TRANSACTIONS AND SETTLEMENTS: CREATING A BALANCE IN LEGAL EDUCATION

GREGORY M. DUHL* & JACLYN MILLNER*

Gregory M. Duhl

I'm a full-time professor at William Mitchell and Jaclyn's an in-house counsel at Liberty Mutual, and I want to talk about our transactional skills program. How we approach our program is different from popular wisdom in the academy. We do things differently, and I want to explain how we do them.

I arrived at William Mitchell, and I was a commercial law professor in disguise. I was hired to teach Bankruptcy, Secured Transactions, and Sales. That was my course package in my first year. Nobody knew that I was originally a legal writing professor and got all of my skills training from Jan Levine at Temple. Once I observed our curriculum for a year, I decided we had a big, big hole in our skills curriculum on the drafting side.

What we had is an advocacy class that probably has been taught longer than I have been alive. And the advocacy class is primarily a class in trial skills. So I went up to the advocacy professors, when I was a young rebel rouser, and said, "Look, you guys teach advocacy. You don't talk about settlements. You don't talk about transactions. You're missing about 97% of what lawyers do, and you're only covering about 3% of what lawyers do. And we're requiring everyone in the school to take your class, and we're not requiring anyone to take a transactional skills class." Their response was, "It's advocacy, and when you're learning advocacy and you're learning how to take a deposition, and you're learning how to respond to interrogatories, and you are doing a mock trial, you're also looking at the implications of advocacy on contract negotiating and drafting." And I looked at their syllabus, and I couldn't find anything about that. I also looked at the book they used, which they wrote, and they said I'll find it in there. And I looked in there, and there were a few pages in a book of about 300 pages on how advocacy might apply to the transactional context. They weren't very happy with me.

A year later I came back and said "Look, you don't teach much of what many lawyers do." They said, "Well, you might be right, but go design a class. We've spent many years fine-tuning this class. Create one of your own."

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* Associate Professor of Law and Managing Director, Center of Negotiation and Justice, William Mitchell College of Law.

* In-House Attorney at Liberty Mutual and Adjunct Professor, William Mitchell College of Law.

So that was the opposition I faced, and I was offered the challenge, and my colleague Jim Hilbert and I decided to develop a two-course skills sequence in the upper years focusing on negotiating, drafting, and client counseling.

The second problem I faced was in a lot of the literature that I had read on transactional pedagogy. I read Tina's book.[1] I read a lot of what's been written about transactional education, and we decided to go in a different direction. So here are the four overriding principles that we came up with in designing our curriculum: One is we thought there was too much focus on business. We looked at the graduates of our school and similar tiered schools, and most of them don't become corporate business lawyers. Most of them are opening up a shingle or are going to be in small firms, so for us transactions -- it didn't mean only business agreements. We didn't dismiss that altogether, but it also meant employment contracts, a prenuptial agreement, an intellectual property license. And we decided we needed to approach this not from "we are teaching deal skills in the business context" -- in the big "B" business context -- but from we're going to approach this from "there is a whole diversity of subject matters where students are going to be applying these transactional skills."

The second thing we took issue with, to some extent, was a lot of the literature that says to teach drafting first. You teach a class in drafting, and then you transition into a deals skills class that involves counseling, negotiation, and drafting. We looked at what lawyers do in context, and we decided that counseling, negotiation, and drafting are all intertwined skills, and we thought students would learn best if they got it all in context. So rather than conceptualizing contract drafting as some isolated skill, which is never used as an isolated skill in practice, we wanted to design our curriculum so the skills would interrelate. And this kind of goes to what Kirsten was saying about Carnegie and experiential education. We wanted our students to learn the skills as they would use them in practice -- not in some sequential, artificial way.

