

I. COURSE INFORMATION

1. Goals of the Course

This course is about the skills, process, theory and ethics of negotiation. The ability to negotiate effectively is central to the work of lawyers. The great majority of matters handled by attorneys on behalf of clients involve the negotiation process in some way. Indeed, in many situations negotiating a solution to the client's problem may be the only action required.

Lawyers negotiate on behalf of clients in both dispute and transactional settings. In most courts in most jurisdictions, something approaching 95% of all cases formally filed in court are resolved without trial, sometimes by dispositive motion or abandonment, but mostly (if often belatedly) by means of negotiation. Many thousands of additional disputes are settled informally each year through negotiation, before they ever ripen into lawsuits. And most lawyers, of course, primarily or solely do transactional rather than dispute resolution work – helping their clients bargain for the sale, purchase or development of businesses, commodities and services, and/or negotiating with government agencies to take or withhold action affecting their clients' interests.

Given the centrality of negotiation to the work of lawyers, it is surprising that formal instruction in bargaining is relatively new to legal education. It is only in the past 25 years or so that courses such as this one have been developed in American law schools. For one thing, it used to be thought that negotiation was an "art" that couldn't really be taught. Much of the early writing in negotiation was of the nonacademic, anecdotal, "you can negotiate anything" variety. But today, the negotiation literature (with important contributions from the fields of law, economics, social and cognitive psychology and international relations) is extremely wide and deep. Clinical legal education has contributed to law schools a more sophisticated knowledge about the various components of the lawyering process and some new methodologies for teaching them. As a result of these developments, almost all law schools today offer specialized instruction in negotiation.

In this course, we will be using a variety of simulation materials, including materials developed by Dean Joseph Harbaugh of Nova Law School, in cooperation with the Practicing Law Institute. (Speaking of the legacy of clinical legal education, Joe was the first clinical teacher hired at the University of Connecticut Law School, in 1968.) We may experiment as we go along. I welcome your ideas and suggestions.

2. Course Structure

In this course, you will learn a variety of negotiation approaches, and will have multiple opportunities to practice and analyze the constituent skills of negotiation, through assigned theoretical readings, out-of-class simulation exercises and periodic in-class skill-building exercises and discussions. In addition, you will be required to maintain a reflective journal, critically analyzing your negotiation preparation, performance and improvement.

In the first two weeks of the course, I will introduce you to distributive (also known as competitive) and integrative (a/k/a problem-solving) bargaining. (The reading is a bit front-loaded, so as to get the basics covered quickly.) As one of the main topics in this course, we will consider how a lawyer chooses and integrates competitive and problem-solving negotiation techniques, depending on his or her own personal style and preferences, the style and preferences of the opposing attorney, the expectations of the client and the nature of the matter being negotiated.

Beginning in week three and approximately every other week for the remainder of the course, you will be assigned a simulated negotiation to prepare and complete out of class. There will be seven out-of-class simulations. These simulations will be video recorded by web-casting for purposes of self- and peer evaluation. Most classes will be built around discussion of the assigned simulations, including analysis of portions of the web-casts that are chosen by you to present to your classmates. From time to time, these discussions will be supplemented by in-class skill-building exercises and role plays, designed to bring out some aspect of the negotiation process.

The out-of-class negotiation simulations are varied and designed to expose you to a number of different fields of law and lawyer activity. We will conduct the final simulation as a mediation, bringing in experienced lawyer-mediators to facilitate your negotiations. This will enable us to consider how the presence of a mediator can change the negotiation dynamic and what “value” a skilled mediator can add to the negotiation process.

3. Required Texts and Materials

The primary text for the course is G. Richard Shell, *Bargaining for Advantage* (Penguin 2d ed. 2006) (“S.”). I have also put together some supplementary course pack materials for purchase at the book store. (“CP.”) Additional readings may be posted on TWEN from time to time.

