Negotiation Questionnaire*, Question 17.
107 *Pre-Negotiation Questionnaire*, Question 4; *Post-Negotiation Questionnaire*, Question 8.
108 *Post-Negotiation Questionnaire*, Question 20.
109 *Post-Negotiation Questionnaire*, Question 4.
110 *Post-Negotiation Questionnaire*, Question 5.
111 *Pre-Negotiation Questionnaire*, Question 7; *Post-Negotiation Questionnaire*, Question 12.

(c) *Focus on Interests, not Positions*

It is crucial that the client remains the central focus during legal negotiation.[112] Although this is addressed in section (g) below, this is also a vital component of interest identification. I asked participants to rate the extent to which they considered their client's issues and objectives to be a priority during their preparation;[113] as well as the opposing party's objectives.[114]

(d) *Create Options for Mutual Gain*

Option generation relies heavily on *Preliminary Considerations*, and the other principles proposed by Fisher and Ury: negotiators are unable to consider option generation without a detailed knowledge of the facts, key stakeholders, and parties' interests. Option generation requires legal practitioners to have a thorough knowledge of their client's case, as well as that of the opposing party. Specific negotiation terminology is used to refer to this, including, for example: BATNA, WATNA, and zone of potential agreement ('ZOPA').[115] Knowing that many respondents would be first-time negotiators,[116] or would not have a solid theoretical foundation of legal negotiation, I chose to use this terminology in full, without the commonly accepted acronyms. Recognising that the application of these terms, particularly BATNA and WATNA, can cause confusion to law students, I was less interested in how participants defined their client's BATNA and WATNA, but instead collected data as to whether they had considered these concepts at all. I therefore included questions about these concepts on the rating scales in both the Pre-Negotiation and Post-Negotiation Questionnaires, asking participants what priority they gave to considering their BATNA, WATNA, and ZOPA, as well as to the non-negotiable elements of the negotiation.[117]

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112 Fisher, Ury and Patton (n 37) Chapter Six.

113 *Pre-Negotiation Questionnaire*, Question 7; *Post-Negotiation Questionnaire*, Question 12.

114 *Pre-Negotiation Questionnaire*, Question 7; *Post-Negotiation Questionnaire*, Question 12.

115 These terms are referred to throughout negotiation literature. See, eg: Astor and Chinkin, *Dispute Resolution in Australia* (n 19); Sourdin, *Alternative Dispute Resolution Sixth Edition* (n 19), Spencer, Barry and Akin Ojelabi (n 19); Boulle and Field (n 53). For a more detailed outline of relevant legal negotiation preparation factors as depicted in the literature, see Appendix O.

116 Legal Negotiation Competitions tend to attract law students with little experience in negotiation.

117 *Pre-Negotiation Questionnaire*, Question 9; *Post-Negotiation Questionnaire*, Question 14

(e) *Insist on Using Objective Criteria*

Since questions used during the legal negotiation competitions are inspired by real-life scenarios, legal principles are often relevant. As such, I asked competitors to rate the priority given to both legal and factual research.[118] Despite the fact that a negotiated outcome has the capacity to reflect solutions that fall outside the ambit of the court's jurisdiction, and therefore does not necessarily accord with strictly legal remedies, law students typically rely on legal authorities during legal negotiation in two ways. They either use these strongly, similarly to preparing for litigation, or ignore them completely in attempting to reach an out-of-court settlement. In reality, a hybrid approach is preferable: using legal authorities to inform the understanding of relevant legal issues and potential consequences, but only drawing on these during the negotiation when they become relevant. Most law students only realise the benefit of this hybrid approach after either struggling during the legal negotiation due to a lack of relevant legal understanding; or by realising the negotiation has reached a stalemate because it has turned into attempted litigation without a third-party decision maker. As such, I used the Post-Negotiation Questionnaire as an opportunity for respondents to comment, with the benefit of hindsight, as to whether there were any other factors that they could have advanced during the negotiation, with suggestions including price, liability and settlement terms.[119] While these inclusions may have influenced respondents' answers, I thought it unlikely that respondents would be familiar with this terminology in the absence of examples. I also specifically asked respondents about whether they considered the consequences of the outcome,[120] and the effect that an agreement might have on their client.[121]

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118 *Pre-Negotiation Questionnaire*, Question 9; *Post-Negotiation Questionnaire*, Question 14, Question 17.

119 *Post-Negotiation Questionnaire*, Question 16.

120 *Pre-Negotiation Questionnaire*, Question 4; *Post-Negotiation Questionnaire*, Question 8

121 *Pre-Negotiation Questionnaire*, Question 9; *Post-Negotiation Questionnaire*, Question 14

(f) *Ethics*

Given that the focus of my research is on legal negotiation *preparation*, most questions related specifically to legal negotiation preparation. There are two exceptions that instead focussed on legal negotiation ethics. I asked whether ethical considerations had any impact on the respondent's preparation or the way in which they planned to conduct the negotiation,[122] whether ethics had played a role in the negotiation, and, if so, what this role had been.[123] The concept of ethics is difficult to interpret in a questionnaire about legal negotiation, as competition ethics are also relevant. When creating the questionnaires I had naïvely assumed that respondents would interpret ethics in relation to the negotiation aspects only, and was surprised when the results indicated that some had thought more about competition ethics than negotiation ethics.[124] At times it was difficult to determine which type of ethics respondents were referencing, as comments about lying or cheating could be relevant to both the legal negotiation and the competition.[125] I resolved this by using qualitative responses to gain clarity where relevant, and by relating answers to legal negotiation ethics where possible. While competition ethics do, of course, have a role in legal negotiation competitions, my focus is on legal negotiation ethics as they relate to legal negotiation conducted in the course of legal practice (emulated by the Legal Negotiation Competition). Understandably, while many law students will have already learnt about legal ethics, at least in an introductory sense, some will struggle to relate this to the legal negotiation environment due to compartmentalising their studies. Some may also struggle to conceptualise a legal negotiation competition as relating to legal practice, which may feel quite distant, particularly to junior law students. Indeed, compliance with legal ethics appears to increase as law students get closer to completing their law studies.[126]

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122 *Pre-Negotiation Questionnaire*, Question 8.

123 *Post-Negotiation Questionnaire*, Question 13.

124 Examples that raised competition ethics were: indicating that the 'comp[etition] is fairer if no-one cheats': 1448PNPR (Response to Pre-Negotiation Questionnaire, 2014); and 'The other team was behind us in the computer lab when we prepared our strategy/agenda. We didn't know this until preparing to leave, so bit concerned. All we can do is pretend all is well and press on as planned': 1407PNPR (Response to Pre-Negotiation Questionnaire, 2014).

125 Several respondents mentioned lying: 1401PNQF (Response to Pre-Negotiation Questionnaire, 2014); 1402PNQF (Response to Pre-Negotiation Questionnaire, 2014); 1602PN (Response to Pre-Negotiation Questionnaire, 2016); 1603PN (Response to Pre-Negotiation Questionnaire, 2016). This will be further unpacked in Chapter Five.

126 Spencer and Scott (n 7).

Legal negotiators typically use negotiation strategies and tactics to assist in advancing their client's interests, though the literature often conflates strategies, skills, and tactics,[127] which can be particularly detrimental to a clear understanding of legal negotiation ethics. While these processes can be incorporated as part of any of the five principles above, I have included them in the ethics category to emphasise that some strategies and tactics might be unethical. In line with the LCA Requirements, and to obtain a broader range of responses, I adopted the all-encompassing phrase *strategies or tactics*, and provided competitors with space to further elaborate on these points. I asked competitors to rate the priority they had given to their own strategies or tactics; opposing counsel's strategies or tactics; and their response to opposing counsel's strategies or tactics.[128] I also considered strategies and tactics relevant to the competition setting, since one of the goals inherent in entering a competition is winning. I therefore included *winning* as another factor on the priority scales,[129] with the aim of differentiating between the legal negotiation and the competition.

One factor that is potentially unethical is *exploiting the other party's weaknesses.*[130] The merits of this argument are discussed in Chapter Five. Again, this factor is subject to dual interpretation, related to the competition itself, or to the legal negotiation. To moderate this I included questions about *how* these weaknesses might be exploited, for example, whether competitors had altered their strategy as a result of knowing, or not knowing, their opposing counsel.[131] Some competitors commented that they tailored a specific strategy because their opposing team was more junior than they (in terms of time at law school, and/or experience in the Legal Negotiation Competition).[132] Since I was aware of this practice, I embedded a question in the Pre-Negotiation Questionnaire to specifically ask if the respondent knew who their opposing counsel was, and whether/how they had tailored their negotiation strategy as a result.[133] If my study was to be replicated, I would recommend asking respondents to nominate *what* they had considered exploiting: the other client's interests; their opposing counsel's interests; or their opposing competitors.

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127 See, eg, Nadja Alexander, Jill Howieson and Kenneth Fox, *Negotiation Strategy, Style, Skills* (LexisNexis 3rd ed, 2015).

128 *Pre-Negotiation Questionnaire*, Question 4; *Post-Negotiation Questionnaire*, Question 8.

129 *Pre-Negotiation Questionnaire*, Question 4; *Post-Negotiation Questionnaire*, Question 8

130 *Pre-Negotiation Questionnaire*, Question 4; *Post-Negotiation Questionnaire*, Question 8

131 *Pre-Negotiation Questionnaire*, Question 5.

132 1213PNPR (Response to Pilot Study Pre-Negotiation Questionnaire, 2012).

133 *Pre-Negotiation Questionnaire*, Question 5.

Other categories that could be dually interpreted as either legal negotiation *or* competition-related include emotion, gender, and culture, which I included on the priority rating scale.[134] These could be considered as standalone categories in their own right, as depicted in the literature.[135] Some competitors may also consider emotion, gender or culture in a strategic or tactical manner, used for manipulation to obtain the outcome they desire for their client. Such manipulation could be intended to grant a competitive advantage, such as by manipulating arguments or power related to opposing counsel's emotion, gender, or culture.[136]

(g) *Client-Centred Negotiating*

Client-centred legal practice has legal ethics at its core,[137] but also warrants separate consideration. One of the goals of a legal negotiation is to achieve an outcome that is acceptable to your client. As such, I asked respondents to rate the extent to which a good outcome for both parties was a priority during their preparation; the importance of the consequences of the outcome; and the effect an agreement might have on their client.[138] In the Post-Negotiation Questionnaire I further asked respondents to rate the effectiveness of the negotiation outcome.[139] I concluded the Post-Negotiation Questionnaire by again asking competitors to think about their client, the focus of the negotiation. I asked them to rate how satisfied their client would be on a range of factors, including negotiation outcome; the

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134 *Pre-Negotiation Questionnaire*, Question 7; *Post-Negotiation Questionnaire*, Question 12

135 On gender and emotion, see generally: Clare Boardman and Richard Beach, 'Mixed-Gender Teamwork in Negotiation' (1998) 9(2) *Australian Dispute Resolution Journal* 110; Leonard Karakowsky and Diane Miller, 'Negotiator Style and Influence in Multi-Party Negotiations: Exploring the Role of Gender' (2006) 27(1) *Leadership and Organisation Development Journal* 50; Laura Kray and Connson Locke, 'To Flirt or Not to Flirt? Sexual Power at the Bargaining Table' (2008) 24(4) *Negotiation Journal* 483; Catherine Tinsley et al, 'Women at the Bargaining Table: Pitfalls and Prospects' (2009) 25(2) *Negotiation Journal* 223. On culture, see generally: Simon Young, 'Cross-Cultural Negotiation in Australia; Power, Perspectives and Comparative Lessons' (1998) 9(1) *Australian Dispute Resolution Journal* 41; Yon Mi Kim and Kyung Hyo Chun, 'Do You Want an Efficient Negotiator or an Ethical One: Goal of the Negotiation Teaching in Law School' (2013) 11 *Asian Business Lawyer* 125.

136 For example, men are usually seen as more competitive, and women more co-operative: Linda Barkas and Stephen Standifird, 'Gender Distinctions and Empathy in Negotiation' (2007) 12 *Journal of Organizational Culture, Communications and Conflict* 83, 89; Astor and Chinkin, *Dispute Resolution in Australia* (n 19). Women may also be seen as more likely to flirt, which can increase perceptions of manipulation: Kray and Locke (n 135) 491. Culture may result in negotiators remaining quiet to avoid confrontation: Simon Young(n 135) 48; or being more respectful of negotiators who are older than they are (also depicted in hierarchical societies): Kim and Chun (n 135) 137.

137 Law Council of Australia, *Conduct Rules* (n 21) r 4.1.

138 *Pre-Negotiation Questionnaire*, Question 9; *Post-Negotiation Questionnaire*, Question 14.

139 *Post-Negotiation Questionnaire*, Question 3.

representation of their interests; the range of feasible options presented by their counsel; ethical issues; preparation; chance of a relationship between clients; the relationship between lawyers; offers their counsel made; concessions their counsel made; hard bargaining; flexibility; whether their counsel revealed confidential/hidden information; and counsel's use of the facts.[140] These questions are particularly useful to re-centralise the students' focus on their client – regardless of the client's fictional nature. In my experience judging Legal Negotiation Competitions, similar questions are asked by judges during competitors' reflection time. Most law students appear to forget (or ignore) their client, and struggle to comment on how satisfied their client would be with the negotiation outcome, particularly in relation to the client's original instructions. This accords with one judge's comment that students are more likely to substitute their own views for that of a fictional client.[141]

(h) *Miscellaneous Factors from the Literature*

There were various factors that appeared in the legal negotiation preparation literature that did not fit within a specific theme, but on which I wanted to collect data. These factors are primarily related to the legal negotiation process but require consideration during preparation. This included the extent to which competitors considered the physical set up, the use of props, and rehearsing the negotiation.[142] I further asked competitors to rate the priority with which they considered setting an agenda,[143] and followed this up in the Post-Negotiation Questionnaire by asking whether and why they did so.[144]

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140 *Post-Negotiation Questionnaire*, Question 18.

141 1513JQPR (Responding to Judge Questionnaire, 2015), part-time legal practitioner.

142 *Pre-Negotiation Questionnaire*, Question 11; *Post-Negotiation Questionnaire*, Question 17.

143 *Pre-Negotiation Questionnaire,* Question 4; *Post-Negotiation Questionnaire*, Question 8.

144 *Post-Negotiation Questionnaire*, Question 19.

(i) *Defining Legal Negotiation*

As indicated above, the primary aim of the questionnaires was to focus on legal negotiation preparation. However, I did also include questions relating to the definition of legal negotiation, aiming to use phenomenography to determine how law students understand this phenomenon. Without any prompting (though within the context of all introductory documents and the previous questions) I asked competitors and judges to provide their definition of legal negotiation.[145] I also asked questions to assess the intersection between two or more of my themes, as exemplified in the overlap between negotiation style and ethics, above. For example, I asked competitors how they thought preparation might affect the outcome of a legal negotiation,[146] and the extent to which they had considered a good outcome for both parties and the consequences of the outcome to be a priority in their preparation.[147]

(j) *Judge Questionnaire*

I asked judges to comment on the same range of questions as competitors, but instead of self-reports they were rating each team's preparation. However, there were so few responses to the Judge Questionnaire, even after increasing the potential participant pool to past judges,[148] that much of the data was meaningless. As such, the only data that I used from judge participants were qualitative comments relating to the definition of legal negotiation and competition-related questions about the least realistic component of the Legal Negotiation Competition. This did, however, allow me to use a phenomenographic approach to identify key points relevant to how Legal Negotiation Competition judges view legal negotiations.

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145 *Pre-Negotiation Questionnaire*, Question 12; *Judge Questionnaire*, Question 10.

146 *Pre-Negotiation Questionnaire*, Question 14; *Judge Questionnaire*, Question 3.

147 *Pre-Negotiation Questionnaire*, Question 4; *Post-Negotiation Questionnaire*, Question 8.

148 See below Part III(E).

C Amendments after Pilot Study

I conducted a Pilot Study at Flinders Law School in 2012.[149] After analysing the results from the Pilot Study, I sought ethics approval to amend the wording and structure of some questions. This included changes in wording and question types (rating scales/worded responses) in the Post-Negotiation Questionnaire to better correspond with the Pre-Negotiation Questionnaire. Furthermore, several questions were omitted entirely, and amended structures were used to group and format similar questions.[150] This resulted in streamlined questionnaires that still measured the same constructs. I also amended the data collection and administration processes after the Pilot Study. The reasons for this were threefold: the administrative burden placed on Competitions Organisers was considerable and impacted distribution and consequent completion; the lack of consistency by competitors choosing to complete either the Pre-Negotiation Questionnaire or the Post-Negotiation Questionnaire, but not both; and the lack of response from most judges. Abandoning the initial methodology to correlate all questionnaires relevant to each competitor-participant reduced the workload for each LSA, which meant that it was easier to enlist the assistance of other LSAs in future iterations of the study. Throughout the Pilot Study there had been constant communication between the LSA and myself, such that this would be unsustainable if multiple LSAs were partaking in the research, particularly those located interstate. I consequently drafted a set of Administration Protocols to assist in streamlining the process. Ethics approval for these amendments was granted by the Flinders University Social and Behavioural Research Ethics Committee on 21 August 2013.

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149 This is the institution at which I am completing my PhD, and the one at which I hold academic status.

150 Structural amendments included adapting tables into lists.

D Questionnaire Administration

1 *Participant Recruitment*

Participant recruitment for my post-Pilot Study data collection was conducted in several steps. I contacted each LSA at the commencement of the academic year to determine whether they were planning to run a Negotiation Competition; in which semester this would be held; and whether they would be willing to advertise my study and administer my questionnaires to their competitors and judges. Each LSA that had initially agreed to be involved in my study was contacted at the start of the semester in which their Negotiation Competition was scheduled. I spoke directly with each Competitions Organiser by phone or email, to explain the Administration Protocols and to ensure the Competitions Organiser understood the importance of providing all ethics documents. I provided soft copies of the Pre-Negotiation Questionnaire,[151] Post-Negotiation Questionnaire,[152] and the Judge Questionnaire,[153] and posted hard copies of these documents to each participating LSA so that I could absorb the printing (and postage) costs.[154] I also included hard copies of both Information Sheets and Letters of Introduction so that the Competitions Organisers would have these on hand at the time of the competition, in case potential participants had not taken note of the Initial Email.

After LSAs had received registrations for the Negotiation Competition, their Competitions Organiser emailed all competitors and judges the relevant Initial Email and attachments. If any competitors or judges wished to take part in the study, they could do so at the competition itself by taking and completing the relevant questionnaire/s. I asked Competitions Organisers to provide questionnaires during and after the Preliminary Round, Quarter Final, and Semi Final at their discretion. I avoided surveying competitors in the Grand Finale (and sometimes Semi Final) as these are often more stressful than other rounds, and I wanted to ensure there was no adverse impact on competitors' performance. Additionally, the procedure for the Grand Finale often differs because there are more judges, the competition is usually held at a Law Firm or Court, and the pre-negotiation and post-negotiation processes are often longer to accommodate for explanations and instructions to multiple judges and an audience.

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151 See Appendices G and H.

152 See Appendices I and J.

153 See Appendices M and N.

154 I was fortunate to be able to do this through receiving a Higher Degree Funding Application in November 2013 to assist with printing and postage costs.

2 *Questionnaire Administration*

The Pre-Negotiation Questionnaire was administered after competitors had completed their preparation for the legal negotiation, but before the legal negotiation commenced. As competitors are expected to arrive in advance of the competition, the questionnaires were provided in hard copy so competitor participants could complete them while waiting for the competition to begin. As indicated above, this approach was chosen so that completion of the questionnaire would not detract from competitor-participants' preparation time, instead, merely from the time they would usually spend waiting. After the conclusion of the legal negotiation, competitors were asked to complete a Post-Negotiation Questionnaire, again in hard copy. Judges were asked to complete one questionnaire, after the legal negotiation had concluded. Both competitors and judges were given the option of completing the Post-Negotiation Questionnaire or Judge Questionnaire in their own time (particularly since competitions can be held during the academic day between other classes), and were provided with a sealable envelope, pre-addressed to the LSA Office, in which to submit their completed response.

At the conclusion of the entire Legal Negotiation Competition, the Competitions Organiser would send out a reminder email to all competitors and judges asking them to return any questionnaires that had not yet been submitted. After the submission of these documents, the Competitions Organiser posted all completed questionnaires to me for analysis.

E Further Amendments

Due to the competition structure and tight timelines, my questionnaires were initially intended to be completed in paper format. This was intended to minimise any time impact on competitors and to increase the opportunity for more respondents to complete the questionnaires. Since technology is not permitted during the competition, and since competitors are typically required to arrive early to the competition (after preparation time), competitors could then complete the questionnaires while waiting for the competition to begin. In 2014 several LSAs provided feedback that often their Competition Organisers do not attend the competition and so there would be no one present to distribute the questionnaires; precluding their LSA from involvement in the study. Other LSAs commented that either the paper questionnaires were too onerous, or they did not want their competitors to have to take the time to complete them. In response to this feedback, I sought further ethics approval to provide participants with the option to complete the questionnaires via the online

platform SurveyMonkey. I chose SurveyMonkey for various reasons: ease of use, clear and easily navigable presentation, user anonymity, and familiarity to most students. The online questionnaires were identical to the paper version of the questionnaires other than a few stylistic changes and grammatical alterations to make the questions more appropriate for an online forum. The introductory page of each questionnaire included as much text as possible from the Information Sheet to remind participants of the key points (although the Information Sheet in full, along with the Letter of Introduction was still sent to every potential participant in the Initial Email). In order to address the timing issue of participants needing to complete the questionnaire without access to technology (between preparation and negotiation), participants were sent the link to the online questionnaire during their preparation time so that they could take a few minutes at the end of this to complete the questionnaire.

I sought further ethics approval to broaden the potential pool of participants to include competitors and judges at ALSA's National Championships in the final years of data collection, 2015-2016. This pool still captured the same broad population of participants: law students and judges involved in legal negotiation competitions. While there was potential that respondents could include New Zealand competitors competing at ALSA, this did not eventuate.[155] This modification involved adding one question to each questionnaire to determine whether the competitor/judge's involvement was at ALSA or during their LSA competition, and was sought in order to increase the amount of quality data collected, and to allow the researcher to easily separate data from different locations. While ALSA was initially willing to advertise my study and distribute the questionnaires, on a practical level this resulted in few responses.

Given the low return rate for Judge Questionnaires, and my finding that most LSAs only use three or four judges throughout each year's competition, I also sought ethics approval to widen the judge-participant pool to any legal academics or practitioners who had previously judged a Legal Negotiation Competition. Previous judges were contacted through LSAs and ALSA. The questionnaire used for previous judges was the same as the Judge Questionnaire, other than grammatical changes (predominantly related to tense) and stylistic changes (to remove or amend questions relating to a specific negotiation). This meant that there were two

[155] The inclusion of competitors from New Zealand was not a concern, as the background questions in each questionnaire were developed to easily allow the removal of data collected from students studying Law outside of Australia.

Judge Questionnaires available – one for Current Judges (ie judges who had judged a negotiation competition within the preceding month) and one for Past Judges.

On 14 April 2015, SBREC granted ethics approval to accept the adoption of online questionnaires, to increase the participant pool to ALSA competitors and judges, and to expand the judge participant pool to former judges. Data collection based on these amendments commenced in July 2015, in academic semester two.

F Introduction to Original Data Analysis

To commence the data analysis process, I developed a codebook and entered all data into SPSS.[156] I analysed Likert scale responses and questions requiring a categorical response using descriptive statistics.[157] Quantitative data was analysed using measures of central tendency to compare responses, primarily through comparison of means. To analyse the qualitative data, I used several methods. The first two qualitative questions in the Pre-Negotiation Questionnaire were included to ascertain how law students prepare for legal negotiation, and their rationale for this. As my aim was to determine individual approaches to legal negotiation preparation, I allowed the data to guide my analysis, and used the data to create categories.[158] Since these questions were open-ended and not influenced by my analysis of the literature, this would ultimately allow me to determine whether the categories I identified from my data matched with the themes I had drawn from the relevant literature.[159] I paired this approach with thematic analysis, to draw out and categorise relevant themes before analysing the frequency of responses.[160] I used thematic analysis for the qualitative responses given to more general questions, particularly those asking for more detail to expand on a quantitative response. Thematic analysis allowed me to focus on 'predominant or important themes', particularly due to its utility when 'investigating an under-researched area, or… working with participants whose views on the topic are not known.'[161] Typically, the themes I identified aligned with the thematic analysis I had conducted on the literature,

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156 IBM SPSS is a statistical package commonly used for analysing data, particularly quantitative data.

157 Pelham and Blanton (n 79) 56.

158 Åkerlind (n 82) 117.

159 Tight (n 82) 320.

160 I ultimately collected around 150 questionnaire responses. While approximately 250 or so responses were completed, the LSA administrators did not send all responses back to me (see below Part IV(D). As such, I could analyse these qualitative responses without the use of statistical software designed for analysing qualitative data, such as NVivo.

161 Braun and Clarke (n 12) 83.

but I allowed the data to guide the inclusion of further themes that became evident from the law students' perspective. I also compared participants' responses based on the background questions, such as the number of negotiation-based topics they had studied previously, or the number of years spent at law school. Phenomenography had a second influence on the way in which I used my qualitative data to provide insight into whether law students prepare for a legal negotiation in line with the literature. Following a phenomenographical approach, I analysed specific quotes from my participants to consider their individual meaning, as well as the meaning that they contribute to the collective 'pool of meanings' in relation to each category that I identified.[162] This was particularly useful in relation to responses to the Judge Questionnaire, and responses from law students regarding legal ethics.

My data provide guidance about law student perspectives on legal negotiation, particularly in relation to the four key themes my research explores. In using methods drawn from phenomenography *and* thematic analysis, my research is data-informed, in that I use my data to provide student insight. However, my analyses themselves are largely based on literature-based research and thematic analyses of literature, to inform the development of my Conceptual Framework, and due to the limitations inherent in my data (discussed in part IV below). I further use my data to refute the comment that inexperienced legal negotiators (ie law students) are not prepared for legal negotiations, instead concluding that law students consider many relevant components during preparation, but that, due to the 'label confusion' in this area, they struggle to apply their knowledge of these components to an actual legal negotiation scenario. While these components potentially constitute 'good practice' as noted in the LCA Requirements, synthesis and further refinement of the literature will assist law students in gaining increased knowledge and application skills.[163] This refinement sits at the intersection of legal negotiation definitions, preparation, ethics and client-centred negotiating, as do the LCA Requirements and my Conceptual Framework of Legal Negotiation Preparation. My legal Conceptual Framework draws together each of these domains to guide

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162 Åkerlind (n 82) 118.

163 Such further refinement, or an 'encyclopaedia or yearbook on negotiation research' echoes calls raised by Menkel-Meadow: Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 18) 922 fn 70. Several collections have been created, see, eg, Andrea Kupfer Schneider and Chris Honeyman, *Negotiation Essentials for Lawyers* (American Bar Association, 2019); Chris Honeyman and Andrea Kupfer Schneider (eds), *The Negotiator's Desk Reference* (Dri Press, 2018); Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (Jossey Bass, 2005). The two companion books, *Negotiation Essentials for Lawyers* and the *Negotiator's Desk Reference* do synthesise much of the literature in this area, however, give little attention to legal negotiation preparation.

law students through the process of legal negotiation preparation, while giving adequate consideration to legal negotiation ethics. It further centralises the client in the preparation process through the development of a series of questions relevant to each component of legal negotiation preparation, that prompt discussion with the client.

G Participant Demographics

This section outlines the demographics of my respondents. Ninety-five Pre-Negotiation Questionnaires were completed, including those submitted during the Pilot Study. As the Pre-Negotiation questions were not altered significantly after the Pilot Study (except for order and format and adding some questions) I was able to utilise both sets of data. The majority of respondents (78.9%) were from South Australia (Flinders University 74.7% and Adelaide University 4.2%) with 12.6% from Queensland (Griffith University), 3.2% from Western Australian (University of Western Australia), and 3.2% from NSW (University of Western Sydney). Fifty-one respondents completed Post-Negotiation Surveys, with many responses again returned during the Pilot Study (41.2%). Again, the majority of responses came from South Australia (41.2% in the Pilot Study at Flinders University; with a further 37.3% between Flinders University and Adelaide University); 19.2% from Queensland (Griffith University) and 2% from New South Wales (University of Western Sydney).

The majority of Pre-Negotiation Survey responses indicated that participants were competing in the Preliminary Round, which is unsurprising as this is the round with the largest number of competitors, and likely the only round in which the questionnaires were administered at some universities. Sixty-five point three percent of respondents competed in the Preliminary Round, 15.8% in the Quarter Final, and 17.9% in the Semi Final.

The majority of participants were in two age ranges, 16-20 (30.5%) or 21-25 (43.1%). There was an almost even split of competitors who identified as male (36.8%) and female (34.7%), with 38.9% who did not specify. Most competitors were in their second year of Law School (32.6%). This is unsurprising as the majority of students wait until after they have properly transitioned to law study; by second year, to begin competing in competitions.[164] Sixteen

[164] The exception to this is if their LSA offers a first year only competition, or if the students are encouraged to progress their skill development. First year students, based on my experiences, are more likely to enter competitions renowned as assessing stereotypically *soft* skills such as Negotiation and Client Interview rather than Mooting or Witness Examination.

point eight percent were in fifth year; 14.7% in third year; 10.5% in first year, 8.4% in fourth year and 1% in sixth year. Forty-three point one percent of participants indicated that they intended to practice law after graduation.[165] This aligns with my previous comments about wanting to capture a broader range of law student responses than just those who had already formed a desire to enter legal practice.

After the Pilot Study, I added a question asking whether participants had studied a core topic that included negotiation. Forty-one percent of respondents indicated they had. Twenty-eight point four percent indicated they had studied one such topic; 8.4% indicated they had studied two, and 4.2% indicated they had studied four. Respondents noted that negotiation was included in a variety of different subjects including *Contract Law; Legal Theory; Law and Modern State; Civil Litigation; Tort Law; Corporate Law; Dispute Resolution and Ethics; Criminal Law; Professional Skills and Ethics; Lawyering; Introduction Topics; Legal Systems; Legal Research and Writing*; and *Practical Legal Training*.[166] Seventeen point nine percent indicated they had studied an elective subject that included negotiation. Eleven point six percent indicated they had studied 1-2 relevant electives; 7.4% had studied 3-4 relevant electives; and 1% had studied five or more relevant electives. Elective subjects included *Alternative Dispute Resolution, Dispute Management*, and *Dispute Resolution*, offered as either semester-long or intensive subjects.

I asked students about their experience with negotiation, particularly whether they had *observed* and/or *assisted* in a negotiation previously. Sixteen point eight percent indicated they had observed or assisted with a negotiation prior to this competition; 7.4% had observed 1-2 negotiations; 2.1% had observed 3-4 negotiations and 4.2% had observed five or more negotiations. Three point two percent had assisted with one negotiation; 3.2% with 3 negotiations and 2.1% with six negotiations. Respondents indicated that the nature of their involvement in observing or assisting with negotiations included competing in or observing competitions; work-related business or insurance related negotiations; unfair dismissal

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165 This question was added after the Pilot Study.

166 Several of the topics on this list are taught at my home university, and I am familiar with the subject outlines. Interestingly, four of the topics I have taught, which do not include any component related to legal negotiation, were included on the list: Criminal Law and Legal Method; Issues in Criminal Law; Legal Research and Writing; Torts 1; and Torts 2 [Interviewing].

negotiations; personal mediations or negotiations to sell a house; settlement negotiations; and observing negotiations during legal placements.

Participants were asked to rate the percentage of future life that they thought they would dedicate to legal negotiation. This was an interesting question to include, as it is not something that law students would normally consider. Due to this, I left the question open, requiring participants to include a percentage response. Only 48% of respondents answered this question, with 47.8% of these indicating that negotiation would take 20% or less of their workload. A further 31.25% indicated that negotiation would take 25%-50% of their workload; with 18.75% indicating that it would consume 60-100% of their workload. This was particularly surprising, given that legal negotiation is used daily in legal practice, and forms the basis of almost all legal work. I was, however, most interested in participants' qualitative justification for their response. Asked to justify their responses, 66.67% of people who answered the previous question provided a reason. Twenty five percent indicated that they anticipated negotiation would form quite a large part of their future lives. However, 22.9% indicated that they were unsure, though six percent of these stated that this was because they were still unsure as to which field they wanted to practice in; and a final two percent indicated that although they were unsure, they knew the importance of developing negotiation skills for legal practice. Eight percent indicated that they would devote little time to negotiation, half of which noted that this was because they wanted to work in litigation. This is a particularly interesting comment given the Law Admissions Consultative Committee alteration to the Academic Areas to include *Civil Dispute Resolution*, and the inclusion of both negotiation and dispute resolution within the Civil Litigation component of the PLT Standards, thereby centralising dispute resolution/legal negotiation as part of the litigation process. Further, this comment fails to recognise that legal negotiation forms the basis of all dispute resolution processes, including litigation.

One percent of respondents indicated that negotiation would take more time than initially thought; a further one percent stating that they would be negotiating for themselves (in terms of salaries) as well as business negotiations; and one percent indicated they would spend 60% of their time negotiating as they were interested in negotiation and mediation as a focus for their practice area. While some of these comments are encouraging as they show some students understand the importance of negotiation and have a willingness to engage in negotiation, others seem to be quite narrow-minded as to how often lawyers use their

negotiation skills, and the fact that negotiation and dispute resolution are a vital foundation for litigation.

IV LIMITATIONS OF THE STUDY

Although I was able to collect some relevant and original data, in this section I outline the five main limitations to the study: the impact of ethics approval; the questionnaire format; the lack of interest from potential participants; the reliance on volunteers to administer the questionnaires; and self-report data. Despite the limitations, the data has been useful in providing an overview of students' preparation for legal negotiations. Nevertheless, this study could be refined, and expanded, to provide more data in support of my findings.

A Ethics Approval

While the requirement for ethics approval itself is by no means a limitation, the impact of this requirement warrants consideration. Seeking ethics approval formalised the proceedings related to data collection and was commonly perceived by LSAs in two ways. First, it meant that some LSAs were less likely to agree to their competitors participating because they perceived the study as overly onerous due to all of the ethics documentation. This limited the number of potential respondents. Alternatively, the formalised proceedings sometimes made LSAs more likely to agree to administer the study because the added formality, in their view, gave the project increased legitimacy.

B Questionnaire Format

Originally, one of the limitations of the study was that the questionnaires were only available in hard copy format. This was done due to the nature of the competition, to reduce the impact on competitors' preparation time, and to limit the requirements on Competition Organisers. After initial consultation with LSA members, it was thought that this would be easier for administrators as well as participants. However, feedback from Competition Organisers and participants indicated that some would prefer an online option – this came down to each individual LSA's approach. This meant seeking further ethics approval and remodelling the questionnaires so that the same questions appeared on both the paper and online questionnaires.

Although moving to an online forum did make facilitation easier (administratively and financially), this approach meant that more Competitions Organisers agreed to undertake the study but then did not forward the link to potential participants. This leads to another limitation of this research, which is the separation between myself as researcher, and each LSA and their Competition Organiser. This was beneficial from an ethical perspective as it removed all opportunities for participant reaction bias. However, the completion rate was higher when I had regular interactions with Competitions Organisers, such as during the Pilot Study. This involved either meeting them in person to explain the study and my research, or discussing this via email or phone at various intervals throughout the data collection process. Although I gave all Competitions Organisers the option to communicate in this way, many LSAs indicated that additional contact was too onerous.

C Lack of Interest

Law students are stereotypically highly focussed and competitive. Law students competing in legal competitions take this level of focus very seriously. Asking such students to undertake a questionnaire, even a relatively quick one related to the competition they had chosen to enter, was always going to prove challenging, as many competitors would prefer to have an extra few minutes to prepare with their teammate or individually. This, to an extent, explains the low response rate. Additionally, competitors who received a link to an online questionnaire may not have seen it, may have chosen to ignore it, or considered it irrelevant. For the Post-Negotiation Questionnaire, it is highly likely that law students had other commitments directly after their legal negotiation, and consequently forgot about the study. Alternatively, after hearing their judge's feedback they may not have wished to undertake further legal negotiation related tasks.

Judges, who are typically legal academics, legal practitioners, or senior law students, lead very busy lives and often only judge competitions as a favour to the Competitions Organiser, LSA or Law School. As such, many do not have time or willingness to complete a questionnaire. Additionally, despite reassurances that the information provided was anonymous and would not impact any affiliation, standing, or role with the University or Law School, some may have preferred not to have their comments or views recorded so as not to be seen to make negative comments against any University or Law School programs.

D Reliance on Volunteers for Administration

One of the most significant limitations of the study was the challenge inherent in working with volunteers and the resultant impact on response rates.[167] There were many difficulties in administering my study through the use of volunteers, particularly those located interstate who were consequently unable to be briefed in person. One challenge related to LSAs who initially agreed to be involved in the study and then became overwhelmed with other competing priorities that resulted in them deciding not to continue with the study (or forgetting to administer the study). Other Competitions Organisers failed to collect the completed questionnaires or follow up the participants after the conclusion of the competition.

Given the onerous nature of the responsibilities of LSA Competitions Organiser, this is often a role that students only take on for a short amount of time before truly appreciating the time requirements and difficult nature of the work. As such, Competitions Organisers often resign and hand their portfolio over to an interim or replacement Competitions Organiser mid-term. This happened at several LSAs throughout the duration of the study, and as a result the questionnaires were not administered, or data collection was halted mid-competition. Sometimes the data that had already been collected was posted to me, but at other times it was lost or destroyed. Finally, Competitions Organisers are usually students in their final or penultimate year of an undergraduate law degree. In one instance, a Competitions Organiser, upon completion of the competition and after having received over 80 completed responses, left the university to complete a six-week full-time placement. When I followed this up, she found that the completed questionnaires had been disposed of by another member of the LSA.

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[167] During my undergraduate law studies, I held the position of volunteer Competitions Director both at my LSA and for an 18-month term for the ALSA Annual Conference. As such, I understand the demands placed upon someone in this role, and attempted to reduce the burden on Competition Organisers, particularly after the Pilot Study.

E Self-Report Data

A further limitation of this type of research is that all data is collected through self-reports, which can cause a participant reaction bias in respondents, meaning that they modify their answers to please or impress the researcher.[168] One of the aims of my study was to find out how law students prepare for legal negotiations, and which factors of legal negotiation preparation they consider. The use of questionnaires was one of the only ways to hear directly from law students about their approach. In order to limit any form of bias, and in line with the ethical obligations related to research, I did not interact with respondents directly, such as would be done during an interview. It is also possible that some respondents, including judges, may use their questionnaire responses to reflect personal positive or negative feelings towards the university, Law School, LSA, Competition Organiser, or competition system rather than focusing on providing their responses about the negotiation itself.

The initial methodology, which involved the Competitions Organiser coding the questionnaires to match a competitor's pre-negotiation and post-negotiation response with that provided from their judge, would have given a great deal more insight into how students prepare, their self-report of the impact of their preparation on the negotiation itself, and their judge's objective assessment of this.[169] That said, it became very apparent that asking Competitions Organisers to administer three questionnaires per negotiation was already too great an administrative burden. Requiring them to match competitors' and judges' questionnaires made this completely administratively unworkable, as explained above.

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168 Pelham and Blanton (n 70) 130.

169 In writing this, I also acknowledge the subjectivity between judges, as was also noted by my respondents: 1464JQPR (Responding to Judge Questionnaire, 2014), indicating the difficulty in obtaining objective judging criteria. LSAs take efforts to minimise this, often providing briefing sessions to judges either in person or through written documentation. It is incredibly difficult to reduce forms of judge subjectivity, however, particularly when different judges bring different views to a negotiation. Student judges will include a lot of the information from their training; legal academics will judge in a way to provide rich feedback, as if they were assessing; and legal practitioners will often find it difficult to put aside the artificiality of the competition and constantly provide a comparison to real-life legal negotiations.

V IMPACT OF LIMITATIONS ON DATA ANALYSIS

The low response rate, particularly to the Post-Negotiation Questionnaire and Judge Questionnaire, impacted the way in which I planned to use the data I collected. I had originally thought that my data would take a more meaningful role in leading my research process. This would have been particularly relevant when using thematic analysis to analyse relevant literature, and to then link those key themes with the data I collected, noting any variance in response from individual perspectives.[170] Unfortunately, the data I collected only provided only minimal insight into law students' methods of preparation for legal negotiation and the associated rationales. This did not render my data meaningless, because I still obtained key insights from the law student population about the legal negotiation preparation skills they have developed, and the way in which they understood *legal negotiation* and *legal negotiation preparation* using phenomenography and thematic analysis. However, I was not able to rely on my data to provide the rich results I had initially expected. As such, the focus of my analysis shifted to rely more extensively on relevant literatures, as is more typical of the field of dispute resolution. However, I *have* used my data to inform each component of my analysis of legal negotiation preparation, particularly drawing on student comments where relevant and insightful. While this data can only lead to tentative conclusions, when analysed with reference to the key literature in this field it can also highlight areas of concern that need to be more fully captured in legal negotiation education, as addressed by the operationalisation of my Conceptual Framework in Chapter 6.

[170] This ties in with the concepts of phenomenography that underpin the thematic analysis.

VI CONCLUSION

Regardless of the limitations above, this study was beneficial in determining how current law students prepare for legal negotiation. This data is valuable because it is original, and is collected from law students who have specifically chosen to participate in extracurricular forays into legal negotiation. This is different from current literature that focuses on students undertaking a specific *Dispute Resolution* or *Civil Litigation* topic.[171] Law students undertaking mandatory or even elective courses are driven by different motivations, including degree progression and assessment. Although the Legal Negotiation Competition structure differs from standard legal practice by involving team negotiations, the primary reasons for entering the Legal Negotiation Competition are skill development or personal growth.[172] The population of law students competing in Legal Negotiation Competitions also provides access to a broader spectrum of students across various year levels at multiple law schools, consequently giving insight into legal negotiation related information that is taught more broadly than within the confines of a specific topic or course.

If this study was to be replicated, the limitations above would need to be considered. My primary recommendation for implementing a similar study is to liaise with Law School Deans and LSA Presidents to set up uniform use of the study across Australia for one year, built into the structure of the Legal Negotiation Competition so as not to detriment or benefit any negotiation competitors regardless of their involvement in the study. This would likely increase response rates for both the Pre- and Post- Negotiation Questionnaire, as well as the Judge Questionnaire. This would not place additional burdens on Competition Organisers as they would just have to ensure that the hard copy questionnaires are present at the negotiation, or send a link to the online questionnaire to competitors and judges with the negotiation question (which is, in my experience, only ever distributed electronically).

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171 See, eg, Spencer and Scott (n 7); Collins, 'Student Reflections' (n 7); Gutman and Riddle (n 46).

172 1207PNPR (Responding to Pilot Study Pre-Negotiation Questionnaire, 2012); 1209PNPR (Responding to Pilot Study Pre-Negotiation Questionnaire, 2012); 1210PNPR (Responding to Pilot Study Pre-Negotiation Questionnaire, 2012); 1211PNPR (Responding to Pilot Study Pre-Negotiation Questionnaire, 2012); 1212PNPR (Responding to Pilot Study Pre-Negotiation Questionnaire, 2012); 1217PNPR (Responding to Pilot Study Pre-Negotiation Questionnaire, 2012); 1218PNPR (Responding to Pilot Study Pre-Negotiation Questionnaire, 2012); 1220PNPR (Responding to Pilot Study Pre-Negotiation Questionnaire, 2012); 1221PNPR (Responding to Pilot Study Pre-Negotiation Questionnaire, 2012); 1222PNPR (Responding to Pilot Study Pre-Negotiation Questionnaire, 2012); 1225PNQF (Responding to Pilot Study Pre-Negotiation Questionnaire, 2012); 1231PNQF (Responding to Pilot Study Pre-Negotiation Questionnaire, 2012).

After the completion of the data collection phase of this PhD, the Law Admissions Consultative Committee introduced the requirement for dispute resolution to be included in *Civil Litigation and Dispute Resolution* as a core topic within the Academic Areas, although this had minimal impact on questionnaire responses as limited responses were received in the final year of data collection. It would be beneficial to determine how legal negotiation is taught within these required topics, and to accordingly survey students' self-reported skills. As negotiation is a core requirement of Practical Legal Training, it would also be useful to survey students studying Practical Legal Training and to compare the results, to determine whether students closer to admission to legal practice feel more confident with their skills, and exhibit a sounder knowledge of legal negotiation preparation pedagogy.

CHAPTER THREE: DEFINING LEGAL NEGOTIATION

I INTRODUCTION

The concept of *legal negotiation*, *prima facie*, appears to be relatively straightforward – a negotiation that has legal components; or is conducted by legal practitioners.[1] However, *legal negotiation* remains undefined in the relevant literature. Menkel-Meadow, a renowned negotiation scholar, noted in the 1980s that the fields of dispute resolution and, more specifically, negotiation were still relatively new. As such, legal negotiation, as a sub-set of negotiation, could not yet be meaningfully defined.[2] Menkel-Meadow did, however, propose several factors relevant to a definition, on which I base my analysis.[3] Continuing from Menkel-Meadow's argument, I contend that now, almost forty years later, legal negotiation has truly situated itself in the legal field and demands particular definition. Legal practitioners have accepted that they conduct legal negotiations as part of legal practice. As an accepted and fundamental component of legal practice, therefore, legal negotiation is also an important part of legal education. While a definition, itself, will not change legal practitioners' practice or legal negotiation processes, critical academic analysis is missing from the field of legal negotiation definitions. The exploration of legal negotiation's role in legal practice, and the parameters of this, will consequently fill this academic gap. In turn, this will provide a foundation on which further analyses of legal negotiation can build. As such, this chapter proves foundational, not only to the further refinement of the field of legal negotiation, but as the underlying theoretical framework that underpins my research on legal negotiation preparation and ethics.

The current landscape of negotiation is turbulent, because negotiation forms part of many disciplines, and each has developed its own, discipline-specific terminology, elements, and skills. As the wider concept of negotiation has expanded (through broader acceptance of dispute resolution in various fields), some of these terms, elements, and skills have become

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1 Assumed from studies by Schneider: Andrea Kupfer Schneider, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (2002) 7 *Harvard Negotiation Law Review* 143 ('Shattering Negotiation Myths'); and Williams: Gerald R Williams, *Legal Negotiation and Settlement* (West Publishing Co, 1983).

2 Carrie Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' [1983] (4) American Bar Foundation Research Journal 905, 928 ('Legal Negotiation: A Study of Strategies in Search of a Theory').

3 Ibid 927-8. See below Part II(C).

conflated between the disciplines. Legal negotiation is one of the areas that has fallen victim to such conflation, which adds another layer of complexity to negotiation in the legal sphere. In this chapter I undertake three tasks. I first track the definitional history of legal negotiation, by positioning negotiation in the dispute resolution landscape. By examining the literature relevant to negotiation, I analyse the three divergent paths that legal negotiation has taken: the role and function of negotiation in law; the theories or approaches to negotiation; and the effectiveness of legal negotiators. While none of these paths specifically defines legal negotiation, they each add value to the search for a definition. Indeed, my analysis of each of these paths is imperative to determining the initial parameters of the concept of legal negotiation. I additionally evaluate my original data, to draw on law students' perceptions of legal negotiation to provide insight into a definition of legal negotiation. Secondly, I consider the utility of a definition of legal negotiation from the perspective of key stakeholders and evaluate the ways in which a definition would be of benefit from these perspectives. Finally, I determine that an all-encompassing definition of legal negotiation fails to capture the nuance in this field, and instead propose the Taxonomy of Legal Negotiation. This Taxonomy is based on five key components that identify a *legal* negotiation, drawn from my analyses in Parts II and III of this chapter. In creating this Taxonomy, I conclude that a strictly *legal* negotiation sits at the intersection of each of these components. The Taxonomy highlights the skills and other elements relevant to legal negotiation, including the relevant ethical obligations placed on *legal practitioner negotiators*, which are not binding on negotiators in other disciplines. While the Taxonomy is primarily an academic tool, it is critical to legal education as it encourages considered and thorough legal negotiation pedagogy. In this way, the Taxonomy also provides an entry point for legal negotiation skill education, and will thereby provide value for law students and legal practitioners alike.

II NEGOTIATION IN THE LEGAL SPHERE

To situate negotiation in the legal sphere it is first necessary to understand the role of dispute resolution in legal practice. In this section, I briefly consider the history of dispute resolution, particularly as it relates to law. I then begin to situate negotiation within the broader context of dispute resolution, before narrowing the scope of my inquiry to the role of negotiation in law. There are several challenges inherent in examining this literature that must be identified before commencing my analysis. *Legal negotiation*, as a term, is referred to in some of the literature.[4] This term is not specifically defined, but merely referred to in passing. This gives the impression that all authors have accepted the same definition, and, to that end, that legal negotiation does not warrant further definition. Secondly, the literature that is relevant to the definition of legal negotiation has been contributed to by various authors, both legal and non-legal. This includes legal authors writing for generalist audiences about negotiation,[5] legal authors writing for legal audiences about negotiation in law (without defining the term),[6] and legal authors writing for legal *and* generalist audiences about negotiation.[7] As such, the terminology in the literature is conflated – some terms apply to legal negotiation, some to general negotiation, and some to both. Schneider terms this 'label confusion'.[8] I address this 'label confusion' by disentangling concepts of *dispute resolution, negotiation* and *legal negotiation*, to commence the process of identifying the key components relevant to legal negotiation.

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4 See, eg, Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory* (n 2); Russell Korobkin, 'A Positive Theory of Legal Negotiation' (2000) 88(6) Georgetown Law Journal 1789 ('A Positive Theory of Legal Negotiation'); Avnita Lakhani, 'Deception as a Legal Negotiation Strategy: A Cross-Jurisdictional, Multidisciplinary Analysis Towards an Integrated Policy Reforms Agenda' (PhD Thesis, Bond University, 2010) ('Deception Legal Negotiation Thesis').

5 See, eg, Roger Fisher, William Ury, and Bruce Patton (ed) *Getting to YES* (Random House, 2nd ed, 2003); Ray Fells and Noa Sheer, *Effective Negotiation: From Research to Results* (Cambridge University Press, 4th ed, 2020).

6 Laurence Boulle and Rachael Field, *Australian Dispute Resolution Law and Practice* (LexisNexis, 2017); Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 6th ed, 2020) ('*Alternative Dispute Resolution Sixth Edition*'); David Spencer, Lise Barry and Lola Akin Ojelabi, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co, 4th ed, 2019); Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2002) ('*Dispute Resolution in Australia*').

7 Melvin Aron Eisenberg, 'Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking' (1976) 89(4) *Harvard Law Review* 637; Robert H Mnookin, Scott R Peppet and Andrew S Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Harvard University Press, 2000).

8 Schneider, 'Shattering Negotiation Myths' (n 1).

A A Brief Foray into Dispute Resolution in Law

The role of dispute resolution in the legal field was initially a response to the 1970s-1980s litigation explosion in America.[9] The court system was in crisis due to an increased number of cases filed in court,[10] long court processes, higher costs, heightened risk attached to litigation,[11] and 'excessive legalization'.[12] The Australian court system was similarly suffering from delay and increased costs,[13] and a reduction in access to justice was inevitable. Dispute resolution was seen to be the quick and easy answer to these problems: resolving disputes while alleviating some of the strain on the court system.[14] Dispute resolution would therefore allow greater flexibility and control for disputing parties,[15] lower costs, and a greater opportunity to 'explore options for settlement' specific to the relevant circumstances.[16] Dispute resolution was consequently seen in direct contrast to litigation, often the weaker choice by comparison. As such, it took some time for dispute resolution to become well-entrenched in the legal system.[17]

Despite the alluring nature of dispute resolution in providing relief to the overburdened judicial system, it was not well received by the legal profession and legal practitioners were slow to adapt to the dispute resolution movement. Indeed, the dispute resolution movement was aptly described by Spencer as analogous to changes in shopping habits: litigation was the equivalent of the corner store, familiar and comfortable, and dispute resolution was the new

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9 The term 'alternative dispute resolution' ('ADR') was first coined by Eric D Green, Jonathan B Marks and Ronald L Olson, 'Settling Large Case Litigation: An Alternative Approach' (1987) 11(3) *Loyola of Los Angeles Law Review* 493, 493. For the purposes of this thesis, I use the broader term, *dispute resolution*, to refer to the broader set of dispute resolution process that encompass negotiation. This is explained in greater depth below.

10 See generally Marc Galanter, 'The Day After the Litigation Explosion' (1986-1987) 46(1) *Maryland Law Review* 3, 13-14.

11 Ibid 8; see also Roscoe Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice' (Speech delivered at the annual convention of the American Bar Association, 1906) 10.

12 Galanter (n 10) 4.

13 Peter Sallmann, The Impact of Caseflow Management on the Judicial System (1995) 18(1) *University of New South Wales Law Journal* 193, 195.

14 Astor and Chinkin, *Dispute Resolution in Australia* (n 6) 77.

15 Brendan French, 'Dispute Resolution in Australia – the Movement from Litigation to Mediation' (2007) 18(4) *Australasian Dispute Resolution Journal* 213, 213.

16 See, eg, David Spencer, *Principles of Dispute Resolution* (Thomson Reuters, 2011) 9-10 ('*Principles of Dispute Resolution 2011*'); Astor and Chinkin, *Dispute Resolution in Australia* (n 6) ch 3.

17 See, eg, Galanter (n 10), Pound (n 11), Green, Marks and Olson (n 9).

supermarket containing a much larger range of innovative options.[18] It took over a decade for legal practitioners to become more comfortable with the concept of dispute resolution, and legal practitioners were still 'sampling' dispute resolution processes in the late 1990s.[19] Dispute resolution and litigation now exist harmoniously: dispute resolution is much more frequently used,[20] yet litigation still has a critical role in legal practice since certain disputes are unsuitable for dispute resolution and require judicial resolution.[21] Indeed, as the use of dispute resolution processes began to increase in areas such as commercial law,[22] it became more common to see an intersection of litigation and dispute resolution processes, with legislative requirements mandating that parties undertake dispute resolution, or at least listing dispute resolution processes as options for resolution.[23] This was done most notably through the introduction of mandatory pre-action protocols in federal civil disputes in 2011.[24] While legislative requirements for dispute resolution processes do not necessarily evidence judicial or legal practitioner support for dispute resolution, they do emphasise the increased use of these processes.

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18 David Spencer, 'Liability of Lawyers to Advise on Alternative Dispute Resolution Options' (1998) 9(1) *Australian Dispute Resolution Journal* 292, 292 ('Liability of Lawyers to Advise on ADR Options'), discussing: G B Robertson, 'The Lawyer's Role in Commercial ADR' (1987) *Law Institute Journal* 1148, 1148.

19 Spencer, 'Liability of Lawyers to Advise on Alternate Dispute Resolution Options' (n 18) 292.

20 While dispute resolution is now used much more frequently, the 'pick-and-choose' approach is still common given the seemingly ever-increasing variety of dispute resolution processes available: French (n 15) 217.

21 Such as certain family law cases or cases involving domestic violence or other extreme power imbalances.

22 See discussion in, for example: Warren Pengilley, 'Alternative Dispute Resolution: The Philosophy and the Need' (1990) 1(2) *Australian Dispute Resolution Journal* 81, 82; and French (n 15) 215.

23 Legislatively required dispute resolution is often termed 'court-connected' alternative dispute resolution: Astor and Chinkin, *Alternative Processes in Australia Negotiation* (n 6) 237; or 'court-referred' or 'court-annexed' alternative dispute resolution: Spencer, 'Liability of Lawyers to Advise on Alternative Dispute Resolution Options' (n 18) 295. Examples of specific legislation that includes dispute resolution requirements, include through the use of counselling and conferences in the *Family Law Act 1975* (Cth), and the amendment of this Act to introduce primary dispute resolution: *Family Law Reform Act 1995* (Cth), and family dispute resolution: *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). This has resulted in strong development of primary dispute resolution (family dispute resolution). Non-family law examples include the *Civil Dispute Resolution Act 2011* (Cth).

24 The *Civil Dispute Resolution Act 2011* (Cth) was a response to National Alternative Dispute Resolution Advisory Council; see also the general federal law dispute resolution provisions are contained in the *Federal Circuit Court of Australia Act 1999* (Cth) Part 4. In 2017-2018 seven percent of general federal civil cases were referred by the court to mediation: Federal Circuit Court of Australia, *Annual Report 2017-2018*, 70. Registrars conducted 564 mediations during the report period. Three hundred and twenty-four matters (57%) were either partially or fully resolved: 71. See above Chapter One for further discussion of this point.

Despite the accepted inclusion of dispute resolution in legal practice, its initial perception as a weaker option to litigation[25] resulted in the connotation that legal practitioners who pursued dispute resolution processes were weaker lawyers. While such an interpretation is no longer recognised in legal practice, it is still reflected in legal pedagogy. Legal education typically brands dispute resolution as a *soft skill* grouped with client interviewing,[26] seen in stark contrast to litigation. This reflects the lens of adversarialism that taints all aspects of Australian legal education,[27] and adds weight to the argument that legal educators teaching dispute resolution topics need to re-set law students' legal thinking, to embrace dispute resolution. Given the importance of the role of dispute resolution in legal practice, the classification of dispute resolution as a soft skill needs to change. One way of enacting such change is to bring dispute resolution processes in law to the forefront of legal education. My research does this through changing the way in which legal practitioners, legal academics, and law students think about legal negotiation: by centralising the client, legal negotiation preparation and legal negotiation ethics. This highlights the key elements of negotiation and of other dispute resolution processes by extension, and better emphasises the need for legal negotiation education. My research, therefore, takes a positive step towards encouraging law students to view dispute resolution in parallel to litigation, rather than in contrast, and to identify and develop the key skills relevant to legal negotiation.

The dispute resolution landscape has evolved to include a multitude of processes through which disputing parties can attempt to resolve a matter without recourse to the judicial system, either by themselves or with representation. Such forms of resolution can result in a greater range of potential remedies outside those traditionally awarded by a court or tribunal. Although dispute resolution processes are typically viewed as a means of resolution, they can also can be advisory, to assist in the identification of key issues or early discussions; facilitative, to further develop arguments; or determinative, resulting in a resolution.[28] The

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25 See, eg, Pengilley (n 22) 93.

26 See, eg, Robert M Bastress and Joseph D Harbaugh, *Interviewing, Counselling, and Negotiating: Skills for Effective Representation* (Aspen Publishers, 1990). More recently, however, interviewing and negotiation are combined as part of legal communication, which is a more appropriate description than 'soft skills': see, eg, Nikolas James, Rachel Field and Jackson Walkden-Brown, *The New Lawyer* (Wiley, 2019) 329-335. This description of legal communication also includes advocacy and persuasion, which neatly combine many aspects of the dispute resolution process.

27 Meg Wootten, 'How Do Law Students Understand the Lawyer's Role? A Critical Discourse Analysis of a First-Year Law Textbook' (Conference Paper, Wellness for Law Conference, 16 February 2017).

28 National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (2003) ('*NADRAC Dispute Resolution Terms*'); Catriona Cook et al, *Laying Down the Law* (LexisNexis, 9th ed, 2015).

vast majority of dispute resolution processes are aided by an unbiased third-party, who attempts to work with the disputing parties to find a mutually beneficial resolution,[29] either in the role of facilitator,[30] or decision maker.[31] This requirement for third-party involvement is not a mandatory component of dispute resolution, but is reflected in dispute resolution terminology. Negotiation does not involve a third-party, which, indeed, is one of its benefits.[32]

NADRAC, the now-defunct Australian Governments taskforce on dispute resolution, provides some definitional guidance. It's definition of *dispute resolution* includes all forms of resolving a matter, 'whether within or outside court proceedings'.[33] Negotiation evidently falls within this definition of dispute resolution, as a process 'used to resolve disputes…within or outside court proceedings…facilitative, advisory or determinative.'[34] This does not present any confusion. *Alternative dispute resolution*, however, is the term typically used by legal academics and practitioners alike to identify dispute resolution processes *through which parties are assisted by a third-party.*[35] As noted above, negotiation, by its very nature, does not include a third-party, either in the role of decision maker or facilitator. In this sense, it does not meet NADRAC's definition of alternative dispute resolution. However, NADRAC's definition is extended by one additional sentence, including: 'approaches that enable parties to prevent or manage their own disputes without outside assistance'.[36] Such 'outside assistance' could extend to legal practitioner representatives. On this strict interpretation, the concept of negotiation conducted by legal practitioners negotiating as agents for their clients fits within the NADRAC definition of *dispute resolution*, but not that of *alternative dispute resolution*.
These distinctions appear to be merely semantic, with *dispute resolution* seemingly intended to refer to all forms of dispute resolution, including judicial determination, while *alternative dispute resolution* refers to all dispute resolution processes that *do not* include judicial determination. This analysis is important for two reasons. Initially it highlights some of the

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29 *NADRAC Dispute Resolution Terms* (n 28) (n 28) definition of 'ADR'.
30 For example, during mediation or conciliation.
31 For example, during arbitration; or, more formally, litigation.
32 Philip H Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspectives* (Academic Press, 1979) 3.
33 *NADRAC Dispute Resolution Terms* (n 28) definition of 'dispute resolution'.
34 Ibid definition of 'dispute resolution'.
35 Ibid definition of 'ADR'.
36 Ibid.

confusion about where negotiation is situated in the dispute resolution landscape, although these semantic distinctions are largely ignored by the literature, which often uses the terms *dispute resolution* and *alternative dispute resolution* interchangeably. Secondly, it fuels the conception that, even though negotiation fits the definition of dispute resolution and is frequently used by legal practitioners as a dispute resolution process in its own right, it is not an *alternative* dispute resolution process. This interpretation is particularly problematic because negotiation forms the basis of many types of dispute resolution, including mediation. A failure to recognise negotiation as part of dispute resolution *and* alternative dispute resolution could mean that negotiation is perceived merely as a skill required for third-party assisted dispute resolution processes, rather than recognising negotiation processes themselves.[37] In my research, I consider negotiation to be the process that forms the foundation of all dispute resolution processes. Legal negotiators therefore require a variety of skills developed through legal education, though the focus of my research is on legal negotiation preparation and the associated legal ethics. In the next section, I consider negotiation more broadly as a dispute resolution process before then narrowing the scope of my inquiry to legal negotiation.

B The Role of Negotiation in Dispute Resolution

Negotiation has long been recognised as a dispute resolution process. Like dispute resolution, negotiation has been contrasted to litigation (or adjudication), and its strengths lie in party-dependent joint decision making, compared with the 'unilateral decision-making' of a third-party.[38] Negotiation has been extensively researched, in various fields. For example, in *Effective Negotiation: From Research to Results*, authors Fells and Sheer note that their guidance is provided for 'students and professionals in business and management, law and human resource management'.[39] This highlights the wide-reaching application of negotiation.[40] While there are many similar publications, canvassing a range of disciplines, Fells and Sheer capture the fundamentals with clarity and insight, particularly acknowledging that negotiation is complicated and pervasive, and often contextually different.[41]

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37 Indeed, several conversations with mediators throughout my research have illustrated this point.

38 Gulliver (n 32) 7.

39 Fells and Sheer (n 5) preface.

40 Echoed by Law Society of New South Wales Commission of Inquiry, *The Future of Law and Innovation in the Legal Profession* (2017) ('*FLIP Report*'); Avril Beckford, 'The Skills You Need to Succeed in 2020', *Forbes* (Web Article 6 August 2018) <https://www.forbes.com/sites/ellevate/2018/08/06/the-skills-you-need-to-succeed-in-2020/#4d53d46288a0>.

41 See, eg, Fells and Sheer (n 5) Chapter 1.

There are various definitions of negotiation, each with similar elements at their core.[42] Fells and Sheer describe 'a process by which two parties with differences that they need to resolve try to reach agreement through exploring options and exchanging offers.'[43] Such a generalist view of negotiation fails to capture the three uses of dispute resolution noted by NADRAC: 'facilitative, advisory, or determinative.' In defining two types of negotiation, *facilitated* and *integrated*, NADRAC applies these three uses to the field of negotiation. This expands on Fells and Sheer's generalist definition while also acknowledging the varied uses of dispute resolution. *Facilitated negotiation* involves a third-party (dispute resolution practitioner) who assists the parties to negotiate, but cannot make a decision on their behalf.[44] *Integrative negotiation*, however, requires parties' agents to negotiate on behalf of their clients, attempting to reach a mutually agreeable outcome.[45] In creating this agent relationship, parties provide instructions, and give their agent authority to negotiate, within certain parameters.[46] *Integrative negotiation*, then, is the most common form of negotiation utilised by agents, including legal practitioners. Combining Fells and Sheer's definition with those issued by NADRAC provides insight into a definition of legal negotiation that has, at its core, legal practitioner involvement and the search for resolution.

Generalist negotiation texts note key themes relevant to negotiation, including the identification of parties, interests, and positions; stages of negotiation; creation of options; and effective negotiation.[47] These either relate specifically to negotiation preparation (or *pre-negotiation*), or to the negotiation itself. These components are relevant to all negotiation contexts. For example, one of the attractions of negotiation as a resolution process is its capacity to address a multitude of issues, and to seek creative options for resolution. As such, negotiation offers the ability to intersect and traverse many disciplines to find workable outcomes. Negotiation outcomes, therefore, are often interdisciplinary.

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42 Menkel-Meadow provides an analysis comparing various definitions: Menkel-Meadow 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 908.

43 Fells and Sheer (n 5) 3. See also: Gulliver (n 32) 3.

44 *NADRAC Dispute Resolution Terms* (n 28) definition of 'facilitated negotiation'.

45 Ibid definition of 'integrated negotiation'.

46 Ibid.

47 Fells and Sheer (n 5) table 1.1.

Negotiations typically arise due to problems or disputes occurring between people. As opposed to other, more legal, forms of dispute resolution (such as mediation, conciliation, and arbitration), negotiation offers greater opportunities to address the relationship between parties. For some disputes, an ongoing relationship is fundamental,[48] and the use of agents might assist to maintain these relationships. A strength of negotiation is the ability for parties to self-represent, or to use a variety of agents. While this could include legal practitioners, agents can also be selected from various professions, for example, accountants, human resources mangers, real estate agents, and social workers – each as required in the specific context. Some professions, such as law and accounting, regulate the conduct of their members through professional conduct rules, often linked to ethical requirements mandated in that field. Consequently, the qualifications that agents have do not always situate them on the same playing field, which must be made explicit to their clients and during negotiations.

Negotiation is a pervasive dispute resolution process with inter-disciplinary application, which makes it difficult to find a general definition of negotiation that applies to all fields. This is exemplified above – when legal processes are relevant, certain components of negotiation might be handled differently, such as through the engagement of legal practitioners. This shows that legal negotiations are different from other types of negotiation, even though *legal negotiation* as a term has not been defined in relevant literature. By its very nature, however, the term *legal negotiation* conjures images of pre-litigation discussions between legal practitioners, thereby attracting the need for representatives to have legal qualifications, follow legal ethics, and for the negotiation to result in legal outcomes with legal consequences, although other outcomes and consequences may also be present.

[48] Eisenberg (n 7) 666-673.

C Legal Negotiation

From the inception of dispute resolution and negotiation in 1970s America, there already seemed to be distinctions relevant to law, particularly those related to the functions of negotiation in law.[49] This included the relevance of negotiation to resolving disputes, and often incorporated discussion of legal strategy, and emphasis on increasing clients' financial gains.[50] Despite this, legal and non-legal commentators alike refer to *negotiation*. Very few references are made to *legal negotiation*, even by legal authors. In 1983, however, there were two significant alterations in the landscape of legal negotiation. Williams published a book specifically addressing legal negotiation: *Legal Negotiation and Settlement*.[51] This, in part, reported his study assessing the effectiveness of legal practitioners engaging in negotiation,[52] thereby explicitly linking *legal negotiation* to negotiations carried out by legal practitioners, and proposing that negotiation was inextricable from the legal process. In the same year, Menkel-Meadow published her own work on legal negotiation, concluding that negotiation was still an emerging field, so it was not yet appropriate to define negotiation specific to the legal context.[53] Nevertheless, she did propose a list of considerations relevant to a definition.

> [T]he following variables are likely to affect orientations to negotiation, including both the goals and the behavior repertories of the negotiators:
> *subject matter* (dispute vs. transaction, the material of the negotiation-is it limited, expandable, is there a need for a definitive, precedential ruling?)
> *content of the issues* (what are the underlying interests of the parties-latent, manifest, short term, long term? do parties value the issues equally?)
> *voluntariness* (do parties have a choice about negotiating?)
> *visibility* (will negotiations be conducted privately or publicly?)
> *relationship* (parties, negotiators, long term vs. one shot)
> *accountability* (to what constituencies is the negotiator responsible-a single client, an organizational client, a family, a labor union?)
> *stake* (who stands to "win or lose" most from negotiation?)
> *routineness* (how is the negotiation limited by frequency and norms of the problem- i.e., plea bargaining?)

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49 See, eg, Ibid; *NADRAC Dispute Resolution Terms* (n 28) definition of 'dispute resolution'; Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 908.

50 Ibid 910. Menkel-Meadow also notes the development of a more cooperative focus by Williams in the subsequent years: at 911-12, citing Williams (n 1).

51 Williams (n 1).

52 Later replicated by Schneider, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (n 1).

53 Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 928.

> *power* (how do parties assess their relative power in terms of fact, law, economic resources, moral righteousness?)
> personal characteristics of the negotiator (psychological "orientations")
> *medium of negotiation* (face-to-face encounter vs. telephonic or written negotiations)
> *alternative to negotiation* (trial, transaction not consummated).[54]

The novel and underexplored nature of negotiation, let alone *legal* negotiation, *was* preclusive and limiting to a specific definition of legal negotiation in 1983. Menkel-Meadow's position was overridden, however, by Williams' study, because it rested on the premise that legal negotiation was conducted by legal practitioners. From this point onwards, the definition of legal negotiation became accepted by academics and practitioners alike, though authors tend to adopt the term *legal negotiation* without explanation or reference. To be clear, this assumed definition of legal negotiation reflects two legal practitioners, representing opposing parties. The legal practitioners come together to negotiate a matter with potentially legal consequences, with the aim of attempting to resolve on one or more legal issues. While this is a perfectly adequate working definition, I argue that there are additional considerations required to define aspects of legal negotiation, including some of those proposed by Menkel-Meadow. Since the assumed definition, reflected in Williams' work, has been so widely accepted, this is an ideal starting point from which to begin an analysis of the relevant literature. Throughout this analysis, and consideration of key stakeholders' perspectives, I pair the accepted definition of legal negotiation from Williams' work with Menkel-Meadow's list of considerations, and use this as an entry-point to determine the key elements of legal negotiation.

Although the relevant authors likely thought they were contributing to a definition of legal negotiation, instead of focussing on defining legal negotiation the literature has diverged into three different paths, with corresponding terminology. To address the first path, it is necessary to consider the literature prior to the 1983 contributions of Williams and Menkel-Meadow. The first path differentiates negotiation from other dispute resolution processes by considering the role of negotiation, specifically in law. The second path focuses on approaches that parties (or agents) may take to negotiation, and is sometimes referred to as

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[54] Ibid 927-928.

the *theories* of negotiation.[55] The final path, based on Williams' work, analyses the effectiveness of legal negotiators, primarily in the American context.[56]

The language used across the different paths lacks clarity and consistency. Indeed, my analysis of the literature pertaining to negotiation approaches in a law context makes it clear that authors have developed their own terminology for, and within, each approach to negotiation, meaning that terminology is not consistently used. This conflation has created a great deal of 'label confusion',[57] which has also muddied the waters in terms of finding a clear-cut definition of legal negotiation. My evaluation concludes that all three paths are important, but that it is now time for them to re-converge to contribute to a definition. While I lay the foundation for each path and analyse each path's contribution to the quest for a definition of legal negotiation, I note that the second path, regarding negotiation approaches, is more relevant to preparation and negotiation skills rather than specifically to the definitions of negotiation. In this chapter, my analysis of negotiation theories is constrained to their relevance to finding a definition of legal negotiation. Further analysis, as it pertains to legal negotiation preparation and legal negotiation ethics, is contained in Chapters Four and Five.

1 *The Role of Negotiation in Law*

The earliest conceptions of legal negotiation considered the role that negotiation took in law. Various authors contributed to this analysis, though it is the works of Eisenberg and Williams that are most significant. Identifying the role of negotiation in law relies on a determination of the reason for negotiating,[58] the reason for which legal practitioners are retained for negotiation, and what *representation* consists of in this context. This emphasises various considerations, including the legal practitioners' qualifications, which enable them to conduct legal negotiations on behalf of clients; the content and context of the legal negotiation itself; and the relevant consequences and outcome. This, in turn, draws on the factors Menkel-Meadow identified as relevant to a definition, including attempts to resolve clients' problems; the subject-matter; the issues; and overarching matters including power; relationships; voluntariness and accountability.[59]

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55 Korobkin, 'A Positive Theory of Legal Negotiation' (n 4).
56 Williams (n 1); Schneider, 'Shattering Negotiation Myths' (n 1).
57 Schneider, 'Shattering Negotiation Myths' (n 1) 151.
58 Gulliver (n 32) Chapter 1.
59 Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 1) 927-8.

Eisenberg's 'seminal piece'[60] on negotiation was one of the earliest conceptions of the role of negotiation in law. Interestingly, he concluded that negotiation, at least initially, does not involve the use of lawyers, since it is only the start of the resolution process,[61] and contrasted dispute negotiating with traditional litigation.[62] To an extent, this accords with the definitions of alternative dispute resolution and dispute resolution, above. On Eisenberg's reasoning, negotiation initially falls within the confines of party-run processes, without the assistance of a third-party. Perhaps Eisenberg considered these initial processes to be 'in the shadow of the law',[63] falling outside the ambit of court processes and the constraint of judicial resolutions, and therefore not yet requiring legal expertise. Such an interpretation correlates with the data my respondents provided when asked to define legal negotiation. The most common response was that negotiation is an alternative to court and is often conducted in the shadow of the court/law (indicated by 29% of respondents). In this sense, my law student respondents appear to view dispute resolution and litigation as two very separate processes. Like Eisenberg's formulation, my respondents did not include reference to legal practitioners, which questions whether it is necessary for legal practitioners to be involved in legal negotiation. In fact, Eisenberg proposed that lawyers be retained only once the matter proceeds to litigation, in order to assist with settlement options.[64] Any negotiations conducted after this point then became legal negotiations, founded on 'legal principles, rules and precedents', and parties thereby required the assistance of legal practitioners.[65] While Eisenberg's determination that lawyers are redundant in early negotiation processes may have been representative of the early lacklustre uptake of dispute resolution, this view is now outdated, particularly given that key legislation mandates dispute resolution.[66] Eisenberg's

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60 Ibid 928.

61 Perhaps this perception is one of the reasons for which the legal community has taken so long to adapt to dispute resolution forming part of the legal process. The view that negotiation does not need to be conducted by lawyers also contributes to the analysis of whether negotiation constitutes part of legal practice: see below Part III(A).

62 Eisenberg (n 7) 654-655; Gulliver also draws on this distinction, with ultimately concluding that negotiation is quite a structured process: Gulliver (n 32) Chapter 1. See also Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 918.

63 Mnookin and Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950, 950 quoted in Carrie Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1983-1984) 31(4) *University of California Los Angeles Law Review* 754, 766 ('Toward Another View of Legal Negotiation'). See also Menkel-Meadow's discussion at 765-6.

64 Eisenberg (n 7) 664.

65 Ibid 664-665. This reasoning further accords with Gulliver (n 32) 9.

66 Negotiation or other dispute resolution is even mandated in some instances, see above Chapter One regarding the *Civil Dispute Resolution Act 2011* (Cth).

emphasis on the need for legal practitioners to become involved in legal negotiations to help navigate the 'legal principles, rules and precedents',[67] however, is critical. This supports the requirement for legal practitioners to have qualifications in substantive law and legal processes, *as well as* training in legal negotiation.

Williams' proposal that negotiation processes are deeply embedded in law, particularly when lawyers are involved and legal rules are relevant,[68] is a natural development of Eisenberg's theories, and is more cohesive with current perspectives on legal negotiation. This intertwined nature of law and negotiation was also identified by my survey participants: 26.5% of respondents indicated that legal negotiations arise only when there is a relevant legal matter or legal context, or when legal consequences are present. This intersection of negotiation and the legal process assists in situating negotiation in law, but proves more difficult when attempting to specifically define legal negotiation. While Williams highlights a distinction between strictly legal procedures and negotiation, he states that lawyers may use pre-trial procedures as negotiation to advance their client's position,[69] which consequently results in an overlap between strictly legal procedures and negotiations.[70] He also states that involving a judge in legal proceedings only complicates the role of negotiation in the legal sphere, by increasing the formality of proceedings, and moving the lawyers away from cooperation into the adversarial arena.[71] Using negotiation in this way further clouds the definition, though likely emphasises the litigation-dispute resolution divide that was so prevalent in the early landscape of dispute resolution.

Other early considerations of legal negotiation related to their function. Eisenberg argued that legal negotiation offers two, specifically legal, functions: [72] dispute-negotiation[73] – which is

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67 Eisenberg (n 7) 664-665.

68 Williams (n 1) 87.

69 Williams (n 1) 85.

70 Ibid.

71 Ibid 85: That said, Williams does note that if the judge is a 'settling judge' their role will instead be to find the best possible settlement for all parties: at 89.

72 Eisenberg (n 7) 638; Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 926.

73 Eisenberg defined *dispute-negotiation* as the resolution process through which parties sought to enforce their rights resulting from a dispute that had already occurred: Eisenberg (n 7) 637-8; 667-8. See discussion by Menkel-Meadow in Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) in which Menkel-Meadow describes this form of negotiation as 'backward looking': at 926.

the primary focus of my research – and rule-making negotiation,[74] though he acknowledged the occasional overlap.[75] His proposed categories firmly situated negotiation – with legal outcomes and legal processes – in the field of law.[76] He further considered the role of party relationships, distinguishing nondependent party relationships (where parties make a one-off contract with no continuing relationship),[77] and dependent relationships (ongoing relationships influenced by other factors, for example an imbalance of power that may impact parties' willingness to negotiate).[78] This was one of the first considerations of party relationships in the context of legal negotiation. By distinguishing concepts such as power imbalances, Eisenberg began to draw legal ethics into the legal negotiation arena, even though he did not explicitly address this. Eisenberg's work displays a significant focus on content and relationships,[79] including consideration of legal expertise and the role of the legal practitioner. These themes – content, relationships, and qualifications – consistently have a legal focus, and are therefore key elements that distinguish legal and non-legal negotiations.

Williams re-conceptualises Eisenberg's work by characterising legal negotiation into four legal jurisdictions: transactions, civil disputes, labour/management, and criminal cases,[80] though his primary focus is civil law. Williams further considers the people who might be involved in a legal negotiation: lawyers, agents, employers/employees without legal training conducting labour/management negotiations, police prosecutors with legal knowledge but limited legal training, accountants, financial advisors, conveyancers, or simply the parties

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74 *Rulemaking negotiation* arises in advance of any disputes and is designed to control and regulate future conduct by preparing for disputes that may arise in the future. This is enacted through using contract negotiations, drafting of legislation or treatymaking. The parties' goal is to be more persuasive as to why their position is correct and consequently why the other party should alter their perspective: Eisenberg (n 7) 637, 665, 668. See also Carrie Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 926.

75 For example, a dispute negotiation may have a 'strong rulemaking component' between parties in a dependent relationship: Eisenberg (n 7) 681.

76 Gulliver, too, proposed two methods of handling disputes: the judicial approach (litigation/adjudication) and the political approach (negotiation). He notes this 'is far too simplistic …[and] merely obfuscates both concepts and reality…[due to the] pervasiveness of both norms and power in all kinds of dispute processes': Gulliver (n 32) 19.

77 Ibid 666.

78 Ibid 672-673.

79 Eisenberg, however, does not necessarily consider that the specific function of a legal negotiation may affect behaviour and relationships, for example when parties attend voluntarily (more common in rule-making negotiations) or if attendance is compelled (for example in a dispute-negotiation): Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 926.

80 Williams (n 1) 2-5.

themselves. By canvassing such a large field of potential negotiators, Williams is arguably questioning the amount of legal knowledge required for a negotiation to become a *legal* negotiation. This raises further questions specific to a definition of legal negotiation, including consideration of whether legal negotiators are required to have legal training/qualifications; whether there is an implication that this training needs to be completed and legal practice commenced to conduct a legal negotiation, and, consequently, the scope of a legal negotiator's accountability.[81] Such components are not specifically answered in the current legal negotiation literature, and warrant further determination in relation to a definition of legal negotiation.[82] This is one of the issues addressed by the creation of the Taxonomy.[83]

Although Eisenberg's classification of negotiation as dispute-negotiation or rule-making negotiation is too simple for current-day purposes, so too is Williams' four-category classification as it fails to consider various criteria that will impact a definition of legal negotiation. As the literature related to legal negotiation expanded, and diverged, this shift in focus effectively closed the conversation about the functions of negotiation, with the exception of side comments and references to previous works. The above analysis of the functions of legal negotiation, though, does raise issues that are important to the parameters of a definition of legal negotiation. This analysis also decreases the likelihood of finding an appropriate all-encompassing definition. I propose that this analysis can be used as a basis to establish several key categories relevant to a definition of legal negotiation. Synthesised as a Taxonomy, these will provide guidance in this field.

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81 This draws on Menkel-Meadows' conception of accountability: Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 928.

82 See below Parts III and IV.

83 See below Part V.

2 *Theories of Negotiation*

Although there are multiple threads that run through all definitions of negotiation, the variety in this field highlights the complexity and versatility of negotiation.[84] There are two broad types of theoretical perspectives that are applied to negotiation. First, theories that guide negotiator behaviour ('negotiation behaviour theories').[85] These are based in a multitude of areas, given the interdisciplinarity of negotiation, and draw on various components, including the social positioning of negotiation (eg social interaction theory) or psychological influences on negotiation behaviour (eg field theory or human needs theory).[86] These negotiation behaviour theories are commonly included in negotiation research in other disciplines, though less commonly in law.[87] In line with the negotiation behaviour theories, one of my original contributions in this thesis could be characterised as defining a theory of legal negotiation by identifying its key components. This is based on the concept that legal negotiations are used to resolve legal matters which have legal consequences, and thereby require legal practitioners' expertise. In this sense, I draw on Williams' and Schneiders' conceptualisation that law and negotiation are inextricably linked, but that this goes beyond descriptions of 'ordinary legal negotiation',[88] which instead focus on settlement negotiations in the overarching context of the litigation process.

