

Negotiation

Law 733 – Spring 2015
Prof. Hinshaw

Course Information

I. Instructor

Art Hinshaw
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II. Class Meetings

Fridays 9-11:55am, Room L1-23

III. Class Format

This class will consist of lecture, discussion, and interactive negotiation role play scenarios.

IV. Course Philosophy and Goals

Negotiation is an essential part of life for most people, and is particularly important for practicing lawyers. Indeed, much of a lawyer's interpersonal time is spent negotiating – with “the other side,” clients, colleagues, even secretaries and court clerks. Because lawyers spend so much time negotiating, people expect lawyers to be skilled negotiators simply because they are lawyers. However, most lawyers spend little, if any, time actually thinking about negotiation. Negotiation is not just a matter of practice or instinct, it is a combination of an art and a science. To learn how to improve our negotiation skills, we need to do several things: (1) learn our strengths and weaknesses as negotiators, (2) understand negotiation theory from the vantage point of various disciplines (law, psychology, and economics to name a few), and (3) put negotiation theory into practice.

Remember that everything we do in this class is focused around my primary goal - helping you approach future negotiations in a more knowledgeable manner so you become better lawyer-negotiators. As a result, emphasis will be placed on developing awareness of how one can improve as a negotiator and on helping others improve as negotiators. Hopefully this class will help provide you with a framework for continuing to improve your negotiation skills long after the class has ended.

There is no one right way to negotiate in every situation. Rather, there are different approaches and styles that are sometimes more effective and less effective. For example, while this course's general approach is focused toward interest-based bargaining / problem solving negotiation, there are times when a more competitive or “hard bargaining” approach may be necessary. As you learn to expand your negotiation repertoire, be assured that you will not be penalized for experimenting with different techniques, regardless of the outcome of your negotiations. Since

this class provides a relatively risk-free learning environment, feel free to experiment in your negotiations – and be mindful of the fact that learning new skills takes time, practice and patience.

V. Required Texts

We will use three primary books during this course.

Beyond Winning: How Lawyers Help Clients Create Value in Negotiations,
by Bob Mnookin, Scott Peppet and Drew Tulumello (Harvard 2000).

Getting to Yes: Negotiating Agreement Without Giving In,
by Roger Fisher, Bill Ury & Bruce Patton, (2d ed. Penguin 1991).

Gain the Edge! Negotiating to Get What You Want,
by Martin E. Latz (St. Martin's Press 2004).

The first two books are available in the bookstore or online. The third book is contained in your subscription to Expert Negotiator. If you would like to purchase a hard copy of this book, it is also readily available.

VI. Supplemental Readings

There will be times when our assigned readings include excerpts from other articles or books that have particular relevance to various topics that we will be studying. A Supplemental Reader is available for purchase in the copy room.

VII. Attendance, Punctuality and Class Preparation

In the majority of classes, you will be paired to negotiate with another student. Hence, your timely attendance and participation are crucial in this course. If you are absent, your absence will preclude not only your participation that day, but also that of your counterpart(s). The same applies to preparation. If you come to class unprepared, not only will you lose out, but your counterpart(s) will also lose out for that day. If you do not expect to be able to attend every class, you should not take this course. Attendance is required, and any absence is presumptively unexcused.

That said, emergencies do arise. If you must miss class, or if you are not prepared to participate on a particular day, you must provide me with an email, in advance (and no later than noon the day of class), explaining the reasons why you are requesting an exception from the normal expectation of participation. A phone call or a conversation, while helpful in letting me adjust negotiation pairings, is not sufficient. In the event of an emergency, you should get something to me in writing as soon as practicable following the class.

I will take attendance, lack of punctuality, and lack of preparation into account in calculating class participation grades. I also reserve the right to impose other sanctions permitted by

university and law school rules. Remember, learning to be a better negotiator is not something that can be done “to” you or “for” you. You must work on it yourself, and what you learn in this course is in large part depends on your effort.