4. Out-of-Class Simulations

Approximately every other week, each student will be assigned a new case for negotiation and will be assigned an opposing lawyer (or lawyers) with whom the negotiation will occur. All the negotiations require significant preparation and planning. All negotiations (except for simulation #3, which will be conducted by email) must be video recorded. During the weeks we are conducting video recorded simulations, a room with a computer and web cam will be made

available for students in the course (details to be announced). Students are responsible for scheduling and video recording their own simulations. Early in the course, I will make arrangements for everyone to be trained on how to use the web-casting technology.

In each simulation, you will all be negotiating the same case, from the same essential facts. In each negotiation, some of you will have one role, some another. Roles are chosen randomly. You should try to treat each simulation as a real negotiation, acting exactly as you would act if the matter you are negotiating were real. (This includes preparing really carefully, so that you can represent your client with minimal reference to notes; dressing with reasonable formality; walking out of the negotiation if you think that would do this in real life; etc.) By being yourself, and taking the role-plays seriously, you will get the maximum possible educational benefit out of the negotiation simulations.

Please do not discuss the negotiation fact pattern or any aspect of the negotiation with any class members until after you and they have completed the simulation. To do otherwise will ruin it for you and them. Also, do not talk about the role-plays with anyone outside the class. I ask this for two reasons. First, you will learn more if you figure things out for yourself, rather than being told by an “expert” you might know. Second, if you discuss the exercises with other students, you might impair the value of the exercises for them if they take the course in the future.

5. Showing and Analyzing Video Excerpts in Class

Every other week (usually in the second week that we discuss a two-week negotiation), students will be asked to select and to show a short excerpt or excerpts from their latest negotiation video that they wish to discuss with the class. This is one of the most important components of the course, and every student must do it at least once, and preferably twice, over the course of the semester.

You will be asked to bring to class approximately 3-5 minutes of video material (no more) that you think would raise interesting and fruitful issues for class discussion. The main purpose of presenting video excerpts in class is to study negotiation interactions in detail and to learn from situations that each of you may have found challenging. I hope that you will share with your classmates interchanges that you found difficult or troubling or that raise questions about the readings or about your own progress as a negotiator, or about which you simply want feedback. Treat this as a learning opportunity, and keep in mind that generally the best learning occurs when you don't think that you (or your negotiation counterpart) handled a situation well and you candidly seek the advice of your classmates on how things might have gone better. If everyone does this, non-defensively and in the spirit of learning, and if everyone commits to providing positive and constructive feedback, then our discussions will be rich and meaningful.

6. The Journal Requirement

As the practice of law has become increasingly competitive and bottom line-oriented, there are fewer opportunities than ever for beginning lawyers to be mentored by experienced ones. The purpose of the journal is to help develop your ability to learn from your own experience by

engaging you in a process of careful pre-negotiation planning and thoughtful post-negotiation self-criticism and analysis.

Prior to the time you sit down in each simulation to negotiate, you are expected to submit on TWEN a journal entry discussing your goals and your plans for achieving them. After the simulation, you are expected to discuss the negotiation with your negotiation counterpart (even if briefly) and to review the video of your performance. Then you are to write a reflective evaluation of your performance in your journal. After we complete our review of each simulation in class, you will have one more week to complete your analysis, incorporating what you learned about your performance from class discussion, and submit your reflections to TWEN.

The principal subject of your journal will no doubt be the out-of-class simulations. I expect you thoughtfully to analyze your goals and your preparation for each negotiation and then assess your performance with respect to those goals in light of class discussion and the readings. But anything else that relates to the course or the subject of negotiation is also fair game. I encourage you to share your reactions to the readings, class discussions, in-class games and exercises, or to analyze, in light of what you have learned in the course, actual negotiations that you engage in outside of law school. I will give you regular written feedback on your journals as the semester progresses.

I expect you to accumulate roughly 60-70 pages of journal entries over the life of the course—the equivalent of 4-5 pages a week (not a daunting requirement if you keep up with it). Each journal entry should be typewritten, 12 point font and double-spaced, containing your name at the top of the entry. Post-negotiation journal reflections for each simulation are due one week after the last class in which we discuss that simulation. (Due dates are noted on the syllabus.)