The negotiation theories in relevant literature encapsulate the divide between *competitive negotiation* ([w]inning at all costs')[89] and *cooperative negotiation* ('[n]egotiating for mutual satisfaction');[90] (collectively 'negotiation theories'). These negotiation theories are frequently referred to in negotiation and dispute resolution textbooks, particularly those used in legal

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84 John Lande, 'Taming the Jungle of Negotiation Theories', in Chris Honeyman and Andrea Kupfer Schneider (eds) *Negotiator's Desk Reference* (Dri Press, 2017) 87, 89 ('Taming the Jungle of Negotiation Theories').

85 There are separate theories that guide negotiator decision making, particularly in the context of ethics. These will be discussed in Chapter Five.

86 See, eg, Lande's synthesis: Lande, 'Taming the Jungle of Negotiation Theories' (n 84) 90.

87 The theories are reflected in a variety of books, some law-specific, others not. For more information and a detailed discussion about these, see Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 907.

88 See, eg, Lande, 'Taming the Jungle of Negotiation Theories' (n 84) 93, citing John Lande, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money* (American Bar Association, 2nd ed, 2015).

89 Herb Cohen, *You Can Negotiate Anything: Getting Your Way in Every Situation* (HarperBusiness, 1990) 119.

90 Ibid chapter 7. Herb Cohen writes for a lay audience, arguing that anything can be negotiated and providing readers with insight into how to conduct a negotiation in a way that suits them, regardless of the topic being negotiated.

education.[91] The negotiation theories are also categorised as *approaches*, *styles*, and *models*, and are commonly applied in all disciplines, not just in law. In my analysis I have drawn predominantly on commentary by legal scholars, although many refer to *negotiation* rather than *legal negotiation*, even though much of their contribution is situated in the legal field.[92]

Competitive and *cooperative* negotiation are seen in contrast,[93] even though negotiators are encouraged to adjust their approach based on the content, process, and desired outcome,[94] or to adopt a hybrid approach.[95] A hybrid approach reflects greater sophistication in negotiation skill, which law students typically lack.[96] The negotiation theories provide overarching philosophies for negotiation, typically used to describe the negotiation itself, or the style the negotiators adopt. As negotiation research and literature expanded, so too did the ambit of each theory. As such, this area suffers from what Schneider terms 'label confusion',[97] which is particularly problematic for law students in their early studies of legal negotiation.

Law students are typically presented with four negotiation *models, styles* or *approaches*: adversarial or distributive negotiation (founded in competitive negotiation theory), and integrative or problem-solving (founded in cooperative negotiation theory). While these

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91 Spencer, Barry and Akin Ojelabi(n 6) Ch 3; Sourdin, *Alternative Dispute Resolution Sixth Edition* (n 6) Ch 2; Astor and Chinkin, *Dispute Resolution in Australia* (n 6) Ch 4, pt 4; and Boulle and Field (n 6) 221-5. Each of these authors outline the approaches to negotiation (adversarial, distributive, integrative and principled), and identify the positives and negatives of each approach. Astor and Chinkin also categorise the functions of negotiation and an explanation of these functions, combined with their own critique. Astor and Chinkin thereby provide greater analysis/critique of negotiation, and a greater variety of examples.

92 The use of general terminology rather than specific reference to *legal* negotiation minimises the importance of negotiation in the legal environment.

93 See, eg, Gary T Lowenthal, 'A General Theory of Negotiation Process, Strategy and Behaviour' (1982-83) 31(1) *University of Kansas Law Review* 69, 92; Spencer, Barry and Akin Ojelabi, (n 6); Sourdin, *Alternative Dispute Resolution Sixth Edition* (n 6); and Astor and Chinkin, *Dispute Resolution in Australia* (n 6) Ch 4; Boulle and Field (n 6).

94 This distinction is picked up quite clearly by Rosemary Howell, 'How Lawyers Negotiate' (PhD Thesis, University of Technology, Sydney, 2005) 18. Howell further comments that the process component is separated into strategies undertaken to plan the negotiation, and the tactics used to execute these plans: 18.

95 See, eg, Charles B Craver, 'Distributive Negotiation Techniques' in Chris Honeyman and Andrea Kupfer Schneider (eds), *The Negotiator's Desk Reference* (Dri Press, 2017) 75 ('Distributive Negotiation Techniques'). Indeed, a competitive negotiation can be developed into a cooperative approach that focusses on resolution by organising an in-person negotiation: Nadja M Spegel, Bernadette Rogers and Ross P Buckley, *Negotiation Theory and Techniques* (Butterworths, 1998) 36.

96 See, eg, Spegel, Rogers and Buckley (n 95) 35; Lowenthal, 'A General Theory of Negotiation Process, Strategy and Behaviour' (n 93) 112.

97 Schneider, 'Shattering Negotiation Myths' (n 1).

teachings are appropriate for beginners, they lack nuance and fail to acknowledge the variety of elements inherent in legal negotiation, and the related skills. As inexperienced legal negotiators, law students do not recognise these nuances, and instead choose a single negotiation model that matches their personality.[98] This shows a simplistic view of negotiation theory; a view that is deficient because it fails to recognise various dimensions of legal negotiation, including context, content, party-relationships, and ethics. Each of these elements will influence the conduct of the legal negotiation and will create nuance in how the chosen theory is applied in practice. Instead of strictly competitive or cooperative negotiation, the elements – and tactics – of legal negotiation lie on a continuum. Experienced legal negotiators use certain tactics because they fit with the broader strategy rather than because they correspond with a particular theory or style.[99] Below, I explain each theory of negotiation, evaluating the ways in which they apply to *legal* negotiation, and, consequently, what they can contribute to the Taxonomy of Legal Negotiation.

(a) *Competitive Negotiation*

Competitive negotiation is based on the adversarial system, sharing many commonalities with litigation, including the end-goal of 'winning'.[100] It is a zero-sum negotiation, which assumes that each party assigns the same value to negotiation items,[101] and that parties want to win at all costs.[102] This means the relationship between disputing parties often deteriorates,[103] and underlying issues might remain unresolved.[104] While competitive negotiation shares similarities with litigation, it involves a less formal process and a broader range of potential outcomes, with clear recourse to judicial determination if negotiations fail.[105] Negotiations

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98 See, eg, Sourdin, *Alternative Dispute Resolution Sixth Edition* (n 6) 55-8 [2.50] for an example of the quiz-style process of selecting an appropriate negotiation style.

99 See below Chapter Five.

100 David Spencer and Tom Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook, 2005) [3.20] and [3.50] exploring win-lose outcomes; see also discussion in Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (n 63) shadow of the law at: 764, 765-766; 789-790.

101 Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (n 63) 765-765, 787.

102 Ibid 766. See also L Susskind and J Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (Harper Collins, 1987) 182 in Spencer, Barry and Akin Ojelabi (n 6) 91 [3.45].

103 Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (n 63) 783.

104 Ibid 788.

105 Ibid 756-7.

conducted by agents, including legal practitioners, tend to be more competitive because this enables the agents to strictly comply with their client's instructions.[106] Early conceptions of negotiation and dispute resolution took a competitive approach, which is likely why dispute resolution was seen as a *weaker option* to litigation. In reference to defining legal negotiation, competitive negotiation takes a strictly legal, litigation-aligned approach, influenced by, and cemented in, the legal process.[107]

While competitive negotiation is known by various terms,[108] it is most commonly referred to as *adversarial negotiation* or *distributive negotiation*. Although each term is still based on the overarching competitive notions above, there are slight differences. *Adversarial negotiation*, for example, is based on the idea that each party wants to win, and primarily focuses on the premise that negotiations should be conducted as in court, achieving similar awards to those a court could make.[109] *Distributive negotiation* is founded instead on the idea that each party has contrasting, unmoving views on how to share limited items or resources, but that options are still negotiable.[110] These two types of competitive negotiation are frequently referred to in the materials provided to law students in their legal negotiation studies, though it is not always made apparent that each of these classifications of negotiation are drawn from the same negotiation theory.

Competitive negotiation has been cast in a poor light since the increased focus on the problem-solving negotiation.[111] Stereotypically, competitive negotiation limits creativity due to its adversarial and rule-based approach,[112] and is characterised by the use of deceptive

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106 Spegel, Rogers and Buckley (n 95) 34.

107 Williams (n 1) 87.

108 Otherwise known as: 'competitive', 'zero-sum' or 'individualistic': Astor and Chinkin, *Dispute Resolution in Australia* (n 6) 116 note 50; 'distributive': Spencer, Barry and Akin Ojelabi, (n 6) 94 [3.50], value-claiming: David A Lax and James K Sebenius, *3-D Negotiation: Playing the Whole Game* (Harvard Business Review Press, 2003) ('*3-d Negotiation*').

109 Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (n 643) 765-756; 790-791

110 M Antsey, *Negotiating Conflict* (Juta & Co Ltd, 1991) 126 in Spencer, Barry and Akin Ojelabi, (n 6) 94 [3.50]

111 Ibid, particularly focusing on distributive negotiation. See also Jay Folberg et al, *Resolving Disputes: Theory, Practice, and Law* (Aspen Publshers, 2005) 43.

112 Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (n 63) 791-792.

tactics,[113] likely due to the alignment between competitive negotiation and litigation.[114] This is one instance that exemplifies the continuum from competitive to cooperative negotiation. Certain behaviours, such as bullying, or hiding information, are at the more competitive end,[115] but could be employed within either theory. Importantly, such behaviours do have ethical implications, and a legal practitioner must always consider their broader ethical duties under the Rules, as well as, specifically, their duty to the client. There are certain instances in which competitive negotiation might be more beneficial, such as when there is an unsalvageable relationship between parties.[116] Competitive negotiation is best avoided, however, when there are multi-dimensional issues involved, when parties want to explore multiple solutions simultaneously,[117] or when parties wish to have an ongoing relationship.[118]

(b) *Cooperative Negotiation*

Cooperative negotiation places emphasis on the parties themselves, and aspires to create a beneficial outcome for all parties.[119] Cooperative negotiation is known by multiple terms,[120] such as integrative negotiation, principled negotiation, or problem-solving negotiation. This theory assumes that the content of the negotiation can be varied based on parties' needs,[121] through using concessions and trade-offs.[122] This again prioritises the client, with all paths leading back to the client's goals and attempting to resolve these.[123] In contrast to competitive negotiation where client goals are often fixed and opposing, cooperative negotiation employs concessions and trade-offs, allowing parties to personally assign values

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113 Folberg et al (n 112).

114 See below, Chapter Five. See also Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (n 63) 782; R Gordon, 'Private Settlement as Alternative Adjudication: A Rationale for Negotiation Ethics' (1985) 18(2) *University of Michigan Journal of Law Reform* 503, 514.

115 Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (n 63) 778-782; Howard Raiffa, *The Art and Science of Negotiation* (Harvard University Press, 1982) 142.

116 Spegel, Rogers and Buckley (n 95) 36

117 Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (n 63) 777.

118 Ibid 783.

119 See generally James J White, 'Essay Review: The Pros and Cons of "Getting to YES"' (1984) 34(1) *Journal of Legal Education* 115, 115.

120 See, eg, Sourdin, *Alternative Dispute Resolution Sixth Edition* (n 6) 50-1 [2.25]: integrative negotiation, win-win, collaborative, merit-based or problem-solving. See also Astor and Chinkin, *Dispute Resolution in Australia* (n 6) 116; Fisher, Ury and Patton (n 5).

121 Sourdin, *Alternative Dispute Resolution* (n 6) 52-3 [2.35].

122 Spencer, Barry and Akin Ojelabi (n 6) 88 [3.30].

123 Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (n 63).

to each issue, and to negotiate based on the values they have assigned in order to gain a benefit.[124] The process of integrative negotiation requires legal practitioners to work together to determine the parties' interests and aims, and to define key problems. Legal negotiators explore various options that could be mutually beneficial to achieve each party's aims,[125] with the majority of time spent on problem definition and exploration.[126] Cooperative negotiation is particularly beneficial when there are multiple issues involved,[127] since parties can utilise concessions and trade-offs to link the various issues in order to reach a compromise.[128] This encourages joint problem-solving and cooperative behaviour to achieve 'joint gains', but also allows for harder bargaining when developing creative options.[129]

Fisher and Ury first coined the term 'principled negotiation'.[130] Their book, *Getting to Yes*, was written with legal insight but for a lay audience and notes that everyone engages in negotiation daily.[131] Fisher and Ury were amongst the first authors to prioritise the outcome of the negotiation rather than the process or other definitions. This encourages emphasis on developing parties' needs and interests to achieve a mutually beneficial agreement,[132] through the use of four main principles.[133] Their book has been criticised as lacking academic sophistication and presenting negotiation as overly simplistic by implying that the same rules can apply to all negotiations.[134] Despite this, however, Fisher and Ury's book was written at

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124 Spencer and Altobelli (n 100) 6; Raiffa (n 115) 82.

125 Sourdin, *Alternative Dispute Resolution Sixth Edition* (n 6) 52-3 [2.25].

126 Ibid 36.

127 Raiffa (n 115) 131.

128 Ibid 131-132: Raiffa notes that parties negotiating multiple issues can use 'side-by-side joint problem solving' to reach a resolution, for example if one party concedes on a shorter settlement duration if the other party concedes on a higher cost: citing Fisher, Ury and Patton (n 5) 23.

129 Ibid 147.

130 Fisher, Ury and Patton (n 5) 43.

131 Ibid 6.

132 Ibid Ch 2-5; Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 919; Mnookin, Peppet and Tulumello (n 7) 28.

133 See below, Chapter Four.

134 White (n 119) 117: 'it is not a scholarly work on negotiation – not rigorous and analytical, rather it is anecdotal and informative': at 115. Fisher responds to White's comments, noting that *Getting to Yes* was intended to be a generalised book, and that of course negotiations differ: Roger Fisher, 'Beyond YES' (1985) 1(1) *Negotiation Journal* 67, 69. See also Bobette Wolski, 'The Role and Limitations of Fisher and Ury's Model of Interest-Based Negotiation in Mediation' (1994) 5(3) *Australian Dispute Resolution Journal* 210, 215 ('Role and Limitations of Fisher and Ury's Model'); Tessa McKeown, 'Fisher and Ury's *Getting to Yes*: A Critique: The Shortcomings of the Principled Bargaining Model' (Article, 2013) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3054357#references-widget>.

Harvard Law School, with the insight of various legal academics.[135] As such, some of these principles have particular relevance to legal negotiation, including legitimacy: using external criteria such as precedents, legislation or other legal information to give value to the outcome.[136] Legitimacy, along with communication, also relates to the visibility of the negotiation, one of the characteristics posited by Menkel-Meadow as relevant to a definition of legal negotiation.[137] This, particularly, brings a legal connotation to the negotiation. Further legal considerations relate to ethics, such as, for example, how much information the legal practitioner agent is required to disclose,[138] how to respond to questions they would prefer not to answer,[139] and how to best comply with the rules of professional conduct.[140]

Until principled negotiation was introduced into the literature, the concept of problem-solving was missing.[141] Menkel-Meadow considers problem-solving negotiation to be a highly beneficial approach. After critiquing various approaches to legal negotiation, she concludes that while no individual source 'offers its own coherent theory',[142] they were tied together through strong threads of problem-solving, though they then diverged depending on the function of negotiation, such as whether the dispute had already occurred or concerned upcoming contracts or litigation.[143] Her problem-solving theory had various parallels to Fisher and Ury's principled negotiation, but had a more legal emphasis, with a focus on the issues that could be resolved with a legal solution.[144] Problem-solving legal negotiation re-centralises the client, returning the legal practitioner to their primary role of resolving legal problems.[145] In this way, problem-solving negotiation allows legal practitioners or other agents to focus on determining the parties' needs, and attempts to help both parties' meet these needs,[146] through further analysis of their preferences.[147] Sarat and Silbey acknowledge

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135 Fisher, Ury and Patton (n 5) 4 Acknowledgements. This list includes Frank Sander, Lawrence Susskind, David Lax, and James Sebenius.

136 Fisher, Ury, and Patton (n 5) 42.

137 Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 927

138 Mnookin, Peppet and Tulumello (n 7) 276.

139 Ibid 286.

140 Ibid 277.

141 Lowenthal (n 93) 72-73.

142 Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 910.

143 Ibid 908.

144 Ibid.

145 Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (n 63) 841.

146 Ibid 795.

147 Ibid 799.

that Menkel-Meadow's expansion of client needs beyond simply legal needs is important, but argue that her identification of then-current literature as only recognising the client's *legal* needs was an incorrect representation of the literature.[148] These comments raise interesting elements for the Taxonomy of Legal Negotiation, particularly related to context and content. Whilst, arguably, the subject in dispute in most *legal* negotiations is founded in law, parties will likely also have other needs, for example: 'economic, social, psychological, religious, moral and political', in Menkel-Meadow's expanded list.[149] Negotiation is an exceptional way of identifying a solution which addresses all of these needs, which might not be available via judicial determination. In contrast to competitive negotiators, cooperative negotiators – particularly those following the problem-solving approach – are more likely to address the breadth of their client's needs,[150] and thereby take a client-centred approach to client representation.[151]

While the literature often considers negotiation theories as *approaches* to be adopted during a negotiation, legal negotiators must instead determine which negotiation theory is appropriate for each negotiation, based on the parties' reasons for negotiating.[152] It is clear that the negotiation theories do offer some insight for the Taxonomy of Legal Negotiation, by reiterating some of the categories most relevant to such classification. This involves careful consideration of the subject matter to be negotiated, and the nature of the parties and the relationships involved. While thought should be given to legal frameworks and possible outcomes (both within and outside judicial awards), this is merely one consideration amongst many, and is guided by the qualifications and training of the negotiators themselves.

Although the literature refers to competitive negotiation and cooperative negotiation as *negotiation theories*, they are instead more relevant to guiding party and negotiator behaviour during negotiations rather than overarching theories of negotiation that can be specifically

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148 Austin Sarat and Susan Silbey, 'Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Judicial Subject' (1989) 66(3) *Denver Law Journal* 437, 484-6.

149 Carrie Menkel-Meadow, 'Lawyer Negotiations: Theories and Realities – What We Learn from Mediation' (1993) 56(3) *Modern Law Review* 361, 367 ('Lawyer Negotiations: Theories and Realities').

150 Ibid 794.

151 Schneider, 'Shattering Negotiation Myths' (n 1) 148, 197.

152 Carrie Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 922-923. This is echoed by Korobkin who emphasises that the competitive-cooperative distinction does not focus on theory or frameworks or the way in which negotiators could use parties' goals: Korobkin, 'A Positive Theory of Legal Negotiation' (n 4) 1790.

applied to legal negotiation. Consequently, the main application of negotiation theories is during the identification and use of particular skills, and during the consideration of legal negotiation ethics. As such, my analysis of competitive and cooperative negotiation has identified two primary skills related to legal negotiation: preparation and ethics. These are echoed in the LCA Requirements for legal negotiation training and form the basis of my analysis in Chapters Four and Five.

3 *Effectiveness of Legal Negotiators*

The final path of the literature is based on general conceptions that negotiation is conducted by legal practitioners, drawing indirectly on the functions in Part II(C)(1) above,[153] and combining these definitions with negotiation theories. Only two commentators, Williams and Schneider – both from America – explicitly contribute to this path of literature.[154] They are two of the first authors to directly define *legal negotiation*, albeit without specific reference. The definition of *legal negotiation* is implied in their use of this phrase to refer to their study of negotiations carried out by *legal* practitioners. Williams' and Schneider's studies focus on determining legal practitioner negotiators' effectiveness. Through my analysis of these studies, I identify and evaluate key characteristics that contribute to creating the Taxonomy, particularly as relates to legal qualifications.

Both Williams and Schneider sought to determine whether legal negotiators were effective.[155] In 1976, Williams collected data from 1000 practising legal practitioners in Phoenix, who evaluated opposing counsel from their last negotiation. He combined results using three different rating systems to assess whether each lawyer's opposing counsel was a competitive or cooperative negotiator,[156] and whether they were *effective*, *average,* or *ineffective* legal negotiators. His results indicated that even in the late 1970s there was a move towards cooperative (problem-solving) negotiation, with nearly triple the number of

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153 While this accords with Williams' approach, Eisenberg argues that negotiation does not always need to be conducted by lawyers: Eisenberg (n 7).

154 See also, in relation to integration of effective negotiation styles and conflict styles, Hal Abramson, 'Fashioning an Effective Negotiation Style: Choosing Between Good Practices, Tactics, and Tricks' (2018) 23(2) *Harvard Negotiation Law Review* 319.

155 Williams (n 1) 20-40.

156 Participants rated their opposing counsel from 0-5 on each of the 75 adjectives; categorised 43 bipolar adjective pairs from 1-7; and determined which of 12 goals and objectives were achieved. He combined the results from these three ratings to conclude which adjectives and goals were characteristic of each negotiation approach: Williams (n 1) 15-46.

cooperative negotiators compared with competitive negotiators. This is particularly insightful considering the legal field at the time was slow to embrace negotiation (although dispute resolution was introduced earlier in America than in Australia). Williams' data also indicated that cooperative legal negotiators are likely to be more effective than competitive negotiators. His results are summarised in the figure below.

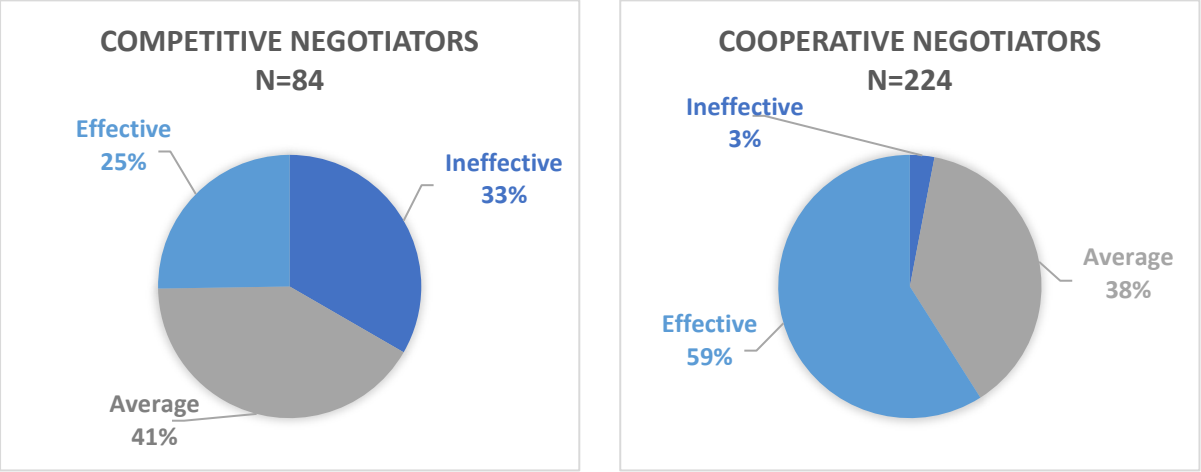

Figure 4: Williams' Comparison Between Cooperative and Competitive Negotiators

In 1999, Schneider replicated Williams' study. She argued that not all legal practitioners would understand the terms *competitive* and *cooperative* in the context of negotiation, as this terminology was more prevalent in the literature in other disciplines, such as the social sciences.[157] In updating Williams' work, Schneider adopted different terminology, to avoid 'label confusion',[158] focusing on the terms *adversarial* and *problem-solving*, which, at the time, were the predominant terms relating to negotiation literature in law.[159] Schneider's results were similar to Williams', in that she found a much higher proportion of legal negotiators were problem-solving negotiators; that adversarial negotiators were much more likely to be regarded as ineffective (a higher percent than in Williams' results); and that problem-solving negotiators were more likely to be effective (slightly lower than Williams' results). Schneider's results are depicted in the figure below.

157 Schneider, 'Shattering Negotiation Myths' (n 1) 152.

158 Ibid 152.

159 Schneider surveyed 1,000 lawyers in Milwaukee and 1,500 in Chicago, resulting in 727 responses: Schneider (n 1) 157-158. She asked participants to self-evaluate their negotiation performance, and to provide information about their training and experience: at 152-153.

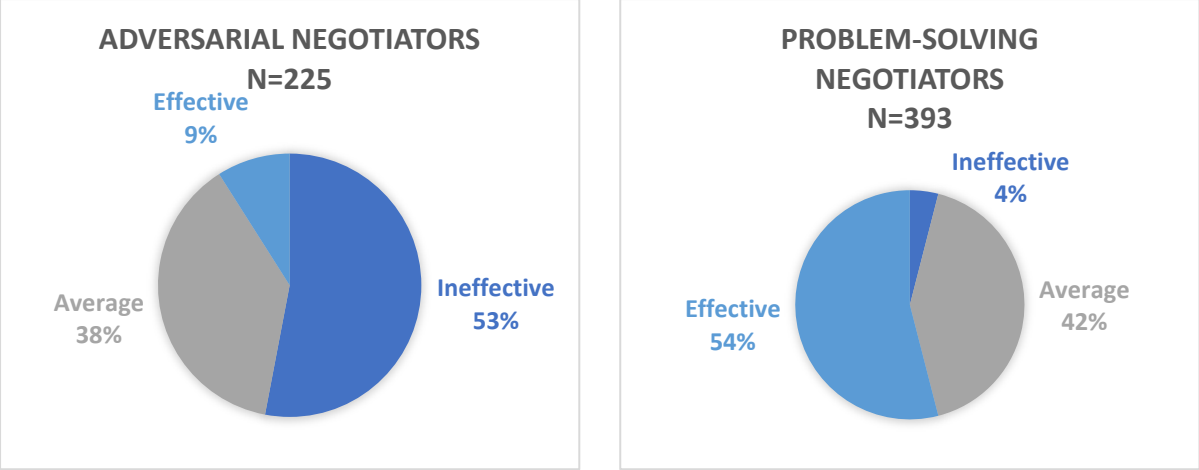

Figure 5: Schneider's Comparison Between Problem-Solving and Adversarial Negotiators

Schneider's more detailed evaluation re-classified her data into a three-cluster analysis, and a four-cluster analysis. In her three-cluster analysis, *problem-solving negotiators* were separated into *true problem-solvers* (36%) and *cautious problem-solvers* (26%),[160] and compared with adversarial negotiators (28%).[161] This moved 50 negotiators from the *adversarial* category to the *problem-solving category*.[162] Schneider identified specific adjectives that described each group, and determined key differences between cautious problem-solvers and true problem-solvers.[163] She found that cautious problem-solvers' goals depict more similarities to those of adversarial negotiators than true problem-solvers, such as 'obtaining a profitable fee and outdoing his [sic] opponent'.[164] True problem-solvers, however, exhibited 'empathy (communicative, accommodating, perceptive, helpful), option creation (adaptable, flexible), personality (agreeable, poised), and preparation (fair-minded, realistic, astute about the law)'.[165] Many of these adjectives are related to *legal* negotiation, rather than other disciplines, as would be expected when analysing legal practitioner participants. In terms of my research, the most relevant of Schneider's results is the four-cluster analysis, in which she maintained the separation of problem-solving negotiators between *true problem-solvers* (38.5%) and *cautious problem-solvers* (27.5%) and separated

160 Cautious problem solvers were described as negotiators who 'are cautious about adopting a completely problem-solving approach to the negotiation': Schneider, 'Shattering Negotiation Myths' (n 1) 171-172.

161 Ibid 171.

162 Schneider noted that this resulted in a 'more extreme and correspondingly even less effective' group of adversarial negotiators: Ibid 176.

163 Ibid 173-4.

164 Ibid174.

165 Ibid 175.

adversarial negotiators into two categories: *ethical* (21.5%) and *unethical* (12.5%).[166] Her results in relation to effectiveness are depicted in the figure below.[167]

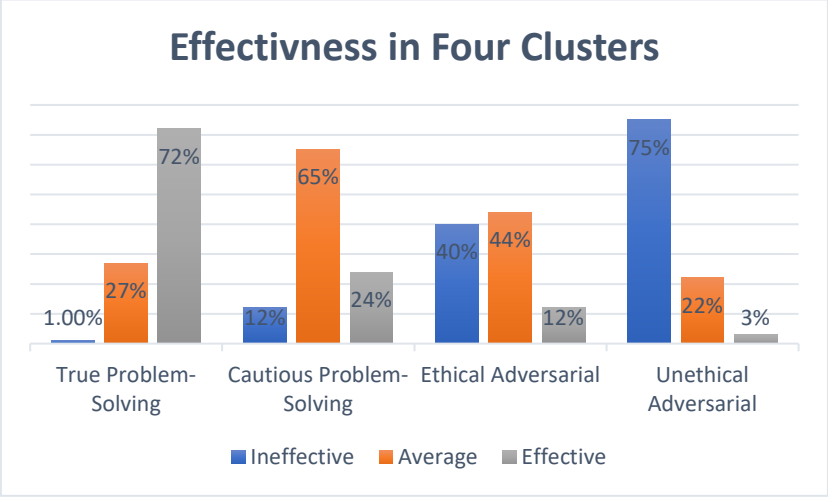

Figure 6: Schneider's Findings: Effectiveness in Four Clusters

Schneider found that the top five adjectives characterising ethical adversarial negotiators indicated no form of negative behaviour.[168] Comparatively, adjectives used to describe unethical adversarial negotiators had strong negative connotations, including 'manipulative', 'conniving', 'greedy', 'rude', 'angry', and 'deceptive'.[169] This reiterates the importance of ethics during legal practice, including during legal negotiation. Another point of note is that the adjective 'experienced' was included in the top five adjectives for each group, except for unethical adversarial negotiators, where it was not present in the top 20 adjectives.[170] This could either indicate that negotiators who adopt an unethical adversarial approach are new to negotiation, and have not yet learned how to best negotiate for their client, or that the negotiators disregarded certain aspects of their training, which may have far-reaching ethical implications. These results were echoed in Schneider's additional, adjective-based, analysis. The top five adjective ratings indicated that unethical adversarial negotiations were: 'not interested in [the opposing] client's needs', 'rigid', 'arrogant', 'unreasonable', and 'single solution'.[171] Also included in the top 20 were 'uncooperative', 'aggressive', 'insincere',

166 Ibid 181.
167 This was adapted from Schneider's table: Ibid 184.
168 Ibid 180-181.
169 Ibid 180-181.
170 Ibid 181.
171 Ibid 182.

'distrustful', 'obstructed' and 'inflicted needless harm'.[172] Schneider noted that adjectives characterising adversarial negotiators did become more negative between the studies.[173] This could indicate that the adversarial approach is losing favour amongst legal practitioners. In terms of defining legal negotiation, this could, in turn, show a move away from favouring a litigation-style approach to negotiation, as seemingly preferred by Eisenberg, instead moving towards a more globally accepted problem-solving approach.

I adapted the terminology from Schneider's four-cluster analysis in constructing my questionnaires. Rather than asking respondents to use adjectives to rate their opposing counsel's negotiation style, however, I asked my participants to use one of the Schneider's four categories to identify their own negotiation style.[174] I also gave them the option of 'other' as a catch-all category, in case they were uncertain of the relevant category, which some respondents used to describe that they chose a combination approach,[175] or if they were unsure.[176] I chose to use Schneider's terminology for my questionnaires due to the prevalence the use of problem solving and adversarial negotiation terminology in the literature, and the fact that the terms are easy to discern. My results are depicted in the pie chart below, and show similarities to Schneider's results, though my participant pool was far smaller.

172 Ibid.

173 Ibid 186.

174 *Pre-Negotiation Questionnaire*, Question 6.

175 Two respondents described a combination of two approaches: 1424PNSF (Responding to Pre-Negotiation Questionnaire, 2014); 1601PN (Responding to Pre-Negotiation Questionnaire, 2016); one was unsure: 1438PNPR (Responding to Pre-Negotiation Questionnaire, 2014) and several described their strategy rather than selecting an approach: 1413PNPR (Responding to Pre-Negotiation Questionnaire, 2014); 1440PNPR (Responding to Pre-Negotiation Questionnaire, 2014); 1445PNPR (Responding to Pre-Negotiation Questionnaire, 2014); 1501PNPR (Responding to Pre-Negotiation Questionnaire, 2015); 1504PNPR (Responding to Pre-Negotiation Questionnaire, 2015); 1509PN (Responding to Pre-Negotiation Questionnaire, 2015); 1602PN (Responding to Pre-Negotiation Questionnaire, 2015).

176 See above Chapter Two for an overview of my precise methodology and associated rationale.

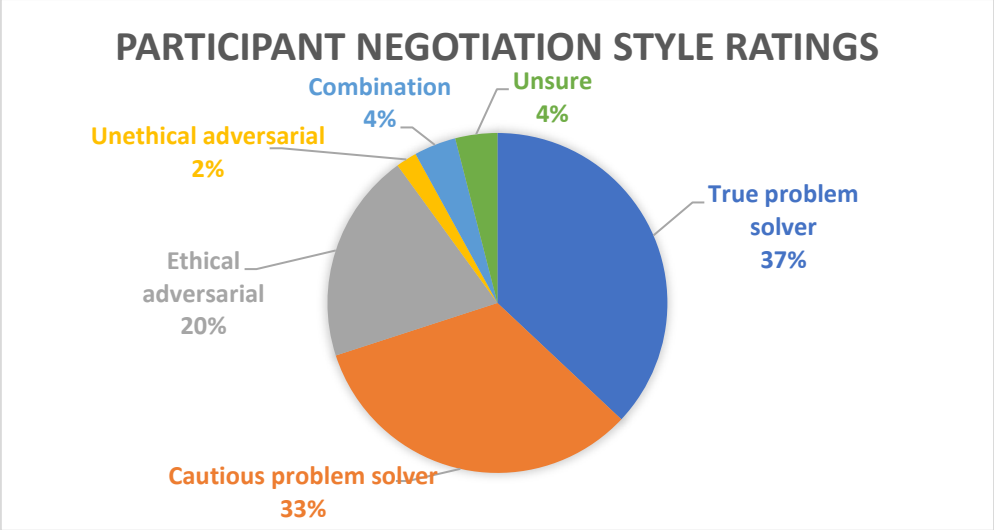

Figure 7: Primary Data Collection: Comparison Between Participants' Self-Reported Negotiation Styles

Similar to Schneider's findings, my results indicate that trends towards problem-solving negotiation are strong amongst Australian law students.[177] These results are surprising, however, given the adversarial focus of the Australian law curriculum. One explanation for this is that Legal Negotiation Competitions tend to attract students who have a strong interest in negotiation, which could easily manifest as a penchant towards problem-solving negotiation.

According to Schneider and Williams' studies, an effective problem-solving negotiator is 'assertive (experienced, realistic, fair, astute, careful, wise) and empathetic (perceptive, communicative, accommodating, agreeable, adaptable)…good (ethical and trustworthy) and offers enjoyable company (personable, social, poised)'.[178] Schneider commented that it is interesting to see that these descriptions remained accurate 23 years after Williams' initial study, and that the early literature had reflected accurate representations of the effectiveness of problem-solving negotiation.[179] This remains true 20 years later, at least amongst law students. Schneider further opines that while legal practitioners recognise the highly effective nature of the problem-solving approach to negotiation, which is characterised by positive

177 It would be beneficial to conduct a study similar to Schneider's in Australia, contrasting the views held by legal practitioners and PLT students about to graduate, to compare how the approach to negotiation may change over time, though such further analysis goes beyond the scope of this thesis.

178 Schneider, 'Shattering Negotiation Myths' (n 1) 185. She further comments that this is similar to the definitions of effective negotiation behaviour explored by Robert Mnookin et al, 'The Tension Between Assertiveness and Empathy' (1996) 12 *Negotiation Journal* 217, cited in Schneider, 'Shattering Negotiation Myths' (n 1) 185.

179 Schneider, 'Shattering Negotiation Myths' (n 1) 185-186.

adjectives, societal perception of lawyers is still negative.[180] It is my contention that centralising the client through the entire process of legal negotiation, particularly legal negotiation preparation, will assist in changing this perception. Although idealistic, perhaps the Taxonomy of Legal Negotiation could improve public perception – at least in relation to legal negotiation – by providing greater insight into how lawyers use problem-solving negotiation to assist their clients in resolving disputes. The first step I have taken towards this is more clearly emphasising client-centrality in all aspects of legal negotiation preparation, as set out in Chapter Four and Chapter Six. This reinforces the importance of the client in accordance with legal negotiation ethics, as set out in Chapter Five.

In terms of defining legal negotiation, the most useful information offered by this path of legal negotiation literature is Schneider's findings about adversarial negotiators. Her classification of adversarial negotiators into *ethical* and *unethical* prioritises the role of ethics in legal negotiation in a way that had not been done before, and relates significantly to the Conduct Rules that govern legal practitioner behaviour. Her findings that the top five adjectives for all classifications *except* unethical adversarial negotiators included 'experienced,'[181] emphasises the link between ethics, qualifications, and experience, and underscores the importance of legal negotiation education. Finally, descriptions of unethical adversarial negotiators included terminology including 'insincere', and 'not interested in my client's needs'.[182] These show an inclination away from client-centred problem-solving lawyering and legal negotiation. Again, this highlights the importance of legal qualifications, ethics, and, by extension, legal education. Schneider raises some strong critiques about her own study, indicating that the term *effectiveness* is left to participant interpretation,[183] and further questioning whether being effective actually meets 'the needs and interests of their client in the negotiation'.[184] She further commented that effectiveness needs to be examined through the use of a definition and studies on client perception, to determine its benefit during a negotiation.[185] Schneider's second critique is particularly important, as often the client can be effectively ignored or discounted during a negotiation conducted by agents (lawyers or other). It is vital that negotiators remember the client they are representing and have a clear

180 Ibid 186.
181 Ibid 181.
182 Ibid 182.
183 Ibid 195.
184 Ibid 196.
185 Ibid 196.

understanding of their authority and instructions. This is one reason for which the minimum competencies set out in Chapter Six prioritise ethics and client-centrality. This will be considered in more depth in Chapters Four and Five, in light of the data collected from law student negotiation competitors.

D Conclusion

Thus far I have evaluated three relevant paths of legal negotiation literature to extract the information that can be used to create a Taxonomy of Legal Negotiation. My analysis shows that while all three paths have a role in shaping legal negotiation, in isolation they are not helpful in determining a specific definition of legal negotiation. Instead, there are several key categories that can be drawn from each of the three paths that warrant inclusion in a Taxonomy. The first constant theme is the relevance of qualifications for legal practitioners representing clients. This is made clear through Williams' analysis of legal negotiation as inextricable from law, and through both Williams' and Schneider's analyses of effective legal negotiators, and further emphasised through the competitive theory of negotiation.

Ethics and accountability are most strongly situated in analyses by Eisenberg, Williams and Schneider. Legal conduct is heavily regulated, and therefore legal practitioners must be aware of their ethical obligations. Schneider, particularly, highlights the importance of ethics, showcasing the negative adjectives associated with unethical legal negotiators. Ethics also encompasses client-centred lawyering; that is, prioritising the client in all components of their matter. Legal practitioners owe an ethical duty to their client, emphasised through the role and function of law, particularly in relation to the legal practitioner's training and accountability. Likewise, some of the strategies associated with competitive theories of negotiation may, indeed, border on unethical. This will be analysed in greater depth in Chapter Five.

There are three further categories that became clear during this analysis First, the legal content and context of legal negotiations. It is often challenging to distinguish a party's legal needs from other relevant needs.[186] Similarly, the relationship between parties may be regulated by law, either in one-off disputes, or disputes between parties who require an ongoing relationship. This is explicitly addressed in the role and function of negotiation, as

[186] Sarat and Silbey (n 148) 484-6.

well as by the negotiation theories. Indeed, there are specific negotiation practices that can assist in either instance. Finally, the consequences or outcome of the negotiation may be explicitly legal. Such consequences or outcomes could have lasting legal ramifications on all parties. This, also, will arguably situate the negotiation firmly within the field of law.

I have therefore identified five categories that emerge from the relevant literature, and that attract specific legal attention. These categories also denote various relevant skills, including preparation (that can address each of the categories, independently or consolidated) and ethics (as a pervasive requirement). After having deduced these five categories, in the next part of this chapter I analyse the utility of a definition of legal negotiation, and its relevance to key stakeholders. In so doing, I evaluate the challenges inherent in an all-encompassing definition of legal negotiation and determine whether any form of definitional guidance would increase clarity in this field, or merely exacerbate the current 'label confusion'.[187]

[187] Schneider, 'Shattering Negotiation Myths' (n 1) 152.

III FINDING VALUE IN A DEFINITION OF LEGAL NEGOTIATION

As dispute resolution processes have gained traction in the legal field, the use of legal negotiation too has increased. Legal practitioners can identify when they are engaging in legal negotiation, although many of them would likely term this *negotiation*, giving only implied reference to the *legal* elements. Despite this, there are key components that classify a negotiation as *legal*. These elements, like the definition itself, seem to be assumed, rather than specifically defined in academic literature or in legal practice. This begs the question: if legal practitioners and academics alike accept that *legal negotiation* is negotiation conducted by legal practitioners, why then does this term require further definition? In this section, I contend that, if legal negotiations can only be carried out by practising lawyers, legal negotiations must therefore constitute legal practice, only be conducted by legal practitioners, and be regulated by legal ethics. This would mean that if the negotiation is carried out by anyone other than a legal practitioner, it cannot be classified as a legal negotiation. Such a definition would provide a clear distinction between legal and non-legal negotiations while aligning with the assumed definitions in the legal negotiation literature. In this part, I critically analyse this argument by considering the parameters of legal negotiation, to determine whether there are any instances in which legal negotiation could be defined to involve legal components, but without the involvement of legal practitioners. Consequently, I further argue that there are key stakeholders beyond practising legal practitioners who would benefit from clarity over what constitutes a legal negotiation. In making these arguments, I consider whether this is a satisfactory definition of legal negotiation, and, indeed, whether an all-encompassing definition could be beneficial, or problematic. Ultimately, I conclude that an all-encompassing definition does present challenges, but that key stakeholders would benefit from guidance as to when a negotiation constitutes a legal negotiation, particularly to maintain clear and stringent legal and ethical regulation of the legal profession.

A The Legal Practice of Legal Negotiation

The literature evaluated above clearly situates legal negotiation in the context of law. In fact, while legal negotiation is not specifically defined in the literature, the concept of legal negotiations as *negotiations conducted by legal practitioners*, appears to have been assumed by all legal negotiation commentators and legal practitioners alike. In this section I consider whether legal negotiation constitutes legal practice, and the consequent ramifications for legal practitioners conducting legal negotiations.

Members of the legal profession are held to very high professional and ethical standards, which are heavily regulated by legislation,[188] and Conduct Rules.[189] This regulation commences during tertiary law study, through the requirements to complete compulsory topics in the Academic Areas and PLT Standards, and the requirement for applicants for admission to legal practice to prove they are a 'fit and proper person to practice law'.[190] The strict regulation continues after a legal practitioner's admission to legal practice, requiring stringent compliance with the Legal Practitioner Legislation and the Conduct Rules. Post-admission, legal practitioners must avoid behaviour that might 'be prejudicial to, or diminish the public confidence in, the administration of justice'[191] or 'bring the profession into disrepute'.[192] They must additionally comply with several fundamental ethical obligations set out in the Conduct Rules, typically summarised as the 'paramount duty to the court and the administration of justice',[193] the ethical obligation to the client,[194] and the ethical obligation

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188 *Legal Profession Act 2006* (ACT); *Legal Profession Uniform Law 2014* (NSW); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (QLD); *Legal Practitioners Act 1981* (SA); *Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2008* (WA). This variety of legislation is in spit of attempts at uniformity. See generally Jane Knowler and Rachel Spencer, 'Unqualified Persons and the Practice of Law' (2014) 16(2) *Flinders Law Journal* 203, 205; Emma Beames, 'Technology-Based Legal Document Generation Services and the Regulation of Legal Practice in Australia' (2017) 42(4) *Alternative Law Journal* 298, 298 and David Robertson, 'An Overview of the Legal Profession Uniform Law' [2015] (Summer) *Bar News: The Journal of the NSW Bar Association* 36.

189 Law Council of Australia, *Australian Solicitor Conduct Rules* (2015) ('*Conduct Rules'*).

190 See above Chapter One.

191 Law Council of Australia, *Conduct Rules* (n 189) r 5.1.1.

192 Ibid r 5.1.2.

193 Ibid r 3.1.

194 Ibid r 4.1.1.

to fellow legal practitioners.[195] These ethical obligations and their specific application to legal negotiation are analysed in Chapter Five.

The strict regulation of legal practitioner behaviour is founded on the legal practitioner engaging in *legal practice*. The definition of *legal practice* varies from jurisdiction to jurisdiction,[196] with respective jurisdictions opting for non-exhaustive examples,[197] specific definitions,[198] or a list of activities that are exempted from definition. The Conduct Rules do not assist in providing a definition of *legal practice*, although they define *legal services* as 'work done, or business transacted, in the ordinary course of legal practice.'[199] Legal negotiation clearly constitutes a *legal service*, as legal negotiations in which a legal practitioner represents a client are clearly 'in the ordinary course of legal practice,' emphasised by the requirement for legal practitioners to 'inform the client…about the alternatives to fully contested adjudication.'[200] This speaks to dispute resolution processes and, therefore, includes legal negotiation. The role of legal negotiation in legal practice, however, has not yet been evaluated.

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195 See, eg, Gino E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2013) '*Lawyers' Professional Responsibility Fifth Edition*'; Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (LexisNexis, 6th ed, 2014); Peter MacFarlane and Ysaiah Ross, *Ethics, Professional Responsibility and Legal Practice* (LexisNexis, 2017).

196 The *Legal Practitioners Act 1981* (SA), for example, has 'the most convoluted definition of and exceptions to legal practice', and 'providing advice about the law or about legal procedure is not expressly included in [the definition]…the implication [in s 21(3a)] being that a person will be practising the profession of the law if such person provides legal advice relating to the law of Australia'. This is followed by a list of 'no fewer than 23 disparate activities that may be performed by certain persons who by doing so will not breach s 21': Knowler and Spencer (n 189) 212. Interestingly, the South Australian Act s 21(2) requires that the person is 'acting for fee or reward', which, in SA only, appears to be a requirement of legal practice. Knowler and Spencer elaborate on this, noting that no case law has interpreted this wording, and also hypothesising that law students could prepare legal documents or even provide legal advice for free, without holding themselves out as qualified lawyers, without breaching the legislation, though they quickly conclude that 'the legal profession would attempt to have [this] stopped without further ado': at 216-217.

197 For example, in the ACT and SA, although these lists are not identical: see commentary by Beames (n 189) 298.

198 *Legal Profession Act 2008* (WA).

199 Law Council of Australia, *Conduct Rules* (n 189); *NADRAC Dispute Resolution Terms* (n 28) definition of 'legal practice'.

200 Law Council of Australia, *Conduct Rules* (n 189) r 7.2.

While the failure to define *legal practice* uniformly at Commonwealth level was a 'missed opportunity',[201] the Victorian Supreme Court in *Cornall v Nagle* ('*Cornall*') did provide some judicial guidance, although the judgment focussed on protecting the public from legal advice given by 'the untrained and the unqualified'.[202] Justice Phillips created a three-limb test ('the Cornall Test') to determine when someone was engaged in legal practice:

> [A] person who is neither admitted to practise nor enrolled as a barrister and solicitor may "act or practise as a solicitor" in any of the following ways:
> (1) by doing something which, though not required to be done exclusively by a solicitor, is usually done by a solicitor and by doing it in such a way as to justify the reasonable inference that the person doing it is a solicitor…
> (2) by doing something that is positively proscribed by the Act or by Rules of Court unless done by a duly qualified legal practitioner…
> (3) by doing something which, in order that the public may be adequately protected, is required to be done only by those who have the necessary training and expertise in the law. For present purposes, it is unnecessary to go beyond the example of the giving of legal advice as part of a course of conduct and for reward.[203]

In creating this test, Phillips J also drew on the principle addressed by Potter J in the Queen's Bench Division of the English High Court:

> …An unqualified person does not "act as a solicitor" within the meaning of s25(1) [of the Solicitors Act 1974] merely by doing acts of a kind commonly done by solicitors. To fall within that phrase, the act in question must be an act which it is lawful only for a qualified solicitor to do and/or any other act in relation to which the unqualified person purports to act as a solicitor…[204]

The question, therefore, is whether legal negotiation meets any of these legal tests.

There are two primary considerations related to the first limb of the Cornall Test. First of all, is legal negotiation usually carried out by a legal practitioner? Despite some authors referring simply to *negotiation*, the literature above concludes that legal negotiations *are* conducted by

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201 Knowler and Spencer (n 188) 206-207 quoting Francesca Bartlett and Robert Burrell, 'Understanding the 'Safe Harbour': The Prohibition on Engaging in Legal Practice and its Application to Patent and Trade Marks Attorneys in Australia' (2013) 23(4) *Australian Intellectual Property Journal* 74, 76.

202 *Cornall v Nagle* [1995] 2 VR 188, 210 (*'Cornall'*). The concept of '[p]roper administration of justice and the protection of the public' is echoed in the Legal Practitioner Legislation in all states and territories, and in Chapter 2 of the Legal Profession National Law, but not in SA's legislation: Knowler and Spencer (n 188) 218.

203 *Cornall* (n 203) 211 (Phillips J).

204 Ibid quoting *Piper Double Glazing Ltd v DC Contracts (1992) Ltd* [1994] 1 All ER 177, 183 (Potter J) ('*Piper Double Glazing*').

a legal practitioner. This aligns with the elements I drew from the literature, particularly the focus on qualifications, representation, and ethics. While a non-lawyer agent could conduct a negotiation that addresses legal issues and legal consequences, if the non-lawyer agent represents a client in a negotiation that has legal issues and resultant legal consequences at its core, it could be reasonably inferred that this person is holding themselves out as a legal practitioner. If the non-lawyer agent is not a practising legal practitioner but is holding themselves out as such, this is a punishable offence.[205] Such conduct meets the second part of the first limb of the Cornall Test, in that the legal practitioner is carrying out legal negotiation 'in such a way as to justify the reasonable inference that the person doing it is a solicitor'.[206] There would be an exception, however, if the non-lawyer agent explicitly tells their client that they are not acting as a legal practitioner. This reflects the need for clarity about what constitutes legal negotiation, for example, a negotiation that has legal matters and consequences at its core but does not involve a legal practitioner representing a client. This could still constitute legal negotiation, but would not attract legal ethics, regulation, or sanction.

In relation to the second limb of the Cornall Test, legal negotiation is not specifically identified as an action required to be undertaken by a legal practitioner according to the Legal Profession Legislation. Indeed, even the South Australian legislation with its extremely comprehensive list of exclusions provides that an unqualified person may 'represen[t] a party to proceedings in a court or tribunal for fee or reward, if the person is authorised by or under the Act by which the court or tribunal is constituted, or any other Act, to do so'.[207] If the unqualified person is also an employee/officer of an association they may represent 'the association or any of its members in proceedings brought pursuant to an Act relating to industrial conciliation or arbitration'.[208] Under this limb of the *Cornall* test, the definition of legal negotiation will be determined by the qualifications of the agent or representative conducting the legal negotiation. If this is a legal practitioner, the legal negotiation will constitute legal practice. Otherwise, unless the unqualified person is holding themselves out

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205 *Legal Profession Act 2006* (ACT) s 16; *Legal Profession Uniform Law 2014* (NSW) pt 2.1; *Legal Profession Act 2006* (NT) s 18; *Legal Profession Act 2007* (QLD) s 24; *Legal Practitioners Act 1981* (SA) s 21; *Legal Profession Act 2007* (Tas) s 13; *Legal Profession Uniform Law Application Act 2014* (Vic) pt 2.1; *Legal Profession (Admission) Rules 2009* (WA) s 12.

206 *Cornall* (n 203) 211.

207 *Legal Practitioners Act 1981* (SA) 21(3)(g).

208 Ibid 21(3)(i)

as a legal practitioner, the legal negotiation will not constitute legal practice. This, again, speaks to the requirement for a multi-level definition of legal negotiation.

The third limb of the *Cornall* Test clearly outlines that only legal practitioners, with 'the necessary training and expertise in the law' can give legal advice, in order to protect the public. Justice Phillips did not consider examples beyond providing legal advice, as these were not relevant in *Cornall.* If a legal practitioner is briefed to represent a client in a legal negotiation, this likely includes giving legal advice – in fact, it may be difficult to separate the specific provision of legal advice from the preparation for the legal negotiation. It is likely that, under this limb of the test, legal negotiation will constitute legal practice. The exception would be if someone was representing a client during a legal negotiation *without* providing legal advice. This would not meet the requirements of legal practice, but would be a very specific scenario whereby the client gave strict and comprehensive instructions and did not require advice about any component of the legal negotiation or any consequent action. It is unlikely that a legal practitioner could often meet this exception, however, since the provision of legal advice is inherent in the representation of clients.

Finally, to address the English High Court test on which Phillips J based his analysis, originally held by Potter J in *Piper Double Glazing Ltd v DC Contracts (1992) Ltd*,[209] it is necessary to consider whether legal negotiation is 'an act which it is lawful only for a qualified solicitor to do'.[210] The answer to this question lies at the centre of a definition of legal negotiation. To start with a broad analysis, it is clear that, to conduct a negotiation, one does not require any legal qualifications. This is so even if the negotiation subject matter or the potential consequences are based on legal principles. Therefore an 'unqualified' person will not be engaging in legal practice simply by conducting a negotiation, either as an agent or on their own behalf. The consideration of legal negotiation narrows the scope of this inquiry. If a legal negotiation attains its classification as *legal* simply by virtue of being conducted by legal practitioners, then legal negotiation is a process that can only be conducted by a practising legal practitioner. In this sense, legal negotiation fits squarely within the bounds of legal practice, when conducted by a qualified legal practitioner who is relying on specific legal principles.

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209 *Piper Double Glazing* (n 204) 183 (Potter J) quoted in *Cornall* (n 203) 211 (Phillips J).

210 *Cornall* (n 203) 211 (Phillips J).

There is still some ambiguity in the evaluation of whether *legal negotiation* meets the definition of *legal practice*. The natural rhythm of this analysis constantly returns to the differentiation of *negotiation* and *legal negotiation*, and whether one must be a practising legal practitioner to engage in a negotiation that deals with legal content and/or consequences. These nuances support the argument for a definition of legal negotiation, particularly one that could articulate different levels of legal negotiation. This could show, for example, that qualified legal practitioners who are undertaking negotiations that address legal content, driven by legal principles, culminating in legal outcomes, are engaging in legal practice regulated by the Legal Practitioner Legislation and the Conduct Rules. Other people who engage in a negotiation with legal content or legal consequences could still be engaging in a lower level of legal negotiation. Due to their lack of legal qualifications, however, they would not be held to such stringent ethical regulation or sanction. To this end, it is key for all agents to clearly explain their qualifications to their clients prior to being engaged. The distinctions identified throughout this section support the need for further clarification about legal negotiation. That said, these distinctions show that perhaps a specific definition might not be the best solution given the melange of exceptions and stipulations that are starting to appear through my analysis.

B Key Stakeholders

There are several key stakeholders that could benefit from a definition of legal negotiation. This includes practising and non-practising legal practitioners; legal educators and their law students; disputing parties; and organisations responsible for drafting legislation, regulations, government policy, and other relevant documentation. In this section I consider the utility of a definition of legal negotiation from each stakeholder's perspective, concluding that legal negotiation could be defined in a way that is relevant to each group, though an all-encompassing definition would include so many provisos that it would be rendered futile.

1 *Practising Legal Practitioners*

Based on the above discussion, it is clear that any practising legal practitioner, who has been engaged to conduct legal work, including representing their client in legal negotiation, is conducting a legal negotiation in the course of legal practice. While this is likely the assumed definition of legal negotiation that has been accepted in legal practice, it does warrant explicit clarification. Legal practitioners need to be aware of when they are, and are not, engaging in legal practice – that is, is a legal practitioner still engaging in legal negotiation if some of the elements I identified from the literature (eg representation, context, outcome) are not present? If a legal practitioner is self-represented in negotiations to set up a phone contract, resulting in a legal agreement, they are using their legal skills, knowledge, and qualifications, though they are not representing a client's interests, merely their own? Alternatively, consider a legal practitioner who is negotiating the purchase of a car for their adult child. This, too, is a legal matter resulting in a legal agreement, and the legal practitioner will again be drawing on their skills, knowledge, and qualifications. This time, they are acting as an agent for their adult child, though not for payment. Arguably, the person in these hypotheticals is not engaged as a legal practitioner at the time of these legal negotiations, so their conduct does not attract the same stringent regulation. Consequently, based on my analysis, these examples likely would not constitute legal negotiation. Even if they *do* constitute legal negotiation in the course of the legal practitioner's legal practice, this behaviour is unlikely to be enforced by regulatory bodies since it is unlikely to constitute an action against which the public need to be protected. While these are trifling points, they do necessitate consideration.

2 *Non-Practising Legal Practitioners*

More problematic here is the role of non-practising legal practitioners. *Prima facie*, non-practising legal practitioners do not practice law and consequently are not currently engaged in legal practice. Of those law students who complete Practical Legal Training, not all will be admitted to legal practice, even though they hold the qualifications necessary to meet the admission requirements. The diversity of employment that someone with legal qualifications can obtain reflects the complex and varied skillset acquired by law students, which can be

applied in many professions.[211] Negotiation is a fundamental component of this skillset.[212] Three categories of people with legal qualifications but who are not currently practising require consideration: someone with all the necessary legal qualifications but who was not admitted to legal practice and therefore does not have a Practising Certificate; someone with a current Practising Certificate but who is not currently working as a legal practitioner; and someone with a lapsed Practising Certificate.

If the definition of legal negotiation is confined to those negotiations in which a legal practitioner is representing a client in a negotiation, then having a specific definition will provide little value. If, however, legal negotiation is defined more broadly to include other considerations, such as the presence of legal issues and legal consequences, then a definition could be used to delineate instances in which legal negotiation constitutes legal practice, and thus when legal ethical duties are enforceable.[213] This is particularly relevant to persons who have a law degree, without a Practising Certificate, or for those whose Practising Certificate has lapsed. Under the relevant legislation, such people are classed as 'unqualified',[214] a category which specifically includes: someone who has never studied law; a current law student; someone with a law degree but without Practical Legal Training; someone with both a law degree and Practical Legal Training who does not have a Practising Certificate; or someone whose Practising Certificate has lapsed. If legal negotiations *only* occur when a legal practitioner is representing a client in a negotiation, then it is impossible for an unqualified person to ever engage in legal negotiation, unless they are holding themselves out to be a legal practitioner. In this instance, legal negotiation is 'required to be done exclusively by a solicitor' and is 'usually done by a solicitor', meeting the Cornall Test. In contrast, if legal negotiations are so classified due to the presence of legal issues, they are not required to involve a legal practitioner. In this second example, a person with full legal qualifications, but no Practising Certificate, is not practising law if they engage in a legal negotiation, and

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211 See, eg, Angela Melville, 'It Is the Worst Time in Living History to be a Law Graduate: or Is It? Does Australia Have too Many Law Graduates?' (2017) 51(2) *The Law Teacher* 203; Michael McNamara, 'University Legal Education and the Supply of Law Graduates: A Fresh Look at a Longstanding Issue' (2019) 20(2) *Flinders Law Journal* 223.

212 See, eg, *FLIP Report* (n 40).

213 See below Chapter Five.

214 *Legal Profession Act 2006* (ACT) s 16; *Legal Profession Uniform Law 2014* (NSW) pt 2.1; *Legal Profession Act 2006* (NT) s 18; *Legal Profession Act 2007* (QLD) s 24; *Legal Practitioners Act 1981* (SA) s 21; *Legal Profession Act 2007* (Tas) s 13; *Legal Profession Uniform Law Application Act 2014* (Vic) pt 2.1; *Legal Profession (Admission) Rules 2009* (WA) s 12.

disciplinary action will only be taken against them if they are illegally holding themselves out as a legal practitioner.[215] This adds another layer of distinction to a definition of legal negotiation, which requires both qualifications, and a current practising certificate.

Consideration must also be given to someone who has a current Practising Certificate but is not currently practising as a legal practitioner. This could include law graduates who have recently been admitted to legal practice and are seeking employment; more experienced legal practitioners who are between jobs; or even a legal practitioner who has decided to leave or retire from legal practice but whose Practising Certificate has not yet expired. The distinction here is that the legal practitioner holds a *valid* Practising Certificate, so is entitled to engage in legal practice, even if they are not doing so. That said, on the arguments presented above, unless the legal practitioner is representing a client in a legal negotiation, they are not engaging in legal negotiation. Problems would arise, however, if someone with a Practising Certificate had a dual qualification in another professional field such as accounting and was representing their client as a business agent in negotiations concerning legal content and legal consequences. The agent would need to be very careful in how they were holding themselves out, both to the client, opposing negotiators/clients, and the world at large. This scenario would present an interesting argument in relation to the third limb of the Cornall Test, which requires that the person is acting as a legal practitioner 'by doing something that, in order that the public may be adequately protected, is required to be done only by those who have the necessary training and expertise in the law.'[216] The agent would need to carefully construct any contracts or engagement documentation, and ensure they are not providing legal advice to the client. If the agent does provide legal advice and does engage in legal negotiation as a legal practitioner representing their client, they will attract the stringent legal and ethical regulation enforced under the Legal Practitioner Legislation. While this final example is slightly less common than the others, these are the scenarios that a definition of legal negotiation should be designed to pre-empt. Addressing all of these nuances would make an all-encompassing definition less beneficial, but would support a broader Taxonomy that classifies various categories of legal negotiation. Such distinctions could also be referenced in codes of ethical and professional conduct, such as the Conduct Rules.[217]

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215 Further discussion related to holding oneself out as a legal practitioner is beyond the scope of this thesis.

216 *Cornall* (n 203) 211 (Phillips J).

217 The role of legal negotiation ethics is further analysed below in Chapter Five, in which I add my voice to the calls for a Code of Ethics specific to the legal negotiation and/or dispute resolution environment.

3 *Legal Educators and Law Students*

A clear definition (or taxonomy) of legal negotiation, along with associated ethical guidelines, would prove beneficial for those teaching legal negotiation. Often, negotiation topics are included in various disciplines, with some even taught as interdisciplinary topics. For such topics, and for law degree accreditation, a definition or Taxonomy of Legal Negotiation would provide clear guidance. This guidance would be particularly beneficial in outlining the parameters of *legal* negotiation, ensuring that, at the very least, law students are aware of the ethical consequences of conducting a legal negotiation (with the implication that the negotiator is holding themselves out as a legal practitioner). It is very likely that a non-lawyer negotiator could be involved in a negotiation relating to legal issues or legal outcomes in various disciplines. While these negotiators might not have legal training, such negotiations could still be considered legal negotiations if a definition of legal negotiation is limited to the presence of only one legal component.

Throughout their studies, law students grapple with difficult content. Ethics, particularly, can be challenging, as students come to terms with the way in which ethics applies to law. Legal negotiation ethics is a subset of legal ethics, although little is written about this in Australia.[218] Consequently, it is unlikely to form a key part of legal education. There have been various critiques that highlight the problems inherent in directly applying the Conduct Rules,[219] which were created to regulate legal practitioner behaviour in the course of preparing a matter for litigation and the litigation process itself, to the legal negotiation environment. Although the application of litigation ethics to typical legal dispute resolution processes that utilise a third-party decision maker or facilitator still requires some interpretation of the Conduct Rules, the application of the Conduct Rules to the legal negotiation environment, which does not rely on third-party involvement, is impractical.[220] While a definition of legal negotiation will not eliminate the need for a dispute resolution and legal negotiation-specific Code of Ethics, it takes the first step in the process by identifying the key components of *legal* negotiation.

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218 See generally Mark J Rankin, 'Legal Ethics in the Negotiation Environment: A Synopsis' (2016) 18 *Flinders Law Journal* 77 ('Legal Ethics in the Negotiation Environment'); Lakhani, 'Deception Legal Negotiation Thesis' (n 4); Mirko Bagaric and Penny Dimopoulos, 'Legal Ethics is (Just) Normal Ethics; Towards a Coherent System of Legal Ethics' (2003) 3(2) *Queensland University of Technology Law and Justice Journal* 367.

219 See, eg, Rankin, 'Legal Ethics in the Negotiation Environment' (n 218).

220 See below Chapter Five.

Understanding the boundaries of legal negotiation is a necessary component of legal education, and would allow law students (and legal educators) to focus on skill development and would assist law students in understanding the skillset required in legal practice. Legal negotiation skills clearly include certain legal knowledge and skills that are different to other legal processes, such as litigation. Appreciating the difference between legal and non-legal negotiations, and the way in which these definitions align with any ethical or legal responsibilities in legal practice, is imperative. This is particularly so when a law student concludes their study of the Academic Areas and must decide whether to progress their studies with Practical Legal Training, or when students make decisions about applying for admission.

A definition of legal negotiation would also help the co-curricular development of legal negotiation skills. As is clear from Chapter Two, all Australian Law Schools have an LSA that runs legal competitions, including the Legal Negotiation Competition. The matters for negotiation in these competitions almost always concern, at a minimum, legal issues. The resolution of some matters will have legal implications, but others may relate more to business, ongoing relationships, or ethics. These competitions are intended to prepare law students for the negotiations encountered in legal practice. Competition negotiations therefore constitute *legal* negotiation, although typically the word *legal* does not appear in the competition title, nor description. As such, LSAs and law students may not appreciate that these negotiations are situated in law, and run parallel to their legal education. Guidance on the parameters of legal negotiation will allow more specific legal negotiation training and will therefore strengthen the quality of the legal negotiation skills with which students graduate. It will also enable judges of the Legal Negotiation Competition to provide direction and feedback to law student competitors as to how to meet professional, legal, and ethical requirements inherent in legal negotiations; therefore, providing invaluable training for their later professional lives.

4 *Disputing Parties*

Although disputing parties are the central point of every dispute and legal matter, they are often unsure as to where to turn for assistance in resolving their disputes. NADRAC has provided advice on this by creating *Your Guide to Dispute Resolution* ('Guide'), a document that guides disputants as to the type of dispute resolution that might best suit their needs.[221] This Guide is framed in terms of how to best access the justice system. Indeed, the Attorney General's introduction clearly distinguishes between alternative dispute resolution and court-based dispute resolution, and is pitched at parties who are searching for assistance with disputes that centre around a legal issue, and potentially require the use of a dispute resolution process.[222] The Guide outlines various considerations about negotiation,[223] amongst other dispute resolution processes, and provides readers with advice about direct and supported negotiation. It would be beneficial for such publicly available documents to include a definition of legal negotiation, and advice on when to seek legal counsel. This would allow parties to identify where their dispute is situated in the legal sphere, and to be clear on which processes might best assist them in resolving the dispute to best meet their needs.[224] This would further ensure that parties understand any negotiation-based, legal, or ethical obligations that are imposed either on themselves, or their representatives/agents.[225]

Further, legislation mandating the use of dispute resolution processes in specific types of matters often requires the use of good faith, and/or that *genuine steps* be taken throughout dispute resolution.[226] *Good faith* has attracted a considerable amount of judicial and academic commentary, although it still remains an elusive concept that is significantly content-dependent.[227] *Good faith* has long been considered part of negotiation and dispute

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221 National Alternative Dispute Resolution Advisory Council, 'Your Guide to Dispute Resolution' *Alternative Dispute Resolution* (Web Page, 2012) < https://www.ag.gov.au/legal-system/alternative-dispute-resolution> .

222 Ibid 2 (The Honourable Nicola Roxon MP).

223 Ibid 13 [3.2].

224 Carrie Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (n 63) 842.

225 See, eg, *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys* [2012] FCA 282 (23 March 2012) ('*Superior IP*'); *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys* (No 2) [2012] FCA 977 (6 September 2012) ('*Superior IP (No 2)*').

226 See, eg, *Civil Dispute Resolution Act 2011* (Cth); *Family Law Act 1975* (Cth).

227 See, eg, discussion in *United Group Rail Services Ltd v Rail Corporation of New South Wales* [2009] NSWCA 177, [70]-[77]; see also Harry Orr Hobbs, 'The Dispute Resolution Act 2011 (Cth) and the Meaning of "Genuine Steps": Formalising the Common Law Requirement of 'Good Faith' (2012) 23(4) *Australasian Dispute Resolution Journal* 249.

resolution,[228] but the phrase was not included in the *Civil Dispute Resolution Act 2011* (Cth) to avoid parties feeling pressured to settle.[229] Regardless, concepts of *good faith* have clearly been embedded in the legislative definition of *genuine steps*,[230] requiring that 'steps taken by the person in relation to the dispute constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute.'[231] The legislation provides a non-exhaustive list exemplifying *genuine steps*, but *genuine steps* has not been judicially advanced, other than in judgments that emphasise the interconnection of *good faith* and *genuine steps*.[232] As such, compliance with *genuine steps* provisions clearly requires more than mere attendance.[233] The lack of further judicial interpretation on this point perhaps indicates that most attempts to comply with *genuine steps* are being accepted by courts, although greater explanation surrounding the definitions of *genuine steps* and *good faith* relating to legal negotiations at federal level is necessary to increase the equity of the process. While this elucidation is distinct from defining legal negotiation, it would assist in increasing the visibility and clarity of legal negotiation.

5 *Organisations Responsible for Drafting Legislation, Regulations, Policy*

Finally, a definition of legal negotiation would prove useful for organisations responsible for drafting legislation, policy, and other legal documents. Since legal negotiation forms the basis of all legal dispute resolution processes, it is implicitly – if not explicitly – included in all legislation that requires parties to undergo dispute resolution. A definition would allow greater clarity for parliamentary drafters in determining when legal negotiation might be relevant, the professions that can represent parties, and any associated ramifications. The corresponding government agencies that engage in the legal negotiation, or provide guidelines or regulations to enforce the legislation, would also benefit. Although analysis of this category of stakeholders does not provide further insight into what a definition of legal negotiation could include, it does bring to the fore various considerations of how a definition could be used. A prime example of this is potential use by government organisations. Such

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228 See, eg, *United Group Rail Services Ltd v Rail Corporation of New South Wales* [2009] NSWCA 177, [70]; *Western Australia v Taylor* (1996) 134 FLR 211, 216, 218-19; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, 255 ('*Aiton Australia*').

229 For commentary on this point see Hobbs (n 227) 251.

230 Hobbs (n 227) 249.

231 *Civil Dispute Resolution Act 2011* (Cth) s 4(1).

232 *CQMS Pty Ltd v Braken Resources Pty Ltd* [2016] FCA 287, 82 For example, threatening infringement proceedings could constitute *genuine steps*, but this can still be done in *good faith* [184].

233 *Aiton Australia* (n 228) 257.

organisations often conduct negotiations concerning legal matters, and have employees who are legally trained, either working in a legal or non-legal capacity. A definition would be useful in delineating between these employees and outlining their responsibilities. Further, government departments responsible for drafting policy or other documents that encompass various forms of negotiation could use a definition of legal negotiation to delineate between parties' negotiation options.

A definition of legal negotiation would be beneficial to certain stakeholders, to provide specific guidance and clarity about what constitutes a legal negotiation, and the associated legal and ethical regulations. My evaluation has shown that there are various components that can classify a negotiation as *legal*, such as the content and consequences, and the qualifications of any representatives. Only one of these will meet the definition of legal practice: a legal practitioner with a current Practising Certificate, representing a client with one or more legal issues, which attract legal outcomes or consequences. In line with the early literature investigating legal practitioner effectiveness, this should constitute a central definition of legal negotiation. In the section below, I examine this central definition, and consider the challenges inherent in an all-encompassing definition.

C The Challenges of an All-Encompassing Definition of Legal Negotiation

When deciding that 'a call for a general theory on legal negotiation [was] premature' in 1983,[234] Menkel-Meadow did provide insight for a starting point: the search for a definition must begin with a 'conception of purpose', emphasising that the main role of lawyers 'is to solve clients' problems.'[235] She further highlighted that legal negotiation needs to addresses different goals and aims for each client, depending on the issue requiring resolution.[236]

As identified above, legal practitioners and academics alike have accepted that legal negotiations are those conducted by a legal practitioner with a current Practising Certificate, representing a client with one or more legal issues, which attract legal (and potentially non-legal) outcomes or consequences, and are regulated through legal and ethical rules of

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234 Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 928.

235 Ibid 922.

236 Menkel-Meadow further questions whether there could be a 'standard or set of criteria by which to measure the outcome of negotiations': Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 922. While this is still a relevant and important consideration, it falls beyond the scope of my research.

professional conduct and sanctioned through the Legal Practitioner Legislation. After a detailed analysis of the literature, it is clear that this definition sits at the centre of legal negotiation, which I term the *central* definition of legal negotiation. This definition fails, however, to capture the nuances of the other key elements of legal negotiation. The list of considerations relevant to a definition of legal negotiation that Menkel-Meadow proposed can be summarised as follows:

> [o]rientations to negotiation, including both the goals and the behaviour repertories of the negotiators: subject matter; content of the issues; voluntariness; visibility; relationship; accountability; stake; routineness; power; personal characteristics; medium of negotiation; [and] alternative[s] to negotiation.[237]

My evaluation and synthesis of the relevant literature has reduced this list to five main categories that could render a negotiation *legal*: *parties and relationships*, c*ontent and context*, *consequence and outcomes*, *ethics and accountability*, and *qualifications and representation*. These encompass many of Menkel-Meadow's considerations and other components that I drew from the literature. It has become clear that having one central definition of legal negotiation would add little value to this body of literature. A Taxonomy of Legal Negotiation, however, which identifies various categories relevant to the classification of legal negotiation and the relevant ethical and legal regulation, would be highly beneficial, as it would allow greater consideration of the nuances identified above. In the final part of this chapter, I propose a Taxonomy of Legal Negotiation, analysing each of the categories identified above and their intersection.

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[237] Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 927-928 citing Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (n 63) n 53.

IV A Taxonomy of Legal Negotiation

There is undoubtedly a central definition of legal negotiation that has been adopted by legal scholars and legal practitioners alike. This has been present since the early literature relating to legal negotiation and is reiterated through both my analysis of the positioning of legal negotiation in the legal sphere and my finding that legal negotiation meets the judicial definitions of legal practice. This accepted definition turns on the concept that a client is represented by a legal practitioner, who has legal qualifications. Through critical analysis of the literature, however, I have identified four additional categories that could be used to class a negotiation as *legal*. This culminates in a list of five key components:

1. Parties and Relationships
2. Content and Context
3. Consequences and Outcome
4. Ethics and Accountability
5. Qualifications and Representation

I propose that a Taxonomy of Legal Negotiation can be used to classify a negotiation as legal or non-legal. The use of a Taxonomy rather than a specific definition captures greater nuance, and therefore assists in identifying a negotiation that includes legal components, in comparison to a legal negotiation that requires stringent regulation. In order to construct this Taxonomy, it is first worth considering a Continuum of Legal Negotiation ('Continuum'). This Continuum (depicted in Figure 8) reflects five types of legal negotiation.

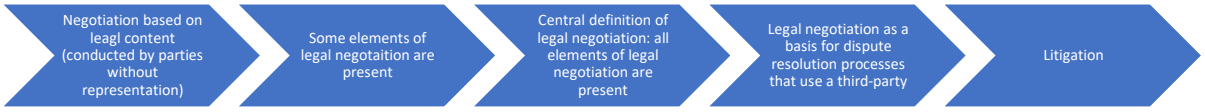

Figure 8: Continuum of Legal Negotiation

The first stage of the Continuum reflects party-run legal negotiations, which are *legal* only in the sense that a legal issue is at the core of the negotiation. For example, a neighbourhood fencing dispute, concerning who should pay for the construction of a new fence between two properties. This is typically remedied through self-help, the resolution of a matter without recourse to more formal legal processes or dispute resolution. The second stage involves more elements of legal negotiation, but not all five. For example, legal content is being negotiated, which will result in legal outcomes or consequences; there is potentially a legal

relationship between parties (contractual or otherwise); and parties might be self-represented or represented by an agent (unqualified person), who may be held accountable by the ethics of a regulatory body. However, the lack of legal practitioner representation dilutes the true *legal* nature of the legal negotiation, due to the absence of stringent legal and ethical regulation attached to the legal profession. The third stage requires legal aspects to be incorporated in all five elements, with emphasis on legal practitioner representation and the consequent legal and ethical regulation and accountability. This meets the central definition of legal negotiation. The fourth stage highlights legal negotiation as the basis of other legal dispute resolution processes. This fourth stage presents challenges to classification under the Taxonomy, as there may be instances in which parties self-represent during these proceedings. If, however, the proceedings are serious, it is likely that the parties will have at least sought legal advice prior to attending dispute resolution. The fifth and final stage, litigation, is the culmination of the previous stages and again intersects all five components. The distinction between stages three and five, however, is the formal requirement of a third-party facilitator or decision maker, in dispute resolution or litigation. Litigation is based on the application of legal principles and creation of legal arguments, guided by strict processes and rules, resulting in specific types of judicial award. Stage three legal negotiations are much more flexible and can result in a far broader array of outcomes. Stage four, between the two, is also constrained by process and limited to awards allowable by the governing tribunal or court.

The main stage relevant to my thesis is the third stage of the continuum: legal practitioners representing clients in negotiations about legal matters, with legal consequences; regulated by legal and ethical rules that govern the legal profession. This central definition lies at the core of the legal negotiations conducted in legal practice – the legal negotiations that the Legal Negotiation Competition aims to emulate. Consequently, the remainder of my thesis is based on this central definition. I use this as a foundation from which to analyse two fundamental components of legal negotiation – preparation and ethics – to create a Conceptual Framework and operationalise the minimum competencies that law students must meet in order to be admitted to legal practice.

Although my thesis rests on this central definition, I have developed the Taxonomy of Legal Negotiation to assist key stakeholders in classifying legal negotiation. It is depicted below, in the Venn Diagram in Figure 9. Each circle portrays one of the five categories I have

identified, with the overlap between circles representing the overlap between categories. The intersection of each circle at the centre depicts the central definition of legal negotiation, with all categories represented. Below the diagram, I have provided a justification for each of the categories that define legal negotiation. In providing this analysis, I have drawn on my evaluation of the literature in the previous parts of this chapter, although I acknowledge that the analysis below is merely an initial exploration of each category relevant to the definition of legal negotiation, which would benefit from critique and further expansion by legal negotiation scholars.

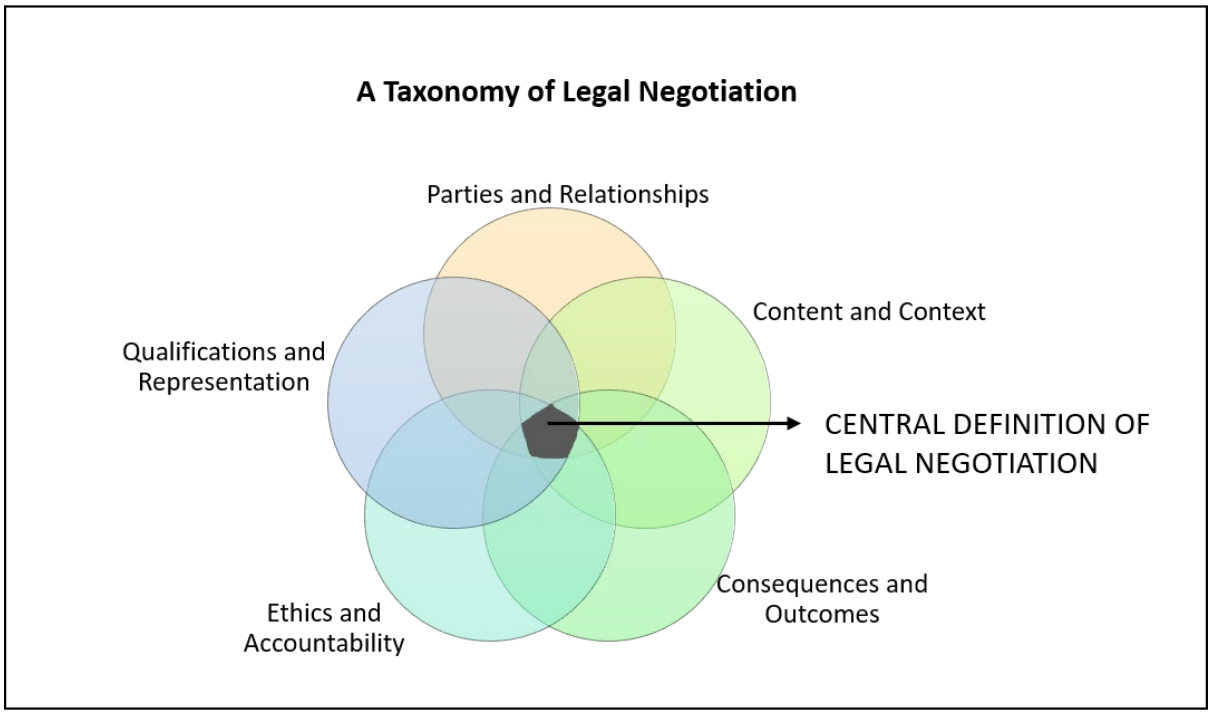

Figure 9: A Taxonomy of Legal Negotiation

A Parties and Relationships

The parties are the most important component of a legal negotiation and are most frequently the key stakeholders. While the parties and key stakeholders themselves do not impact the *legal* classification of a legal negotiation, their relationships are often governed by legal systems or processes.[238] This highlights the intersection between *Parties and Relationships*, *Content and Context,* and *Outcome and Consequences*. The role or function of the legal negotiation – the reason for which parties are negotiating[239] – will evidently influence the legality of the negotiation, and, indeed, the voluntariness of party involvement.[240] If the negotiation is initiated by parties or representation (excluding legal practitioners), this is less likely to be a legal negotiation. This aligns with Eisenberg's original formulation, that legal practitioners need only be involved in later legal negotiations to help parties with the strictly legal aspects.[241] If, however, the legal negotiation is mandated by legislation, this has much stronger legal connotations, and is more likely to involve legal practitioners. Indeed, Eisenberg began to identify key components of a definition of strictly legal negotiation by emphasising the involvement of legal practitioners in legal negotiation; the difference between one-off negotiations and ongoing relationships between parties;[242] and the impact of power imbalances.[243]

Parties themselves may be heavily impacted by the legal system or legal processes. A party's 'stake' in the negotiation,[244] for example, may cause a power imbalance – such as the use of 'fact, law, economic resources, [and] moral righteousness'[245] – which can strongly influence a negotiation.[246] The exposure of such power imbalances can cause legislatively-mandated

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238 See, eg, Bruce Patton, 'Negotiation' in Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (Jossey-Bass, 2005) 279, 282.

239 Menkel-Meadow refers to this as 'subject matter': Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 928. See also Eisenberg (n 7); Williams (n 1).

240 Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 927-8.