VIII. Negotiation Exercises

Much of this class will revolve around in-class negotiation role-play exercises. At the end of class you will receive the instructions for your role for the role-play exercise the following week. Make sure to read the materials and prepare your negotiation strategy before class.

An essential part of any negotiation is preparation, but most negotiators mistakenly devote little or no time to preparation. The more you prepare for a negotiation, the better your ultimate outcome will be. From a pedagogical perspective, preparation is one step in connecting negotiation theory to practice. Preparing for a negotiation means more than simply reading the materials for the problem. You should identify your (or client’s) interests, your estimation of the interests of your negotiation counterpart, your reservation point and BATNA, your goals, and strategy. We will be discussing all of these concepts throughout the semester and to make this task easier, we will be using Expert Negotiator, a web-based negotiation preparation tool, to help you organize this information.

You may discuss your upcoming negotiations with others who are playing the same role that you have been assigned. However, it is important that you do not discuss your confidential instructions with others who have been assigned other roles. Not only is doing so a violation of the school’s honor code, but your honesty, integrity and ethical conduct in this regard will count in your grade and will affect your reputation with your peers and your instructor. If you have any questions about the confidentiality of any facts, ask me.

IX. Grading

This class will be graded on the law school’s grading curve for courses of more than 20 students. Your grade is primarily based on what you learn in the course as demonstrated in your writing assignments and your class discussions. The specifics are below.

A. Participation (15%)

Participation includes timely attendance, participation in class exercises (as discussed above), participating in class discussions (quality trumps quantity), and your negotiation preparation documents. An unexcused absence results in no class participation points for that day.

B. Client Letter and Negotiation Self-Evaluation (35 %)

On Friday March 6th you will be doing a negotiation resulting in two written assignments. The first is a letter to your client detailing that week’s assigned negotiation. The letter should review your negotiation preparation, discuss the negotiation outcome and how it meets the client’s goals, and any other information you believe to be pertinent. A letter simply reciting a play-by-play account of what occurred in the negotiation will result in a poor grade. The Negotiation

Self Evaluation, on the other hand, is a self-reflection piece evaluating your negotiation skills. Self-reflection is a key means of deepening your understanding of yourself as a negotiator, and this assignment is designed to provide you with an opportunity to engage in this kind of reflective learning. To help you with this assignment, I recommend making a video of the negotiation so you can refer to it later. Both documents will be due to Suzy Lynn via email or hard copy on Thursday March 19th at 4pm.

- Client Memo – 20% of the course grade
- Negotiation Self-Evaluation – 15% of the course grade

C. Ellsworth Journal (40%)

In lieu of a final exam or paper, each student will complete a self-reflection paper discussion your negotiation capstone experience - the Ellsworth Negotiation. Your discussion should contain specific reflection and analysis on your negotiation experience rather than superficial rambling over lots of topics. Also, a Journal simply reciting a play-by-play account of what occurred during your negotiations will result in a poor grade. Your journals will be treated with utmost confidence. As with the Negotiation Self-Evaluation, the Ellsworth Journal is designed to provide you with an opportunity to engage in reflective learning.

Ellsworth Journal is due on Friday April 24th at noon via email or hard copy to Suzy Lynn in Room 265. More information on the Journal Entry Guidelines in Section XIII below.

D. Reputation Index (10%)

The Reputation Index is a proxy for the long-term effects of reputations created by negotiation activities. Within the legal community the negotiations you conduct today affect the perceptions and expectations of others tomorrow. The index recognizes that those individuals who have reputations as trustworthy and effective negotiators will have an advantage in future negotiations, and those who have reputations as untrustworthy and ineffective will have a disadvantage.

At the end of the semester I will ask each of you to identify students who “you think have developed good reputations as negotiators” and students who “you think have developed bad reputations as negotiators.” I will also ask you to give specific examples supporting your reasons for identifying each person in response to each question. If you would like to know your negotiation reputation among your classmates, I will provide you with the information that others have reported about you.