The following are some suggestions for the content of your journal as it relates to the out-of-class negotiations. The list of topics for your pre-simulation entries is a long one, but I expect you to consider and address all these topics when you do your planning. By contrast, the list of topics for post-negotiation entries is exhaustive and is provided only as a *suggestion* of the types of things you may want to write about. You cannot possibly cover all, or even many, of these topics in any one journal entry. The most important thing is that your post-negotiation entries be reflective and analytical, rather than merely descriptive. I would much prefer an in-depth analysis of a few issues in each journal entry, rather than a discussion that is “a mile wide and an inch deep.”

Pre-Simulation Entry: To Be Prepared and Submitted to TWEN **Before** Each Negotiation (Maximum: 5 Double-Space Pages).

- A. *Interest Analysis:* What are my client's needs and interests in this case? What are his or her priorities? To what extent do my client's interests conflict with my opponent's? To what extent do the parties have shared interests? To what extent do the parties have differing but compatible interests?
- B. *Strategy:* What negotiation strategy (distributive, problem-solving, or a combination) do I wish to adopt in this negotiation? Why?
- C. *Leverage:* What sources of leverage do I have in this case? What about my opponent? To the extent that my client's interests and my opponent's interests diverge, how can I maximize my leverage and neutralize my opponent's?
- D. *Style:* What style (friendly? civil? formal? hard-nosed?) will I adopt in this negotiation? Why?
- E. *Information Exchange/Information Bargaining:* What information do I need from my opponent? What specific questions will I ask to obtain this information? What information do I need to protect and why? What specific techniques/answers am I going to use to protect sensitive information?
- F. *General Bargaining Issues:* What is the anticipated bargaining range in this negotiation? What is my target point (an ambitious but realistic goal)? What is my resistance point (bottom line)? What is my opponent's most likely target point and resistance point?
- G. *Offers, Concessions and Justifications:* Should I make the first offer? What will my opening offer be? How will I justify it? What will be my second and subsequent offers? What arguments, norms and standards can I employ to justify each offer or concession that I made?
- H. *Agenda:* If the negotiation has more than one issue, in what order do I want to discuss them? Why? What do I want the agenda of this negotiation to look like?
- I. *Persuasion:* How can I be most persuasive in this case, to help get my client what he or she wants?
- J. *Problem-Solving for Mutual Gain:* What opportunities exist in this negotiation for mutual gain? How can I learn about and exploit them?

Please note: There are a great many things to think about when planning a negotiation, and *all* of these topics and sub-topics must be addressed in each plan. Each of you will have to develop your own method of efficiently presenting your plans. Bulletized presentations are fine. But bottom line: in negotiation planning, as in math class, it's important to "show your work."

Post-Simulation Entry: To Be Prepared and Submitted on TWEN *After* Completing Your Negotiation, Reviewing the Video of Your Performance and Initial Class Discussion.
(Maximum: 5 Double-Space Pages).

At the beginning of each post-simulation entry, please report a) who your client was, b) whom you negotiated against, c) what the outcome was, and d) how long the negotiation took. Then go on to reflect on two or three topics of your own choosing. You are encouraged to focus deeply on aspects of each negotiation that you found challenging, surprising, important (because they were important to the outcome of your negotiation or are likely to arise often in practice), or otherwise significant in terms of your own learning. Here are some possible topics to consider:

- A. *Preparation:* In light of my performance, what could I have done better to prepare? To what extent did the negotiation go as I expected? What surprises occurred in the negotiation? Did I mistakenly predict how my opponent would behave? How? Why?
- B. *Listening and Questioning.* Did I listen well? What got in the way? Was my questioning precise and effective? How could it be improved?
- C. *Information Bargaining:* Did I get the information I needed? Why or why not? Did I leak information I wanted to protect? Why? How, specifically, could I have better controlled the flow of information in the negotiation?
- D. *Agenda:* Who controlled the agenda of the negotiation? Did my pre-planned agenda anticipate what actually occurred in the negotiation? Did the structure of the agenda affect the result? How?
- E. *Strategy:* Did my overall negotiation strategy work? How should it have been different? What tactics did I employ, and with what success? In what ways did my opponent's goals, strategies and tactics surprise me?
- F. *Persuasion:* Were my arguments persuasive? Was I effective in influencing my opponent? Why or why not? How could I have been more persuasive? Was my opponent persuasive? Why or why not?
- G. *Style:* Was my negotiation style appropriate to the negotiation? Effective? Why or why not? Was my opponent's? Why or why not?
- H. *Ethics:* Did any ethical issues arise? How did I and my opponent deal with them? What could/should we have done differently? Was there any relationship between any ethical issues that came up and the outcome of the negotiation?
- I. *Emotions:* To what extent did positive or negative emotions affect this negotiation? Did my emotions interfere with my performance in any way? What set me off? What, if

anything, can I do to prevent this from happening in the future?

- J. *Progress*: Have I progressed in my ability to negotiate? What do I need to do in order to improve? How well did I learn from the last simulation?
- K. *Class discussion and readings*: How has my analysis been informed by the negotiation theories raised in class or by the readings?
- L. *Critique of opponent's performance*: Once during the course of the semester, at a time of your own choosing, I would like you to include in your journal a 1-2 page critique of selected aspects of your negotiation opponent's performance, to be shared with him or her, as well as with me. To be of maximum utility, your critiques should contain both positives and constructive criticisms, and should be supported by concrete examples from the video. Please copy/paste your critique in an email to your negotiation opponent, with a copy to me.

Additional Topics:

Here are some additional, more generic topics (a non-exclusive list) that you might also wish to explore in your journals:

- A. *Natural Bargaining Style*: Am I naturally more comfortable with collaborative, problem-solving negotiation or with competitive negotiation? Do I enjoy conflict or am I generally a conflict avoider? Under what circumstances? Where does my "conflict management style" come from? What are the implications for me as a prospective lawyer-negotiator?
- B. *Gender Issues*: How, if at all, does my gender affect my attitudes about conflict resolution and negotiation and my behavior as a negotiator? Is it easier or harder for me to negotiate against someone of a different gender? Does gender matter at all in negotiation? What are the implications for me as a prospective lawyer-negotiator?
- C. *Cultural and Family Issues*: How, if at all, has my cultural or family upbringing affected my attitudes about negotiation or my behaviors as a negotiator? What are the implications for me as a prospective lawyer-negotiator?
- D. *Relationship Issues*: How, if at all, have my prior relationships with other students in the course affected my negotiations with them? How did the reputation of my negotiation counterpart affect my planning or performance? What are the implications of such factors for me as a prospective lawyer-negotiator?
- E. *Principal-Agent Issues*: Am I more comfortable bargaining for myself or for others? Why? Do lawyers dampen conflict or exacerbate it? Under what circumstances? What factors make it appropriate or inappropriate for a client to attend a negotiation? If it had been possible to include my client in this negotiation, would I have done so? Why or

why not? To what extent would have I been comfortable having my client observe me on video negotiating his/her problem? Why or why not? Is this an appropriate standard by which to evaluate my performance?

- F. *Ethics Redux*: What “school” of ethics do I come from? (See Shell, Chapter 11.) Where do my ethical beliefs about negotiation come from? What are the implications for me as a prospective lawyer-negotiator?
- G. *The Role of Mediation*: Would a mediator have been helpful in this negotiation? Why or why not? What specifically could a mediator have done to improve the negotiation? What generalizations can I draw from my experience about the place of mediation in the practice of law?
- H. *Other Themes*: What are the effects of fear and anger in negotiation, and what can a negotiator do to overcome them? What is the role of trust in negotiation and how can a negotiator build it? What is the importance of reciprocity in negotiation, and what are the effects of a negotiator’s failure to make reciprocal concessions? What are the causes of overconfidence in negotiation, and what can a negotiator do to fight it? Now that the semester is over, what do I think are the most important traits and skills of an effective negotiator? What skills have I learned and insights have I gained in this course that I can use in my everyday life?

