

Negotiation

Law 733 – Spring 2023
Course Information and Syllabus

I. Instructor

Art Hinshaw
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II. Class Meetings

Tuesday 8:00am – 8:55am, Thursday 8:00am – 9:55am
BLCS Room 150

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 time is spent negotiating – with “the other side,” clients, colleagues, even secretaries and court clerks. Some negotiations involve incredibly complex and high stakes issues: international treaties, settlements of class actions lawsuits, mergers of multinational companies. Others are more simple and mundane: modifying a lease, adjusting a property damage claim, scheduling a deposition. Because lawyers spend so much time negotiating, people expect lawyers to be skilled negotiators. However, most lawyers spend little, if any, time actually thinking about negotiation much less planning deliberate negotiation strategies designed to satisfy their clients' interests. Negotiation is not just a matter of 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.

Everything we do in this class is designed to help you approach future negotiations in a more knowledgeable manner so you become better lawyer-negotiators. This class will also provide the 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 that are sometimes more effective and less effective. For example, while this course's general approach is focused toward interest-based bargaining, there are times when a more distributive focused 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 two primary books during this course.

Negotiation and Lawyers

by Art Hinshaw, Alyson Carrel, Leonard L. Riskin, Chris Guthrie, Richard Reuben, Jennifer Robbennolt, and Nancy Welsh (West Academic 2021)

Beyond Winning: How Lawyers Help Clients Create Value in Negotiations,

by Robert Mnookin, Scott Peppet and Drew Tulumello (Belknap/Harvard 2000).

These books are available in the bookstore or online.

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 on the course Canvas page.

VII. Attendance, Punctuality and Class Preparation

In the majority of classes and almost every Friday, 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, 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. Sometime after 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 the class when we will be doing the scenario.

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

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 those 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 mid-sized courses (20 - 39 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 (20%)

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

B. Negotiation Interview (40%)

You will interview someone who has been involved in a "significant negotiation" within the last year about a dispute or a transaction. Presumably this person will be a lawyer, but it is not necessary that the interviewee be a lawyer. After an hour long interview, you will write a report summarizing the interview and describing the insights you gained. The report should be 4-5 pages double spaced with 2 of those pages addressing issues surrounding negotiation theory gleaned from the negotiation. This assignment is designed to have you learn from someone's experience in actual negotiation and to reflect on how the concepts we learn in this class may apply in actual negotiations. The report will be due on Wednesday February 22nd at noon.

C. Client Letter (pass/fail)

Following the roleplay assignment on Thursday March 2nd you will draft a letter to your client explaining your negotiation preparation, the negotiation's outcome, how the negotiation's outcome meets the client's interests, 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 not be sufficient. The letter should be no more than 2 pages and is due on Tuesday March 14th at noon. A failing grade will be the equivalent of 2 weeks of a zero grade for class participation

D. Final Reflection Paper (40%)

In lieu of a final exam or paper, each student will complete a self-reflection paper discussing your negotiation capstone exercise(s). Your discussion should contain specific reflection and analysis on your negotiation experience rather than superficial rambling over lots of topics. Also, simply reciting a play-by-play account of what occurred during your negotiations will not be sufficient. Your reflection paper will be treated with utmost confidence. This assignment is designed to provide you with an opportunity to engage in reflective learning, a key means of deepening your understanding of your negotiation strengths and weaknesses and improving your skills. This paper should be 6 – 7 pages double spaced and analyze salient events from the capstone through the lens of negotiation theory.

The Final Reflection Paper is due on Wednesday April 19th at noon. More information on the Reflection Paper Guidelines appears in Section XI below.

X. iDecisionGames

iDecisionGames is the web-based tool we'll be using to prepare for and report about our in-class negotiations. During our fourth 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. From that point forward, your in-class negotiation materials will be distributed via iDecisionGames. 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 for grading.

There is a \$75 fee (approximate) associated with using the site. 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 impacting your class participation grade and preventing a classmate from having a negotiation partner.

XI. Reflection Paper Guidelines

To help you organize your thoughts when writing your Final Reflection Paper 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 parts 2 and 3 are where the self-reflective learning occurs and, therefore, are the keys to grading. Additionally, you should subject 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 going forward?
- *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 deep thought. What I mean by that is that it is very easy to come to quick conclusions to explain issues (for example simply saying - “I did this because I was afraid of being exploited in the negotiation”) and fail to slow down to take time to look at your 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. This is what you should do, in written form, in parts 2 and 3 of the requested information described above.

XII. Plagiarism

Plagiarism unfortunately occurs with regularity in seminar classes at the law school. Plagiarism is defined as follows in the law school’s Statement of Student Policies, Section XIII (C)(3).

Plagiarism is representing the words or ideas of another as one’s own. Quoting or paraphrasing another’s writing without acknowledging the author’s identity is a form of plagiarism.

The Statement of Student Policies also gives an example of plagiarism.

Example: Student A, writing a paper for a seminar, rephrases a passage from a law review article and fails to cite the source. A has [plagiarized from the source and] violated this provision.

