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HOW TO DESIGN AND CONDUCT NEGOTIATION SIMULATIONS IN CONTRACT DRAFTING COURSES

Naveen Thomas

INTRODUCTION

In any law school course, the most common type of exercise used to teach negotiation skills is a simulated negotiation based on a hypothetical fact pattern. This type of activity is ubiquitous in classes that are dedicated to negotiation skills, but it can also be useful in contract drafting courses. This article focuses on transactional negotiation simulations in the latter context, though most of its suggestions apply equally to these exercises in any course.

SIMULATION SETUP

Negotiation exercises tend to follow the same general steps.

First, the professor divides the class into teams. If possible, each team should have an even number of students. Although pairs are often best, a team can have more than two students, which may be more practical in large classes. This requires students to work collaboratively and encourages teamwork, which is an important but often overlooked lawyering skill. However, larger teams also make it more difficult for the professor to grade students who are working collaboratively, because collective work products may mask distinct individual contributions. In addition, shyer or less vocal students working on larger teams may be less involved in the exercise than they would be when working alone. Those students may need individualized attention and encouragement to benefit fully from the learning experience. Therefore, pairs tend to be ideal.

The second step is to assign each team member to represent one of two clients. In a pair, each student will represent a different client. In a larger team, students are divided further into subgroups, each of which will represent a different client. To the extent possible, each team's subgroups should consist of an equal number of students. If an odd number of students are participating in the exercise, however, then one team will have an uneven number of representatives for each client. The professor should pay special attention to that team to ensure a fair distribution of work throughout the exercise.

Third, each student receives a set of client-specific instructions, which she must keep confidential and not share with students representing the opposite party. As discussed below, the instructions may contain facts about the client and the proposed transaction, the client's thoughts and preferences regarding certain deal terms, and practical guidance for completing the exercise.

INSTRUCTIONS

The professor should tailor the instructions to the course's precise learning goals. A wide variety of available approaches can lead students to perform different activities and to develop different types of knowledge and skills. Several aspects of a negotiation exercise's instructions can contribute to these diverse outcomes.

Preparing for the negotiation

First, the instructions should inform students how to prepare for the negotiation exercise. If the activity spans multiple class sessions, then students should know what they need to do before each one. For instance, do students have to meet with their hypothetical clients in advance? Do they need to do any legal research into issues raised by their clients? These decisions affect how the students will spend their time on the exercise and the skills that they will develop.

In deciding these issues, professors should always consider how much time students likely have in their schedules to devote to any given activity. Unless several weeks are devoted to an exercise, an attempt to cover every possible lawyering competency may lead students to spend little time developing any of them.

Learning initial details

Students can take different approaches to learn the facts and other details of the hypothetical situation underlying the exercise. As initially suggested above, these matters could be presented directly in the exercise's written instructions, in the form of either a memorandum from the client or notes from a meeting with the client. Alternatively, students could take a more active role in learning the facts. For instance, they could obtain this information by interviewing a mock client played by the professor, an actor, or a student in a complementary course. This activity would clearly expand the simulation's learning goals of the exercise from negotiation skills to interviewing skills. In return, it would require more preparation and supervision by the professor, likely require meetings outside of class, and increase the exercise's duration. Therefore, mock interviews are not feasible in every course.

Regardless of how the facts are presented, the number and complexity of business and legal issues determine how much time students devote to gathering and processing facts rather than negotiating with their counterparts and drafting the contract. If the professor has limited time and prefers to emphasize negotiating and drafting, then an economy of facts is likely optimal.

Obtaining further information

The initial set of facts can be either exhaustive or open. With the second option, students must have the opportunity to obtain further information from their clients, both to clarify the initial facts and to resolve issues raised by conversations with opposing counsel. Regardless of whether the professor or other people act as each client in delivering the initial facts, those actors could play those roles during the exercise's later stages. By communicating with their clients, not only in person during class but also by e-mail outside of class, students can practice both oral and written client counseling skills. To introduce additional realism to the simulation, the actors can change the clients' positions in response to developments in the negotiation, which frequently occurs in practice.

Creating a term sheet

The professor must decide on the types of written work that students must create and submit. In a drafting course, the most obvious choice for the ultimate deliverable is a negotiated contract memorializing the parties' agreement. In addition, as part of this process, students could first prepare a term sheet, which memorializes the terms on which the parties agree in a document that is less formal and less complete than a contract. This reflects business lawyers' typical practice and guides students in drafting the eventual contract.