Again, there is much more here than you can possibly cover in depth in any one journal entry, and for your post-negotiation entries I strongly prefer that you tackle 2-3 issues in detail rather than many issues superficially. Also, there are many ways to write effective post-negotiation journal entries. I do confess, however, that I am particularly partial to “transcript analyses,” in which you develop issues of interest to you by analyzing the actual words you and your negotiation counterpart used, talking about what you were thinking, saying and (when appropriate) *feeling* “in the moment” at critical times in the negotiation, and suggesting different things you could have said or done, different approaches you could have taken, and areas for possible improvement.

7. Grading

Grades in this course are not based on your performance in, or the results of, the simulations themselves. The course is designed this way to encourage you to experiment with different ideas and techniques in your negotiations, without fear of failure. I want you to try out strategies and techniques that may not come naturally to you, with the goal of developing your flexibility to negotiate effectively in a wide variety of disputes and transactions and with a variety of different people. I am much more interested in the quality of your preparation and planning in advance of each negotiation, and the depth of your analysis of your own performance and the performance of your classmates after each negotiation, than in how you *do* in the negotiations themselves.

Your grade in the course will thus depend on my evaluation of your journal (60%), the quality of your participation and leadership in class discussions (30%) and other indices of effort and

educational responsibility in the course (10%). Have you prepared really carefully for each simulation? Have you taken advantage of opportunities to learn from experience by careful analysis of your own planning and performance and that of your classmates? Have you developed effective methods of self-critique? Have you applied the theoretical readings in analyzing your own and others' negotiations? Are your journal entries analytical and introspective or primarily descriptive? Are they submitted on a regular, timely basis? Have you been present, on time and prepared for all classes and simulations? Have you contributed significantly to making the classes successful learning experiences, by making interesting comments and asking good questions? Did your selection of video excerpts to show in class raise significant learning issues for yourself and others? Were your comments on other students' video excerpts concrete and constructive?

In this course, regular, punctual class attendance is essential. If sickness or a personal emergency requires you to miss any class, please let me know before that class begins. In addition, I expect you to have arranged, planned for, completed and taped each simulation prior to the time it is discussed in class. Failure to do so could result in the lowering of your grade by as much as a full letter grade.

8. Small Group Tape Review

In general, I will not physically be in the room when you negotiate and, other than observing the video excerpts you choose to show in class, will not see you negotiate. For most students, that's fine. Other students have occasionally reported that they would like individualized feedback on their negotiating performance during the semester. This semester, in week 13, I will hold small group discussions with each negotiation group and review with you video excerpts *of your choosing* from your most recent negotiation ("Wendy's Way," a teamed negotiation.) I will spend 60 minutes or so with each group. This will be *instead* of class that week, either during our scheduled class time or at mutually convenient times to be arranged. If in addition, there is an issue or particularly problematic negotiation about which you would like to meet privately, or a small piece of video you would like me to give you feedback on and discuss with you, please let me know and I will be happy to arrange a meeting. My official office hours are from 10:30-11:30 on Thursdays, but I am around a lot and happy to see you at other times. Please contact me at james.stark@law.uconn.edu or (860) 570-5278 to make an appointment.

9. A Final Word

This course, more than most others at law school, is about your own skills, values and professional growth. Some negotiation courses are quite prescriptive: they seek to teach a single method of negotiation (usually problem-solving negotiation) to their students. That is not my approach. Rather I choose to provide you with (hopefully) good readings and interesting and varied simulations, and then give you the freedom to learn from your own experiences and find your own way. So work hard, take chances, and have fun!