Please note that plagiarism is a serious violation of the Honor Code and may result in dismissal from the law school.

XIII. Miscellaneous and Nonetheless Important

A. Classroom Behavior

Respect for the thoughts, ideas, and speech of classmates and faculty is the foundation of the educational process. Threatening behavior in the classroom will be dealt with in accordance with SSM § 104-02, which requires that “all incidents and allegations of violent or threatening conduct by an ASU student (whether on- or off-campus) must be reported to the ASU Police Department and the Office of the Dean of Students.” The use of electronic devices during class is prohibited with the exception of laptops used for class purposes. Recording the class in any manner without the permission of the instructor is prohibited.

B. Disability Accommodations

Per College of Law and university policies,

The College of Law will provide reasonable accommodations for students with documented disabilities. College of Law accommodations can be made after the student requesting accommodations has met with the Disability Resource Center staff and eligibility has been established. Accommodations that fundamentally alter the prescribed course of studies must be approved by the College of Law. Students with disabilities that require accommodation(s) and/or adjustments should contact the College of Law Assistant Dean for Academic Affairs in order to make arrangements for reasonable accommodations.

C. Title IX

Title IX is a federal law that provides that no person be excluded on the basis of sex from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity. Both Title IX and university policy make clear that sexual violence and harassment based on sex is prohibited. An individual who believes they have been subjected to sexual violence or harassed on the basis of sex can seek support, including counseling and academic support, from the university. If you or someone you know has been harassed on the basis of sex or sexually assaulted, you can find information and resources at <https://sexualviolenceprevention.asu.edu/faqs>.

As a mandated reporter, I am obligated to report any information I become aware of regarding alleged acts of sexual discrimination, including sexual violence and dating violence. ASU

Counseling Services, <https://eoss.asu.edu/counseling>, is available if you wish discuss any concerns confidentially and privately.

D. Syllabus Revisions

Information in this syllabus, other than grading and attendance policies, is subject to change with reasonable notice.

XIV. Summary of Key Dates

February 22nd – Negotiation Interview due at noon

March 14th – Client Letter due at noon

April 19th – Final Reflection Paper due at noon

XV. Syllabus

A. Foundations

Week 1, January 10 and 12 – Orientation; Competition and Cooperation

Beyond Winning, pgs. 1-10

Negotiation and Lawyers, pgs. 7-14

Week 2, January 17 and 19 – Negotiation Ethics

Beyond Winning, Chapter 11

Negotiation and Lawyers, pgs. 119-125, and 132-139

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

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

B. Creating and Claiming Value

Week 3, January 24 and 26 – Interest Based Negotiation

Negotiation and Lawyers, pgs. 29-48

James J. White, *The Pros and Cons of “Getting to Yes”* / Roger Fisher, *Comment* (supplement)

Simon Sinek – *How Great Leaders Inspire Action* at

https://www.ted.com/talks/simon_sinek_how_great_leaders_inspire_action?language=en

Week 4, January 31 and February 2 – The Negotiation Process I

Beyond Winning, pgs. 204 – 211
Negotiation and Lawyers, pgs. 55-67 and 71-77

Week 5, February 7 and 9 – The Negotiation Process II

Negotiation and Lawyers, pgs. 77-96

Week 6, February 14 and 16 – Adversarial Negotiations, Hard Bargaining, and Difficult Tactics

Negotiation and Lawyers, pgs. 96-108
Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help* (supplement)(Section VII only)

C. The Human Element

Week 7, February 21 and 23 – 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

Lisa Feldman Barrett – *You Aren't at the Mercy of Your Emotions – Your Brain Creates Them* at
https://www.ted.com/talks/lisa_feldman_barrett_you_aren_t_at_the_mercy_of_your_emotions_your_brain_creates_them?language=en

D. Special Issues in Negotiation

Week 8, February 28 and March 2 – Principles and Agents

Beyond Winning, Chapters 3 and 7

Spring Break – March 7 and 9

Week 9, March 14 and 16 – Culture, Race, and Gender in Negotiation

Negotiation and Lawyers, pgs. 141-156
Charles B. Craver, *The Impact of Ethnicity and Gender*, from Effective Legal Negotiation and Settlement (supplement)
Andrea Schneider, *Women Don't Negotiate and Other Similar Nonsense* at

https://www.youtube.com/watch?time_continue=5&v=jFX1wAOv724

Week 10, March 21 and 23 – Plea Bargaining

G. Nicholas Herman, Plea Bargaining, Chpts. 1 and 2 (supplement)
Rebecca Hollander-Blumoff, *Getting to “Guilty”*: Plea Bargaining as
Negotiation (supplement)

Week 11, March 28 – Technology in Negotiation / Begin Capstone project

Negotiation and Lawyers, pgs. 157-172

E. Capstone Project

Week 11 (cont’d), March 30 – no class

Week 12, April 4 and 6 – no class

Week 13, April 11 and 13

- April 11 – no class
- April 13 - Debrief and Moving Forward
Beyond Winning, Conclusion