The third thing we decided was in response to what we read in the literature that transactions are so much different than settlements. It said to design classes solely based on transactions, and that's what this is all about. And we said, "Wait a second. The same skills that lawyers use in transactional work—counseling, negotiating, and drafting—they also use in settlement work." And as Judy said, the form of the agreements might be a little different, but the skills are the exact same. And Jaclyn's going to talk more about why we go through a settlement exercise and how we transition from the first half of the semester being about transactions and the second half of the semester being about settlements in our Transactions and Settlements class.

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[1] Tina L. Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2007).

Also the goal was to appeal to as many students as possible, and we said, "Every student in the school needs this class." And as part of our curriculum development we were going to have two fundamental second-year skills classes. We have advocacy, so the students who are going to become litigators will pick up the skills they need. And we're going to have our course in Transactions and Settlements, where both litigators and other students who aren't going to be in court all of the time will learn the skills that they need.

And I guess the fourth principle we thought about was in response to my exhaustion from giving guest lectures in PR classes on transactional ethical issues because the typical PR course is primarily devoted to litigation. I've written a little bit in the area of the ethics of contract drafting and every PR professor said, "Can you give a one-week segment?" And I said, "I've had enough doing this." So we decided to integrate the ethical issues into our scenarios, by us playing clients and students playing lawyers and testing the students ethically, and then by talking about the ethical challenges that the students faced during the simulations.

So those were our four guiding principles in creating these two courses, which we felt were different than a lot of the courses in the transactional programs that we studied around the country.

So the first course we created was called Transactions and Settlements. It's not focused on any area of law, and the students, after some introductory counseling, negotiation, and drafting instruction, interview a client, counsel a client, and negotiate and draft an international distributorship agreement. And instead of us playing the clients, we pick some students to play the clients, and the students that play the clients negotiate the business terms. The students who play lawyers negotiate the legal terms. And then the team of lawyer and client work with the opposing counsel and client and get the deal done.

We had the same problem of scaling that others have had. The students were getting frustrated with the ratio of one faculty member to 6 to 12 lawyers, so we said let the students play the clients. We also got criticism saying, "In the real world business terms are not often negotiated by lawyers but they are negotiated by the clients," so we used students to play clients and let them negotiate the business terms.

We then do a set of conferences and rewrites on the contract draft using legal writing pedagogy, and that's their intense exposure to drafting. Then we switch gears and we do two settlement scenarios. One is an employment standstill agreement, where we introduce two skills. One is dealing with difficult clients. We bring in guests -- which have ranged from my father, to a law firm associate, to other faculty at the school, to former students, to other celebrities in the community -- and we instruct them. We give them a packet, and they're going to be difficult. And they're also going to be changing their position, and they're going to throw in surprises, and by that point in the class, we want to challenge the students to deal with clients that aren't that easy to manage.

The second thing we introduce at this point is the back and forth of contract drafting, so we require the lawyer on one side to do the first draft. The lawyer on the other side marks it up with track changes, and then the lawyers come together and try to reach a final agreement. And Jaclyn will explain how we do that in more detail when we get to the third big assignment in the course, which is a civil rights settlement agreement. The settlement agreement assignment goes about four weeks where we're trying to get them to put all of the coursework together, all they learned. And you have those materials in your packet. So kind of the grand culmination of the course isn't a transaction. It's a settlement agreement.

So that's part one. That's Transactions and Settlements. That's our signature course. We're running it for about 100 to 150 students a year. That's pretty significant, which means about two-thirds of our graduating class is going through the course.

We then needed to develop a more capstone-type class that we call Deals and Dispute Resolution. And in this class [we] introduce another variable and that is the students have to become subject matter experts. So, for example, for this year -- and we do it in a week -- it's a simulation done over five days, ten hours a day, three credits the first week in January. The students don't sleep. They don't eat. They pull a couple of all-nighters, but they end up with three credits, and it's realistic.

But what we have the students do is we have them sign up in subject matter groups. So for this J-Term, we have a business law option, we have an employment law option, and we have an insurance option, so students pick the area in which they want to specialize. They think the insurance law students will all be working together, the business law students will be working together, the employment law students will be working together on separate simulations. They don't quite grasp that it's one big class with all of the students working together on the same simulation with legal issues in different subject matters. We're not intentionally surprising them, but we don't exactly clarify this.