241 Eisenberg (n 7) 664-665.

242 Peter Spiller (ed), *Dispute Resolution in New Zealand* (Oxford University Press, 1999) 44; John Mulder, *Non-Stop Negotiating: The Art of Getting What You Want* (Penny Publishing, 1992) 21, 48; Astor and Chinkin, *Dispute Resolution in Australia* (n 6) 122; Sourdin, *Alternative Dispute Resolution Sixth Edition* (n 6) 52 [2.35]; Spencer, Barry and Akin Ojelabi, (n 6) 111 [3.110].

243 See generally Eisenberg (n 7); and see above Part II(C)(1).

244 Menkel-Meadow defines this as 'who stands to "win or lose" most from negotiation' Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 927-928.

245 Ibid 928.

246 See, eg, Spiller (n 242) 44, Gary Goodpaster, *A Guide to Negotiation and Mediation* (Transnational Publishers Inc, US, 2013) 172, Folberg et al (n 111) 79.

dispute resolution processes to be terminated and remitted for judicial determination.[247] A power imbalance that does not result in remission to judicial determination can be reduced by the visibility of the negotiation. Further, increased visibility of the negotiation process or outcome is likely to result in parties being bound by strictly legal outcomes, due to public accountability. In this way, visibility can influence an outcome to be more legal.[248] That said, a privately conducted negotiation can still constitute a *legal* negotiation, indeed, one of the challenges related to ethical regulation of legal negotiations is the private nature of the legal negotiation process, in the absence of third parties.

A final consideration relevant to relationships extends the definition of relationships beyond the parties themselves. The concept of relationships warrants consideration, particularly regarding the relationships between negotiators,[249] whether legal practitioners or other representatives. Such relationships will be impacted by a variety of factors, including previous interactions. This is an important component of preparation for legal negotiation, which is further analysed in Chapter Four.

B Content and Context

One of the key elements of legal negotiation is whether the negotiation includes legal issues, and whether there is a legal context that is relevant to this content. This, to an extent, is the gateway to legal negotiation, and one of the main factors that distinguishes legal and non-legal negotiations. Context relates to the broader systems that regulate the negotiation, including the legal system, and whether the negotiation is in response to a dispute that has already arisen, or is transactional in nature. Identifying the context is imperative, as it can help to determine the most beneficial dispute resolution processes and can thereby provide insight into both whether negotiations will be 'successful and productive',[250] and the influence that 'different contexts make in negotiation theory and behaviour.'[251] If parties are faced with a dispute that is situated in a legal context, they will often engage legal representation for the legal practitioner's specialist knowledge in that area. In a strictly legal context, it is clear from the literature that legal negotiators draw from both competitive and

247 See, eg, *Civil Dispute Resolution Act 2011* (Cth).

248 Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 27-928.

249 Ibid 927-928; Gulliver (n 32) 18.

250 Carrie Menkel-Meadow, 'Negotiating with Lawyers, Men, and Things: The Contextual Approach Still Matters' (2001) 17(3) *Negotiation Journal* 257, 259 ('Negotiation with Lawyers, Men and Things').

251 Ibid 259.

cooperative theories of negotiation, although problem-solving negotiation theory is considered most effective.[252] While commentators consider certain stereotypical behaviours or strategies related to each theory, little scholarship is given to the intersection of negotiation theories and theories of legal practitioner decision making or ethical philosophies. These theoretical perspectives and philosophies reflect the overlap between *Content and Context*, *Ethics and Accountability*, and *Qualifications and Representation*, when a legal practitioner is engaged to represent a client. Further analysis of the relevance of these components to legal negotiation ethics is contained in Chapter Five.

Content, however, focuses on the subject matter in issue during the negotiation,[253] and the interests of the parties – evidently overlapping with *Parties and Relationships*. In order for the negotiation to constitute *legal* negotiation, either the content of the negotiation must be identifiably legal,[254] or there must be a legal element in one or more of the issues in dispute. Alternatively, the purpose or requirement for the legal negotiation must be situated in a broader legal context, for example, in a specific area of law that mandates dispute resolution processes.[255] This again corresponds with the early work towards a definition of legal negotiation, based on the role of legal negotiation.[256]

While the role and function of legal negotiation is strongly tied to subject matter, the *Content and Context* category requires deeper analysis that focuses on broader aspects of the legal negotiation that will be of most importance to a client.[257] This involves consideration of all components of the negotiation, which could include economic, social, or legal aspects,[258] though most negotiations will involve some form of legal content, even if parties do not engage legal representation. For example, the neighbourhood fencing dispute raised earlier. If

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252 Schneider, 'Shattering Negotiation Myths' (n 1); Williams (n 1).

253 Although Menkel-Meadow's definition of 'subject matter' more aligns with role or function of negotiation: Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 927-8.

254 Context is highly significant to negotiation: Menkel-Meadow, 'Negotiating with Lawyers, Men, and Things' (n 250) 259.

255 This again corresponds with the early work related to the role and function of legal negotiation. These functions overlap with the subject matter of the negotiation, such as dispute negotiation or transactional negotiation. See, eg, Eisenberg (n 7); Williams (n 1); Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 927.

256 Eisenberg (n 7); Williams (n 1)

257 This will form the basis for the chapter on preparation: see below Chapter Four.

258 Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 928.

negotiations are amicable, there is no need to engage legal representation, even though the content relates to a potential contract regarding payment for the replacement of a dilapidated fence. This negotiation has legal content and a legal outcome, although it is situated within the social context of a relationship between neighbours. This example could be classed as a legal negotiation due to the content and outcome, though does not attract the other categories in the Taxonomy, so does not meet the requirements for the central definition of legal negotiation. If, however, the negotiations regarding the fence reach a stalemate, or the influence of a power imbalance become apparent, legal practitioners could be engaged. This would then attract all elements of the Taxonomy and would meet the central definition. This exemplifies the interaction between the categories, and the ease with which the classification of a legal negotiation can evolve to meet the central definition.

Two final considerations relevant to *Content and Context* are the medium of negotiation and any alternatives to negotiation.[259] Both of these factors are heavily influenced by the legal nature of negotiation. Legal negotiations are conducted through a series of media, including written communications, telephonic or digital communications, and face-to-face negotiations – a typically legal matter using legal negotiations will rely on multiple media before a resolution is finalised. Likewise, the legal content and broader context of a negotiation will also help to identify the most relevant dispute resolution process. Legal negotiation skills will be relevant regardless. As such, legal content and context may drive a matter through various dispute resolution processes, likely beginning with party-party or lawyer-lawyer legal negotiations before progressing to mediation, other dispute resolution processes, or litigation, either through the natural progression of the matter and relevance of dispute resolution processes, or due to legislatively-mandated processes.

C Consequences and Outcome

As identified above, parties engage in negotiation for a variety of reasons, both legal and non-legal. The consequences resulting from a negotiation are critical to a client and can have significant impacts on both the client and their relationship with other stakeholders. One of the best rationales for choosing to engage in legal negotiation over other dispute resolution processes, however, is the variety of outcomes that are available – legal and non-legal – without the constraint of typical tribunal or judicial awards. For this reason, it is vital that

259 Ibid.

representatives consider various outcomes that could benefit their client,[260] and that they involve their client in this process. Non-legal outcomes could include specific ways to seek recourse; an apology (though this may have legal ramifications); or a way to enforce morals or other ethical obligations. Legal outcomes will often arise to enforce legal rights, and could include meeting contractual obligations, financial payments, or physical rectification. The variety of outcomes will range in legality as a dispute moves through the Legal Negotiation Continuum, culminating in mandated (and enforceable) legal consequences at the higher stages. One difficulty with negotiation is that the process is not controlled by a third-party, and therefore documents created during this process are not necessarily enforceable in and of themselves. If parties want legal enforceability, they may wish to conduct a legal negotiation in a setting with a third-party facilitator or decision maker.[261] If the consequences or stakes in a matter are high, parties are more likely to engage representation with specialist knowledge in the area and to commence legal negotiations at stage three of the Continuum above.

D Ethics and Accountability

The ethical obligations and practices that regulate negotiation will depend on the type of negotiation, and the qualifications of any representatives. If, for example, the parties do not engage any representation, negotiations are more likely to be governed by parties' own ethical and moral conceptions.[262] If, however, parties engage representation, their agent's behaviour will be regulated by standards of professional conduct or ethics relevant to their field. Representatives such as conveyancers, financial advisers, accountants, social workers, medical professionals and psychologists, will be bound by their own set of professional and ethical requirements.[263] These are related to foundational principles of ethics, as applied to

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260 David Spencer, *Principles of Dispute Resolution* (Lawbook Co, 3nd ed, 2020) 42-3 [2.160] ('*Principles of Dispute Resolution 2020*'); see also Janice Gross Stein, 'Getting to the Table: The Triggers, Stages, Functions and Consequences of Prenegotiation' (1988) 44(2) *International Journal* 473, 485; Spencer, Barry and Akin Ojelabi (n 6) [3.45] citing L Susskind and J Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (Harper Collins, 1987) 178-84; Folberg et al (n 111) 88-90; Barbara A Budjac, *Conflict Management a Practical Guide to Developing Negotiation Strategies* (Corvette Pearson Prentice Hall, 2012) 198.

261 Though, of course, under the Conduct Rules if the parties engage lawyers, the lawyers need to advise clients of dispute resolution processes prior to court: Law Council of Australia, *Conduct Rules* (n 190) r 7.2. See also David Spencer, 'Liability of Lawyers to Advise on ADR Options' (n 18).

262 See below Chapter Five.

263 For example, the professional behaviour of Chartered Accountants in Australia is set by the Accounting Professional and Ethical Standards Board, and based on 'integrity, objectivity, professional competence and due care, confidentiality, and professional behaviour': Chartered Accountants Australia-New

professional bodies. While there are parallels between legal ethics and ethical principles, legal ethics are more strongly aligned with professional conduct rather than the tenets of ethics.[264] The Conduct Rules govern legal practitioner behaviour in the course of legal practice, which, based on the argument above, includes legal negotiation. There are no *specific* rules of conduct or ethics that relate explicitly to legal negotiation conducted by legal practitioners,[265] though given the positioning of legal negotiation in legal practice, all legal, ethical, and conduct obligations apply. This presents a variety of challenges, considering that the legal, ethical, and conduct obligations, while important to protect the public, were designed to apply to the adversarial system, and cannot be directly transposed to the dispute resolution or legal negotiation environment. This means that the ethicality of some components of legal negotiation remains unclear, and there are differing views as to whether certain ethically ambiguous behaviour could be enforced under the Legal Practitioner Legislation as either unsatisfactory professional conduct or professional misconduct.[266] This is analysed in Chapter Five.

Zealand, 'Codes and Standards', *Chartered Accountants* (Web Page, 2020) <https://www.charteredaccountantsanz.com/member-services/member-obligations/codes-and-standards>. Thorough exploration of this is beyond the scope of my research, which focuses on people with legal qualifications.

264 See, eg, Bagaric and Dimopoulos (n 218); John Wade, 'Ethically Ambiguous Negotiation Tactics (EANTS): What are the Rules Behind the Rules?' (Conference Paper, Law Society of Saskatchewan CPD Seminars, 12 May 2014) ('EANTS').

265 Rankin notes one exception related to Law Council of Australia, *Conduct Rules* (n 189) r 22.1, noting that the word 'compromise' does not appear in other rules, though Rankin notes this is a weak argument: Rankin, 'Legal Ethics in the Negotiation Environment' (n 218) 109-10.

266 *Legal Profession Act 2006* (ACT) s 386 (definition of 'unsatisfactory professional conduct'), s 387(1) (definition of 'professional misconduct) and s 389(a) notes that a breach of the Rules can amount to either of the previous sections, interpreted in line with the *Legislation Act 2001* (ACT) s 104; *Legal Profession Uniform Law (NSW)* s 296 (definition of 'unsatisfactory professional conduct'), s 297(1) (definition of 'professional misconduct) and s 298(a) notes that 'conduct consisting of a contravention of this Law' amounts to the previous actions. This is extended under the *Legal Profession Uniform Law Application Act* 2014 (NSW) s 165B to apply to local regulations; *Legal Profession Act 2006* (NT) s 464 (definition of 'unsatisfactory professional conduct'), s 465(1) (definition of 'professional misconduct), and s 466(1)(a) indicates that 'contravention of this Act' amounts to the previous actions; *Legal Profession Act 2007* (Qld) s 418 (definition of 'unsatisfactory professional conduct'), s 419 (definition of 'professional misconduct), and s 420(1)(a) notes that contravention of the legal profession rules amounts to the previous actions; *Legal Practitioners Act 1981* (SA) s 68 (definition of 'unsatisfactory professional conduct'), s 69 (definition of 'professional misconduct), and s 70(a) notes that contravention of the legal profession rules amounts to the previous actions; *Legal Profession Act 2007* (Tas) s 420 (definition of 'unsatisfactory professional conduct'), s 421(1) (definition of 'professional misconduct), and s 422(1)(a) notes that contravention of the legal profession rules amounts to the previous actions; *Legal Profession Uniform Law Application Act 2014* (Vic) s 296 (definition of 'unsatisfactory professional conduct'), s 297(1) (definition of 'professional misconduct) and s 298(a) notes that 'conduct consisting of a

E Qualifications and Representation

Qualifications and Representation is the final category of the Taxonomy, and the only one that has the capacity to classify a legal negotiation within the central definition of legal negotiation.[267] Parties engaging in disputes or conflict can choose from a variety of representatives, though many are self-represented, particularly at the early stages of disputes. Not all representatives will have qualifications, and such qualifications will not always be relevant to the dispute at hand (for example, a legal practitioner's qualifications are irrelevant to their negotiations to help their child purchase a car). It is the intersection of legal qualifications and client representation that renders a negotiation legal in nature. There are various reasons for this. Legal practitioners are governed by stringent educational and credentialing requirements from the moment they commence their studies.[268] This sets the foundation for legal education, and includes studying specific theoretical and skills-based topics, meeting various competencies (including in legal negotiation) prior to admission to legal practice, and being a 'fit and proper person' to enter the legal profession. Such standards must be maintained throughout the legal practitioner's legal career. Once retained, legal practitioners have strict obligations to their clients, including to inform clients of dispute resolution options. Breaches of these obligations can result in disciplinary actions, sanctions, or civil suits against the practitioner.[269] This extends to negligently rejecting a settlement offer.[270]

Legal practitioners hold a position of trust, constructed through the fiduciary relationship with their client. Legal practitioners are often seen as leaders in society, and thought to have significant power. Members of the legal profession, therefore, have a duty to society to engage ethically and appropriately in their work. Requiring legal negotiation to be conducted *only* by practising legal practitioners guarantees that parameters are placed around legal negotiation, and ensures that legal practitioners act within the confines of their role and exercise their significant power professionally.

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contravention of this Law' amounts to the previous actions; *Legal Profession Act 2008* (WA) s 402 (definition of 'unsatisfactory professional conduct'), s 403(1) (definition of 'professional misconduct) and s 404(a) notes that 'conduct consisting of a contravention of this Act or a previous Act' amounts to the previous actions.

267 Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (n 2) 930.

268 See below Chapter One.

269 Spencer, 'Liability of Lawyers to Advise on ADR Options' (n 18); *Superior IP* (n 225); *Superior IP International (No 2)* (n 225).

270 *Kendirjian v Lepore* (2017) 259 CLR 275, 287.

F Concluding Comments about the Taxonomy of Legal Negotiation

Although I have concluded that the central definition of legal negotiation aligns with the definition that appears to have been accepted by scholars and legal practitioners alike for several decades, the Taxonomy of Legal Negotiation provides clear articulation of this. Through my analysis of the relevant literature, I found various factors beyond the central definition of legal negotiation that could cause a negotiation to be classified as *legal*, including *Parties and Relationships, Content and Context, Outcome and Consequences, Ethics and Accountability*, and *Qualifications and Relationships*. As such, a clear-cut definition of legal negotiation that incorporates each of these components and the associated nuances is not possible, nor is it desirable. Instead, I created a Taxonomy that included each of these five categories. This provides guidance for anyone involved in a negotiation as to when key elements of a negotiation are, or become, legal. It is, however, at the intersection of all five elements that the central definition of legal negotiation is situated. The central definition of legal negotiation requires each element to have a legal component, culminating in the engagement of legal practitioners to resolve the matter. The Taxonomy of Legal Negotiation will provide guidance and clarity to each of the key stakeholders identified in Part III(B) above. This guidance is particularly important for law students, who are beginning their career in law. Providing clear guidance about their involvement in legal negotiation, and the resultant legal, ethical, and professional obligations will provide a sound foundation for their legal negotiation education.

V CONCLUDING THOUGHTS ABOUT DEFINING LEGAL NEGOTIATION

In this chapter I drew on three divergent paths of legal negotiation literature in the search for a definition of legal negotiation. I concluded that, while no specific literature defined legal negotiation, most scholars and legal practitioners alike had assumed that a *legal* negotiation was a negotiation carried out by legal practitioners. This was particularly relevant in two bodies of literature: the first relating to the role and function of negotiation (situated in law), and the second pertaining to the effectiveness of legal negotiators, through studies that examined the negotiation practices of legal practitioners. The middle path of literature on negotiation theories did not assist in formulating a specific definition of legal negotiation, but instead relied on an unspecified but assumed definition (that aligned with the assumed definitions above) and then crafted the theories/approaches/styles that legal negotiators could adopt to advance their client's case. This assumed definition of legal negotiation answered my preliminary questions about the term, although failed to adequately address the considerations Menkel-Meadow raised as relevant to a definition of legal negotiation in determining whether further clarity about legal negotiation was required. I used the assumed definition and Menkel-Meadow's considerations as an entry point to evaluate the three paths of literature, as well as to identify any benefits that key stakeholders could glean from a definition of legal negotiation, to determine whether further clarity about legal negotiation was required.

While legal negotiations conducted by legal practitioners clearly constitute legal practice, there are various other elements of a negotiation that can be legal, but that do not require the engagement of legal practitioners. For example, the content or context of the matter in dispute may have legal components, or the outcome or consequences might be legal in nature. Further, the legal system might regulate or impact the relationship between parties or other key stakeholders. While each of these elements is legal in nature, without the engagement of a legal practitioner the negotiation of these elements does not align with the central definition of legal negotiation. The role of ethics, accountability, qualifications and representation are the key elements that cause a legal negotiation to be legal. If legal practitioners – with legal qualifications – are engaged to represent a client, their conduct is regulated by the Conduct Rules and legal and ethical obligations. There is increased accountability, and clients have recourse for any legal or ethical breaches of professional practice.

Through the remainder of my thesis, I focus on the central definition of legal negotiation, as carried out by legal practitioners, and as emulated by law students during Legal Negotiation Competitions. In addition to guiding the development of the Taxonomy, my identification of the five categories that together constitute legal negotiation have also highlighted key aspects of the legal negotiation skillset. These skills are particularly emphasised by three key factors of legal negotiation: preparation, ethics, and client-centrality. These are fundamental components of legal negotiation, with which legal practitioners must carefully and precisely engage. In Chapters Four and Five I specifically highlight the first two of these components. My emphasis in each chapter is on how legal negotiation preparation and legal negotiation ethics constitute 'good practice', and whether law students in Legal Negotiation Competitions meet these standards. As a result of my analysis in these two chapters, in Chapter Six I present a Conceptual Framework that sits at the intersection of these three components, and use this Conceptual Framework to operationalise legal negotiation preparation through the development of a series of minimum competencies that law students must meet – as part of their legal negotiation education – in order to be admitted to legal practice. These competencies draw on the central definition of legal negotiation and are based on the premise of client-centred lawyering, which acknowledges legal practitioners' foundational ethical obligations to their clients.

CHAPTER FOUR: LEGAL NEGOTIATION PREPARATION

I INTRODUCTION

In Chapter Three I proposed a definition of legal negotiation that sits at the intersection of five components: *Parties and Relationships; Content and Context; Ethics and Accountability; Consequences and Outcome*; and *Qualifications and Representation*. This central definition specifically reflects the relationship between a legal practitioner and their client, governed by authority and client-issued instructions. It depicts a legal negotiation conducted by two legal practitioners, acting under that given authority, who each represent their client by negotiating legal issues with legal outcomes. This definition of legal negotiation lays the foundation for the remainder of my research. In Chapter Three I also determined three key themes that arise in the legal negotiation literature, and that are reflected in the LCA Requirements: legal negotiation preparation, legal negotiation ethics, and client-centrality. In this chapter, my focus is on legal negotiation preparation, imbued with client-centrality. In Chapter Five I will focus on legal negotiation ethics, also imbued with client-centrality, and in Chapter Six I will draw these themes together, culminating in proposals to improve legal negotiation education with regard to law student preparation for legal negotiation.

Legal negotiation preparation is traditionally an under-scrutinised area of legal negotiation.[1] While there is abundant literature about legal negotiation preparation, most authors provide their own view on how to prepare for a negotiation,[2] typically without critique of previous literature. Indeed, *Negotiation Essentials for Lawyers*,[3] the recently published companion

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1 Indeed, Boulle comments anecdotally that negotiation preparation is 'easily overlooked in pressured legal practice': Laurence Boulle and Rachael Field, *Australian Dispute Resolution Law and Practice* (LexisNexis, 2017) 239.

2 See, eg, John Mulder, *Non-Stop Negotiating: The Art of Getting What You Want* (Penny Publishing, 1992); Nadja M Spegel, Bernadette Rogers and Ross P Buckley, *Negotiation Theory and Techniques* (Butterworths, 1998); Gary Goodpaster, *A Guide to Negotiation and Mediation* (Transnational Publishers Inc, 2013); Baden Eunson, *Negotiation Skills* (John Wiley & Sons Ltd, 1994); Jay Folberg et al, *Resolving Disputes: Theory, Practice, and Law* (Aspen Publishers, 2005); Nadja Alexander and Jill Howieson, Negotiation Strategy, Style, Skills (LexisNexis Butterworths, 2nd ed, 2010); Bruce Patton, 'Negotiation' in Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (Jossey-Bass, 2005) 279. See also Appendix O.

3 Chris Honeyman and Andrea Kupfer Schneider (eds), *The Negotiator's Desk Reference* (Dri Press, 2018). *The Negotiators Desk Reference* contains an edited collection of articles that portray current thinking about negotiation, particularly as relates to the legal field, though also reflecting interdisciplinarity. This book provides practical examples in various negotiation contexts, which are beneficial to legal practitioners practising in this field.

book to *The Negotiator's Desk Reference*,[4] does not explicitly reference legal negotiation preparation. While *The Negotiator's Desk Reference* notes that it includes information about preparation, this is buried in chapters containing various other material, rather than in a dedicated chapter providing advice 'for people who are new to negotiation theory', as claimed in the book's introduction.[5] Despite lacking this key element of legal negotiation, these two books are immensely useful as part of legal negotiation practice, and provide great insight into the legal negotiation process. This exemplifies scholarly approaches to legal negotiation preparation – preparation is often side-stepped in order to concentrate on the seemingly more important component of legal negotiation, the part that occurs at the table.[6] This also reflects the condition of legal negotiation education in the United States, where desk reference books such as these are heavily utilised, allowing the conclusion that legal negotiation preparation is minimised in legal education.

While there is limited empirical data that demonstrates how legal practitioners or law students prepare for a legal negotiation,[7] it is unsurprising that informal studies show that negotiators often neglect preparation.[8] This is also apparent in legal negotiation education courses, in which students cite the following reasons for neglected preparation include that: 'preparation is not as important at the main event', 'there is only so much you can do to prepare – a lot happens at the negotiation table that you can't predict', 'I'm a good negotiator, I know what I am doing, I don't need to prepare', and 'there's no point in putting in too much time until we know what their position is'.[9] Such comments could easily be applied to the

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4 This has been adopted as a teaching text at various universities, including the University of Melbourne, and various universities across Canada, America, and Scotland: NDR Books, 'About the NDR', *The Negotiator's Desk Reference* (Web Page) < https://www.ndrweb.com/>.

5 Honeyman and Schneider, *The Negotiator's Desk Reference* (n 3) 3. This is in contrast to the inclusion of various chapters that contain the word 'ethics' or 'ethical' in their titles: see eg, chapters 35, 36, 40.

6 David A Lax and James K Sebenius, *3-D Negotiation: Playing the Whole Game* (Harvard Business Review Press, 2003) ('*3-D Negotiation: Playing the Whole Game*').

7 Most studies are based on law student participation in specific dispute resolution topics, not specifically about preparation. There is similarly little research into how non-legal negotiators prepare for negotiations: Ray Fells and Noa Sheer, *Effective Negotiation: From Research to Results* (Cambridge University Press, 4th ed, 2020) 63.

8 These results were taken from an informal study of participants in negotiation courses: Alexander and Howieson (n 2) 105.

9 Ibid 106.

Legal Negotiation Competition environment, as these negotiations are particularly low-risk, which is another factor that tends to reduce preparation.[10]

Despite legal negotiation preparation often being neglected, in the literature it is recognised as 'essential',[11] and will 'invariably improve [a negotiator's] performance in the negotiation',[12] and 'minimise the chance for surprise at the negotiation table'.[13] Law student respondents to my study recognise the importance of legal negotiation preparation, with 83.7% rating this as 8/10 or above.[14] The importance of legal negotiation preparation is also reflected in the LCA Requirements (examined below). While there is clear recognition of the importance of legal negotiation preparation, this recognition does not cause such preparation to be undertaken. There could be various explanations as to why law students do not prepare, but one key challenge lies in understanding what constitutes appropriate preparation. There is abundant literature on legal negotiation preparation, although many authors differently conceptualise which elements of preparation are most important. While the literature does include *some* overlap between key components, various authors use different terminology to discuss similar concepts, or, alternatively, use similar terms to discuss different points.[15] For example, negotiation planning. The literature includes reference to 'mapping the negotiation';[16] using a 'negotiation planning worksheet';[17] a 'planning grid';[18] a 'negotiation preparation checklist';[19] or a 'negotiation navigation map';[20] and a systematic seven-element checklist for preparation,[21] amongst other techniques. Each approach contains similarities

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10 Roger Fisher and Danny Ertel, *Getting Ready to Negotiate: The Getting to Yes Workbook* (Penguin Books, 1995) 4. In this chapter I also critique the artificialities of the Legal Negotiation Competition and highlight instances in which 'good practice' legal negotiation preparation *in legal practice* would not accord with 'good practice' legal negotiation preparation reflected in the Legal Negotiation Competition (such as the intricacies of authority).

11 Alexander and Howieson (n 2) 127; Howard Raiffa, *The Art and Science of Negotiation* (Harvard University Press, 1982) 120, cited in Peter Spiller (ed), *Dispute Resolution in New Zealand* (Oxford University Press, 1999) 44; Spegel, Rogers and Buckley (n 2) 39; Harvard Business Review, *On Negotiation and Conflict Resolution* (Harvard Business School Press, 2000) 206.

12 Alexander and Howieson (n 2) 68; Michael Mills, *Dispute Resolution: A Practitioner's Guide to Successful Alternative Dispute Resolution* (Lawbook Co, 2018) 268.

13 Alexander and Howieson (n 2) 105.

14 *Pre-Negotiation Questionnaire*, Question 13.

15 See below Part II.

16 Mulder (n 2) 19; Spegel, Rogers and Buckley (n 2) 54.

17 Goodpaster (n 2) 170

18 Eunson (n 2) 9.

19 Folberg et al (n 2) 88-90.

20 Alexander and Howieson (n 2) 106-7.

21 Patton (n 2) 289.

and differences, but there is typically no explanation of the relevance of differences, nor information about how to determine when different approaches might be beneficial. While each approach does showcase the importance of moving logically through the process of legal negotiation preparation, the overwhelming nature of this field exhibits 'label confusion' similar to Schneider's depiction of negotiation theories.[22]

Another example of different conceptualisations of legal negotiation preparation guidance is reflected in the advice that negotiators spend 80-90% of their time preparing for a negotiation,[23] since under-preparation is a 'serious handicap'.[24] While this is sound guidance, there is no clear definition of what constitutes 80-90%, particularly in legal practice where a legal practitioner could be handed a file to prepare for a legal negotiation or other process commencing merely a few hours later.[25] Such suggested percentages further challenge the concept that if preparation is done well, it does not need to take a long time.[26] These time issues could, in themselves, be one reason for inadequate preparation, showing either that negotiators simply are not given enough time to prepare, or that they underestimate the time they need to spend on preparation.

Law students, particularly, struggle to know how to prepare for a legal negotiation. As a Legal Negotiation Competition Judge I have often seen this result in the incorrect identification of, or incorrect emphasis on, certain components of legal negotiation preparation,[27] or in limited-to-no preparation. In my experience, confused law students

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22 Andrea Kupfer Schneider, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (2002) 7 *Harvard Negotiation Law Review* 143, 152 ('Shattering Negotiation Myths'). See above Chapter Three.

23 Carrie Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1983-1984) 31(4) *University of California Los Angeles Law Review* 756 ('Toward Another View of Legal Negotiation'), discussed in Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2002) 122 ('*Dispute Resolution in Australia*').

24 Roger Fisher and Danny Ertel (n 10) 3.

25 These time restrictions are, to an extent, echoed in the structure of Legal Negotiation Competitions, in which negotiators typically only receive the fact scenario two hours prior to the negotiation. Competitors do, however, have unlimited time prior to this two-hour window to ensure their understanding of negotiation itself, and to perfect their more general preparation (limited, of course, by study, work, family and social responsibilities).

26 Fisher and Ertel (n 10) 9.

27 Ibid 5.

typically conduct minimal preparation because they give up;[28] or they resort to online search engines as their starting point.[29] Although online searches for *legal negotiation* are beneficial, law students are instead more likely to search for *negotiation*, which is often reflected in the title of competition and the relevant literature.[30] Such searches consequently fail to grasp the legal nuance inherent in *legal* negotiation, and may result in findings more relevant to other disciplines. A final option for confused law students is to rely on their adversarial training and take a litigation inspired approach to preparation, as if preparing for a moot, or mock court appearance.[31] This is in direct contrast to the approach depicted above, in which law students ignore the legal nuance. This instead implies that *only* a legal focus is taken, thereby ignoring key components of *negotiation* such as the development of a range of options that extends more broadly than those that a court could award. None of these approaches are beneficial and will likely leave a law student negotiator feeling confused, lost, or overwhelmed during the legal negotiation itself, which could lead to a poor negotiation outcome, or even to unethical behaviour. This could be improved through the process of legal negotiation education, and thorough guidance that operationalises legal negotiation preparation.

As explained in Chapter One, law students learn about dispute resolution during their undergraduate law studies.[32] Study of legal negotiation, however, is not expressly mandated in legal education, although law students will likely gain some, minimal, understanding of legal negotiation during these compulsory topics. In some instances, law students might even have the opportunity to attempt a simulated legal negotiation, though this tends to be reserved for standalone dispute resolution topics or electives. The main component of legal negotiation training itself occurs during Practical Legal Training. A Practical Legal Training graduate is expected to display an entry level legal practitioner's skill set regarding legal negotiation

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28 See, generally, Fisher and Ertel (n 10) 5; though it is important to note that it is good not to have one prescriptive view to preparation, as each negotiation is different: Honeyman and Schneider, *The Negotiator's Desk Reference* (n 3).

29 This was exhibited by multiple respondents to my study, who indicated that they prepared using online information (5.43%) or YouTube videos (4.35%). While these percentages may seem low, it was surprising to have the same answers come up multiple times in an open-ended question.

30 See above Chapter Three, and, for example, see, eg: Andrea Kupfer Schneider and Chris Honeyman (eds), *Negotiation Essentials for Lawyers* (American Bar Association, 2019) ('*Negotiation Essentials for Lawyers*').

31 See, eg, David Spencer, *Principles of Dispute Resolution* (Lawbook Co, 3rd ed, 2020) 32-3 ('*Principles of Dispute Resolution 2020*').

32 See above Chapter One, Part II(A).

(among other skills), in order to apply for admission to legal practice.[33] The specific components related to legal negotiation training are contained in the LCA Requirements,[34] depicted in the following table.

Table 2: LCA Requirements

Pre-Negotiation
1. prepared, or participated in the preparation of, the client's case properly having regard to the circumstances and good practice.
The Negotiation Process
2. identified the strategy and tactics to be used in negotiations and discussed them with and obtained approval from the client, or been involved in or observed that process. 3. carried out, been involved in or observed, the negotiations effectively having regard to the strategy and tactics adopted, the circumstances of the case and good practice.
Post-Negotiation
4. documented any resolution as required by law or good practice and explained it, or been involved in the process of explaining it, to the client in a way a reasonable client could understand.[35]

There are two key points in the LCA Requirements that highlight the importance of legal negotiation preparation. By including specific requirements for law graduates to have been involved in 'the preparation of the client's case,'[36] the Law Council of Australia has made it quite clear that preparation is integral to legal negotiation. By further noting that preparation must be done 'with regard to the circumstances of the case and good practice',[37] the Law Council of Australia has implicitly acknowledged the importance of literature in this field, and its application in legal practice (assuming that these align). The LCA Requirements fail to recognise, however, the 'label confusion'[38] inherent in the legal negotiation preparation literature. Identifying 'good practice' that pertains to legal negotiation preparation requires detailed research and assessment of the literature, unlike what is required in accordance with the Academic Areas. Typically, the Academic Areas and PLT Standards have been designed to intersect, regulated through the assessment of law students' competency in a variety of

33 See above Chapter One, Part II(B).

34 Law Admissions Consultative Committee, *Practical Legal Training Competency Standards for Entry-Level Lawyers* (2015) ('*PLT Standards*').

35 Ibid 'Lawyers' Skills' [5.10] Element 6.

36 Ibid.

37 Ibid.

38 Schneider, 'Shattering Negotiation Myths' (n 22) 152.

areas (including legal negotiation).[39] In contrast to legal negotiation, Priestley topics contain substantive law, governed by clear legislation or case law, easily attainable through simple legal research.[40] In non-Priestley topics, such as legal negotiation, this process is different. Here, as part of the Academic Areas, law students must simply learn about '[a]lternative dispute resolution',[41] and '[o]bligations of parties and practitioners relating to the resolution of disputes'.[42] As explained previously, this wording does not require law students to be taught anything about legal negotiation specifically. During Practical Legal Training law students begin to learn more, but the guidance in the LCA Requirements is further limited because understanding legal negotiation preparation is not as straightforward as researching current primary sources to determine the correct principles. Not only do law students enter Practical Legal Training with limited skills in alternative dispute resolution generally, let alone regarding legal negotiation, but the small amount of guidance available as to how to prepare for a legal negotiation references 'good practice', which is not clearly identified in the literature without conducting detailed research and analysis. This necessitates significant attention, and the development of guidance to assist law students and legal practitioners alike through the process of 'good practice' legal negotiation preparation.

Thus far, I have introduced the challenges related to the legal negotiation preparation literature, the way that these impact legal negotiation education through both the LCA Requirements and the resultant learning of legal negotiation preparation skills by law students. To address these challenges, I propose the implementation of a Legal Negotiation Preparation Framework, that synthesises the 'good practice' contained in the literature. In order to propose such a Framework, I conducted a thematic analysis of the relevant literature on legal negotiation preparation and identified 36 key themes related to legal negotiation

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39 See above Chapter One.

40 For example, as part of Criminal Law, law students are required to learn about specific crimes, such as murder. Identifying the relevant legal principles is straightforward, using basic legal research skills. The related component of the *PLT Standards* (n 34) develops the theory related to each Priestley topic and makes it more practical. With regard to the example of murder, above, PLT students would need to provide clients with information about the relevant charge, identify the legal elements, and assist with trial preparation, among other matters. This is a logical next step from the knowledge attained during study of the Academic Areas, and is replicated in all Priestley topics: Law Admissions Consultative Committee, *Prescribed Academic Areas of Knowledge* (2016) ('*Academic Areas')*.

41 Law Admissions Consultative Committee, *Academic Areas* (n 40) 5 'Civil Dispute Resolution', element 12 'Alternative dispute resolution'.

42 Ibid 5 'Civil Dispute Resolution', element 13 'Obligations of parties and practitioners relating to the resolution of disputes'.

preparation.[43] During my analysis I observed overlap between these themes and Fisher and Ury's Four Principles of Negotiation ('the Four Principles')[44] which are prevalent in the literature. While the Four Principles were created as a generalist way to view the negotiation process as a whole, I propose that they provide an excellent entry point from which to analyse the key components of 'good practice' as they relate to legal negotiation *preparation*. In Part II of this chapter, I present my proposed five-category Legal Negotiation Preparation Framework, which draws inspiration from Fisher and Ury's Four Principles, and further reflects a synthesis and critique of these principles and the existing literature, with a focus on *legal* negotiation. In presenting this Framework, I introduce each of the five categories and evaluate legal negotiation preparation literature to determine the 'good practice' components of each category. I use my original data to provide examples of law student legal negotiation preparation in three ways. First, I use quantitative data to illustrate how law students prioritise factors relevant to legal negotiation preparation while preparing for the Legal Negotiation Competition.[45] Where appropriate, I also use qualitative comments from my respondents to exemplify specific areas of relevance or concern. After having presented the Legal Negotiation Preparation Framework, in Part III of the chapter I then use my original qualitative data to inform a case study on law student preparation for legal negotiation. In this case study, my analysis focuses on the method of legal negotiation preparation adopted by law students, and consequently determines whether their chosen approach aligns with 'good practice' and the Legal Negotiation Preparation Framework.

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43 See Appendix O.

44 Roger Fisher, William Ury, and Bruce Patton (ed) *Getting to YES* (Random House, 2nd ed, 2003) 11-12. These principles are often reflected in a broader seven principle approach: Interests, Relationships, Communication, Options, Alternatives, Legitimacy, Commitment. See, eg, Patton (n 2) 279; Spencer, *Principles of Dispute Resolution 2020* (n 31) 42-9; David Spencer, Lise Barry and Lola Akin Ojelabi, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co, 4th ed, 2019) 102-26; Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 6th ed, 2020) 59-61 [2.55] ('*Alternative Dispute Resolution Sixth Edition*'); Mills (n 12) 135-50.

45 As explained in Chapter Two, my surveys were designed to collect both quantitative data and qualitative data. The quantitative data consisted of Likert Scales created to determine the extent to which law students considered the factors I identified as important components of legal negotiation preparation, during my thematic analysis (see more detail below). The qualitative data, however, was collected from open-ended questions designed for law students to share their chosen method of preparation, and the rationale for this. Unlike the quantitative questions, responses to the qualitative questions were not prompted or limited in any way. My quantitative data is summarised in Appendix P.

II A LEGAL NEGOTIATION PREPARATION FRAMEWORK

It is clear that both law students and legal practitioners would benefit from elaboration of the LCA Requirements related to 'good practice' for legal negotiation preparation. In order to identify 'good practice', I analysed relevant literature on both negotiation preparation and legal negotiation preparation. I narrowed 36 key themes present in this literature,[46] down to five categories:

1. Preliminary Considerations
2. Relationships and Communication
3. Parties' Interests
4. Option Generation
5. Assessment of Solutions

Categories 2-5 of this list are modelled on Fisher and Ury's Four Principles: 'separate the people from the problem'; 'focus on interests not positions'; 'invent options for mutual gain'; and 'insist on using objective criteria'.[47] Fisher and Ury created the Four Principles to address the problem of negotiators favouring one negotiation theory (either competitive or cooperative negotiation),[48] addressing this by offering an approach to all aspects of negotiation (not specifically preparation). The scholarly critique of Fisher and Ury's Four Principles centres on two primary concerns: first, that the Four Principles consist of overly simplistic, non-scholarly work which fails to recognise the complexities in negotiations, and held out to apply to *all* negotiations when this is not possible.[49] The Four Principles *are* simplistic, and are better suited to general negotiation rather than legal negotiation.[50] That said, the Four Principles align with the legal field by relying on regulatory frameworks (often including law),[51] using legal systems as a means of dispute resolution,[52] and by placing the

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46 See Appendix O.

47 Fisher, Ury and Patton (n 44) 11-12.

48 Ibid 6. See above Chapter Three.

49 Bobette Wolski, 'The Role and Limitations of Fisher and Ury's Model of Interest-Based Negotiation in Mediation' (1994) 5(3) *Australian Dispute Resolution Journal* 210, 215 ('The Role and Limitations of Fisher and Ury's Model'). See also James J White, 'Essay Review: The Pros and Cons of "Getting to YES"' (1984) 34(1) *Journal of Legal Education* 115, 188.

50 Fisher and Ury sought advice and critique from legal authors and legal practitioners, notably the Harvard Law School, including Frank Sander; Lawrence Susskind; David Lax; and James Sebenius: Fisher, Ury and Patton (n 44) 4. Arguably, these authors come from a legal background and still acknowledge the relevance of Fisher and Ury's principles to legal negotiations. Fisher and Ury's principles now form the basis of the concepts taught in the Harvard Program on Negotiation.

51 Amy J Cohen, 'Negotiation as Law's Shadow: On the Jurisprudence of Roger Fisher' in Honeyman and Schneider *The Negotiator's Desk Reference* (n 3) 79, 80.

52 Amy J Cohen (n 51) 81-2.

parties at the centre of the dispute, thus emphasising their interests and relationships. In the field of law, too, the parties are emphasised through the focus on client representation, authority, and resultant ethical obligations.[53] This client-centrality is echoed in the LCA Requirements. This alignment between Fisher and Ury's Four Principles, legal practice, and the LCA Requirements emphasises the importance of including the client in all aspects of legal negotiation preparation, which has not been strongly reflected in legal negotiation preparation literature.

The second critique of the Four Principles contends that the implication that Fisher and Ury's work can be applied to all negotiations is misleading and limited, in that it fails to capture the nuance of legal negotiation.[54] The Four Principles assume that integrative (win-win) solutions are always available.[55] This is *not* always the case, particularly in legal negotiation where various factors, such as power imbalances, could easily result in non-agreement and escalation to court or tribunal determination. In such circumstances, negotiation may not be appropriate, regardless of which negotiation theory is followed. In response to this critique, Fisher acknowledged that not all negotiations are the same, and that his intention had been to seek generality and 'a common structure that applies across the board'.[56] While a 'common structure' will not always be applicable during a legal negotiation, a common structure of *preparation* can be applied to all legal negotiations – though even this must be moulded to the specific context and legal components. By contextualising Fisher and Ury's Four Principles in the field of legal negotiation, enhanced by the work of legal scholars, I determine the 'good practice' requirements of legal negotiation preparation, and propose a Legal Negotiation Preparation Framework modelled on the Four Principles.

To do this, I have focussed on the first of the LCA Requirements, which emphasises legal negotiation preparation. I have expanded Table 2, above, to encompass the five categories I propose are necessary to prepare for a legal negotiation, in sum, comprising the Legal Negotiation Preparation Framework. This includes, first, the overarching category of *Preliminary Considerations*. This category is missing from Fisher and Ury's Four Principles, though it could be argued that the components of this category are assumed in their Four

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53 Law Council of Australia, *Australian Solicitor Conduct Rules* (2015) Ch 5 ('*Conduct Rules*').

54 See, eg, White (n 49); Wolski, 'The Role and Limitations of Fisher and Ury's Model' (n 49).

55 White (n 49) 116.

56 Roger Fisher, 'Beyond YES' (1985) 1(1) *Negotiation Journal* 67, 69.

Principles, which may suffice for a non-legal negotiation. I argue, instead, that this first category is imperative to 'good practice' legal negotiation preparation, due not just to its inclusion of authority and the resultant ethical obligations, and is fundamental to obtaining information about the dispute. In Table 3 I depict the main factors relevant to each of the five categories, which I analyse below.

Table 3: LCA Requirement 1: Legal Negotiation Preparation

<table>
<tr><td colspan="4">Pre-Negotiation
1. prepared for or participated in the preparation of a client's case with regard to circumstances of good practice;</td></tr>
<tr><td colspan="4">Preliminary Considerations
• Authority
• Parties and subject matter
• Situation and context
• Issue identification
• Agenda/priority order
• Attendees
• Physical considerations: location and room set up</td></tr>
<tr><td>Relationships and Communication</td><td>Parties' Interests</td><td>Option Generation</td><td>Assessment of Solutions</td></tr>
<tr><td>• Relationship between legal practitioner and client
• Relationship between clients
• Relationships between legal practitioner and teammate
• Relationship between legal practitioners
• Communication
• Factors impacting relationships:
o Emotion
o Gender
o Power
o Culture</td><td>For all parties:
• Interests
• Positions</td><td>For all parties:
• BATNA
• WATNA
• ZOPA
• Options
• Non-negotiables
• Concessions
• Offers
• Priority order/agenda</td><td>• Legal principles
• Ethical requirements
• Regulatory frameworks
• Viability
• Reality Testing
• Legitimacy
• Agenda
• Consequences of outcome (for both parties)</td></tr>
</table>

To determine the 'good practice' requirements of legal negotiation preparation I synthesise the literature relevant to each of the five categories of my proposed Legal Negotiation Preparation Framework. As part of this analysis, I use my original quantitative data to provide information as to whether law student respondents prioritised relevant components as part of their legal negotiation preparation, and, consequently, whether they recognise the

importance of these factors.[57] In the following sections, therefore, I evaluate the literature regarding 'good practice' legal negotiation preparation for each category. I then consider the insight provided by my quantitative data to determine how law students prioritise the components in each category, and my qualitative data to gain an understanding of how law students perceive each component (using phenomenographic methods) and the frequency of these perceptions (using thematic analysis). I use this data to analyse whether law students are meeting the requirements of 'good practice' that I identified from the literature. As such, my analyses will move between considering what is required of a legal practitioner, and data provided by law students. Where relevant, I explicitly highlight these differences, and explain what should be required of a law student on the cusp of admission to legal practice, when compared to a seasoned legal practitioner.

A An Initial Principle: Preliminary Considerations

When a legal practitioner commences their preparation for a legal negotiation there are initial key components. These include, of course, the authority they have been given and its ethical impact on the negotiation, the parties, subject matter, and issues relevant to the dispute. Legal practitioners must also consider matters relevant to process, such as who will attend the negotiation and how it will be set up. The literature regarding legal negotiation preparation falls into two categories: authors that explicitly identify such *Preliminary Considerations*;[58] and those that assume these had been carried out prior to commencing preparation.[59] While *Preliminary Considerations* might seem particularly straightforward and not worthy of a separate category, accurately conducting these initial stages of preparation is imperative. As

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57 As identified in Chapter Two, my quantitative data was primarily ascertained through the use of Likert scales to rate the priority given to various factors during legal negotiation preparation. These ratings were given on the following scale:
1 (very high priority) – 2 (high priority) – 3 (medium priority) – 4 (low priority) – 5 (very low priority)
Throughout this chapter I present the average rating provided by my respondents, with reference to either the *average* or *mean* score. I also categorise the average responses numerically, referencing their position from 1 (highest priority) to 31 (lowest priority). A full representation of the factors, average ratings, and numerical order is contained in Appendix O.

58 Alexander and Howieson (n 2) 107; Folberg et al (n 2) 88-90; Spiller (n 11) 45; Spegel, Rogers and Buckley (n 2) 54 [3.22]; Mulder (n 2) 48; Goodpaster (n 2) 173; Eunson (n 2) 4; Astor and Chinkin, *Dispute Resolution in Australia* (n 23) 123; John H Wade, 'The Last Gap in Negotiations: Why Is It Important? How Can It Be Crossed?' (1995) 6(2) *Australian Dispute Resolution Journal* 93, 94 ('The Last Gap in Negotiations'); Barbara A Budjac, *Conflict Management a Practical Guide to Developing Negotiation Strategies* (Corvette Pearson Prentice Hall, 2012) 197. I note, however, that some of these authors focussed on fact identification at the negotiation table rather than as part of preparation.

59 See, eg, Fisher, Ury and Patton (n 44).

such, they are a key component of 'good practice' and must be clearly extrapolated for law students, who are learning these skills in a logical process that does not merely assume that they have been undertaken. This allows relevant skills to be scaffolded throughout legal negotiation education. In this way, *Preliminary Considerations* reminds legal practitioners of fundamental components of legal negotiation preparation, thereby laying the foundation for the remaining four categories.

There is one clear starting point that governs all legal matters, but that is not often addressed in the legal negotiation preparation literature: authority.[60] This is governed by the fiduciary relationship between legal practitioner and client, and prompts the instructions given to the legal practitioner. By virtue of engaging a legal practitioner to negotiate on their behalf and giving instructions, a client is providing their legal practitioner with authority.[61] This has its basis in the ethical obligation that legal practitioners owe to a client, and doctrines of confidence, based on a relationship of trust.[62] The authority provided by a client, however, is not unlimited, and a legal practitioner must understand the initial importance of determining the parameters of their authority. They must also be aware that authority is an ongoing matter,[63] as a client's instructions may change throughout the course of legal negotiation(s). As such, it is essential that the legal practitioner maintain communication with their client throughout the process,[64] and listen carefully to all information provided.[65] This is not always done well,[66] but, if done properly, will result in a clear and accurate understanding of their client's wishes. Poor preparation and lack of understanding about the limits around authority can lead to challenging situations – and potentially unethical behaviour – at the negotiation

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60 Although the complexities of authority are discussed in depth in Chapter Five in relation to legal ethics, this concept is a pervasive component of legal practice and thus requires consideration as part of legal negotiation preparation.

61 Law Council of Australia, *Conduct Rules* (n 53). See generally, Gino E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 6th ed, 2017) ('*Lawyers' Professional Responsibility, Sixth edition*'); Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (LexisNexis, 6th ed, 2014); Peter MacFarlane and Ysaiah Ross, *Ethics, Professional Responsibility and Legal Practice* (LexisNexis, 2017).

62 Robert M Bastress and Joseph D Harbaugh, *Interviewing, Counselling and Negotiating: Skills for Effective Representation* (1990) 66-68. See also Carrie Menkel-Meadow et al, *Dispute Resolution: Beyond the Adversarial Model* (Wolters Kluwer, 2nd ed, 2011) 72-73 ('*Beyond the Adversarial Model*').

63 Scott R Peppett, 'Six Principles for Using Negotiating Agents to Maximum Advantage' in Moffitt and Bordone (n 2) 198; John Wade, 'Limited Authority to Settle' in Andrea Kupfer Schneider and Chris Honeyman, *Negotiation Essentials for Lawyers* (n 30) 269 ('Limited Authority to Settle').

64 Fells and Sheer (n 7) 286.

65 Menkel-Meadow et al, *Beyond the Adversarial Model* (n 62) 68.

66 Ibid 64.

table.[67] While authority is one of the most crucial components of legal negotiation preparation in legal practice, it is difficult to replicate during Legal Negotiation Competitions, which involve simple, written information from a fictional client. This information does not always contain specific instructions and cannot be clarified as the negotiation progresses. Regardless of the lack of detail included in competition scenarios, few competitors will understand the importance, or indeed the limits of these instructions, since most law students do not learn about legal ethics until their third or fourth year of study.[68] Without clear understanding of the fiduciary relationship between legal practitioner and client, the instructions given, and the scope of these instructions, a legal practitioner cannot properly prepare for a legal negotiation. Consequently, all aspects of the Legal Negotiation Preparation Framework must be viewed through the lens of authority as the foundational requirement of 'good practice'.

The *Preliminary Considerations* stage of legal negotiation preparation, then, needs to involve clear discussions between legal practitioner and client as to the key components of the matter in dispute, including the material facts, parties, and subject matter.[69] This will then inform the questions the legal practitioner asks their client to determine the parameters of their instructions. While it could be argued that identification of these preliminary matters falls within Fisher and Ury's first two principles, 'separate the people from the problem'; and 'focus on interests, not positions', this presents a challenge in legal negotiations. A legal practitioner cannot follow either of these principles until they have a clear and precise understanding of the relevant people, the subject matter, the broader context, and the issues to be negotiated.[70] Although these are semantic points, they are foundational for 'good practice'. If these steps are omitted, legal practitioners are more likely to also omit details from the remainder of their legal negotiation preparation, or to be surprised by additional information they have not considered, during the negotiation itself.

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67 See below Chapter Five.

68 See above Chapter One, Part III(A).

69 Often, the identification of parties, content, relationships, and negotiation process (ie intersection between *Preliminary Considerations* and *Relationships and Communication*) will involve moving back and forth between the different stages of preparation. See, eg, Adrian Borbély and Julien Ohana, 'The Impact of the Negotiator's Mindset, in Three Dimensions' in Chris Honeyman and Andrea Kupfer Schneider, *The Negotiator's Desk Reference* (n 3) 91, 93-4. While this applies generally to negotiators, it can be contextualised to apply to legal practitioner negotiators.

70 See, eg, Negotiation Navigation Map: Nadja Alexander, Jill Howieson and Kenneth Fox, *Negotiation Strategy, Style, Skills* (LexisNexis 3rd ed, 2015) [5.4].

The identification of parties and key stakeholders as is critical, as is the need to determine the legal issues and parties' interests.[71] These components of legal negotiation preparation are inherent in all legal negotiation preparation literature,[72] and are therefore uncontroversial components of 'good practice'. This understanding was also reflected by my student respondents, who considered the identification of issues as a high-to-very-high priority (average rating of 1.57), and the importance of identifying key stakeholders as a middle-to-high priority (average rating of 2.10). Only 10% of respondents wanted to be more prepared on this factor. This, along with comments such as 'issues and stakeholders [are most important] because they are the issues and the people who have to live with the outcomes',[73] indicate that law student respondents understand the importance of these components of legal negotiation preparation.

Legal negotiations often turn on the subject matter itself – the facts presented during the legal negotiation.[74] Very little literature guides legal practitioners to understand the facts in dispute – again, it seems to be assumed that an astute legal practitioner will do factual research and make sure to fully appreciate all relevant facts. As a result, I did not directly ask law students about the priority they gave to understanding the facts, instead assuming that they would instinctively commence their preparation by reading and understanding the fact scenario, as they would with a law school assignment. Only 51% of respondents specifically noted that their preparation involved engagement with the facts,[75] although it is likely that they did intrinsically commence by reading and analysing the facts but did not specifically comment on this. Respondents reported plans to use the facts tactically (45%) to gain bargaining power or leverage; or to engage in problem-solving (13%). This reflects competitive vs cooperative negotiation theories, weighted more heavily towards competitive negotiation than to

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71 Alexander and Howeison (n 2) 110-111; Spiller (n 11) 45; Spegel, Rogers and Buckley (n 2) 53 [3.21]; Mulder (n 2) 29; Goodpaster (n 2) 169; Menkel-Meadow et al, *Beyond the Adversarial Model* (n 62) 131; Eunson (n 2); Sourdin, *Alternative Dispute Resolution Sixth Edition* (n 44) 59 [2.55]; Astor and Chinkin, *Dispute Resolution in Australia* (n 23) 122; Wade, 'The Last Gap in Negotiations' (n 58) 94; Folberg et al (n 2) 88-90; Budjac (n 58) 197; Raymond Saner, *The Expert Negotiator* (Kulwer Law International, 2000) 164; Janice Gross Stein, 'Getting to the Table: The Triggers, Stages, Functions and Consequences of Prenegotiation' (1988) 44(2) *International Journal* 473 485; Alex J Hurder, 'The Lawyer's Dilemma: to Be or Not to Be a Problem-Solving Negotiator' (2007) 14(1) *Clinical Law Review* 253 73-4;

72 See, eg, Alexander, Howieson and Fox (n 70) [5.4].

73 1407PNPR (Response to Pre-Negotiation Questionnaire, 2014).

74 Goodpaster (n 2) 169.

75 See below Part III.

problem-solving, aligning with Spencer and Scott's findings that junior law students are more likely to be competitive.[76]

Gaining a detailed understanding of the facts often requires factual research, which commences the process of determining the issues in dispute, the parties' interests and positions, and potential bargaining ranges and options. While most academics do not consider facts to be negotiable,[77] facts in areas outside the law are constantly negotiated,[78] and can be perceived differently by different professions or cultures.[79] Adler recommends that facts be treated as 'opinions, assertions, and beliefs' until parties *agree* about the facts,[80] although agreement may not always be possible.[81] Adler's concerns are by-passed in Legal Negotiation Competitions that are based primarily on agreed facts. Further, pre-negotiation discussions can settle the relevant facts and manage any complexities.[82] My survey respondents considered factual research to be a middle-to-high priority (average rating of 2.58). In my experience, competitors typically feel tied to the facts as written, feeling restrained from undertaking additional research despite the ambiguity often written into Legal Negotiation Competition questions. My results reflect this, or, alternatively, could imply that respondents simply did not feel the need to understand the facts in more depth. Indeed, I have judged many negotiations that stalled on the alleged price of an item in dispute (a car, for example), because the negotiators failed to research potential price points.

Legal practitioners must gain a clear understanding of the relevant legal issues.[83] Usually, clients will have specific reasons for engaging in legal negotiation, which will relate to both the relevant issues and to their interests. Given that law students are taught to identify legal

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76 David Spencer and Marilyn Scott, 'ADR for Undergraduates: Are We Wide of the Mark?' (2002) 13(1) *Australasian Dispute Resolution Journal* 22.

77 Peter S Adler, 'Negotiating the Facts' in Chris Honeyman and Andrea Kupfer Schneider, *The Negotiator's Desk Reference* (n 3) 455, 458.

78 Ibid.

79 Ibid 460-1.

80 Ibid 459.

81 Goodpaster (n 2) 170.

82 Stein (n 71) 482.

83 Alexander and Howieson (n 2) 110-111, Map Step 1; Spiller (n 11) 44-45; Mulder (n 2) 29; Eunson (n 2); Astor and Chinkin, *Dispute Resolution in Australia* (n 23) 122; Stein (n 71) 485 problem identification (stage 1); Budjac (n 58) 197

issues as part of their preliminary undergraduate legal education,[84] it is unsurprising that my respondents rated *issue identification* as the overall second highest priority (average rating of 1.57).[85] It is also important to determine the client's priority order for the relevant issues. Arguably, *Preliminary Considerations* is too early in the legal negotiation process for legal practitioners to consider a priority order or begin to create an agenda, because they do not yet have a thorough understanding of the relationships between parties, or parties' interests. It is, however, appropriate as part of 'good practice' for legal practitioners to at least understand the priority that their client would give to each issue, identified at this stage, but built on throughout the remaining categories.

Opinions are divided on the use of agendas in negotiation.[86] While agendas are useful for ordering the issues in dispute;[87] determining the order of information to be presented or obtained;[88] or even for gaining control or advantage over the negotiation from its conception;[89] they can also be limiting, particularly for inexperienced law student negotiators who either feel tied to their agenda, or are unsure how to re-prioritise the issues in dispute as the negotiation progresses.[90] Thorough preparation, including clear understanding of instructions and of the subsequent categories in the Legal Negotiation Preparation Framework will reduce the likelihood of *at the table* agenda struggles. My survey respondents rated *agenda-setting* as a middle-to-high priority (average rating of 2.13). Respondents who had studied an elective topic containing legal negotiation were more likely to rate *agenda-setting* as a high or very-high priority. This reflects an understanding of how quickly time elapses during a 50-minute timed-negotiation and the resultant benefit of a priority order. Agendas can provide stability during legal negotiation preparation, and can also assist in determining what will – and what will not – be raised during the legal negotiation.[91] While the creation of an agenda is not imperative to 'good practice' legal

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84 This is a common teaching methodology throughout first year legal education. See, eg, Nikolas James, Rachel Field and Jackson Walkden-Brown, *The New Lawyer* (Wiley, 2019) 287-91; Michelle Sanson and Thalia Anthony, *Connecting with Law* (Oxford University Press, 3rd ed, 2016) 25; Catriona Cook et al, *Laying Down the Law* (LexisNexis, 9th ed, 2015) 550.

85 See Appendix N for a full list of these ratings.

86 See, eg, Stein (n 71) 482; Budjac (n 58) 198, Mary Power, 'Agenda Setting in Real-Life Negotiations' (1999) 10(1) *Australasian Dispute Resolution Journal* 30.

87 See, eg, Fells and Sheer (n 7) 80-1.

88 Ibid 124-5.

89 Saner (n 71) 131.

90 See, eg, Mills (n 12) 253.

91 Stein (n 71) 482.

negotiation preparation, knowledge of the order in which the client prioritises the relevant issues is key to 'good practice'.

While not necessarily an important part of 'good practice', the way in which the negotiation itself is set up attracts abundant scholarly commentary.[92] This includes who will attend the legal negotiation,[93] the location of the legal negotiation,[94] and room set up.[95] These components are sometimes, however, considered to come after the preparatory stage.[96] For the purposes of legal negotiation preparation, then, the legal practitioners who will attend the legal negotiation must be carefully selected, with clear parameters set around their role.[97] The legal practitioners need to consider the likely responses of opposing counsel to the issues raised,[98] which may involve tailoring their approach to opposing counsel's legal negotiation style.[99] The physical set up of the negotiation is relevant,[100] particularly to neutrality[101] and control,[102] and reflects legal negotiation theories.[103] For example, competitive negotiators are more likely to engage in physical power plays demonstrated through negotiators sitting at opposite ends of large desks,[104] whereas cooperative negotiators are more likely to encourage negotiators to sit side-by-side.[105] Despite the abundant references to physical setting in the literature, in legal practice many legal practitioners would give little thought to this.[106]

Competitors in Legal Negotiation Competition have little flexibility over physical set up, but surprisingly rated this as a middle-to-high priority (average rating of 2.43; 19 of 31 factors). Since the Pre-Negotiation Questionnaire was intended to be completed prior to the actual

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92 See eg Spegel, Rogers and Buckley (n 2) 58-60.

93 Stein (n 71) 482; Wade, 'The Last Gap in Negotiations' (n 58) 94-95; Astor and Chinkin, *Dispute Resolution in Australia* (n 23) 123.

94 Eunson (n 2) 12.

95 Stein (n 71) 482.

96 Spiller (n 11) 47.

97 Astor and Chinkin, *Dispute Resolution in Australia* (n 23) 123; Stein (n 71) 482; Power (n 86) 33

98 See, eg, Spegel, Rogers and Buckley (n 2) 60 [3.33]; Mulder (n 2) 48; Astor and Chinkin, *Dispute Resolution in Australia*(n 23) 123; Spiller (n 11) 44-6.

99 This spans the legal-ethical divide, and is specifically analysed in Chapter Five in relation to my data.

100 See, eg, Stein (n 71) 482, 485; Wade, 'The Last Gap in Negotiations' (n 58) 94-5; Spegel, Rogers and Buckley (n 2) 60 [3.32].

101 Eunson (n 2) 12.

102 Leo Hawkins and Michael Hudson, *The Art of Effective Negotiation* (The Business Library, 1990) 51.

103 Ibid 51-3.

104 Ibid 52.

105 Ibid 53.

106 Ibid 51.

negotiation, I expected low ratings as respondents might not have known the layout of the room. Comments made by respondents indicated that they wanted the room to be 'conducive for conversation'[107] and that this has an 'impact on social power'.[108] While this may reflect relevant legal negotiation literature, I did not expect social power to be identified as relevant in a simulated legal negotiation. Such comments could mean that respondents were taking the competition seriously, or could reflect a socially desirable response – deducing that 'the researcher' was examining negotiation strategy and behaviour.[109] A similar component to physical set up, the *use of props*, was rated as a low priority (average rating of 3.98), the lowest of all factors. This reflects law student understanding that their priorities in legal negotiation preparation should lie elsewhere. Ultimately, while legal practitioners will not always have control over the physical location of the legal negotiation, they should be aware of the impact that physical location might have on relationships and power dynamics, which, it seems, law students have already grasped. Such relationships, however, are not a commonly depicted component of legal negotiation *preparation* in the literature and are consequently more likely to be more reflective of 'best' or 'advanced' practice, rather than 'good practice'.

While the importance of some of these *Preliminary Considerations* may appear banal, this level of detail is not only required for a clear identification of 'good practice', it is also necessary to provide precise guidance to law students who are learning to prepare for a legal negotiations. My data reflects that law students recognise the importance of subject matter and party identification as key components of legal negotiation preparation. Having a good understanding of these matters, specifically, will assist law students (and legal practitioners) to work through the remaining four categories of the Legal Negotiation Preparation Framework, and to avoid ethical issues that might arise due to lack of knowledge.

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107 1301PNPR (Response to Pre-Negotiation Questionnaire, 2013).

108 1305PNPR (Response to Pre-Negotiation Questionnaire, 2013).

109 See above Chapter Two, Part IV.

B Relationships and Communication

After legal negotiators have identified the relevant parties and stakeholders, they are in a prime position to identify and analyse the connections between parties involved in the legal negotiation. This corresponds with Fisher and Ury's first principle – 'separate the people from the problem' – which focuses on the 'human aspect of negotiation,'[110] predominantly the relationships between parties;[111] parties' emotions;[112] and communication.[113] As noted in Chapter Three, the distinguishing factor that identifies a negotiation as *legal* is the involvement of legal practitioners representing the parties. Moving Fisher and Ury's analysis into the legal negotiation environment, therefore, requires legal practitioners to consider a broader range of relationships, distinct conceptions related to emotion, and a different register of communication.

1 *Legal Negotiation Relationships*

There are three principal relationships relevant to legal negotiation: between the parties (and any key stakeholders);[114] between the legal practitioners and client; and between the legal representatives (both on the same team and with opposing counsel). Being able to identify all relevant relationships and understand their impact on the legal negotiation forms part of 'good practice', given the ability of these relationships to affect the outcome of the legal negotiation. The relationship between parties is often fragmented, causing the dispute that led to legal negotiation. As such, parties' emotions can run high, which impacts both the negotiation itself, and any ongoing relationship between parties. This can lead to difficulty separating strongly interconnected positions and relationships.[115] The use of legal practitioner representatives, however, minimises some of these problems. Legal practitioners can objectively assess the relevant party relationships in the absence of any emotion related to the subject matter of the negotiation,[116] and can therefore determine the need for any ongoing

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110 Fisher, Ury and Patton (n 44) 14.

111 Ibid 14.

112 Ibid 19.

113 Ibid 20.

114 See, eg, Spiller (n 11) 45; Mulder (n 2) 21, 48; Spencer, Barry and Akin Ojelabi (n 44) 111 [3.110]; Hawkins and Hudson (n 102) 27; Saner (n 71) 153; Alexander, Howieson and Fox (n 70) 93-4.

115 Rebecca Hollander-Blumoff, 'Building Relationships as Negotiation Strategy' in Moffitt and Bordone (n 2).

116 Fisher, Ury and Patton (n 44) 14.

relationships, and negotiate accordingly.[117] Legal practitioners must work with their client to determine each party's thoughts, fears, hopes, values and understanding of the facts, as well as how these could impact the legal negotiation process or outcome.[118] Legal practitioners can therefore legitimise each party's emotions,[119] and decide how that emotion could be used during the negotiation. Indeed, removing parties' emotion from discussions can reduce the conflict created between parties' interests and the consequent impact on parties' relationships,[120] and mean that parties are more likely to reach agreement.[121] Law students recognise the importance of the *relationship between clients*, rating this as a middle-to-high priority (average rating of 2.19). Their comments noted the importance of the *relationship between clients*, but also acknowledged the significance of context in determining whether parties require an ongoing relationship, or whether the relationship has broken down.[122] Being able to identify the need for any ongoing relationships between parties is a key component of 'good practice' and will impact the way in which legal negotiations unfold. For example, a client involved in ongoing matters may prefer that their legal practitioner adopts a harder or softer bargaining approach, depending on the circumstances, though this approach may change as negotiations progress.

The concept of *relationships* highlights the importance of an open dialogue between the client and their legal practitioner. Without this, the legal practitioner will not have as much knowledge about the subject matter of the legal negotiation. As such, the legal practitioner's relationship with their client is the most important relationship in the legal negotiation process. This is echoed throughout the literature, though is often implicit, particularly in relation to ethical obligations.[123] Indeed, many of the factors relevant to legal negotiation relationships are founded in legal practitioners' ethical obligations, particularly in legal ethical duties to the law and the administration of justice, and that to fellow legal

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117 Spiller (n 11) 44; Mulder (n 2) 21; 48; Astor and Chinkin, *Dispute Resolution in Australia* (n 23) 122; Sourdin, *Alternative Dispute Resolution Sixth edition* (n 44) 60 [2.55]; Spencer, Barry and Akin Ojelabi (n 44) 111 [3.110].

118 Fisher, Ury and Patton (n 44)15-18.

119 Ibid 19-20.

120 Ibid 15: Particularly reflected when negotiators use a competitive approach to negotiation.

121 Spencer, Barry and Akin Ojelabi (n 44) 96-7 [3.60] quoting M Anstey, *Negotiating Conflict* (Juta & Co Ltd, 1991); Deanna Foong, 'Emotions in Negotiation' (2007) 18(3) *Australasian Dispute Resolution Journal* 186, 189 quoting Roger Fisher and Daniel Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (Viking, New York, 2005) 203.

122 1501PNPR (Response to Pre-Negotiation Questionnaire, 2015).

123 See below Chapter Five, Part II(B)(2).

practitioners. Additionally, a legal practitioner's ascription to various ethical schools or philosophies will influence the way in which they interact, and communicate with other legal practitioners during legal negotiations, which also relates to issues of reputation that are predominantly relevant in law and legal negotiation.[124] Pragmatically, legal practitioners on both sides of a matter must, at least, attempt to develop a professional working relationship that properly reflects the standards of the profession, and their legal and ethical obligations.[125] A legal practitioner's behaviour is also indicative of where their approach to legal negotiation lies on the cooperative-competitive continuum. For example, it is beneficial for legal practitioners to create a relationship of trust for the purposes of negotiations. From a cooperative perspective, this is best done by creating a respectful relationship from the start, and by being empathetic. My survey respondents considered *relationship with the opposing team* to be a middle priority (average rating of 3.05), 27th priority of the 31 factors surveyed. This positioning, and the fact that only 25% of respondents indicated they wanted to be better prepared on this factor, indicates that students do not understand (or value) the importance of the relationship between competing teams. Although not all legal practitioners will prioritise a relationship with opposing counsel, it is pragmatic to keep the relationship cordial as it is highly likely that the lawyers will work together again, and reputation is incredibly important in the legal field.[126] These results could, however, be representative of the nature of the competition itself: a relationship between teams could easily be strained by competitors' desire to win. This highlights one of the least realistic components of the legal negotiation competition, since legal practitioners in real life need to prioritise their client's interests over *winning* against the other side – this is one of the fundamental tenets of negotiation compared with litigation.

Although survey respondents did not consider the relationship between opposing negotiation teams to be a high priority, they did recognise the need for a good working relationship with their teammate. Respondents gave high-to-very-high-priority to both *working with their teammate* (average rating of 1.62) and their *relationship with their teammate* (average rating of 1.64); respectively fourth and fifth of the 31 factors – much higher than *relationship with the opposing team.* This reflects that law students *do* understand the importance of legal

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124 See, eg, John Wade, 'Ethically Ambiguous Negotiation Tactics (EANTS): What are the Rules Behind the Rules?' (Conference Paper, Law Society of Saskatchewan CPD Seminars, 12 May 2014) ('EANTS').

125 Spencer, *Principles of Dispute Resolution 2020* (n 31) 48-9.

126 Wade, 'EANTS' (n 124).

practitioners working together, and that, in regard to the relationship between teams, this was overshadowed by the nature of the competition. Respondents' comments displayed an understanding of the importance of working with their teammate: 'working together…will hopefully make the process better and more beneficial for everyone'[127] and 'working with teammate [was important] because we would like to find equilibrium and balance in ADR strategies'.[128] This second comment, in particular, shows insight into an understanding of how the relationship between teammates can benefit the legal negotiation.

2 *Factors Impacting Relationships*

There are various factors that can affect relationships during a legal negotiation. For example, Fisher and Ury draw attention to the importance of recognising and acknowledging emotion during a negotiation,[129] though this is only minimally addressed in the literature related to legal negotiation preparation.[130] This sub-set of literature also draws on gender, culture, and power, which, in turn, can be linked to strategy, tactics, and consequently to legal negotiation ethics. Some, but not all, of these components can be tempered through the use of legal practitioners representing the parties during legal negotiation. As part of 'good practice', legal practitioners must be able to identify when the factors are relevant and the resultant potential impact of these factors. Arguably, to achieve minimum competence in this area, a law student must be able to identify whether these factors are relevant to the legal negotiation.[131] This is one area that particularly reflects the artificiality of Legal Negotiation Competitions. It is consequently unsurprising that respondents rated the priority given to *emotion*, *gender*, and *culture* during their preparation as 27th, 29th and 30th of the 31 factors. Since the clients are fictional, any impacts of emotion, gender, culture, and power are likely to be ignored or avoided, if they are even identifiable in written instructions. Even if competitors *do* understand the significance of these factors, these impacts will not be felt during the Legal Negotiation Competition. The exception to this is the concept of power, which is commonly mentioned in the legal negotiation literature, particularly as it relates to

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127 1306PNPR (Response to Pre-Negotiation Questionnaire, 2013).

128 1407PNPF (Response to Pre-Negotiation Questionnaire, 2013).

129 Fisher, Ury and Patton (n 44) 19.

130 Notable exceptions include Foong (n 121); Daniel L Shapiro, 'Enemies, Allies, and Emotions: The Power of Positive Emotions in Negotiation' in Michael L Moffitt and Robert C Bordone (n 2) 66. Where emotion is addressed in general negotiation literature, the focus is on the emotion of the parties in a party-party negotiation, and how emotion can be harnessed: Fells and Sheer (n 7) 48-51.

131 See below Chapter Six.

strategy.[132] These factors are rarely included in legal negotiation *preparation* literature, but are relevant to the legal negotiation itself. Below, I have examined these factors through a preparatory lens to provide insight into how to best consider these during legal negotiation preparation.

Emotion is predominantly addressed in literature related to the negotiation itself, rather than to preparatory stages,[133] and focuses primarily on how legal practitioners should address the emotion of parties present at the negotiation.[134] For a legal negotiation during which parties are not present, such as those relevant to my research, legal practitioners should still, as part of legal negotiation preparation, consider the parties' emotions and how these relate to the relevant issues and to each party's interests. Having a clear understanding of these matters will influence the priority of agenda items, and could provide insight into how other parties may react to certain offers.[135] The only way legal practitioners can gain an understanding of these matters is to seek their client's input, perhaps by using methods such as role-reversal or rehearsal to predict the other side's reactions.[136] The client interaction needed for proper identification of emotion is not reflected in Legal Negotiation Competitions, although emotion is still a relevant consideration. For law students entering a Legal Negotiation Competition, emotions are more likely to signify competitors' nerves or desire to win, rather than the emotions of their fictional clients. Since law students do not have the opportunity to consider the emotions of a real client, they must at least be made aware of the role that emotion can play in a real-life legal negotiation. As a result of the above analysis, it is unsurprising that *emotion* was considered a middle-to-low priority (average of 3.15) and respondents seemed confident with their preparation on this matter. This is one matter worth noting for legal negotiation education, particularly in highlighting the differences between competition negotiations and real-life negotiations.

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132 See generally Goodpaster (n 2) 175; Budjac (n 58) 198; Spiller (n 11) 44; Folberg et al (n 2) 79; Deborah Kolb and Jessica Porter, 'Power at Play in Negotiation: Moves and Turns' in Chris Honeyman and Andrea Kupfer Schneider (eds) *Negotiator's Desk Reference* (n 3) 365.

133 See, eg, Foong (n 121); Shapiro (n 130) 64.

134 Fisher and Shapiro (n 121) 149-50, in Foong (n 121) 189-91.

135 Fisher, Ury and Patton (n 44) 15. See also Spegel, Rogers and Buckley (n 2) 60 [3.33].

136 Spencer, Barry and Akin Ojelabi (n 44) 96-7 [3.60] quoting Anstey (n 121). Role-plays are also encouraged by Mulder (n 2) 50 who states that there should be no rules during a role-play and 'no critical judgment allowed': at 52; and Astor and Chinkin, *Dispute Resolution in Australia* (n 23) 122. Regarding rehearsal see also: Spegel, Rogers and Buckley (n 2) 58-60; Mulder (n 2) 48; Eunson (n 2) 5.

While the literature primarily considers the gender of the parties themselves, particularly in relation to power dynamics, there is a subset of literature that analyses how gender influences the way in which legal practitioners negotiate,[137] particularly how negotiators identify, analyse, and react to negotiation signals.[138] Men and women can comprehend negotiation differently,[139] and react to different cues.[140] Men often take a more competitive approach to negotiation,[141] while women tend to be more cooperative,[142] focussed on building relationships and problem-solving.[143] The literature related to gender stereotypes does not specifically consider legal practitioner negotiators, however, who may avoid gender stereotypes due to their legal training. As with emotion, law students responding to my questionnaire gave minimal priority to considerations of *gender*, rating this as one of the lowest priorities to which they turned their attention (average rating of 3.92), 29th of 31 factors. It is likely that competitors perceived this question as asking about the gender of the clients. Since the *clients* in these instances are fictional people providing only written instructions, in most instances their gender is unlikely to have an impact on the negotiation itself. The gender of the law student negotiators, however, might have influenced the progression of the negotiation, but this interpretation was not reflected in any law student comments.

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137 Judith O'Hare, 'Negotiating with Gender' (1997) 8(3) *Australian Dispute Resolution Journal* 218, 224. For a detailed analysis on the relationship between gender and negotiation, see Deborah M Kolb and Linda L Putnam, 'Negotiation Through a Gender Lens' in Moffitt and Bordone (n 2) 135.

138 Clare Boardman and Richard Beach, 'Mixed-Gender Teamwork in Negotiation' (1998) 9(2) *Australian Dispute Resolution Journal* 110, 111-112. Alexander, Howeison and Fox caution, however, that it is difficult to generalise about how sex and gender will affect negotiation: Alexander, Howeison and Fox (n 70) 201-2; 203-4.

139 Linda Barkacs and Stephen Standifird, 'Gender Distinctions and Empathy in Negotiation' (2008) 12 *Journal of Organizational Culture, Communications and Conflict*, 83, 89. See generally Morial Shah, 'Negotiation: Women's Voices' (2020) 20(1) *Pepperdine Dispute Resolution Law Journal* 167.

140 O'Hare (n 137) 221.

141 Ruth Charlton, 'Negotiators: Are Men from Mars and Women from Venus?' (1998) 9(2) *Australian Dispute Resolution Journal* 89, 89; Carolyn Brooks, 'Don't Fence us in' (1998) 9 *Australian Dispute Resolution Journal* 94, 94. See also O'Hare (n 137) 222, and Boardman and Beach (n 138) 111 regarding the relationship between power and gender, particularly with regards to men taking on more powerful roles.

142 Barkacs and Standifird (n 139) 87; Charlton (n 141) 89. See also O'Hare (n 137) 222 regarding the female focus on relational power and empathy.

143 Astor and Chinkin, *Dispute Resolution in Australia* (n 23) 128. For more on women's perception of social relationships as relevant to negotiation, see Fells and Sheer (n 7) 45-48.

Culture may also impact the progression of legal negotiations, particularly in the sense that certain cultures have different values, which may influence the legal negotiation process,[144] for example through the way in which legal practitioners rely on legal principles, or challenge authority.[145] There is copious literature relating to the role of culture in negotiation, particularly cross-cultural negotiation and the ways in which culture could influence negotiations at the table.[146] In *real life* negotiations, culture will often be evident in the parties' appearance or beliefs, and clients can easily explain this to their legal practitioner in advance – this will take a particularly important role in relation to identification of *Parties' Interests* and *Option Generation*, below.[147] Legal practitioners must ensure they respect a client's cultural beliefs, and the resultant impact on any components of the legal negotiation. Cultural aspects are, however, an uncommon factor in Legal Negotiation Competitions, partly reflected through the fictional nature of the clients. This is likely why respondents rated *culture* as a low priority (average rating of 3.96; 30th of 31 factors). In terms of 'good practice', legal practitioners must be able to identify any cultural factors that could influence the negotiation – in practice, these will be much more evident than during simulated legal negotiations.

A final consideration is power, which is more prevalent in the literature than the factors above.[148] While the literature commonly refers to power during the negotiation itself, there is also emphasis on assessing each party's relative bargaining power during preparation.[149] Power imbalances can be caused by many factors, including emotional manipulation, the

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144 See eg: Astor and Chinkin, *Dispute Resolution in Australia* (n 23) 113; Fisher, Ury and Patton (n 44) 80; Peter Condliffe, *Conflict Management, A Practical Guide* (6th ed, 2019) 229-238 [6.29]-[6.36]; Siew Fang Law, 'Culturally Sensitive Mediation: The Importance of Culture in Mediation Accreditation' (2009) 20(3) *Australian Dispute Resolution Journal* 162, 164; Simon Young, 'Cross-Cultural Negotiation in Australia: Power, Perspectives and Comparative Lessons' (1998) 9(1) *Australian Dispute Resolution Journal* 41, 48; Mulder (n 2) 50; Alexander, Howeison and Fox (n 70) chapter 9. For a detailed explanation of the *relevance* and *impact* debates pertaining to culture in negotiation, see: Anthony Wanis-St John, 'Cultural Pathways in Negotiation and Conflict Management' in Moffitt and Bordone (n 2) 118, 124-9. Menkel-Meadow et al caution, however, that advice about culture could be 'too simplistic…or so general that it is not helpful': Menkel-Meadow et al, *Beyond the Adversarial Model* (n 62) 181-2.

145 Wanis-St John (n 144) 121.

146 See, eg, Fells and Sheer (n 7) chapter 13.

147 Ibid 357-60.

148 See, eg, Spiller (n 11) 44, Goodpaster (n 2) 172, Folberg et al (n 2) 79; Alexander, Howeison and Fox (n 70) 142-6.

149 Goodpaster (n 2) 172, Folberg et al (n 2) 79.

impact of culture, employment relationships, and financial considerations,[150] and can heavily impact negotiations. Like gender, power can be reflected in several ways during a legal negotiation. First, regarding the relationships between legal practitioners – a junior legal practitioner may feel less powerful than their senior opposing counsel, although careful preparation can minimise this power imbalance. Power imbalances between the parties themselves can be caused by factors such as domestic violence, which completely nullifies a victim's ability to negotiate. In some instances, this is addressed in legislation that allows such victims to avoid otherwise mandatory dispute resolution.[151] While this factor is again tempered by engaging legal representation, legal practitioners must ensure they are aware of the impact of power on the relationship between their client and any other parties or key stakeholders, and the affect this may have on legal negotiation processes and outcome. This is relevant to 'good practice'. My survey respondents rated the consideration given to *power imbalances* as a middle-to-high priority during preparation (average rating of 2.47; 20th of 31 factors). On reflection, 52% wished they had been more prepared on this factor, perhaps indicating that a power imbalance was present during the legal negotiation and that they were unprepared for this; or that they had not identified power imbalances as relevant until the negotiation itself. Relatedly, respondents rated *exploiting other parties' weaknesses* as middle-to-high priority (average rating of 2.58), though 60% wished they had been more prepared on this point. Both *power* and *exploiting other parties' weaknesses* relate to strategy and tactics, and, consequently, to legal ethics. To this end, these factors will be analysed through a legal ethics lens in Chapter Five.