X. Ethics Mini-Trials and Informal Ethics Opinions

Starting January 30th we will be enforcing the Model Rules for Professional Conduct in our negotiation exercises. If any student is charged with a violation of the Model Rules during a negotiation, an Ethics Mini-Trial will be conducted during the next class. Professor Hinshaw will preside, and the non-involved class members will constitute the Armstrong Hall Ethics Committee. Any charge must be filed with Professor Hinshaw by 5pm the Monday following

the alleged infraction. If the purported infraction occurs during the Ellsworth Negotiation, the charge must be filed by 5pm April 14th, the Tuesday before our last class period.

As with any trial, both the Accusing Party and the Accused shall present their respective evidence, each witness will be subject to cross examination, and each party will have the opportunity to summarize their respective arguments. The Armstrong Hall Ethics Committee will then vote by secret ballot on each charged violation. A 2/3 majority shall be required for a finding of unethical conduct. If found guilty the Armstrong Hall Ethics Committee may suggest the appropriate penalty to Professor Hinshaw, who will then take that suggestion into consideration before making a decision on what the penalty shall be. Instead of an ethics mini-trial, an Informal Ethics Opinion may be requested from the Armstrong Hall Ethics Committee. Requests for an ethics opinion must be made within two days of the conduct in question by 5pm.

XI. Expert Negotiator

Expert Negotiator is the web-based tool we'll be using to prepare for and report about our in-class negotiations. During our second class period we will have a tutorial for using the software to get you up to speed on how to use it. Before that class period, you will have to register for the site.

As a part of the preparations for your negotiations you will fill out the negotiation preparation template. At the beginning of class you will hand printed copies of your preparation document in to me. The preparation sheets will be incorporated into the class participation portion of your grade.

XII. Course Materials Fee

There will be a one-time course materials fee of \$50 to defray the licensing costs associated with Expert Negotiator, which will be paid directly to Expert Negotiator. If you fail to pay the fee, you will not have access to your in class negotiation assignments and you will be unable to participate in our assigned negotiations thereby preventing a classmate from having a negotiation partner.

XIII. Summary of Key Dates

March 19 – Client Memorandum and Self-Evaluation due at 4pm

April 24 – Ellsworth Journal due at noon

XIV. Reflection / Journal Guidelines

To help you organize your thoughts when writing reflective papers for this class, think about the task as a request for three things: (1) a basic and neutral factual account of an important feature of your negotiation, (2) your reaction to or how you felt about what you described, and (3) how would you do things differently or what you learned from this event. Note that there should be more than just one event for this kind of analysis.

More specific guidelines for reflective writing:

- *Do not act as a reporter* – Do not simply itemize what was done. Instead, pick out some observations, questions, or concepts that struck you as particularly interesting or important. Grapple with those issues.
- *There are no “right” answers* – You won’t be graded on whether you agree or disagree with what’s presented in class. Feel free to challenge the ideas being presented and discuss the basis for your challenge.
- *Be specific* – Conclusory statements without support or analysis do not fulfill the self-reflective purpose for the journals. For example, if you feel the urge to write that you are annoyed with your negotiation partner, take time to investigate why you are annoyed. What triggered the annoyance? Have you felt this before? Does this say something about the way you negotiate? Did you learn how to respond in these kinds of situations?
- *Explore other viewpoints* – How might someone else have responded to what happened in the negotiation? What do you think was motivating the other person to do what s/he did? Why do you think that?
- *Be honest* – Do not gloss over your own ambivalence, confusion or weaknesses. Sometimes what you will learn after a negotiation is that you are not sure what to do, or you need to keep thinking about how to manage a certain problem.