On the first day, they're put in law firms, one business lawyer, one employment lawyer, and one insurance lawyer on each side. So there are law firms of three representing each client, and we have about 72 to 96 students in the class. And then they get a problem. The problem for this year is an employer negotiating an employment agreement with a CEO. The business issue is the CEO wants some seats on the board that it can give to some friends. The employment issue is the employer wants the employee to sign a non-compete. The insurance issue is the scope of the indemnification that the CEO is going to get.

So what the students do -- they research their respective issues and the research is overseen by the library. We work in partnership with the reference staff. The students research their issues. They analyze the issues. They meet in their subject matter groups -- so Jaclyn runs the insurance group. I run the business group. And we have another adjunct

who runs the employment group. We talk about the issues and then they have to work in their law firms to try to reach a deal. And how they delegate the drafting, the negotiation, is up to them. And it's just phenomenal to see the wide variety of styles that the groups use.

Then we fast-forward two years. It's called Deals and Dispute Resolution, so it has to be a dispute next. The employee is accused of breaching his fiduciary duty of loyalty. At the same time, the employee suffers a physical injury that also causes a psychiatric injury, and [he] needs to file for workers' compensation. The employer fires the employee and says the reason the firing is taking place is because the employee breached fiduciary duties. So now we have the business people researching fiduciary duties. We have the employment people researching violations of the ADA because that's the statute under which the employee brings his claim. And we have the insurance people researching two issues under the workers' compensation statutes. One is whether a psychiatric injury is compensable under the state's workers' compensation law, and the second is whether the employee can also allege retaliation for filing a workers' compensation claim; and the question is, "What does the employee have to do to establish a workers' compensation claim and cause of action for retaliation?" So that's about Wednesday during the week. They then go and research those issues.

Then about Thursday morning, they do some discovery -- some pleadings, some document requests, interrogatories, and we do that because a lot of students graduate who say they don't know what an interrogatory is. They don't know what a document request is. They don't know how to file a workers' compensation petition.

Then we create great personnel files -- and this is the most fun part of teaching the course -- we have the CEO, who has a 20-year history of psychiatric illnesses. He has taken every medication in the book, so it's fun creating all these medical records.

So then about Thursday afternoon, we say, "Okay, it's now time for you to try to settle the dispute." The students work in their law firms and they try to reach a settlement so the case doesn't have to go to court. Two law firms – one on each side – work together in trying to daft a settlement agreement. Unlike a first-year legal writing class where it's important to try to get the students to do a deal and have the experience of drafting it -- we tell the students, "You don't have to reach a settlement. If you want to go litigate the case and you think that's the best alternative for the client, go litigate it and write us a memo why you made that decision." And we do this in Transactions and Settlements too. We do this in Deals and Dispute Resolution. And we always have a couple of teams in each exercise who can't settle a dispute. And we make them write a 10-page memo, so it's torturous for them. But they explain why they want to litigate. For example, they must pursue litigation if the other side is being unreasonable.

So this J-Term class has picked up. We are doing a version over the summer. The nice thing about it is we can change the subject areas every year. Last year we did intellectual

property, international business, employment, and public interest. Trying to write a scenario that covered all those issues was close to impossible, but we did it. This year we created symmetry among business, employment, and insurance law issues. They work well together, and the course allows students to focus on and learn about the issues that are important in those areas, but it also requires them to work with students who are interested in other subject areas and then apply all of the skills that we are emphasizing. And, again, when they do these negotiations with six people, it is fascinating to watch. Some groups use Google Docs, and they're all making edits to the same document. Some groups have somebody on the board with the doc cam, and they go line by line through the edits. Some groups are so lost that they send somebody out for coffee because they haven't slept, and the rest do the work. But this is in real time, so when we give them the research issue on Monday at 3, they need an answer by Tuesday at 9 the next morning. And I don't care about working them too hard. This is a 5-day class and the students are earning three credits. And I tell them they're going to do nothing else for the week.