II. SYLLABUS

Class # and Date	Subject	Readings and Assignments
1. Wednesday Aug. 28	Introduction to the Course, and to the Basics of Distributive and Integrative Bargaining. Style vs. Strategy in Negotiation.	Nelkin, 59-76, 121-34, 185-90, in <u>CP</u> ; <u>S.</u> 3-25, 117-37. Distribute “Management of Differences” survey for discussion in Class 2.
2. Wednesday Sept. 4	Foundations of Effective Negotiation	<u>S.</u> 26-113. Distribute Simulation #1: <u>Colonial Confectioners.</u> ” Tape by 9/10.
3. Wednesday Sept. 11	Review <u>Colonial Confectioners.</u> The Ethics of Negotiation; Information Exchange, Opening Offers, Concessions.	<u>S.</u> 138-74, 196-228 Distribute Simulation #2: <u>HSN and OCN.</u> Tape by 9/17.
4. Wednesday Sept. 18	Review <u>HSN & OCN.</u> Principles of Influence in Negotiation.	<u>S.</u> 175-95; Guthrie article, in <u>CP.</u> Distribute Simulation #3: <u>Negotiating a Job Transfer</u> (Interscholastic email negotiation). Begin Sunday 9/22, complete by Sunday 9/29. <u>Colonial Confectioners</u> journal reflections due on TWEN by 5 pm.
5. Wednesday Sept. 25	Complete review of <u>HSN & OCN.</u> Negotiating via Internet Technology.	Thompson & Nadler extract, in <u>CP.</u> Distribute Simulation #4: <u>Klare v. Journal.</u> Tape by 10/8.

<p>6. Wednesday Oct. 2</p>	<p>Review <u>Negotiating a Job Transfer</u>. The Tension Between Empathy and Assertiveness.</p>	<p>Mnookin, et al, <u>Beyond Winning</u> 44-68, in <u>CP</u>. <u>HSN-OCN</u> reflections due on TWEN by 5 pm.</p>
<p>7. Wednesday Oct. 9</p>	<p>Review <u>Klare v. Journal</u>. Psychological/Emotional Aspects of Negotiation.</p>	<p>Adler, Rosen & Silverstein extract and Gray extract, in <u>CP</u>. Distribute simulation #5: <u>Milam v. Midwest Airlines & Capri Hotel</u> Tape by 10/22. Email negotiation transcripts and “mini-reflections” due on TWEN by 5 pm.</p>
<p>8. Wednesday Oct. 16</p>	<p>Complete review of <u>Klare v. Journal</u>. Evaluating a Case for Settlement.</p>	<p>Mnookin, Peppet & Tulumello, <u>Beyond Winning</u> 224-40, in R.</p>
<p>9. Wednesday Oct. 23</p>	<p>Review <u>Milam</u>. Multi-Party Negotiations; Cognitive Aspects of Negotiation.</p>	<p>Gifford extract and Birke & Fox extract, in <u>CP</u>. <u>Klare v. Journal</u> reflections due on TWEN by 5 pm.</p>
<p>10. Wednesday Oct. 30</p>	<p>Complete review of <u>Milam</u>. Gender and Culture Issues in Negotiation.</p>	<p>Korobkin book extract, in <u>CP</u>. Distribute Simulation #6: <u>Wendy’s Way & Robert Gordon</u>. Tape by 11/13.</p>
<p>11. Wednesday Nov. 6</p>	<p>Class does not meet. Use this extra time to prepare for <u>Wendy’s Way</u>, a complex, teamed negotiation.</p>	<p>Bryant extract, in <u>CP</u>. <u>Milam</u> reflections due on TWEN by 5 pm.</p>
<p>12. Wednesday Nov. 13</p>	<p>Review <u>Wendy’s Way</u>. Collaboration in Law Practice.</p>	<p>No reading assignment. Distribute mediation simulation #7: <u>In re Estate of Gale</u>. Tape by 12/3.</p>

13. Wednesday Nov. 20	Complete review of <u>Wendy's Way</u> . No formal class meeting. Small group tape review meetings, times TBA.	Readings on mediation, to be posted to TWEN.
WEDNESDAY NOVEMBER 27: NO CLASS, THANKSGIVING BREAK		
14. Wednesday Dec. 4	The Role of Mediation. Review mediation simulation and assess course.	No reading assignment.

All remaining journal entries, including your Wendy's Way and Estate of Gale reflections and a capstone entry reflecting on your overall experiences in the course, are due on TWEN on or before 5:00 on Monday, December 16.