150 See generally Rebecca Hollander-Blumoff (n 115).

151 See, eg, *Family Law Act 1975* (Cth) s 60J. See also commentary by Joshua Taylor, 'A Critical Analysis of Practitioners Issuing "Not Appropriate for Family Dispute Resolution" Certificates Under the *Family Law Act 1975* (Cth)' (2020) 41(1) *Adelaide Law Review* 149.

3 *Communication*

Communication is essential for legal negotiation, but is an often challenging part of preparation.[152] Fisher and Ury identify three, seemingly interrelated problems associated with communication during negotiation: that negotiators communicate in a way that the other side does not understand;[153] that one side is not listening to the other;[154] or that the information being communicated is misunderstood.[155] During a legal negotiation, the first two problems are less applicable, since legal practitioners must communicate clearly and listen to one another.[156] It is possible, however, that information communicated could be misunderstood. To prepare for this, legal practitioners could plan some of their communication in advance, particularly the questions they will ask about key issues. This is another reason for which legal practitioners must understand the scope of their authority and the associated ethical obligations. This relates to the questions they can ask as well as the information they can disclose, particularly how they will speak about key issues and ask associated questions. One of the reasons for which law students do not thoroughly prepare for legal negotiation is that it is difficult to prepare when negotiations could take so many different turns at the table – this is particularly relevant to communication. Despite this, legal negotiators who prepare thoroughly will not be surprised by additional information presented at the table, or, at the very least, will be less thrown by this information.

Legal negotiation preparation is significantly different from preparing for a moot or mock court appearance, particularly with regards to communication. Law students, however, might not recognise this due to the often-adversarial nature of legal education.[157] In a legal negotiation, the relationship between negotiators is based on trust and rapport,[158] and both require active listening,[159] and a dialogue of questions and responses.[160] This is not always

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152 Spencer, *Principles of Dispute Resolution 2020* (n 31) 47 [2.180]; Fisher, Ury and Patton (n 44) 20-21.

153 Fisher, Ury and Patton (n 44) 20.

154 Ibid 20.

155 Ibid 21.

156 Listening is often poorly done during negotiation: see, eg, Guy Itzchakov and Avraham N Kluger, 'Listening with Understanding in Negotiation and Conflict Resolution' in Honeyman and Schneider, *The Negotiator's Desk Reference* (n 3) 409, 410-12

157 Spencer, *Principles of Dispute Resolution 2020* (n 31) 31.

158 Andrea Kupfer Schneider and Sean McCarthy, 'Choosing Among Modes of Communication' in Honeyman and Schneider (n 3) 107, 109; Saner (n 71) 149; Hawkins and Hudson (n 102) 38.

159 Fisher, Ury and Patton (n 44) 21. See generally Menkel-Meadow et al, *Beyond the Adversarial Model* (n 62) Eunson (n 2) 6; Spencer, *Principles of Dispute Resolution 2020* (n 34) 36-7 [2.80]; Mills (n 12) 104-5.

160 Schneider and McCarthy (n 158) 109.

reflected in law student legal negotiations, which veer towards litigation-style application of law to facts, or conversely, devolve into informal conversations between peers. Techniques such as reframing, and asking open and closed questions, are particularly useful to gather key information about the other parties' perceptions of the dispute.[161] This, in turn, relates to how the legal practitioner frames their argument;[162] and expands their argument beyond the legal principles related to the case,[163] both of which require the use of persuasion.[164] Forming clear and concise arguments, phrases, and offers can be difficult when under pressure, and underprepared or inexperienced legal practitioners could potentially misrepresent their client's instructions as a result, which raises significant ethical concerns.[165] This, likewise, applies to the presentation of offers during the legal negotiation. To an extent, though, the acceptance of offers presented during a legal negotiation will depend on the initial rapport and trust created between legal practitioner negotiators,[166] and, of course, on authority. The consequent presentation of offers and counter-offers, until agreement is reached, reflects the 'negotiation dance'.[167] If a legal practitioner is unprepared, they may be quick to propose counter offers,[168] rather than waiting to hear the full offer and asking further questions to determine its benefit. This could have ethical ramifications if the legal practitioner is not following client instructions.

As part of 'good practice' legal negotiation preparation, a legal practitioner must identify and understand the relevant relationships, their impact on the information gathered during *Preliminary Considerations*, and the impact that various factors might have on the relevant relationships. In progressing their legal negotiation preparation, the legal practitioner should also consider their communication strategy, particularly in terms of information gathering and offer presentation. Such strategies must always align with their authority.

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161 Spencer, *Principles of Dispute Resolution 2020* (n 34) 34-36.

162 Menkel-Meadow et al, *Beyond the Adversarial Model* (n 62) 136.

163 Ibid.

164 Ibid.

165 Indeed, this is when many ethical lapses occur. See below Chapter Five.

166 Saner (n 71) 55.

167 See generally Folberg, Golann, Kloppenberg and Stipanowich (n 2) chapter five.

168 Saner (n 71) 167.

C Parties' Interests

Although the process of thorough legal negotiation preparation will require a legal practitioner to move back and forth between the categories in the Legal Negotiation Preparation Framework, at this stage they are well positioned to use their knowledge of the subject matter, parties, relationships and issues to define the parties' interests.[169] This component of the Legal Negotiation Preparation Framework strongly emphasises client-centrality. It is fundamental that the client is involved in identifying and evaluating the relevant interests. In Fisher and Ury's Four Principles, this is reflected as 'focus on interests, not positions', and rests on the premise that parties' interests (wants, needs, fears, and concerns) are more beneficial to reaching a negotiated outcome than their positions.[170] The 'most powerful interests are basic human needs…[including] security, economic well-being, a sense of belonging, recognition, [and] control over one's life.'[171] This considers the client as a whole,[172] moving beyond a merely legal focus.[173] A legal practitioner must work with their client to identify their interests, and, ideally, to determine solutions that would best suit these interests (through the remaining stages of preparation and the negotiation itself).[174] Involving the client in the process of interest identification is key to ensuring the client remains a central part of the legal negotiation process. The legal practitioner must ensure that they have a full appreciation of the client's reasoning, and how any potential outcome may affect them.[175] Indeed, failure to consider a client's interests and ways to create value for these interests will disadvantage a legal practitioner during the legal negotiation,[176] and will mean that they do a disservice to their authority, and, ultimately, to their client. Furthermore,

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169 Fisher, Ury and Patton (n 44) 28-9. See also Fells and Sheer (n 7) 66-8.

170 Fisher and Ertel (n 10) ch 3; Fisher, Ury and Patton (n 44) 23. See also Folberg et al (n 2) 88-90; Goodpaster (n 2) 169-71; Sourdin, *Alternative Dispute Resolution Sixth Edition* (n 44) 59 [2.55]; Astor and Chinkin, *Dispute Resolution in Australia* (n 23) 122; Spiller (n 11) 45; Spegel, Rogers and Buckley (n 2) 3.21, 53.

171 Fisher, Ury and Patton (n 44) 27.

172 Katherine R Kruse, 'Beyond Cardboard Clients in Legal Ethics' (2010) 23(1) *Georgetown Journal of Legal Ethics* 1, quoted in Menkel-Meadow et al, *Beyond the Adversarial Model* (n 62) 58.

173 David A Binder, Paul B Bergman and Susan C Price, *Lawyers as Counselors: A Client-Centred Approach* (West Academic, 1991), in Menkel-Meadow et al, *Beyond the Adversarial Model* (n 62) 60.

174 Fisher, Ury and Patton (n 44) 30. For more information about working with a client to determine key facts about the negotiation, see Jennifer Robbennolt and Jean R Sternlight, 'Good Lawyers Should be Good Psychologists: Insights for Interviewing and Counselling Clients' (2008) 23 *Ohio State Journal on Dispute Resolution* 437 in Menkel-Meadow et al, *Beyond the Adversarial Model* (n 62) 75-8.

175 See, eg, Chris Guthrie and David Sally, 'Miswanting' in Honeyman and Schneider, *The Negotiator's Desk Reference* (n 3) 38, 40.

176 Marilyn Scott, 'Collaborative Law: A New Role for Lawyers' (2004) 15(3) *Australasian Dispute Resolution Journal* 207, 214.

once legal practitioners have addressed their own client's interests, they need to consider other parties' interests,[177] determining any 'common ground' between the parties,[178] any long-term issues,[179] and, to foreshadow Fisher and Ury's third principle, the way in which options could be created to meet all parties' needs.[180]

Contrastingly to interests, *positions* are the potential outcomes that relate to the client's interests. Focusing on positions during the legal negotiation itself can cause negotiations to become deadlocked and result in competitive negotiation and hostile behaviour.[181] While a legal practitioner should identify their client's positions to gain insight into their thinking, this needs to form part of legal negotiation preparation rather than be presented during the legal negotiation itself. One reason for which it is difficult to critically analyse interests is because there is a strong interrelationship between interests and positions, and these concepts are often inextricable.[182] Even scholarly use of the term *positions,* however, attracts ambiguity in some of the literature.[183] If authors who have engaged with this literature as their life's work recognise inherent ambiguities, this only strengthens the argument that law students are confused about legal negotiation preparation. That said, parties' positions typically reflect the interests they seek to address, which can be used during legal negotiations.[184] Negotiators often incorrectly assume that because the parties on either side of a matter likely have directly contrasting positions, they must therefore have similar interests.[185] This reflects a more simplistic view of legal negotiation and will generally not be a true representation. Disputing parties are more likely to have similar positions (wanting the same outcome, or thinking they do), driven by having either similar *or* contrasting interests.[186]

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177 See, eg, James K Sebenius, 'Developing Superior Negotiation Case Studies' (2011) 27(1) *Negotiation Journal* 69, 88 ('Developing Superior Negotiation Case Studies'); Spiller (n 11) 46; Hawkins and Hudson (n 102) 13; Menkel-Meadow, 'Toward Another View of Legal Problem Negotiation' (n 23) 804; Fells and Sheer (n 7) 67-8; Folberg et al (n 2) 100-101; Max H Bazerman and Katie Shonk, 'The Decision Perspective to Negotiation' in Moffitt and Bordone (n 2) 52, 59.

178 Saner (n 71) 164.

179 Ibid.

180 Carrie Menkel-Meadow, 'Toward Another View of Legal Problem Negotiation' (n 23) 793, 804.

181 Fisher, Ury and Patton (n 44) Introduction and Chapter One.

182 Chris Provis, 'Interests vs. Positions: A Critique of the Distinction' (1996) 12(4) *Negotiation Journal* 305 313.

183 White (n 49) 120.

184 Sebenius, 'Developing Superior Negotiation Case Studies' (n 177) 89.

185 Fisher, Ury and Patton (n 44) 24.

186 See generally Fisher, Ury and Patton (n 44) 23.

Despite the frequent literary references to *interests* and *positions*, my experience with law students indicated that they do not always understand this terminology, particularly if they have received minimal legal negotiation education. My deeper exploration of the literature identified various other terminology associated with interest identification, including *objectives* and *goal definition*,[187] which were treated synonymously in relation to their foundational importance to preparing for a negotiation, whether legal or general. As such, I used the term *objectives* in my questionnaires. The respondents considered *your client's objectives* as the most important priority in preparation, rating this high-to-very-high (average rating of 1.51), noting that 'obtaining my client's objectives is paramount and reflects the reason they have hired me to negotiate on their behalf'.[188] This sentiment was echoed in many other comments, and indicated strong client-centrality in the legal negotiation preparation process, showing an attempt by law student negotiators to comply with client instructions and ensure their client was satisfied with the negotiated outcome in compliance with 'good practice'. One comment indicated that both parties' objectives are equally important, to assist in finding 'mutual wins'.[189] While this reflects the need to consider all parties' interests in order to reach a mutually satisfactory outcome,[190] it does not accord with further data that I collected. Respondents rated the consideration of the *other side's objectives* as a considerably lower priority (average rating of 2.33; 17th factor of 31). This reiterates the gap between the literature and law students' understanding, and consequently highlights an area of 'good practice' that is not currently being attained by law students. Encouragingly, however, the comments provided in the Post-Negotiation Questionnaire indicated that 66% of respondents wished they had been better prepared in relation to *the other side's objectives*. This implies that respondents felt unprepared during the legal negotiation, or, even, that respondents learnt from this negotiation/questionnaire experience that considering the other side's objectives was important. Although these findings reflect some learning, they do not indicate *why* law

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187 Alexander and Howieson (n 2) 110-111; Spiller (n 11) 44; Spegel, Rogers and Buckley (n 2) 51 [3.19]; Mulder (n 2) 18; Richard Shell, *Bargaining for Advantage* (Viking, 1999) 3 ('*Bargaining for Advantage*'); Eunson (n 2) 5; Wade, 'The Last Gap in Negotiations' (n 124) 94; John Wade, 'Persuasion in Negotiation and Mediation' (2008) 8(1) *Queensland University of Technology Law Journal* 253, 262 ('Persuasion in Negotiation and Mediation'); Hurder (n 71) 284; Folberg et al(n 2) 79, 85; Mills, (n 12) 203.

188 1509PN (Response to Pre-Negotiation Questionnaire, 2015).

189 1501PNPR (Response to Pre-Negotiation Questionnaire, 2015).

190 1423PNSF (Response to Pre-Negotiation Questionnaire, 2014); 1304PNPR (Response to Pre-Negotiation Questionnaire, 2013); 1312PNSF (Response to Pre-Negotiation Questionnaire, 2013); 1403PNQF (Response to Pre-Negotiation Questionnaire, 2014); 1413PNPR (Response to Pre-Negotiation Questionnaire, 2015).

students did not prioritise this factor more highly. Is it that they simply did not think of it? That considering the other side's objectives strayed too far from the central focus on their client (within their adversarial training)? Or did they not know to consider this, or dismiss it as unimportant amongst seemingly more pressing matters? While investigation of these questions falls beyond the scope of my research, they do inform the Conceptual Framework of Legal Negotiation Preparation that I propose in Chapter Six.

Legal practitioners must ensure that their clients remain open-minded, as a variety of information and proposals might be raised during the negotiation.[191] Lines of questioning that relate to the identification of both parties' interests need to be explained to the client, so the legal practitioner can manage any reactions. This overlaps with communication (between legal practitioner and client) and the relationship between legal practitioner and client, as part of *Preliminary Considerations* and *Relationships and Communication*. It is important for the legal practitioner to remember the cause of any breakdown in party relationships, and to acknowledge, to the client, the importance of the client's perspective in giving the legal practitioner insight into *all* relevant interest and potential positions. This deeper analysis is crucial, and often neglected.[192]

D Option Generation

As with *Parties' Interests*, there is undeniable support in the literature encouraging legal negotiators to generate various options and alternatives as part of the legal negotiation preparation process.[193] This is one of the most fundamental parts of legal negotiation preparation,[194] because it positions both the parties and the legal practitioners to develop eventual outcomes. It must, however, be based on a solid foundation formed through preparing the previous three categories, including clear identification of the issues and the

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191 Fisher, Ury and Patton (n 44) 29.

192 Provis (n 182) 310.

193 See, eg, Eunson (n 2) 5; Spencer, Barry and Akin Ojelabi (n 44)103-6; Stein (n 71) 485; Leib Leventhal, 'The Foundation and Contemporary History of Negotiation Theory' (2006) 17(2) *Australasian Dispute Resolution Journal* 70, 76, Wade, 'The Last Gap in Negotiations' (n 58) 94; Folberg et al (n 2) 88-90, Budjac (n 58) 198. Also note the commentary provided by Guthrie as to the negative points related to *Option Generation*, primarily decision aversion, irrational decisions, and the negative affect of decisions, although many of these will be countered through the use of a legal practitioner agent, and through a considered *Assessment of Solutions*: Guthrie and Sally (n 175) 219.

194 Spencer, *Principles of Dispute Resolution 2020* (n 31) 43-6 [2.150-2.160]; see also Stein (n 71) 485; Scott (n 176) 214; Spencer, Barry and Akin Ojelabi (n 44) 103 [3.85]; Folberg et al (n 2) 88-90; Budjac (n 58) 198.

parties' needs and interests.[195] *Option Generation* primarily involves identifying options acceptable to the client, and includes consideration of the parameters of the negotiation,[196] defined through parties' individual bargaining ranges and ZOPA,[197] as well as each party's BATNA,[198] and WATNA.[199] In this sense, the literature becomes particularly terminology heavy, and includes various terms that address similar factors. This is yet another example of 'label confusion' related to legal negotiation.[200] In my questionnaires I chose to avoid acronyms, amending BATNA and WATNA to *your client's best/worst options if negotiations fail*, for added clarity and to avoid any confusion about the terms. While not all law students would be familiar with such terminology, I was confident that law students would apply the plain English meaning to each phrase. Unlike 'create options for mutual gain', the equivalent third principle of Fisher and Ury's Four Principles, the legal negotiation approach to option generation does not require disputing parties to reach agreements based on mutual gain. The assumption that parties will always reach a mutually beneficial outcome is highly optimistic, and offers a simplistic view of negotiation,[201] which fails to address the complexities of legal negotiation. That said, the flexibility, party control, and a broader range of potential solutions that form part of legal negotiation mean that this process is more likely to lead parties to an agreeable outcome than other dispute resolution processes.

Identifying and analysing potential options is one of the most difficult parts of legal negotiation preparation, although neglecting this component can prove detrimental.[202] The challenge in this area lies in embracing the unknown: although identifying the relevant parties' interests is relatively straightforward with the assistance of the client, defining potential solutions involves more guesswork, particularly regarding the information that will be provided by the other side, and their interests. To thoroughly prepare, the legal practitioner

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195 Leventhal (n 193) 76.

196 Spegel, Rogers and Buckley (n 2) 57.

197 Russell Korobkin, 'On Bargaining Power', in Honeyman and Schneider (eds), *The Negotiator's Desk Reference* (n 3) 18 ('On Bargaining Power').

198 See, eg, Menkel-Meadow et al, *Beyond the Adversarial Model* (n 62) 131; Astor and Chinking (n 23) 122; Sourdin, *Alternative Dispute Resolution Sixth Edition* (n 44) 59 [2.55]; Spencer, Barry and Akin Ojelabi (n 44) 105-6 [3.90].

199 Astor and Chinkin, *A Dispute Resolution in Australia* (n 23) 122.

200 Schneider, 'Shattering Negotiation Myths (n 22) 152.

201 See, eg, White (n 49).

202 Sebenius, 'Developing Superior Negotiation Case Studies' (n 177) 93; see also Warren Pengilley, 'Alternative Dispute Resolution: The Philosophy and the Need' (1990) 1(2) *Australian Dispute Resolution Journal* 81, 85; Budjac (n 58) 197-198.

must work with their client to realistically determine the factors on which their client will not compromise (the non-negotiables). After this, the ZOPA can be identified with reference to the pre-determined issues and interests relevant to all parties. This is the 'bargaining range',[203] influenced by the parties' 'walk away zone and aspiration level',[204] or reservation point.[205] Once the ZOPA has been set, each party's BATNA and WATNA must be identified, although it is useful for legal practitioners to note that the scope of the ZOPA can change depending on additional information presented during the negotiation itself,[206] which reiterates the need for constant communication between legal practitioner and client. This then allows for the identification of possible options, which need merely be identified and not evaluated in order to encourage a range of potential options.[207] In terms of preparation, there is no set order for determining these factors, although certain authors have their preferred method. Leventhal, for example, proposes a four-stage process in which legal practitioners identify the relevant issues; determine the parties' interests; generate options; and evaluate the options to determine the most relevant alternatives.[208] Some legal practitioners may prefer to reverse the final two steps of Leventhal's process: identifying their client's BATNA and WATNA first, and using these to inform the ZOPA. Regardless, each of these processes is fundamental to a successful negotiation, which constitutes 'good practice' for legal negotiation preparation. As such, I address each of these stages, in greater detail, below.

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203 Leventhal (n 193) 73.

204 Spegel, Rogers and Buckley (n 2) 3.25, 56.

205 Robert H Mnookin, Scott R Peppet and Andrew S Tulumello, *Beyond Winning Negotiating to Create Value in Deals and Disputes* (Harvard University Press, 2000) 20.

206 Fells and Sheer (n 7) 158.

207 Fisher, Ury and Patton (n 44) 31; Jennifer Gerarda Brown, 'Creativity and Problem Solving' in Honeyman and Schneider, *The Negotiator's Desk Reference* (n 3) 71, 72.

208 Leventhal (n 193) 76.

1 *Non-Negotiables and Zone of Potential Agreement*

To determine the client's non-negotiables, the legal practitioner will need to consider each party's bottom line,[209] noting that this might change as more information comes to light during the legal negotiation itself. At this stage, legal practitioners can start to generate alternative solutions and options,[210] and fully explore the possible range of outcomes.[211] In so doing, they will determine the parties' objectives:[212] what they *must* get; what they would *like* to get, and any points that they could concede or trade.[213] These components form part of the legal negotiation *playing field*, including the bargaining ranges and ZOPA.[214] Law student respondents showed an understanding of the importance of these factors. They rated *considering the ZOPA* as a high priority (average rating of 2.02), commenting that they had learnt the importance of this from previous negotiation feedback,[215] and that they 'need to be prepared to respond to every challenge'.[216] Similarly, law student respondents rated *non-negotiables* as a high priority (average rating of 2.04). One respondent indicated that this factor was important 'because [it] can result in a standstill, unable to move forward – need to devise ways to move around it'.[217] This shows insight into the considerable weight of non-negotiable components, and emphasises the need to prepare for situations in which non-negotiable elements cause controversy. Moments of controversy during a legal negotiation can cause legal practitioners to grasp for their instructions, to determine information they can and cannot reveal, and questions they can and cannot ask. This involves careful attention, to ensure compliance with their given authority.

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209 Mulder (n 2) 50.

210 Leventhal (n 193) 76. This reflects multiple categories of the Legal Negotiation Preparation Framework.

211 Wade, 'The Last Gap in Negotiations' (n 58) 94.

212 Goodpaster (n 2) 168.

213 Astor and Chinkin, *Dispute Resolution in Australia* (n 23) 122; see also Budjac (n 58) who recommends that each negotiator determines three positions for every issue: their opening offer; what they would realistically like; and what they would walk away with): at 198.

214 Leventhal (n 193) 73.

215 1403PNQF (Response to Pre-Negotiation Questionnaire, 2014).

216 1403PNQF (Response to Pre-Negotiation Questionnaire, 2014).

217 1301PNPR (Response to Pre-Negotiation Questionnaire, 2013).

2 *BATNA and WATNA*

Identification of the parties' BATNAs is one of the most important methods of legal negotiation preparation,[218] without which legal practitioners will place themselves, and consequently their client, in a vulnerable position.[219] In my experience, this is one of the areas with which law student negotiators struggle the most, likely because they have limited experience of negotiation outcomes, and find it difficult to determine a realistic and accurate BATNA. From my judging and teaching experiences I know that law students typically understand the acronym *BATNA*, but do not understand how to apply this to a negotiation scenario. That said, one respondent summarised their understanding of a BATNA well, noting that it is important to consider their client's BATNA because any agreement 'should be better than this',[220] and the BATNA should be kept in mind if parties cannot agree. Identifying the BATNA involves consideration, in consultation with their client, of the goals that each party wants to achieve. These include 'motivations, interests, positions, time, people, tools (including what is said/unsaid and non-verbal communication).'[221] Further considerations include any points that can be traded,[222] and all potential alternatives available to the client.[223] These processes are particularly difficult for law student negotiators, due to their lack of experience with real-life options.

The second part of the process occurs during the legal negotiation itself, at which point the legal practitioner must decide *how* to determine whether the settlement proposed by the other side is a better alternative to the options gained from abandoning the negotiation.[224] This is a considerably challenging part of preparation, as it is difficult to prepare for, and requires careful evaluation of the next component of the Legal Negotiation Preparation Framework, *Assessment of Solutions*. Legal practitioners must, at this stage, constantly be cognisant that

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218 See, generally: Menkel-Meadow et al, *Beyond the Adversarial Model* (n 62) 131; Eunson (n 2); Astor and Chinkin, *Dispute Resolution in Australia* (n 23) 122; Sourdin, *Alternative Dispute Resolution Sixth Edition* (n 44) 59 [2.55]; Spencer, Barry and Akin Ojelabi (n 44) 105-6 [3.90]; Wade, 'The Last Gap in Negotiations' (n 58) 94; Pengilly (n 202) 85; Folberg et al (n 2)79; Russell Korobkin, 'A Positive Theory of Legal Negotiation' (2000) 88(6) *Georgetown Law Journal* 1789 in Folberg et al (n 2) 83, 88-90; Budjac (n 58) 187-9.

219 Fisher, Ury and Patton (n 44) 51.

220 1302PNPR (Response to Pre-Negotiation Questionnaire, 2013). See, eg, Bruce Patton (n 2) 283.

221 Eunson (n 2) 5.

222 Astor and Chinkin, *A Dispute Resolution in Australia* (n 23) 122.

223 Menkel-Meadow et al, *Beyond the Adversarial Model* (n 62) 131; See also Korobkin, 'On Bargaining Power' (n 197) 20.

224 Spencer, *Principles of Dispute Resolution 2020* (n 31) 44-6 [2.160].

offers need to be taken back to their client for consideration, unless they have very detailed and clear authority.[225] Failure to do this could breach their authority and raise ethical issues. Further, they need to remember that a client's BATNA can change throughout the course of the legal negotiation.[226] My survey respondents considered *your client's best options if negotiations fail* to be a high priority during their legal negotiation preparation (average rating of 2.00; 7th of 31 factors). Even respondents who rated themselves as only *somewhat unprepared* or *extremely unprepared* still considered the BATNA to be a high priority during legal negotiation preparation. This accords with the prevalence of BATNAs in the literature and indicates that information about BATNAs is either commonly taught to law students or is otherwise readily available to them. Unsurprisingly, given that students are typically uncertain about how to determine their client's BATNA, 42% of respondents wished they had been better prepared on this point. The same number of respondents wanted to be more prepared on WATNAs, although this was considered a slightly lower priority than BATNAs (average rating of 2.09; 12th of 31 factors). The lower rating here could be due to the priority the literature gives to BATNAs.

It would be remiss, here, to exclude a brief discussion of strategies and tactics, although this is more relevant to the second LCA Requirement.[227] Strategies and tactics can relate to any category of the Legal Negotiation Preparation Framework, or indeed, to any stage of the negotiation itself, but are often underpinned by BATNAs.[228] There is inherent power in what opposing counsel believes the client's BATNA to be.[229] Legal practitioners may try to deflate the other side's BATNA by creating doubt about the available courses of action if the legal negotiation is unsuccessful, such as by discussing adverse publicity, costs, judicial delays, a fractured relationship between the parties and/or stakeholders,[230] though this strongly relates to legal negotiation ethics, and legal practitioners must be wary of breaching these. Fisher and Ury encourage negotiators to view a strong BATNA as increasing the power in the

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225 Fells and Sheer (n 7) 266.

226 Ibid 264-5. See also James K Sebenius, 'What Roger Fisher Got Profoundly Right: Five Enduring Lessons for Negotiators' (2013) 29(2) *Negotiation Journal* 159, 164 ('*What Roger Fisher Got Profoundly Right*').

227 That law students have identified the strategy and tactics to be used in negotiations and discussed them with and obtained approval from the client, or been involved in or observed that process': Law Admissions Consultative Committee, *PLT Standards* (n 34) [5.10] 'Lawyers' Skills' Element 6.

228 Fells and Sheer (n 7) 109.

229 Korobkin, 'On Bargaining Power' (n 197) 20-1.

230 See generally Spencer, *Principles of Dispute Resolution 2020* (n 31) 44-6 [2.160].

negotiation,[231] by allowing the negotiator to consider all offers and concessions made in relation to each party's BATNA. This enables parties to more feel more strongly about any final terms that are agreed to.[232] This similarly applies during legal negotiation. If the client has a strong BATNA, this can consequently increase their confidence in any agreement. As such, this draws together principles relevant to each category of the Legal Negotiation Preparation Framework, culminating in the final category, *Assessment of Solutions*.

One final factor that is relevant to *Option Generation* is the priority given to *a good outcome for both parties*, because it shows insight into the motivations driving legal negotiations, and because a *good outcome* must be fair, and the parties must commit to it. Law student respondents considered *a good outcome for both parties* to be a high priority (average rating 2.06; ranked 11 of 31 factors), with the vast majority of participants rating this as very high (43.14%) or high (29.41%). Respondents reasoned that achieving a *good outcome* for both parties is a pragmatic approach to negotiation, as this is 'the whole point of negotiating'.[233] This shows awareness of the goals of legal negotiation, as compared with the litigation process. Although many of my survey responses could be related to law students' adversarial training, this response was more focussed on dispute resolution, indicating that law students do understand the rationale for conducting a legal negotiation. While I would expect this from law students entering a Legal Negotiation Competition, competitors' reasons for entering such a competition are wide and varied and do not always align with skill development.

When evaluating the overall ratings between factors, the factors relevant to *Option Generation* are:

7. Strategies and tactics you might use (average of 2.00)
8. Your client's best options if negotiation fail (average of 2.00)
9. How to respond to potential strategies of tactics used by opposing counsel (average of 2.00)
10. The zone of potential agreement between parties (average of 2.02)
11. The non-negotiable elements of the negotiation (average of 2.04)
12. A good outcome for both parties (average of 2.06)
13. Your client's worst options if negotiations fail (average of 2.09)

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231 Fisher, Ury and Patton (n 44) 52.

232 Ibid 53.

233 1302PNPR (Response to Pre-Negotiation Questionnaire, 2013).

These close ratings show that respondents considered these factors to be similar in terms of priority, which reinforces my earlier comments about law students having some understanding of these fundamental components of 'good practice' for legal negotiation preparation. That said, ranking the results numerically based on averages, it is clear that BATNA and ZOPA are considered of greater importance than non-negotiables and WATNAs, at least by law student negotiators. This reflects poor command of the legal negotiation literature and draws attention to the need for clear guidance on legal negotiation preparation that is specifically designed for law students and embedded in legal education.

E Assessment of Solutions

A 'good practice' approach to *Assessment of Solutions* involves careful consideration of the options generated in the previous stage and how these relate to the client's interests;[234] assessment of these options using objective criteria such as legal, ethical, and regulatory principles; and analysis of any consequences that may arise from the proposed options. This category, of course, is heavily dependent on the information gathered and ideas generated throughout the previous four categories and may additionally require legal practitioners to re-consider and re-visit previous categories to ensure they are meeting their client's instructions. This, again, involves precise consultation with the client, as well as encouragement to focus on option *generation*, not evaluation, until this stage.[235]

Assessment of Solutions reflects, to an extent, Fisher and Ury's fourth principle: 'insist on using objective criteria'. This aligns more strongly with *legal* negotiation than Fisher and Ury's other principles, by incorporating two main features: *legitimacy* and *commitment*, which are relatively easily drawn into the legal sphere. *Legitimacy* relates to objective regulatory or legal frameworks, a key component of law; and *commitment* relates to parties' agreement and the associated follow through, often reflected through the creation of a contract. Unlike Fisher and Ury's other three principles, which are intended to apply to the negotiation process rather than specifically to preparation, Fisher and Ury explicitly note that it is beneficial to prepare objective criteria in advance of the negotiation, and, particularly, to determine how such criteria can be applied to the circumstances of the case.[236] Accordingly, this final category is vital to the progression of a legal negotiation. It can, however, present

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234 Astor and Chinkin, *Dispute Resolution in Australia* (n 23) 118.

235 Fisher, Ury and Patton (n 44); Spencer, Barry and Akin Ojelabi (n 44) 103-4 [3.85]; Mulder (n 2) 52.

236 Fisher, Ury and Patton (n 44) 44.

challenges for law students. First, law students could be more likely to focus on the application of legal principles and legal research due to their primarily adversarial training, rather than considering a broad range of solutions and relevant external criteria. Alternatively, law students could prepare solutions in advance, determine that these would meet their client's requirements, and consequently be inflexible during the negotiation itself. I address these challenges below, focusing on two main areas: legitimacy, and the use of objective criteria as a means of assessing proposed solutions, with a particular focus on legal and factual research; party commitment to the agreement; and the perceived consequences of the outcome.[237]

The concept of legitimacy is 'too often (and unwisely) overlooked' during legal negotiation.[238] In order for clients to be assured that they have reached a legitimate and fair outcome they need to feel satisfied with their legal practitioners' approach during the negotiation.[239] While Fisher and Ury's emphasis on objective criteria is criticised as 'exaggerating the power of objective criteria,'[240] this is irrelevant to legal negotiations, for which a range of objective criteria will almost always apply. While legal negotiations are often used to provide parties with a broader range of outcomes than a traditional judicial award, there are still legal rules that may apply, regardless of the forum in which the dispute is resolved. As such, a legal practitioner must consider these legal principles during their preparation, and such principles provide a 'fair and independent starting point' that is 'legitimate and practical'.[241] Law students must be careful, however, not to fastidiously apply black-letter law to legal negotiation scenarios. This defeats the purpose of legal negotiation as an *alternative* to litigation. Legal negotiation allows for more creativity, and for solutions that bypass the bounds of strict legal interpretation. Rather than readying arguments based on legal authorities for immediate use, legal practitioners could enhance the legitimacy of a legal negotiation by preparing authorities to help establish legal positions,[242] or even to use experts to '[verify] the settlement', therefore increasing parties' perception of 'fairness'.[243] This does

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237 I note that the outcome of a negotiation, particularly a 50-minute negotiation as part of the Legal Negotiation Competition, does not always equate to an agreement: Fells and Sheer (n 7) 32-23; Patton (n 2) 285.

238 Patton (n 2) 281.

239 This relates not only to the first LCA Requirement, but also to the second.

240 White (n 49) 117.

241 Fisher, Ury and Patton (n 44) 89.

242 Spencer, Barry and Akin Ojelabi (n 44) 109-10 [3.100], Principled Negotiation Element 4.

243 Ibid 92, Principled Negotiation Element 4; see also Hurder (n 71) 275.

not detract from the relevance and utility of law in advancing a client's argument but emphasises the focus of negotiation on mutual decision making. Legal practitioners must, however, be aware of the legal implications of any negotiated agreement and must understand that the way a court treats a negotiated agreement will depend on the intention of the parties when the agreement was created.[244]

In order to identify relevant objective criteria, the legal practitioner will draw on their understanding of the matter in dispute, and the broader legal, ethical, and regulatory frameworks that operate in this field. In my questionnaires, I focussed on *legal research* and *factual research* as terms to embody *legitimacy* and *objective criteria*, to avoid any terminological confusion. My results showed that respondents considered *legal research* to be only a middle priority (average rating of 2.94; ranked 25th of 31 factors, immediately following factual research). This might be explained by one comment that legal research is important but 'not applicable in this case'.[245] While the respondent did not provide further details about the case or the relevant area of law, it is possible that s/he was able to separate legal requirements from factual matters. This was surprising, however, based on the focus of

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244 There are four categories that a court will use to classify a negotiated agreement that is intended to be executed by formal contract. The first three were determined in *Masters v Cameron* (1954) 91 CLR 353, 360. The first category reflects situations in which the parties have agreed to all terms and 'intend to be immediately bound', though still seek a formal contract, at 360. This is the most common form of agreement, and parties are immediately bound to perform the terms, regardless of whether a formal contract is enacted. The second category also reflects complete agreement by the parties, but where 'performance of one or more of the terms [is] conditional upon the execution of a formal document', at 361. The second category also reflects complete agreement by the parties, but where 'performance of one or more of the terms [is] conditional upon the execution of a formal document', at 360. In such instances the parties are bound to create a formal contract and execute it accordingly. The third category reflects circumstances where parties do not intend to be bound by any terms 'unless and until they execute a formal contract', at 360. Parties can therefore add, amend, or remove clauses or 'withdraw at any time until the formal document is signed', at 361. The third category has been expanded into a fourth category, in which parties intend to be 'bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms': *Baulkham Hills Private Hospital Pty Ltd v G R Securities Pty Ltd and Others* (1986) 40 NSWLR 622, 628 expanding the doctrine in *Masters v Cameron* (1954) 91 CLR 353, 360 with reference to *Sinclair, Scott & Co v Naughton* (1929) 43 CLR 310, 317. This doctrine has been applied in jurisdictions that require parties to engage in dispute resolution prior to bringing a claim, such as family law. When parties have mediated, resulting in a negotiated agreement, 'the parties have agreed that the court's jurisdiction will be exercised by the making of orders giving effect to the settlement': *Grant v Grant* [2012] NSWSC 725 [43]. Parties that have agreed to undertake mediation, and who, as a result, have agreed to be immediately bound by the negotiated settlement agreement, even if seeking a formal contract (as in the first category above), cannot resultantly use legislation to argue that they should not be bound, at [53].

245 1307PNPR (Response to Pre-Negotiation Questionnaire, 2013).

adversarial training in legal education. Respondents gave *factual research* a slightly higher, middle-to-high rating (average rating of 2.58; ranked 24th of 31 factors). This aligns with students' views that the 'question is mainly fact based',[246] implying they would not consider doing research beyond the scenario or the facts themselves. Respondents seemed generally pleased with their preparation on these points, only 25% wishing they had been better prepared on factual research; and 38% wanted to be better prepared on legal research. This higher percentage for legal research likely indicates – from my experience with Legal Negotiation Competition judging – that respondents wish they had better understood their client's legal rights/obligations or the relevant objective criteria. While I did not specifically ask about legitimacy or objective criteria, in the Post-Negotiation Questionnaire I did ask respondents whether there were any factors they could have advanced further during the legal negotiation, with examples relating to both factual and legal research, such as price, liability, and other terms of settlement. Of the few respondents that answered this question, the most frequent comments were that respondents were happy with the outcome or could not think of factors to further advance (26%); that they could have further advanced the facts (22%) or the price (16%). Other comments included that they should have threatened to walk away,[247] should have collaborated on the agenda,[248] or could have improved their negotiation style through 'push[ing] harder'.[249] Some of these comments raise interesting questions about relevant legal negotiation ethical parameters, and are explored in Chapter Five.

The perception of legitimacy is also relevant to resultant legal practitioner and client confidence in the negotiated outcome.[250] I asked survey respondents to consider this in three ways: *the effect an agreement might have on your client*; *a good outcome for both parties*; and *the consequences of the outcome*. Respondents rated the *effect an agreement might have on your client* as high-to-very-high priority (average rating of 1.60, ranked 3 of 31 factors).[251] This could show that the legal practitioner was focussed on coming to an agreement, but not how it would impact a (fictional) client. This is characteristic of a competition based on

246 1419PNSF (Response to Pre-Negotiation Questionnaire, 2014).

247 1314PO (Response to Post-Negotiation Questionnaire, 2013).

248 1451PO (Response to Pre-Negotiation Questionnaire, 2014).

249 1431PO (Response to Pre-Negotiation Questionnaire, 2014).

250 See, eg, Spencer, Barry and Akin Ojelabi, (n 44) 109-10 [3.100]; Wade, 'The Last Gap in Negotiations' (n 58) 94-5.

251 Ninety-six percent of respondents rated this as middle, high, or very high priority. Four percent rated it as 'low priority' (both of whom identified as being *somewhat prepared*).

hypothetical clients and reflects competition artificiality. In real life it is almost impossible to *forget* the effect an agreement has on the legal practitioner's client because the client is giving instructions and paying fees. *Forgetting* about the client, or, indeed, substituting their own judgment for that of the client could result in the legal practitioner breaching their ethical obligations to their client. Furthermore, there is clear overlap between this category and *Parties' Interests*, since parties are more likely to commit to a particular outcome or agreement if they feel that their interests have been satisfied.[252] Respondents highlighted the significance of the client, stating that this factor was one of the most important.[253] This demonstrates students' understanding of the legal practitioner's role as agent, in line with the LCA's negotiation requirements.

Respondents considered *consequences of the outcome* to be a middle-to-high priority (average rating of 2.27; ranked 16 of 31 factors). Respondents' justification for this included prioritising the client's interests, and negotiation ethics, as well as the impact of the ongoing relationship between parties. Based on the reasoning that 'client's interests come first'[254] and my other data showing law students' general tendency to centralise the client, I expected the consequences of the outcome to be a higher priority. This could be an example of where students understand some of the theory (such as the importance of the client) but are not able to take the next steps towards application of this theory (considering how their client would be impacted by an agreement). Twenty percent of respondents wished they had been better prepared on this point, which is likely influenced by the fictional client and lack of ability to apply theory in legal negotiation. This is particularly interesting as respondents rated *the effect an agreement might have on your client* within the top five priorities in legal negotiation preparation. These two factors are quite similar, though received significantly different responses. This could reflect a lack of law students' insight into terminology, considering *agreement* vs *outcome* and *effect* vs *consequences*. Regardless, my results clearly emphasise that law students felt a sense of responsibility to their client, indicating that, for many students, their client was at the forefront of their consciousness during legal negotiation preparation (regardless of the fictional nature of the client). Overall, 'good practice' legal

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252 Provis notes that *positions* are also used to refer to commitment, in the literature: Provis (n 182) 308. See also Menkel-Meadow, 'Toward Another View of Legal Problem Negotiation' (n 23) 760-1 in which Menkel-Meadow outlines eight criteria against which an outcome should be assessed.

253 Alternately, respondents who rated this as low priority did so because it is difficult to 'look at the future for a fake situation': 1446PNPR (Response to Pre-Negotiation Questionnaire, 2014).

254 1419PNSF (Response to Pre-Negotiation Questionnaire, 2014).

negotiation preparation with regard to *Assessment of Solutions* requires legal practitioners to prepare objective legal, ethical and regulatory criteria, against which to determine the suitability of their client's potential agreement, and the associated consequences.

F Final Considerations

Before addressing my final observations from the above analysis, it is beneficial to examine the top and bottom ranked factors from my law student respondents, to identify overarching trends. The top five factors overall, with average ratings of high-to-very-high,[255] were:

1. Your client's objectives (average rating of 1.51)
2. The issues (average rating of 1.57)
3. The effect an agreement might have on your client (average rating of 1.60)
4. Working with your teammate (average rating of 1.62)
5. Your relationship with your teammate (average rating of 1.64)

This reflects respondents' understanding of the importance of the client's instructions and interests. This also indicates law students' understanding of the impact that the relationship with a teammate can have on a legal negotiation. Although it is impossible to determine whether the ratings for teammate relationships relate to winning the competition or negotiation more broadly, arguably, even if respondents' focus is on winning this still helps negotiators develop and understand the importance of teamwork. While respondents rated many factors between middle and high priority, the rankings indicate that they seemed less concerned about the opposing party and their counsel, except for how to respond to the other team's ZOPA, and a good outcome for both parties. This could be interpreted in line with the adversarial focus of legal education and litigation. Legal practitioners do not owe a legal duty to opposing counsel, despite the utility of considering opposing arguments when preparing. While legal practitioners *do* have an ethical obligation to fellow legal practitioners, this likely does not extend beyond professional courtesy (other than several specific rules related to the litigation environment that arguably do not apply during legal negotiations).[256]

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255 The highest mean ranking was 1.51, directly between high and very high. Interestingly, despite the clear understanding that respondents had relating to the importance of the client, none of the factors received an average rating of very high, although respondents did use the entire spectrum of Likert scale responses.

256 See eg, my analysis in Chapter Five about whether/how the Conduct Rules apply to legal negotiation, particularly related to the discrepancies between practical enforcement and the intention of the regulator.

The bottom six factors, with average ratings ranging from middle to low priority, included:

26. Rehearsal (average rating of 3.00)
27. Relationship between competing teams (average rating of 3.05)
28. Emotion (average rating of 3.15)
29. Gender (average rating of 3.92)
30. Cultural aspects (average rating of 3.96)
31. Bringing in props (average rating of 3.98)

Some of these factors are heavily impacted by the nature of the competition, such as the inability to bring in props. Other factors, such as emotion, gender, and culture, may also have been unnecessary considerations for the specific negotiation scenarios used, although it is unlikely that *all three* of these factors were irrelevant to *all* of the negotiation scenarios used by my respondents.[257] Further, this explanation neglects the role that these factors can play both within a team, and between teams, which respondents are unlikely to have considered. They may, however, have considered each other's strengths and weaknesses, which may be related to the process of defining gender roles as above. These factors, however, are typically underappreciated by inexperienced negotiators, who would be unlikely to consider them during a negotiation. This again emphasises that law students understand the basic premise of most of the factors of legal negotiation preparation contained in the literature, but do not consider more advanced application.

The literature related to legal negotiation preparation is wide and varied, and it is only detailed analysis that draws out the key components of 'good practice' in this area. Through adopting a modified version of Fisher and Ury's Four Principles, which have become firmly entrenched in this literature,[258] I have developed the Legal Negotiation Preparation Framework to cover five main categories that reflect the key components of 'good practice', drawing on the relevant legal negotiation preparation literature. Although thorough

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257 Though I again note the role that gender can play both within a team, and between teams, which respondents are unlikely to have considered. They may, however, have considered each other's strengths and weaknesses, which may be akin to the process of defining gender roles as above. Sixty three percent of respondents indicated that they knew who their opposing counsel was (Pre-Negotiation Question 5). Twenty one percent indicated that they tailored their negotiation approach in response to this, by predicting approaches or personalities; exploiting nerves (their opposition was a team of first year students); sending messages or blocking them (likely on social media); or being ready to expect the unexpected (perhaps in response to a seasoned team). This is further addressed in Chapter 5 in relation to legal ethics.

258 Raised specifically in the leading dispute resolution textbooks: Sourdin, *Alternative Dispute Resolution Sixth Edition* (n 44); Spencer, Barry and Akin Ojelabi (n 44) 102-19; Astor and Chinkin, *Dispute Resolution in Australia* (n 23) 116, Field and Boulle (n 1) mentioned, in brief, throughout chapter six.

preparation will require legal practitioners to move back and forth between the categories as necessary, working through all categories, while maintaining frequent communication with their client, will enable legal practitioners to meet the requirements of 'good practice' legal negotiation preparation.

Table 4: Legal Negotiation Preparation Framework

Legal Negotiation Preparation Framework In preparing for a legal negotiation, a legal practitioner must:	
Preliminary Considerations	1. Understand the parameters around their authority, and that this can change throughout the matter. 2. Maintain clear communication with their client, centralising the client and encouraging information exchange. 3. Clearly identify the relevant parties, subject matter, and issue(s) in dispute (and conduct relevant research to ensure an understanding of the relevant facts).
Relationships and Communication	4. Understand the relationships between key parties and stakeholders and the impact that various factors (such as power) can have on these. 5. Identify the relevant relationships between legal practitioners and understand how these can impact the negotiation. 6. List preliminary areas about which to ask questions during the legal negotiation and what these questions will be.
Parties' Interests	7. List the interests, motivations and positions of all parties.
Option Generation	8. List the parties' bargaining range. 9. List each party's BATNA and WATNA. 10. Determine a list of relevant options (being creative; without yet evaluating the options).
Assessment of Solutions	11. Determine a list of relevant legal, ethical, and regulatory frameworks against which to assess each option. 12. Assess the legitimacy/fairness of each option. 13. Consider how each option serves each party's interests. 14. Discuss the proposed solutions with client and consider any amendments to authority.

Working through the steps in this order moves the legal practitioner through the categories of the Legal Negotiation Preparation Framework, and ensure they consider each stage of preparation through the lens of authority, while centralising the client. In this way, the Framework complies with the first LCA Requirement, while also providing additional detail based on 'good practice'.

In the following section I delve more deeply into my data to determine how law students actually prepare for legal negotiations – not to the priority given to various factors relevant to preparation (which is analysed above), but, instead, their own qualitative reports of how they conducted their legal negotiation preparation, and why they chose to prepare in that way. I also evaluate how satisfied law student respondents think their client would be with certain factors of legal negotiation preparation.

III A Case Study on Student Preparation

When viewed as a whole, the Legal Negotiation Preparation Framework begins to piece together a clear view of 'good practice' for legal negotiation preparation in a way that focuses on authority and client-centrality, echoing the LCA Requirements. In this case study, I determine whether law student legal negotiation preparation meets the requirements of 'good practice', identified in the previous section. To do this, I focus on specific components of my data. I first evaluate quantitative responses provided by law students regarding how prepared they thought they were for the legal negotiation, paired with open-ended qualitative responses outlining the methods of preparation that were undertaken, and the associated rationale.[259] I assess these responses against the components of overall 'good practice' to legal negotiation preparation. Following this analysis, I return to a fundamental component of both legal negotiation ethics and the LCA Requirements: client-centrality. To gain insight into law students' perceptions about this, I asked a series of questions related to how satisfied the law student thought their client would be, on a range of factors, which align with the five categories of the Legal Negotiation Preparation Framework above.

[259] Pre-Negotiation Questionnaire, questions 1-3. These are the first few questions of my Pre-Negotiation Questionnaire, located on the first page of questions. As such, respondents answered these questions prior to reading about different factors of preparation on the subsequent pages, and were therefore not primed to answer in a certain way. I evaluate these using methods inspired by phenomenography (to assess individual qualitative responses) and thematic analysis (to assess the frequency of responses provided by the cohort).

A Law Student Preparation

The majority of my respondents considered themselves to be *somewhat prepared* for the negotiation (average of 2.24). In creating my questionnaires, I theorised that law students would prepare for legal negotiations by using common methodologies outlined in leading Australian dispute resolution textbooks or online. Given the wide array of advice offered in the literature, I was unsurprised that most respondents specified multiple approaches of preparation, providing a total of 231 qualitative responses.[260] The most common method of preparation was to engage with the fact scenario (51% of respondents), by reading, researching, discussing, analysing, summarising or strategising. Considering that Legal Negotiation Competition competitors are given a specific fact scenario on which to negotiate, containing both general and confidential information, it is unsurprising that respondents would indicate a tendency to prepare by engaging with the facts. It is also likely that those respondents who *did not* indicate engagement with the facts as part of preparation omitted this because they thought it was an obvious component of preparation that did not need to be specified. The second most common method of legal negotiation preparation was to conduct research. As set out in the following figure, the most common type of research was legal research, followed closely by factual research. As discussed above, neither of these results are surprising given the emphasis on both of these skills during legal education and their relevance to 'good practice'.

[260] Two hundred and thirty-one responses were provided by 92 respondents. I analysed the results using thematic analysis to group the methods of preparation that were specified. I grouped these into fourteen categories: facts; research; resolutions/outcomes/offer; team roles; agenda; plan; legal research; our interests/positions; ideas; options; their interests/positions; BATNA/WATNA; Harvard/Fisher; and miscellaneous. When reporting the results, the percentage stated is a percentage of the number of respondents, not the number of responses, to accurately reflect how many respondents considered each aspect of preparation.

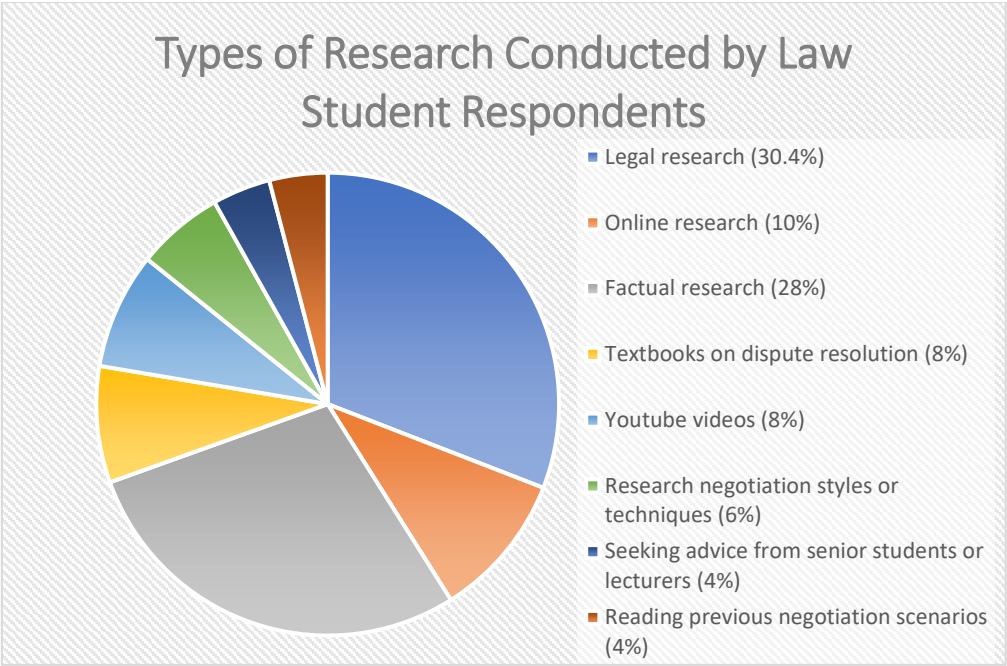

Figure 10: Types of Research Conducted by Law Student Respondents.

Other methods of preparation included the consideration of potential resolutions, outcomes or offers (25%), although only 15% of respondents considered their client's interests, with merely 10% considering the opposing party's interests or positions. This supports the analysis of my quantitative data, after which I deduced that law students prioritise their own client, with limited consideration as to the other parties involved. This also shows that law students follow some of the legal negotiation preparation advice in the literature, but not necessarily all of the steps, or in the suggested order. The 'label confusion' discussed previously is also relevant here. For example, 16% of respondents reported devising an agenda, and an additional 16% created a plan. None of the respondents explained what they meant by *agenda* or *plan*, although these terms could well have been treated as synonymous. Further, respondents did not mention whether they considered parties' interests or positions, but it is difficult to develop an agenda or plan without having done this.

Law students' rationales for their chosen method of preparation are depicted in the following figure. These results were unsurprising, with the majority choosing a method that had worked previously (41.7%). All but one of the respondents that answered this question had completed a topic including legal negotiation, and therefore all respondents likely had at least basic knowledge of legal negotiation, or had access to information about negotiation that can provide a starting point for legal negotiation preparation. It is encouraging to see that Legal

Negotiation Competition law student competitors had actually given some thought to how they would prepare for a legal negotiation and were able to provide information about this.

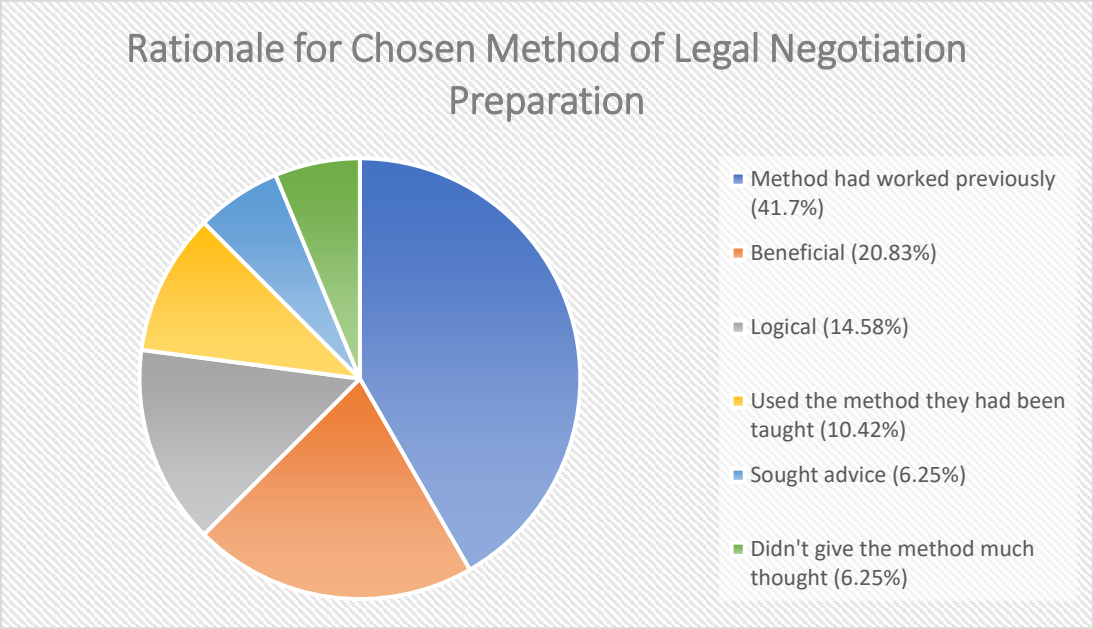

Figure 11: Rationale for Chosen Method of Legal Negotiation Preparation.

Given the strong inclusion of Fisher and Ury's Four Principles in the main Australian alternative dispute resolution textbooks, I was particularly surprised that only 2.17% of respondents mentioned this as part of their preparation, although other respondents did mention terminology consistent with Fisher and Ury's approach but without categorising it as such. This terminology included *options* (10.87%); *interests* (*our interests* (7.6%); *their interests* (3.26%)); *positions* (*our positions* (7.6%); *their position* (6.5%)). Some respondents also mentioned *BATNA* (7.61%), and *WATNA* (5.62%). The inclusion of this terminology aligns with my hypothesis that students would follow the approaches contained in the leading textbooks, likely because Legal Negotiation Competition competitors were more likely to engage with relevant literature than the broader law student population.

Drawing solely on this data demonstrates that respondents understand some of the most common components of legal negotiation preparation. It further appears, however, that they take a scattergun approach to preparation, lacking the insight and critical reasoning skills to determine a logical order to their preparation. My overall findings do indicate, however, that

law students are focused on their client, despite the fictional nature of Legal Negotiation Competition clients.

B Perceived Client Satisfaction

The final component of the Legal Negotiation Competition highlights the importance of introspective and reflective practice, by requiring competitors to respond to two questions that prompt them to reflect on their legal negotiation:

1. In reflecting on the entire negotiation, if you were to be faced with a similar situation tomorrow, what would you do the same and what would you do differently?
2. How well did your strategy work in relation to the outcome?[261]

At this point, judges are permitted to ask questions. Such questions could include asking competitors to determine their client's satisfaction on various points – this, too, is my approach to judging.[262] As such, in the Post-Negotiation Questionnaire I asked respondents to rate how satisfied they thought their client would be ('perceived satisfaction') on 13 different components that mirror the preparatory themes explored in my questionnaires. While this data is only reflective of what the law student respondents *thought* their client's perceived satisfaction would be, rather than whether the law student's preparation aligns with 'good practice', these results do provide some, albeit limited,[263] insight into the law students' reflection about their legal negotiation preparation.

Unsurprisingly, respondents indicated that their clients would typically be satisfied with all factors. While this could be interpreted differently for every factor, it is unlikely that a client (fictional or otherwise) would be satisfied with *all* of these. That said, such positive responses could reflect the respondents' minimal experience with client interaction, and their consequent struggle to determine whether their client would be satisfied. In such instances, the respondent could have based their responses on whether they themselves were satisfied,

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261 Australian Law Students' Association, 'Negotiation Championship Rules' (2010) ('Negotiation Championship Rules 2010') r 6.7.

262 This has been more strongly reflected in the 2020 Competition Rules, which split the Self-Analysis component of the competition into two parts, one 6-7-minute period in which the competitors reflect on their negotiation with emphasis on 'the effectiveness of their strategy and the final outcome' and one 3-4 minute period during which the judge(s) can question the competitors: Australian Law Students' Association, 'Negotiation Championship Rules 2020' (n 260) r 16.1.2.3 ('Negotiation Championship Rules 2020').

263 The questions relating to client satisfaction were added after the Pilot Study. Resultantly, only 30 respondents provided data in relation to these questions. As such, while the data is still interesting and useful, it only allows tentative conclusions to be drawn.

rather than their client.[264] In relation to the law student respondents' preparation as a whole, 88% of respondents indicated that their client would be either *satisfied* (63%) or *very satisfied* (25%) (average rating of 2.00). Based on my interpretation of law student preparation above, law students have knowledge about legal negotiation preparation, but lack guidance and experience to tailor this to different situations. They consequently feel confident with their preparation, which has a flow on effect to their (albeit fictional) client's perceived satisfaction on various points. This lack of guidance and experience could also cause law students to inadvertently breach their ethical obligations in legal practice.

1 *Preliminary Considerations*

Although *Preliminary Considerations* requires clear consideration of the subject matter of the dispute and the parties involved in the dispute, the only way to assess this in the context of the Legal Negotiation Competition is through consideration of the facts provided in the negotiation scenario. Respondents reported that their clients would be satisfied with their lawyers' use of facts, 92% reporting that their clients would be either *very satisfied* (46%) or *satisfied* (46%), with an average of 1.69. Considering that each negotiation scenario in the Legal Negotiation Competition contains both agreed and confidential facts, it is also useful to consider *how* the facts were used. This could lead to certain ethical considerations. When initially asked *how they planned to use the agreed and hidden facts*, 45% of respondents indicated this would be done either confidentially or tactically. The comments relating to tactics noted the facts would be used as 'leverage', as a 'bargaining tool',[265] or to 'intimidate'.[266] Thirty eight percent of respondents provided greater detail on their planned use of the confidential facts, noting intent to either reveal the facts early, to assist with problem solving;[267] to keep the information hidden unless relevant or necessary;[268] or to use the confidential facts 'in the best interests of the client'.[269] Each of these comments display a client-centred focus, and the last comment, particularly, reflects an understanding of the importance of the client's instructions. Eighty-three percent of respondents indicated their clients would be *very satisfied* (52%) or *satisfied* (30.6%) with whether *confidential*

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264 1514JQSF (Response to Judge Questionnaire, 2014).

265 1401PNQF (Response to Pre-Negotiation Questionnaire, 2014).

266 1405PNPR (Response to Pre-Negotiation Questionnaire, 2014).

267 1311PNSF (Response to Pre-Negotiation Questionnaire, 2013);

268 1424PNSF (Response to Pre-Negotiation Questionnaire, 2014); 1444PNPR (Response to Pre-Negotiation Questionnaire, 2014).

269 1415PNPR (Response to Pre-Negotiation Questionnaire, 2014). This aligns with Spencer and Scott's findings (n 74) 30.

information was revealed to opposing counsel (average of 1.74). This could mean either choosing not to reveal any of the information at all, or revealing just what was in their client's best interests.[270] Of course, the respondents could only assess their client's satisfaction by determining whether the information they revealed aligned with their written instructions – this is artificial, as in real life a client's instructions, interests, and even their BATNA may change as the negotiation progresses. In terms of 'good practice', if competitors' understanding of the relevant facts was sufficient for them to provide a rationale on how they would use the facts, particularly in line with their clients' instructions, it is likely that they have met the 'good practice' requirements. It is less clear, however, whether they have met 'good practice' requirements regarding authority. In the context of a simulated legal negotiation, authority lacks realism and is sometimes omitted completely from the instructions provided in the negotiation scenario. It is unlikely that law students completely understand the requirements related to authority due to lack of experience, particularly seen in the context of the comments raised above regarding potentially unethical use of the facts.

2 *Relationships and Communication*

'Good practice' legal negotiation preparation related to *relationships* involves identification of all relevant relationships, including those between parties, stakeholders, and legal practitioners. Overall, respondents thought their clients would be *satisfied* with the relationship between lawyers (average of 1.77). This question did not differentiate between teammates and competing teams, however, which respondents rated significantly differently in terms of priority given during legal negotiation preparation (average rating for the priority given to the *relationship between teammates* was 1.64, whereas the *relationship between teams* averaged 3.05 and was rated 27th of 31 factors). It is more likely that respondents interpreted the Post-Negotiation client satisfaction question as reflecting the relationship between competing teams, rather than between teammates, and did not give the relationship between teammates much thought. It is useful to consider that all competitors likely know one another, and potentially have classes together. This might reflect a friendlier, and perhaps less formal, negotiation than when negotiating with strangers in the course of legal practice. Alternatively, their impression of perceived client satisfaction could be skewed due to their relationship with opposing counsel outside of the negotiation. As to the relationship between clients, respondents thought that their clients would be *satisfied* with this (average of 1.67).

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[270] See below Chapter Five for ethical implications of such behaviour.

While not every legal negotiation requires an ongoing relationship between clients, many of the negotiation scenarios in the Legal Negotiation Competition would require parties to continue working together to resolve further issues. Law student respondents met 'good practice' requirements in relation to party relationships, but not regarding relationships between teammates or competing teams. While this is justifiable in the context of a Legal Negotiation Competition, it could also reflect a lack of understanding of legal ethical obligations.[271]

3 *Parties' Interests*

As demonstrated above, identification of parties' interests is one of the most important components of legal negotiation preparation, and, consequently is an imperative part of 'good practice'. This was reflected in law students' priority ratings, although their emphasis was on their client's interests and objectives, rather than those of other parties, which were rated considerably lower. Respondents rated their clients' perceived satisfaction, regarding the representation of client interests, as between *satisfied* and *very satisfied* (average of 1.58). Due to the literary attention given to this component and the ease with which one can prepare for this factor prior to the negotiation, I was surprised that respondents did not rate *perceived client satisfaction* as higher. Perhaps respondents felt confident in this part of their preparation, but were unable to represent their client's interests as planned due to the way in which the negotiation unfolded. For example, they may have received additional or surprising information during the legal negotiation that made them unable to adjust their approach to reconceptualise their client's interests.

4 *Option Generation*

To assess client satisfaction on *Option Generation* I focussed on offers and concessions. Respondents noted that their client would, overall, be *satisfied* with the *offers they made during the negotiation* (average of 1.92). Specifically, 28% of respondents rated their client's perceived satisfaction a*s very satisfied,* and 60% as *satisfied.* The difference between categories could represent instances in which offers were not well received, or were affected by other information presented by opposing counsel. This, in turn, may have resulted in the need to make concessions. Respondents rated their client's satisfaction on *the concessions you made* as slightly less than that for offers, between *satisfied* and *not satisfied* or

[271] See below Chapter Five.

dissatisfied (average of 2.17). This could, perhaps, be rated lower than *the offers you presented* because making concessions could be perceived as a weakness, or in a negative light. Alternatively, respondents might think that their client would be less than *very satisfied* if *any* concessions were made, since making concessions could impact the client's bargaining range. This perspective lacks sophistication, because the 'dance' of negotiation involves the trading of various offers and concessions, and it is through this process that legal practitioners can develop trust and create a strong, workable, agreement for both parties. Interestingly, when asked how their preparation could have assisted respondents in reaching a more effective outcome, comments included considering the other side's options,[272] considering a range of alternatives,[273] and being more prepared generally,[274] as well as on legal[275] and factual research.[276] These are all reflected in the Legal Negotiation Preparation Framework as part of 'good practice'.

While not specifically part of preparation, I also asked respondents about their client's perceived satisfaction related to the *flexibility* during the legal negotiation. This reflects a deeper understanding of the relevant issues and interests, and shows an ability to amend offers and concessions in light of the information received during the legal negotiation. This was rated very highly, with 33% indicating their client would be *very satisfied* and 46% indicating their client would be *satisfied* (average of 2.08). Ratings this high regarding flexibility are remarkable, because it takes experience to develop the ability to be flexible during a legal negotiation. This warrants brief consideration in light of the legal negotiation theories, and reflects the self-report data that shows 72% of respondents elected to use a cooperative or problem-solving approach, which is typically more flexible. This does not accord with Spencer and Scott's findings that junior law students are more likely to adopt competitive negotiation approaches.[277] Interestingly, however, only 42% of respondents rated their opposing counsel's negotiation style as problem-solving.[278] The fact that there are such

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272 14216PO (Response to Post-Negotiation Questionnaire, 2014); 1313PO (Response to Post-Negotiation Questionnaire, 2013).

273 1454PO (Response to Post-Negotiation Questionnaire, 2014; 1453PO (Response to Post-Negotiation Questionnaire, 2014; 1457PO (Response to Post-Negotiation Questionnaire, 2014.

274 1456PO (Response to Post-Negotiation Questionnaire, 2014; 1427PO (Response to Post-Negotiation Questionnaire, 2014.

275 1435PO (Response to Post-Negotiation Questionnaire, 2014.

276 1524PN (Response to Pre-Negotiation Questionnaire, 2014).

277 Spencer and Scott (n 74) 30.

278 A further 46% described this as ethical adversarial and 10% as unethical adversarial. Three percent classifying their opposing counsel's style as 'other', described as 'assertive.

significant differences (30%) between self-reports and descriptions of opposing counsel warrants further investigation, particularly as to how legal practitioners and law student negotiators perceive opposing counsel.[279]

5 *Assessment of Solutions*

As part of *Assessment of Solutions* I asked respondents to rate their client's perceived satisfaction about the range of *feasible* options they presented. While this could also form part of *Option Generation*, the use of the word *feasible* implies that the options have been reality tested, and are legitimate options to which the parties could commit. This factor received an average rating of 1.96. Given that determining options is one of the reasons for which parties negotiate, it was surprising that law students would not have expected their clients to be more satisfied with this. This could mean that, during their preparation, the law student negotiators did not assess the potential solutions against objective criteria, thereby resulting in solutions that were not feasible or legitimate. This could reduce client commitment to the solution. It is also worth considering the difference between feasible options that were *presented* at the negotiation compared with feasible options that were *created* during preparation – the survey question asked for a reflection on client satisfaction *after* the negotiation, reflecting both the lawyers' preparation *and* the negotiation itself. This fails to reflect feasible options that were merely created during the process of preparation but not presented to opposing counsel.

An assessment of the overall negotiation outcome also reflects the respondents' preparation. Respondents rated their client's perceived satisfaction related to the outcome of the negotiation as *satisfied* (average rating of 1.92), and likewise considered the outcome to be *somewhat effective* (average of 1.8). Given law students' inexperience in legal practice, they are unlikely to have goalposts by which to measure such standards. More likely, they are basing their understanding of negotiation outcome on the literature, particularly the idea of reaching a mutually beneficial outcome for all parties. If further research were to be done on this point, it would be beneficial to ask respondents what their client wanted, and how the negotiated outcome met those requirements. This was not reflected in respondents' responses.

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279 See above Chapter Two, Part IV(E). Further discussion of this phenomenon is, however, beyond the scope of this thesis, but would be a worthwhile consideration for future research.

C Does Law Students' Legal Negotiation Preparation Accord with 'Good Practice'?

In developing the questionnaires for my study, I conducted extensive research into legal negotiation preparation, evaluating extant literature,[280] and carefully determining which factors of legal negotiation preparation to include in my survey instrument.[281] My questionnaires therefore reflect the components of my proposed Legal Negotiation Preparation Framework. When presented with these factors, law students, overall, did comply with some components of 'good practice', shown specifically through the priority order given to these factors.[282] That said, the ratings given to some factors (such as *relevant relationships*, and *the other side's objectives*) indicate that law students lack the depth of understanding to guide their knowledge of how to apply principles from the literature to a legal negotiation scenario. When outlining their preparation in absence of any prompts or suggested wording, the results reflect various components of good practice,[283] but show a scattered approach to legal negotiation preparation. Although the factors mentioned by respondents were relevant and important parts of legal negotiation preparation, they reflected one or two relevant components, rather than a whole approach to preparation. Consequently, law students' methods of legal negotiation preparation appear to require more detailed guidance about how to apply principles of 'good practice' legal negotiation preparation to a negotiation scenario.

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280 See Appendix O.

281 See Appendices G, H, I, J, M and N.

282 See Appendix P.

283 The consideration of facts (47% of respondents), research (39%), offers/resolutions (23%), and agendas (15%) or plans (15%) are relevant to good practice.

IV CONCLUSION

In this chapter I outlined five components of legal negotiation preparation, drawing on relevant legal negotiation literature, including Fisher and Ury's Four Principles. Together, these five components comprise the Legal Negotiation Preparation Framework, and reflect 'good practice' as noted in the LCA Requirements. I then used my original data to provide insight into whether law students understand these components of 'good practice', and can apply them to a legal negotiation scenario, drawing on both quantitative and qualitative responses.

Inexperienced negotiators often neglect preparation,[284] for various reasons including that it takes too much time,[285] and 'is not as important as the main event'.[286] Throughout this chapter I have shown that these arguments lack depth, and that, if law students had proper guidance, they would be able to prepare more thoroughly for a legal negotiation, even in the absence of abundant time. When presented with specific factors related to legal negotiation preparation law students can identify their importance and rank them in terms of the priority given to each during preparation. Consequently, it is clear from my data that law student negotiators *do* attempt to prepare, and do consider many factors of legal negotiation preparation that are relevant to good practice. Analysing this more deeply shows that law students have basic knowledge and understanding of various factors relevant to legal negotiation preparation, but do not have the deeper comprehension to apply these to specific scenarios, highlighted through the analysis above. Law students would, therefore, benefit from clear guidance that identifies the key aspects of legal negotiation preparation, and justifies why these are important, in the broader context of legal practitioners' duties to their client and broader ethical obligations. This would enrich law students' legal negotiation preparation. Ideally, this would be embedded in all aspects of legal education (at both undergraduate and PLT level) to ensure law students' understanding of these fundamental components of legal negotiation preparation.

It is also important to recognise the artificiality of the Legal Negotiation Competition as related to certain components of legal negotiation preparation, such as authority. Although I have analysed the concepts of authority as particularly relevant to legal negotiation

284 Alexander and Howieson (n 2) 105.
285 Fisher and Ertel (n 10) 4.
286 Alexander and Howieson (n 2) 106.

preparation, it is difficult to apply this analysis to the Legal Negotiation Competition context, in which competitors are unable to seek clarifying, or more detailed, instructions from their client. In legal practice, authority is a fundamental component of legal negotiation preparation and requires careful and considered attention. Authority is the lens through which all legal matters must be analysed, and, as such, is also a critical component of legal ethics. Throughout this chapter I have identified various other ethical issues as they relate to legal negotiation preparation. As such, in Chapter Five my analysis shifts to legal ethics, and, specifically, legal negotiation ethics, to determine how legal ethical principles apply to legal negotiation, whether law students are able to identify and apply these principles, and how such principles can guide law students during their legal negotiation preparation.

CHAPTER FIVE: THE ROLE OF LEGAL ETHICS IN LEGAL NEGOTIATION PREPARATION

I INTRODUCTION

In Chapter Four I used the LCA requirements as a lens through which to synthesise the multitude of approaches to legal negotiation preparation, to address the label confusion inherent in this field. My analysis was based on the foundation of the central definition of legal negotiation that I proposed in Chapter Three, which is emulated in the Legal Negotiation Competition. These were the first steps towards answering my research question: what are the minimum competencies a law student must meet to demonstrate competent legal negotiation preparation prior to being admitted to legal practice? While the main emphasis of my research is on preparation for legal negotiation, the analysis shown in Chapters Three and Four confirmed the strong interrelationship between legal negotiation preparation and legal negotiation ethics. Indeed, proper preparation can result in fewer ethical dilemmas, and a more ethical negotiation.[1] As such, in this chapter I examine the role of ethics in legal negotiation, particularly as it relates to legal negotiation preparation.

Ethics are fundamental to the practice of law, and the professional conduct expected of legal practitioners is stringently defined in the Conduct Rules. The concept of ethics in law, however, is markedly different from general conceptions of ethics, and instead incorporates both rules of professional conduct and legal ethical obligations. When applied to the litigation process, these Conduct Rules and associated ethical obligations are easily understood, and enforceable via Legal Practitioners Legislation in each jurisdiction.[2] Legal practitioners are expected to understand and maintain legal ethics in all parts of legal practice, including during legal negotiations.[3] They must be able to detect ethical dilemmas, and make decisions about how to react to these, while still complying with the Conduct Rules and associated

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1 Jim Parke, 'Lawyers as Negotiators: Time for a Code of Ethics?' (1993) 4(3) *Australian Dispute Resolution Journal* 216, 223. Lauchland, however, notes that legal practitioners should not assume that their counterparts are prepared, and that '[o]ne may sometimes bargain effectively from a position of ignorance': Kay Lauchland, 'Secrets, Half-Truths and Deceit in Mediation and Negotiation – Lawyers Beware! (2007) 9(6) *ADR Bulletin* 97, 99.

2 *Legal Profession Act 2006* (ACT); *Legal Profession Uniform Law 2014* (NSW); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (QLD); *Legal Practitioners Act 1981* (SA); *Legal Profession Act 2007* (Tas); *Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession (Admission) Rules 2009* (WA).

3 *Legal Services Commissioner v Mullins* [2006] LPT 012 ('*Mullins*'); *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352 (7 December 2006) ('*Fleming*'). See generally Art Hinshaw, 'Teaching Negotiation Ethics' (2013) 63(1) *Journal of Legal Education* 82, 82.

ethical obligations placed on them by virtue of being a legal practitioner. When drawn into the legal negotiation environment, however, the application of legal ethics is more nuanced, and 'replete with ethical challenges.'[4] Upon admission to legal practice, law graduates are expected to have knowledge about legal ethics and be qualified to apply this knowledge in their daily practice, to the competence standards of an entry-level practitioner.[5] However, 'the law on lawyering on its own provides an incomplete ethical resources for lawyers ethical decision-making, and it is misleading to suggest otherwise.'[6]

Unfortunately, being qualified and competent 'is not a guarantee of ethical conduct,'[7] nor of a legal practitioner's ability to apply those legal ethics in a legal negotiation setting. Indeed, Boulle and Field note that:

> [t]o engage in ethical conduct in dispute resolution environments lawyers must not only understand the rules about how to behave in a professional and ethical manner they must also have the capacity to make independent ethical judgments. Such judgments require an ethical disposition, a personal ethical framework and a moral compass.[8]

Boulle and Field's quote emphasises the intersection of multiple components of decision making in the legal negotiation context. Legal practitioners must be capable of both detecting, and deciding how to address, any ethical dilemmas that arise during legal negotiation, although this aspect of legal practitioner decision making is scarcely addressed in relevant literature. This is particularly challenging because the Conduct Rules were drafted for the litigation environment, and have been transposed into the legal negotiation environment.[9] A further factor that underpins the importance of understanding how a legal practitioner's ethical – and legal – responsibilities apply during legal negotiation relates to the concept that legal practitioners are immune from negligence suits arising from court

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4 Jennifer K Robbennolt and Jean R Sternlight, 'The Psychology of Ethics in Negotiation' in Andrea Kupfer Schneider and Chris Honeyman, *Negotiation Essentials for Lawyers* (American Bar Association, 2019) 257, 257.

5 Law Admissions Consultative Committee, *Practical Legal Training Competency Standards for Entry-Level Lawyers* (2015) ('*PLT Standards*').

6 Michael Robertson, 'Embedding "Ethics" in Law Degrees' in Sally Kift et al, *Excellence and Innovation in Legal Education* (LexisNexis, 2011) 99, 103 [4.10].

7 Laurence Boulle and Rachael Field, *Australian Dispute Resolution Law and Practice* (LexisNexis, 2017) 471 [12.2].

8 Ibid.

9 Avnita Lakhani, 'The Truth About Lying as a Negotiation Tactic: Where Business, Ethics, and Law Collide…Or Do They? Part 1' (2007) 9(6) *ADR Bulletin* 101 ('The Truth About Lying Part 1').

proceedings or legal work that leads to a judicial determination.[10] This immunity, however, does not extend to settlement offers, as these do not 'affect the judicial determination of a case'.[11]

Legal practitioners often find it difficult to reconcile the strict Conduct Rules with their own decision making capacity when confronted with an ethical dilemma.[12] Confusion is exacerbated by the lack of guidance available from regulatory bodies, and heightened by academic and practitioner commentary that indicate the Conduct Rules are often applied very differently in the legal negotiation environment than during litigation. While such nuances in application may seem evident to a seasoned legal practitioner, the discrepancies between what is expected in accordance with the Conduct Rules and associated ethical obligations, and what is done in practice, prove problematic to law students who are already struggling to grasp the fundamental and stringent concepts of legal ethics.[13] As such, not only are law students guided by their personal ethics and the ethics of decision making, but there are various other constraints on law students' ethical decision making processes, which will be evaluated in this chapter.

Before continuing, it is necessary to consider the positioning of legal ethics and legal negotiation ethics in legal education.[14] Law students are required to study legal ethics during both undergraduate and Practical Legal Training studies, typically in a standalone topic called *Ethics and Professional Responsibility*, or a topic about civil litigation, which often do not involve substantive black letter law. Law students often see such ethics topics as a 'sure pass',[15] which is indicative of some students' limited engagement with the relevant materials. Importantly, there is no specific requirement for law students to learn about *legal negotiation*

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10 See *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1, 31 (Gleeson CJ, Gummow, Hayne and Hayden JJ) affirming *Giannarelli* (1988) 165 CLR 543.

11 *Kendirjian v Lepore* (2017) 259 CLR 275, 286, quoting *Atwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 25 [50].

12 David Jenaway, 'Culture and Negotiation: The Role of Morality' (2008) 19(1) *Australian Dispute Resolution Journal* 49, 50 citing Yasiah Ross, *Ethics in Law* (Butterworths, 2001) 25; Lakhani, 'The Truth About Lying Part 1' (n 9).

13 Various studies demonstrate law students' lack of ethical understanding, particularly in relation to choosing to act unethically for a variety of reasons including direction from a client. See, eg, Howard Raiffa, 'Ethical and Moral Issues' in Carrie Menkel-Meadow and Michael Wheeler (eds), *What's Fair: Ethics for Negotiators* (Jossey-Bass, 2004) 15, 15.

14 See above Chapter One.

15 Parke (n 1) 225

ethics during these topics. While there may be an implied link to legal negotiation ethics as part of *Ethics and Professional Responsibility*, teachings about legal ethics are not often related back to the dispute resolution environment, let alone the more specific legal negotiation environment.[16] Further, NADRAC – the Government taskforce created to improve legal education about dispute resolution – includes no reference to ethics in the document in which it sets out the aspects of dispute resolution that law students must learn.[17] Consequently, Australian law students appear to learn very little, if anything at all, about the application of legal ethics to the legal negotiation environment.[18] Any knowledge they do gain typically forms part of a larger topic on civil dispute resolution or ethics, and students therefore compartmentalise their knowledge. This compartmentalisation means that law students then struggle to draw legal ethical principles from the adversarial environment inherent in Australian law schools across to the legal negotiation environment, which, in turn, reduces problem-solving.[19] Students who enter Legal Negotiation Competitions, however, have a much higher likelihood of learning about legal negotiation ethics, although the discrepancies and confusion relating to legal negotiation ethics described above may mean that Competition Judges avoid giving advice on this area. Given the frequency with which legal practitioners utilise legal negotiation skills, it is imperative that law students gain a proper understanding of how legal ethics apply to legal negotiation, with attention given to any contradictions expressed in the Conduct Rules and relevant literature.[20]

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16 This is despite academic calls that such teachings should not focus just on the adversary system, but instead that law schools 'have a responsibility to ensure that the alternative dispute resolution professionals graduating from their courses will possess appropriate ethical standard': Parke (n 1) 225.

17 This document is now inaccessible online, but the relevant provisions are set out in Donna Cooper, 'Assisting Future Lawyers to Conceptualise Their Dispute Resolution Advocacy Role' (2013) 24(4) *Australasian Dispute Resolution Journal* 242, 244 ('Assisting Future Lawyers').