So that's our two-semester transactional skills sequence that students take in their second and third years.. Deals and Dispute Resolution is a J-Term course. I want to offer it over Thanksgiving week and spring break. No one else seems to like that idea except me. The course is emotionally draining. The faculty don't sleep. Students don't sleep. The course evaluations say one of two things: "This was the most horrible course I've ever taken, but I've learned more than any other class in law school," or they say, "This was absolutely, by far, hands down, the best course I've ever taken in terms of preparing myself for the practice of law." And like Kirsten said when they do her exercise, when the students take Transactions and Settlements, student after student says, "This is helping me get a job, because I can go in and say, 'I drafted a contract.' I can go in and say, 'I settled a dispute.'" And they feel they're finally learning something that the rest of the curriculum doesn't teach.

So that's how we created our transactional skills curriculum from scratch. And it was a grounds-up effort to try to instill this at our school. And now it's a part of our curriculum.

So Jaclyn, do you want to talk a little about our scenario and how we work in the settlement?

Jaclyn Millner

Yes. So I'll start out talking just for a minute a little bit more about why we decided to teach settlements along with transactions, how those skills are interrelated, how we see them as interrelated, even though, as Greg said, many people do not. And in your packet you have a lot of information about our settlement agreement scenario. Obviously, there's not enough time for you to read through all that now, so I will briefly summarize for you our settlement agreement scenario so that then I can explain to you how we administer it in class, what our goals are in terms of teaching, and what students get out of that. And then,

as Greg mentioned earlier, we do weave in ethical issues into our scenarios, and we sometimes have issues that the students figure out and have to deal with in acting out these scenarios and representing their clients. But also, we give them ethical scenarios that we put together -- some of you picked up one, and if not, we'll pass it out later. But we base some ethical scenarios on the facts that they just dealt with, and then we have them talk through in groups and as a class what ethical issues arose. So we will go over, if there's time at the end, one of those ethics scenarios, which we call "ethics labs."

G. Duhl: But Jaclyn, I take one issue with something you said. The students never feel they're acting this out. Class ends at 9:30, but students stay 'til midnight, 1 in the morning. They don't feel like they're actors. They feel like they're lawyers. And we always say we're going home, and then we get an email at 1:00 in the morning with a student that has a question. I mean, they really eat and sleep this stuff, which is just amazing.

Alright, so why do we teach transactions and settlements together? Why do we do that? You know I feel very strongly, and Greg does as well, that the skills that go into transactional work also go into settlements, into litigation. Those skills are client interviewing -- whether the issue is in litigation, whether there's a dispute, or whether you're doing a transactional issue, you're working with a client. And you need to meet with that client and find out what their interests are and what their goals are, what's going on, what do they want. At later times, you are going to continue meeting with that client and you are going to need to counsel them, give them advice, show them what you're going to do for them whether, again, it's a dispute or a deal. You are going to negotiate on their behalf, and you are going to -- if you settle litigation, you are going to draft a settlement agreement. So in both the case of a settlement and a deal, you are drafting an agreement.. If you don't reach a deal, then you know the parties go off and do something else. If the scenario is in litigation, then you go to court if you don't reach an agreement, but the basic fundamental skills are the same. It's the client interviewing skills, the client counseling skills, the negotiation skills, and the drafting skills.

In the context of our settlement agreement case that we do at the end of the semester -- and, again, those documents are in your packet -- the focus there is this scenario. And when we give the students the background information when they're playing the lawyer for either the plaintiff or the defendant -- and the same goes for our distributorship agreement scenario and for our standstill agreement scenario -- we don't type up a little summary of, "Here are the facts. Here is what you are supposed to do. Here is what the other side is going to do." We give them documents. We give them letters that have been exchanged between the parties. We give them realistic documents similar to what Kirsten put up on the board, and they need to read through those documents, and before they meet with their client, the obligation is on them to figure out what's going on. We don't hand it to

them on a silver platter. When you are a lawyer, before you meet with a client, the client does not type up for you a memo concisely telling you, "These are all my interests. Here's the scenario." That's the lawyer's job to do. So you'll see in our packet that there is not [a] clear, concise summary, but that's the reason for that.