If a term sheet is assigned, then another choice arises. The professor could review and approve it before the students begin drafting the contract, or the students could submit it at the end of the exercise along with the contract. The former approach helps to ensure that the students have followed instructions but requires additional time. In contrast, a professor using the latter approach could use the term sheet while grading to confirm how completely and accurately the students have drafted the contract.

Drafting the contract

Once the students, after consulting with their clients, have agreed on an initial set of business terms, potentially memorialized in a term sheet, they can proceed to draft the contract. The professor must make several important decisions regarding this stage of the simulation.

First, the instructions should state whether students must create the agreement from scratch or based on a template or precedent. With the latter approach, the exercise could further require the students to find a suitable starting document, perhaps subject to the professor's approval. For transactional attorneys, researching templates and precedents is an important practical skill, which such an exercise could help students to develop. Of course, this requirement also lengthens the exercise, so professors with less time should consider providing students with a specific starting document. A relevant contract from the drafting course could be suitable because students are already familiar with it and can apply lessons from the prior assignment in drafting the new agreement.

Regardless of whether students begin with a precedent or template, the instructions should explain how the students should divide responsibility for drafting the contract.

The most realistic method is for one student to write the first draft, and the other student to review and comment on that draft, leading to an exchange of comments between the students. This approach accurately reflects transactional practice but unfortunately tends to place a greater workload on the first student, because preparing a first draft often takes more time than does commenting on another lawyer's work. However, this method can be fairer to students in a course involving multiple negotiation exercises, with each student alternating between the two roles. In any event, monitoring an exchange of redlines between multiple teams is much more burdensome than just reviewing their final contracts, so a professor must ensure that adequate time is available before asking students to take this approach.

For a more balanced workload, the students can draft the agreement together based on the terms on which they have agreed while creating the term sheet. If the students have so far taken a "positional" or "adversarial" approach to negotiating those terms, they must now take an "integrative" or "problem-solving" approach to drafting the contract.¹ Effective negotiators should master both approaches, and this structure

¹ See generally ALICIA ALVAREZ & PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE 152 55 (2013).

permits students to diversify their skills. While drafting the contract based on the agreed business terms, students invariably encounter new issues on which their clients must agree before they can finalize the agreement, which calls for further client communication and negotiation.

LEGAL RESEARCH

In designing a negotiation simulation, among the most impactful decisions is whether to require students to perform legal research. The considerations vary depending on the course's broader context. For instance, toward the end of a first-year legal writing program, a simulated negotiation requiring research would allow students to apply relevant lessons from earlier in the semester and to practice their newfound skills. In an upper-level contract drafting course, however, some professors may dispense with research so that students instead focus on negotiating and drafting terms in accordance with their clients' interests. Other professors, however, recognize that legal research is an inherent part of transactional lawyering and seek to integrate that activity into the exercise as well.

Whatever the desired focus, time allocation is a critical concern in planning any simulation in law school. Given their other commitments, students have only so many hours each week to devote to a given course. This varies depending on the course's number of credit hours as well as the specific time of the semester. Though the precise amount of time is variable and unknowable, if a professor asks students to perform more activities as part of the same exercise, then they will tend to devote less time to each of those activities.

Therefore, by requiring legal research in a contract drafting course, professors may divert students from practicing their nascent writing skills. Because legal research is an integral part of many law school courses but negotiating and drafting tend to be limited to only a few, contract drafting professors should consider whether to focus on the latter skills by ignoring the former. If the professor decides nonetheless to require research, then she should ensure that students have enough time to devote sufficient attention to all the exercise's components.

To design a simulation that calls for research, the professor can present a deal that requires in-depth knowledge of an area of substantive law, as in a highly regulated industry. This leads students to spend much of their time learning about the relevant legal framework. For instance, in a transaction involving pharmaceutical patents, legal research is often

essential to the negotiation. Alternatively, one can direct students to research only specific issues, such as a non-compete provision's enforceability in a given state, and to negotiate and draft the relevant provisions accordingly. This can be a good compromise for professors who want to require some legal research to reflect real-world practice without diverting too much attention from negotiating and drafting.