18 Mark J Rankin, 'Legal Ethics in the Negotiation Environment: A Synopsis' (2016) 18(1) *Flinders Law Journal* 77 ('Legal Ethics in the Negotiation Environment').

19 Ibid 92.

20 Although scholars such as Spencer and Scott encourage law students to instead learn and refine practical legal negotiation skills only after their first two years of legal practice, such views no longer accord with the priority given to alternative dispute resolution in the literature and the frequency of its use in legal practice: David Spencer and Marilyn Scott, 'ADR for Undergraduates: Are We Wide of the Mark?' (2002) 13(1) *Australasian Dispute Resolution Journal* 22, 24-5.

In this chapter I bring legal negotiation ethics to the fore, which has scarcely been done in the Australian legal ethics literature.[21] I analyse the Conduct Rules and associated ethical obligations imposed on legal practitioners, as they apply to legal negotiation. Since legal negotiation ethics, as a field, contains significant ambiguities, I also examine the components of legal practitioner decision making – ethical philosophies of decision making, schools of bargaining ethics, and theories of negotiation – and their impact on legal negotiation and the ethical decisions law students and legal practitioners need to make as part of the legal negotiation process.[22] To deepen this analysis, I evaluate how each of these components applies to legal negotiation, and critique the parameters of this application. In so doing, I identify problems inherent in transposing and enforcing rules clearly designed for the litigation environment into the legal negotiation environment. Throughout my analysis in this chapter, I emphasise the need for greater clarity on legal negotiation ethics and highlight the importance of clear and precise ethical rules that apply specifically to the legal negotiation environment. The current lack of a Code of Ethics reduces the impact of ethics in legal negotiation.[23] I add my voice to those of various authors who have argued for a Code of Ethics that applies particularly to dispute resolution proceedings, and that specifically address legal negotiation ethics.[24] Such rules are imperative for the future functioning of the legal profession, as the lack of third-party facilitation and/or decision making in legal negotiation reduces the practical application and enforcement of the current Conduct Rules. A Code of Ethics would also offer overarching guidance in the dispute resolution context, and, although

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21 Scott J Maybury 'The Ethics of Negotiation – Are We Misleading Ourselves?' (2016) 38(7) *Bulletin* 80. Cf Rankin, 'Legal Ethics in the Negotiation Environment' (n 18); Mirko Bagaric and Penny Dimopoulos, 'Legal Ethics is (Just) Normal Ethics: Towards a Coherent System of Legal Ethics' (2003) 3(2) *Queensland University of Technology Law Journal* 21.

22 In this chapter, as in the entire thesis, I am considering legal negotiation as it relates to civil law, excluding family law that is governed by its own rules, and also excluding criminal law. These areas raise their own ethical issues, which are beyond the scope of this thesis. For further analysis of ethical issues that arise in these contexts, see, eg, Judy Gutman, 'Legal Ethics in ADR Practice: Has Coercion Become the Norm?' (2010) 21(4) *Australasian Dispute Resolution Journal* 218.

23 Rankin, 'Legal Ethics in the Negotiation Environment' (n 18) 82 citing G E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2013) ('*Lawyers' Professional Responsibility Fifth Edition*') 697 and Gary T Lowenthal, 'The Bar's Failure to Require Truthful Bargaining by Lawyers' (1989) 2(2) *Georgetown Journal of Legal Ethics* 411, 444 ('The Bar's Failure to Require Truthful Bargaining by Lawyers').

24 See, eg, Lakhani, 'The Truth About Lying Part 1' (n 9) 108; Parke (n 1) 227; Roger Fisher, 'Beyond YES' (1985)1(1) *Negotiation Journal* 67.

it could not identify all ethical issues that may arise during legal negotiation,[25] would provide an improved starting point.

While various calls for ethical codes relating more broadly to dispute resolution have been made in an attempt to create clarity for the legal profession, in this chapter I consider these challenges from an Australian law student perspective, which has not yet been done.[26] I draw on original qualitative data that indicates student confusion in this area,[27] and I synthesised this with extant literature that highlights deception as one of the five principal ethical issues relevant to legal negotiation.[28] This area frequently gives rise to ethical dilemmas in the legal negotiation environment, and accordingly requires legal practitioners to make decisions about how to respond to, or even how to pre-empt, such dilemmas. I consequently use deception as a case study, to highlight the challenges of intersecting the Conduct Rules, ethical obligations, and components of legal practitioner decision making when confronted with deceptive conduct during legal negotiation. Of note, deceptive conduct that occurs during litigation or other legal proceedings involving a third-party adjudicator or facilitator is recognised as breaching the Conduct Rules, and therefore attracts disciplinary action, or tortious or contractual claims brought by the client.[29] This is not the case in the legal negotiation environment. These differences are exemplified by the fact that, even though the Conduct Rules are intended to provide clarity, there is still considerable unethical behaviour

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25 Douglas R Richmond, 'Lawyers' Professional Responsibilities and Liabilities in Negotiations' (2009) 22(1) *Georgetown Journal of Legal Ethics* 249, 250. See also John Goldberg, 'Is Professional Ethics an Oxymoron?' (2016) 38(4) *The Bulletin* 34, 34.

26 While key literature does not include an analysis on law student perspectives relevant to ethical and professional responsibilities related to legal negotiation, there have, however, been studies that evaluate student involvement in various dispute resolution and/or ethics topics, and their consequent use of ethics. See, eg, Spencer and Scott (n 20); Cooper, 'Assisting Future Lawyers' (n 14), Rachael Field and James Duffy, 'Law Student Psychological Distress, ADR and Sweet-Minded, Sweet-Eyed Hope' (2012) 23(3) *Australasian Dispute Resolution Journal* 195; Pauline Collins, 'Student Reflections on the Benefits of Studying ADR to Provide Experience of Non-Adversarial Practice' (2012) 23(3) *Australasian Dispute Resolution Journal* 204 ('Student Reflections').

27 As highlighted in Chapter Two, I use descriptive statistics to analyse quantitative data, thematic analysis to identify themes in qualitative written responses, and phenomenography to highlight key individual responses that are reflective of this area.

28 The other three are fairness, fidelity and respect: Jonathan R Cohen, 'The Ethics of Respect in Negotiation' (2002) 18(2) *Negotiation Journal* 115, 115 ('The Ethics of Respect in Negotiation'). See also Russell Korobkin, 'A Positive Theory of Legal Negotiation' (2000) 88(6) *Georgetown Law Journal* 1789 ('A Positive Theory of Legal Negotiation').

29 For more about breach of duty or retainer, see Peter MacFarlane and Ysaiah Ross, *Ethics, Professional Responsibility and Legal Practice* (LexisNexis, 2017) 236 [6.11].

displayed by legal practitioners during legal negotiations.[30] Such behaviour is typically accepted as part of the legal negotiation process,[31] in part because legal negotiation ethics remain unclear. Further, there is a notable absence of legal practitioner misconduct cases concerning deceptive or misleading conduct during a legal negotiation.[32] This indicates either an understanding that 'deception is part of negotiation';[33] that minimal deceptive conduct occurs during legal negotiations; or that there is a problem with reporting or enforcement.[34] I evaluate each of these concepts throughout the chapter. Given the dearth of Australian academic literature on this topic, my analysis extends to Australian legal practitioner commentary provided through Law Society and practitioner journals. I also analyse global commentary, particularly from the considerable American literature on this issue,[35] which I use cognisant of the regulatory, behavioural and cultural differences between jurisdictions.[36]

I conclude the chapter by highlighting my concerns for law students in relation to their understanding and application of legal negotiation ethics amid the discrepancies and confusion apparent in this field. In the absence of regulatory reform that develops a Code of Ethics, or other clarity on the application of current Conduct Rules and ethical obligations to

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30 Rankin, 'Legal Ethics in the Negotiation Environment: A Synopsis' (n 18) 82.

31 See, eg, Hinshaw (n 3); Art Hinshaw and Jess K Alberts, 'Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics' (2011) 16 *Harvard Negotiation Law Review* 95; and Denise Fleck et al, 'Neutralizing Unethical Negotiating Tactics; An Empirical Investigation of Approach Selection and Effectiveness' (2014) 30(1) *Negotiation Journal* 23, 26.

32 *Mullins* (n 3); Parke (n 1) 218; Avnita Lakhani, 'Deception as a Legal Negotiation Strategy: A Cross-Jurisdictional, Multidisciplinary Analysis Towards an Integrated Policy Reforms Agenda' (PhD Thesis, Bond University, 2010) 254-7 ('Deception Legal Negotiation Thesis'). Lakhani's doctoral thesis analysed disciplinary actions against legal practitioners from 1996-2006 in Queensland. She found that merely 20 cases involved deceptive or misleading conduct, and that only one instance occurred during a negotiation.

33 Richard Shell, 'Bargaining with the Devil Without Losing Your Soul: Ethics in Negotiation' in Carrie Menkel-Meadow and Michael Wheeler (n 10) 57, 73 ('Bargaining with the Devil').

34 Lakhani, 'Deception Legal Negotiation Thesis' (n 32) 269.

35 Such literature particularly focuses on deception as well as commentary on how the 'Rules of Professional Conduct [are] inapposite and particularly unhelpful in dealing with a variety of ethical and professional responsibility issues that occur when lawyers are performing different roles,' such as negotiation: Carrie Menkel-Meadow, 'The Evolving Complexity of Dispute Resolution Ethics' (2017) 30(3) *Georgetown Journal of Legal Ethics* 389, 401 ('The Evolving Complexity of Dispute Resolution Ethics'). For further critique on the American rules see, eg, Michael S McGinniss, 'Breaking Faith: Machiavelli and Moral Risks in Lawyer Negotiation' (2015) 91(2) *North Dakota Law Review* 247. Bagaric and Dimopoulos note the extent of the ethics literature in America 'has reached almost saturation level': Bagaric and Dimopoulos (n 21) 368.

36 Parke (n 1) 219. See, eg, Yon Mi Kim and Kyung Hyo Chun, 'Do You Want an Efficient Negotiator or an Ethical One: Goal of the Negotiation Teaching in Law School' (2013) 11 *Asian Business Lawyer* 125, 137.

legal negotiation, I provide advice to law students that highlights the key challenges in this field, and explains how they can be prepared to identify ethically ambiguous behaviour in the legal negotiation environment, particularly as part of legal negotiation preparation.

II ETHICS IN THE LEGAL NEGOTIATION ENVIRONMENT

Traditionally, ethics are guided by deontological or utilitarian theories. Consequently, ethics include ideas of morals, honesty, and integrity.[37] Ethics are contextual,[38] culturally dependent,[39] and reflective of community values.[40] While some of these general ethical principles underpin legal ethics,[41] legal ethics have taken a divergent, more practical path.[42] Legal ethics have therefore become a diluted version of ethics,[43] moving away from moral principles and focusing on regulating legal practitioner behaviour. Given legal practitioners' important societal role, the resulting community expectations,[44] and the requirement for societal trust in the profession,[45] it is important that the requisite 'competence and diligence' are enforceable.[46] As such, legal ethics have become compulsory 'rules [of professional

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37 Gino E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 6th ed, 2017) ('*Lawyers' Professional Responsibility Sixth Edition*') 4, [1.05]. See also Gino Dal Pont, 'Professionalism in the 21st Century: Maintaining Your Ethics in an Evolving Profession' (2018) 38(1) *Proctor* 17 ('Professionalism in the 21st Century'); Yasiah Ross, *Ethics in Law* (Butterworths, 2001) chapter 1-2.

38 The contextual nature of ethics became apparent in interpreting the survey data that I received. When drafting the survey questions, I had thought that questions pertaining to *ethics* would be interpreted as legal ethics or legal negotiation ethics. Instead, some respondents focused on competition ethics, for example stating that the 'comp[etition] is fairer if no-one cheats': Survey 1448PNPR (Response to Pre-Negotiation Questionnaire, 2014).

39 Parke (n 1) 219

40 Ibid 220.

41 Three moral principles, 'truth telling; personal liberty; and the maxim of positive duty…transcend both major moral theories': Bagaric and Dimopoulos (n 21) 379. Bagaric and Dimopoulos apply this to three specific legal ethical dilemmas: performance of pro bono work (as an obligation); the cab rank rule; and the duty to not mislead the court. They conclude that ethical theories are vital to situate legal ethics in a theoretical framework: at 396. See also Louise Cauchi, 'An Obligation to Serve? Ethical Responsibilities and the Legal Profession' (2002) 27(3) *Alternative Law Journal* 133, 133.

42 See, eg, Bagaric and Dimopoulos (n 1821 Though for considerations that look more deeply to practitioner values, such as consideration of the question: 'can a good person by a good lawyer?', see, eg L Ray Patterson, 'An Inquiry into the Nature of Legal Ethics: The Relevance and Role of the Client' (1987) 1(1) *Georgetown Journal of Legal Ethics* 43, 43 onwards; question raised at 46; Dal Pont, 'Professionalism in the 21st Century' (n 37).

43 John Wade, 'Ethically Ambiguous Negotiation Tactics (EANTS): What are the Rules Behind the Rules?' (Conference Paper, Law Society of Saskatchewan CPD Seminars, 12 May 2014) 15 ('EANTS').

44 Michael D'Ascenzo, 'The importance of being ethical' 27(10) *Proctor* 43, 44; Parke (n 1) 218.

45 Ros Burke, 'Ethical Obligations: Doing What is "Right"' (2012) 34(1) *The Bulletin* 8, 8.

46 Gino Dal Pont, 'Unethical or Incompetent – Does it Matter?' [2018] (April) *Law Institute Journal* <https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/August-2018/Unethical-or-incompetent-

conduct] which are conveniently packaged under an ethics label,'[47] rather than purely ethical principles.[48] This demands the question: are legal ethics, therefore, simply a means of regulating legal practitioner behaviour, tailored for the litigation environment?[49]

The concept that *legal ethics* is simply a vessel to regulate and enforce legal practitioner conduct requires scrutiny. Legal practitioners must still make decisions about their conduct and respond to any ethical dilemmas that arise in legal practice. The Conduct Rules simply cannot provide answers for every ethical dilemma a legal practitioner might face,[50] and cannot detect associated nuance, be it cultural, behavioural, or social.[51] As such, legal ethics need to comprise more than just professional conduct rules and must therefore incorporate personal decision making in relation to managing ethical dilemmas,[52] even if legal practitioners struggle to recognise this as a component of legal ethics.[53] For the purposes of this thesis, I draw on analysis by Bagaric and Dimopoulos that requires legal ethics to be 'cement[ed]…within a broader theoretical framework'.[54] Correspondingly, I define *legal ethics* as having two intertwined components: the long-standing practice-based definitions regarding the regulation of practitioner behaviour;[55] and the need for personal decision making to manage ethical dilemmas, which sits within broader ethical theory.[56] It is the intersection of these two components that can cause difficulty for legal practitioners in identifying and responding to potential ethical dilemmas, many of which arise in the legal

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%E2%80%93-does-it-matter-> ('Unethical or Incompetent – Does it Matter?'). This terminology is apparent in each jurisdiction's definition of *unsatisfactory professional conduct* in the Legal Practitioner Legislation.

47 Bagaric and Dimopoulos (n 21) 368.

48 Goldberg (n 26) 34. Thought also note commentary by Cauchi that certain ethical principles and values 'such as honesty, integrity, impartiality, respect for the law, respect for persons, diligence, economy and efficiency, responsiveness and accountability are evident in Australian professional ethical codes and guidelines': Cauchi (n 41) 33.

49 Goldberg (n 26) 35.

50 Burke (n 45) 8.

51 Kenneth Martin, 'Legal Ethics: Navigating the Legal Minefield' (2015) 42(9) *Brief* 36, 38.

52 Paula Baron and Lillian Corbin, *Ethics and Legal Professionalism in Australia* (Oxford University Press, 2nd ed, 2017) 25.

53 Jenaway (n 12) 50 citing Ross (n 37) 25.

54 Bagaric and Dimopoulos (n 21) 396.

55 This aligns with the description of the Ethics and Professional Responsibility component of the Academic Areas prescribed by the Law Admissions Consultative Committee and Law Council of Australia. Nevertheless, I note the commentary from various authors that argue that in order to properly represent societal understandings of ethics, legal ethics should apply general ethical principles to what is done in legal practice: See, eg, Bagaric and Dimopoulos (n 21) 369.

56 Bagaric and Dimopoulos (n 21) 396.

negotiation environment. Legal negotiation ethics is not specifically defined either in the Conduct Rules, or relevant literature. Instead, it appears to be defined as existing legal ethics applied to instances in which a legal practitioner conducts a legal negotiation. There are, however, various difficulties inherent in the assumption that legal ethics can be easily transposed into the legal negotiation environment. My analysis will show that legal negotiations are subject to legal ethics, and that legal ethics (as it currently stands) cannot simply be extended to legal negotiations. I now consider how each of the components of legal ethics relate to the legal negotiation environment.

A The Australian Solicitor Conduct Rules

The Conduct Rules set out the standards expected of legal practitioners;[57] provide direction on ethical obligations that practitioners owe;[58] and encourage societal confidence in a profession that highly values ethical and professional responsibilities.[59] Legal practitioners are expected to consult the Conduct Rules for guidance to assist in the resolution of ethical issues. Even though legal negotiation is such a foundational part of legal practice, it is not specifically referred to in the Conduct Rules.[60] In this section I examine the application of the Conduct Rules to legal negotiation, the role that Tribunal decisions have taken in interpreting this, and law student understandings of the application of the Conduct Rules to legal negotiation.

The Conduct Rules delineate legal practitioners' fundamental ethical responsibilities as follows:

> 3. PARAMOUNT DUTY TO THE COURT AND THE ADMINISTRATION OF JUSTICE
>
> 3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.[61]
>
> 4. OTHER FUNDAMENTAL ETHICAL DUTIES
>
> 4.1 A solicitor must also:
>
> 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;
>
> 4.1.2 be honest and courteous in all dealings in the course of legal practice;
>
> 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;

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57 Dal Pont, *Lawyers' Professional Responsibility Sixth Edition* (n 37) 29 [1.125].

58 Ibid 30 [1.125].

59 Ibid.

60 See Chapter Three, Part III for my analysis of whether legal negotiation constitutes legal practice.

61 Law Council of Australia, *Australian Solicitor Conduct Rules* (2015) ('*Conduct Rules*') r 3.

4.1.4 avoid any compromise to their integrity and professional independence; and

4.1.5 comply with these Rules and the law.[62]

The Conduct Rules apply to all Australian legal practitioners,[63] throughout their dealings in legal practice. Close reading of the Conduct Rules, however, could lead to an interpretation that, since the Conduct Rules are entirely silent as to *legal negotiation* and *negotiation*, the Conduct Rules are relevant only to litigation,[64] or dispute resolution facilitated by a third-party. The Conduct Rules do, however, frequently refer to legal practitioner conduct in 'court', which is specifically defined to include all forms of dispute resolution.[65] There are two key issues that arise from this. First, direct transposition of *court* is not always feasible. Secondly, although the Queensland Legal Practitioners Tribunal determined that the Conduct Rules are relevant to dispute resolution,[66] this determination was in the context of duties of honesty towards a third-party facilitator, a context that is not relevant to legal negotiation.

1 *Challenges Inherent in Using Legal Negotiation as a Synonym for Court in the Conduct Rules*

Even though the Conduct Rules are clearly intended to apply to all forms of legal practitioner behaviour, it appears that their application to legal negotiation has not been thoroughly considered by regulatory bodies. Although *court* is broadly defined to include dispute resolution, this definition poses practical difficulties. There are several challenges inherent in this interpretation of *court,* particularly relevant to legal negotiation processes and procedures, and the broader aims of legal negotiation.

The first challenge of substituting *legal negotiation* in place of *court* in the Conduct Rules relates to ambiguity arising from process requirements. For example, a legal practitioner must only 'allege any matter of fact' if he or she 'believes on reasonable grounds that the factual material already available provides a proper basis to do so' in relation to 'any court document settled by the solicitor' and arguments made during hearing.[67] Arguably, the intent of the Conduct Rules is to prevent deceit relating to facts, particularly in the creation of any relevant

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62 Ibid r 4.

63 Ibid r 1.1.

64 Baron and Corbin (n 52) 187 [2.1]. This is a particularly traditional view, which again emphasises the difference between *litigation* and *dispute resolution* – litigation being more formal (and heavily regulated by the Conduct Rules), and dispute resolution being less formal, with less rigorous regulation.

65 Law Council of Australia, *Conduct Rules* (n 61) 39-40 Glossary (definition of 'court').

66 *Mullins* (n 3).

67 Law Council of Australia, *Conduct Rules* (n 61) r 21.3.

documentation. Two difficulties arise from this rule. Initially, legal negotiations are likely to occur prior to the creation of any documentation, rendering this rule ineffective in the legal negotiation context. Secondly, while *hearing* is undefined, this clearly relates to litigation, rather than legal negotiation. Although *court* is noted to have an extensive definition, there is no comment as to court-related terminology, such as *hearing*, being similarly extended. It therefore appears that the regulator intends to bridge an ethical gap by attempting to extend rules developed for a litigation environment to all forms of dispute resolution,[68] in lieu of developing a series of conduct rules that apply specifically to dispute resolution. Although seemingly a semantic issue that can be overcome using a contextual approach to interpretation, extending the definition of *hearing* and *court* in this way reflects a lack of insight into the way in which dispute resolution and legal negotiation processes function outside the court system.

Procedurally, legal negotiation is used as a way for parties to create an agreement, and often to avoid redress to litigation. Certain Conduct Rules appear to contradict that aim when applied to the legal negotiation context. For example, legal practitioners must only make use of court process when these are 'reasonably justified'[69] and 'appropriate for the robust advancement of the client's case on its merits';[70] rather than to harass, embarrass,[71] or unduly obtain advantage.[72] Legal negotiations are usually justifiable, with some exceptions regarding power imbalances or physical safety,[73] and need to be commenced for a genuine reason.[74] Legal negotiations are typically confidential, private, and often without prejudice. Due to this, it is difficult to know whether such proceedings are intended to harass, embarrass or unduly obtain advantage, although it is conceivable that legal negotiations could be used to delay legal proceedings. While this is an important ethical consideration, the private nature of legal

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68 Lakhani makes similar arguments about the system in the United States, suggesting that Rule 4.1 'is embedded into a framework of ethical rules that seems initially meant to apply to litigation or the adversarial system': Lakhani, 'The Truth About Lying Part 1' (n 9) 107. See also Parke (n 1) 218.

69 Law Council of Australia, *Conduct Rules* (n 61) r 21.1.1.

70 Ibid r 21.1.2.

71 Ibid r 21.1.3. There are plans to incorporate this rule in Upper Canada: George Tsakalis, 'Negotiation Ethics: Proposals for Reform to the Law Society of Upper Canada's Rules of Professional Conduct' (2015) 5(4) *Western Journal of Legal Studies* <http://ir.lib.uwo.ca/uwokls/vol5/iss4/3>:1-13, 11.

72 Law Council of Australia, *Conduct Rules* (n 61) r 21.1.4.

73 See above Chapter Three.

74 Law Council of Australia, *Conduct Rules* (n 61) r 7.2.

negotiation makes compliance difficult to identify or enforce, as further explored in Part D, below.

A legal practitioner has a duty to inform the court of relevant Australian legislation, either during the hearing or while judgment is pending.[75] This includes both binding or persuasive Australian authorities that are directly against their client's case (if the court has not already been informed of this).[76] Again, this refers to the *court* and *hearing*. On a strict interpretation, this relates solely to proceedings that include a third-party decision maker or facilitator, including disclosure to a mediator (but not opposing counsel).[77] This could not be similarly applied to legal negotiation, because there is no third-party. If the rule *was* to be applied, this would result in legal practitioners directly informing opposing counsel of all points that counter their case, and would therefore hinder the process of option generation, as well as contradict the rationale underpinning legal negotiation.

Above I have elucidated just three problems relating to the transposition of the Conduct Rules from a litigation environment to legal negotiation, drawing on the definition of *court.* While the interpretation of *court* may be clear for seasoned practitioners who have experienced these nuances in practice, such nuances prove confusing for law students, especially as the students attempt to develop competence in this area.

2 *Tribunal Application of the Conduct Rules to Legal Negotiation*

Despite the arguments above, the Conduct Rules are clearly intended to apply to dispute resolution. This was clarified by the tribunal in *Legal Services Commissioner v Mullins* ('*Mullins'*), which makes it clear that the professional responsibilities and ethical requirements of legal practitioners apply equally to all forms of dispute resolution and litigation.[78] Wolski's commentary about *Mullins*, however, interprets the tribunal's findings

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75 Law Council of Australia, *Conduct Rules* (n 61) r 19.8.

76 Ibid r 19.6.

77 Bobette Wolski, 'The Truth about Honesty and Candour in Mediation: What the Tribunal Left Unsaid in *Mullins'* Case' (2012) 36(2) *Melbourne University Law Review* 706, 733 ('The Truth about Honesty and Candour in Mediation').

78 *Mullins* (n 3). See also Baron and Corbin (n 52) 187 [2.1]. There has been extensive commentary on this decision. In her comment, Wolski notes that 'in neither [the litigation or mediation] context do [legal representatives in Australia] owe a general duty to be candid, open or forthright': Wolski, 'The Truth about Honesty and Candour in Mediation' (n 77) 708. Wolski reflects that neither Mullins, nor the case against the solicitor Garret, 'gives a detailed account of the rules of disclosure governing legal representatives in mediation': at 716. She further notes many authors interpret the decision in *Mullins* as

as only relating to the duty of honesty a legal practitioner owes to a mediator,[79] in relation to mediator-facilitated negotiations that occur during mediation.[80] This again emphasises the distinction between negotiation and dispute resolution processes involving a third-party facilitator or decision maker.[81]

As seen in Chapter Three, there are various formulations of negotiation that do not recognise legal negotiation as a form of dispute resolution. While I argue that legal negotiation unquestionably fits within the definition of dispute resolution, it does have specific characteristics – primarily the lack of third-party facilitator or decision maker – that move it into a category of its own. Applying Wolski's interpretation of *Mullins* to legal negotiation could mean that a legal practitioner owes the same duty to their opposing counsel during a legal negotiation as they do to a mediator. While all legal practitioners have an ethical obligation to fellow practitioners, this interpretation would require a high level of disclosure and honesty between counsel, which would likely contradict client instructions and therefore breach both the Conduct Rules and obligations to the client.[82] However, if the Conduct Rules and *Mullins* are only intended to apply to dispute resolution processes that involve a third-party decision maker/facilitator, where does this leave legal negotiation? This dilemma further supports the need for a separate legal negotiation Code of Ethics.[83]

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indicating that the legal practitioners have different duties in litigation compared with mediation, and that in mediation they have a duty to disclose relevant facts. Wolski posits that such commentary 'overstate[s] the significance and effect of the decision in *Mullins*' as it 'blur[s] the distinction between honesty and candour' and there is 'no affirmative duty of disclosure imposed under the rules *unless* disclosure is required to qualify a partial truth or, as was the case in *Mullins*, to correct a statement which has become false': at 736-737. Finally, Wolski comments that a legal practitioner's duty will depend on whether dealings are with a court (or third-party decision maker or facilitator) or fellow practitioner – while 'Justice Byrne did allude to a distinction between duties owed in mediation and duties owed in litigation…[h]e did not elaborate upon what he meant…[and] [t]here was no need for the Tribunal to distinguish between litigation and mediation': at 737.

79 Wolski, 'The Truth about Honesty and Candour in Mediation' (n 77) 737-8.

80 The literature often refers to *negotiations* that occur during mediation – this is not what I mean by the term *legal negotiation* throughout this thesis. See further explanation in Chapter Three.

81 See, eg, Philip H Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspectives* (Academic Press, 1979): this is one of the unique characteristics of legal negotiation.

82 This is discussed in greater detail in Part II(B) and (C) below.

83 While the content of such a Code of Ethics goes beyond the scope of this thesis, throughout the following sections I analyse relevant constructions of legal negotiation ethics and highlight the difficulties that apply when certain components of litigation ethics are directly transposed into the legal negotiation environment.

3 *Law Student Understandings of Legal Ethics*

When asked about legal ethics, law students responding to my questionnaires noted that legal practitioners should not lie,[84] or break the law.[85] This shows an understanding of the moral components of legal ethics, and the potential enforcement of ethical breaches, even though this understanding would benefit from further refinement. Their understanding, however, does not always extend to the legal negotiation environment. My questionnaire results showed that law students had an incomplete understanding of legal negotiation ethics, with only 54% of respondents indicating that they considered legal ethics to be relevant during their Legal Negotiation Competition preparation. Comments from those respondents who did turn their mind to legal ethics noted that ethics are the 'foundation of negotiation',[86] and negotiations should be approached in good faith.[87] Even those respondents who did not consider ethics noted that they 'would have conducted [them]selves in an ethical manner regardless',[88] or that they aimed not to be rude.[89] Some regretted not considering ethics,[90] whereas others commented that they would only consider ethics if ethical issues seemed relevant upon reading the scenario.[91] These results are particularly interesting as respondents were at various stages of their law studies, and consequently only some would have studied legal ethics. This shows that even those students who do understand the importance of legal ethics, are unable (or unwilling) to strictly apply legal ethics during a legal negotiation. My results do not provide insight on whether this is a matter of limited understanding of legal ethics, or legal negotiation preparation requirements, or both.[92] Nevertheless, each of these scenarios are equally problematic and must be reflected in the minimum competencies required for legal negotiation. A clear and detailed explanation of legal ethics, and their application to legal negotiation, must also be included in legal negotiation education.

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84 1401PN (Response to Pre-Negotiation Questionnaire, 2014) 3rd year student; 1402PN (Response to Pre-Negotiation Questionnaire, 2014) 2nd year student; 1602PN (Response to Pre-Negotiation Questionnaire, 2016) year level not specified; 1603PN (Response to Pre-Negotiation Questionnaire, 2016) year level not specified.

85 1502PNPR (Response to Pre-Negotiation Questionnaire, 2015) 5th year student.

86 1412PNPR (Response to Pre-Negotiation Questionnaire, 2014) 5th year student.

87 1503PNPR (Response to Pre-Negotiation Questionnaire, 2015) 4th year student.

88 1413PNPR (Response to Pre-Negotiation Questionnaire, 2014) 3rd year student.

89 1303PNPR (Response to Pre-Negotiation Questionnaire, 2013) 2nd year student.

90 1302PNPR (Response to Pre-Negotiation Questionnaire, 2013) 2nd year student.

91 1406PNPR (Response to Pre-Negotiation Questionnaire, 2014) 4th year student; 1446PNPR (Response to Pre-Negotiation Questionnaire, 2014) 2nd year student; 1305PNPR (Response to Pre-Negotiation Questionnaire, 2013) 5th year student.

92 This should be a subject for further research.

The use of deception during legal negotiation presents a specific instance of confusion. One of my survey respondents, after noting that they had considered ethics and must not lie, stated that they were '[n]ot sure how these [ethics] work in a negotiation setting but they are important to real life'.[93] Although not so explicitly expressed in other responses, this mirrors the law students' understanding of legal negotiation ethics that I have witnessed while judging Legal Negotiation Competitions. This respondent was in their third year of law studies and was required to undertake two compulsory topics, *Professional Responsibility and Ethics* and *Alternative Dispute Resolution*, in their first year of law studies. This is concerning because the student had been exposed to both ethics and dispute resolution (including negotiation, as outlined in the *Alternative Dispute Resolution* topic description). After completing these two topics, the student still exhibited confusion about how to apply legal ethics during legal negotiations, which reinforces my argument that law students suffer from uncertainty in this area. While this exemplifies only one student's experience, it is highly unlikely to be an isolated situation, and aligns with my observations while judging Legal Negotiation Competitions.

There are various challenges inherent in applying the Conduct Rules directly to the legal negotiation environment, which are made increasingly difficult by post-*Mullins* interpretations. It is clear that the Conduct Rules *do* apply to all parts of legal practice, ensuring that legal practitioners are competent and diligent in the provision of legal services.[94] While a Code of Ethics specific to legal negotiation would be beneficial, in absence of this and given the frequency with which legal practitioners engage in legal negotiation, legal practitioners and law students need to look to other sources for guidance on how to interpret their ethical duties in the legal negotiation environment. Some guidance is provided by the three ethical obligations that legal practitioners owe: to the court and the administration of justice; to the client; and to fellow legal practitioners. While these obligations are drawn from the Conduct Rules, they are also standalone obligations that have attracted considerable academic commentary.[95] In Part B I outline each of the ethical

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93 1401PNQF (Response to Pre-Negotiation Questionnaire, 2014) 3rd year student.

94 Law Council of Australia, *Conduct Rules* (n 61) r 4.1.3.

95 See, eg, Dal Pont, *Lawyers' Professional Responsibility Sixth Edition* (n 37); MacFarlane and Ross (n 29). Although there is academic commentary, judicial commentary only extends to the ethical obligation to the court, rather than the other duties, 'with the result that most such duties are perceived as somewhat loose and ill-defined: Parke (n 1) 220.

obligations and consider their relevance to legal negotiation. This, along with Parts C and D, form the basis for the case study in Part III below.

B Legal Practitioners' Ethical Obligations

Applicants applying for admission must prove they are a 'fit and proper person to practice law.'[96] Post-admission, they must avoid behaviour that might 'be prejudicial to, or diminish the public confidence in, the administration of justice'[97] or 'bring the profession into disrepute'.[98] To do this, legal practitioners must maintain three, often competing, ethical obligations: their paramount duty to the court and the administration of justice; their duty to their client; and their duty to other legal practitioners. These duties are drawn from the foundation of the legal profession itself, and have been enshrined in the Conduct Rules, the Academic Areas, PLT Standards, the credentialing procession for Admission,[99] and ongoing professional development.[100] This ensures both the regulation of legal practitioner behaviour, and, to an extent, legal practitioner competence, since knowledge of legal ethics is a crucial part of a legal practitioner's ability to uphold the law and ethical duties.[101] My research concern is, in light of the challenges raised above, that it is incredibly difficult for law students to develop their understanding of the nuances inherent in adequately applying legal negotiation ethics. I address this by examining the intersection between the Conduct Rules and ethical obligations, and the components of legal practitioner decision making.

Although the Conduct Rules were not directly mentioned in any student questionnaire response, it is clear that students have some understanding of their requirements. Some responses show further insight into the three ethical obligations, noting the importance of not lying,[102] of 'professional courtesy',[103] and of preserving future relationships with fellow

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96 Law Council of Australia, *Conduct Rules* (n 61) r 5. See also Appendix A for a detailed explanation of key Legal Practitioner Legislation in Australia.

97 Law Council of Australia, *Conduct Rules* (n 61) r 5.1.1.

98 Ibid r 5.1.2.

99 See generally Mary McComish, 'What is a "Good" Lawyer' (2006) 33(11) *Brief* 14, 15; Gino Dal Pont, 'Lawyers in (Good) Character' (2016) 43(3) *Brief* 6, 6 ('Lawyers in (Good) Character').

100 See also Dal Pont, *Lawyers' Professional Responsibility Sixth Edition* (n 37) 4.20-4.35.

101 Dal Pont, although also note comments by Boulle and Field that even though a legal practitioner is qualified, and competent, their behaviour may still not be ethical: Boulle and Field (n 7) 471 [12.2].

102 The literature itself does not often use the term 'lying', instead focusing on deception: Michelle Wills, 'The Use of Deception in Negotiations: is it "Strategic Misrepresentation" or is it a Lie?' (2000) 11(4) *Australasian Dispute Resolution Journal* 220, 224.

103 1305PNPR (Response to Pre-Negotiation Questionnaire, 2013) 5th year student.

practitioners.[104] Scholarly analysis of these obligations as they apply to the legal negotiation environment is minimal. Indeed, there is little critique on legal practitioners' obligations generally, except for some analysis of the duty to the court and the administration of justice.[105] This lack of analysis and/or guidance has meant that the obligations are sometimes considered to be 'somewhat loose and ill-defined'.[106] I address this by considering each of the three ethical obligations owed by legal practitioners as they specifically relate to the legal negotiation environment.

1 *Duty to the Court and the Administration of Justice*

Legal practitioners' paramount duty is to the court and the administration of justice, although this has been interpreted as a broader 'duty … [or] fidelity to the law' so as to encompass all aspects of legal practice, including dispute resolution.[107] While the duty itself is rarely defined, it includes 'situations where lawyers must exercise ethical judgment,'[108] which clearly extends to legal negotiation. While the duty itself is ubiquitous in legal practice and therefore poses definitional challenges,[109] Bell and Abela propose a framework of three elements that encapsulate this duty.[110] In the Australia context, this has been summarised to include candour; integrity and professionalism; and client education promoting public confidence in the administration of justice.[111] Although private in nature, legal negotiation is one of the most visible components of a legal practitioner's work, because it forms a considerable part of legal work, and is something that legal practitioners are expected to carry out. It must therefore be carefully regulated to maintain public confidence.[112]

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104 1510PN (Response to Pre-Negotiation Questionnaire, 2015) year level not specified.

105 Parke (n 1) 220

106 Ibid 220.

107 Baron and Corbin (n 52) 95.

108 Ibid.

109 Ibid, discussing Robert Bell and Caroline Abela, 'A Lawyer's Duty to the Court' (Paper presented to the Advocates Society, Melbourne, 20 November 2009), <https://www.advocates.ca/Upload/Files/PDF/Advocacy/InstituteforCivilityandProfessionalism/Duty_to_Court.pdf>.

110 Bell and Abela (n 109) 5, 7, 12. For a more detailed analysis of the ways that these elements apply in the Australian law context (more broadly than just in relation to dispute resolution) see Baron and Corbin (n 52) Chapter 4.

111 Baron and Corbin (n 52) 98.

112 Rankin 'Legal Ethics in the Negotiation Environment' (n 18) 79; Parke (n 1) 226.

The 2015 Review of the Conduct Rules[113] rejected the need for a separate duty of candour, acknowledging that it is already encompassed in the broader duty to the administration of justice.[114] However, the current duty does not clarify the application of the requirement of candour beyond the litigation process, reflected in duties pertaining to frankness in court,[115] and the responsible use of court process and privilege.[116] These requirements fail to address the nuances of legal negotiation, and whether legal negotiation mandates the same level of candour as litigation.[117] This raises conflict between candour and client confidentiality, and, resultantly, between deception and confidentiality.[118]

Integrity and professionalism are key to all components of legal practice, including legal negotiation. While a legal practitioner is bound to follow their client's instructions, they must also exercise their own independent and forensic judgement, rather than acting as the client's 'mere mouthpiece.'[119] This can be aided by thorough preparation, and comprehensive discussions with the client,[120] and is reflected in the LCA Requirements. The concepts of integrity and professionalism encompass two further principles: the 'duty to not abuse process' and 'obligation to respect the court',[121] which are fundamental components of the duty to the court and administration of justice. When applied to legal negotiation, however, their intent is diluted. Abusing court processes and failing to respect the court are serious, punishable actions. There are examples relating to legal negotiation that could breach these principles, such as drawing out legal negotiation (with or without specific client instructions), being disrespectful to opposing counsel, or instigating negotiations haphazardly. While such behaviour could be interpreted as a lack of legal practitioner professionalism, the private and

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113 The only review of the rules since they were proposed: Mike Emerson, 'Legal Ethics and Mediation: Is the ASCR Enough?' (2014) 34(9) *Proctor* 36, 37.

114 Law Admissions Consultative Committee, *Review of the Australian Solicitors' Conduct Rules* (2018) 23-25 ('*Review of the Australian Solicitors' Conduct Rules*'). While this dismisses the relevance of a direct reference to candour, the Ethics Committee's comment as part of the 2015 Review of the Academic Areas proposed that candour should be addressed in the commentary relating to Rule 4.1, although this was not addressed. Bell and Abela's framework still applies, however, because candour does still fit within the ambit of the rule.

115 Law Council of Australia, *Conduct Rules* (n 61) 19.1-19.12.

116 Ibid 21.1-21.8.

117 This is addressed more fully in the context of deception and misrepresentation below.

118 See below Part III.

119 Law Council of Australia, *Conduct Rules* (n 61)17.1; see *Fleming* (n 3) [70].

120 Parke (n 1) 223. Such discussions will also reduce the likelihood of unethical behaviour by the legal practitioner.

121 Baron and Corbin (n 52) 103, adding to Bell and Abela's framework.

less structured nature of legal negotiation makes it difficult to distinguish between instances in which legal negotiations were haphazardly instigated or drawn out, or prolonged for *one last attempt* at resolution.[122] This then demands the question: need such actions in legal negotiation be sanctioned comparably to abuse of process or disrespecting the court during litigation? The obvious answer is no, but this would, again, be best reflected in a Code of Ethics. It is nuances like these that cause difficulty and moral tension for law students – students who may instinctively understand that the litigation and negotiation environments are different, but in the absence of clear guidance cannot differentiate how to maintain compliance with the Conduct Rules in the legal negotiation environment.

The final component of Bell and Abela's framework,[123] client education, is specifically embedded in the Conduct Rules. Legal practitioners must be familiar with all forms of dispute resolution and their benefits and limitations; and must consequently explain all available options so that their client can make an informed decision about which type of resolution is in their best interests.[124] Legal practitioners must also inform their client that their duty to the court and the administration of justice is paramount, and will prevail in any instances of conflict between ethical duties.[125] Although this guidance seems clear, the ambit of client instructions can be wide. Law students, particularly, use client instructions as a free-for-all to allow poor ethical behaviour.[126] This must be clearly addressed in legal negotiation education, particularly in relation to whether legal negotiation ethics are more relaxed than legal ethics applied in litigation.

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122 Anstey suggests this can enable parties to have 'breathing space' to 'regroup around their core concerns': M Anstey, *Negotiating Conflict* (Juta & Co Ltd, Capetown, 1991) 142; in David Spencer, Lise Barry and Lola Akin Ojelabi, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co, 4th ed, 2019) 94-100 [3.60].

123 Bell and Abela (n 109) 12.

124 Law Council of Australia, *Conduct Rules* (n 61) r 7.1 and 7.2 There will be instances where certain issues, such as power imbalances, will mean that negotiation is not a relevant course of action. Such issues are beyond the scope of this thesis, but are explored in articles by John Woodward, 'Tipping the Scales – to What Extent Doe the Presence of Power Imbalances Detract from the Efficacy of Principled Negotiation?' (2015) 26(2) *Australasian Dispute Resolution Journal* 86. See also Parke (n 1) 219.

125 Law Council of Australia, *Conduct Rules* (n 61) r 3.1. See also Baron and Corbin (n 109) 97 and Bobette Wolski, 'The Truth about Honesty and Candour in Mediation' (n 77).

126 Spencer and Scott (n 20) 30. See also Richmond (n 26) and Maybury (n 21).

2 *Duty to the Client*

'The lawyer-client relationship is at the centre of a lawyer's ethical framework'.[127] When a client retains a legal practitioner to act on their behalf, this creates a contractual and fiduciary duty,[128] that the legal practitioner must act in the client's best interests.[129] Once retained, a legal practitioner acts as the client's agent,[130] specified through the client's instructions and authority.[131] The client can action a breach against their legal practitioner in tort, contract, or misconduct proceedings.[132] To avoid a breach, the legal practitioner must prepare diligently for all aspects of the representation,[133] and must understand the complex ethical layers involved. A legal practitioner's duties towards a client can be split into three broad categories: communication; authority; and confidentiality.[134]

Client communication – echoing client centrality – is one of the pillars of legal negotiation, and forms part of the LCA Requirements. Rather than underscoring the importance of maintaining regular communication throughout the process of legal negotiation,[135] however, the LCA Requirements only focus on obtaining client approval to use certain strategies and tactics.[136] Client communication commences with initial interviews, during which the legal practitioner must ask appropriate and clear questions to ascertain specific details. While this forms part of preparation, it also reinforces the way in which ethical requirements are intertwined throughout all components of legal negotiation, including preparation. Regular client communication is important because a client's interests may change or further develop, either in the lead up to the legal negotiation or during the negotiation itself. This will impact

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127 MacFarlane and Ross (n 29) 171 [51.]

128 Dal Pont, *Lawyers' Professional Responsibility Sixth Edition* (n 37) 22 [1.95]; Baron and Corbin (n 52) 122 [1.2].

129 Law Council of Australia, *Conduct Rules* (n 61) r 4.1.1.

130 Agency has not yet been defined in a general or legal setting. It is accepted for the purposes of this thesis that the lawyer is acting as an agent to enter legal negotiations on behalf of their client, under instructions and authority: the discussion by Dal Pont, *Lawyers' Professional Responsibility Sixth Edition* (n 37) 3.80 and associated footnotes.

131 Gino Dal Pont, 'The Lawyer by Implication', (2019) 46(4) *Brief* 10, 10 ('The Lawyer by Implication').

132 See further discussion in MacFarlane and Ross (n 29) 236-7 [6.11].

133 This includes having legal and factual knowledge of the situation; as well as understanding each party's interests, positions, BATNA, WATNA, ZOPA, non-negotiables and preferred outcome. This will be explored in terms of ethical principles throughout the rest of this chapter. Also, see above Chapter Four.

134 Baron and Corbin (n 52).

135 See discussion in Chapter Four, but see also Richmond (n 26) 259-60; Bernard Mayer, 'The Lawyer as Ally and Coach' in Schneider and Honeyman, *Negotiation Essentials for Lawyers* (n 3) 307.

136 Law Admissions Consultative Committee, *PLT Standards* (n 5) [5.10] 'Lawyers' Skills' Element 6.

client instructions and may alter the given authority. Clients must be frequently updated on information obtained, and offers or compromises made, during the legal negotiation. This will confirm both that the legal practitioner has an adequate understanding of the client's current position on all issues, and that the legal practitioner is acting within their authority. These client conversations enable the legal practitioner to make an informed decision about when it is necessary to halt negotiations to seek further instructions.[137] While this is crucial in legal practice, client communication is not realistically replicated in Legal Negotiation Competitions.

Legal practitioners must fully understand their client's instructions, and the authority required to enact these instructions. There are various components to the authority awarded to legal practitioners, although these are rarely considered as distinct categories. Foundationally, legal practitioners gain *actual* authority from the contract between legal practitioner and client,[138] and from specific written and/or oral instructions. Legal practitioners' role as legal agent provides *implied* authority,[139] as necessary to carry out the client's instructions. A legal practitioner may also have *apparent* authority when the client has 'held out' the legal practitioner 'as authorised to act in a certain position.'[140] Finally, legal practitioners have *ostensible authority* to receive communications,[141] or compromise,[142] which are foundational to legal negotiation. Despite these nuances, a client may still bring legal proceedings against a legal practitioner who acts outside their authority,[143] particularly given the technological ease with which they can communicate with their client to confirm instructions.[144] Consequently, legal practitioners have very little excuse for failing to seek further instructions as necessary, although the extent of *implied*, *apparent*, and *ostensible* authority can cause ambiguity during legal negotiations.

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137 Law Council of Australia, *Conduct Rules* (n 61) r 8.1.

138 Dal Pont, *Lawyers' Professional Responsibility Sixth Edition* (n 37) 87 [3.90]; 88 [3.100].

139 Ibid.

140 Ibid 87 [3.90], citing Gino Dal Pont, *Law of Agency* (3rd ed, LexisNexis Butterworths, 2014) Ch 20 ('*Law of Agency*').

141 Dal Pont, *Lawyers' Professional Responsibility Sixth Edition* (n 37) 92-93 [3.140].

142 Ibid 93-4 [3.145].

143 Ibid 88 [3.95].

144 Ibid 94 [1.145] citing *Broadbent v Medical Board of Queensland* [2010] QCA 352, [36].

The concept of authority is particularly artificial in the context of Legal Negotiation Competitions, particularly as law students are working from written instructions – which are often unclear, with undefined scope, and prohibit competitors from seeking any clarification from the client. Further, there is usually no mention of a retainer agreement, or the outer parameters of the legal practitioner's authority.[145] Indeed, only one survey respondent mentioned their client's instructions or authority.[146] This is one of the least realistic components of legal negotiation competitions,[147] and resultingly '[i]t is difficult for participants to resist the temptation to substitute their own judgment and values for those of [the] client'.[148] This is particularly difficult for law students with limited client experience, though is easily overcome in legal practice through client communication. The legal practitioner must be careful, however, to ask their client clear and relevant questions so that they do not impose their own views in place of the client's.[149]

The Legal Negotiation Competition poses two further challenges in relation to authority, and in this sense does not adequately prepare law students for *real life* legal negotiations. Competitors will often commence negotiations by asking opposing counsel if they have authority to settle.[150] While seemingly realistic in sentiment,[151] *full authority to settle* is rarely specified in the Legal Negotiation Competition instructions. Regardless, competitors often intimate that they have full authority to settle, and are unlikely to consider the consequences of this misrepresentation.[152] In reality, legal practitioners would most

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145 See, eg, Charles B Craver, 'Techniques of Distributive Negotiation' in Schneider and Honeyman, *Negotiation Essentials for Lawyers* (n 3) 29, 33 ('Techniques of Distributive Negotiation').

146 1311PNSF (Response to Pre-Negotiation Questionnaire, 2013): this comment showed some understanding of authority and instructions, nothing that '[o]ur client's instructions are vague and give us a lot of authority, so we need to consider options carefully'.

147 Agreed by law student respondents: 1505PO (Response to Post-Negotiation Questionnaire, 2015); 1524PN (Response to Post-Negotiation Questionnaire, 2015).

148 1513JQPR (Response to Judge Questionnaire, 2015) part-time legal practitioner.

149 Indeed, Rankin notes that 'client interest'… is often nothing more than the self interests of the lawyer': Rankin, 'Legal Ethics in the Negotiation Environment: A Synopsis' (n 18) 94. This 'cannot justify unethical behaviour': at 95.

150 Though some authors argue that legal practitioners do not have a duty to provide information about their authority: Richmond (n 26) 276.

151 John Wade, 'Limited Authority to Settle' in Schneider and Honeyman, *Negotiation Essentials for Lawyers* (n 3) 269, 272 ('Limited Authority to Settle').

152 While there are grounds to exclude competitors from the remainder of the competition based on ethical breaches, this is unlikely to be done purely for indicating authority to settle when this is not present on the facts, likely due to the implied authority to enter negotiations. Interestingly, older texts on negotiation propose that a negotiator should not 'let the other person trick you into admitting that you have

commonly have authority to enter into negotiations and discuss suggested terms with their client, seeking further instructions.[153] While experienced legal practitioners would appreciate this nuance, law students may think that authority to settle on *one* issue provides authority to settle *all* issues, even if such issues were not identified during preparation or discussed with their client.

Related to both authority and confidentiality, Legal Negotiation Competition scenarios often include wording that prohibits the disclosure of certain information except in specific circumstances. This may give rise to ostensible authority. For competitors who are not well versed in legal ethics and scope of authority, these areas prove incredibly challenging because there are no clear rules about whether they have ethical obligations of disclosure. While failure to disclose may seem to breach the Conduct Rules, actual disclosure additionally breaches the legal practitioner's duty to their client. My data shows that some competitors refuse to disclose information from their confidential facts,[154] whereas others will not hesitate to do so.[155] Interestingly, most decisions regarding disclosure were rationalised as being in the client's best interests,[156] which correlates with Spencer and Scott's findings that law students often use this as a justification.[157] The Legal Negotiation Competition rules are silent on disclosure of confidential information, likely in an attempt to echo real life legal negotiations. In the Competition, though, competitors may be disqualified if a judge concludes they are acting unethically either during their preparation or during the negotiation

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authority': Roger Dawson, Secrets of Power Negotiating (Career Press, 2nd ed, 2001) cited in Folberg et al *Resolving Disputes: Theory, Practice, and Law* (Aspen Publishers, 2005) 47.

153 *Pianta v National Finance & Trustees Ltd* (1965) 189 CLR 146. See also Craver who indicates that specifically stating the limits on authority can be used as a tactic: Charles B Craver, 'Classic Negotiation Techniques' (2016) 52(2) *Idaho Law Review* 425, 443 ('Classic Negotiation Techniques'). It is worth noting, however, that the competition does not allow competitors to return to their clients for any further instructions. This detracts from the 'real life' experience of negotiation and creates a level of artificiality (raised by competitors and judges alike in my questionnaires).

154 '[H]idden – keep our weaknesses secret': 1305PNPR (Response to Pre-Negotiation Questionnaire, 2014); 'wisely': 1449PNPR (Response to Pre-Negotiation Questionnaire, 2014); 'keep our strong points hidden, do not reveal until the end or until required': 1312PNSF (Response to Pre-Negotiation Questionnaire, 2013); 'the hidden facts will be disclosed when necessary': 1439PNPR (Response to Pre-Negotiation Questionnaire, 2014); 'keep some hidden, disclose some. Go for best interest of client': 1444PNPR (Response to Pre-Negotiation Questionnaire, 2014).

155 1311PNSF (Response to Pre-Negotiation Questionnaire, 2013); 1419PNSF (Response to Pre-Negotiation Questionnaire, 2014).

156 1424PNSF (Response to Pre-Negotiation Questionnaire, 2014); 1444PNPR (Response to Pre-Negotiation Questionnaire, 2014); 1502 (Response to Pre-Negotiation Questionnaire, 2015).

157 Spencer and Scott (n 20) 30

itself. That said, in my vast experience running and judging these competitions, I have never seen a team disqualified on these grounds.

The duty of confidentiality is foundational to the relationship between legal practitioner and client.[158] It is imperative that clients fully disclose all relevant information to their legal practitioner.[159] Client-practitioner communications are protected under legal professional privilege,[160] which both reassures the client and encourages public confidence in the legal system.[161] Client confidentiality presents an interesting predicament for legal practitioners in relation to legal negotiation in that, even if a client has fully briefed their legal practitioner – who has asked thorough and carefully considered questions, and been prudent with their preparation – legal negotiations are often unpredictable.[162] While there are usually several matters on which parties seek resolution, the informal nature of legal negotiation and the wide range of potential outcomes mean additional issues will often be raised, resulting in various offers and concessions. During this process of information exchange, legal practitioners must be ever-cautious to maintain client confidentiality, particularly as they could breach confidentiality by merely commenting on information that is in the public domain.[163] While *disclosing* publicly available information itself does not breach confidentiality (since the information is not confidential),[164] *commenting* on the information, and therefore confirming its existence, may constitute a breach.[165] While such nuances are easily recognised and addressed by seasoned legal practitioners, they prove challenging for

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158 Law Council of Australia, *Conduct Rules* (n 61) r 9. This confidentiality extends to all employees within the same firm as the client's lawyer: r 9.1.1, as well as those engaged to provide legal services to that client, such as a barrister: r 9.1.2.

159 Dal Pont, *Lawyers' Professional Responsibility Sixth Edition* (n 37) 344 [10.10]; see also Rick Cullen, 'The Duty of Confidentiality', (2018) 45(1) *Brief* 17, 17.

160 Baron and Corbin (n 52)103 [2.1.2]. A full discussion of confidentiality in comparison with legal professional privilege is beyond the scope of this thesis.

161 Dal Pont, *Lawyers' Professional Responsibility Sixth Edition* (n 37) 344 [1.10].

162 The unpredictable nature of legal negotiations is often used to justify lack of preparation or raised during comments on the importance of preparation: 1306PNPR (Response to Pre-Negotiation Questionnaire, 2013); 1312PNSF (Response to Pre-Negotiation Questionnaire, 2013); 1422PNSF (Response to Pre-Negotiation Questionnaire, 2014); 1439PNPR (Response to Pre-Negotiation Questionnaire, 2014). See also Nadja Alexander and Jill Howieson, Negotiation Strategy, Style, Skills (LexisNexis Butterworths, 2nd ed, 2010) 105-6.

163 Dal Pont, *Lawyers' Professional Responsibility Sixth Edition* (n 37) 353 [10.95] fn 55: Though Dal Pont cautions lawyers that disclosing such information, in the public domain or not, may be considered by clients to be a breach of trust.

164 Ibid.

165 Ibid; there may also be a chance that confidential information is then disclosed.

law students. This is another valid reason for the development of a Code of Ethics for legal dispute resolution.

3 *Duty to Fellow Legal Practitioners*

In addition to their duties to the court and the administration of justice, and to their client, legal practitioners have an ethical obligation to other practitioners. In the context of the Legal Negotiation Competition, such a duty would be owed to the law student's negotiation partner, and the two opposing student lawyers. The understanding of the duty to fellow practitioners is particularly problematic in the legal negotiation environment. Given that many of the relevant ethical rules relate to disclosure or misrepresentation of relevant facts and law, this duty gives rise to challenging considerations in terms of legal negotiations. This is explicitly scrutinised in relation to deception and disclosure in Part III below, where I advance the argument that a strict application of the Conduct Rules to the legal negotiation environment would create conflict between the legal practitioners' duty to their client and to their fellow practitioners.[166]

Identifying opposing counsel can assist a legal practitioner in determining their strategy, as part of preparation.[167] In my study, 63% of respondents knew who their opposing counsel would be,[168] and 21% tailored their strategy accordingly. This was most commonly done by predicting the other side's personality and negotiation approach, which can be useful for creating a professional relationship built on trust.[169] However, some respondents demonstrated a less ethical approach, identifying that their opposing counsel were first year law students, and aiming to 'exploit [their] nerves.'[170] This sits at the intersection of legal and

166 For further discussion of the relationships between parties, see above Chapter Four.

167 Raymond Saner, *The Expert Negotiator* (Kulwer Law International, 2000) 153

168 It is unclear, however, whether the LSAs kept this information from competitors, or whether competitors interpreted the question differently, and had been informed about their opposing counsel but did not know them.

169 Andrea Kupfer Schneider, 'Teaching a New Negotiation Skills Paradigm' (2012) 39 *Washington University Journal of Law and Policy* 13 ('Teaching a New Negotiation Skills Paradigm').

170 1213PNPR (Response to Pre-Negotiation Questionnaire, 2013). In examining whether negotiation tactics are ethical or not, Parke comments on McCarthy's list of negotiation tactics in Paul McCarthy, *Developing Negotiating Skills and Behaviour* (CCH Australia, Sydney, 1989) Ch 6. McCarthy comments '[a]ge and experience (wet behind the ears) – To undermine your opponents, commenting on their age and experience may be appropriate', which Parke says, along with the other listed tactics, are legal but unethical, and that this one in particular is '*never*' appropriate: Parke (n 1) 221-2.

competition ethics.[171] While it cannot be said that senior practitioners have never exploited a junior's nerves, such behaviour contravenes the ethical obligation to fellow practitioners.[172] In terms of a competition, however, this strategy is situated within the bounds of competition 'fun'.[173] This is not addressed in the competition rules or guidelines, but relates instead to law students' morals. In legal practice, such behaviour would similarly reflect morals and ethics, while also having pragmatic impacts on reputation,[174] and could – depending on the circumstances – result in disciplinary action.

While the Conduct Rules and ethical obligations form the foundation of legal ethics, it is important to note that Australian law students are trained in a primarily adversarial way, with an immediate focus on litigation.[175] Law students typically commence their law degree with an understanding of community expectations,[176] which they have already used to develop their personal sense of morals and ethics. However, the notion that they are training to be a legal practitioner and the weight that comes with this role greatly shapes a law student's sense of legal ethics,[177] which are further constrained by the adversarial, litigation-focus, and competitive influence that is commonly experienced at law school. These circumstances will influence a law student's approach to legal negotiation, decision making, and responses to ethical dilemmas. Given the inherent difficulties in applying the Conduct Rules and ethical obligations to legal negotiation, it is consequently important to identify other influences that will impact a legal practitioner's ethicality, and to consider the intersection between these influences, particularly as they relate to legal negotiation.

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171 See above Chapter Two.

172 Indeed, in providing advice to legal practitioners who are unsure whether their negotiation behaviour is ethically questionable, Lax and Sebenius question the concept of reciprocity, asking legal practitioners to consider how they would feel if the tactic was used against them, or against a younger colleague: David A Lax and James K Sebenius, 'Three Ethical Issues in Negotiation' (1986) 2(4) *Negotiation Journal* 363, 365-6 ('Three Ethical Issues in Negotiation').

173 For my more detailed analysis of competition ethics, see above Chapter Two.

174 Wade, 'EANTS' (n 43).

175 Meg Wootten, 'How Do Law Students Understand the Lawyer's Role? A Critical Discourse Analysis of a First-Year Law Textbook' (Conference Paper, Wellness for Law Conference, 16 February 2017).

176 Parke (n 1) 227.

177 Ibid 227

C Influences on Legal Practitioner Decision Making During Legal Negotiations

It would be remiss to think that legal practitioners' behaviour operates in a vacuum, outside of context, personal decision making and consideration of all relevant information and knowledge of the parties involved.[178] Human behaviour is guided by an internal compass that relates to morality – this also extends to legal ethical decision making. The Conduct Rules are merely a starting point to guide ethical behaviour,[179] and legal practitioners 'must use their analytical skills to resolve [any] problem[s].'[180] These 'analytical skills' must be used to identify potential ethical dilemmas and determine how such dilemmas could impact the legal negotiation, and, for more significant ethical concerns, the legal practitioners' careers. As such, legal practitioners need to be cognisant of how to identify potential ethical issues that may arise during legal negotiation, and they consequently require knowledge of various ethical philosophies and theories, specifically as these apply to legal negotiation. Three such approaches have been applied in the legal negotiation literature:[181] the ethical philosophies of decision making; the schools of bargaining ethics; and the theories of negotiation. Given the practical nature of the LCA Requirements it is unlikely that an Australian law student will be exposed to the first two of these approaches during their legal negotiation studies. Ideally, a law student would be introduced to each of these approaches early on during their law studies to help them orient, develop, and refine their moral compass in the legal sphere.[182]

1 *Ethical Philosophies*

Legal negotiation scholars hold out several philosophies associated with ethical reasoning,[183] although these are seldom included in *legal* ethics literature.[184] These ethical philosophies include end-result ethics, duty or rule ethics, social contract ethics, and personalistic ethics,[185] each applying differently to legal negotiation, as evaluated below. Although at least one of

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178 Burke (n 41) 8.

179 Jonathan R Cohen, 'A Taxonomy of Dispute Resolution Ethics' in Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (Jossey-Bass, 2005) 244, 245 ('A Taxonomy of Dispute Resolution Ethics').

180 Burke (n 41) 8.

181 In narrowing the scope of my research, I have confined my analysis to those theories that have been applied specifically to legal negotiation. For a discussion on additional theories as they apply in law more broadly, see Ross (n 37) chapter 2.

182 This could be done concurrently with a general introduction to ethical considerations proposed by McComish (n 99) 14.

183 See Lakhani, 'The Truth About Lying Part 1' (n 9) 106.

184 See exceptions: Wade, 'EANTS' (n 43); Lakhani, 'The Truth About Lying Part 1' (n 9).

185 Lakhani, 'The Truth About Lying Part 1' (n 9) 106.

these philosophies will guide a legal practitioner's decision making, not all are easily applied to legal practitioner decision making during legal negotiations. Rather, a fifth category – pragmatism, prudence and practicality – is more suited to legal practitioner characteristics.[186]

In theory, duty ethics is most suited to legal practitioners, because conduct is governed by upholding rules, principles, or laws.[187] This is the core of legal training. The heavy reliance on legal principles, however, poses challenges for applying duty ethics to legal negotiation. A legal practitioner partial to this philosophy would likely engage in detailed legal negotiation preparation, developing a sound understanding of the relevant law and regulatory frameworks. They would likely then use these to aid option generation and assessment of solutions. Such reliance on legal principles, however, is not always beneficial in developing creative options as part of legal negotiation. In addition, a legal practitioner following duty ethics is likely to strictly adhere to the Conduct Rules and ethical obligations. They would, consequently, feel obliged to disclose any laws that go directly against their case, and maintain complete honesty with opposing counsel, as they would in litigation. This could interfere with the overarching purposes of legal negotiation, and could potentially conflict with the legal practitioner's duty to their client, particularly if the client has instructed that certain issues not be broached during the legal negotiation. This reinforces the ambiguity in having one set of Conduct Rules for both litigation and dispute resolution.

In contrast to duty ethics, end-result ethics focuses on consequences, rather than the behaviour itself.[188] The legal practitioner would examine the consequences arising from their behaviour during the legal negotiation, and whether these consequences produce an ethical outcome. As such, the legal practitioner is unlikely to question whether deceptive tactics are ethical but would instead determine whether the outcome that such tactics produced aligns with their ethical position. As such, a legal practitioner following this approach could potentially justify the use of an unethical or ethically ambiguous strategy to achieve the client's ideal outcome at the conclusion of the matter.

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186 Wade, 'EANTS' (n 43).

187 Lakhani, 'The Truth About Lying Part 1' (n 9) 106; Wade, 'EANTS' (n 43) 11-12, drawing on Immanuel Kant's work.

188 Lakhani, 'The Truth About Lying Part 1' (n 9) 106; Wade, 'EANTS' (n 43) 11-12 drawing on work by Jeremy Bentham and John Stuart Mill.

Social construct ethics is based on the theory that conduct is dictated by 'the customs and norms of a community.'[189] This definition does not distinctly require conformance with law or legal principles, although constraining one's actions to follow legal principles would indicate that they abide by the requisite 'customs and norms.' Society is likely to view legal negotiation as a process through which parties reach resolutions without the formality and expense of litigation. Societal perceptions of legal negotiation, however, make this analysis problematic. First, society would likely identify *negotiation* as something that they do every day, and a process during which they might experience mistruths or deceptive behaviour. Secondly, they would need to consider whether simply changing the negotiators to legal practitioners, and the content to a legal subject with legal consequences, would alter societal views about the acceptance of unethical conduct during legal negotiation. While a deeper analysis of social construct ethics is beyond the scope of this thesis, ultimately the way in which a legal practitioner perceives this societal view will influence their approach to ethical decision making during a legal negotiation.

A fourth school of ethics, personalistic ethics, is guided by each person's moral conscience.[190] Legal practitioners' ethical thought processes are heavily influenced by their strict training to follow legal rules, meaning that they might tend towards other categories of ethics. As such, they 'often find it difficult to incorporate individual values into their professional practice,'[191] which can cause cognitive dissonance between personal ethics and perceptions of legal ethics. This, in turn, can cause conflict between ethical decision making, ethical obligations, and Conduct Rules during a legal negotiation. Law students, who are developing their personal ethics in parallel with their understanding of legal ethics, are more likely to have their personal ethics clouded by legal rules.

While some of these ethical philosophies, particularly duty ethics, are easily applied to litigation, none fully encapsulate legal practitioner ethical decision making during legal negotiations. Wade's fifth approach, however, is designed to focus on legal practitioner

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189 Lakhani, 'The Truth About Lying Part 1' (n 9) 106; Wade, 'EANTS' (n 43) 11-12 drawing on work by Jean-Jacques Rousseau (normalistic ethics).

190 Lakhani, 'The Truth About Lying Part 1' (n 9) 106; Wade, 'EANTS' (n 43) drawing on work by Martin Buber

191 Jenaway (n 12) 50 citing Ross (n 37) 25.

behaviour. It centralises protecting perceived self-interest, as well as aspects related to reputation,[192] while still supporting personal conscience.[193] Both reputation – based on 'peer evaluation'[194] – and public perception are imperative to legal practitioners. Consequently, self-interest takes a significant role in legal practitioner compliance with ethical obligations, particularly in reducing the likelihood of breaches or adverse consequences. In creating this fifth approach, Wade drew the *legal* aspects from each philosophy, allowing legal practitioners to prioritise the application of legal rules, but not to their own – or their client's – detriment, as could happen with duty ethics. Here, legal practitioners prudently consider societal perceptions about the role of legal practitioners during legal negotiations, and practically and pragmatically balance each party's long-term and short-term goals, within relevant legal processes and regulatory frameworks. This is the most realistic philosophy of ethical decision making for legal negotiations and accords with the ethical obligations and Conduct Rules above – though these may still come into conflict.

2 *Schools of Bargaining Ethics*

Like ethical philosophies, schools of bargaining ethics can influence legal practitioner behaviour during a legal negotiation. These schools are particularly prevalent in America, and various American literature contains explicit advice about applying these schools.[195] While such literature is less prevalent in Australia, three key schools of bargaining ethics are considered in relation to negotiation: the poker school,[196] the idealist school,[197] and the pragmatist school.[198] In this section I analyse each school, determining the challenges

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192 Wade notes that authors such as Lewicki do not acknowledge his suggested fifth school because a strong focus on self-interest does not accord with ethics: Wade, 'EANTS' (n 43) 9-10.

193 Ibid 7

194 Parke (n 1) 220.

195 In the United States, much of legal practice is guided by Desk Reference Books, or Handbooks, which practitioners keep to hand. These contain guidance from experienced practitioners or legal academics, often including anecdotes or scenarios from which practitioners can glean certain wisdoms to help shape their own practice, and posit various ethical dilemmas from the perspective of each bargaining school. See, eg, Schneider and Honeyman, *Negotiation Essentials for Lawyers* (n 3); Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (Jossey Bass, 2005).

196 The Poker School was originally founded by Albert Carr, see discussion in: Shell, 'Bargaining with the Devil' (n 33) 64. See also Albert Z Carr, 'Is Business Bluffing Ethical' in Menkel-Meadow and Wheeler (n 13) 247; Lakhani, 'The Truth About Lying Part 1' (n 9) 106.

197 Summarised by Shell, 'Bargaining with the Devil' (n 33) 67. See also Lakhani, 'The Truth About Lying Part 1' (n 9) 106.

198 Shell, 'Bargaining with the Devil' (n 33) 68. See also Lakhani, 'The Truth About Lying Part 1' (n 9) 106

inherent in applying it to legal negotiation, and conclude that the Pragmatist School provides the most relevant guidance for legal practitioner decision making during legal negotiations.

The Poker School views 'negotiation as a game with certain rules, defined by the law. Conduct within *the rules* is ethical. Conduct outside *the rules* is unethical,'[199] though there are no clear indications of whether, or how, unethical conduct is penalised. Based on this definition the Poker School can, *prima facie*, be easily applied to legal negotiation. There are, however, several challenges with this application, the first of which lies in defining *the rules* in the above quote. The Poker School is based on the presumption that all legal practitioners are working to the same rules of legal negotiation, which is impossible given the confusion and discrepancies in the legal negotiation environment.[200] The relevant *rules* include the rules of legal negotiation, the law, and the Conduct Rules. The challenge here lies in the lack of clarity as to their intersection. As such, it is difficult to identify how a legal practitioner following duty ethics would proceed, particularly if the relevant sets of rules conflict. In this way, end-result ethics is seemingly more applicable, although it is again difficult to determine the consequences that might apply to unethical behaviour, since the Poker School relies on ethically ambiguous behaviours.[201] In Australia, such thinking appears to be in direct contrast to the 'honest and courteous…dealings' required by the Conduct Rules.[202] The answer to all of these challenges seems to be the implementation of a Code of Ethics for the legal negotiation environment. Again, the lack of a Code of Ethics invites questions about the view that regulatory authorities take on legal negotiation ethics – whether the absence of direct commentary supports ethically ambiguous conduct during legal negotiation, and how this can be enforced. Proponents of the Poker School of legal negotiation ethics in Australia need to ensure they are informed about the range of consequences relevant to ethically ambiguous behaviour, although there is again quite minimal advice about this, and it appears that only serious conduct will breach relevant Legal Practitioner Legislation.[203]

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199 Shell, 'Bargaining with the Devil' (n 29) 64 (emphasis added). See also Carr (n 196); Lakhani, 'The Truth About Lying Part 1' (n 9) 106; Russell Korbokin, 'Behavioural Ethics, Deception, and Legal Negotiation' (2020) 20(3) *Nevada Law Journal* 1209, 1236 ('Behavioural Ethics, Deception, and Legal Negotiation').

200 Shell, 'Bargaining with the Devil' (n 33) 66.

201 Carr (n 196) 248.

202 Law Council of Australia, *Conduct Rules* (n 61) r 4.1.2.

203 See below Part II(D).

In contrast to the focus on the rules of the *game* of legal negotiation, the Idealist School places its focus on societal views of ethical behaviour. In this way, it most succinctly accords with social contract ethics. This School accepts bargaining as part of daily life, concluding that ethics should apply uniformly to all parts of life.[204] This presents challenges when applied to legal negotiation ethics, as the ethics that guide a negotiation amongst friends or family are different to those governing legal practitioner negotiations. Further, societal views can be influenced by various factors, including culture, religion, social and economic conditions, and morals. This aligns somewhat with duty ethics, causing the legal negotiator to feel morally bound to do the *right thing* for everyone involved, even if this means losing 'strategic advantage'.[205] A proponent of the Idealist School must therefore have a clear understanding of societal perspectives of legal practitioners' ethical behaviour during legal negotiations. A member of the public is entitled to expect a 'standard of competence and diligence' from a legal practitioner, and, consequently, this should include ethics.[206] Regardless, the concerns relating to enforcement discussed above still apply, and reinforce the challenge of applying the Idealist School to legal negotiation ethics.

The Pragmatist School is the most relevant to legal negotiation and aligns with Wade's fifth ethical philosophy: *pragmatism, prudence and practicality*. Under the Pragmatist School, while unethical tactics such as deceptive conduct are acknowledged and sometimes used,[207] alternatives are preferable given the negative effects of such behaviour on relationships and reputation.[208] Legal practitioners who subscribe to the Pragmatist School are likely to

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204 Summarised by Schell, 'Bargaining with the Devil' (n 33) as 'do the right thing even if it hurts' – this school considers 'bargaining [as] an aspect of social life, not a special activity with its own unique set of rules. Ethics that apply at home should carry into the realm of negotiation': 67. See also Lakhani, 'The Truth About Lying Part 1' (n 9) 106.

205 Schell, 'Bargaining with the Devil' (n 33) 67.

206 As required by the Legal Practitioner Legislation: *Legal Profession Act 2006* (ACT) s 386; *Legal Profession Uniform Law 2014* (NSW) s 296; *Legal Profession Act 2006* (NT) s 464; *Legal Profession Act 2007* (QLD) s 418; *Legal Practitioners Act 1981* (SA) s 68; *Legal Profession Act 2007* (Tas) s 420; *Legal Profession Uniform Law Application Act 2014* (Vic) s 296; *Legal Profession (Admission) Rules 2009* (WA) s 402. While some jurisdictions have slightly differing wording, the essence of the definition remains the same. See also Boulle and Field (n 7).

207 Schell, 'Bargaining with the Devil' (n 33) 68.

208 This school recognises deception as a 'necessary part of negotiation process, but prefers not to rely on misleading statements and overt lies if there is a serviceable, practical alternative. Concern for the potential negative effects of deceptive conduct on present and future relationships. Thus, lying and other questionable tacts are bad not so much because they are "wrong" as because they cost the user more in

respond to probing questions with comments such as 'I don't know' if '[their] actual state of knowledge is hard to trace and the lie poses little risk to [their] relationships'.[209] Consequently, a proponent of the Pragmatist School is most likely to consider the wider implications of their conduct during a legal negotiation and how this might impact the way in which they are perceived by colleagues, and any broader impacts on their future legal career. Given the lack of a Code of Ethics and the challenges associated with unclear consequences for ethically ambiguous behaviour, this is the most realistic approach to decision making during a legal negotiation. As such, this approach encapsulates some of the nuances most relevant to the legal negotiation environment, as does Wade's fifth ethical philosophy.

While literature and teachings about the schools of bargaining ethics are more prevalent in America, their inclusion in Australian legal negotiation literature is indicative of their relevance to legal negotiation. That said, my analysis highlights the challenges of following such schools in the absence of a Code of Ethics. This stands in stark contrast to America, where specific rules and commentary govern the making of false statements,[210] which often form the basis of ethical dilemmas. The American literature particularly notes that, in the context of legal negotiation, certain issues are not considered to constitute material facts, such as '[e]stimates of price or value placed on the subject of a transaction,' including 'a party's intentions as to an acceptable settlement of a claim'.[211] The Australian position on this topic is further evaluated in Part III below, however, it is clear that Australia, too, would benefit from precise guidance.[212]

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the long run than they gain in the short run', such as impacting their credibility: Schell, 'Bargaining with the Devil' (n 33) 67-8. See also Lakhani, 'The Truth About Lying Part 1' (n 9) 106; Wade, 'EANTS' (n 43).

209 Schell, 'Bargaining with the Devil' (n 33) 69.

210 American Bar Association, *Model Rules of Professional Conduct* (2020) Model Rule 4.1.

211 Although there are still questions as to what, exactly, constitutes a material fact beyond these examples; when a false statement of material fact or law arises; and how this applies to the legal negotiation environment: Lakhani raises these questions with reference to Wetlaufer's commentary: Lakhani, 'The Truth About Lying Part 1' (n 9) 108 citing Gerald Wetalufer, 'The Ethics of Lying in Negotiations' (1990) 75 *Iowa Law Review* 1219, 267-269 [sic]. See also Avnita Lakhani, 'The Truth About Lying as a Negotiation Tactic: Where Business, Ethics, and Law Collide…Or Do They? Part 2' (2007) 9(7) *ADR Bulletin* 133; Schell, 'Bargaining with the Devil' (n 29) 68.

212 See generally Lakhani, 'The Truth About Lying Part 1' (n 9); Lakhani, 'The Truth About Lying Part 2' (n 211).

3 *Theories of Negotiation*

The ethical philosophies and schools of bargaining ethics provide useful insight into an individual legal practitioner's ability to make ethical decisions or to handle ethical dilemmas. While schools of bargaining ethics are more prevalent in American literature, theories of negotiation feature heavily in Australian legal negotiation literature.[213] Resultingly, Australian law students are much more likely to be exposed to these theories. Negotiation theories are founded in either competition or cooperation, and can heavily influence a legal practitioner's legal negotiation preparation; strategy and tactics; and identification of, and response to, any ethical issues.[214] It is beneficial for law students, particularly, to understand how legal negotiation ethics can be associated with different legal negotiation theories, so to develop their own approach to legal negotiation. Competitive theories tend to be stereotyped as negative, and more likely to involve unethical behaviour,[215] whereas cooperative theories are considered to be more positive, problem-solving, and better serve the client.[216]

Competitive theories of legal negotiation, primarily adversarial or distributive approaches, attract particularly negative stereotypes relating to ethics – including 'distortion, manipulation, bullying, and dramatics[217] – although not all behaviours typical of competitive negotiators are unethical. Competitive legal negotiators are thought to more frequently engage in deceptive or aggressive tactics, with the intent to achieve perceived better client outcomes.[218] This favours the Poker School of bargaining ethics, and end-result ethics. Distributive negotiators tend to engage in stubborn behaviours, and attempts to 'wait out' the other party.[219] This can result in positional bargaining and the 'negotiation dance' of 'adopt[ing] and relinquish[ing] a sequence of positions in an effort to achieve settlement,'[220]

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213 See above Chapter Two, particularly discussion about the terminology attributed in this area. 'Theories' is treated synonymously with 'negotiation styles' and 'approaches'. See, eg, John S Murray, Understanding Competing Theories of Negotiation (1986) 2(2) *Negotiation Journal* 179.

214 Schneider, 'Teaching a New Negotiation Skills Paradigm' (n 169) 21.

215 Folberg et al (n 152) 43.

216 Rankin 'Legal Ethics in the Negotiation Environment' (n 18) 93. Such comments have also been extended to the gender divide. See generally Morial Shah, 'Negotiation: Women's Voices' (2020) 20(1) *Pepperdine Dispute Resolution Law Journal* 167, 173.

217 Folberg et al (n 152) 43.

218 Competitive behaviour, however, is no less effective than cooperative negotiation: Charles B Craver, 'The Impact of Negotiator Styles on Bargaining Interactions' (2011) 35(1) *American Journal of Trial Advocacy* 1, 4-8 ('The Impact of Negotiator Styles on Bargaining Interactions').

219 Spencer, Barry and Akin Ojelabi (n 122) 94.

220 Anstey (n 122) 126 in Spencer, Barry and Akin Ojelabi (n 122) 94-5 [3.60].

or threatened walk outs. These actions are not unethical as such, although the legal practitioner's conduct – or failure to follow through on threats – could impact their credibility.[221] Consequently, a legal practitioner subscribing to Wade's pragmatic approach to ethics is unlikely to adopt these measures. Stereotypically, adversarial negotiators are more likely to use behaviours such as 'strategic exhortations',[222] including bullying or hiding information.[223] These are unethical, and breach the legal practitioner's ethical obligations to the administration of justice and to fellow legal practitioners, as well as the Conduct Rules. Menkel-Meadow, writing from the American perspective, posits that such tactics stem from those used in litigation, noting that trial lawyers may withhold information due to 'the presumed loss of advantage at trial.'[224] It is interesting to evaluate this comment in the Australian context, through the lens of Conduct Rules created for a litigation environment but transposed to legal negotiation. Using a strict interpretation of the Conduct Rules, withholding information, regardless of the need to avoid 'the presumed loss of advantage at trial', could breach the Conduct Rules in the context of litigation, general dispute resolution, and legal negotiation. This both highlights pertinent differences between jurisdictions,[225] and reiterates the utility of a Code of Ethics.

Despite the commonly touted stereotypes that are more frequently connected to competitive negotiation, most negotiation behaviours are not associated with a particular theory, and instead lie on a continuum between competitive and cooperative behaviour.[226] For example, engaging in early information exchanges and assessment of the other negotiator's approach does not reflect a particular negotiation theory.[227] The step that follows, however, is more indicative of the chosen approach. For example, a decision to disclose further information on the basis that both lawyers are acting in good faith is more characteristic of cooperative

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221 Anstey (n 122) 154 in Spencer, Barry and Akin Ojelabi (n 122) 85-6 [3.50]. See also Nadja Alexander, Jill Howieson and Kenneth Fox, *Negotiation Strategy, Style, Skills* (LexisNexis 3rd ed, 2015) 213-222.

222 Carrie Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1983-1984) 31(4) *University of California Los Angeles Law Review* 754 (n 217) 788 ('Toward Another View of Legal Negotiation').

223 Ibid 778-82.

224 Ibid 782.

225 Cf American Bar Association (n 210) Rule 4.

226 Antsey (n 122) 127 in Spencer, Barry and Akin Ojelabi (n 122) 95 [3.60]. See above Chapter Two.

227 Nadja M Spegel, Bernadette Rogers and Ross P Buckley, *Negotiation Theory and Techniques* (Butterworths, 1998) 34

negotiation,[228] as is placing emphasis on developing a relationship of trust.[229] Law students, however, are unlikely to recognise that their negotiation behaviour lies on a continuum, and will instead attempt to follow a single approach to legal negotiation. This reflects the need for law students to be introduced to ethical decision making, with key teachings drawn from the areas covered above. While thorough preparation is held out as one of the best strategies used by cooperative negotiators,[230] it is, in reality, reflective of all ethical philosophies and schools of bargaining ethics. Regardless of the ethical philosophy, school of bargaining ethics, or negotiation theory, without thorough preparation a legal practitioner will be unable to properly understand their instructions and the scope of their authority, or to identify potential ethical issues. These three pillars – preparation, authority, and ethics – lie at the core of legal negotiation. Law students must understand the interconnection of these pillars to develop competence in legal negotiation.