The most common error that self-reflections suffer from is a lack of analysis. What I mean by that is that it is very easy to come to quick conclusions to explain issues and fail to slow down to take time to look at our actions, to place them in context of negotiation theory, to question how or whether the theory applies here, and to use those questions to learn from the experience. The key is to do this in written form, so I can see that you’re doing it.

I. Laying the Foundation

January 16 – Orientation; Competition and Cooperation

Getting to Yes, 3-15 (Introduction)

Andrea K. Schneider, *Teaching a New Negotiation Skills Paradigm* (supplement)

Iris Bohnet and Stephen Meier, *How Much Should You Trust?* (supplement)

For more information: Catherine H. Tinsley and Kathleen O’Connor, *Want the Best Deal Possible? Cultivate a Cooperative Reputation* (supplement)

January 23 – Negotiation Ethics

Beyond Winning, Chapter 11

Arizona Rules of Professional Conduct 1.2(d), 1.6(d), 4.1, and 8.4(c)

James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation* (supplement)

Gerald B. Wetlaufer, *The Ethics of Lying in Negotiation* (supplement) (read Part I, skim Part II)

II. The First Negotiation Tension – Creating and Distributing Value

January 30 – Interest Based Negotiation I

Getting to Yes, 1-107

Guhan Subramanian, *Taking BATNA to the Next Level* (supplement)

February 6 – Interest Based Negotiation II

Beyond Winning, pgs. 204 – 211

Russell Korobkin, *On Bargaining Power* (supplement)

Adam D. Galinsky, William W. Maddox and Gillian Ku, *The View from the Other Side of the Table* (supplement)

For more information: Gain the Edge, pgs. 34-40 and 43-64

February 13 - Dividing the Pie

Beyond Winning, Chapter 1

Gain the Edge, Chapter 4, pgs. 145-161, 164-169, 182-195, and 204-210

February 20 – Adversarial Negotiations, Hard Bargaining and Difficult Tactics

Beyond Winning, pgs 211- 223

Gary Goodpaster, *A Primer on Competitive Bargaining* (supplement)(read Part IV, skim Part V)

For more information: Maurice E. Schwietzer, *Negotiators Lie* (supplement);

III. The Second Negotiation Tension – Empathy and Assertion

February 27 – Empathy and Assertion

Beyond Winning, Chapter 2

Douglas Stone, Bruce Patton and Sheila Heen, *Learning: Listen from the Inside Out*, in Difficult Conversations: How to Discuss What Matters Most (supplement)

Roger Fisher and Daniel Shapiro, *Address the Concern, Not the Emotions*, in Beyond Reason: Using Emotions as You Negotiate

For more information: *Are You Asking the Right Questions?* (supplement)

IV. The Third Negotiation Tension – Principles and Agents

March 6 – Principles and Agents

Beyond Winning, Chapters 3 and 7

V. Special Issues in Negotiation

March 20 – Plea Bargaining and Multiparty Negotiations

Beyond Winning, Chapter 12

G. Nicholas Herman, Plea Bargaining, Chpts. 1 and 2 (supplement)

Rebecca Hollander-Blumoff, *Getting to “Guilty”: Plea Bargaining as Negotiation* (supplement)

March 27 – Culture, Race, and Gender in Negotiation

Beyond Winning, pgs. 167 – 172

Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations* (supplement)

Charles B. Craver, *The Impact of Ethnicity and Gender*, from Effective Legal Negotiation and Settlement (supplement)

Jayne Seminare Docherty, *Culture and Negotiation: Symmetrical Anthropology for Negotiators* (supplement)

For more information: Dina W. Pradel, et al., *When Does Gender Matter in Negotiation?* (supplement)

VI. Capstone Project – the Ellsworth Negotiation

April 3 – Ellsworth Negotiation – no class

April 10 – Ellsworth Negotiation – no class

April 17 – Ellsworth Debrief and Moving Forward

Andrea K. Schneider, *What Family Lawyers Are Really Doing When They Negotiate* (supplement)