

Multi-Stage Simulation Review: *The DONS Negotiation*

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Background

The DONS Negotiation is a four-party, double-stage simulation from Harvard's Program on Negotiation.¹ The role-play involves a pre-litigation settlement negotiation between two lawyers and their clients, Lisa and Matt, a former romantic couple. Lisa knew at the time of their relationship that she had DONS, a deadly sexually transmitted virus similar to HIV. She did not tell Matt that she was infected and the two engaged in unprotected intercourse. After they broke up, Lisa wrote to Matt to tell him that she was DONS-positive and encouraged him to get tested. Matt tested positive with a home self-test kit and then threatened to sue Lisa. At this point, Lisa suggested a meeting between their lawyers.

Lisa has three children, one of whom has cancer. She has no income and slightly over \$800,000 in assets, which Matt knows about. The twist is that her grandmother recently passed away and left her \$3 million, which Matt doesn't know about. She wants to protect the inheritance because she plans to use the money for medical expenses and to pay for her children's college education. Lisa is remorseful about having infected Matt and wants to make the remainder of his life more comfortable.

Matt quit his job and gave away many of his personal possessions after testing positive for DONS with the home test. However, he later had his blood tested by a laboratory and discovered that he is naturally immune to DONS, so he is not infected with the virus. Though relieved that he does not have DONS, Matt is angry and wants Lisa to suffer for the emotional distress she caused him.

Stages

1. In Stage 1, the two lawyers each meet with their respective clients to learn more details about their clients' situations and to develop a strategy for the settlement negotiation. Both lawyers are meeting their clients for the first time. During these meetings, Lisa tells her lawyer about the inheritance and instructs her lawyer to keep this information confidential, while Matt tells his lawyer he doesn't actually have DONS and similarly instructs his lawyer not to divulge this information. Stage 1 usually takes about 20 to 30 minutes—on the longer side if the lawyer is uncomfortable with the instruction not to disclose, and on the shorter side if the lawyer quickly agrees. One goal of this stage is for the lawyers to improve their client interviewing skills—particularly in a situation involving

¹ *The DONS Negotiation* was written by Robert C. Bordone and Jonathan Cohen based on another simulation by Nevan Elam and Whitney Fox. Copies of *The DONS Negotiation* simulation are available from the Program on Negotiation Clearinghouse at www.pon.org or 800-258-4406.

- somewhat uncomfortable subject matter—and to build relationships with their clients. Another goal is for the lawyers to navigate the principal-agent tensions inherent in the clients’ instructions not to disclose material facts in the negotiation.
2. In Stage 2, the lawyers meet with each other to discuss a settlement. I have them meet without their clients present and without further opportunity to ask their clients for permission to disclose the confidential information. I assign the clients to observe another lawyer pair’s negotiation. Stage 2 usually takes about 30 minutes. This stage’s goal is for the lawyers to negotiate a satisfactory settlement while they wrestle with the decision whether to disclose in light of competing Model Rules and their personal standards of ethical conduct.
 3. Next, the students return to their lawyer-client pairs so that the clients can give their lawyers feedback on Stage 1. I ask the clients to comment particularly on their lawyers’ active listening, empathy, and assertiveness and then to address what worked well and what could have been done differently. This generally takes about 10 minutes.
 4. Finally, we regroup and debrief the negotiation as a whole. Among other things, I ask the lawyer-client pairs to discuss how they approached the nondisclosure instructions in Stage 1. I walk through the relevant Model Rules with the class and ask the lawyers who did disclose the confidential information to explain why they felt they had to do so under the Rules, and those who didn’t to explain why they felt they were justified in not disclosing. (Many students are studying for the MPRE around the time that they negotiate *DONS*, and it is often eye opening for them to experience one of these tricky ethical situations in practice.) We also talk about the durability of an agreement that is reached when material facts are omitted, as well as how the lawyers’ reputational considerations affect their decisions whether to disclose. This debrief takes between 60 and 90 minutes.

Logistical Considerations

My class meets for 90 minutes twice a week. I usually cancel the first class and hold a double session on the second class day so that we can conduct and debrief *DONS* in a single three-hour session. I find that students—especially Lisa’s side—have a strong emotional reaction to the nondisclosures and an immediate debrief best captures the moment. Alternatively, if you have a similar class schedule you could run Stages 1 and 2 during the first class and conduct the debrief in the second class, or do Stage 1 outside of class and then do Stage 2 and a shorter debrief in a single class.

Future Modifications

In the future, I plan to rewrite *DONS* to see whether adding some additional stages changes the outcomes. One version might go like this:

1. **Lawyers' Lunch:** The lawyers meet for a friendly lunch prior to being assigned to their clients' cases and before they know anything about their clients.
2. **Initial Lawyer-Client Meeting:** Matt and Lisa meet their respective lawyers for the first time and ask them for help in arranging their affairs before they succumb to DONS. This meeting takes place while Matt still believes he is DONS-positive and before Lisa knows about her inheritance or Matt threatens to sue.
3. **Second Lawyer-Client Meeting:** Matt and Lisa meet again with their respective counsel, this time after Lisa has received the inheritance and after Matt knows he is immune and has threatened to sue (i.e., Stage 1 of the original *DONS* simulation).
4. **First Settlement Negotiation:** The lawyers meet to negotiate the settlement.
5. **Third Lawyer-Client Meeting:** The lawyers have an opportunity to meet again with their clients to discuss progress made on the settlement and (if desired) to seek permission to disclose the confidential information. Assuming the clients refuse to permit disclosure, this gives the lawyers a further opportunity to decide whether following their clients' instructions comports with their personal ethical standards.
6. **Second Settlement Negotiation:** The lawyers meet again to finish their negotiation, either with new instructions or with reaffirmation of the original instructions.

Adding the additional stages gives the lawyers more opportunities to build trust and rapport, both with each other and with their clients. The goal of adding these stages is to explore how this alters the lawyers' behavior throughout the negotiation and to see if it affects their decision whether to disclose the confidential information.

I also plan to add an additional variation (either to the original *DONS* negotiation or to this modified version) by assigning two lawyers per client to see if this affects the disclosure decision or the conduct of the negotiation generally. On the one hand, the lawyer pairs might reinforce each other's decisions. On the other, the lawyers might talk each other out of following their initial inclinations. Particularly if they initially disagree about their disclosure strategy, pairing up the lawyers also forces them to cope with an additional relationship tension.