In this section I have introduced the Conduct Rules and ethical obligations that govern legal practitioner behaviour. While the Conduct Rules are held out as the starting point for ethical guidance, this in itself presents challenges. If the Conduct Rules are merely a starting point, they are subject to interpretation and case-by-case application, which consequently implies that a variety of contextualised applications are permissible. Yet, if legal practitioners are not careful, their interpretation and consequent application of the Conduct Rules could be actioned as a breach, resulting in civil action brought by their client, or disciplinary action.[231] In the legal negotiation environment, however, these interpretative nuances represent challenges in identifying potential ethical breaches that will attract consequences. In the next section, I highlight key challenges that apply to legal negotiation, and the resulting difficulties of enforcement.

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228 Ibid 34

229 Carrie Menkel-Meadow et al, *Dispute Resolution: Beyond the Adversarial Model* (Wolters Kluwer, 2nd ed, 2011) 98 ('*Beyond the Adversarial Model*').

230 Cooperative, particularly problem-solving, negotiators typically conduct more thorough preparation, with a more detailed focus on parties' 'underlying needs and objectives' to create a wider range of options, and to consider all parties' perspectives: Menkel-Meadow, 'Toward Another View of Legal Negotiation' (n 222) 794. This involves detailed exploration of parties' motivations, including economic, legal, social psychological, ethical and moral: at 794, 803.

231 It appears, however, that breaches that occur in the legal negotiation environment are less likely to be enforced as misconduct, or, at least, are less likely to proceed to hearing. The reasons for this are explored in greater depth in Part III below.

D Breaches and Enforcement of Ethical Issues Arising in the Legal Negotiation Environment

There are significant challenges that arise when applying legal ethics to legal negotiation, particularly including the identification of ethical breaches and their consequent enforcement. In this section I examine Australian Legal Practitioner Legislation that outlines legal practitioner misconduct and the associated sanctions, to determine whether unethical legal practitioner behaviour during a legal negotiation could breach these provisions. I then evaluate the qualifications and competence a legal practitioner requires to be able to identify potentially ethically ambiguous behaviours prior to a legal negotiation. My analysis stems from the perspective that the current Conduct Rules contain certain deficiencies when applied to legal negotiation, and that a legal practitioner's decisions during a legal negotiation are made against the background of their instructions, their knowledge/understanding of the Conduct Rules and ethical obligations and other legislation, as well as their own ethical influences. It is the intersection of each of these components that can cause challenges for a legal practitioner who is trying to make the *right* decision for their client, and for their own credibility as a legal practitioner. I conclude this section by positing that, despite the strict, litigation-focussed Conduct Rules, it is unlikely that ethically ambiguous legal negotiation behaviours will constitute unsatisfactory professional conduct or professional misconduct as required to breach Legal Practitioner Legislation. This, seemingly, is why such behaviours are commonly used during legal negotiation in legal practice, and why they are apparent in the relevant literature. While strict proponents of duty ethics might not endorse the use of such ethically ambiguous behaviours, those who follow more pragmatic, profession-based ethics and bargaining schools will likely recognise that, given the legal negotiation environment operates without a specific Code of Ethics, it is crucial for legal practitioners (and therefore law students) to be prepared to understand, identify, and respond to the most common ethically ambiguous behaviours used during legal negotiations.

1 *Legal Practitioner Legislation*

To be sanctioned, legal practitioner conduct must breach the Legal Practitioner Legislation or any associated regulations or rules. This includes the Conduct Rules, and therein lies the challenge raised above – if the application of the Conduct Rules to the legal negotiation environment is unclear, how can breaches be identified and sanctioned? Further, what about instances of conflict, such as when a legal practitioner must maintain client confidentiality, but therefore cannot disclose information to opposing counsel, consequently breaching ethical obligations to fellow practitioners? If such behaviour contravenes the above documents, this must be made apparent to legal practitioners.

A legal practitioner breaches Legal Practitioner Legislation by engaging in 'unsatisfactory professional conduct' or 'professional misconduct'.

> [U]nsatisfactory professional conduct includes conduct of a legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.[232]

Legal practitioners are held to strict standards of competence as part of their process of admission to legal practice.[233] Throughout this thesis I have advanced the argument that the LCA Requirements that set out legal negotiation education are insufficient and ambiguous, specifically as they relate to legal negotiation preparation and legal negotiation ethics. This is particularly relevant here, as the lack of precise competencies leaves unclear the concept of whether inadequate legal negotiation preparation, or legal negotiation ethics, would constitute 'unsatisfactory professional conduct.' Arguably, if a law student has been admitted on the basis that they have achieved the competencies outlined in the LCA Requirements and has maintained this level, they would not fall short of the 'standard of competence and diligence' required.

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232 *Legal Profession Act 2006* (ACT) s 386; *Legal Profession Uniform Law 2014* (NSW) s 296; *Legal Profession Act 2006* (NT) s 464; *Legal Profession Act 2007* (QLD) s 418; *Legal Practitioners Act 1981* (SA) s 68; *Legal Profession Act 2007* (Tas) s 420; *Legal Profession Uniform Law Application Act 2014* (Vic) s 296; *Legal Profession (Admission) Rules 2009* (WA) s 402. While some jurisdictions have slightly differing wording, the essence of the definition remains the same.

233 Law Admissions Consultative Committee, *PLT Standards* (n 5).

'Professional misconduct' is a higher standard than 'unsatisfactory professional conduct'.

> [P]rofessional misconduct includes—
>
> (a) unsatisfactory professional conduct of a legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
>
> (b) conduct of a legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to practise the profession of the law.[234]

The requirement to be a 'fit and proper person' mirrors the standard used for admission to legal practice,[235] and emphasises the importance of this standard throughout a legal practitioner's career. As such, it is imperative that legal practitioners understand whether, and how, legal negotiation ethics might breach this component of Legal Practitioner Legislation. Although the current ambiguity and lack of a Code of Ethics make it easier to argue against a breach, a Code of Ethics would make breaches easier to identify and sanction.

Each jurisdiction has a person or organisation that can investigate unsatisfactory professional conduct or misconduct or professional misconduct.[236] This person or organisation can take various action,[237] including bringing an action before the relevant Tribunal.[238] Some of these

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234 *Legal Profession Act 2006 (*ACT) s 387(1); *Legal Profession Uniform Law 2014* (NSW) s 297(1); *Legal Profession Act 2006* (NT) s 465(1); *Legal Profession Act 2007* (QLD) s 419(1); *Legal Practitioners Act 1981* (SA) s 69; *Legal Profession Act 2007* (Tas) s 421(1); *Legal Profession Uniform Law Application Act 2014* (Vic) s 297; *Legal Profession (Admission) Rules 2009* (WA) s 403. While some jurisdictions have slightly different wording, the essence of the definition remains the same.

235 *Legal Profession Act 2006* (ACT) s 26; *Legal Profession Uniform Law 2014* (NSW) s 15; *Legal Profession Act 2006* (NT) s 30; *Legal Profession Act 2007* (QLD) s 30; *Legal Practitioners Act 1981* (SA) s 15; *Legal Profession Act 2007* (Tas) s 26; *Legal Profession Uniform Law Application Act 2014* (Vic) s 15; *Legal Profession (Admission) Rules 2009* (WA) s 22.

236 This ranges from the Legal Profession Conduct Commissioner, Complaint Committee, Law Society, Council, Legal Profession Board, or local regulatory authority: *Legal Profession Act 2006* (ACT) part 4.4; *Legal Profession Uniform Law 2014* (NSW) s 299; *Legal Profession Act 2006* (NT) s 488; *Legal Profession Act 2007* (QLD) 435-6, 439; *Legal Practitioners Act 1981* (SA) part 6; *Legal Profession Act 2007* (Tas) s 440; *Legal Profession Uniform Law Application Act 2014* (Vic) s 299; *Legal Profession (Admission) Rules 2009* (WA) s 421.

237 *Legal Profession Act 2006* (ACT) pt 4.5; *Legal Profession Uniform Law 2014* (NSW) s 299; *Legal Profession Act 2006* (NT) s 496-500; *Legal Profession Act 2007* (QLD) part 4.7; *Legal Practitioners Act 1981* (SA) pt 6 sub-div 3; *Legal Profession Act 2007* (Tas) s 445-6; *Legal Profession Uniform Law Application Act 2014* (Vic) s 299; *Legal Profession (Admission) Rules 2009* (WA) s 424.

238 *Legal Profession Act 2006* (ACT) s 410(1)(c); *Legal Profession Uniform Law 2014* (NSW) s 300; L*egal Profession Act 2006* (NT) s 496; *Legal Profession Act 2007* (QLD) part 4.9; *Legal Practitioners Act 1981* (SA) s 77L; *Legal Profession Act 2007* (Tas) s 445(a); *Legal Profession Uniform Law Application Act 2014* (Vic) s 300; *Legal Profession (Admission) Rules 2009* (WA) s 424(1)(c), 428.

actions have severe consequences for legal practitioners, and therefore the current lack of guidance about the application of legal ethics to legal negotiation is indefensible.

The most significant challenge legal practitioners face with regard to legal negotiation ethics is knowing which behaviours could be considered unethical. Some unethical behaviours, such as a legal practitioner bringing themselves or the profession into disrepute,[239] or breaking the law,[240] indisputably breach the Conduct Rules. Other Conduct Rules, however, such as that to 'be honest and courteous in all deadlines in the course of legal practice',[241] are enforced much less stringently in the legal negotiation environment.[242] This may also conflict with the rule to 'not disclose any information that is confidential to a client.'[243] Without strictly prohibiting certain ethically ambiguous strategies during a legal negotiation, this enforcement of ethically ambiguous behaviour remains unclear. Seemingly, as long as the legal practitioner and profession are not brought into disrepute, all behaviour is potentially permissible, perhaps under the guise of following 'a client's lawful, proper and competent instructions.'[244] This can justify a multitude of behaviours.

While the Conduct Rules, ethical obligations, and Legal Practitioner Legislation set the framework that regulates legal practitioner behaviour, it is the ethical philosophies and schools of bargaining ethics that 'set the stage whenever a negotiation is in play'.[245] This is because every legal negotiator has their own 'bargaining ethics',[246] which have been shaped by the philosophies, schools, and negotiation theories. Since legal ethics topics in Australia are taught with specific reference to the Conduct Rules, and in a litigation environment, the teachings are unlikely to specifically consider the role of legal negotiation ethics, and typically do not consider bargaining ethics or philosophies of ethical decision making. These are concepts that law students need to learn during their law studies, when they can benefit from the experience of academics (predominantly during undergraduate studies) and legal

239 Law Council of Australia, *Conduct Rules* (n 61) r 5.1.
240 Ibid r 4.1.5.
241 Ibid r 4.1.2.
242 See below Part III for specific case study on this.
243 Law Council of Australia, *Conduct Rules* (n 61) r 9.1.
244 Ibid r 8.1. See also Spencer and Scott in relation to law student behaviour(n 20) 30.
245 Lakhani, 'The Truth About Lying Part 1' (n 9) 106.
246 Ibid.

practitioners (during Practical Legal Training), who can educate them about the key difficulties in this area, the ethical dilemmas they may experience, and how to respond to these.

2 *Ethically Ambiguous Legal Negotiation Behaviours*

Writing in 1993, Parke stated that

> [e]thical standards must necessarily reflect, insofar as possible, the values of the particular community at the relevant time, lest they become irrelevant. To accommodate this, ethics must necessarily have a degree of 'elasticity'; it is essential, however, that they are not rendered 'rubbery' in the process. Few lawyers probably pause to contemplate the ethical considerations of their actions. In most cases a perceived breach of ethics by the opposing lawyer will be much more easily recognised that the lawyer's own 'indiscretions.'[247]

In this section, I will critically analyse three components of Parke's statement, with emphasis on the 'elastic' but not 'rubbery' nature of legal ethics; legal practitioners' lack of engagement with legal ethics; and identification of breaches.

In line with the Conduct Rules and Legal Practitioner Legislation, it appears that without clear guidance about what is – and is not – unethical in the legal negotiation environment, legal practitioners are left to decide this for themselves. To do so, they will draw on their legal education and practical experience, as well as their own ethical philosophy and any legal negotiation and bargaining styles that they have developed. Initial identification of legal negotiation ethics is part of legal negotiation preparation. Indeed, the ability to understand, identify, and act on ethical breaches unquestioningly meets the LCA Requirement of 'good practice'. In addition, there are significant problems with applying the current Conduct Rules, obligations, and legislation to legal negotiation. As such, Parke's comment that there must be a 'degree of "elasticity"' stands firm – there is clearly elasticity if identification of breaches and associated penalties are so unclear. That said, the lack of case law relating to ethical breaches during legal negotiation could also indicate that legal ethics has moved beyond 'elasticity' towards 'rubbery'. These seem, to an extent, to be merely semantic differences. An experienced legal practitioner can distinguish between unethical or illegal acts and will often see 'neon lights' when negotiation behaviour (by client or lawyer) is 'potentially

247 Parke (n 1) 220.

"illegal"',[248] resultantly acting to 'avoid or minimise client or own liability.'[249] While this is typical behaviour for an *experienced* legal practitioner, it is much more challenging for law students who have limited experience and who require clear guidance as part of legal education. This renders legal ethics even more important, and a key foundation of legal negotiation *and* legal negotiation education.

Given the challenges in identifying potential ethical breaches, Wade argues that law students should instead learn about 'ethically ambiguous negotiation tactics' ('EANTs').[250] In light of the lack of a Code of Ethics specific to legal negotiation or other clear guidance, understanding EANTs is likely the best way to ensure that law students are prepared for the types of behaviour they may encounter during legal negotiation. Wade defines 16 EANTs that, in his experience, are frequently used in legal practice: 'false statements'; 'silence'; 'half-truths'; 'initial truth then silence'; 'puffery and vague platitudes'; 'bluffs and threats'; 'no hurry'; 'extreme offers'; 'spurious filed claims or cross claim's; 'add ons' (demands); 'good cop/bad cop routine'; 'flattery and ingratiation'; 'research and "infiltration"'; 'a lawyer talk[ing] directly to the counterpart client'; 'stonewalling and silence'; 'drown[ing] in paper, delay and administrative expense'.[251] These are supported by practitioner reports, which makes it seem that legal negotiation ethics, in legal practice at least, have accepted EANTs through acquiescence.[252] Wade's analysis determines that these EANTs are constrained by ethical philosophies and schools,[253] and he questions, accordingly, 'whether certain EANTS are so entrenched as part of the "game" of negotiation, that they are substantially immune from regulation'.[254]

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248 Wade, 'EANTS' (n 43) 6 (emphasis added).

249 Ibid.

250 Ibid 5.

251 Ibid 1-3

252 See, eg, Lauchland (n 1); Emerson (n 113); McComish (n 99); Michael Legg and Justine Rogers, 'Ensuring Ethical Practice: Beyond Policies and Procedures' (2015) 2 *Law Society of New South Wales Journal* 90, 90-1; Martin Cuerden, 'Pointing the Finger – Making Allegations of Wrongdoing by Another Practitioner to the Legal Profession Complaints Committee' (2019) 46(11) *Brief* 12; Martin (n 51); D'Ascenzo (n 44); Dal Pont, 'Professionalism in the 21st Century' (n 37).

253 Wade, 'EANTS' (n 43) 6 – without ethical schools there would be 'a greater epidemic of EANTs'. 'Almost all EANTs can be currently justified or rationalised as OK under all four schools of ethics, and also under a narrow interpretation of self interest of lawyers': at 15.

254 Ibid 4.

Although the acceptance of EANTs as part of legal negotiation ethics does not necessarily render legal negotiation ethics 'rubbery,'[255] it does mean that EANTs are less likely to be regarded as enforceable breaches of legal ethics. As such, even if an opposing legal practitioner or client recognises EANT behaviour as potentially unethical, it is unlikely to be reported.[256] This lack of reporting is strengthened by the private nature of legal negotiations, to the exclusion of third-party facilitators or decision makers who could otherwise report legal practitioner conduct. If, however, EANT behaviour *is* reported as unethical, it is highly unlikely to be sanctioned.[257] This, in itself, acts as a 'lack of deterrent to such conduct and, perhaps, goes so far as to facilitate it.'[258] While Parke's comments were made nearly three decades ago, little has been done to advance the area of legal negotiation ethics in Australia since then.

It is clear that there are various influences on a legal practitioner's ability to understand, identify, and handle ethical dilemmas during legal negotiation. Given the variance between these influences, it is unsurprising that law students find this area challenging and confusing, and that few cases regarding legal practitioner misconduct during legal negotiations have proceeded to hearing. This is particularly due to the challenges inherent in identifying and reporting misconduct, especially given the discrepancies between occurrences in legal practice compared with the Conduct Rules, obligations and legislation.[259] While there are strict sanctions to regulate legal practitioner behaviour that is considered to be 'unsatisfactory professional conduct' or 'professional misconduct' under Legal Practitioner Legislation, these thresholds require a considerably high level of misconduct, one that frequently used EANTs are unlikely to meet. What has become clear throughout this chapter, however, is that

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255 Parke (n 1) 220.

256 While opposing counsel is more likely to report the breach than the legal practitioner themselves, 'it is no light matter' to raise a complaint against a legal practitioner': *Fleming* (n 3) [78]. Opposing counsel must have clear evidence under Rule 32.1, which can be difficult to ascertain due to the private nature of legal negotiation proceedings. Legal practitioners do have a 'professional obligation to report a practitioner where the lawyer knows (or has a firm belief based on sufficient evidence) that the practitioner has committed at least a serious breach of professional standards – in the sense of conduct which goes to another practitioner's honesty or fitness to practice', however it is unlikely that an EANT, otherwise accepted as a daily part of legal negotiation, would be sufficient to satisfy this requirement: Cuerden (n 252) 13.

257 See, eg, Lakhani, 'Deception Legal Negotiation Thesis' (n 32).

258 Parke (n 1) 223.

259 Indeed, Parke notes that it 'would be foolhardy to adopt the approach that because little is heard of unethical conduct in ADR, it is any less problematic than congestion of the courts or other legal dilemmas': Parke (n 1) 218.

'varying perceptions of what standards of truthfulness *should* guide lawyers' conduct in representing a client in negotiation offer little by way of identifying the standards that *do currently* guide them',[260] again highlighting the benefit of a specific Code of Ethics. While this is a genuine problem that warrants attention from regulatory bodies, law students still need to understand and abide by legal negotiation ethics in the interim. As such, law students must be taught about the intersection and conflict between the different factors influencing legal negotiation ethics and decision making. In alignment with Wade's suggestion, law students need to learn to expect EANTs during legal negotiation.[261] It follows, therefore, that in preparing for a legal negotiation, law students must determine which EANTs may arise and how to respond to appropriately. This accords with 'good practice', and therefore necessitates consideration as part of the requisite minimum competencies of legal negotiation preparation. In the section below I use deception as a case study to exemplify the challenges highlighted above, particularly examining the concept of deception through the lens of the legal principles and ethical philosophies introduced above.

260 John W Cooley, 'Defining the Ethical Limits of Acceptable Deception in Mediation' (2004) 4(2) *Pepperdine Dispute Resolution Law Journal* 263, 268.

261 John Wade, 'Ethically Ambiguous Negotiation Tactics (EANTS): What are the Rules Behind the Rules?' (n 43) 15.

III CASE STUDY: DECEPTION

Deception is one of the most prevalent and challenging ethical issues in the legal negotiation environment,[262] and is considered a 'time-honoured'[263] and 'entrenched' part of legal negotiation practice.[264] Deception, however, is not commonly a dilemma that arises during litigation, as the strict Conduct Rules, obligations, and legislation indicate that such behaviour is not acceptable in court, tribunal proceedings, or during dispute resolution processes that involve a third-party facilitator or decision maker.[265] Throughout this chapter I have identified key problems with applying existing Conduct Rules, obligations and legislation directly to the legal negotiation environment, which reinforces the need for a Code of Ethics. I have also highlighted the discrepancies between these written documents and occurrences in legal practice, which seems to accept EANTs as commonplace during legal negotiation.

Deception is a crucial issue for legal practitioners conducting legal negotiations, particularly given the ambiguities concerning disclosure of confidential information. Indeed, my survey results and my experience with law students show that this ethical challenge additionally proves the most problematic for law students, who understand that lying is 'morally wrong',[266] and not permissible during legal practice, but who are unsure how to apply this in the legal negotiation environment. This is echoed in legal practice, by legal practitioners who 'lie because they are confused as to what actually constitutes ethical conduct within a negotiation.'[267] Indeed, there seems to be a fine line between appropriate and inappropriate ethical conduct during legal negotiation.[268] I use this case study to exemplify the challenges I raised above, and, particularly, to analyse deceptive conduct through the lens of ethical

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262 Rankin, 'Legal Ethics in the Negotiation Environment' (n 18) 83.

263 Ibid 83.

264 Ibid 84; Russell Korbokin, 'Behavioural Ethics, Deception, and Legal Negotiation' (n 199) 1255.

265 Ross (n 9) 4. Ross questions whether it is ever appropriate to lie in legal practice. See also Lakhani, 'The Truth About Lying Part 1' (n 9) 107; Al Sturgeon, 'The Truth Shall Set You Free: A Distinctively Christian Approach to Deception in the Negotiation Process' (2011) 11(1) *Pepperdine Dispute Resolution Law Journal* 395.
For a summary on the American viewpoint of whether deception is appropriate, sometimes appropriate, never appropriate, or inevitable, at 399-400.

266 Bagaric and Dimopoulos (n 21) 371-2.

267 Rankin, 'Legal Ethics in the Negotiation Environment' (n 18), citing Peter Reilly, 'Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help' (2009) 24 *Ohio State Journal on Dispute Resolution* 481, 519.

268 Parke (n 1) 221.

philosophies, schools of bargaining ethics, and negotiation theories. I conclude that legal negotiation ethics presents key challenges. In the absence of a specific Code of Ethics, I end the chapter by offering advice the importance of using legal negotiation preparation to identify EANTs.

A Defining Deception

Before considering the ethical issues associated with deception in the legal negotiation environment, it is useful to first define deception and to outline its scope. While *deception* is not defined in relevant legislation or case law, it is not a specialist term, and is generally considered synonymous to *lying*.[269] In absence of definitions from primary sources, guidance can be gleaned from dictionary definitions, and from key scholars: Lakhani, whose doctoral thesis and subsequent publications analyse deception as it relates to negotiation; and Wolski, one of Australia's leading experts on ethics in mediation. The Macquarie Dictionary defines *deception* as 'the act of deceiving'[270] and *deceive* as 'to mislead by a false appearance or statement'.[271] These definitions appear, *prima facie*, to involve an action; therefore, non-disclosure – failing to disclose – might not meet the definition. However, deception during negotiation is held out to include two key aspects. First, deception is 'concealing the truth,'[272] which 'concerns the accuracy of information conveyed.'[273] Second, deceptive conduct involves 'exhibiting false information…[the] deception is embedded in the lie,[274] which addresses 'sharing of information, or conversely, the withholding of it.'[275] When read together, these definitions comprise deception as it relates to legal negotiation, and broadens the context to include non-disclosure, silence, and withholding information – this corresponds with White's comments that deception and disclosure fall on a spectrum,[276] which would expressly encompasses several EANTs.

In the legal negotiation context, deception is consequently related to dishonest conduct. In this way, a legal practitioner who misleads opposing counsel or misrepresents information by

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269 Lakhani, 'The Truth About Lying Part 1' (n 9) 101.
270 *Macquarie Dictionary* (online at 8 June 2020) 'deception' (def 1).
271 Ibid 'deception' (def 2).
272 Lakhani, 'The Truth About Lying Part 1' (n 9) 103
273 Wolski, 'The Truth about Honesty and Candour in Mediation' (n 77) 708-9.
274 Lakhani, 'The Truth About Lying Part 1' (n 9) 103
275 Wolski, 'The Truth about Honesty and Candour in Mediation' (n 77) 708-9.
276 James J White, 'Essay Review: The Pros and Cons of "Getting to YES"' (1984) 34(1) *Journal of Legal Education* 115, 118.

explicit comment – or silence if this constitutes an omission – will meet definitions of deceptive conduct.[277] The logical question that follows from this definition is whether deceptive conduct is unethical. Although deception occurs frequently during legal negotiations and is an accepted part of the legal negotiation environment,[278] it is necessary to examine whether it does, in fact, constitute unethical conduct that breaches Legal Practitioner Legislation and warrants sanction. To do this, I offer two separate analyses. First, a strict interpretation of the Conduct Rules and ethical obligations as they apply deception to legal negotiation, with emphasis on specific Conduct Rules and legal practitioners ethical obligation to their client. Second, a more moderate interpretation analysing the relationship between legal practitioner decision making and deception, assessing whether the ethical philosophies, schools of bargaining ethics, and theories of negotiation support deceptive conduct in the legal negotiation environment.

B The Rules and Ethical Obligations: A Strict Interpretation

The Conduct Rules contain two broad references to honesty and one to deception,[279] although the terms *deceive* and *honest*, and their derivatives, remain undefined. Despite the definition proposed above, *non-disclosure* is also undefined in the Conduct Rules, and does not appear to be addressed.[280] Legal practitioners must 'be honest and courteous in all dealings during legal practice',[281] which includes legal negotiation.[282] Either form of deception as defined above could breach this provision. That said, the concept of honesty does raise issues in relation to legal negotiation ethics:

> [n]egotiation … by definition involves incomplete information. It is in many ways the nature of the exercise for each protagonist to withhold relevant information from the other(s). Were negotiations conducted with complete candour and full disclosure of all relevant information, there would arguably be limited scope for negotiation in its commonly understood sense….it now appears clear that a

277 If silence constitutes an omission, Wills indicates it may constitute unethical behaviour: Wills, (n 102) 222.

278 Lakhani, 'The Truth About Lying Part 1' (n 9) 101; Cooley (n 255) 264; Korbokin, 'Behavioural Ethics, Deception, and Legal Negotiation' (n 199).

279 One other reference is made to not being deceptive in relation to law practice advertising, however this is irrelevant for the purposes of this thesis: Law Council of Australia, *Conduct Rules* (n 61) rr 36.1.2 and 36.2.

280 Rankin, 'Legal Ethics in the Negotiation Environment' (n 18) 111.

281 Law Council of Australia, *Conduct Rules* (n 61) r 4.1.2. MacFarlane and Ross, two of Australia's leading experts on ethics, notes that 'lawyers have a reputation for lying' despite this provision: MacFarlane and Ross (n 29) 4 [1.11].

282 See above Chapter Three.

> lawyer's attitude of incomplete candour within negotiation may, in certain circumstances, be unethical.[283]

This statement from Dal Pont, a leading Australian legal ethics scholar, provides minimal guidance to legal negotiators. If withholding information is the essence of legal negotiation, but 'incomplete candour' is unethical, where does this leave legal negotiation? Legal practitioners must have clear guidance on which common negotiation practices breach legal negotiation ethics, and the resultant disciplinary action.[284]

The Conduct Rules use the word *deception* once, stating that a legal practitioner 'must not deceive or knowingly or recklessly mislead the court',[285] which extends to dispute resolution.[286] Further misleading statements must be corrected.[287] As noted by Dal Pont above, however, one purpose of legal negotiation is to trade information, offers and concessions. Consequently, transposing this rule from litigation to negotiation does not achieve the Conduct Rules' intent. For instance: 'legal practitioners must 'not deceive or knowingly or recklessly mislead the [*negotiation*].'[288] While it is appropriate not to mislead a dispute resolution third-party facilitator or decision maker,[289] legal negotiation is not included in this category. Alternatively, if this rule was interpreted as ensuring not to mislead other legal practitioners/agents/parties during legal negotiation, it would meet the intent of the Conduct Rules, but would go against the essence of legal negotiation.

Contrary to the tone of the Conduct Rules and legislation, negotiation is frequently described as a 'game'[290] or 'dance,'[291] 'where certain accepted and tacitly agreed-upon "rules" apply.'[292] Those unspoken rules comprise the bargaining process, throughout which

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283 Gino Dal Pont, 'Ethics: The Lawyer as Negotiator' (2008) 82(9) *Law Institute Journal* 74 ('Ethics: The Lawyer as Negotiator').

284 Rankin, 'Legal Ethics in the Negotiation Environment' (n 185) 81.

285 Law Council of Australia, *Conduct Rules* (n 61) r 19.1.

286 Ibid Glossary (definition of 'court').

287 Ibid r 19.2.

288 Ibid r 19.1 (emphasis added). In terms of statutory interpretation, this could be one example of the literal rule resulting in ambiguous results, triggering interpretation using the purposive rule.

289 Cf mediation: *Mullins* (n 3).

290 Lakhani, 'The Truth About Lying Part 2' (n 211) 136.

291 Ibid 137.

292 Ibid.

misrepresentation,[293] puffing,[294] bluffing,[295] and exaggeration,[296] and other EANTs are frequently use,[297] aligning with Wade's pragmatic approach.[298] In fact, these behaviours are 'well entrenched in negotiation practice in Australia',[299] perhaps so much so that they are 'substantially immune from regulation'.[300] This highlights the dissonance between occurrences in legal practice and the Conduct Rules, as such behaviours clearly contravene the requirement to 'not deceive or knowingly or recklessly mislead the court'.[301] Of course, many of these behaviours are likely to go undetected and unsanctioned due to the private nature of legal negotiation.[302]

Under the Legal Practitioner Legislation, legal practitioners must not do anything to damage their status as a 'fit and proper person to practice law,'[303] or that could 'be prejudicial to, or diminish the public confidence in, the administration of justice',[304] or 'bring the profession

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293 Parke (n 1) 221

294 In the US, *puffery* includes 'statements about a party's willingness to compromise or resolve a dispute, a party's willingness to compromise or resolve a criminal matter, a party's willingness to concede something or a value placed on a concession, the strength or weakness of a party's factual or legal positions, the strengths or weaknesses of a party's case, the value or worth of the subject of the parties' negotiation, and a party's goals or objectives': Richmond (n 26) 268 discussing American Bar Association, Lawyers' Manual on Professional Conduct Formal Opinion 06-439' *ABA Ethics Opinions* (12 April 2006) <https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2018/01/ABA-Opinion-06-439-Obligation-of-Truthfulneess-in-Negotiation-and-Mediation.pdf>. See also Korobkin's comments about puffery, particularly that '[s]ome statements that appear at first glance to be puffs are actually statements that the speaker believes to be true, even if they are objectively false' and note his determination that both deontologists and consequentialists would not consider such statements unethical: Korbokin, 'Behavioural Ethics, Deception, and Legal Negotiation' (n 199) 1225.

295 Wills (n 102) 223.

296 Ibid 222-3.

297 Although some authors consider these as unethical, but question '[h]ow many lawyers are already employing similar (if not worse) tactics in their dealings?': Parke (n 1) 222.

298 Wade, 'EANTS' (n 43).

299 Parke (n 1) 223 Lakhani, 'The Truth About Lying Part 2' (n 211) 137.

300 Wade, 'EANTS' (n 43) 4. Cf comments from Cox and Harg that encourage legal negotiators to be honest, and resist 'sleight of hand': Mark Cox and Renae Harg, 'The Ethics of Settlement Negotiations in Employment Disputes' (2018) 45(11) *Brief* 28, 29.

301 Law Council of Australia, *Conduct Rules* (n 61) r 19.1.

302 See Parke (n 1). See above Part II(D).

303 *Legal Profession Act 2006* (ACT) s 26; *Legal Profession Uniform Law 2014* (NSW) s 15; *Legal Profession Act 2006* (NT) s 30; *Legal Profession Act 2007* (QLD) s 30; *Legal Practitioners Act 1981* (SA) s 15; *Legal Profession Act 2007* (Tas) s 26; *Legal Profession Uniform Law Application Act 2014* (Vic) s 15; *Legal Profession (Admission) Rules 2009* (WA) s 22.

304 Law Council of Australia, *Conduct Rules* (n 61) r 5.1.1.

into disrepute'.[305] Breaching these provisions can result in serious sanctions.[306] While legal practitioner conduct during a legal negotiation *could* breach these provision, as argued above, it is likely that a breach would require a considerable degree of unethical behaviour. Given legal practitioners' acceptance of – or acquiescence to –deceptive behaviour during legal negotiation, it is unlikely that such behaviour would meet the significant requirements of 'unsatisfactory professional conduct' or 'professional misconduct.'

While the Conduct Rules do not explicitly address legal negotiation, Rule 22.1 implicitly refers to legal negotiation by referring to the compromise of a case, specifically: a legal practitioner must not 'knowingly make a false statement to an opponent in relation to the case (including in its compromise),'[307] and must immediately correct it.[308] This aligns with both the broader rules related to honesty above, as well as the definitions of deception in Part III(A). Rule 22.1 applies to statements that omit information, or where the 'initially true [statement] becomes false in the course of the negotiations'.[309] Judicial interpretation extends this to partial truths, including an 'affirmative statement…which require[s] some qualification'.[310] Rankin, one of the few Australian commentators to address legal negotiation ethics, proposes that a hybrid test will determine whether a statement meets this requirement. The statement must be objectively false, *and* the legal practitioner making the statement must subjectively know it is false.[311] Unless both tests are met, this section is not contravened. Some authors have questioned whether deception requires 'deliberate intention to mislead'.[312] If intent to deceive *is* required, deceptive conduct would more likely be

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305 Ibid r 5.1.2.

306 See above Part II(D). Failure to correct opposing counsel's incorrect statement, however, does not breach Law Council of Australia, *Conduct Rules* (n 61) r 22.1, though may breach other Rules: Rankin, 'Legal Ethics in the Negotiation Environment' (n 18) 106-7.

307 Law Council of Australia, *Conduct Rules* (n 61) r 22.1. This wording does not appear elsewhere in the Rules. While it could be argued that this means the remainder of the Conduct Rules do not apply to legal negotiation (or 'compromise') Rankin notes that this is a weak argument: Rankin, 'Legal Ethics in the Negotiation Environment' (n 18) 109-10. This is particularly so based on attempts to avoid absurdity using the 'Golden Rule' of statutory interpretation: at 110.

308 Law Council of Australia, *Conduct Rules* (n 61) r 22.2. In terms of mediation, this is further reflected in the Law Council of Australia, *Guidelines for Lawyers in Mediation* (March 2007).

309 *Fleming* (n 3) [73] (Judge Chaney).

310 Ibid. See generally Rankin, 'Legal Ethics in the Negotiation Environment' (n 18).

311 Ibid 105; Wolski, 'The Truth about Honesty and Candour in Mediation: What the Tribunal Left Unsaid in *Mullins'* Case' (n 77); Wills (n 102) 223.

312 Wills (n 102) 223.

classed as a significant breach of the Conduct Rules.[313] Interestingly, Wade's commentary notes that 'false statements', 'silence', or 'half-truths', when 'intentional, reckless, negligent or innocent', constitute EANTs.[314] The use of the term 'innocent' here is surprising, as this would not breach the Conduct Rules, particularly if any misstatements were corrected once the mistake was realised. Although this has not been tested judicially, there are instances in which an explicit statement made by a legal practitioner is intended to comply with the client's instructions, rather than to deceive or mislead. This latter example is particularly relevant to the behaviour of confused law students and/or inexperienced legal practitioners.

Law students are uncertain about what information they can reveal during a legal negotiation. The students responding to my questionnaires were divided about whether ethical issues had played a role in their negotiations,[315] with only 58% agreeing that they had. Confusion about legal negotiation ethics was emphasised through respondent comments. Some students noted their opposing counsel refused to disclose certain facts.[316] This could mean that only half-truths were provided, in breach of Conduct Rule 22.1. Some respondents very clearly noted that '[they] can't lie/cheat/deceive,'[317] and therefore disclosed all facts that were relevant.[318] This shows strict compliance with the Conduct Rules and Legal Practitioner Legislation. Others either tried to work around, or not disclose, their confidential information (33% of respondents) which could meet the definitions of deception above. Some students used the facts to their advantage (39% of respondents), or only 'shared information that was bad for [the other side].'[319] This is not deceptive conduct, as such, but falls within the 'game' of legal negotiation. Further, it is difficult to determine, in the context of a Legal Negotiation Competition, the extent to which information was withheld from opposing counsel, since competitors typically never receive information about their opposing counsel's instructions.[320] In this sense, it is also difficult to know whether competitors would meet

313 See generally, from the American context, Korbokin, 'Behavioural Ethics, Deception, and Legal Negotiation' (n 199) 1209, 1222.

314 Wade, 'EANTS' (n 43) 1-2.

315 Post Negotiation Questionnaire, question 13. Fifty-eight percent of respondents indicated that ethics was relevant to their preparation, and 42% stated that it was not.

316 1314PO (Response to Post-Negotiation Questionnaire, 2013).

317 1404PO (Response to Post-Negotiation Questionnaire, 2014).

318 1314PO (Response to Post-Negotiation Questionnaire, 2013); 1404PO) Response to Post-Negotiation Questionnaire, 2014).

319 1505PO (Response to Post-Negotiation Questionnaire, 2015).

320 See generally Korbokin, 'Behavioural Ethics, Deception, and Legal Negotiation' (n 199).

Rankin's test, as competitors do not always have enough information to determine whether a statement is false, again highlighting an artificiality of the competition. As noted above, deceptive behaviour is best observed by opposing counsel.[321] Some respondents reported that their opposing counsel showed signs of lying or dishonesty,[322] or bordered on unethical conduct.[323] It is unclear whether the competitors acted on this information, such as by reporting their opposing counsel to the Competition Organisers, but taking such action is unlikely unless the unethical conduct is very serious – mirroring, to some extent, action taken for breaches under the Conduct Rules and legislation.

The confusion displayed by my respondents mirrors that exhibited in legal practice, again highlighting that EANTs are not clearly addressed under the Conduct Rules. Without specific guidance, it is unclear whether an EANT would breach the Conduct Rules and result in sanction. This can be exemplified by a legal practitioner withholding information. While this behaviour could breach the Conduct Rules pertaining to dishonesty,[324] it could also conflict with the duty of client confidentiality. There are some exceptions to confidentiality, but it is unlikely that the Conduct Rules' requirement for honesty will be sufficient to justify that the legal practitioner was 'compelled by law to disclose' the information.[325] This example also raises conflict with the broader duty to the court and administration of justice. This brings to light an important question: when the Conduct Rules are in conflict with the legal practitioner's duty to their client, what is the correct course of action? This unanswered question could lead to misrepresentation during a legal negotiation,[326] through partial disclosure or non-disclosure.[327] One way to address this is to categorise concepts such as 'misrepresentation, bluffing [and] falsification' separately to deception, and therefore treat these less seriously.[328]

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321 Parke (n 1) 220.

322 1455PO (Response to Post-Negotiation Questionnaire, 2014).

323 1506PO (Response to Post-Negotiation Questionnaire, 2015).

324 Withholding information about 'one's true "bottom line" is seen to be part and parcel of traditional competitive bargaining': Wills (n 102) 223.

325 Law Council of Australia, *Conduct Rules* (n 61) r 9.2.2. See, generally, MacFarlane and Ross (n 29) 302-306.

326 Selene Mize, 'Is Deception in Negotiating Unprofessional?' (2005) *The New Zealand Law Journal* 245, 245; Rankin, 'Legal Ethics in the Negotiation Environment' (n 18) 97.

327 See, eg, Korbokin, 'Behavioural Ethics, Deception, and Legal Negotiation' (n 199) 1229.

328 Roy J Lewicki and Robert J Robinson, 'Ethical and Unethical Bargaining Tactics: An Empirical Study', in Menkel-Meadow and Wheeler (n 10) 222, 223-4.

The EANT concept of bluffing appears frequently in the literature and allows exemplification of jurisdictional differences. Bluffing relates to the inflation of offers and bargaining ranges, generally through using a 'false display of confidence or aggression to deceive or intimidate someone.'[329] This meets the definition of deception above by 'exhibiting false information.'[330] Bluffing appears to fit within the *rules of the game of negotiation* due to its common use during legal negotiation,[331] and could fall within the parameters of implied authority if the subject matter relates directly to client instructions. The extent of the bluff, however, may impact the ethicality of the behaviour. For example, if the legal practitioner indicates that their client can only pay $X, which falls well outside the client-instructed range, this could be considered 'strategic posturing', which has the intent of using explicit statements to deceive.[332] This breaches the Conduct Rules because the legal practitioner has made a 'statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person'.[333] Of course, 'grossly exceeds' is undefined and has not yet been subject to judicial interpretation, though is likely to be case-dependent. A jurisdictional comparison is useful. Similarly to Australia's Conduct Rules, the American Bar Association Model Rules require that a legal practitioner does 'not knowingly make a false statement of material fact or law to a third person' ('Model Rule 4.1').[334] Unlike in Australia, however, the commentary on Model Rule 4.1 qualifies this rule explicitly in the context of legal negotiation, excluding '[e]stimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim.'[335] This means that bluffs and EANTs used during a legal negotiation would not breach Model Rule 4.1.[336] The broad definition of 'statements of material fact,' however, could be interpreted with such discretion as to render legal negotiation ethics 'rubbery,'[337] and even more difficult to enforce.[338] This example demonstrates the importance of striking a

329 Alexander, Howieson and Fox (n 221) 213.

330 Lakhani, 'The Truth About Lying Part 1' (n 9) 103

331 See, eg, Wade, 'EANTS' (n 43). See also Korbokin, 'Behavioural Ethics, Deception, and Legal Negotiation' (n 199).

332 Mize (n 326) 245-6; see also, comparatively, Rankin, 'Legal Ethics in the Negotiation Environment' (n 18) 84-5.

333 Law Council of Australia, *Conduct Rules* (n 61) r 34.1.1 This has been recommended for incorporation in rules in Upper Canada: Tsakalis (n 71) 11.

334 American Bar Association (n 210) Model Rule 4.1(a).

335 See further discussion in: Shell, 'Bargaining with the Devil' (n 33) 58.

336 Richmond (n 26) 282.

337 Parke (n 1).

338 See, eg, Folberg et al (n 152) 166.

balance between enforcing legal negotiation ethics, and allowing legal practitioners to engage in standard legal negotiation conversations and practices.

There is clear conflict between the Conduct Rules, obligations, and legislation. This is particularly problematic when identifying potentially unethical behaviours, as the Conduct Rules and legislation lack guidance regarding relevant sanctions. Further, this questions the parameters of the legal practitioner's ethical obligation to their client, and how to resolve conflicts that arise. Client-centrality is a fundamental component of good practice lawyering, is one of the pillars of legal negotiation, and is part of the LCA Requirements. Justifiably, if the legal practitioner discusses deceptive tactics with the client, this could form part of client instructions that the legal practitioner is obliged to follow, unless overruled by their paramount ethical duty to the law and the administration of justice, though, arguably, bluffing or misstating facts is unlikely to be significant enough to breach the Conduct Rules or legislation. This further questions the scope of deceptive practices, which fall on a continuum ranging from bluffing or slightly inflating offers to outright lying. While law students might rationalise any range of unethical conduct as justified by client instructions,[339] such justifications are unlikely to always negate a breach. In practice, however, an experienced legal practitioner can identify potentially unethical or illegal behaviour, and act accordingly,[340] ideally refusing the instructions.

The Conduct Rules and Legal Practitioner Legislation are strict in their requirements for legal practitioners to act ethically. However, their silence as to legal negotiation and a specific Code of Ethics for legal negotiation and dispute resolution demonstrates a blatant disregard for the confusion created by applying litigation Conduct Rules to the legal negotiation environment. Without specific guidance as to which EANTs or unethical behaviours could breach the Conduct Rules and Legal Practitioner Legislation, and the associated sanctions, this terrain is difficult to navigate. It is worth considering, here, the *legal* aspect of legal negotiation. Perhaps dishonest or deceptive conduct *is* inherent in the *rules of the game* in negotiation, but *legal* negotiation with *legal* consequences requires stricter regulation, as appears to be outlined in the Conduct Rules. Why then, does deceptive conduct raise such confusion? In part, this is due to the range of behaviours that could be considered deceptive.

339 Spencer and Scott (n 20) 30.

340 Wade, 'EANTS' (n 43) 6.

Further, behaviours that are undoubtably deceptive – and in breach of the Conduct Rules and legislation – during litigation, are seemingly accepted during legal negotiation. This double standard makes it difficult for legal practitioners to understand their ethical duties. Legal practitioners indisputably have an ethical duty to their client to be well prepared for legal negotiations. Such preparation must be client-centred to determine the client's wants and needs,[341] including the extent of bargaining ranges, information the client does not want disclosed during negotiations, and which offers or concessions need to be brought back to the client for approval. Thorough preparation is a countermeasure against poor ethical conduct, as a well-prepared legal practitioner is less likely to engage in ethically ambiguous conduct and is more likely to identify opposing counsel's poor ethical behaviour.[342] In addition to navigating the minefield of strict legal ethics, legal practitioners also need to be aware that their decision making during a legal negotiation is influenced by various other factors, including ethical philosophies, bargaining ethics, and legal negotiation theories, although these are not legally binding.

C Legal Practitioner Decision Making: A Moderate Interpretation

While the Conduct Rules, ethical obligations and Legal Practitioner Legislation offer a strict interpretation to deceptive conduct, albeit mired by ambiguity, other aspects of legal practitioner decision making offer a more moderate interpretation. As argued in Part II(C), legal practitioners are impacted by various influences, including the construction of their own ethical framework, during process of decision making. Below, I critically analyse how ethical philosophies, bargaining ethics, and legal negotiation theories view deceptive conduct in the legal negotiation environment, and explore the intersection between these elements and the Conduct Rules and ethical obligations.

There are four key points relevant to interpreting deceptive conduct through the lens of ethical philosophies. First, a strict interpretation of deceptive conduct as unethical because it contravenes the Conduct Rules, ethical obligations, and Legal Practitioner Legislation. This approach would accord with duty ethics, though would be hampered by the same interpretation ambiguities raised in the previous section. Second, it is worth considering the range of deceptive conduct. The ambiguities introduced above, and the lack of clearly defined

341 Richmond (n 26) 276.

342 See, eg, Richmond (n 26) 282.

deceptive conduct that would constitute a breach introduce nuance into this interpretation, meaning that some ethical philosophies are more likely to recognise degrees of ethicality that mirror the continuum of deceptive conduct. For example, social construct ethics is dependent on societal views, and consequently reflects societal perspectives of deception. Society, however, is likely influenced by degrees of deception – the difference between inflating a bargaining range compared with an outright lie intended to deceive. While *intent* is not part of the definitions of deception proposed above, it is likely to impact societal opinion. Society is more likely to accept a half truth,[343] which means that certain EANTs would be permissible during legal negotiation. End-result ethics would also consider the half-truth to be ethical, as a means to an end. Likewise, personalistic ethics would determine that, if the legal practitioner thought telling a half-truth was acceptable conduct, it would therefore not affect their reputation, and would thus be ethical. Only duty ethics would consider a half-truth unethical. While such considerations are relevant to determining the influences on legal practitioner decision making, it is important to note that the final decision will rest with a disciplinary body charged with determining whether the legal practitioner's half-truth constituted a breach of relevant Conduct Rules, obligations, or Legal Practitioner Legislation. Such judicial determination would set a strong precedent for future legal practitioner conduct during legal negotiations. Given the confusion about legal negotiation ethics, judicial determination would present clear guidance, though it is unsurprising that no actions have been brought, nor determinations made, to date.

There are two final considerations relevant to the ethical philosophies. A legal practitioner's ethical framework is influenced by legal training, the development of their conscience, and their life experiences. This can mean that the legal practitioner's values align with the strict interpretation of legal negotiation ethics, or that there is discord between these. This is one reason for which Wade's proposed fifth category of ethical philosophies, *pragmatism, prudence and practicality*, is so persuasive in relation to legal negotiation ethics. This underscores the importance of the legal practitioner's position in legal practice, and their role as agent for their client. If a legal practitioner believes that deceptive conduct will damage

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343 Cooley argues, drawing on Sissela Bok, *Lying: Moral Chocie in Public and Private Life* (Pantheon Books, 1989) 58-9, that '"[w]hite lies permeate all aspects of social practice…Both society, in general, and…the legal profession in particular, consider many types of deception acceptable: Cooley (n 260) 264. See also Craver, 'The Impact of Negotiator Styles on Bargaining Interactions' (n 218) 4. See also Korbokin, 'Behavioural Ethics, Deception, and Legal Negotiation' (n 199) 1232-4.

their reputation and public perception, they are unlikely to engage in such behaviour. Likewise, according to end-result ethics, if any ethically ambiguous tactics would affect the outcome of the legal negotiation – and possibly result in sanctions or reduced credibility for the legal practitioner – this could sway the practitioner against using unethical tactics.[344]

Substantial proportions of American legal negotiation ethics literature emphasise deception. It is consequently unsurprising that deception also features heavily in the literature about bargaining ethics. Similarly to the ethical philosophies above, the appropriateness of deceptive conduct during legal negotiation varies. The Poker School considers deception to be inherent in legal negotiation, and therefore acceptable practice.[345] The Pragmatist School views deceptive behaviour as negative due to potential effects on relationships and reputation.[346] It is, however, acceptable conduct if 'serviceable, practical alternative[s]' are unavailable.[347] The Idealist School takes the most narrow view of deceptive conduct, similarly to social construct ethics, considering deception to be unethical dependent on where the behaviour lies on the continuum of deceptive conduct. Members of the Idealist School are more likely to invoke silence or refuse to answer tricky questions,[348] or might note that they do not have instructions – though that statement itself could be deceptive.[349] Withholding information and/or using silence meets the definition of deception above, which means that the Idealist School accepts at least one form of deception – though arguably not deceptive statements (ie lying or bluffing). Since silence is not an explicit statement, this arguably does not breach the deception provision in the Conduct Rules, but could breach the honesty provisions. Alternately, if there are client instructions to withhold information, this could comply with the ethical obligations and meet the Idealist School's requirements. Nevertheless, the conflict between these components and the Conduct Rules could cause dissonance between the legal practitioner's values and actions, which is particularly confronting for a recent law graduate who is trying to maintain legal negotiation ethics and meet their client's instructions.

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344 Wade, 'EANTS' (n 43)

345 Carr (n 196) 248.

346 Shell, 'Bargaining with the Devil' (n 33) 68. See also Avnita Lakhani, 'The Truth About Lying Part 1' (n 9) 106.

347 Schell, 'Bargaining with the Devil' (n 33) 68.

348 Ibid 69.

349 Rankin notes that it is better to comment that 'I do not wish to divulge that information at this time.': Rankin, 'Legal Ethics in the Negotiation Environment' (n 18) 112.

Definitions of deceptive conduct are significant to whether such conduct is acceptable according to the ethical philosophies and schools of bargaining ethics. The theories of negotiation can be examined slightly differently. There are, *prima facie*, negative connotations ascribed to competitive negotiation, such as hiding information,[350] similarly to how the Poker School might be seen to be unethical in its acceptance of deceptive conduct. Consequently, deceptive behaviour – or any unethical conduct – would likely be more accepted by competitive negotiators but considered inappropriate by cooperative negotiators. Indeed, competitive negotiators are more likely to be aware of deceptive practices or EANTs, and to 'wait out' the other side, or to determine whether the other side is bluffing.[351] Despite this, negotiation behaviour – including ethical conduct – falls on a continuum, and Schneider's study showed that competitive negotiators can be ethical *or* unethical.[352] In this sense, deceptive conduct can be associated with either negotiation theory. As such, even though negotiation theories will shape the approach that law students take to legal negotiation, the theories have very little to add to an analysis of deceptive conduct used during legal negotiation.[353]

While it is clear that the components of legal practitioner decision making do not provide further clarity about whether deceptive conduct during legal negotiations is ethical, an analysis of deception from these perspectives confirms the need for a specific definition of deception that aligns with what is required by the Conduct Rules, obligations, and Legal Practitioner Legislation. The ambiguities and confusion raised by the strict interpretation in Part III(B) mirror those raised by the moderate interpretation in this part, and emphasise that there are aspects of each component of legal practitioner decision making that consider deceptive conduct ethical, and aspects that consider it unethical. Regardless, each component

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350 Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (n 222) 782

351 Spencer, Barry and Akin Ojelabi (n 122) 85-7 [3.25] quoting Carrie Menkel-Meadow, 'Toward Another View of Legal Negotiation' (n 222).

352 See, eg, Andrea Kupfer Schneider, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (2002) 7 *Harvard Negotiation Law Review* 143, 179 ('Shattering Negotiation Myths').

353 See generally Abramson's integration of negotiation styles and conflict styles to assess the value of deceptive conduct: Hal Abramson, 'Fashioning an Effective Negotiation Style: Choosing Between Good Practices, Tactics, and Tricks' (2018) 23(2) *Harvard Negotiation Law Review* 319, 342-4 ('Fashioning an Effective Negotiation Style').

would benefit from a clear definition of what is, and what is not, sanctionable behaviour. Outright deceptive conduct, such as lying with clear intent to deceive, is likely to be regarded as much more serious, and will only be considered appropriate in rare circumstances.[354] Half-truths, bluffing, or inflating offers, however, along with other EANTs, provide insight into the ambiguities associated with current definitions, Conduct Rules, obligations, and Legal Practitioner Legislation. In light of the challenges identified in this chapter, the absence of a specific Code of Ethics, and lack of clear guidance from regulatory bodies, law students must be taught how to identify potentially unethical behaviours, and how to respond to these.

Lakhani aptly summarises the way that the definition of deception impacts its ethicality:

> The future of deception and its various forms as a negotiation tactic lies in the eyes of the beholder. If the beholder is a legal professional, a 'poker' player and a fan of the social contract ethic, lying is part of the negotiations dance. If the beholder is a legal professional, a pragmatist and a religious man, lying may be part of the game, but only in very specific instances such as to prevent harm. … As a negotiation tactic, lying and other forms of deception are not generally considered permissible. However, reality presents another story, where deception is sometimes permissible, sometimes necessary, and sometimes expected.[355]

This reflects two unknowns of using deceptive tactics during a legal negotiation. First, whether the deceptive tactic is accepted or appropriate as part of the 'game' of negotiation; and second, whether the deceptive behaviour would breach the Conduct Rules, obligations, or Legal Practitioner Legislation.

354 Such as by proponents of the Poker School, or end-result ethics (in some circumstances).

355 Lakhani, 'The Truth About Lying Part 2' (n 211) 137-138.

IV CONCLUSION

The discrepancies and challenges that arise with regard to legal negotiation ethics show that certain behaviours, such as the EANTs proposed by Wade, have become common place in legal negotiation and are very unlikely to be classed as unethical, reported, or sanctioned.[356] Wade argues legal practitioners should 'start every negotiation with the assumption that the counterpart lawyer is a liar.'[357] While this directly contradicts the requirements for honesty enshrined in the Conduct Rules, it stands as good advice for law students as part of their legal negotiation preparation, and as a key component of legal negotiation education. They should be prepared for other legal practitioners to engage in unethical – or ethically ambiguous – conduct during legal negotiations and be able to recognise such actions.[358] In the meantime, they should, themselves, be prepared to engage in good practice.[359] In absence of further guidance in the form of a Code of Ethics, in order to meet a minimum level of competence (and to protect themselves and their client) law students must understand the challenges concerning the identification and sanction of unethical behaviour during a legal negotiation. While it is contradictory to advise law students to avoid unethical conduct such as deception since there is no clear definition of what this comprises, law students must, at minimum, be aware of the types of conduct that could be considered ethically ambiguous, and must determine whether they want to engage in such behaviour. This reinforces the idea that there is a 'distinction between *aspirational ideals* and *minimum standards* in articulations of ethical norms.'[360]

To be admitted to legal practice, law students must show competence at the standard of an entry-level practitioner. With regard to legal negotiation, this involves satisfying the LCA Requirements. While lack of competence does not indicate a tendency towards unethical conduct, a legal practitioner with a poor understanding of legal ethics is more likely to

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356 See, eg, Parke (n 1); Rankin, 'Legal Ethics in the Negotiation Environment' (n 18).

357 Wade, 'EANTS' (n 43) 5. See also Rankin, 'Legal Ethics in the Negotiation Environment' (n 18) 115. See also Korbokin, 'Behavioural Ethics, Deception, and Legal Negotiation' (n 199) 1255.

358 Wade, 'EANTS' (n 3943

359 Regarding 'good practice' in the context of the Good Practice, Tactics and Tricks Framework, see: Hal Abramson, 'Fashioning an Effective Negotiation Style: Choosing between Good Practices, Tactics and Tricks (GTT Framework)' in Schneider and Honeyman, *Negotiation Essentials for Lawyers* (n 3) ('GTT Framework').

360 JonathanCohen, 'A Taxonomy of Dispute Resolution Ethics' (n 179) 246.

inadvertently breach legal ethics.[361] Legal negotiation ethics involves a subjective element,[362] and therefore law students must understand the interrelationship between the Conduct Rules, obligations, and the personal choice involved in legal practitioner decision making in the context of legal negotiation. Law students – and entry-level legal practitioners – are trying to understand the intersection of many difficult components of legal negotiation: the client's instructions; the conversation at the table; the content and their planned communication; the questions they want to ask to ascertain information about the other client's interests and positions; and every part of 'good practice' preparation. Adding ethical obligations creates another level to their already complex thought processes during a legal negotiation. Law students' – and legal practitioners' – behaviour 'must be assessed with regard to what the solicitor knows, what the solicitor should know, the conduct of the other persons or entities involved and how the solicitor's decision to act in a certain way reflects the level of trust expected of the legal profession'.[363] This accords with the Conduct Rules, and, particularly, reflects societal views of legal practitioners and legal practice.

My main concern for law students is not that they will struggle with the application of legal ethics in a legal negotiation competition setting, although I have raised various concerns about this at key junctures in this chapter. Instead, I am concerned that law students will not receive useful critique on their performance of legal negotiation ethics, because many legal negotiation competitions are judged by student judges, who are exposed to the same legal training as competitors. These law student judges therefore have limited understanding of the complexities of legal negotiation ethics, and consequently have reduced ability to provide good guidance on the application of legal negotiation ethics. This means that law student legal negotiators do not receive proper feedback on their ethical approach, nor insight into the consequences – both personal and for their client or the administration of justice – that could follow from either their own ethically ambiguous behaviour, or from failing to address opposing counsel's ethically ambiguous behaviour. In this sense, academic and legal practitioner teachers and mentors are the best source of guidance,[364] and the best judges for

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361 Hilary Astor and Christine Chinkin, 'Mediator Training and Ethics' (1991) 2(4) *Australasian Dispute Resolution Journal* 205, 210, quoting New South Wales Law Reform Commission, *Alternative Dispute Resolution: Training and Accreditation of Mediators*, Discussion Paper 21, October 1989, 23.

362 Jenaway (n 12) 50 citing Ross (n 37) 25.

363 Burke (n 45) 8.

364 Pauline Collins, 'Resistance to the Teaching of ADR in the Legal Academy' (2015) 26(2) *Australasian Dispute Resolution Journal* 64, 65 ('Resistance to the Teaching of ADR').

Legal Negotiation Competitions – although this can, understandably, be difficult for law student volunteers to organise. Law students need to have the opportunity to learn about and practice legal negotiation ethics in *safe* simulated environments where they can develop their legal negotiation ethics and practice these skills, thereby being free to make decisions and mistakes and learn about the related consequences. At present, with the lack of regulator guidance, the only way law students are able to learn and develop legal negotiation skills is during Practical Legal Training. Law students must attain these skills – including the identification of ethical issues and the understanding of the associated consequences – *before* their potentially unethical conduct could impact a client and/or the legal practitioner's career. This underscores the importance of including legal negotiation ethics in legal education, to better prepare law students for legal practice.

This chapter has highlighted the challenges associated with legal negotiation ethics. I have analysed the Conduct Rules and ethical obligations that govern legal practitioner behaviour in Australia, with particular reference to the way in which this can be applied in the legal negotiation environment. In my analysis, I have noted the difficulties associated with transposing a Code of Ethics intended for ligation into the legal negotiation environment. By drawing on relevant literature and comments from my original data relating to lying and deception, I identified deception as one of the most likely ethical dilemmas in legal negotiation and highlighted the discrepancies and challenges inherent in the application of the Conduct Rules, obligations, and components of legal practitioner decision making to legal negotiation ethics. I concluded that law students and legal practitioners alike would benefit from clear guidance about legal negotiation ethics – particularly as to the identification and sanction of unethical behaviours during legal negotiation – and from a specific Code of Ethics. Failing to explicitly include legal negotiation in the Conduct Rules ignores a principal legal service that legal practitioners perform daily, and therefore means that such work is not ethically regulated or scrutinised.[365]

[365] Rankin, 'Legal Ethics in the Negotiation Environment' (n 18) 79.

While a Code of Ethics for legal negotiation would be beneficial and would provide a sound starting point for legal practitioner behaviour, it will not be a solution for *all* ethical dilemmas that arise in the legal negotiation context.[366] In this chapter I have emphasised the importance of thorough legal negotiation preparation, in line with literature that indicates that good preparation will increase the ethical behaviour used during legal negotiation,[367] and noted that, conversely, poor training and a lack of legal ethical understanding increases unethical conduct. In this way, legal negotiation ethics, preparation, and client-centrality unite as the three pillars on which legal negotiation rests. It is beneficial for law students to have a set of clear minimum competencies that they need to meet in order to attain the LCA Requirements, which sits at the intersection of these three pillars. In Chapter Six, I address the importance of clear standards that a law student must meet in order to be admitted to legal practice. While the LCA Requirements outline the standards required for legal negotiation, my research has shown that these are deficient. Instead, I propose a Conceptual Framework of Legal Negotiation Preparation that synthesises my analyses of legal negotiation preparation and legal negotiation ethics with client-centrality. I use my Framework of Legal Negotiation Preparation as the foundation for this Conceptual Framework, and then present a series of minimum competencies that will guide law students to ensure they meet the LCA Requirements.

366 Parke (n 1) 267.

367 Ibid 223.

CHAPTER SIX: THE CONCEPTUAL FRAMEWORK OF LEGAL NEGOTIATION PREPARATION: A WAY OF OPERATIONALISING LEGAL NEGOTIATION PREPARATION FOR LAW STUDENTS

I INTRODUCTION

In Chapter One I proposed that my research would address the following question:

> What are the minimum competencies a law student must meet to demonstrate competent legal negotiation preparation prior to being admitted to legal practice?

To progress towards an answer, I first critiqued the inclusion of legal negotiation in legal education, and found that the LCA Requirements were deficient. In my initial analysis of the literature, I found that there were significant difficulties with defining terms relevant to this field. I therefore examined the turbulent history of legal negotiation definitions. I concluded that there is a central definition of legal negotiation that depicts a legal negotiation conducted by two legal practitioners, each representing a client, who negotiate legal issues with legal outcomes.[1] This type of legal negotiation is emulated in Legal Negotiation Competitions, from which I collected original data. This definition highlighted the importance of client-representation, and, consequently, legal negotiation ethics and authority. My research further established the challenges inherent in legal negotiation education, particularly with reference to the LCA Requirements against which law students are assessed prior to admission to legal practice. I have argued that the LCA Requirements regarding legal negotiation preparation are unclear and relate to excessive literature in which the key principles of 'good practice' are undefined.[2] As a result of these conclusions, my research focussed on three interconnected themes: legal negotiation preparation, legal negotiation ethics, and client-centrality – together, the pillars of legal negotiation – with the intention of creating a set of minimum competencies that can improve legal negotiation education. Preparation and client-centrality are identified explicitly in the LCA Requirements (depicted through the emphasis in the table below), whereas legal negotiation ethics are implicit throughout all three stages.

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1 See above Chapter Three.

2 See above Chapter Four.

Table 5: LCA Requirements: With Emphasis as to the Three Pillars of Legal Negotiation

Pre-Negotiation
1. prepared, or participated in the *preparation* of, the client's case properly having regard to the circumstances and good practice.
The Negotiation Process
2. identified the strategy and tactics to be used in negotiations and *discussed them with and obtained approval from the client*, or been involved in or observed that process. 3. carried out, been involved in or observed, the negotiations effectively having regard to the strategy and tactics adopted, the circumstances of the case and good practice.
Post-Negotiation
4. documented any resolution as required by law or good practice and explained it, or been involved in the process of explaining it, to the client in a way a reasonable client could understand.[3]

To synthesise these three themes, I critically analysed literature relating to legal negotiation preparation and legal negotiation ethics, both with emphasis on client-centrality. To determine the 'good practice' components of legal negotiation preparation expected by the LCA Requirements, I created the Legal Negotiation Preparation Framework informed by Fisher and Ury's Four Principles of Negotiation.[4] I used this to analyse my original data on law student legal negotiation preparation. My data showed that law students do consider the key components when preparing for legal negotiations but lack the skills to apply their knowledge of these components to the legal negotiation at hand.[5] This emphasises the deficiencies I identified in legal negotiation education. The concept of legal negotiation ethics provides further, and more significant, challenges for law students and legal practitioners alike. The application of the current Conduct Rules to legal negotiation is unclear, and there are discrepancies between the requirements of the Conduct Rules, ethical obligations, and Legal Practitioner Legislation, and what is done in legal practice. I critically analysed the difficulties of applying the Conduct Rules, obligations, and Legal Practitioner Legislation to legal negotiation, and explored broader aspects of legal practitioner decision making, using deception as a case study to highlight the challenges faced by legal practitioners in this area.

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3 Law Admissions Consultative Committee, *Practical Legal Training Competency Standards for Entry-Level Lawyers* (2015) ('*PLT Standards*') [5.10] 'Lawyers' Skills' Element 6.

4 See above Chapter Four.

5 This aligns with literature that notes law students can appropriately grasp theory: David Spencer and Marilyn Scott, 'ADR for Undergraduates: Are We Wide of the Mark?' (2002) 13(1) *Australasian Dispute Resolution Journal* 22, 34.

Overall, my research has shown that the field of legal negotiation suffers from lack of clarity, which, as a result, inhibits law students from attaining competence in this area prior to admission to legal practice.

In this chapter, I shift the emphasis of my research to more strongly focus on legal negotiation education. To do this, I intersect the three pillars of legal negotiation into a Conceptual Framework. I then use this Conceptual Framework to address the deficiencies in current legal negotiation education as relates to legal negotiation preparation. I operationalise legal negotiation preparation by setting out the minimum competencies required to meet the LCA Requirements for legal negotiation preparation. I commence this process by analysing the requirement for competency-based education in tertiary legal education in Australia, determining that this is highly beneficial for profession-oriented fields,[6] but noting that there must be a distinction between entry-level practitioners and expert legal practitioners.[7] Consequently, there must be a minimum competency that law students must meet to become entry-level practitioners – this is reflected, for legal negotiation, in the LCA Requirements embedded in the PLT Standards. In Part III, then, I introduce a Conceptual Framework of Legal Negotiation Preparation, which sits at the intersection of my research on legal negotiation preparation, legal negotiation ethics, and client-centred legal negotiation. In Part IV, I propose a way of using the Conceptual Framework to operationalise legal negotiation preparation, and to set out the requisite minimum competencies in a way that would be most beneficial to law students, through the creation of a series of tables that align with the Legal Negotiation Preparation Framework proposed in Chapter Four. Part IV is therefore directed at law students, and accordingly has a change in tone in comparison to the theoretical components of my research. The series of tables I propose include explanation and advice about each minimum competency, and a series of questions that relate to both preparation and ethics, designed to prompt law students to consider the key concerns relevant to each

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6 See, eg, Terri Mottershead and Sandee Magliozzi, 'Can Competencies Drive Change in the Legal Profession' (2013) 11(1) *University of St Thomas Law Journal* 51; Michael McNamara, 'University Legal Education and the Supply of Law Graduates: A Fresh Look at a Longstanding Issue' (2017) 20(2) *Flinders Law Journal* 223; Roberta L Ross-Fisher, 'Implications for Educator Preparation Programs Considering Competency-Based Education' (2017) 2(2) *The Journal of Competency-Based Education* e01044: 1-3; Geoff Monahan and Bronwyn Olliffe, 'Competency-Based Education and Training for Law Students in Australia' (2001) 3 *University of Technology Sydney Law Review* 181; Gayle Gasteen, 'National Competency Standards: Are They the Answer for Legal Education and Training' (1995) 13(1) *Journal of Professional Legal Education* 1.

7 Gasteen (n 6) 10.

minimum competency. In the main, questions pertaining to preparation are written to be directed towards the client, to create useful dialogue.[8] Further guidance is provided as to how law students can elevate the competency, and, where relevant, advice specifically related to the Legal Negotiation Competition is noted. By way of concluding advice, I offer final guidance to law students about how to reach the minimum competencies throughout their studies, particularly in a curriculum that does not explicitly support the development of legal negotiation skills until Practical Legal Training. To close the chapter, in Part V, I draw together the aspects of the Conceptual Framework and minimum competencies, particularly emphasising the importance of authority.

II THE NEED FOR MINIMUM COMPETENCIES

While competency-based training and assessment is generally considered to be an emerging field,[9] this form of training has been recognised in legal education in Australia since the 1960s/70s.[10] Typically, competency-based training is a system that allows students to 'acquire and demonstrate their knowledge and skills by engaging in learning exercises, activities and experiences that align with clearly defined programmatic outcomes.'[11] Given,

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8 I note that profession-oriented competency-based education can include various forms of assessment, including practical experiences. For the purposes of legal negotiation, these typically include simulations conducted in-class and/or real interactions through the form of placements. I have designed the Conceptual Framework to address both of these scenarios, to ensure that law students understand how they might use the Conceptual Framework to guide the questions that they ask a client, or that they use to guide their analysis of written instructions that form the basis of in-class simulations or Legal Negotiation Competition questions.

9 The Competency-Based Education Network website notes that 'competency-based education is still a nascent field with a small number of people and institutions understanding enough to describe it or implement it': 'How Does C-BEN Support the Field?' *Competency-Based Education Network* (Web Page) <https://www.cbenetwork.org/>. It is also thought that employers generally know little about competency-based education, even when they are involved in the development of relevant competencies: Joy Henrich, 'Competency-Based Education: The Employer's Perspective of Higher Education' (2016) 1(3) *The Journal of Competency-Based Education* 122, 122. In Australia there is clear understanding in the legal profession of the competency requirements that entry-level practitioners are required to meet (even if there is less understanding of *how* to meet these competencies).

10 See, eg, Mottershead and Magliozzi (n 6) 53.

11 Howard Lurie and Richard Garrett, 'Deconstructing Competency-Based Education: An Assessment of Institutional Activity, Goals, and Challenges in Higher Education' (2017) 2(3) *The Journal of Competency-Based Education* 301047: 1-19, 3 quoting Competency-Based Education Network, 'Activities & Impact C-BEN Year Two Report,' *Public Agenda* (Report, 2016) <http://www.publicagenda.org/files/ActivitiesAndImpact_CBENYear2Report_2016.pdf>.
See also J Gervais, 'The Operational Definition of Competency-Based Education' (2016) 1(2) *The Journal of Competency-Based Education* 98, 98. This is echoed by the National Training Board (1991) definition of 'competency' quoted in Gasteen (n 6) 11.

however, that competency-based training can be applied to many disciplines, it is unsurprising that there are various definitions of *competency* and *competency-based education* that can be adapted to suit the needs of each course and institution.[12] While some authors note the importance of *mastering* the relevant competencies,[13] in practice this is profession-dependent.[14] In legal education, the relevant competencies 'are based on what is usually done in the workplace and the standard performance that is normally required,'[15] and 'provide a thorough foundation for minimum standards in curricula.'[16] The minimum standards required in law therefore emphasise the difference between levels of competence 'expected of an entry-level lawyer (the novice) to that of a specialist (the expert)'.[17]

In Australian legal education, the Academic Areas (undergraduate studies) are taught through mastery-based learning.[18] Competency-based training is conducted during Practical Legal Training, as a prerequisite for admission to legal practice.[19] Each of the PLT Standards therefore reflects a 'prescribed competence' that law students must meet,[20] 'build[ing] on the academic knowledge, skills and values about the law, the legal system and legal practice' attained during study of the Academic Areas.[21] This is typical of profession-oriented

12 See, eg, Gervais (n 11) 98; Mottershead and Magliozzi (n 6) 51-2; Lurrie and Garrett (n 11) 2.

13 See, eg, T R Nodine, 'How Did We Get Here? A Brief History of Competency-Based Higher Education in the United States' (2016) 1(2) *The Journal of Competency-Based Education* 5, 6; Gervais (n 11) 99; Henrich (n 9) 126; Michelle R Weise, 'Got Skills? Why Online Competency-Based Education is the Disruptive Innovation for Higher Education' (2014) (November/December) *Educause Review* 27, 32; Aaron M Brower et al, 'Designing Quality Into Direct-Assessment Competency-Based Education' (2017) 2(2) *The Journal of Competency-Based Education* e01043:1-10, 2; Ross-Fisher (n 6) 2; Lurrie and Garrett (n 11) 3; Jamie P Monat and Thomas F Cannon, 'Two Professors' Experience with Competency-Based Education' (2018) 3(2) *The Journal of Competency Based Education* 301061:1-14, 2.

14 In medicine, for example, there is a higher level of mastery required due to the complexities of patient care and the high-pressure and uncertain nature of medical situations: see Australian Medical Association, 'Competency-Based Training in Medical Education', *AMA* (Web Page, 2010) < https://ama.com.au/position-statement/competency-based-training-medical-education-2010>.

15 Monahan and Oliffe (n 6) 188. See also Henrich (n 9) 126.

16 Monahan and Oliffe (n 6) 188.

17 Gasteen (n 6) 10. This is reflected in the Law Admissions Consultative Committee, *PLT Standards* (n 3).

18 See, eg, discussion of mastery-based learning in Nodine (n 13) 6-7.

19 Law Admissions Consultative Committee, *PLT Standards* (n 3); McNamara (n 6) 246.

20 Law Admissions Consultative Committee, *PLT Standards* (n 3) 3.1(a).

21 Ibid 4.3.

training,[22] with a view to developing graduates who understand 'what is done in practice and how to do it'.[23] Relevant competencies are created based on the following questions:

1. 'What are we training [teaching] [our] young lawyers to become?'[24]
2. 'What do we want our graduates to know and be able to do?'[25]
3. 'What are the full range of competencies necessary for students to master?'[26]
4. 'What does "mastery" mean and how is it defined (and transcribed)?'[27]
5. 'Do[es the student] know how to transfer [their] knowledge to action'?[28]

In a profession-oriented field such as law, these questions need to be answered through consultation with key stakeholders,[29] including academics, practitioners, and regulatory bodies that govern accreditation processes.[30] Typically, a national standard will 'inform' and 'steer' the curriculum,[31] and will be used as a basis to create the competencies, which are then integrated by each Law School.[32] Competency standards must be developed and reviewed over time, parallel to 'industry standards and professional expectations,'[33] and must be precisely articulated.[34]

The Australian PLT Standards were drafted to synthesise the skills a law student is required to develop with their understanding of key practice areas.[35] While the PLT Standards

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22 This is reflected in other profession-based training in Australia such as medicine, although there are key differences related to execution. Competency-based training is also seen in other areas such as educator preparation programs and other areas that require professional licensing: see, eg, Ross-Fisher (n 6) 1-2.

23 Gasteen (n 6) 2. In this way, legal education has its basis in vocationalism, although this is not reflected specifically as part of developing minimum competencies. For an explanation and critique of vocationalism in law see Nickolas James, 'More than Merely Work-Ready: Vocationalism versus Professionalism in Legal Education' (2017) 40(1) *University of New South Wales Law Journal* 186.

24 Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013) 35 quoted in Mottershead and Magliozzi (n 6) 57.

25 Ross-Fisher (n 6) 2.

26 Brower et al (n 13) 2.

27 Ibid 2.

28 Jennifer Cunningham, Emily Key and Rhonda Capron, 'An Evaluation of Competency-Based Education Programs: A Study of the Development Process of Competency-Based Programs' (2016) 1(3) *The Journal of Competency-Based Education* 130, 130-133.

29 Ross-Fisher (n 6) 2.

30 Cunningham, Key and Capron (n 28) 130-131.

31 Ross-Fisher (n 6) 1.

32 Ibid 1-2.

33 Ibid 2.

34 Monat and Cannon (n 13) 2.

35 This was the culmination of various reports and lists including from the Australasian Professional Legal Education Council and the Law Admissions Consultative Committee, informed by reports such as the

emphasise the expected *competency standards* that an entry-level legal practitioner must meet, these are typically reflected as *skills*.[36] The focus of my research, legal negotiation, is considered a skill 'essential to the lawyer's craft',[37] and as such is included as one of the key skills in the 'Lawyer's Skills' component of the PLT Standards. While typical competency-based assessment is built using the terms *competence*, *descriptors*, *learning outcomes* and *standards*,[38] the PLT Standards have their own terminology. 'Lawyer's Skills' comprises the requisite *standard*. This standard requires that: 'an entry level lawyer should be able to demonstrate oral communication skills, legal interviewing skills, advocacy skills, negotiation and dispute resolution skills, and letter writing and legal drafting skills.'[39] The PLT Standards then label 'negotiating settlements and agreements' as an *element* of this standard,[40] and each of the four LCA Requirements as 'performance criteria', against which to measure 'competent performance'.[41] These terms are used consistently throughout the PLT Standards, and are depicted in the table below.

United States' American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development – An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (1992) ('*MacCrate Report*'). See discussion in Monahan and Oliffe (n 6) and Gasteen (n 6), particularly at 9-10.

36 Law Admissions Consultative Committee, *PLT Standards* (n 3) [3.1](a).

37 Monahan and Oliffe (n 6) 188. See also *MacCrate Report* (n 35) 138 in Gasteen (n 6) 9; Law Society of New South Wales Commission of Inquiry, *The Future of Law and Innovation in the Legal Profession* (2017) ('*FLIP Report*'); Avril Beckford, 'The Skills You Need to Succeed in 2020', *Forbes* (Web Article 6 August 2018) <https://www.forbes.com/sites/ellevate/2018/08/06/the-skills-you-need-to-succeed-in-2020/#4d53d46288a0>.

38 Mottershead and Magliozzi (n 6) 51, and 56 quoting from the United Kingdom's Legal Education and Training Review, *Final Report* (2013) 119.

39 Law Admissions Consultative Committee, *PLT Standards* (n 3) [5.10] 'Lawyers' Skills' Element 6. this description has not changed since the initial introduction – reflected in Monahan and Oliffe (n 6) 200.

40 Law Admissions Consultative Committee, *PLT Standards* (n 3) [5.10] 'Lawyers' Skills' Element 6. 6

41 Gasteen (n 6) 12.

Table 6: Competency-Based Terminology as Applied to the PLT Standards

	PLT Standards
Standard	Lawyer's Skills: 'An entry level lawyer should be able to demonstrate…negotiation and dispute resolution skills'
Element	Negotiating Settlements and Agreements
Performance Criteria (LCA Requirements)	**Pre-Negotiation** 1. prepared, or participated in the preparation of, the client's case properly having regard to the circumstances and good practice.
	The Negotiation Process 2. identified the strategy and tactics to be used in negotiations and discussed them with and obtained approval from the client, or been involved in or observed that process. 3. carried out, been involved in or observed, the negotiations effectively having regard to the strategy and tactics adopted, the circumstances of the case and good practice.
	Post-Negotiation 4. documented any resolution as required by law or good practice and explained it, or been involved in the process of explaining it, to the client in a way a reasonable client could understand.[42]

The first LCA Requirement notes that law students must have 'prepared for or participated in the preparation of a client's case with regard to circumstances of good practice.' While, *prima facie*, this seems clear, the abundant legal negotiation literature demonstrates the challenges in identifying 'good practice'. Further, while legal negotiation literature notes that inexperienced negotiators often display poor preparation, my data reflects that this situation is not as dire as it might otherwise seem – law students *do* understand at least some of the factors relevant to legal negotiation preparation. They struggle, however, with applying these factors to a legal negotiation scenario. Therefore, law students do *not* 'know how to transfer [their] knowledge to action'.[43] This, in turn, indicates a deficiency in this part of competency-

42 Law Admissions Consultative Committee, *PLT Standards* (n 3) [5.10] 'Lawyers' Skills' Element 6.

43 Cunningham, Key and Capron (n 28) 130-133.

based legal negotiation training. However, legal negotiation preparation is a skill that can be learnt if students are provided with a useful framework to guide their learning.

To determine the principles of 'good practice' as relates to legal negotiation preparation, I used a detailed thematic analysis of legal negotiation preparation literature to develop the Legal Negotiation Preparation Framework. This separates the relevant literature into five key categories of legal negotiation preparation, thus reflecting the principles of 'good practice' in this area. The table below depicts the importance of *Preliminary Considerations* as the first step of legal negotiation preparation. It then holds the other four components at the same level but proposes an order through which to address these. In Chapter Four, I further emphasise the value of working through each component, before then returning to previous categories as more information becomes available and as client instructions develop.

Table 7: LCA Requirement 1: Legal Negotiation Preparation

Pre-Negotiation 1. prepared, or participated in the preparation of, the client's case properly having regard to the circumstances and good practice.			
Preliminary Considerations			
Relationships and Communication	*Parties' Interests*	*Option Generation*	*Assessment of Solutions*

Law students must have a clear understanding of what constitutes 'good practice' legal negotiation preparation, and, particularly, what is required for law students to be considered competent at legal negotiation preparation for the purposes of admission to legal practice. While the first LCA Requirement necessitates compliance with 'good practice', it does not explicitly identify the difference between the standard expected of an entry-level legal practitioner and an experienced legal practitioner. For admission to legal practice, law students must meet a minimum standard of legal negotiation preparation, which they can then develop and refine post-admission as they gain experience.[44] Such minimum competencies have not been examined in extant literature, particularly not while reflecting the intersection of legal negotiation preparation, legal negotiation ethics, client-centred legal negotiation and

[44] Spencer and Scott (n 5) 34.

the LCA Requirements.[45] Numerous authors have, however, created lists to be used during legal or general legal negotiation preparation.[46] While these lists do have their merits, they do not include clear explanations of how the items of legal negotiation preparation align with relevant legal negotiation ethics, nor provide relevant questions to facilitate and guide legal practitioner-client interaction.

In sum, I have three concerns with the legal negotiation components as currently outlined in the PLT Standards. First, that the LCA Requirements – performance criteria – are based on 'good practice,' a phrase that is undefined and unclear in the literature. Second, given the lack of definition and clarity in the literature, there are limited ways for a law student to operationalise 'good practice'.[47] Finally, the LCA Requirements related to legal negotiation have not been significantly updated since their original creation,[48] despite the need for competencies to change over time to properly reflect changing professional practice.[49] Both

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45 I note the Schneider's study on effective legal negotiation, which determine legal practitioners' negotiation behaviour as 'effective', 'average', or 'ineffective': Andrea Kupfer Schneider, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (2002) 7 *Harvard Negotiation Law Review* 143, Appendix A ('Shattering Negotiation Myths'). My research instead focuses on the preparatory stages that occur before such negotiation behaviours can be used.