To minimize the time that students spend researching legal issues and industry practices, one should choose a subject that is already familiar to most students and, even better, builds upon other content in the same course. For instance, Tina Stark's contract drafting textbook contains several drafting exercises based on employment relationships.² If a course uses this textbook and at least some of these exercises, students will learn aspects of employment law and how employment agreements are typically drafted. For continuity, a negotiation simulation at the end of such a course could ask students to negotiate and draft such an agreement, perhaps using one of the other exercises' contracts as a precedent.

RELATIVE CLIENT PREFERENCES

In the confidential instructions that each student receives in a negotiation exercise, each client will state a series of preferences with respect to certain deal terms. Professors can manipulate each client's preferences with respect to a term so that students spend more time negotiating certain issues than others. In general, for students to reach agreement quickly regarding an issue, each client should express an overlapping range of acceptable terms. To encourage further discussion of a topic, however, the two clients' negotiating positions should be farther apart, and the clients should emphasize the importance that they place on that topic.

To illustrate these principles, consider the following hypothetical fact pattern.³ The Museum of Legal Documents ("MOLD"), in New York, has had trouble attracting visitors and is hiring a new Executive Director to turn around its business. MOLD's President is named Gorgonzola, and the museum is in discussions with a candidate named Pearl.

² TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (2d ed. 2014).

³ This fact pattern is inspired in part by an exercise presented in the teacher's notes of RICHARD K. NEUMANN, JR., *TRANSACTIONAL LAWYERING SKILLS: CLIENT INTERVIEWING, COUNSELING, AND NEGOTIATION* (ESSENTIAL LAWYERING SKILLS SERIES) (2013).

The parties have not provided an exhaustive set of preferences, so the lawyers negotiating the deal (i.e., the students) will need to consult their clients (i.e., the professor) to reach agreement on certain terms. We will consider a few pairs of excerpts from the instructions, which take the form of lawyers' notes from client interviews.

Encouraging agreement

First, with respect to salary, the instructions contain the following statements:

Gorgonzola

MOLD paid the previous executive director a salary of \$180,000 per year. Given MOLD's current dearth of visitors, Gorgonzola does not think that they can afford to pay Pearl that much. He's willing to go up to \$150,000 if necessary but does not want to offer anything less than \$120,000. Below that amount, he is worried that, given her credentials, she will eventually be tempted to leave for another job.

Pearl

Pearl does not know how much the director of a prestigious museum in New York typically earns. As a law librarian in Chicago, she earns \$75,000 per year. Given the higher cost of living in New York, she expects to need a salary of at least \$100,000 to maintain a similar standard of living. Pearl considers this a minimum. Although she would obviously prefer a higher salary, this is a nonprofit organization, so she doesn't want to be too demanding.

In the context of an employment agreement, lawyers rarely negotiate the salary, and drafting the relevant contract provision tends to be simple. As a result, despite the importance of that term to the clients, students should not spend much time negotiating it. To prevent prolonged discussions on this topic, if the salary is part of the negotiation at all, we can make it easy for the students to agree by providing a substantial overlap in each client's range of acceptable terms, as demonstrated above.

Alternatively, we could minimize the overlap to make it more difficult to agree on the salary, prompting students to focus on other types of compensation, like bonuses, profit sharing, and equity incentives. These would raise more complex business and drafting issues than would a mere

salary and would, therefore, be a more appropriate focus in a drafting course.

Encouraging client communication

Next, the parties have stated the following preferences regarding termination:

Gorgonzola

Gorgonzola fears that if the next director can't turn MOLD around within a year, then he may have to close the museum. In that unfortunate situation, he anticipates that he'll be under significant financial pressure, so he doesn't want to owe a ton of money to the director on top of his other expenses relating to the closure. Although these are the only circumstances in which Gorgonzola foresees having to fire the director, he would like to provide for other customary grounds for termination in case something unexpected happens.

Pearl

Given the time and money involved in moving to New York, Pearl wants to ensure that MOLD can't fire her without adequate notice and compensation that she can find another job and relocate again if necessary. She will understand if MOLD ultimately decides to part ways with her, but she feels like they should wait at least a year before making that decision. In turn, she would like to be able to leave for a different job if she doesn't like the way things are going, though she wouldn't want to do this abruptly and leave MOLD in a lurch.

In contrast to the salary, the two parties express very different positions regarding termination, which involves more interesting legal considerations and drafting issues.