46 See, eg, Nadja Alexander and Jill Howieson, Negotiation Strategy, Style, Skills (LexisNexis Butterworths, 2nd ed, 2010) 107 (negotiation map; five stage process); 68-100 (ten step guide to constructive negotiation); Nadja M Spegel, Bernadette Rogers and Ross P Buckley, *Negotiation Theory and Techniques* (Butterworths, 1998) 54 [3.22] (5 stage process); Gary Goodpaster, *A Guide to Negotiation and Mediation* (Transnational Publishers Inc, 2013) 170 (planning worksheet including seven stages); Jay Folberg et al, *Resolving Disputes: Theory, Practice, and Law* (Aspen Publishers, 2005) 88-90 (checklist that includes three main stages, each with multiple sub-points); Baden Eunson, *Negotiation Skills* (John Wiley & Sons Ltd, 1994) 9 table 2.1 (planning grid including 13 considerations).

47 This was originally reflected by law Deans who provided feedback on the original *PLT Standard*s and who noted that 'the present prescriptions were too broad and ill-defined to help PLT courses or work place providers of PLT to design satisfactory programs, devise assessment modes or form judgments about whether students possessed appropriate competence and skills': Monahan and Olliffe (n 6) 187.

48 The additions since the LCA Requirements' initial implementation are emphasised in italics in the extract below: Law Admissions Consultative Committee, *PLT Standards* (n 3) [5.10] 'Lawyers' Skills' Element 6 (emphasis added).

> 1. prepared, *or participated in the preparation of,* the client's case properly having regard to the circumstances and good practice.
> 2. identified the strategy and tactics to be used in negotiations and discussed them with and obtained approval from the client, *or been involved in or observed that process.*
> 3. carried out, *been involved in or observed,* the negotiations effectively having regard to the strategy and tactics adopted, the circumstances of the case and good practice.
> 4. documented any resolution as required by law or good practice and explained it, to the client in a way a reasonable client could understand.

Cf Monahan and Olliffe (n 6) 202.

49 Ross-Fisher (n 6) 2.

the scholarship and practice of dispute resolution and legal negotiation have developed significantly since the implementation of the PLT Standards, which is not reflected in the LCA Requirements, nor in corresponding legal negotiation education. I have developed a Conceptual Framework of Legal Negotiation Preparation to address these concerns and to highlight the three pillars of legal negotiation: ethics, preparation, and client-centrality.

III THE CONCEPTUAL FRAMEWORK OF LEGAL NEGOTIATION PREPARATION

I have designed this Conceptual Framework of Legal Negotiation Preparation to draw together the key three themes of my research: legal negotiation ethics, client-centred legal negotiation, and legal negotiation preparation. To do this, I highlight the importance of driving legal negotiation ethics and client-centred legal negotiation through the Legal Negotiation Preparation Framework that I developed in Chapter Four. This can be represented by the following diagram, which shows that legal negotiation ethics and client-centred legal negotiation are driven through the Legal Negotiation Preparation Framework to operationalise legal negotiation preparation.

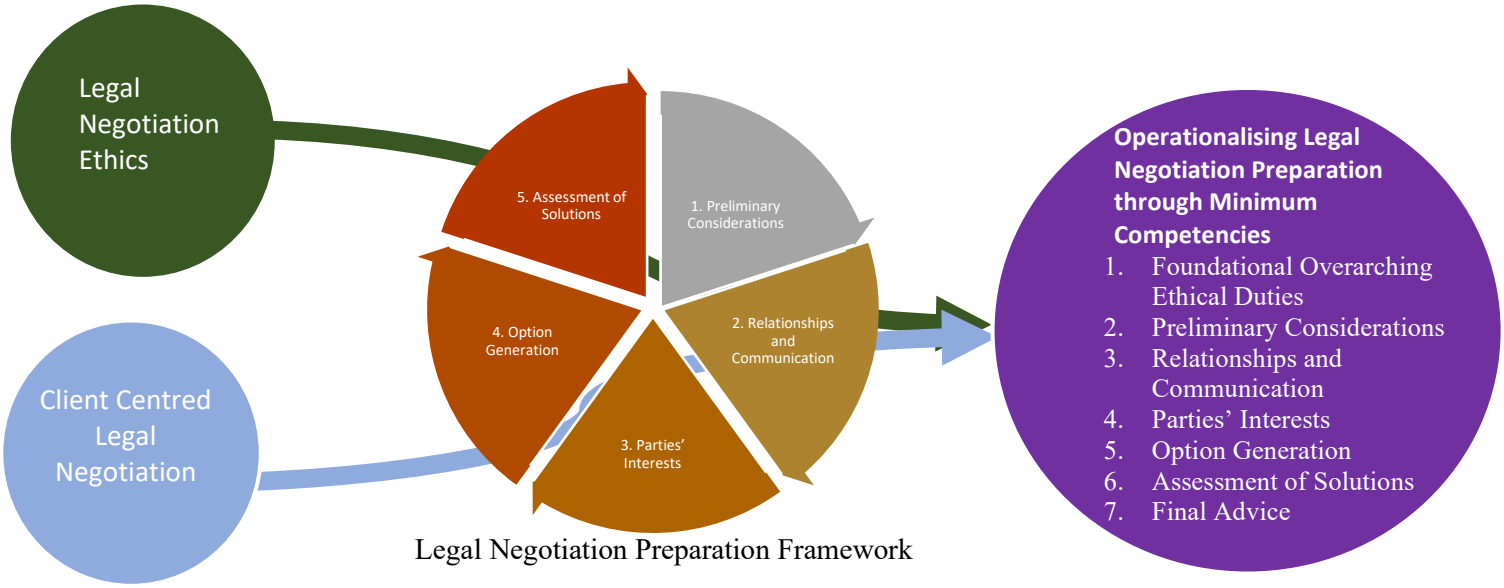

Figure 12: Conceptual Framework of Legal Negotiation Preparation.

In this form, the Conceptual Framework of Legal Negotiation Preparation provides a theoretical basis for legal negotiation preparation by synthesising the three key components of legal negotiation preparation. In alignment with the competency-based terminology relevant to the PLT Standards, seven components should be inserted under the first LCA Requirement, to reflect 'good practice' (depicted below). Each component then translates into key minimum competencies for legal negotiation preparation, drawn from the Legal Negotiation Preparation Framework. There are two additional components, the first emphasising the foundational overarching ethical duties, and the latter component offering final advice.

Table 8: Components of Legal Negotiation Preparation

	PLT Standards
Standard	Lawyer's Skills: 'An entry level lawyer should be able to demonstrate…negotiation and dispute resolution skills'
Element	Negotiating Settlements and Agreements
Performance Criteria (LCA Requirements)	Pre-Negotiation 1. prepared, or participated in the preparation of, the client's case properly having regard to the circumstances and good practice.
Components	1. Foundational Overarching Ethical Duties 2. Preliminary Considerations 3. Relationships and Communication 4. Parties' Interests 5. Option Generation 6. Assessment of Solutions **7.** Final Advice

The Conceptual Framework of Legal Negotiation Preparation synthesises the key requirements of legal negotiation, which can be used to form minimum competencies. It does not, however, suggest a means of operationalising this synthesis in a way that can be easily used in legal negotiation education. To operationalise this Conceptual Framework, I have developed a series of Minimum Competency Tables ('Tables') that can be used to aid law students in attaining the minimum competencies relevant to legal negotiation preparation. The Tables emphasise preparation and ethics, while also facilitating a dialogue between the law student/legal practitioner and their client (either fictional or real). It is important to note, here, that a law student's legal negotiation skills can be assessed in various ways. This could involve:

1. Working with a real client to prepare for the legal negotiation (under supervision of an experienced legal practitioner);
2. Assisting an experienced legal practitioner in preparing for the legal negotiation (with less direct involvement with the client, such as fewer opportunities to ask questions);
3. Preparing for a summative simulated legal negotiation;
4. Preparing for a formative in-class simulated legal negotiation (typically involving less preparation time and less rigorous assessment than in 3 above); or

5. Preparing for a simulated legal negotiation held as part of, for example, a Legal Negotiation Competition.[50]

Whilst only the first two of these options meet the criteria set out in the first LCA Requirement, all options are frequently used as part of legal negotiation training, whether officially part of the curriculum (options 1-4), or not (option 5). Cognisant of this, I have designed the Tables below to include a list of questions that law students/entry-level legal practitioners can ask to guide their discussions with a real or simulated client, or can use as a way to interrogate the written facts/instructions with which they are provided.

The minimum competencies are separated into the five main components of the Legal Negotiation Preparation Framework. As part of each component, I provide information and initial guidance about the purpose of that component, before separating it into key factors that are determined by relevant literature.[51] These factors are contained in tables that note the factor (as a minimum competency) and proceed to provide explanation and advice as to the relevant legal negotiation preparation and ethics associated with that factor. Each Table also includes relevant questions relating to preparation and ethics. Sometimes, the law student will know the answer to the question, in which case it is used as a prompt. At other times, the law student will need to discuss the question with their client to ascertain key information. Following each Table there is be a paragraph containing guidance about how to advance that component's minimum competencies and highlighting any key points that are relevant to Legal Negotiation Competitions. An example Table is included below. The information in italics will change as necessary.

Table 9: Example Table for Minimum Competencies for Legal Negotiation Preparation

Component of the Legal Negotiation Preparation Framework			
		Preparation	Ethics
Name of the Minimum Competency	Minimum Competency	*Explanation and Advice*	*Explanation and Advice*
	Question(s)	*Question(s)*	*Question(s)*

[50] I distinguish Legal Negotiation Competitions from formative in-class simulated legal negotiations because Legal Negotiation Competitions are voluntary, extra-curricular activities.

[51] See above Chapter Four.

While not all components and terms are defined in the Tables, the Tables are intended to be used alongside existing curricula, not in isolation without further explanation, instruction, or guidance. They will guide law students through a thorough process of legal negotiation preparation, while also reminding them of the importance of legal negotiation ethics, client interaction, and client instructions/authority. While not every legal negotiation term is specifically defined, there is sufficient information in the descriptions, components and minimum competencies to provide law students with relevant key terms that they could use to find further information about negotiation terminology.

In the Part IV of this chapter, I write specifically to law students, guiding them through the process of legal negotiation preparation and outlining the relevant Minimum Competency Tables that operationalise the Conceptual Framework of Legal Negotiation Preparation. This is intended to provide insight into – and a starting point for – legal negotiation preparation, and to improve legal negotiation education.

IV A Legal Negotiation Preparation Guide for Law Students: Operationalising the Conceptual Framework of Legal Negotiation Preparation Through Minimum Competency Tables

Legal negotiation is a foundational skill for legal practitioners. In essence, it depicts two legal practitioners, representing their clients by negotiating legal issues with legal outcomes, acting within the scope of their client's authority. To be admitted to legal practice, you need to attain the standard of an entry-level practitioner as relates to legal negotiation preparation (and various other skills). This is prescribed by the PLT Standards. To meet this requirement for legal negotiation preparation, you must have 'prepared, or participated in the preparation of, the client's case properly having regard to the circumstances and good practice'.[52] The Conceptual Framework of Legal Negotiation Preparation intersects three foundational parts of legal negotiation: ethics, preparation, and client-centred legal negotiation. Intertwining these three parts through the process of legal negotiation preparation is key to ensuring you are thoroughly prepared, and are 'having regard to the circumstances and good practice' while attaining the standard of an entry-level legal practitioner as required for admission. This standard is called *minimum competence*. After your admission to legal practice, you will have opportunities to refine your legal negotiation preparation skills under the supervision of experienced legal practitioners, therefore further developing your level of competence.

The Conceptual Framework of Legal Negotiation Preparation requires you to work through the following six components of preparation, with the seventh component offering final advice.

1. Foundational Overarching Ethical Duties
2. Preliminary Considerations
3. Relationships and Communication
4. Parties' Interests
5. Option Generation
6. Assessment of Solutions
7. Final Advice

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[52] Law Admissions Consultative Committee, *PLT Standards* (n 3) [5.10] 'Lawyers' Skills' Element 6, Requirement 1.

It is advisable that you initially work through each component in order. As you move through the components, however, you will be presented with additional information and considerations that may prompt you to return to previous components – this is part of the process. Each component is made up of a series of *minimum competencies* – these are the competencies required for legal negotiation preparation as part of the process of admission to legal practice in Australia. These minimum competencies are set out in tables that offer advice about how best to attain that competency ('Minimum Competency Tables'). Each table will be modelled on the example below, with the sections in italics changing as necessary.

Table 10: Example Table for Minimum Competencies for Legal Negotiation Preparation

Component			
		Preparation	Ethics
Name of the Minimum Competency	Minimum Competency	*Explanation and Advice*	*Explanation and Advice*
	Question(s)	*Question(s)*	*Question(s)*

Each table will specify the relevant component from the list above and outline the associated minimum competencies. The tables will then provide an explanation and advice about how to meet that minimum competency, with regard to relevant preparation and ethics. In addition, the table will provide key questions related to preparation and ethics. These are intended to prompt your thinking, and to assist in the identification of appropriate information relevant to each minimum competency. Sometimes, you will be able to answer these questions yourself. At other times, the question will act as a prompt for discussion with your client. You will need to sort through the information your client provides to determine how to use it to achieve the minimum competency. The Minimum Competency Tables can be used whether working with a real client, a fictional client (such as those used during simulated legal negotiations) or a client who has only provided written instructions (such as those used during Legal Negotiation Competitions: partner-based competitions run by the Law Students' Association in most Australian Law Schools). After each table there is additional information about how to elevate the competency above minimum level. There is also further guidance provided that distinguishes between real-life or assessed legal negotiations and Legal Negotiation Competitions. Finally, there is some repetition of key factors (primarily relating to ethical obligations such as authority) throughout the Minimum Competency Tables. This is

to further prompt you to address these foundational components of legal negotiation as part of your preparation.

1 *Foundational Overarching Ethical Duties*

Foundational ethical considerations include two key elements. First, an understanding of legal practitioners' three overarching ethical obligations: to the law and the administration of justice, to their client, and to fellow legal practitioners. These are governed by the common law and the Conduct Rules,[53] and are enforced through Legal Practitioner Legislation.[54] Although the Conduct Rules extend to all aspects of legal practice, including alternative dispute resolution (such as legal negotiation), they are more applicable to processes involving a third-party facilitator or decision maker, which excludes legal negotiation. In the absence of a specific Code of Ethics applying to legal negotiation, however, legal practitioners conducting legal negotiations are bound by the Conduct Rules. Sometimes these Conduct Rules and ethical obligations can come into conflict. Legal practitioners need to have a good understanding of the Conduct Rules and their ethical obligations to determine when conflicts might arise – for example, when there is conflict between disclosure requirements under the Conduct Rules and the duty of client confidentiality. While there are no clear answers about how such conflicts can be resolved, this is best explored under the supervision of a mentor or supervising legal practitioner.

The second key element of the foundational ethical considerations relates to the authority the client gives to the legal practitioner. This is the most important part of legal negotiation – without authority, the legal practitioner cannot properly engage in the legal negotiation. You must always have a clear understanding of your client's instructions and the parameters of your authority. As such, you need to create a continual dialogue with your client in order to ensure that any changes to your instructions are immediately identified. As further information becomes apparent during the legal negotiation, it is inevitable that your

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53 Law Council of Australia, *Australian Solicitor Conduct Rules* (2015) ('*Conduct Rules*').

54 *Legal Profession Act 2006 (*ACT); *Legal Profession Uniform Law 2014* (NSW); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (QLD); *Legal Practitioners Act 1981* (SA); *Legal Profession Act 2007* (Tas); *Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession (Admission) Rules 2009* (WA).

instructions will change. The questions that arise throughout the Minimum Competency Tables will assist you in creating this dialogue.

Law students – and legal practitioners – conducting legal negotiations will need to identify potential ethical dilemmas and to determine how to respond to these. Practical tips will come from your supervisor or mentor, but in the interim these Minimum Competency tabes will provide you with guidance to pre-empt various ethical dilemmas, and to ensure high quality legal negotiation preparation to reduce the likelihood of ethical dilemmas.[55] While this first table gives insight into the overarching ethical obligations, more specific ethical points will be raised throughout the remaining components of the Conceptual Framework. It is important to note that legal ethics comprises multiple components. This table specifically relates to the overarching Conduct Rules and ethical obligations owed by a legal practitioner, and the authority and instructions provided by the client. These are the foundational points of legal negotiation ethics. Ethical conduct itself is separate to this and must be apparent throughout the legal negotiation preparation process. This will be more precisely addressed in the advanced competencies below the table, and then consistently throughout the other components of the Conceptual Framework. In this way, ethical duties and obligations, authority, and ethical conduct are driven throughout the entire Conceptual Framework.

[55] Jim Parke, 'Lawyers as Negotiators: Time for a Code of Ethics?' (1993) 4(3) *Australian Dispute Resolution Journal* 216, 223

Table 11: Conceptual Framework of Minimum Competencies for Legal Negotiation Preparation

Part 1: Overarching Ethical Duties

PRE-NEGOTIATION		
Rules and ethical duties	Minimum Competency	Understand the Conduct Rules and each of the three ethical duties: duty to the law and the administration of justice (which is paramount); duty to the client; duty to fellow practitioners. Be aware of potential conflicts and the presence of deceptive behaviour.
	Question(s)	What are my ethical duties, and how do these intersect with the Conduct Rules?
Authority	Minimum Competency	Ascertain the scope of authority and instructions – remember that these can change throughout the progression of the matter. Note that, at this early stage, your client may not be able to give you full instructions. You will need to return to this constantly throughout your preparation as more information becomes apparent. Remember that you must stay within your client's instructions and act in your client's best interests at all times.[56]
	Question(s)	What is the scope of your authority/instructions?

(a) *Advanced Competence*

There is sometimes discrepancy between conduct in legal practice and the requirements of the Conduct Rules and ethical obligations. While this would be reduced by clear guidance in the form of a Code of Ethics specific to legal negotiation, you need to be able to act ethically in the interim. Ethical duties related to honesty and, conversely, deception, are particularly challenging in relation to legal negotiation. *Ethically ambiguous negotiation tactics* are frequently used during legal negotiations. These include 'false statements'; 'silence'; 'half-truths'; 'initial truth then silence'; 'puffery and vague platitudes'; 'bluffs and threats'; 'no hurry'; 'extreme offers'; 'spurious filed claims or cross claim's; 'add ons' (demands); 'good cop/bad cop routine'; 'flattery and ingratiation'; 'research and "infiltration"'; 'a lawyer talk[ing] directly to the counterpart client'; 'stonewalling and silence'; 'drown[ing] in paper, delay and administrative expense'.[57] You need to learn to recognise such behaviours, and be prepared for these to occur during legal negotiations.

To further develop your competence in this field, you should understand that there are various other factors that influence ethical legal practitioner decision making. This includes ethical philosophies, Schools of Bargaining Ethics, and legal negotiation theories – each of which view legal negotiation ethics slightly differently. You should understand that your past

56 Law Council of Australia, *Conduct Rules* (n 53) rr 4.1.2; 8.1.

57 John Wade, 'Ethically Ambiguous Negotiation Tactics (EANTS): What are the Rules Behind the Rules?' (Conference Paper, Law Society of Saskatchewan CPD Seminars, 12 May 2014) 1-3 ('EANTS').

ethical decision making, your education, and your legal training all influence your ethical decision making, including during a legal negotiation.

(b) *Legal Negotiation Competition Advice*

Although Legal Negotiation Competitions occur in a simulated environment that seemingly lacks the rigour of legal practice, they are a prime opportunity to develop your legal negotiation skills. Ethics are significant even in a simulated environment, and you must ensure you follow the Conduct Rules and ethical obligations. This is one environment in which deception and other ethically ambiguous negotiation tactics mentioned above come to the fore, as law students experiment with the limits of ethical behaviour. You need to be aware of these tactics and consider how you will respond to them. The Legal Negotiation Competition, particularly the self-analysis component, provides an excellent opportunity to identify potentially unethical behaviours and receive feedback from a legal practitioner or legal academic.

2 *Preliminary Considerations*

Preliminary Considerations is one of the most underrated components of legal negotiation preparation. Failure to adequately address *Preliminary Considerations* negatively impacts your ability to progress through the stages of legal negotiation preparation, as you will need to repeat steps to ascertain the correct information. If this is not done, your understanding of the matter will be deficient. While many of the factors relevant to *Preliminary Considerations* are intuitive, working through them in the order below will ensure that the information gathered as part of one factor can be built on as part of the next. This component is particularly reliant on discussions with your client.

Table 12: Conceptual Framework of Minimum Competencies for Legal Negotiation Preparation

Part 2: Preliminary Considerations

Component 1: Preliminary Considerations			
		Preparation	Ethics
Parties	Minimum Competency	Identify your client and the other key people relevant to the situation.	Ensure there are no conflicts of interest.[58]
	Question(s)	Who is involved in this dispute?	Are there any potential conflicts of interest?
Subject matter, situation and context.	Minimum Competency	Develop a good working knowledge of the material facts.[59] Understand the situational context of the negotiation, ie why this particular dispute arose in this particular context.	Consider how much information will be disclosed about the facts during the legal negotiation itself. Remember your duty to your client: do not disclose information that is confidential.[60]
	Question(s)	What happened to result in the need for legal negotiation? What happened before the dispute? What led to this point?	Is there any information that is confidential or needs to only be disclosed in specific instances (ie if opposing counsel raises the topic)?
Issue identification	Minimum Competency	Determine the key legal issues relevant to the legal negotiation. This involves assessing the subject matter, situation, and context to identify the issues the client would like resolved.	Ensure that you consider the perspective of each party.
	Question(s)	What are the key issues to be resolved? How would each party phrase every issue?	Where are the key points of conflict for each issue?
Priority order	Minimum Competency	Determine your client's priority order for the relevant issues. These are early considerations and will be revisited at later stages of the Conceptual Framework. This could start to take the form of an agenda.	Consider whether any issues are interdependent.
	Question(s)	How important is each issue?	If issues are interdependent, could this result in ethically ambiguous behaviours such as puffery, bluffs, threats, or extreme offers? Identify these.
Authority	Minimum Competency	Confirm the authority your client has provided, and how this translates into my instructions.	Remember to stay within your client's instructions and act within their best interests.[61]

58 Law Council of Australia, *Conduct Rules* (n 53) r 11.1.

59 Ibid r 2.1.3

60 Ibid r 9.1. This is unless client allows it (under r 9.2). See also r 18.1: 'do not deceive or knowingly or recklessly mislead the court'.

61 Ibid rr 4.1.2; 8.1.

			This is one of the most important considerations, but make sure to ascertain the information above before confirming the scope of authority with your client.
	Question(s)	Has your client changed their authority or instructions?	Has your client withdrawn authority or changed their instructions?

(a) *Advanced Competence*

There are many points that could advance your competence in *Preliminary Considerations*. The first involves gaining a thorough understanding of what has happened, including all key stakeholders. You should also start to think about the other party – how would they phrase the material facts, the dispute, and the key issues? Are there any differences between your client's formulation and what you expect from the other side? Thinking about a dispute from both perspectives is useful in determining potential solutions. This is relevant even from an early stage, but will also be discussed in more depth throughout later components of the Conceptual Framework. Additionally, when identifying the relevant issues, it is important to remember the differences between litigation, which focuses on primarily legal issues, and legal negotiation, and which has the scope to focus on a variety of issues. These could include economic, legal, social, psychological, ethical and moral issues.[62] Identifying a broad range of issues can assist in determining potential options for resolution later on.

There are several other process factors that relate to *Preliminary Considerations*. This first requires a determination of whether legal negotiation is the most appropriate dispute resolution process. This involves a discussion during which you advise your client of various other options.[63] Legal negotiations must only be commenced for a genuine reason – not to prolong or delay proceedings.[64] Once your client has decided to commence legal negotiations, you will need to identify the key attendees. This will necessitate further discussions with your client, and opposing counsel, to determine whether either party or any key stakeholders need to be present. This will also involve consideration of any additional people, such as interpreters or other professionals as relevant (eg accountants, social workers,

62 Carrie Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1983-1984) 31(4) *University of California Los Angeles Law Review* 754, 794, 803 ('Toward Another View of Legal Negotiation'). See also Laurence Boulle and Rachael Field, *Australian Dispute Resolution Law and Practice* (LexisNexis, 2017) 222-3 [647].

63 Law Council of Australia, *Conduct Rules* (n 3) r 7.2.

64 Ibid r 21.1.

psychologists, etc). Finally, you will need to determine the physical location for the negotiation. Often, legal negotiations will be held at either legal practitioner's firm, or perhaps in a meeting room at the court or other institution. It is unlikely that the legal practitioners will be required to set up the room (though note the exceptions to this under *Legal Negotiation Competition Advice*, below).

(b) *Legal Negotiation Competition Advice*

The simulated environment of the Legal Negotiation Competition means that competitors have no input as to location, physical set-up, time, and attendees. Competitors are tied to the written information provided in their agreed facts and confidential facts, and are unable to ask questions to elicit further information. As such, some of the minimum competencies above, such as identifying the situation and context, or key people involved, will be limited to the information they have available. While simulated competitions are artificial in this regard, they provide a beneficial opportunity for skill development, and for law students to reflect on how they would elicit information from a client.

3 *Relationships and Communication*

Several key relationships are present during legal negotiations. Of course, the relationship between client and legal practitioner is extremely significant, which is echoed throughout this Conceptual Framework and is governed by the ethical duty the legal practitioner owes their client. There is also a relationship between clients, which is likely to already be fractured in some way if the parties have resorted to legal negotiation for resolution. Finally, there are relationships between legal practitioners – governed by the ethical obligation to fellow practitioners – both between opposing counsel and between negotiation partners (as in a Legal Negotiation Competition). This component of the Conceptual Framework encourages you to understand the variety of relationships relevant to legal negotiation, as well as to understand how certain factors could impact those relationships and how communication can be developed beneficially to progress the legal negotiation. Again, the legal ethical obligations are prevalent here, as they guide all relevant relationships.

Communication is an important aspect of legal negotiation – indeed, a negotiation could not occur without communication. Law students tend to trust in their existing communication skills, but typically do not consider *how* they will communicate, nor the key messages that they want to convey. This component will prompt you to revisit the key issues you have previously identified, and to start to develop key questions to ascertain facts relevant to each issue.

Table 13: Conceptual Framework of Minimum Competencies for Legal Negotiation Preparation

Part 3: Relationships and Communication

Component 2: Relationships and Communication			
		Preparation	Ethics
Relationship between legal practitioner and their client	Minimum Competency	Create a relationship of trust from the first meeting with your client – encourage them to provide you with as much information as possible, and reassure them that you will determine what is key to their case. Reemphasise the importance of your authority and your instructions.	Commence a dialogue with your client to determine authority and parameters of instructions; develop rapport and trust (fiduciary relationship) so that your client feels comfortable to disclose pertinent information. Ensure that any information your client provides aligns with ethical obligations and the Conduct Rules. Start to explore the bounds of confidentiality – are there any points that your client does not want revealed?
	Question(s)	What is my role (as legal practitioner) during the legal negotiation? What is the scope of my instructions/authority?	How can I develop a good working relationship with my client, built on trust? Which information is confidential?
Relationship between clients	Minimum Competency	Identify and consider the relationships between parties, and the need for any ongoing relationship.	Remember your obligation to the law and the administration of justice as a basis for encouraging the legal negotiation to progress. Also keep in mind that there could be a negative relationship between your client and other parties/key stakeholders.
	Question(s)	What is the relationship between your client and other parties/key stakeholders, and would they like these relationships to continue?	How might any negative relationships between your client and other parties/key stakeholders impact the progress of the negotiation, particularly as relates to

			communication (ie will the other party listen to what your client has to say)?
Relationship with teammate	Minimum Competency	Identify each legal negotiator's strengths and weaknesses and whether/how these will affect the relationships during the legal negotiation.	Remember the ethical duty to fellow practitioners. Consider how the answers to your questions relate to this factor will impact strategy/tactics.
	Question(s)	What are your negotiation strengths and weaknesses? How can you work with your partner to overcome these?	Are there any dynamics between yourself and your negotiation partner that could impact the negotiation? How can you minimise these?
Relationship with opposing legal practitioner/team	Minimum Competency	Consider how you will work with all lawyers to attempt to negotiate the matter at hand. Determine whether you know opposing counsel and evaluate their approach to negotiation/any history you have with them.	Remember the ethical duty to fellow practitioners (but consider the extent of this duty as compared to ethical duties in litigation).
	Question(s)	What is your negotiation style? What do you know about opposing counsel's negotiation style?	Are there any dynamics between yourself and opposing counsel that could impact the negotiation? How can you minimise these?
Communication	Minimum Competency	Drawing on the issues identified in *Preliminary Considerations*, consider which issues you want to communicate to opposing counsel, and the questions you have about these. You will return to this phrasing throughout the next few components. Work with your client to identify this wording	Drawing on previously discussed information, are there any issues or facts that your client considers confidential? Consider the scope of your duty of confidence, and how this intersects with other ethical duties.
	Question(s)	How can you phrase key issues/questions to clearly communicate your points?	How will you answer questions about issues your client would prefer not to disclose?
Power	Minimum Competency	Consider whether power dynamics are relevant to any of the relationships, and how such power dynamics might impact the legal negotiation (note that this will more heavily impact certain legal jurisdictions, eg family law). Power dynamics are relevant to the relationship between clients, but also to legal practitioners. Power dynamics could include: financial situations, emotional manipulation, cultural issues, gender, age, experience.	Determine whether power could be used strategically/tactically between parties – consider whether this is unethical, and how to react if it becomes apparent.

	Question(s)	Is your client being affected by any power dynamics? Is your client the victim or perpetrator of power dynamics? Is there a power dynamic between yourself and opposing counsel?	What will you do if power imbalances become relevant for your client during the negotiation? What will you do if you are the victim of a power imbalance as a result of opposing counsel's tactics?

(a) *Advanced Competence*

Advancing your skillset regarding *Relationships and Communication* involves a deeper analysis of key relationships. When considering the scope of each relationship, explore both your client's perspective and that of any other parties/key stakeholders. How would each person involved in the negotiation describe the key relationships, and would they want/need the relationship(s) to continue? This will impact the level of emotion they invest in the negotiation, and could result in differing outcomes. The relationship with opposing counsel is also very important, because this could impact the progression of the legal negotiation. Law students and entry-level legal practitioners, particularly, must be careful that their opposing counsel do not take advantage of their inexperience. Finally, legal negotiation training often includes detailed consideration of legal negotiation theories or approaches to legal negotiation – including competitive (adversarial; distributive) and cooperative (integrative; problem-solving). It is useful to consider your approach to legal negotiation for each issue – noting that typically a legal practitioner does not adopt a single approach to a legal negotiation, but alters their approach as negotiations unfold.

To advance your communication, you must carefully consider the wording you choose. This is challenging, and takes significant practice – it is particularly difficult to craft precise wording during the negotiation itself. During preparation it is highly beneficial to draft key phrases pertaining to each legal issue, and to create a list of questions that you would like answered for each issue. Drafting these lists in advance allows you to give more detailed consideration to each point. This not only allows you to consider, in depth, the intersection of the *Preliminary Considerations* with *Relationships and Communication*, but improves your ability to ascertain key information during the negotiation itself.

(b) *Legal Negotiation Competition Advice*

Legal Negotiation Competitions involve teams, consisting of pairs of law students. Typically, competitors will self-select their partner. The relationship between negotiation partners is important to the flow of the negotiation. Partners need to determine their key strengths and weaknesses, and consider how they will work as a team during the negotiation. This includes identifying, for example, how they might split agenda items between them, and whether a particular partner is more suited to asking questions or negotiating offers/concessions. You must also identify your legal negotiation styles or preferences, to determine how these will intersect, and must consider how you will communicate with your partner during the legal negotiation.

The clients in a Legal Negotiation Competition are fictional, so it is often more difficult to determine whether any power dynamics are impacting the relationship. It also means, however, that power dynamics between fictional clients are more easily set aside to progress the negotiation. Competitors must be cognisant, however, that they are not substituting their own thought processes in place of their client's (fictional or not). There may also be power dynamics between competing teams, such as between experienced and inexperienced competitors. While there is scope for competition fun, competitors need to be aware of potential power dynamics and consider how to respond to these, within the scope of the Competition Rules.

4 *Parties' Interests*

Legal negotiation literature strongly emphasises the significance of parties' interests and positions. Both *interests* and *positions* will shape the next two components the Conceptual Framework, as well as the discussions at the legal negotiation itself. It is important to note that it is sometimes difficult to separate interests from positions, which will become clear as you start to identify these. While you must always be aware of your client's interests and positions, and negotiate cognisant of these, you will not always mention them to opposing counsel.

Table 14: Conceptual Framework of Minimum Competencies for Legal Negotiation Preparation

Part 4: Parties' Interests

Component 3: Parties' Interests			
		Preparation	Ethics
Interests	Minimum Competency	*Interests* include parties' underlying wants, needs, fears and concerns – these are highly beneficial to developing various options.[65] Each party will have interests related to each issue.	It is likely that the parties' interests will be in conflict – often, this is the reason for which legal negotiations were commenced. This can cause negotiations to become heated, and could result in the use of various tactics (eg stonewalling or deception). Note also that legal practitioners could use parties' interests against them (particularly if there are any interests that affect power dynamics, identified above).
	Question(s)	What are my client's interests related to each issue?	How should I respond if the discussions become heated? What will I do to address any ethically ambiguous tactics that arise? Is there any way that my client's interests could be used against them? How can I respond to this during the legal negotiation?
Positions	Minimum Competency	*Positions* includes the potential outcomes that relate to interests – ie, based on their interests, what is each party's position?	Often, negotiating about positions rather than interests can cause a negotiation to deadlock.[66]
	Question(s)	What is my client's ultimate position (goal, outcome) related to each issue?	If opposing counsel is only focusing on positions, how can I return the conversation to interests to progress the negotiation?

65 Roger Fisher and Danny Ertel, *Getting Ready to Negotiate: The Getting to Yes Workbook* (Penguin Books, 1995) ch 3; Roger Fisher, William Ury, and Bruce Patton (ed) *Getting to YES* (Random House, 2nd ed, 2003) 23; Folberg et al (n 46) 88-90; Gary Goodpaster (n 45) 169-71; Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 6th ed, 2020) 59 [2.55] ('*Alternative Dispute Resolution Sixth Edition*'); Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2002) 122 ('*Dispute Resolution in Australia*'); Peter Spiller (ed), *Dispute Resolution in New Zealand* (Oxford University Press, 1999) 45; Spegel, Rogers and Buckley (n 46) 53 [3.21].

66 Fisher, Ury and Patton (n 65) Introduction and Chapter One.

(a) *Advanced Competence*

To advance this competency beyond the minimum level, you must first more deeply analyse your client's interests. Interests are often founded in areas such as 'security, economic well-being, a sense of belonging, recognition, [and] control over one's life'.[67] Identify your client's interests – beyond legal interests – related to each issue. After this, consider the opposing client's perspective. Think about their interests and positions as relevant to each issue, and how they might respond to your client's interests and positions. This will assist you in determining how the negotiation will progress, and will enhance your argument (in a similar way to planning arguments for both plaintiff/prosecution and defence as part of litigation preparation).

(b) *Legal Negotiation Competition Advice*

The Legal Negotiation Competition structure, as a simulated negotiation based on written instructions, again raises challenges in relation to determining parties' interests. Typically, competition scenarios contain various ambiguities, and contradictions between each party's confidential facts. This can make it quite challenging to determine each party's interests and positions without the ability to question the client. As such, competitors need to be open to how discussions progress, whilst also prepared to push back against information presented by opposing counsel. This ties in with *Communication* in the previous component and involves asking key questions to determine the scope of the information presented.

5 *Option Generation*

After having determined the key *Preliminary Considerations*, *Relationships and Communication*, and *Parties' Interests*, you are well positioned to turn your mind to the different options available for your client. This involves careful consideration of various points, which are defined below. Throughout this component it is crucial to discuss each of these points with your client so that you can gain further insight into their perspectives and interests. Some of the topics in the table below may cause your instructions to change. It is therefore imperative that you revisit the issue of authority and instructions with your client, to confirm the relevant parameters.

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67 Ibid 27.

There are some key terms relevant to this component that you may have seen in relevant literature. Use these terms to guide you through the process of option development.

Table 15: Terminology Relevant to Option Generation

Best alternative to a negotiated agreement (BATNA)	The BATNA is the standard against which you can measure any offers. It will depend on your client's situation and can be identified through a discussion of your client's goals.[68] For example, in a contractual negotiation about price, a client may wish to walk away and deal with a different supplier if their preferred price is not met. This is their BATNA.
Worst alternative to a negotiated agreement, (WATNA)	The WATNA is the opposite of the BATNA. For example, if a client wants to avoid going to court at all costs, litigation would be their WATNA.
Zone of potential agreement (ZOPA)	The ZOPA is the negotiating or bargaining range within which both parties can potentially agree. Determining the ZOPA can encourage a good outcome for both parties, though not all issues will have a ZOPA.
Options	The options are ideas related to potential solutions. Using the table below you will develop a range of options that you will discuss with your client. Importantly, not every option you develop will be raised during the legal negotiation with opposing counsel.
Non-negotiables	The non-negotiables are the issues on which your client will not negotiate. These are often walk-away points: if you are unable to attain these particular terms, your client may wish to terminate negotiations.
Offers	Offers are based on the options that you have discussed with your client. These are the terms that you are proposing for the opposing client to consider. Through the process of legal negotiation both sides will present various offers, which will be negotiated until terms have been agreed to, or the legal negotiation is halted.
Concessions	Concessions are compromises, often agreed to as a sign of good will in relation to one issue, to gain more favourable terms on another.

[68] See, eg, Eunson (n 46) 5.

Table 16: Conceptual Framework of Minimum Competencies for Legal Negotiation Preparation

Part 5: Option Generation

Component 4: Option Generation			
		Preparation	Ethics
BATNA	Minimum Competency	Develop your client's BATNA.	It is unlikely that you will disclose your client's BANTA to the other side unless certain circumstances prompt it. Discuss this with your client. Remember your duties related to disclosure and deception, and determine how to address this during the negotiation (return to *Foundational Overarching Ethical Duties* above).
	Question(s)	What is my client's BATNA? What is my client's ideal outcome for each issue? If we are not able to reach an agreement, what is my client's best option (ie going to court, walking away from negotiations, etc)?	In which circumstances might I need to disclose my client's BATNA? How will I do this?
WATNA	Minimum Competency	Develop your client's WATNA.	It is highly unlikely that you will disclose your client's WANTA to the other side. Remember your duties related to disclosure and deception, and determine how to address this during the negotiation (return to *Foundational Overarching Ethical Duties* above).
	Question(s)	What is my client's WATNA? If we are not able to reach an agreement, what is my client's worst option (ie going to court, walking away from negotiations, etc)?	How will I protect my client's WATNA from being disclosed, without engaging in unethical tactics?
ZOPA	Minimum Competency	What is the ZOPA for each issue? Return to *Preliminary Considerations* and *Parties' Interests* to evaluate this.	Consider the information that will be disclosed in order to determine the ZOPA. Consider the ethical issues that would arise here, eg inflating bargaining ranges, bluffing, puffery.
	Question(s)	What are my client's parameters on each issue? (eg what is the maximum and minimum price)?	What questions can I ask to determine the ZOPA?

Options	Minimum Competency	Work with your client to generate a list of options – think creatively at this stage.[69] These options will be narrowed through the next stages.	Although you are encouraging your client to think broadly and creatively, do not allow them to assume that you will be able to achieve all of these options. Remind them that these are just *options* but that the actual solutions will be determined after the legal negotiation itself.
	Question(s)	What are the available options? What does your client think about each option? Are there any options your client would prefer to remove from the table?	What are the parameters around each option?
Non-negotiables	Minimum Competency	Identify which issues are non-negotiable and determine why these are important to your client.	Remember duties relating to scope of instructions and confidentiality.
	Question(s)	Are there any issues on which my client is not willing to negotiate? Determine the parameters of these.	Why would my client prefer not to negotiate on these issues? Is this information confidential?
Concessions	Minimum Competency	Determine whether any issues can be grouped together, and which options your client might be willing to use as concessions.	Remember duties relating to scope of instructions and confidentiality.
	Question(s)	Are there any options that my client might be willing to concede?	Do the concessions alter my instructions?
Offers (in conjunction with priority order/agenda)	Minimum Competency	Re-determine the order in which your client would like the issues to be addressed. Also determine the options that your client would like to present, and the order in which to present options. Discuss proposed priority order and offers with client.	Consider how options will be presented (high or low initial offers and associated strategy). Also note the ethical implications (ie will you be using any ethically ambiguous tactics such as bluffing or puffery? Consider the impact of these).
	Question(s)	In which order should the issues be addressed? Which options should be presented?	What are the parameters/scope of each option? Which ethically ambiguous negotiation tactics might be present?

[69] Fisher, Ury and Patton (n 65).

Authority	Minimum Competency	Confirm the authority your client has given you, and how this translates into your instructions.	Remember you must stay within your client's instructions and act within your client's best interests.[70] This is one of the most important considerations, but you will need to ascertain the information above before confirming the scope of authority with your client.
	Question(s)	Has my client altered their authority or instructions?	Has your client withdrawn authority or any instructions?

(a) *Advanced Competence*

There are two key areas to develop as part of *Option Generation*. The first focuses on your client, and the second on the opposing party, though each area should be developed simultaneously. You must determine your client's BATNA and WATNA for each issue, as well as a BATNA and WANTA for the other side. To do this systematically, work through each issue in your client's priority order, examining the criteria in the table above from each side's perspective. When addressing offers and concessions, discuss with your client whether they can anticipate any offers or concessions the other side will make, and whether there are any offers or concessions your client would like you to request. At this stage it is imperative to have an open dialogue with your client to determine how they wish to proceed. As you work through these criteria, your client will give you additional information. Your resultant discussions will shape your client's interests and may change the parameters of your instructions. This is an ideal opportunity to revisit your instructions and authority.

(b) *Legal Negotiation Competition Advice*

The artificial nature of Legal Negotiation Competitions means that it is difficult to precisely ascertain your client's interests. Although your written instructions will typically give you some guidance about your client's interests, these will not always be easy to translate into the items in the table above. It is important that competitors do not substitute their own interests for that of their client, though this is very challenging when negotiating purely based on written instructions. Despite the artificiality, competitors should still identify the BATNAs, WATNAs, ZOPAs, options, non-negotiables, concessions and offers to determine how these could be addressed in the best interest of their client.

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70 Law Council of Australia, *Conduct Rules* (n 43) rr 4.1.2; 8.1.

6 *Assessment of Solutions*

This component of the Conceptual Framework draws together all the preparation you have done so far. The process used for this component will help you to identify whether the options you have generated are viable. You will need to identify (and research) any factual information, legal principles, ethical requirements, or regulatory frameworks that could limit the scope of your client's options. Law students have a tendency to over-research and to plan detailed legal arguments before a legal negotiation, as if preparing for litigation. While such work can be beneficial in terms of thorough preparation, you should not approach a legal negotiation as if it were litigation. Instead, use legal research to determine your client's legal position, ie whether their rights have been infringed, or whether they would likely have to pay compensation if the case was to advance to trial. Then use this analysis to inform the way in which you develop a variety of solutions that could be beneficial for your client.

After working through this component, you will have generated a series of solutions to present during the legal negotiation. While client input must be sought where necessary to address each criterion in the table below, this component is typically conducted by the law student/legal practitioner alone. Importantly, the legal principles, ethical principles and regulatory frameworks against which you address the viability of your options must remain in the background during the legal negotiation unless they become relevant.

Finally, you will need to work with your client to determine whether, in light of relevant principles, requirements and/or frameworks, the proposed options are viable. This involves 'reality testing' each option, which will determine its legitimacy (the 'fairness' of the outcome for all parties). It is important to involve your client in discussions about 'reality testing' and legitimacy or viability, as it is ultimately your client who will have to abide by the agreement. At this stage of legal negotiation preparation, you also need to start considering the consequences of any outcome, and the affect these will have on your client and any other key parties and/or stakeholders. Before your client agrees to any negotiated settlement, you must be aware that courts will rely on parties' acts, statements, and intentions to determine whether a contract was created. Parties may intend to be immediately bound by a negotiated agreement; to be bound immediately but still seek a formal contract; not to be

bound at all unless a formal contract is created;[71] or to be bound immediately while intending to create a binding contract with additional terms.[72]

Table 17: Conceptual Framework of Minimum Competencies for Legal Negotiation Preparation

Part 6: Assessment of Solutions

Component 5: Assessment of Solutions			
		Preparation	Ethics
Facts	Minimum Competency	Ensure you understand all relevant facts and conduct research as necessary (eg into price).	Conduct thorough research – do not inflate bargaining ranges/prices.
	Question(s)	What are the parameters of each fact (eg are there any price constraints)?	How can you develop an argument on relevant factors (eg price) while maintaining ethics?
Legal Principles	Minimum Competency	Determine the legal principles that govern the relevant issues by conducting legal research. This might identify certain legal processes or parameters that need to be considered (eg under the *Civil Dispute Resolution Act 2011* (Cth) a 'Genuine Steps Statement' needs to be filed).[73]	Operate within the parameters of the law,[74] but remember that a negotiation is not a courtroom so there is more scope to develop a variety feasible solutions. Identify and recognise ethically ambiguous negotiation tactics (like bluffing and threats) that might be used, and how you will respond to these.
	Question(s)	What are the legal requirements that relate to this negotiation?	How will I respond if my client asks me to do something illegal? How will I respond to the use of ethically ambiguous negotiation tactics during the negotiation?
Ethical Requirements	Minimum Competency	Determine whether there are any ethical requirements that your client is obliged to meet. To do this, determine the relevant field (eg business) and any associated codes of ethics.	Consider what you will say to your client (or how you will react) if they ask you to do something that is against legal ethics or against any other the ethical codes relevant to the legal negotiation.
	Question(s)	Are there any ethical requirements relevant to the subject matter of this negotiation – eg does this fall within a	How do your client's ethical obligations (in their field) intersect with your ethical

71 *Masters v Cameron* (1954) 91 CLR 353, 360.

72 *Baulkham Hills Private Hospital Pty Ltd v G R Securities Pty Ltd and Others* (1986) 40 NSWLR 622, 628 expanding the doctrine in *Masters v Cameron* (1954) 91 CLR 353, 360 with reference to *Sinclair, Scott & Co v Naughton* (1929) 43 CLR 310, 317.

73 *Civil Dispute Resolution Act 2011* (Cth) s 9.

74 Law Council of Australia, *Conduct Rules* (n 53) r 4.1.5.

		certain field governed by its own ethics (eg business)? What is the impact of any such codes of ethics on the legal negotiation?	obligations towards your client, the law and administration of justice, and fellow practitioners?
Regulatory Frameworks	Minimum Competency	Determine whether there are any regulatory frameworks that govern your client's relationship with other parties or set a process for the negotiation.	Operate within the parameters of the law.[75]
	Question(s)	Are there any regulatory frameworks that relate to this negotiation?	Are there any regulatory limitations on a proposed agreement? How will you respond to your client if they ask you to arrange something that does not comply with the relevant regulatory framework?
Viability, legitimacy, and reality testing	Minimum Competency	Analyse the viability of each option that you have covered. This sometimes involves measuring the proposed option against the external criteria identified above (eg legal, ethical, or regulatory frameworks).	Remember your ethical duties, the Conduct Rules, and the scope of your authority. Also consider your answers to the questions in this column, above. The ultimate choice about agreeing or not agreeing to potential solutions rests with the client – this is the client's informed choice.
	Question(s)	Which questions should you ask opposing counsel about the options presented? Is each option a viable option – will your client abide by it? Does your client think it is a fair option? Does your client think it is a realistic option? What impact will the proposed options have on your client?	How should the information be presented? How will you respond to your client if they ask you to *work around* any external/objective criteria?

[75] Law Council of Australia, *Conduct Rules* (n 53) r 4.1.5.

(a) *Advanced Competence*

To extend the criteria above you need to consider each aspect from the perspective of the opposing party. This is particularly relevant when assessing the viability, legitimacy and reality of each potential option. Your client can assist in determining whether the opposing client will see each option as viable, fair, and realistic. This can further help you to identify any challenges that might arise during the negotiation. Additionally, each option can be assessed in terms of the relevant consequences for *each* party and key stakeholder. This will assist in determining whether parties will abide by any agreement that is made.

(b) *Legal Negotiation Competition Advice*

Competition instructions do not always contain sufficient information on which to conduct detailed research. You should do the best you can with the information available, and use the negotiation as an opportunity to ask opposing counsel detailed questions to ascertain any further information. While there is scope to read into the information contained in the scenario, you should not make up additional facts or information. Competitors are typically quick to rely on legal principles during a legal negotiation, but you should only use this information when necessary – a legal negotiation is designed to give parties a broader range of options than a typical judicial or tribunal award.

7 *Final Advice*

Legal negotiation preparation is a fundamental component of legal negotiation that is often neglected by law students. Having a good understanding of *how* to prepare for a legal negotiation, and the associated ethics, will assist in progressing the negotiation itself – if legal negotiation preparation has been thoroughly conducted, and you have a good understanding of the preparatory process and the applicable legal ethics, you will be well positioned for the legal negotiation. Although there are various unknowns that could unfold at the legal negotiation table, thorough preparation ensures that you are prepared for most situations that could arise. Being prepared results in a more ethical negotiation, and means that you are unlikely to be thrown by information presented by opposing counsel.

You must always consult your client throughout the process of legal negotiation. As a legal practitioner, you have a strong legal ethical duty, fiduciary duty, and contractual obligation to your client, and, ultimately, you are engaging in legal negotiation to ascertain a viable

agreement on their behalf, *for them*. As such, make sure you have constant communication with your client, ask them for the information you need (do not assume they will be able to determine the relevant points or to identify which information is key), and continually check the parameters of your instructions (even during the legal negotiation process). Following these steps reinforces your client-centred approach to legal negotiation and will stand you in good stead in legal practice.

After the process of legal negotiation preparation using the Conceptual Framework above, you will be well-positioned to conduct the legal negotiation and post-negotiation processes.

V CONCLUSION

In this chapter I have drawn together my research, with emphasis on the three key parts of legal negotiation – preparation, ethics, and client-centrality – to address the deficiencies in educational requirements pertaining to legal negotiation preparation. I have created a Conceptual Framework of Legal Negotiation Preparation that sits at the intersection of these three themes and accentuates their importance. I then operationalised this Conceptual Framework through the creation of Minimum Competency Tables, which can be used by law students and entry-level legal practitioners alike, and can thereby form a key part of initial legal negotiation education. These Tables outline the five key components of the Legal Negotiation Preparation Framework set out in Chapter Four as a model of 'good practice', as required by the first LCA Requirement. The Tables consequently describe the preparation and ethics factors relevant to each component of the Legal Negotiation Preparation Framework, highlighting the minimum competency required to demonstrate the first LCA Requirement to the standard of an entry-level legal practitioner. Each component is then elevated through the description of the relevant advanced competency, and any nuances relevant to Legal Negotiation Competitions are highlighted.

While the Conceptual Framework emphasises the intersection of key components for legal negotiation preparation, the use of the Tables ensures that law students have a methodical process for legal negotiation preparation. While there are various other lists that can be used to aid legal negotiation preparation, this one is unique in that it synthesises preparation with ethics and client-centrality. It provides clear explanations and advice to law students about how to achieve minimum competence on each factor of the five components of the Legal

Negotiation Preparation Framework, and also provides prompting questions to elicit appropriate information – either from the law student or their client. While experienced legal practitioners may argue that certain factors contained in the Tables are common sense, if such factors were common sense *to law students*, law student preparation for legal negotiation would not be considered deficient – either in the literature, or as observed during Legal Negotiation Competitions. Experienced legal practitioners may also disagree on the exact minimum competency required for each factor. I have developed the Tables to emphasise the key competencies relevant to each component of the Legal Negotiation Preparation Framework, acknowledging that the key five components are a reflection of 'good practice' legal negotiation preparation. As such, some factors in the Tables instruct law students to 'identify' or 'consider' various points. This avoids higher level analysis or critique that would be arguably form part of more advanced competencies, rather than those on par with an entry-level legal practitioner. The exception to this is the minimum competencies relevant to authority. A client's instructions, and the parameters of a legal practitioner's authority, are critical to the progression of a legal negotiation – without this, the negotiation cannot go ahead. It is therefore unquestionable that a law student must confirm this authority at every stage of their preparation, and throughout the legal negotiation itself.

I created the Conceptual Framework of Legal Negotiation Preparation to do three things. First, to reflect the five components of 'good practice' preparation contained in the Legal Negotiation Preparation Framework. Second, to highlight the importance of the three key pillars of legal negotiation – preparation, ethics, and client-centrality. Finally, to operationalise the process of legal negotiation preparation in a structure that allows law students to understand and apply the components of 'good practice' legal negotiation *while* engaging with ethics and client-centred legal negotiation. This method of operationalising the Conceptual Framework provides clarity over an area of legal negotiation that has been forgotten in most recent literature, and is my original contribution to the field of legal negotiation education.

CHAPTER SEVEN: CONCLUSION

I INTRODUCTION

Legal practitioners' primary function is to represent clients: to give them a voice when they might otherwise not have one. Legal negotiation is one of the most important skills that lawyers use on a daily basis in representing clients, however legal negotiation is barely taught (if at all) during undergraduate law studies. This significantly questions the role of legal negotiation in legal education. Instead, law students are expected to develop and refine their legal negotiation skills to the standard of a competent entry-level legal practitioner during their short, postgraduate Practical Legal Training studies. Indeed, the PLT Standards set out the performance criteria – the LCA Requirements – that a law student must meet to satisfy the requisite standard. For legal negotiation preparation, the law student must have 'prepared, or participated in the preparation of, the client's case properly having regard to the circumstances and good practice.'[1] Preparation itself remains undefined in the LCA Requirements, as does 'good practice'. Detailed thematic analysis of the literature is required to understand 'good practice' legal negotiation preparation. Yet, law students are expected to meet these standards.

Consequently, my thesis was derived from the premise that law students insufficiently prepare for legal negotiations. My research is important and original because it addresses the gap between what law students *actually* know about legal negotiation preparation and what they are *expected* to know to prepare to represent a client in a legal negotiation, and provides guidance about how these skills can be better attained as part of legal negotiation education. This has been driven by my overarching research question:

> What are the minimum competencies a law student must meet to demonstrate competent legal negotiation preparation prior to being admitted to legal practice?

To answer this question, I identified four relevant issues, which formed the basis for five research sub-fields. The first issue is that there is no clear definition of *legal negotiation* in the literature. Instead, the literature focuses on the theories of negotiation, and relies on an accepted explanation of *legal negotiation* that has never been explicitly formulated or evaluated in the literature. To remedy this, I created a Taxonomy of Legal Negotiation,

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[1] Law Admissions Consultative Committee, *Practical Legal Training Competency Standards for Entry-Level Lawyers* (2015) ('*PLT Standards*') [5.10] 'Lawyers' Skills' Element 6.

determining that a negotiation can have various *legal* components, but that a central definition of legal negotiation sits at the intersection of five key factors: *Parties and Relationships; Content and Context; Consequences and Outcome; Ethics and Accountability; Qualifications and Representation*. To satisfy this central definition of legal negotiation, the legal practitioner – bound by legal ethics – must be representing a client, who has given the legal practitioner the authority to negotiate a legal matter with legal consequences on the client's behalf. Assessing this Taxonomy through the lens of legal negotiation preparation led me to determine that there are three key pillars upon which legal negotiation is founded: preparation, ethics, and client-centrality.

The second issue I identified is that legal negotiation does not feature during the undergraduate law curriculum except in passing, related to a broader component on dispute resolution. Legal negotiation is required to be taught only at Practical Legal Training level, and while it *is* included in the LCA Requirements, these contain limited explanation as to how law students are expected to prepare for a legal negotiation. The reference to 'good practice' is not substantiated in the LCA Requirements or PLT Standards and is not clearly defined in the relevant literature. Further, there is only implicit reference to ethics in the LCA Requirements, which is not related to the requirement about legal negotiation preparation. These deficiencies in legal education led to my third and fourth research sub-questions, which were also influenced by my experiences as a Legal Negotiation Competition judge and question writer. I had previously identified a gap between my expectations of law student negotiators' preparation and the way that they conducted themselves during a negotiation. I put this down to lack of legal negotiation preparation, an idea that was strongly echoed throughout the relevant literature.[2] After my initial research, I hypothesised that the overabundance of literature in this area, littered with 'label confusion',[3] was a contributing factor to law students' lack of preparation. Further, law students might resort to basic levels of preparation due to feeling overwhelmed at the sheer amount of available literature and resources, and their often-contradictory nature. After detailed thematic analysis of the

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2 See, eg David Spencer and Marilyn Scott, 'ADR for Undergraduates: Are We Wide of the Mark?' (2002) 13(1) *Australasian Dispute Resolution Journal* 22. See also: Nadja Alexander and Jill Howieson, *Negotiation Strategy, Style, Skills* (LexisNexis Butterworths, 2nd ed, 2010) 106; Roger Fisher and Danny Ertel, *Getting Ready to Negotiate: The Getting to Yes Workbook* (Penguin Books, 1995) 4.

3 Andrea Kupfer Schneider, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (2002) 7 *Harvard Negotiation Law Review* 143, 152 ('Shattering Negotiation Myths').

relevant literature, I determined 36 themes, which could be broadly grouped into an amended version of Fisher and Ury's four principles of negotiation.[4] This resulted in the Legal Negotiation Preparation Framework, comprising *Preliminary Considerations, Relationships and Communication, Parties' Interests, Option Generation, and Assessment of Solutions*. This Framework set out the requirements of 'good practice' in line with extant literature. I analysed my original data in light of this Framework and determined that the view that law students are unprepared for legal negotiations is incorrect. I found that most respondents reported varying amounts of legal negotiation preparation, however their approach to preparation was ad hoc, and typically informed by what they had done to prepare for previous negotiations. After further analysis evaluating specific factors of legal negotiation preparation, I concluded that while law students were addressing many relevant components of preparation, they did not have a clear or reasoned approach – they did not understand *why* they were preparing on certain elements. This meant that they also struggled to apply their understanding of legal negotiation preparation to a specific legal negotiation scenario.

The fourth issue I identified relates to legal negotiation ethics. I noticed, first, that the Academic Areas, PLT Standards and LCA Requirements fail to specifically link legal negotiation and legal ethics. Although the LCA Requirements make implicit reference to legal negotiation ethics by noting that law students must have 'identified the strategies and tactics to be used in negotiations and discussed them with and obtained approval from the client,'[5] this merely implicit reference to ethics and authority is insufficient. In Australia, legal practitioners have three primary ethical duties: to the law and the administration of justice; to their client; and to their fellow legal practitioners. These duties and further ethical obligations are set out in the Conduct Rules and are enforceable through disciplinary action under Legal Practitioner Legislation. Legal practitioners are held to high standards of ethics, which must be reflected in all aspects of their legal work. In analysing the Conduct Rules, it is clear that rules pertaining to conduct in *court* include all forms of dispute resolution, thus including legal negotiation. However, there are instances of absurdity if the definition of *court* is not limited to a judicial body, tribunal, or dispute resolution process involving a third-party facilitator or decision maker. I analysed the Conduct Rules and ethical obligations,

4 Roger Fisher, William Ury, and Bruce Patton (ed) *Getting to YES* (Random House, 2nd ed, 2003).

5 Law Admissions Consultative Committee, *PLT Standards* (n 1) [5.10] 'Lawyers' Skills' Element 6, Requirement 2.

and several factors that influence legal practitioner decision making, to determine how these apply to legal negotiations. This has rarely been done in the Australian context. I found that the majority of my respondents did consider ethics, and that some of those who did not consider the role of ethics, upon reflection, would have preferred to be more prepared on this factor. My data indicated some confusion about deception, which is one of the most common ethically ambiguous negotiation tactics. As such, I provided a case study on deception in legal negotiation, analysing this through the lens of the Conduct Rules, ethical obligations, and ethics of legal practitioner decision making. Throughout Chapter Five I consistently found that there is significant confusion as to how legal ethics apply to legal negotiation, and I consequently echoed academic calls for a Code of Ethics specific to the legal negotiation environment, which would provide clarity in this area.

To answer my overarching research question, I drew together my Taxonomy of Legal Negotiation, Legal Negotiation Preparation Framework, analysis of legal negotiation ethics and my original data to create a Conceptual Framework of Legal Negotiation Preparation that sits at the intersection of the pillars of legal negotiation: preparation, ethics, and client-centrality. This Conceptual Framework provided a means of addressing the intersection between these pillars, and a way of operationalising legal negotiation preparation. The Conceptual Framework, however, could not be easily used as part of legal education. I therefore used the five components from the Legal Negotiation Preparation Framework as a basis from which to determine the minimum competencies a law student must meet to be considered competent at legal negotiation preparation, for the purpose of admission to legal practice. In developing these minimum competencies, I created explanations and advice for law students as to the preparatory and ethical components of each competency, as well as a series of questions they could use to generate discussion with their client. These questions were intended to identify key information that the law student could then use to achieve that specific minimum competency. While the lack of clarity in the Conduct Rules (as to legal negotiation ethics) and LCA Requirements (as to legal negotiation preparation) is an insufficient foundation upon which to train law students, my Conceptual Framework and its operationalisation provides law students with an avenue through which to develop their legal negotiation skills in this area, which, in turn, will give them the best possible chance to competently carry out the legal negotiation.

My original contribution to knowledge to the fields of legal negotiation, legal negotiation education, and legal education in this thesis is four-fold. First, I analysed relevant literature to develop a Taxonomy of Legal Negotiation, culminating in a central definition of legal negotiation. Secondly, I used thematic analysis to exemplify 'good practice' requirements for legal negotiation preparation from relevant literature – synthesising a field replete with an overabundance of information. I collected original data from 146 law students across New South Wales, Queensland, South Australia and Western Australia about how they prepare for legal negotiations and used methods of phenomenography and thematic analysis to assess whether law students meet the requirements of 'good practice' legal negotiation preparation. Thirdly, I evaluated the application of legal ethics to the legal negotiation environment, an underdeveloped field of scholarship in Australia. I offered greater insight by providing a case study on deception, specifically noting the challenges and confusion this area presents to law students. Finally, I used my analyses and original data to create a Conceptual Framework of Legal Negotiation Preparation that synthesises the three key themes of legal negotiation preparation. I then used Minimum Competency Tables to operationalise this Conceptual Foundation in a workable manner, that can be easily used by law students as part of legal negotiation education, to overcome the deficiencies currently inherent in legal education.

My research shows that law students are lacking fundamental skills relevant to legal negotiation preparation. While this may be addressed through undergraduate and Practical Legal Training curricula, I propose that there are specific ways through which this can be remedied, or at least partially remedied. In Part II below I suggest recommendations that spring from my findings, addressed to five key stakeholders. After this I consider future research that could be done in this field, before providing my concluding thoughts.

II RECOMMENDATIONS

My original data provides insight into Australian law students' preparation for legal negotiations. Primarily, this shows that law students' preparation is not in the dismal, neglected state that is reflected in the literature. Instead, it appears that students' preparation is ill-informed, likely exacerbated by the 'label confusion' inherent in the literature.[6] As a result of my findings, I used the first LCA Requirement to inform a set of minimum competencies to help guide law students and entry-level legal practitioners through the process of legal negotiation preparation. My findings have, additionally, led to the identification of other relevant issues that could be addressed by key stakeholders. Below, I outline a proposed response to my findings, by considering the way that five key stakeholders could contribute to law students' legal negotiation skill development.

A Regulators

While the main regulators of legal practitioner behaviour are the Law Societies in each jurisdiction, the Law Council of Australia is the 'peak national representative body of the Australian legal profession.'[7] In this role, the Law Council of Australia 'works for the improvement of the law and of the administration of justice,'[8] developing various policies and guidelines that are often implemented by the states and territories – for example, the creation of the Conduct Rules, the Academic Areas of Practice, the PLT Standards, and the Uniform Admission Arrangements. My first recommendation is that the Law Council of Australia create a policy providing specific guidance on what constitutes legal negotiation, perhaps reflective of my Conceptual Framework. Alternately, the Law Council of Australia's 1989 Policy on Alternative Dispute Resolution could be updated to include this.[9] Such guidance would solidify the Law Council of Australia's recognition of legal negotiation as a fundamental skill that is utilised by legal practitioners every day in legal practice.

Secondly, that the Law Council of Australia introduce specific conduct rules that operate in legal negotiation environments, either as a standalone Code of Ethics or as a subset of the Conduct Rules. This would provide greater clarity about legal practitioners' behaviour during

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6 Schneider, 'Shattering Negotiation Myths' (n 3) 152.

7 Law Council of Australia, 'About us', *Law Council of Australia* (Web Page, 2020) <https://www.lawcouncil.asn.au/about-us>

8 Ibid.

9 Law Council of Australia, 'Law Council Policy on Alternative Dispute Resolution' (1989).

negotiations, and greater insight about appropriate responses to unethical or ethically ambiguous behaviour. This would further inform the definition of *legal negotiation* and could emphasise the ways in which the definition of *court* currently in the Conduct Rules applies to a legal negotiation setting.

Thirdly, that the Law Council of Australia provide more specific requirements for the competencies that entry level practitioners need to meet in relation to legal negotiation, and thereby re-evaluate the role of legal negotiation in legal education. My thesis takes a positive step towards this. While the depth in which I consider the minimum competencies – using Minimum Competency Tables – could not be replicated in the PLT Standards, the seven components considered in the Conceptual Framework could be included. This thesis clearly illustrates that legal negotiation preparation is a much broader concept than is currently encapsulated within the LCA Requirements, and this needs to be remedied.

Fourthly, that the Law Council of Australia allow law students further training opportunities. While the 2015 review of the Academic Areas rejected the inclusion of legal negotiation in undergraduate studies, this should be reconsidered, particularly bearing in mind the importance of this skill, and the increasing recognition of legal negotiation as a vital skill for lawyers and professionals.[10] This could mirror the approach taken to teaching statutory interpretation. In describing the Law Council of Australia 'Statement on Statutory Interpretation', the Law Council of Australia website states:

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[10] See, eg, Law Society of New South Wales Commission of Inquiry, *The Future of Law and Innovation in the Legal Profession* (2017) ('*FLIP Report*'). Negotiation was specifically listed in the top ten skills for 2020 by Forbes in 2018: Avril Beckford, 'The Skills You Need to Succeed in 2020', *Forbes* (Web Article, 6 August 2018) <https://www.forbes.com/sites/ellevate/2018/08/06/the-skills-you-need-to-succeed-in-2020/#4d53d46288a0>. While negotiation is not listed in the 2019 version of Forbes' top 10 skills for 2020, many of the skills required for negotiation are listed, including critical thinking, adaptability and flexibility, creativity, emotional intelligence, cultural intelligence and diversity, judgment and complex decision making, and collaboration: Bernard Marr, 'The 10+ Most Import Job Skills Every Company Will Be Looking For In 2020', *Forbes* (Web Article, 28 October 2019) <https://www.forbes.com/sites/bernardmarr/2019/10/28/the-10-most-important-job-skills-every-company-will-be-looking-for-in-2020/#5c53ab7a67b6>.
Further, the World Economic Forum stats that negotiation is a 'human skill' which will 'retain or increase [its] value' in 'the 2022 skills equation' and has 'rising demand': World Economic Forum Centre for the New Economy and Society, *The Future of Jobs Report* (Insight Report, 2018) 12. It is one of the key interpersonal skills required 'to define high-quality learning in the Fourth Industrial Revolution: World Economic Forum Centre for the New Economy and Society, *The Future of Jobs Report* (Insight Report, January 2020) 4, 7, 19.

> [t]he Council of Australian Law Deans has been asked for its advice on whether the knowledge and skills can be imparted by using the pedagogical techniques favoured by most law schools and how it might be possible to ensure that each law school arranges for its graduates to attain the relevant knowledge and skills, without making Statutory Interpretation a further Academic Requirement for admission.[11]

This option could be applied to the teaching of legal negotiation at undergraduate level.

Finally, that the Law Council of Australia offer greater access to negotiation training and development for members of the legal profession. While some of this could take the form of continuing professional development courses, supplementary opportunities for involvement in longer courses – including the chance for skill development, feedback, and reflection – would benefit both recently admitted legal practitioners and the profession as a whole. Incorporating legal negotiation in the Academic Areas, PLT Standards and as part of continuing professional development and other opportunities for ongoing development would provide significant and appropriate learning experiences and scaffolding of legal negotiation.

B Legal Practitioners (Experienced Legal Negotiators)

Legal practitioners world-wide have embraced legal negotiation as a field and recognised the important role that negotiation takes in resolving legal matters. My recommendations for legal practitioners are three-fold. First, to continue to embrace legal negotiation and to never lose sight of the fundamental role of client-centrality. It is imperative that emphasis is placed on the importance of the ethical duty to the client and the need to act within the scope of the client's authority, and that such emphasis is understood and maintained by legal practitioners.

Secondly, to educate and encourage law students and entry-level legal practitioners to develop their legal negotiation skills. Additional encouragement and insight, and opportunities for mentoring and further skill development, are fundamental to the professionalism of legal practice. This is particularly relevant in terms of legal negotiation ethics. While there is a scarcity of literature about legal negotiation education in the Australian context, legal negotiation ethics are used every day in legal practice. Law students and entry-level legal practitioners must glean important insights from more experienced

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11 Law Council of Australia, 'Statement on Statutory Interpretation' (Web Page) < https://www.lawcouncil.asn.au/lacc/documents/proposals_submissions.cfm?cv=1>.

practitioners, who can provide critical explanation of the way in which the Conduct Rules, ethical obligations, and practical application of legal negotiation co-exist in legal practice.

Finally, I encourage legal practitioners to become involved in judging Legal Negotiation Competitions. These competitions provide a fundamental role in both legal education and legal negotiation pedagogy.[12] Legal practitioner involvement provides law students with greater real-world experience. Involvement can include offering scenarios that form the basis of negotiation questions; or offering judging or coaching services.

C Legal Educators

Law schools must teach legal negotiation as part of legal education. While this is not specifically required as part of the Academic Areas, it is arguably encompassed within directives pertaining to dispute resolution. Teaching negotiation can be labour- and time-intensive, but finding creative ways to encourage students to practice legal negotiation skills will help to reduce the litigation-focus that is prevalent in Australian Law Schools.[13] Creative methods could include providing course credit to students who compete in Legal Negotiation Competitions; adding an in-class negotiation and a reflective assessment; specifically addressing negotiation during legal ethics courses; asking students to negotiate the terms of a contract as part of a drafting class, or having faculty members host a negotiation or dispute resolution related discussion group.[14] All of these options provide stronger scaffolding of legal negotiation skills throughout the curriculum. This will strengthen the links between legal negotiation theory and practice and will consequently allow students to identify and develop skills relevant to both legal negotiation preparation and ethics.

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12 Peter Kesting and Remigiusz Smolinski, 'When Negotiations Become Routine: Not Reinventing the Wheel While Thinking Outside the Box' (2007) 23(4) *Negotiation Journal* 419.

13 Meg Wootten, 'How Do Law Students Understand the Lawyer's Role? A Critical Discourse Analysis of a First-Year Law Textbook' (Conference Paper, Wellness for Law Conference, 16 February 2017); Spencer and Scott (n 2) 34-5.

14 Such a group is facilitated by my Principal Supervisor at Flinders University. Such activities could also be extended using implementation negotiation theory, a recent framework designed to advance lawyers' negotiation skills by focusing on deal design: Tina L Stark, 'Implementation Negotiation: A Transactional Skill That Builds on and Transforms Classic Negotiation Theory' (2018-2019) 20(2) *Transactions: The Tennessee Journal of Business Law* 513. The preparatory elements of this would derive from the conception of legal negotiation presented in this thesis, and would allow law students to develop their knowledge of legal negotiation more fully prior to entering legal practice. See also suggestions by Arvid Bell and Taylor Valley, 'The Art of Negotiation Exercise Design: Five Basic Principles to Produce Powerful Learning Experiences' (2020) 36(1) *Negotiation Journal* 57.

Practical Legal Training providers, who already teach legal negotiation, must consider how best to approach preparation and ethics. Without further Law Council of Australia guidance as to ethics relevant to the legal negotiation environment, it is worth involving legal practitioners to provide advice about how legal negotiation ethical dilemmas could be approached in real life.[15] Since this is the only opportunity law students have to both learn practical legal negotiation skills during their legal education and to further develop *and* refine these, it is paramount that both preparation and ethics take centre-stage during their Practical Legal Training. The inclusion of practical skills, feedback, and reflection is also fundamental before students advance to legal practice. This will mean that they are able to meet the minimum competencies and the LCA Requirements during their placement and final assessments.

D Law Students' Associations

In a time when law students typically struggle to balance study with many other commitments, and when the workload of academic staff is seemingly ever-increasing, it is becoming common for LSAs to reduce the amount of competitions offered. I strongly encourage LSAs to maintain their competitions offerings, but to consider rebranding these as skill development exercises. I helped lead a similar rebrand of first year competitions at my home university in relation to both Client Interview and Advocacy competitions, and this resulted in increased numbers of participants and increased participant engagement, recognised through an Award for Teaching Excellence.[16] While law students are stereotypically competitive, the rebranding of legal competitions as *skill development exercises* refocuses law students' attention, and reprioritises the opportunity to learn and develop professional skills. Such a rebrand is most easily done with the support of academic staff, however, who can assist in running skill development seminars and providing feedback. Not all institutions have the resources to support this.

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15 I note that some PLT providers already invite practitioners to facilitate sessions on practical skills, though this does not always include legal negotiation.

16 This formed the basis of a presentation that I gave at the Global Legal Skills Conference: Samantha Kontra and Brayden Mann, 'Embedding Legal Skills for 21st Century Lawyers from Orientation' ('Conference Presentation', Global Legal Skills Conference, December 2018).

I also strongly advise LSAs to reach out to members of the legal profession to be involved in skill development and competitions. While legal practitioners are incredibly busy, many welcome the opportunity to give back to the profession. It can be difficult to secure legal practitioner involvement, but reaching out to faculty contacts, patrons, and the relevant Law Societies or Foundations can prove fruitful.

E Law Students

I conclude my recommendations with advice for law students. Legal education is often considered adversarial. Despite evolving technologies and workforces, a typical image of a legal practitioner is in front of a courtroom, a view perpetuated by various legal pop culture references. In reality, legal negotiation is a skill that legal practitioners utilise every day, whereas few practitioners make daily court appearances. Legal negotiation is a requirement of legal practice, and developing strong skills in this area will allow the best possible service to a client. Law students must consequently embrace legal negotiation and use every opportunity to develop their skills in this area. While legal negotiation is often considered a *soft* skill, it is a skill that lays the foundation for all forms of dispute resolution, and for litigation. In my experience, law students often consider legal negotiation to be confusing, and overwhelming. This could, in part, be because of the amount of literature relating to legal negotiation preparation, and the lack of literature relating to legal negotiation ethics. This renders legal negotiation preparation ambiguous, particularly for those unable to gain practical experience, and results in avoidance behaviour. I encourage law students to consider the role of legal ethics from the beginning of their studies, and the relevance of these ethics to each unit they study and all that they do. More broadly, I encourage law students to take every possible opportunity to develop their practical skills – this will serve them well no matter which field they choose to pursue.

III FUTURE RESEARCH

In this thesis I used various analyses to determine current trends in the literature in relation to legal negotiation preparation and ethics. I then used original data collected from current law students to provide law students' perspective into their current legal negotiation practices. These two methods informed my conclusions that law students only meet the two lowest components of learning,[17] remembering and understanding, and are generally unable to accelerate through the middle components, applying and analysing. There were various difficulties faced during my research, particularly in relation to data collection, which could be developed for future research.

I approached participants in the Legal Negotiation Competitions run throughout Australian Law Schools as a way to standardise my data collection. These Competitions are run almost identically, with the main differences involving the number of preliminary rounds, or whether the competition was aimed at junior or senior students. My data captured insights from students at all levels of law study. While students were asked which year level they were studying, this was often complicated by double or triple degrees, exchanges, deferral of studies, and placements. Ideally, data would be collected from students undertaking Practical Legal Training. The structure of Australian law degrees at some universities is such that Practical Legal Training skills are embedded throughout undergraduate studies. This makes it difficult to separate data from undergraduate students and Practical Legal Training students. Collecting data from Practical Legal Training students is also complicated by the fact that each Practical Legal Training provider teaches legal negotiation differently in terms of the exercises or role plays conducted in class. The Legal Negotiation Competitions provided a standardised format and allowed participants to draw on a specific negotiation when writing their responses. Overall, this approach is sound as it relies on specific examples rather than asking respondents to consider the last time they negotiated.[18] In future studies, however, it

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17 Based on Bloom's Taxonomy. See, eg, Paul D Callister, 'Time to Blossom: An Inquiry into Bloom's Taxonomy as Hierarchy and Means for Teaching Legal Research Skills' (2010) 203 *Law Library Journal* 191; Darcy Haag Granello, 'Encouraging the Cognitive Development of Supervisees: Using Bloom's Taxonomy in Supervision' (2000) 40(1) *Counselor Education and Supervision* 31.

18 Schneider and Williams respectively asked their respondents to consider their last negotiation – arguably asking legal practitioners to do this invites more sophisticated insight than asking law students, who might draw on a five-minute in-class negotiation. Situating the data collection in a specific competition therefore provides relevant and significant context. See Gerald R Williams, *Legal Negotiation and Settlement* (West Publishing Co, 1983); Schneider, 'Shattering Negotiation Myths' (n 3). See above Chapter Three for more detailed analysis of Williams' and Schneider's methods.

would be useful to attain data from Practical Legal Training students as well as from undergraduate students and potentially even legal practitioners in their first year of legal practice, to determine whether legal negotiation preparation skills improve over time.

Another consideration in relation to the population from which my data is drawn concerns the nature of students who enter the Negotiation Competition. In my Pilot Study I asked respondents about their motivations for entering the Legal Negotiation Competition. The majority of respondents entered to gain experience, negotiation practice or professional growth, or for fun/to win.[19] Students who enter such competitions are typically more committed and focussed than those who do not.[20] This could mean that information collected from competitors is not representative of the average law student – although, if highly motivated and committed Legal Negotiation Competition competitors, who arguably spend additional time becoming acquainted with the requirements of a legal negotiation in order to progress through competition rounds, are *still* struggling to understand the relevance of various factors of preparation, this does not bode well for the average law student.

Future research must also consider the way in which such questionnaires are administered. One of the challenges of using Law Students' Associations to distribute questionnaires is their typical composition of overworked volunteer law students, overwhelmed by the running of the competition itself. While this is disappointing in terms of the number of responses, it is reflective of the nature of these Law Students' Associations roles. For my data collection, the highest number of participants were from my home state, likely because I was able to visit the universities and meet with their competitions administrator(s) or member(s) of the Executive Committee to discuss the project and explain the data collection process. This was not possible in relation to law students in other states. This could be addressed if the respective Law School assisted the Law Students' Association with the administration of the study. Alternately, running the study during Practical Legal Training courses could eliminate the use of Law Students' Associations altogether.

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19 Some entered for other reasons, such as 'bullied by coordinator': 1206PNPR (Response to Pilot Study Pre-Negotiation Questionnaire, 2012); being made to enter by their teammate: 1211PNPR (Response to Pilot Study Pre-Negotiation Questionnaire, 2012); being asked to enter at the last minute as a stand in: 1219PNPR (Response to Pilot Study Pre-Negotiation Questionnaire, 2012).

20 See, eg, discussion by Smolinksi and Kesting (n 12). Note, though, that some students choose not to participate in such competitions because they would prefer to put the time into their studies; or because their time is consumed with other commitments, such as paid work or caring responsibilities.

My research has provided novel insight into how Australian law students prepare for legal negotiation, why they choose this method of preparation, a detailed analysis of the priority students gave to each of the factors involved in such preparation, and the consideration given to legal negotiation ethics as part of preparation. Based on the findings reached throughout my thesis, it would be beneficial to conduct further studies collecting data from a broader population, drawing more representatively across Australia. Such data should be collected from both undergraduate and Practical Legal Training students, as well as junior practitioners. This would allow the research to evolve and enable a comparison of the information provided by these three cohorts to determine whether they approach legal negotiation preparation differently. It would also be beneficial to collect data from students before and after their Practical Legal Training studies in legal negotiation, to determine the impact of studying this field. Ideally, a longitudinal study tracking undergraduate law students through their Practical Legal Training studies and entry into the legal profession, surveying them approximately five times, would provide incredible insight. Having the support of regulatory bodies, such as each jurisdiction's Law Society, and/or the Law Council of Australia, would increase the ease with which data could be collected. The results from such studies could add further depth to my findings, and could allow the evolution of the Conceptual Framework and Minimum Competencies that I propose.

IV CONCLUDING THOUGHTS

Legal negotiation is one of the most significant methods through which legal practitioners obtain desirable outcomes for their clients. It is a fundamental part of legal practice, which is simultaneously under-explored and over-explored in relevant academic literature. This thesis seeks to provide analysis and context to the melange of literature, to then offer guidance to law students and inexperienced legal negotiators. The paramount focus of my thesis is on law students, and ways of improving their preparation for legal negotiations, through clear guidance that can be embedded in legal negotiation education. These students are the future of the legal profession, and the reputation of the profession will lie in their hands. My thesis is written in response to my observations of law student negotiations, particularly regarding the lack of preparation done prior to Legal Negotiation Competitions. I examined law students' approach to legal negotiation preparation and ethics during their undergraduate law studies, at the prime time when they were developing their legal negotiation skills, albeit in absence of a specific curriculum directive to include negotiation during undergraduate studies. My findings that law students do prepare, but that this preparation is ad hoc and does not reflect a depth of understanding or critical analysis, were unsurprising, though not entirely reflective of the literature.

Ultimately, my thesis offers guidance to law students through the development of a Conceptual Framework of Legal Negotiation Preparation. This draws together each thread of my thesis: providing a Taxonomy of Legal Negotiation to respond to comments about defining legal negotiation from the 1990s;[21] the need to define 'good practice' legal negotiation preparation as addressed in the first LCA Requirement; the lack of explicit mention of legal negotiation ethics in the LCA Requirements, PLT Standards, and Academic Areas, and only minimal reference in relevant literature; and the importance of centralising the client in the process of legal negotiation. These key themes were developed into a theoretical Conceptual Framework, which I then operationalised through the creation of a series of Minimum Competency Tables that law students can use to meet the entry-level standards required by the PLT Standards and LCA Requirements. This then led into a series of recommendations for regulators, legal practitioners, legal educators, LSAs and law

[21] Carrie Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' [1983] (4) *American Bar Foundation Research Journal* 905, 928 ('Legal Negotiation: A Study of Strategies in Search of a Theory').

students, identifying key ways that these stakeholders can encourage legal negotiation skill development.