The parties do not state views on all the same issues; Gorgonzola talks about termination in connection with closing the museum, and Pearl talks about the notice period. This encourages a more dynamic discussion, as students must identify common ground and consult with their clients regarding issues that their respective instructions do not address.

Moreover, certain words and phrases in these instructions are vague. Gorgonzola's lawyers must consider what other grounds for termination in this relationship might be "customary," which may call for research. To translate "a ton of money" and "adequate notice and compensation" into precise numbers, Pearl's lawyers must follow up with her considering the other negotiated terms.

In general, to encourage further client discussion, the instructions should not provide all relevant facts and preferences in precise detail. As in real transactional practice, what the parties do not tell their lawyers can be as important as what they do tell them.

These excerpts also raise a separate and important point: Gorgonzola's concern about closing the museum calls for a customized ground for termination, which students must draft on their own without relying on a precedent or template. To present different challenges, fact patterns should include a diverse array of client preferences, including some that are unique to the transaction at hand.

Encouraging problem solving

Finally, consider the following pair of excerpts regarding the employee's authority:

Gorgonzola

Based on his discussions with Pearl, Gorgonzola is confident that she will bring to MOLD an impeccable eye for historic legal documents. However, her unusual ardor for 17th-century Italian debentures makes him worry that she may avoid more forward-looking exhibits. Therefore, although he will permit her to add new pieces freely, he wants to prevent her from removing existing works without his approval.

Pearl

The most important term for Pearl is that she has complete control over MOLD's collection from day one. She sees MOLD as a revolutionary vision that previous directors have failed to execute, and she does not want to be bound by their banal curation. To help the museum reach its potential before it's too late, she wants the authority to add and remove works whenever she wants—without anyone else's approval.

Another way to encourage students to consult the client rather than just to negotiate based on the initial facts is to include for each client some positions that appear inconsistent with the other client's positions on the same issue.

Here, Gorgonzola wants complete control over the museum's collection, but Pearl clearly disagrees with this position. If the students follow their clients' initially stated wishes, then they will reach an impasse,

which is common in transactional negotiations. If they do not reach an impasse, then their term sheets and contracts will reflect this, demonstrating to the professor that they have been careless or cavalier with the facts, which should affect their grades.

Each student must explain the disagreement to her client in the context of the larger deal and must provide advice on how to resolve the issue. The individuals acting as clients could make concessions or encourage the students to come up with a practical solution. For instance, in this situation, the parties might eventually agree to incorporate into the contract an exhibit that lists certain permanent works that cannot be removed, while permitting the director to remove other works without approval.

GRADING

In a contract drafting course, a negotiation simulation presents unique challenges to the grader. First, unlike in most drafting exercises, much of the students' performance in the activity is not distilled in written format but instead occurs orally in interactions with their partners. If some or all of these interactions occur outside of class, assessing students' performance can be difficult. Second, the final contract and the term sheet, if one is assigned, are joint work products, so determining each student's relative contribution to the end results is often impossible.

As to the first challenge, professors should, of course, diligently observe each student's engagement in the exercise in class. Although meetings between students outside of class are difficult to monitor, if students must also communicate with their clients by e-mail, then professors can use these exchanges to evaluate students' performance as well. In every client communication, whether in class or by e-mail, the professor should note any information exchanged with the student to be able to confirm later whether the eventual contract accurately reflects the client's stated preferences.

The challenge of grading joint writings is harder to surmount. If a professor requires students to exchange comments and carefully monitors the changes in each draft, then individualized grades should be possible. Unfortunately, as discussed above, this approach to a negotiation exercise is rarely practical. In the more typical situation in which the professor reviews only the final contract, the only fair approach is usually to give the same grade to the entire team.

However, this does not imply that all students in a team should receive the same grade with respect to their other work in the simulation. Instead, one can easily bifurcate the grade into two different components:

one for the negotiation and another for the drafting. The first can be different for each student based on the professor's observations of her oral communications in class and her e-mail communications outside of class. The second can be the same for all students in a team based on their joint written submission.

CONCLUSION

As this article demonstrates, negotiation simulations can take a seemingly endless combination of forms depending on the professor's specific design decisions—all of which impact the way students spend their time, the knowledge that they obtain, and the skills that they practice and develop. In creating these exercises, professors should pay careful attention to the amount of available time, their educational goals, and the context of the larger course. When planned and performed properly, negotiation simulations are an effective, engaging, and energizing way to impart essential lawyering skills.