Legal negotiation requires legal practitioners to take their clients' lives into their own hands, albeit within the scope of set authority. This thesis offers a step toward the development of law students' legal negotiation skills, with a focus on legal negotiation preparation, ethics, and client-centrality that can be embedded in legal negotiation education. It is imperative that law students are adequately trained in these skills, and that they are given the opportunity to develop, refine, and practice their legal negotiation skills so that, when they enter legal practice, they can maintain their fundamental ethical duties to the law and the administration of justice, their fellow practitioners, and, ultimately, to their client. In this way, law students can rediscover the seemingly forgotten component of legal negotiation – preparation – and elevate it by using the minimum competencies proposed in the Conceptual Framework of Legal Negotiation Preparation.

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APPENDICES

Appendix A: Requirements for Admission to Legal Practice in Australia

To become a legal practitioner in Australia, a law student must:[1]

1. be over 18 years of age;[2]
2. have completed an approved Australian law degree of at least three year's duration,[3] which contains the prescribed academic areas;[4]
3. have completed the PLT standards;[5]

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1 These requirements are governed by the Law Council of Australia's Law Admissions Consultative Committee, and their recommendations have been adopted by each State and Territory in Australia.

2 *Legal Profession Act 2006* (ACT) s 21(1); *Legal Profession Uniform Law 2014* (NSW) s 16(1); *Legal Profession Act 2006* (NT) s 29(1)(a); *Legal Profession Act 2007* (QLD) s 30(1)(a); *Legal Profession Uniform Law Application Act 2014* (Vic) s 16(1); *Legal Profession Act 2007* (Tas) s 25(1).

3 Law Admissions Consultative Committee, *Statement on Duration of Legal Studies* (2013); Law Admissions Consultative Committee, *Model Admission Rules* (2015) r 2(1). These rules have been adopted in each State and Territory in Australia: *Legal Profession Uniform Admission Rules 2015* (NSW) r 5(1)(a); *Legal Profession Act 2006* (NT) s 4(1)(a); *Supreme Court (Admission) Rules 2004* (QLD) r 6(3)(a); *LPEAC Rules 2018* (SA) r 7(1)(a); *Legal Profession Uniform Admission Rules 2015* (Vic) r 5(1)(a); *Legal Profession (Board of Legal Education) Rules 2010* (Tas) r 4(1)(a); Law Admissions Consultative Committee, *Model Admission Rules* (2015) r 2(1) has been adopted in Western Australia. Compliance with these standards are additionally enforced by LACC who is tasked with reviewing these standards to ensure their effectiveness and relevance to the admission of practitioners to the Supreme Court: Law Admissions Consultative Committee, *Accreditation Standards for Australian Law Courses* (undated).

4 Law Admissions Consultative Committee, *Prescribed Academic Areas of Knowledge* (2016) adopted in each Australian State and Territory: *Legal Profession Act 2006* (ACT) s s 21(1)(a); *Court Procedures Rules 2006* (ACT) r 3605(1)(a); *Legal Profession Uniform Law 2014* (NSW) s 17(1)(a); *Legal Profession Uniform Admission Rules 2015* (NSW) r 5(1)(c) and Schedule 1; *Legal Profession Act 2006* (NT) ss 10(1); 10(3); 24(a); and 29(1)(a); *Legal Profession Admission Rules 2007* (NT) r 4(10(b) and Schedule 3; *Legal Profession Act 2007* (QLD) s 30(1)(b); *Supreme Court (Admission) Rules 2004* (QLD) r 6(3)(b); *LPEAC Rules 2018* (SA) r 7(1)(b) and Appendix A; *Supreme Court Civil Rules 2006* (SA) r 370(1)(b)(i); *Legal Profession Uniform Law Application Act 2014* (Vic) ss 17(1)(a) and 19(1); *Legal Profession Uniform Admission Rules 2015* (Vic) r 5(1)(c) and Schedule 1; *Legal Profession Act 2007* (Tas) s 25(1)(a); *Legal Profession (Board of Legal Education) Rules 2010* (Tas) r 4(1)(c) and Schedule 1; *Legal Profession (Admission) Rules 2009* (WA) r 5(1) and 6 adopting Law Admissions Consultative Committee, *Prescribed Academic Areas of Knowledge* (2016) Schedule 1. Although South Australian does not mention the academic areas in their *Legal Practitioners Act 1981* (SA), this Act does require applicants for admission to satisfy the *LPEAC Rules 2018* (SA), which do include reference to the academic areas in r 7(1)(b) and Appendix A.

5 Law Admissions Consultative Committee, *Practical Legal Training Competency Standards for Entry-Level Lawyers* (2015) adopted in each Australian State and Territory: *Legal Profession Act 2006* (ACT) s s 21(1)(a); s 21(1)(b); *Court Procedures Rules 2006* (ACT) r 3607D(1); *Legal Profession Uniform Law 2014* (NSW) s 5(1)(c); *Legal Profession Uniform Admission Rules 2015* (NSW) r 6(1)(a) and Schedule 2; *Legal Profession Act 2006* (NT) ss 10(2); 10(4); 24(a); and 29(1)(c)(ii); *Legal Profession Admission Rules 2007* (NT) r 5(1) and Schedule 4; *Legal Profession Act 2007* (QLD) s 30(1)(c); *Supreme Court (Admission) Rules 2004* (QLD) r 7; *LPEAC Rules 2018* (SA) r 8 and Appendix B; *Supreme Court Civil Rules 2006* (SA) r 370(1)(b)(ii); *Legal Profession Uniform Law Application Act 2014* (Vic) ss 17(1)(b) and 19(1); *Legal Profession Uniform Admission Rules 2015* (Vic) r 6 and Schedule 1; *Legal Profession Act 2007* (Tas) s 25(1)(b); *Legal Profession (Board of Legal Education) Rules 2010* (Tas) r 7(1) and Schedule 2; *Legal Profession (Admission) Rules 2009* (WA) r 7(2)(a) adopting Law Admissions

4. have met the English proficiency requirements;[6] and
5. have met the character-based (suitability) requirements.[7]

Consultative Committee, *Prescribed Academic Areas of Knowledge* (2016) r 3(2)(b) r 6 and Schedule 1. Although South Australian does not mention the academic areas in their *Legal Practitioners Act 1981* (SA), this Act does require applicants for admission to satisfy the *LPEAC Rules 2018* (SA), which do include reference to the academic areas in r 8 and Appendix B.

6 Law Admissions Consultative Committee, *Model Admission Rules* (2015) r 8; Law Admissions Consultative Committee, *English Language Proficiency Guidelines* (2018)*; Court Procedures Rules 2006* (ACT) r 3605(1)(b); *Legal Profession Uniform Admission Rules 2015* (NSW) r 10(1)(l); *Legal Profession Act 2007* (QLD) s 33(3); *LPEAC Rules 2018* (SA) Appendix 1(1)(l); *Legal Profession Uniform Admission Rules 2015* (Vic) r 10(1)(l); Law Admissions Consultative Committee, *Model Admission Rules* (2015) r 8 adopted in WA.

7 Law Admissions Consultative Committee, *Disclosure Guidelines for Applicants for Admission to the Legal Profession* (undated); *Legal Profession Act 2006* (ACT) ss 17(2), 19(1), 22; *Legal Profession Uniform Law 2014* (NSW) ss 17(1)(a); 17(2)(b), 19(1)(c); *Legal Profession Uniform Admission Rules 2015* (NSW) r 10(1); *Legal Profession Act 2006* (NT) ss 3, 11(1), 25, 30 and 35; *Legal Profession Act 2007* (QLD) ss 9, 30 and 31; *LPEAC Rules 2018* (SA) Appendix D Law Admissions Consultative Committee Disclosure Guidelines for Applicants for Admission to the Legal Profession; *Legal Profession Uniform Law Application Act 2014* (Vic) ss 17(2)(b) and 19(1); *Legal Profession Uniform Admission Rules 2015* (Vic) r 10(1); *Legal Profession Act 2007* (Tas) ss 9 and 26; *Legal Profession Act 2008* (WA) ss 8, 31 and 38(1).

Appendix B: List of Australian Law Schools and their Civil Procedure/ADR/Negotiation Core and Elective Topics

University/Law School	**Civil Procedure Course/Unit/Topic**	**Mention of Negotiation in Civil Procedure Topic**	**When is Civil Procedure Topic Studied**	Elective Topics that may include Dispute Resolution
Australian Catholic University	LAWS201 Civil Procedure and ADR	Mentions 'Science of negotiation'	Year 2, Semester 2	Family Law
Australian National University	LAWS2244 Litigation and Dispute Management	No	Year 4, Semester 1	Dispute Management (but this is a graduate course)
Bond University	LAWS11-325 Civil Dispute Resolution	Yes	Final trimester	Family Law Family Law Practice Advanced Dispute Resolution Dispute Resolution: Practice and Procedure Dispute Resolution: Theories and Principles Mediation Negotiation (is a postgraduate course but undergrad students can enrol) Mediation and Dispute Resolution Practice 1 Mediation and Dispute Resolution Practice 2 Family Dispute Resolution 1 Family Dispute Resolution 2

University/Law School	Civil Procedure Course/Unit/Topic	Mention of Negotiation in Civil Procedure Topic	When is Civil Procedure Topic Studied	Elective Topics that may include Dispute Resolution
Central Queensland University	LAWS3017 Civil Procedure	No	End of degree	Alternative Dispute Resolution Family Law
Charles Darwin University	LWZ317 Civil Procedure	No, but does mention ADR	Year 3, Semester 2	Family Law
Charles Sturt University	LAW217 Civil Procedure	No, but does mention ADR	Year 3, Semester 1	Family Law Dispute Resolution: Methods and Results (specifically mentions negotiation)
Curtin University	LAWS3009 Civil Procedure	No, but does mention ADR	Year 2, Trimester 3B	Family Law Alternative Dispute Resolution (specifically mentions negotiation)
Deakin University	MLL391 Civil Procedure and Dispute Resolution	No, but does mention ADR	Year 4, Trimester 2	ADR: Principle and Practice Family Law International ADR (specifically mentions negotiation)
Edith Cowan University	LAW4504 Civil Procedure I	No, nor do they specify ADR	LAW4504 Year 4, Semester 1	Alternative Dispute Resolution (specifically mentions negotiation) Family Law
	LAW4614 Civil Procedure II	No, nor do they specify ADR	LAW4614 Year 4, Semester 2	

University/Law School	Civil Procedure Course/Unit/Topic	Mention of Negotiation in Civil Procedure Topic	When is Civil Procedure Topic Studied	Elective Topics that may include Dispute Resolution
Flinders University	LLAW3212 Civil Litigation	No	LLAW3212 Year 3, Semester 1	Dispute Management (specifically mentions negotiation) Family Law
	LLAW7000 Civil Litigation Practice (PLT)	No	LLAW7000 Year 3, Semester 2 (PLT)	
Griffith University	5210Law Civil Procedure	No	Year 3, Trimester 1	Family Law **Had ADR Clinic and Negotiating Legal and Commercial Disputes but this is not offered from 2017
James Cook University	LA1107 Contemporary Practice: The New Lawyer	No, but mention of non-adversarial dispute resolution	Level 1	
	LA4022 Civil Procedure	No	Level 4	

University/Law School	Civil Procedure Course/Unit/Topic	Mention of Negotiation in Civil Procedure Topic	When is Civil Procedure Topic Studied	Elective Topics that may include Dispute Resolution
La Trobe University	LAW1DR Dispute Resolution	Yes	Year 1, Semester 1	Family, Society and Law Negotiation (not offered in 2018)
	LAW2CIV Civil Procedure	No, but does mention ADR	Year 3, Semester 2	
Macquarie University	LAWS398 Civil and Criminal Procedure	Mentions 'adversarial disputation'	Level 3	
Monash University	LAW4303 Litigation and Dispute Resolution	No	Year 3, Semester 2	Family Law Assistance Program: Professional Practice Negotiation and Conflict Resolution (specifically mentions negotiation)
Murdoch University	LLB450 Civil Procedure	Mentions 'alternatives to litigation'	Year 4	International Arbitration Law Alternative Dispute Resolution (specifically mentions ADR and negotiation)
Queensland University of Technology	LLB103 Dispute Resolution	Yes	Year 1, Semester 1	Family Law International Arbitration
	LLB306 Civil Procedure	Mentions 'resolving disputes' and 'dispute resolution skills'	Year 3, Semester 2	

University/Law School	Civil Procedure Course/Unit/Topic	Mention of Negotiation in Civil Procedure Topic	When is Civil Procedure Topic Studied	Elective Topics that may include Dispute Resolution
RMIT (JD only)	LAW1031 Negotiation and Dispute Resolution	Yes	Year 1	
	LAW1030 Civil Procedure	Mentions choices between civil alternatives to litigation	Year 2	
Southern Cross University	LAW72001 Civil Litigation and Procedure	No, but does mention ADR	Year 3, Session 1	Family Law Practice Mediation and Dispute Resolution (specifically mentions negotiation Mediation Practice and Procedure (specifically mentions negotiation)
Swinburne University of Technology	LAW10012 Civil Procedure and Alternative Dispute Resolution	Yes	Must be completed concurrent to or after LAW10010 Introduction to Australian Law and Statutory Interpretation	

University/Law School	Civil Procedure Course/Unit/Topic	Mention of Negotiation in Civil Procedure Topic	When is Civil Procedure Topic Studied	Elective Topics that may include Dispute Resolution
University of Adelaide	LAW3501 Dispute Resolution and Ethics	Dispute resolution, civil disputes	Year 4, S1	Family Law Practice
	LAW6502 Civil Litigation Practice (GDLP level)			
	LAW6001 Dispute Resolution and Ethics (Hons)	Capstone topic to prepare students for GDLP, Hons students only		
University of Canberra	7047 Litigation and Dispute Processing	Yes, as an example of alternative modes of dispute resolution	Level 3	Family Law ADR (specifically mentions negotiation)
University of Melbourne (JD only)	LAWS90140 Disputes and Ethics	Yes	Year 1, Semester 2	Family Law Negotiations
University of New England	LAW312 Criminal and Civil Procedure	No	Year 3, Trimester 2	Alternative Dispute Resolution Family Law International Arbitration

University/Law School	**Civil Procedure Course/Unit/Topic**	**Mention of Negotiation in Civil Procedure Topic**	**When is Civil Procedure Topic Studied**	**Elective Topics that may include Dispute Resolution**
University of Newcastle	LAWS4003 Civil Procedure	No, but mentions 'contextualising litigation in the broader context of dispute resolution' and the 'essential role of dispute resolution processes'	Year 4/5 depending on choice Semester 1	Alternative Dispute Resolution (specifically mentions negotiation) Commercial Dispute Resolution Family Law
University of NSW	LAWS2371 Resolving Civil Disputes	Yes, and specifically mentions ADR also	Year 4, Semester 1	Family Law International Commercial Arbitration Principled Negotiation ADR in Practice

University/Law School	Civil Procedure Course/Unit/Topic	Mention of Negotiation in Civil Procedure Topic	When is Civil Procedure Topic Studied	Elective Topics that may include Dispute Resolution
University of Notre Dame	LAWS3007 Advanced Civil Procedure	No	Year 4, S1	Family Law
	LAWS4001 Civil Procedure	No, but specifically mentions ADR	Year 4, Semester 2	
	LAWS4629 Alternative Dispute Resolution	Yes	Year 4, Semester2	
University of Queensland (TC Beirne School of Law)	LAWS4701 Civil Dispute Resolution	No, but specifically mentions ADR	Year 4, Semester 2 (not offered in 2018)	Family Law Civil Procedure The Legal Profession
University of South Australia	LAWS4016 Dispute Resolution and Civil Litigation	Yes	Year 4, Semester 2	Family Law
University of Southern Queensland	LAW3322 Civil Procedure	No, but specifically mentions ADR	Year 3, Semester 2	Family Law

University/Law School	**Civil Procedure Course/Unit/Topic**	**Mention of Negotiation in Civil Procedure Topic**	**When is Civil Procedure Topic Studied**	**Elective Topics that may include Dispute Resolution**
University of the Sunshine Coast	LAW304 Civil Procedure	Not on the course page, but discusses negotiation and ADR in the course handbook	Year 3, Semester 2	Family Law International Commercial Disputes
University of Sydney	LAWS1014 Civil and Criminal Procedure	Mentions 'dispute resolution'	Year 2, Semester 1	Family Law
University of Tasmania	LAW451 Civil Procedure	Mentions 'dispute resolution'	Year 4, Semester 2	Dispute Resolution Family 1 – The Family and the Child Family 2 – Financial Aspects of Family Law
University of Technology, Sydney (includes PLT)	70204 Civil Practice	In detailed subject info mentions negotiation	Year 2, Semester 1 (Autumn Session)	Dispute Resolution Advocacy Family Law

University/Law School	Civil Procedure Course/Unit/Topic	Mention of Negotiation in Civil Procedure Topic	When is Civil Procedure Topic Studied	Elective Topics that may include Dispute Resolution
University of Western Australia (JD/Masters)	LAWS5103 Dispute Resolution	Yes, and ADR	Pre-Semester 1 Year 2 (Between Years 1 and 2)	Family Law Negotiation and Mediation
	LAWS5115 Procedure	Mentions 'resolution of civil conflicts and disputes'	Year 3, Semester 2	
University of Western Sydney	200811.3 Alternative Dispute Resolution	Yes and ADR	Year 1, Semester 2 (Spring Session)	Mediation Family Law Advanced Family Law Family Dispute Resolution
	200813.3 Civil Procedure and Arbitration	No, but mentions civil procedure, court supervised processes and arbitration	Year 3, Semester 2 (Spring Session)	
University of Wollongong	LLB3300 Remedies and Civil Procedure	No	Year 3 (not offered in 2018)	Family Law Advanced Family Law

University/Law School	**Civil Procedure Course/Unit/Topic**	**Mention of Negotiation in Civil Procedure Topic**	**When is Civil Procedure Topic Studied**	**Elective Topics that may include Dispute Resolution**
University of Victoria	BLB3130 Interviewing and Negotiation Skills	Yes	Year 2, Semester 1	Family Law in Society Commercial Arbitration Law Commercial Arbitration Practice and Procedure Alternative Dispute Resolution (specifically mentions negotiation)
	LLW4000 Civil Procedure	No, but mentions ADR and a focus on litigation and court/procedural rules	Year 3, Semester 1	

Appendix C: List of Australian Law Schools and their Ethics and Professional Responsibility Core and Elective Topics

University/Law School	Ethics and Professional Responsibility Course/Unit/Topic	When is Ethics and Professional Responsibility Topic Studied
Australian Catholic University	LAWS305 Legal Ethics and Professional Responsibility	Year 3, Semester 1
Australian National University	LAWS1202 Lawyers, Justice and Ethics	Year 2, Semester 2
Bond University	LAWS11-106 Legal Foundations B	Year 1, Trimester 1
	LAWS11-326 Legal Profession	Final Year
Central Queensland University	LAWS13013 – Legal Professional Conduct	Final Year
Charles Darwin University	LWZ320 Professional Responsibility	Year 3, Semester 2
Charles Sturt University	LAW309 Professional Legal Conduct	Year 2, Semester 1
Curtin University	BLAW3014 Professional Responsibility	Year 2, Trimester 3B
Deakin University	MLL335 Legal Practice and Ethics	Year 3, Trimester 2
Edith Cowan University	LAW4704 Legal Ethics and Professional Responsibility	Year 4
Flinders University	LLAW1221 Professional Skills and Ethics [Ethics I]	Year 1, Semester 2
	LLAW3211 Corporate Law 2 [Ethics II]	Year 3, Semester 1
Griffith University	5193LAW Ethics and Professional Responsibility in Practice	Year 3, Trimester 1
James Cook University	LA4038 Legal Ethics and Trust Accounting	Year 4
La Trobe University	LAW3LPC Legal Practice and Conduct	Year 4, Semester 2
Macquarie University	LAWS108 Law, Lawyers and Society	Level 1
Monash University	LAW4309 Lawyers' Ethics in Practice	Year 3, Semester 2
Murdoch University	LLB468 Ethics and Professional Responsibility	Year 4

University/Law School	Ethics and Professional Responsibility Course/Unit/Topic	When is Ethics and Professional Responsibility Topic Studied
Queensland University of Technology	LLH302 Ethics and the Legal Profession	Year 3, Semester 1
RMIT (JD only)	LAW1037 Legal Practice Management and Professional Conduct	Year 3
Southern Cross University	LAW00519 Professional Conduct	Year 3, Session 2
Swinburne University of Technology	LAW3015 Legal Practice & Professional Conduct	After LAW10012 Civil Procedure & Alternative Dispute Resolution
University of Adelaide	LAW3501 Dispute Resolution and Ethics	Year 4, Semester 1
University of Canberra	7043 Lawyers and Professional Responsibility	Level 3
University of Melbourne (JD only)	LAWS90140 Disputes and Ethics	Year 1, Semester 1
University of New England	LAW320 Professional Conduct	Year 3, Trimester 1
University of Newcastle	LAWS4007 Professional Conduct	Final Year, Semester 1
University of NSW	LAWS1320 Lawyers, Ethics and Justice	Year 3, Semester 2
University of Notre Dame	LAWS3007 Advanced Civil Procedure (includes ethics)	Year 4, Semester 2
	LAWS4710 Commercial Practice and Ethics	Year 4, Semester 2
University of Queensland (TC Beirne School of Law)	LAWS3703 Ethics and the Legal Profession	Year 3, Semester 2
University of South Australia	LAWS4006 Lawyers, Ethics and Society	Year 3, Semester 1

University/Law School	**Ethics and Professional Responsibility Course/Unit/Topic**	**When is Ethics and Professional Responsibility Topic Studied**
University of Southern Queensland	LAW3312 Ethics for Lawyers	Year 3, Semester 1
University of the Sunshine Coast	LAW402 Professional Conduct	Year 4, Semester 2
University of Sydney	LAWS2013 The Legal Profession	Year 4, Semester 1
University of Tasmania	LAW452 Legal Ethics	Year 4, Semester 1
University of Technology, Sydney (includes PLT)	70103 Ethics Law and Justice	Year 1, Semester 1
University of Western Australia (JD/Masters)	LAWS4109 Legal Theory and Ethics	Year 1, Semester 2
University of Western Sydney	200020.5 Professional Responsibility and Ethics	Year 1, Semester 1
University of Wollongong	LLB1197 Legal Ethics and Professional Responsibility	Year 3, Semester 2
University of Victoria	LLW5004 Lawyers' Ethics and Professional Responsibility	Year 3, Semester 2

Appendix D: Questionnaire Administration Protocols

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CRICOS Provider No. 00114A

ADMINISTRATION PROTOCOLS

Title: *Legal Negotiation Research Study*

Researcher:

Ms Samantha Kontra

Flinders Law School

Ph: 8201 2864

Overview of the Study

The study is investigating student preparation for legal negotiation competitions. Two cohorts of participants are involved: negotiation competitors and negotiation judges. Competitors are asked to complete two questionnaires per negotiation; one prior to the negotiation but after the preparation period and the other one after the conclusion of the negotiation. Each questionnaire should take approximately 5-10 minutes to complete.

Judge participants are asked to complete one questionnaire, upon the conclusion of the negotiation.

Overview of Questionnaire Administration

The project must be administered by a member of the Law Students' Association who is not involved in running the Negotiation Competition (LSA Representative). This person is responsible for making sure all questionnaire are handed out to participants, and that they are collected after the completion of the round.

The LSA Representative may organise for time keepers or judges or someone else that is present at the negotiations to hand out the surveys to all participants.

Administration Process

1. Prior to the negotiation, please send out the initial email to all of the competitors and judges involved in the competition. The Information Sheet and Letter of Introduction must be attached to this email.
2. Copies of the surveys, as well as the Information Sheets and Letters of Introduction will be posted to you in hard copy – please make sure that these are available at each around of the negotiation so that anyone who would like to participate in the study is able to.
3. At each round of the negotiation, organise for a person who will be present (time keeper, etc) to have copies of these documents and to make sure that those who wish to participate are given 5-10 minutes prior to the negotiation to complete the Pre-Negotiation Questionnaire.
4. Collect the completed Pre-Negotiation Questionnaire.
5. After the conclusion of the round, hand out the Post-Negotiation Questionnaires to the competitor participants and the Judge Questionnaire to the Judge.
6. Either collect the completed questionnaires immediately or ask the participant to forward it to you at their earliest convenience (in a sealed envelope – these will be provided).
7. Once the competition has concluded, send the completed questionnaires back to the principal researcher at Flinders Law School.

Appendix E: Information Sheet for Competitor Participants

Ms Samantha Kontra
Flinders Law School
Law and Commerce Building Room 2.49

GPO Box 2100
Adelaide SA 5001

Tel: 08 8201 2864
Email: samantha.kontra@flinders.edu.au

CRICOS Provider No. 00114A

INFORMATION SHEET FOR NEGOTIATION COMPETITORS

Title: *Legal Negotiation Research Study*

Researcher:
Ms Samantha Kontra
Flinders Law School
Ph: 8201 2864

Description of the Study:

This study analyses student preparation for legal negotiations, and is part of a larger project which looks at the role of negotiation within the field of law, particularly focusing on the key aspects involved in negotiation. This project is supported by the Flinders University School of Law and a pilot study was conducted within the Flinders Law School in 2012. This study is now being expanded throughout Australian Law Schools.

Purpose of the study:

The purpose of this study is to explore the key factors students take into account when they are preparing for a negotiation, and the types of preparation that they engage in. To determine this, information will be gathered from both student negotiators as well as negotiation judges.

What will I be asked to do?

If you consent to participate in this study, you will be asked to complete a Pre-Negotiation Questionnaire and a Post-Negotiation Questionnaire for each negotiation that you undertake during the Negotiation Competition. Each questionnaire will take approximately 5-10 minutes to complete.

The Pre-Negotiation Questionnaire will be completed at the commencement of the negotiation (after the conclusion of the preparation period). Once complete, this questionnaire will be collected by the Law Students' Association ('LSA') Representative. After the conclusion of the negotiation, you will be provided with the Post-Negotiation Questionnaire. You may choose to complete this immediately and hand it to the LSA Representative, or to take it away (with a sealable envelope) to complete in your own time and return to the Law Students' Association Office upon completion.

It is important to note that your participation or non-participation in this study will not impact your success in the Negotiation Competition in any way, nor will this affect your standing in the Law School or the University.

What benefit will I gain from being involved in this study?

Providing details about your knowledge and negotiation experiences will enable an exploration of the way that students prepare for a negotiation, which will ultimately assist in allowing an analysis of the role of negotiation in the field of law. Providing this information will allow you the opportunity to critically reflect on the negotiations that you undertake throughout the study, which may also lead to skill improvement.

Will I be identifiable by being involved in this study?

No identifying information will be collected, although participants are given the opportunity to provide their contact details in order to be contacted for follow up research. If contact details are provided for this reason, they will not be used to identify the participant's questionnaire responses in the thesis or any resulting publications.

Are there any risks or discomforts if I am involved?

The researcher anticipates few risks from your involvement in the study. You are reminded that involvement in the study will not impact your success in the Negotiation Competition in any way, nor will this affect your standing in the Law School or University.

If you would prefer not to answer a certain question on the questionnaire please leave this question blank. You may also withdraw from the study at any time.

If you have any concerns regarding anticipated or actual risks or discomfort, please raise them with the LSA Representative. If you do suffer any harm, distress or anxiety from this study, you may wish to contact the Health and Counselling Service at your University.

How do I agree to participate? What if I change my mind?

Participation in this study is voluntary. If you would like to participate, please contact the LSA Representative by email or in person to register your interest. You agree to consent to your participation in the study by completing the questionnaires.

Participants are able to withdraw from the study at any time without consequence or without needing to provide reasons as to your withdrawal. If you wish to withdraw from the study, either hand in your questionnaire in blank form (i.e. without any questions answered) or inform the LSA Representative of your decision to withdraw.

How will I receive feedback?

After the conclusion of the project (in approximately July 2016) a Feedback Sheet will be compiled, outlining the data collected, any analysis and conclusions reached through the study. This Feedback Sheet will be provided to the LSA to send to their alumni (if possible). The Feedback Sheet cannot be sent directly to participants, as no personal information is being collected.

Thank you for taking the time to read this information sheet and we hope that you will accept our invitation to be involved.

This research project has been approved by the Flinders University Social and Behavioural Research Ethics Committee (Project number 5764). For more information regarding ethical approval of the project the Executive Officer of the Committee can be contacted by telephone on 8201 3116, by fax on 8201 2035 or by email human.researchethics@flinders.edu.au.

Appendix F: Letter of Introduction for Competitor Participants

Dr Rhain Buth
Flinders Law School
Faculty of Education, Humanities and Law
Room 3.33 Law and Commerce Building

GPO Box 2100
Adelaide SA 5001

Tel: 08 8201 5923

23 September 2013

LETTER OF INTRODUCTION

Dear Negotiation Competition Competitor,

This letter is to introduce Ms Samantha Kontra, who is a PhD student in the Faculty of Education, Humanities and Law, Flinders Law School. Ms Kontra is undertaking research leading to the production of a thesis or other publications on the subject of legal negotiation. This particular study focuses on exploring aspects of student preparation for legal negotiation, from the perspectives of both negotiation competitors and negotiation judges. This comprises part of a larger project which explores, amongst other topics, the key factors involved in negotiation, and the role of negotiation and alternative dispute resolution within the field of law. The study was piloted in 2012 in the Flinders Law School, and is currently being expanded to explore preparation undertaken by students across Australian Law Schools.

The purpose of this letter is to invite you to volunteer to assist with Ms Kontra's study. Participation will include completing two questionnaires for each negotiation you undertake in the Negotiation Competition. Each questionnaire will take approximately 5-10 minutes to complete. You will be asked to complete the Pre-Negotiation Questionnaire before the negotiation (but after the preparation time) and the Post-Negotiation Questionnaire after the conclusion of the negotiation. Questionnaires will be completed at the location at which your round of negotiation takes place. If you are unable to complete the Post-Negotiation Questionnaire immediately you will receive a sealable envelope and will be instructed to place the questionnaire into the envelope upon completion, and return it to the Law Students' Association Office.

Your involvement in the study will not impact your success in the Negotiation Competition in any way. Furthermore, your participation or non-participation in this study will in no way affect your standing in either your Law School or the University. Any information provided will be treated in confidence and none of the participants will be individually identifiable in the resulting thesis or other publications.

If you decide to participate in this study you are entirely free to discontinue your participation at any time, without consequence. Simply inform the Law Students' Association Representative of your withdrawal, or just do not complete the questionnaires when they are provided to you. Furthermore, if you would rather not provide an answer to a particular question this is completely acceptable. As the research is being conducted by questionnaire only, if you complete the questionnaire you will be providing consent to the study.

If you feel that you have been adversely impacted in any way by this study, or that you have suffered from harm or distress, please do not hesitate to contact me on the details below. If you do suffer in any of these ways, or if you feel anxious as a result of the study, you might also like to contact the Health and Counselling Service at your university.

If you have any enquiries concerning this project, please direct them to me at the address above or by telephone on (08) 8201 5923 or email (rhain.buth@flinders.edu.au).

Thank you for your attention and assistance.

Yours sincerely

Dr Rhain Buth
Flinders Law School

This research project has been approved by the Flinders University Social and Behavioural Research Ethics Committee (Project number 5764). For more information regarding ethical approval of the project the Executive Officer of the Committee can be contacted by telephone on 8201 3116, by fax on 8201 2035 or by email human.researchethics@flinders.edu.au.

Appendix G: Pre-Negotiation Questionnaire for Competitors in Pilot Study

LEGAL NEGOTIATION RESEARCH STUDY

Pre-Negotiation Questionnaire

Negotiation ID:
Participant ID:

Return of Questionnaires
Once you have completed this questionnaire please hand it to the FLSA Representative.

If you would prefer not to answer a question, please leave that field blank. Please remember that you are able to withdraw from this study at any time without consequence and without providing reasons for your withdrawal. If you would like to withdraw from this study please hand the blank questionnaire to the FLSA representative.

1. How prepared are you for this negotiation:

Extremely prepared	Somewhat prepared	Not prepared or unprepared	Somewhat unprepared	Extremely unprepared
1	2	3	4	5

2. What did you do to prepare for this negotiation?

_____

_____

_____

_____

3. To what extent do you think you will be able to generate a variety of feasible options?

We will suggest multiple feasible options		We will suggest a few feasible options		We will not suggest any options
1	2	3	4	5

4. How do you think that your teamwork will impact the negotiation outcome?

Strongly detract	Somewhat detract	Neither detract nor enhance	Somewhat enhance	Strongly enhance	I don't know
1	2	3	4	5	6

5. **Do you know who your opposing counsel are for this negotiation?** YES / NO

   Have you tailored your negotiation strategy in any way due to this? YES / NO

   If YES, how?

   _____

   _____

   _____

6. **Did you have enough time when preparing for the negotiation?** YES / NO
   If NO, how much more time would you have liked? _____

7. **If this is not the first round of negotiation, how has your strategy changed in light of past negotiations in this competition?**

   _____

   _____

   _____

   _____

If this is the first round of negotiations, please answer questions 9-14. Otherwise, thank you for completing this questionnaire.

8. **Background Questions**

   Year level in Law School: _____

   Gender: Male / Female

   Age: 16-20 21-25 26-30 31-35 36-40 41-50 50+

9. **I have competed in a negotiation competition prior to this year:** YES / NO

   If YES, how many competition negotiations have you competed in prior to this year?

   1-2 3-4 5+

10. **I have completed at least one elective topic with a component that directly relates to negotiation prior to this year**:

YES / NO

If YES, how many have you completed?

1-2 3-4 5+

11. **I have observed *legal* negotiations in a professional setting** (i.e. away from Law School) YES / NO

If YES, how many have you observed?

1-2 3-4 5+

12. **I have assisted in preparing for a legal negotiation conducted in a professional setting (e.g. having worked at a Law Firm or in another capacity where you have been exposed to preparing for negotiations)**

YES / NO

If YES, how many negotiations have you helped prepare for?

1-2 3-4 5+

13. Why did you enter the negotiation competition?

_____

_____

_____

_____

14. Do you have any further comments?

_____

_____

_____

Thank you for completing this questionnaire.

Appendix H: Pre-Negotiation Questionnaire for Competitors After Pilot Study

LEGAL NEGOTIATION RESEARCH STUDY

Pre-Negotiation Questionnaire

Once you have completed this questionnaire please hand it to the Law Students' Association Representative. If you would prefer not to answer a question, please leave that field blank. Please remember that you are able to withdraw from this study at any time without consequence and without providing reasons for your withdrawal. If you would like to withdraw from this study there is no need to return the questionnaire.

Background Questions

1. **University:** _____

2. **Round of Negotiation:** Preliminary Quarter Final Semi Final Grand Final

3. **Year Level in Law School:** _____

4. **Gender:** Male / Female

5. **Age:** 16-20 21-25 26-30 31-35 36-40 41-50 50+

6. **Do you intend to practice law once you graduate?** YES / NO / UNDECIDED

7. **Please list the topics you have studied at Law School in which you have learnt about negotiation:**
   _____ Elective / Core Year level: _____
   _____ Elective / Core Year level: _____
   _____ Elective / Core Year level: _____
   _____ Elective / Core Year level: _____

8. **Have you *observed* or *assisted in* any legal negotiations in a professional setting?** YES / NO
   If YES, how many: Observed: _____ Assisted: _____
   Please outline the nature of these negotiations and your involvement:

_____

_____

9. **In your future professional life, what percentage of the time do you think will be dedicated to negotiation?**
   _____
   Do you have any comments about this?

_____

_____

Negotiation Questions

1. **How prepared are you for this negotiation? (Please circle your response)**

Extremely prepared	Somewhat prepared	Not prepared or unprepared	Somewhat unprepared	Extremely unprepared
1	2	3	4	5

2. How did you prepare for this negotiation?

3. Why did you choose to prepare in this way?

4. In preparing for the negotiation, to what extent have you considered the following factors to be a priority? Please circle only those which are applicable.

	Very high priority	High priority	Middle priority	Low priority	Very low priority
Strategies or tactics you might use	1	2	3	4	5
Strategies or tactics opposing counsel might use	1	2	3	4	5
How to respond to potential strategies or tactics used by opposing counsel	1	2	3	4	5
Exploiting other parties' weaknesses	1	2	3	4	5
A good outcome for both parties	1	2	3	4	5
Working with your teammate	1	2	3	4	5
Your negotiation style	1	2	3	4	5
Winning	1	2	3	4	5
Setting an agenda	1	2	3	4	5
The consequences of the outcome	1	2	3	4	5

Of these factors, which do you consider to be the most important for this negotiation, and why? Do you have any further comments on these?

5. Do you know who your opposing counsel will be for this negotiation? YES / NO
Have you tailored your negotiation strategy in any way due to this? YES / NO

If YES, how?

---

6. How would you characterise your negotiation style and why? Please circle the style which best applies.

True problem solver	Cautious problem solver	Ethical adversarial	Unethical adversarial	Other, please describe below

---

---

7. In preparing for the negotiation, to what extent have you considered the following factors to be a priority? Please circle only those which are applicable.

	Very high priority	High priority	Middle priority	Low priority	Very low priority
The issues	1	2	3	4	5
Key stakeholders	1	2	3	4	5
Your client's objectives	1	2	3	4	5
The other side's objectives	1	2	3	4	5
Power imbalances	1	2	3	4	5
Emotion	1	2	3	4	5
Gender	1	2	3	4	5
Cultural aspects	1	2	3	4	5

Of these factors, which do you consider to be the most important for this negotiation, and why? Do you have any further comments on these?

---

8. Did ethical considerations have any impact on your preparation or the way in which you plan to conduct the negotiation? How so?

9. In preparing for the negotiation, to what extent have you considered the following factors to be a priority?

	Very high priority	High priority	Middle priority	Low priority	Very low priority
The effect an agreement might have on your client	1	2	3	4	5
Your client's best options if negotiations fail	1	2	3	4	5
Your client's worst options if negotiations fail	1	2	3	4	5
The non-negotiable elements of the negotiation	1	2	3	4	5
The zone of potential agreement between parties	1	2	3	4	5
Legal research	1	2	3	4	5
Factual research	1	2	3	4	5

Of these factors, which do you consider to be the most important for this negotiation, and why? Do you have any further comments on these?

10. How do you plan to use the agreed and hidden facts during this negotiation? (please be specific)

11. In preparing for the negotiation, to what extent have you considered the following factors to be a priority?

	Very high priority	High priority	Middle priority	Low priority	Very low priority
The physical set-up of the room	1	2	3	4	5
Whether to bring in any props (glasses, tissues, etc.)	1	2	3	4	5
Rehearsal of the negotiation	1	2	3	4	5
The relationship between competing teams	1	2	3	4	5

Your relationship with your teammate	1	2	3	4	5
The relationship between clients	1	2	3	4	5

Of these factors, which do you consider to be the most important for this negotiation, and why? Do you have any further comments on these?

12. How would you define 'legal negotiation'?

13. How important do you think preparation is in legal negotiation and why?

Not at all Important									Extremely Important
1	2	3	4	5	6	7	8	9	10

14. How do you think preparation may affect the outcome of a legal negotiation?

15. Do you have any further comments?

Thank you for completing this questionnaire. If you would like to be contacted to discuss your answers in more detail or answer interview questions please provide your name and contact details below. Further details of the research is able to be provided upon request.

Name: _____ Phone:

_____

Email:

_____

Appendix I: Post-Negotiation Questionnaire for Competitors in Pilot Study

LEGAL NEGOTIATION RESEARCH STUDY

Post-Negotiation Questionnaire

Negotiation ID:

Participant ID:

Return of Questionnaires

If you complete this questionnaire immediately after the negotiation, please hand the completed questionnaire to the FLSA representative. If you are unable to complete the questionnaire immediately, the FLSA Representative will supply you with a sealable envelope. Upon completion, please place the questionnaire in the envelope provided, seal the envelope and return it to the FLSA Office (LWCM 2.11).

If you would prefer not to answer a question, please leave that field blank. Please remember that you are able to withdraw from this study at any time without consequence and without providing reasons for your withdrawal. If you would like to withdraw from this study please hand the blank questionnaire to the FLSA representative.

15. Was your preparation helpful in negotiating this matter?

Very helpful		Somewhat helpful		Not at all helpful
1	2	3	4	5

Please provide an explanation for your response:

_____

_____

_____

_____

16. How satisfied do you think your client would be with the outcome of the negotiation?

Very satisfied	Somewhat satisfied dissatisfied	Not satisfied or dissatisfied	Somewhat dissatisfied	Very dissatisfied
1	2	3	4	5

Please provide an explanation for your response:

_____

_____

17. To what extent did you reach agreement with opposing counsel?

Completely	Moderately	Somewhat	Very little	Not at all
1	2	3	4	5

18. Did you use an agenda for the negotiation? YES / NO

19. Did you use a negotiation plan for the negotiation? YES / NO

20. Was your agenda the same as your negotiation plan? YES / NO
If NO, how did they differ?

21. In preparing for the negotiation, to what extent did you consider the following factors to be a priority?

	Very high priority	High priority	Middle priority	Low priority	Very low priority
Satisfying your client's objectives	1	2	3	4	5
Legal knowledge	1	2	3	4	5
Other parties' interests	1	2	3	4	5
Ethics	1	2	3	4	5
Power imbalances	1	2	3	4	5
Agenda construction	1	2	3	4	5
The material facts	1	2	3	4	5
Winning	1	2	3	4	5
Working with your teammate	1	2	3	4	5
Concessions you could make	1	2	3	4	5
Concessions the other party could make	1	2	3	4	5
Client to client relationship	1	2	3	4	5
Your client's best option if negotiations fail	1	2	3	4	5

Your client's worst option if negotiations fail	1	2	3	4	5
Exploiting other parties' weaknesses	1	2	3	4	5
Generating a variety of feasible options	1	2	3	4	5
Your relationship with opposing counsel	1	2	3	4	5
The non-negotiable elements of the negotiation	1	2	3	4	5
Zone of potential agreement between parties	1	2	3	4	5
Other, please specify:	1	2	3	4	5

22. If preparing for this negotiation again, which of these factors would you give greatest priority to?
Please rank the items from 1 (most important) to 20 (least important)

Satisfying your client's objectives		Concessions the other party could make	
Legal knowledge		Client to client relationship	
Other parties' interests		Your client's best option if negotiations fail	
Ethics		Your client's worst option if negotiations fail	
Power imbalances		Exploiting other parties' weaknesses	
Agenda construction		Generating a variety of feasible options	
The material facts		Your relationship with opposing counsel	
Winning		The non-negotiable elements of the negotiation	
Working with your teammate		Zone of potential agreement between parties	
Concessions you could make		Other, please specify:	

23. Which of the material facts were of most value in the negotiation? (Be specific)

24. To what extent were you able to suggest a variety of feasible options during the negotiation?

Multiple feasible options suggested		A few flexible options suggested		No options suggested
1	2	3	4	5

25. Did you have enough time during the negotiation? YES / NO
If NO, how much more time would you have liked? _____

26. How well did your teamwork enhance or detract from obtaining a negotiated outcome?

Greatly enhanced	Somewhat enhanced	Did not enhance nor detract	Somewhat detracted	Greatly detracted
1	2	3	4	5

Please provide an explanation for your response:

_____

_____

_____

_____

27. Which factors led you to (or not to) make an initial offer during the negotiation?

_____

_____

_____

_____

28. Was an initial offer discussed during your preparation? YES / NO
If YES, were any decisions made about whether you would present the first offer?

_____

_____

_____

_____

29. What have you learnt from this negotiation competition?

_____

_____

_____

30. In hindsight, would you do anything differently to prepare for this negotiation?

31. Do you have any further comments?

Thank you for completing this questionnaire.

Appendix J: Post-Negotiation Questionnaire for Competitors After Pilot Study

LEGAL NEGOTIATION RESEARCH STUDY

Post-Negotiation Questionnaire

Once you have completed this questionnaire please hand it to the Law Students' Association Representative. If you are unable to complete the questionnaire immediately, the LSA Representative will supply you with a sealable envelope. Upon completion, please place the questionnaire in the envelope provided, seal the envelope and return it to the LSA Office. If you would prefer not to answer a question, please leave that field blank. Please remember that you are able to withdraw from this study at any time without consequence and without providing reasons for your withdrawal. If you would like to withdraw from this study there is no need to return the questionnaire.

16. How effective was your preparation for this negotiation? (Please circle your response)

Extremely effective	Somewhat effective	Not effective or ineffective	Somewhat ineffective	Extremely ineffective

17. How effective was your opposing counsel's preparation for this negotiation? (Please circle your response)

Extremely effective	Somewhat effective	Not effective or ineffective	Somewhat ineffective	Extremely ineffective

18. How effective was the negotiation outcome? (Please circle your response)

Extremely effective	Somewhat effective	Not effective or ineffective	Somewhat ineffective	Extremely ineffective

19. How effective were you and your teammate during this negotiation? (Please circle your response)

Extremely effective	Somewhat effective	Not effective or ineffective	Somewhat ineffective	Extremely ineffective

20. How effective was the other team during this negotiation? (Please circle your response)

Extremely effective	Somewhat effective	Not effective or ineffective	Somewhat ineffective	Extremely ineffective

21. Of all of your preparation, which parts were the most and least effective?

_____

_____

_____

22. On reflection, how could your preparation have assisted you in reaching a more effective outcome?

_____

_____

_____

23. Which of the following factors would you have liked to be better prepared on? (Check those which apply)

- ☐ Strategies or tactics you might use
- ☐ Strategies or tactics opposing counsel might use
- ☐ How to respond to potential strategies or tactics used by opposing counsel
- ☐ Exploiting other parties' weaknesses
- ☐ Working with your teammate
- ☐ Your negotiation style
- ☐ Winning
- ☐ Setting an agenda
- ☐ The consequences of the outcome

Of these factors, which were you most effective at and why? Do you have any further comments about these?

24. How would you characterise your negotiation style and why? Please circle the style which best applies.

True problem solver	Cautious problem solver	Ethical adversarial	Unethical adversarial	Other, please describe below

25. How would you characterise opposing counsel's style during the negotiation? Please circle the style which best applies.

True problem solver	Cautious problem solver	Ethical adversarial	Unethical adversarial	Other, please describe below

26. Was your negotiation style of assistance in producing an effective negotiation? If so, how?

27. Which of the following factors would you have liked to be better prepared on? (Check those which apply)

- ☐ The issues
- ☐ Key stakeholders
- ☐ Your client's objectives
- ☐ The other side's objectives
- ☐ Power imbalances
- ☐ Emotion
- ☐ Gender
- ☐ Cultural aspects

Of these factors, which were you most effective at and why? Do you have any further comments about these?

28. Did ethical issues play a role in the negotiation? YES / NO
Discuss the role and impact of ethics on the effectiveness of the negotiation

29. Which of the following factors would you have liked to be better prepared on? (Check those which apply)

- ☐ The effect an agreement might have on your client
- ☐ Your client's best options if negotiations fail
- ☐ Your client's worst options if negotiations fail
- ☐ The non-negotiable elements of the negotiation
- ☐ The zone of potential agreement between parties
- ☐ Legal research
- ☐ Factual research

Of these factors, which were you most effective at and why? Do you have any further comments about these?

30. How did you or your opposing counsel use the agreed and hidden facts during this negotiation? (please be specific)

31. Are there any factors that you could have advanced further during the negotiation, and why? (e.g. price, liability, other terms of settlement)

32. Which of the following factors would you have liked to be better prepared on? (Check those which apply)

- ☐ Legal research
- ☐ The physical set-up of the room
- ☐ Whether to bring in any props (glasses, tissues, etc)
- ☐ Rehearsal of the negotiation
- ☐ The relationship between competing teams
- ☐ Your relationship with your teammate
- ☐ The relationship between clients

Of these factors, which were you most effective at and why? Do you have any further comments about these?

_____

_____

_____

33. How satisfied would your client be with the following points?

	Very satisfied	Satisfied	Not satisfied or dissatisfied	Dissatisfied	Very dissatisfied
The outcome of the negotiation	1	2	3	4	5
They way his/her interests were represented	1	2	3	4	5
The range of feasible options you presented	1	2	3	4	5
The handling of any ethical issues	1	2	3	4	5
Your preparation for the negotiation	1	2	3	4	5
The chance of an relationship between clients	1	2	3	4	5
The relationship between lawyers	1	2	3	4	5
The offers you made	1	2	3	4	5
The concessions you made	1	2	3	4	5
The hard bargaining during the negotiation	1	2	3	4	5
The flexibility in the negotiation	1	2	3	4	5
Whether you revealed confidential/hidden information to opposing counsel	1	2	3	4	5
Your use of the facts	1	2	3	4	5

34. Did you set an agenda during the negotiation? Why did you choose/not choose to do so?

_____

_____

_____

35. How well did your teamwork enhance or detract from the effectiveness of the negotiation? Please provide an explanation for your answer.

_____

_____

36. In your opinion, what is the least realistic feature of the negotiation competition?

_____

_____

37. Do you have any further comments?

_____

_____

Thank you for completing this questionnaire. If you would like to be contacted to discuss your answers in more detail or answer interview questions please provide your name and contact details below. Further details of the research is able to be provided upon request.

Name: _____

Phone: _____

Email:

_____

Appendix K: Information Sheet for Judge Participants

Ms Samantha Kontra
Flinders Law School
Law and Commerce Building Room 2.49

GPO Box 2100
Adelaide SA 5001

Tel: 08 8201 2864
Email: samantha.kontra@flinders.edu.au

CRICOS Provider No. 00114A

INFORMATION SHEET FOR NEGOTIATION JUDGES

Title: *Legal Negotiation Research Study*

Researcher:
Ms Samantha Kontra
Flinders Law School
Ph: 8201 2864

Description of the Study:

This study analyses student preparation for legal negotiations, and is part of a larger project which looks at the role of negotiation within the field of law, particularly focusing on the key aspects involved in negotiation. This project is supported by the Flinders University School of Law and a pilot study was conducted within the Flinders Law School in 2012. This study is now being expanded throughout Australian Law Schools.

Purpose of the study:

The purpose of this study is to explore the key factors students take into account when they are preparing for a negotiation, and the types of preparation that they engage in. To determine this, information will be gathered from both student negotiators as well as negotiation judges.

What will I be asked to do?

If you consent to participate in this study, you will be asked to complete one questionnaire at the conclusion of each negotiation that you judge in the Negotiation Competition. Each questionnaire will take approximately 5-10 minutes to complete. You may choose to complete the questionnaire immediately and hand it to the Law Students' Association ('LSA') Representative, or to take it away (with a sealable envelope) to complete in your own time and return to the LSA Office upon completion.

It is important to note that your participation in this study will not impact the Negotiation Competition in any way, nor will this affect your standing in the Law School or the University.

What benefit will I gain from being involved in this study?

Providing details about your knowledge and negotiation experiences will enable an exploration of the way that students prepare for a negotiation, which will ultimately assist in allowing an analysis of key aspects of negotiation and the role of negotiation in law schools and the legal arena.

Will I be identifiable by being involved in this study?

No identifying information will be collected, although participants are given the opportunity to provide their contact details in order to be contacted for follow up research. If contact details are provided for this reason, they will not be used to identify the participant's questionnaire responses in the thesis or any resulting publications.

Are there any risks or discomforts if I am involved?

The researcher anticipates few risks from your involvement in the study. You are reminded that involvement in the study will not impact your success in the Negotiation Competition in any way, nor will this affect your standing in the Law School or University.

If you would prefer not to answer a certain question on the questionnaire please leave this question blank. You may also withdraw from the study at any time.

If you have any concerns regarding anticipated or actual risks or discomfort, please raise them with the LSA Representative. If you do suffer any harm, distress or anxiety from this study, you may wish to contact the Health and Counselling Service at your university.

How do I agree to participate? What if I change my mind?

Participation in this study is voluntary. If you would like to participate, please contact the LSA Representative by email or in person to register your interest. You agree to consent to your participation in the study by completing the questionnaires.

Participants are able to withdraw from the study at any time without consequence or without needing to provide reasons as to your withdrawal. If you wish to withdraw from the study, either hand in your questionnaire in blank form (i.e. without any questions answered) or inform the LSA Representative of your decision to withdraw.

How will I receive feedback?

After the conclusion of the project (in approximately July 2016) a Feedback Sheet will be compiled, outlining the data collected, any analysis and conclusions reached through the study. This Feedback Sheet will be provided to the LSA to send to their alumni (if possible). The Feedback Sheet cannot be sent directly to participants, as no personal information is being collected.

Thank you for taking the time to read this information sheet and we hope that you will accept our invitation to be involved.

This research project has been approved by the Flinders University Social and Behavioural Research Ethics Committee (Project number 5764). For more information regarding ethical approval of the project the Executive Officer of the Committee can be contacted by telephone on 8201 3116, by fax on 8201 2035 or by email human.researchethics@flinders.edu.au.

Appendix L: Letter of Introduction for Judge Participants

Dr Rhain Buth
Flinders Law School
Faculty of Education, Humanities and Law
Room 3.33 Law and Commerce Building

GPO Box 2100
Adelaide SA 5001

Tel: 08 8201 5923

23 September 2013

LETTER OF INTRODUCTION

Dear Negotiation Competition Judge,

This letter is to introduce Ms Samantha Kontra, who is a PhD student in the Faculty of Education, Humanities and Law, Flinders Law School. Ms Kontra is undertaking research leading to the production of a thesis or other publications on the subject of legal negotiation. This particular study focuses on exploring aspects of student preparation for legal negotiation, from the perspectives of both negotiation competitors and negotiation judges. This comprises part of a larger project which explores the key factors involved in negotiation, and the role of negotiation and alternative dispute resolution within the field of law. The study was piloted in 2012 in the Flinders Law School, and is currently being expanded to explore preparation undertaken by students across Australian Law Schools.

The purpose of this letter is to invite you to volunteer to assist with Ms Kontra's study. Participation includes completing one questionnaire for each negotiation you judge in the Negotiation Competition. Each questionnaire will take approximately 10-15 minutes to complete. Questionnaires will be completed at the location at which your round of negotiation takes place. If you are unable to complete the Questionnaire immediately you will receive a sealable envelope and will be instructed to place the questionnaire into the envelope upon completion, and return it to the Law Students' Association Office.

Your involvement in the study will not impact the Negotiation Competition in any way. Furthermore, your participation or non-participation in this study will in no way affect your standing in either your Law School or the University. Any information provided will be treated in confidence and none of the participants will be individually identifiable in the resulting thesis or other publications

If you decide to participate in this study you are entirely free to discontinue your participation at any time, without consequence. Simply inform the Law Students' Association Representative of your withdrawal, or just do not complete the questionnaires when they are provided to you.

Furthermore, if you would rather not provide an answer to a particular question this is completely acceptable. As the research is being conducted by questionnaire only, if you complete the questionnaire you will be providing consent to the study.

If you feel that you have been adversely impacted in any way by this study or that you have suffered from harm or distress, please do not hesitate to contact me on the details below. If you do suffer in any of these ways, or if you feel anxious as a result of the study, you might also like to contact the Health and Counselling Service at your university.

If you have any enquiries concerning this project, please direct them to me at the address above or by telephone on (08) 8201 5923 or email (rhain.buth@flinders.edu.au).

Thank you for your attention and assistance.

Yours sincerely

Dr Rhain Buth
Flinders Law School

This research project has been approved by the Flinders University Social and Behavioural Research Ethics Committee (Project number 5764). For more information regarding ethical approval of the project the Executive Officer of the Committee can be contacted by telephone on 8201 3116, by fax on 8201 2035 or by email human.researchethics@flinders.edu.au.

Appendix M: Judge Questionnaire for Judges in Pilot Study

LEGAL NEGOTIATION RESEARCH STUDY

Judge Questionnaire

Negotiation ID:

Judge ID:

Team A Participant IDs:

Return of Questionnaires

If you complete this questionnaire immediately after the negotiation, please hand the completed questionnaire to the FLSA Representative. If you are unable to complete the questionnaire immediately, the FLSA Representative will supply you with a sealable envelope. Upon completion, please place the questionnaire in the envelope provided, seal the envelope and return it to the FLSA Office (LWCM 2.11).

If you would prefer not to answer a question, please leave that field blank. Please remember that you are able to withdraw from this study at any time without consequence and without providing reasons for your withdrawal. If you would like to withdraw from this study please hand the blank questionnaire to the FLSA representative.

My primary occupation is:

Legal academic	YES / NO	Part time / Full time
Legal practitioner	YES / NO	Part time / Full time
Member of the judiciary	YES / NO	
Other: _____		

How many years of experience have you had in any of the following capacities?

As a legal academic: _____
As a legal practitioner: _____
As a member of the judiciary: _____
As a legal competitions judge: _____

Gender: Male / Female

Age: 16-20 21-25 26-30 31-35 36-40 41-50 50+

1. **Please nominate which team won the negotiation and complete the form accordingly:**
   Team A / Team B

2. **In your opinion, how well did each team prepare for the negotiation?**

Team A	Strong preparation was evident		Some preparation was evident		No preparation was evident
	1	2	3	4	5
Team B	Strong preparation was evident		Some preparation was evident		No preparation was evident
	1	2	3	4	5

3. In your opinion, how flexible were the teams in their negotiation?

Team A	Very flexible		Somewhat flexible		Completely inflexible
	1	2	3	4	5
Team B	Very flexible		Somewhat flexible		Completely inflexible
	1	2	3	4	5

4. How well did the teams explore the interests of the other party?

Team A	Explored in detail		Adequately explored		Inadequately explored
	1	2	3	4	5
Team B	Explored in detail		Adequately explored		Inadequately explored
	1	2	3	4	5

5. Were the teams able to suggest a variety of feasible options?

Team A	Multiple feasible options suggested		A few flexible options suggested		No feasible options suggested
	1	2	3	4	5
Team B	Multiple feasible		A few flexible		No feasible options suggested

	options suggested		options suggested		
	1	2	3	4	5

6. In your opinion, how did each team's teamwork enhance or detract from the negotiation?

Team A	Greatly enhanced	Somewhat enhanced	Did not enhance nor detract	Somewhat detracted	Greatly detracted
	1	2	3	4	5

Team B	Greatly enhanced	Somewhat enhanced	Did not enhance nor detract	Somewhat detracted	Greatly detracted
	1	2	3	4	5

7. How well did each team observe negotiation ethics?

Team A	Clearly considered		Somewhat considered		Not considered at all
	1	2	3	4	5*

Team B	Clearly considered		Somewhat considered		Not considered at all
	1	2	3	4	5*

***Were negotiation ethics breached?** YES / NO

If YES, please provide more detail

8. **If the teams were to conduct this negotiation again, which of the following elements would you have them give greater priority to during their preparation?**
   Please rank the factors in order of priority from 1 (most important) to 20 (least important)

Satisfying their client's objectives		Concessions the other party could make	
Legal knowledge		Client to client relationship	
Other parties' interests		Their client's best option if negotiations fail	
Ethics		Their client's worst option if negotiations fail	
Power imbalances		Exploiting other parties' weaknesses	
Agenda construction		Generating a variety of feasible options	
The material facts		Their relationship with opposing counsel	
Winning		The non-negotiable elements of the negotiation	
Working with their teammate		Zone of potential agreement between parties	
Concessions they could make		Other, please specify:	

9. **Do you have any further comments?**

Thank you for completing this questionnaire.

Appendix N: Judge Questionnaire for Judges after Pilot Study

LEGAL NEGOTIATION RESEARCH STUDY

Judge Questionnaire

If you complete this questionnaire immediately after the negotiation, please hand the completed questionnaire to the Law Students' Association Representative. If you are unable to complete the questionnaire immediately, the Representative will supply you with a sealable envelope. Upon completion, please place the questionnaire in the envelope provided, seal the envelope and return it to the LSA Office. If you would prefer not to answer a question, please leave that field blank. Please remember that you are able to withdraw from this study at any time without consequence and without providing reasons for your withdrawal. If you would like to withdraw from this study there is no need to return the questionnaire.

Background Questions

University: _____

Round of Negotiation: Preliminary Quarter Final Semi Final Grand Final

My primary occupation is:

Legal academic	YES / NO	Part time / Full time
Legal practitioner	YES / NO	Part time / Full time
Other: _____		Part time / Full time

How many years of experience have you had in any of the following capacities?

As a legal academic: _____
As a legal practitioner: _____
As a member of the judiciary: _____
As a legal competitions judge: _____

Gender: Male / Female

Age: 16-20 21-25 26-30 31-35 36-40 41-50 51-60 61+

Negotiation Questions

1. **Please note the areas that you think would have produced a more effective negotiation:**
   Team A (team with higher score)

_____

_____

_____

Team B (team with lower score)

2. **What role, if any, do you think preparation played in this negotiation?**

3. **How did preparation affect the outcome?**

4. Of the following factors, please rate those you think were the most important in preparing for this negotiation.

	Very high priority	High priority	Middle priority	Low priority	Very low priority
Strategies or tactics the party might use	1	2	3	4	5
Strategies or tactics the opposing counsel might use	1	2	3	4	5
How to respond to potential strategies or tactics used by the opposing counsel	1	2	3	4	5
Exploiting other parties' weaknesses	1	2	3	4	5
A good outcome for both parties	1	2	3	4	5
Working with teammate	1	2	3	4	5
Negotiation style	1	2	3	4	5
Winning	1	2	3	4	5
Setting an agenda	1	2	3	4	5
The consequences of the outcome	1	2	3	4	5

Please consider the effectiveness of the team with the lower score. Which two of these factors do you believe they displayed the least effectively and why?

5. **Of the following factors, please select those you think were the most important in preparing for this negotiation**

	Very high priority	High priority	Middle priority	Low priority	Very low priority
The issues	1	2	3	4	5
Key stakeholders	1	2	3	4	5
The client's objectives	1	2	3	4	5
The other side's objectives	1	2	3	4	5
Power imbalances	1	2	3	4	5
Emotion	1	2	3	4	5
Gender	1	2	3	4	5
Cultural aspects	1	2	3	4	5

Please consider the effectiveness of the team with the lower score. Which two of these factors do you believe they displayed the least effectively and why?

6. **Of the following factors, please select those you think were the most important in preparing for this negotiation**

	Very high priority	High priority	Middle priority	Low priority	Very low priority
The effect an agreement might have on your client	1	2	3	4	5
The client's best options if negotiations fail	1	2	3	4	5
The client's worst options if negotiations fail	1	2	3	4	5
The non-negotiable elements of the negotiation	1	2	3	4	5
The zone of potential agreement between parties	1	2	3	4	5
Legal research	1	2	3	4	5
Factual research	1	2	3	4	5

Please consider the effectiveness of the team with the lower score. Which two of these factors do you believe they displayed the least effectively and why?

7. Of the following factors, please select those you think were the most important in preparing for this negotiation

	Very high priority	High priority	Middle priority	Low priority	Very low priority
The physical set-up of the room	1	2	3	4	5
Whether to bring in any props (glasses, tissues, etc.)	1	2	3	4	5
Rehearsal of the negotiation	1	2	3	4	5
The relationship between competing teams	1	2	3	4	5
The relationship with their teammate	1	2	3	4	5
The relationship between clients	1	2	3	4	5

Please consider the effectiveness of the team with the lower score. Which two of these factors do you believe they displayed the least effectively and why?

8. **Which of all of the above factors were particularly well demonstrated by each team, and how?**
   Team A (team with higher score))

   Team B (team with lower score)

9. **How well do you think competitors understood their ethical obligations in this negotiation? Do you have any comments on this?**
   Team A (team with higher score)

   Team B (team with lower score)

10. **How would you define 'legal negotiation'?**

11. How important do you think preparation is in legal negotiation and why?

Not at all Important									Extremely Important
1	2	3	4	5	6	7	8	9	10

12. In your opinion, what is the least realistic feature of the negotiation competition?

13. Do you think there should be an increased or decreased focus on negotiation in Law Schools? What do you think the focus of this should be?

14. Do you have any further comments?

Thank you for completing this questionnaire. If you would like to be contacted to discuss your answers in more detail or answer interview questions please provide your name and contact details below. Further details of the research is able to be provided upon request.

Name: _____ Phone: _____

Email: _____

Appendix O: Preliminary Thematic Analysis of Legal Negotiation Preparation Literature

Preliminary Considerations

1. Authority[1]
2. Subject matter/understand facts in dispute[2]
3. Parties and stakeholders[3]
4. Map the negotiation[4]
5. Negotiation planning worksheet[5]
6. Planning grid[6]
7. Negotiation Navigation Map[7]
8. Fisher and Ury's principles[8]
9. Negotiation styles[9]

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1 John Mulder, *Non-Stop Negotiating: The Art of Getting What You Want* (Penny Publishing, 1992) 50; John H Wade, 'The Last Gap in Negotiations: Why Is It Important? How Can It Be Crossed?' (1995) 6 *Australian Dispute Resolution Journal* 93, 94-5 ('The Last Gap in Negotiations').

2 Peter Spiller (ed) *Dispute Resolution in New Zealand* (Oxford University Press, 1999) 45; Nadia M Spegel, Bernadette Rogers and Ross P Buckley, *Negotiation Theory and Techniques* (Butterworths, 1998) 54; Mulder (n 1) 48, 50; Gary Goodpaster, *A Guide to Negotiation and Mediation* (Transnational Publishers Inc, 2013) 169-70, 173; Baden Eunson, *Negotiation Skills* (John Wiley & Sons Ltd, 1994) 4; Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2002) 123 ('*Dispute Resolution in Australia*'); Janice Gross Stein, 'Getting to the Table: The Triggers, Stages, Functions and Consequences of Prenegotiation' (1988) 44(2) *International Journal* 473, 482; Leib Leventhal, 'The Foundation and Contemporary History of Negotiation Theory' (2006) 17(2) *Australasian Dispute Resolution Journal* 70, 76; Wade, 'The Last Gap in Negotiations' (n 1) 94; Mary Power, 'Agenda Setting in Real-Life Negotiations' (1999) 10(1) *Australian Dispute Resolution Journal* 30, 32; Alex J Hurder, 'The Lawyer's Dilemma: to Be or Not to Be a Problem-Solving Negotiator' (2007) 14(1) *Clinical Law Review* 253, 276; Jay Folberg et al, *Resolving Disputes: Theory, Practice, and Law* (Aspen Publishers, 2005) 79, 88-90; Barbara A Budjac, *Conflict Management a Practical Guide to Developing Negotiation Strategies* (Corvette Pearson Prentice Hall, 2012) 197; Peter S Adler, 'Negotiating the Facts' in Chris Honeyman and Andrea Kupfer Schneider (eds), *The Negotiator's Desk Reference* (Dri Press, 2018) 455, 458.

3 Nadja Alexander and Jill Howieson, *Negotiation Strategy, Style, Skills* (LexisNexis Butterworths, 2nd ed, 2010) 110-11; Spiller (n 2) 44-5; Bruce Patton, 'Negotiation' in Moffitt and Bordone (eds), *The Handbook of Dispute Resolution* (Jossey-Bass, 2005) 279, 282; Alain Lempereur and Aurélien Colson, *The First Move: A Negotiator's Companion* (John Wiley & Sons Ltd, 2010) 30-5.

4 Alexander and Howieson (n 3) 107; Spegel, Rogers and Buckley (n 2) 54; Folberg et al (n 2) 88-90.

5 Goodpaster (n 2) 170.

6 Eunson (n 2) 9.

7 Alexander and Howieson (n 3) 106-7.

8 Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 6th ed, 2020) 59 [2.55] ('*Alternative Dispute Resolution Sixth edition*'); David Spencer, Lise Barry and Lola Akin Ojelani, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co, 4th ed, 2019); Melinda Shirley and Wendy Harris, 'Assuring Quality in the Assessment of Negotiation Skills - a Case Study in the Teaching of Trusts' (2002) 9(3) *Murdoch University Electronic Journal of Law* 1, [39].

9 Mulder (n 1) 45, 48; Leventhal (n 2) 73, 76; Wade, 'The Last Gap in Negotiations' (n 1) 94-5; Folberg et al (n 2) 88-90.

10. Scene-setting and logistics[10]
11. Culture[11]
12. Emotion[12]
13. Gender[13]
14. Bargaining power[14]
15. Communication[15]
16. Location[16]
17. Self-preparation[17]
18. Internal and external preparation[18]

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10 Spiller (n 2) 47; Spegel, Rogers and Buckley (n 2) 58-60; Eunson (n 2) 5; Alexander and Howieson (n 3) 121-3; Stein (n 2) 485; Power (n 2) 33; Folberg et al (n 2) 88-90; Leo Hawkins and Michael Hudson, *The Art of Effective Negotiation* (The Business Library, 1990) 51-3.

11 Mulder (n 1) 50; Astor and Chinkin, *Alternative Dispute Resolution in Australia* (n 2) 113; Roger Fisher, William Ury, and Bruce Patton (ed) *Getting to YES* (Random House, 2nd ed, 2003) 80; Peter Condliffe, *Conflict Management, A Practical Guide* (6th ed, 2019) 229-237 [6.29]-[6.36]; Siew Fang Law, 'Culturally Sensitive Mediation: The Importance of Culture in Mediation Accreditation' (2009) 20 *Australian Dispute Resolution Journal* 162, 164; Simon Young, 'Cross-Cultural Negotiation in Australia: Power, Perspectives and Comparative Lessons' (1998) 9(1) *Australian Dispute Resolution Journal* 41, 48; Mulder (n 1) 50; Anthony Wanis-St John, 'Cultural Pathways in Negotiation and Conflict Management' in Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (Jossey Bass, 2005) 118, 121, 124-9; Menkel-Meadow, et al, *Beyond the Adversarial Model* (n 15) 181-2.

12 Lempereur and Colson (n 3) 37; Roger Fisher and Daniel Shapiro, *Beyond Rason: Using Emotions as You Negotiate* (Viking, 2005) in Deanna Foong, 'Emotions in Negotiation' (2007) 18(3) *Australasian Dispute Resolution Journal* 186, 186; Daniel L Shapiro, 'Enemies, Allies, and Emotions: The Power of Positive Emotions in Negotiation' in Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (Jossey Bass, 2005) 66.

13 Judith O'Hare, 'Negotiating with Gender' (1997) 8 *Australian Dispute Resolution Journal* 218, 224; Deborah M Kolb and Linda L Putnam, 'Negotiation Through a Gender Lens' in Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (Jossey Bass, 2005) 135; Clare Boardman and Richard Beach, 'Mixed-Gender Teamwork in Negotiation' (1998) 9 *Australian Dispute Resolution Journal* 110, 111-112; Linda Barkacs and Stephen Standifird, 'Gender Distinctions and Empathy in Negotiation' (2008) 12 *Journal of Organizational Culture, Communications and Conflict* 83, 89; Ruth Charlton, 'Negotiators: Are Men from Mars and Women from Venus?' (1998) 9(2) *Australian Dispute Resolution Journal* 89, 89; Carolyn Brooks, 'Don't Fence us in' (1998) 9(2) *Australian Dispute Resolution Journal* 94, 94; Astor and Chinkin (n 2) 128.

14 Goodpaster (n 2) 175; Budjac (n 2) 198.

15 Carrie Menkel-Meadow et al, *Dispute Resolution: Beyond the Adversarial Model* (Wolters Kluwer, 2nd ed, 2011) 136 ('*Beyond the Adversarial Model*'); Eunson (n 2) 6; Alexander and Howieson (n 3) 111; Sourdin (n 8) 60 [2.55]; Spencer, Barry and Akin Ojelabi (n 8); Stein (n 2) 485; Folberg et al (n 2) 88-90.

16 Eunson (n 2) 12; Stein (n 2) 482; Wade, 'The Last Gap in Negotiations' (n 1) 94-5.

17 Alexander and Howieson (n 3) 125.

18 Menkel-Meadow et al, *Beyond the Adversarial Mdoel* (n 15) 131; Russell Korobkin, 'A Positive Theory of Legal Negotiation' (2000) 88(6) *Georgetown Law Journal* 1789, 1794-8; Folberg et al (n 2) 83-4.

19. Agenda or priority order[19]

20. Pre-Negotiation[20]

Relationships and Communication

21. Likely response of other negotiator[21]

22. Power[22]

23. Ongoing relationships[23]

Parties' Interests

24. Goal definition[24]

25. Parties' issues and interests[25] and motivations[26]

Option Generation

26. Framing[27]

27. Generations of options and alternatives[28]

28. Strategy[29]

Stein (n 2) 482; Budjac (n 2) 198; Raymond Saner, *The Expert Negotiator* (Kulwer Law International, 2000) 131; Lempereur and Colson (n 3) 40.

20 Stein (n 2) 482.

21 Spiller (n 2) 44; Spegel, Rogers and Buckley (n 2) 60; Mulder (n 1) 48; Astor and Chinkin, *Dispute Resolution in Australia* (n 2) 123.

22 Spiller (n 2) 44; Goodpaster (n 2) 172; Folberg et al (n 2) 79.

23 Spiller (n 2) 44; Mulder (n 1) 21, 48; Spencer, Barry and Akin Ojelabi (n 8) 87, 93; Astor and Chinkin, *Dispute Resolution in Australia* (n 2) 122; Sourdin*, Australian Dispute Resolution Sixth edition* (n 8) 60 [2.55].

24 Alexander and Howieson (n 3) 110-11; Spiller (n 2) 44-5; Spegel, Rogers and Buckley (n 2) 51; Mulder (n 1) 18; G Richard Shell, *Bargaining for Advantage* (Viking, 1999) 3; Eunson (n 2) 5; Wade (n 1) 94; John H Wade, 'Persuasion in Negotiation and Mediation' (2008) 8(1) *Queensland University of Technology Law Journal* 253, 262 ('Persuasion in Negotiation and Mediation'); Hurder (n 2) 274; Folberg, Golann, Kloppenberg and Stipanowich (n 2) 85-6.

25 Alexander and Howieson (n 3) 110-11; Spiller (n 2) 44-45; Spegel, Rogers and Buckley (n 2) 53; Mulder (n 1) 29, 50; Goodpaster (n 2) 169-171; Menkel-Meadow et al, *Beyond the Adversarial Model* (n 15) 131; Eunson (n 2); Sourdin (n 8) 59 [2.55]; Astor and Chinkin (n 2) 122; Stein (n 2) 485; Leventhal (n 2) 76; Wade, 'The Last Ga in Negotiations' (n 1) 94; Power (n 2) 32; Marilyn Scott, 'Collaborative Law: A New Role for Lawyers' (2004) 15(3) *Australasian Dispute Resolution Journal* 207, 214; Hurder (n 2) 273-4; Folberg et al (n 2) 88-90; Budjac (n 2) 197; Alexander and Howieson (n 3) 110.

26 Lempereur and Colson (n 3) 38-9.

27 Alexander and Howieson (n 4) 110-11; Spiller (n 2) 44.

28 Alexander and Howieson (n 3) 110-11; Spiller (n 2) 44; Spegel, Rogers and Buckley (n 2) 52; Goodpaster (n 2) 168; Eunson (n 2) 5; Spencer, Barry and Akin Ojelabi(n 8) 88-9; Stein (n 2) 485; Leventhal (n 2) 76; Wade, 'The Last Gap in Negotiations' (n 1) 94; Scott (n 25) 214; Folberg et al (n 2) 88-90; Budjac (n 2) 198; Lempereur and Colson (n 3) 40-1.

29 Goodpaster (n 2) 168; Eunson (n 2); Wade, 'The Last Gap in Negotiations' (n 1) 94-5; Power (n 2) 33; Budjac (n 2) 199.

29. Tactics[30]

30. Parameters of dispute, ZOPA, bargaining range[31]

31. BATNA[32]

32. Opening offers[33]

Assessment of Solutions

33. Role playing, brainstorming, reality testing[34]

34. Legitimacy[35]

35. Commitment[36]

36. Post-negotiation[37]

30 Goodpaster (n 2) 168; Eunson (n 2); Folberg et al (n 2) 88-90.

31 Spegel, Rogers and Buckley (n 2) 56; Mulder (n 1) 50; Goodpaster (n 2) 168; Sourdin, *Alternative Dispute Resolution Sixth edition* (n 8) 59 [2.55]; Leventhal (n 2) 73; Wade (n 1) 94; Folberg et al (n 2) 79; Budjac (n 2) 198; Korobkin (n 18) 1792-4.

32 Menkel-Meadow et al, *Beyond the Adversarial Model* (n 15) 131; Eunson (n 2) ; Astor and Chinkin (n 2) 122; Sourdin, *Alternative Dispute Resolution in Australia Sixth edition* (n 8) 59 [2.55]; Spencer, Barry and Akin Ojelabi (n 8) 89; Wade, 'The Last Gap in Negotiations' (n 1) 94; Warren Pengilley, 'Alternative Dispute Resolution: The Philosophy and the Need' (1990) 1(2) *Australian Dispute Resolution Journal* 81, 85; Folberg et al (n 2) 79; Korobkin (n 18) 83; Budjac (n 2) 198.

33 Wade, 'The Last Gap in Negotiations' (n 1) 97-98; Ross P Buckley, 'Adversarial Bargaining: The Neglected Aspect of Negotiation' (2001) 75(3) *The Australian Law Journal* 181, 185.

34 Mulder (n 1) 50, 52; Astor and Chinkin, *Alternative Dispute Resolution in Australia* (n 2) 122.

35 Spencer, Barry and Akin Ojelabi (n 8) 91-2; Wade, 'The Last Gap in Negotiations' (n 1) 94-5.

36 Spencer, Barry and Akin Ojelabi (n 8) 100-101.

37 Sourdin, *Alternative Dispute Resolution in Australia Sixth edition* (n 8) 60 [2.55]; Spencer, Barry and Akin Ojelabi (n 8) 100; Wade (n 1) 94-5; Folberg et al (n 2) 98-9.

Appendix P: Results: Priority Order of Legal Negotiation Factors

Rating	Question Number and Text	N	Mean	SD	Very high	High	Middle	Low	Very Low
1.	7C Your client's objectives	49	1.51	0.938	34 69.39%	9 18.47%	3 6.12%	2 4.08%	1 2.04%
2.	7A The issues	49	1.57	0.736	27 55.10%	17 34.69%	4 8.16%	1 2.04%	0 0%
3.	9A The effect an agreement might have on your client	48	1.60	0.869	29 60.42%	11 22.92%	6 12.5%	2 4.17%	0 0%
4.	4F Working with your teammate	52	1.62	1.032	34 65.38%	1 1.92%	3 5.77%	4 7.69%	1 1.92%
5.	11E Your relationship with your teammate	42	1.64	1.008	25 59.52%	11 26.19%	4 9.52%	0 0%	2 4.76%
6.	4A Strategies and tactics you might use	52	2.00	0.970	18 34.62%	21 40.38%	9 17.31%	3 5.77%	1 1.92%
7.	9B Your client's best options if negotiations fail	48	2.00	1.031	17 35.42%	21 43.75%	4 8.33%	5 10.42%	1 2.08%
8.	4C How to respond to potential strategies or tactics used by opposing counsel	52	2.00	0.929	18 34.62%	19 36.54%	13 25%	1 1.92%	1 1.92%
9.	9E The zone of potential agreement between parties	48	2.02	0.887	15 31.25%	20 41.67%	10 20.83%	3 6.25%	0 0%
10.	9D The non-negotiable elements of the negotiation	48	2.04	0.922	15	19	12	1	1

					31.25%	39.58%	26.67%	2.08%	2.08%
11.	4E A good outcome for both parties	51	2.06	1.223	22 43.14%	15 29.41%	6 11.76%	5 9.8%	3 5.88%
12.	9C Your client's worst options if negotiations fail	47	2.09	0.974	15 31.91%	18 38.30%	9 19.15%	5 10.64%	0 0%
13.	7B Key stakeholders	49	2.10	0.770	10 20.41%	26 53.06%	11 22.45%	2 4.08%	0 0%
14.	4I Setting an agenda	52	2.13	1.172	19 36.54%	17 32.69%	9 17.31%	4 7.69%	3 5.77%
15.	11F The relationship between clients	42	2.19	1.174	15 35.71%	12 28.57%	9 21.43%	4 9.52%	2 4.76%
16.	4J The consequences of the outcome	52	2.27	1.239	18 34.62%	14 26.92%	12 23.07%	4 7.69%	4 7.69%
17.	7D The other side's objectives	48	2.33	1.018	8 16.67%	24 50%	11 22.92%	2 4.17%	3 6.25%
18.	4G Your negotiation style	51	2.37	1.076	12 23.53%	18 35.29%	12 23.53%	8 15.69%	1 1
19.	11A The physical set-up of the room	42	2.43	1.039	3 7.14%	3 7.14%	14 33.33%	17 40.48%	5 11.90%
20.	7E Power imbalances	49	2.47	0.981	8 16.33%	17 34.69%	19 38.78%	3 6.12%	2 4.08%

21.	4B Strategies and tactics opposing counsel might use	52	2.48	1.057	9 17.31%	19 36.54%	17 32.69%	4 7.69 %	3 5.77%
22.	4H Winning	52	2.56	1.274	14 26.92%	12 23.07%	13 25%	9 17.31%	4 7.69%
23.	4D Exploiting other parties' weaknesses	52	2.58	1.194	12 23.08%	12 23.07%	18 34.62%	6 11.54%	4 7.69%
24.	9G Factual research	48	2.58	1.235	10 20.83%	17 34.42%	7 14.58%	11 22.92%	4 8.33%
25.	9F Legal research	48	2.94	1.295	8 16.67%	11 22.92%	11 22.92%	12 26.67%	6 12.5%
26.	11C Rehearsal of the negotiation	42	3.00	1.230	6 14.29%	7 16.67%	16 38.10%	7 16.67%	6 14.29%
27.	11D The relationship between competing teams	42	3.05	1.396	7 16.67%	8 19.05%	13 30.95%	4 9.52%	10 23.81%
28.	7F Emotion	47	3.15	1.335	7 14.89%	7 14.89%	15 31.91%	8 17.02%	10 21.28%
29.	7G Gender	48	3.92	1.412	4 8.33%	3 6.25%	6 12.5%	10 20.83%	24 50%
30.	7H Cultural aspects	48	3.96	1.383	4 8.33%	5 10.42%	6 12.5%	8 16.67%	24 50%

31.	11B Whether to bring in any props (glasses, tissues, etc)	42	3.98	1.137	3 7.14%	1 2.38%	6 14.29%	16 38.10%	16 38.10%