G. Duhl: Can I just pipe in and say one thing?

J. Millner: Yeah.

G. Duhl: When colleagues or other academics say that there's no relation between settlement agreements and transactional work, think about what a settlement agreement is. In many cases, a settlement agreement is a transaction. If you look in the family law context, there is a dispute, but the settlement agreement is how the two partners are going to structure their relationship after divorce and structure their relationship with the children. So all of it is transactional. In a lot of settlement agreements, parties are building a transaction of how they're going to work together, so this dichotomy seems really artificial.

Audience: Do people complain about that? I mean, you're being very defensive about it. It seems sort of intuitive. I'm not sure why it's such a big deal.

J. Millner: I agree with you, but there is -- I mean there's literature out there. There are people who strongly believe a transaction is a transaction, and that is very different from a settlement.

G. Duhl: I just applied for a job directing a transactional skills program at a law school. And in the job description it said transactional skills are much different than settlement skills. You are going to focus on transactional skills, not settlement skills. And I see that in articles by leading experts in transactional law -- that transactions and settlements are different. And even some of our faculty say, "I teach ADR," or, "I teach negotiatio. You can't be talking about settlements." So it sounds intuitive, but I'm adamant about it because I encounter opposition.

Audience: You can't get enough negotiation.

G. Duhl: And you can never get enough negotiation.

Absolutely, and another thing -- just piggybacking off of what Greg said before I get to our scenario -- the reason that we structure our class this way in terms of the transaction, and then the standstill agreement, and then the settlement agreement: we use the standstill

agreement in the middle of the semester to help transition the students from the context of, "There's no dispute. There's just a transaction, and we're done to – we're in litigation." They believe that when there is a dispute erupting lawyers are off to litigation. We use the standstill agreement (as an example of an agreement preventing litigation) as an intermediary step to show them the difference between the two situations and how sometimes you have a situation that's a dispute, and as Greg said, you're determining your relationship going into the future.

I actually -- in practice, it was an interesting experience for me at work in my day job. I was in a mediation -- an issue not that we give to our students, but an insurance issue going on -- and the mediator, we were chatting because we were sitting in the room for an hour and a half while the other party decided what to make for their counteroffer. So we're chatting and I'm talking with him about how I teach this class, and he was curious and interested. And I was explaining it to him, and I told him about the standstill agreement project. He said, "Oh my god, can you please send me a draft of a standstill agreement? I've never heard of this. I didn't even know what it was, and there are so many situations in which we need to educate companies on what that is, because this is a good tool that I think can be used in practice." So that did help confirm to me that this is a very impactful class. I believe that because every day in practice, I am dealing with these issues, but I definitely think that this class is practical. And that just recently happened to me, an example of how practical it is.

I want to make sure we have time to talk about our settlement agreement scenario and how we administer that in the classroom. The basic fact pattern, what's going on in the settlement agreement, is there is an independent contractor. She is –of Mexican descent. The litigation is already ongoing. The dispute has -- the complaint, the answer already filed, I believe, about two years previously. There's a dispute. The roofing contracting company, they are denying that there was any discrimination going on. The plaintiff is alleging -- I believe it's under Section 1985 -- Ku Klux Klan Act conspiracy against civil rights. There has been discovery already completed. This is now two years into the litigation, and the reason that we do that is we want the students to have documents from the litigation. We want them to have information so that they can get into the nitty-gritty of the negotiating.

The interesting thing -- and we do put this in the packet because the way we designed the course is that much of the discovery has already been completed -- there's a deposition transcript of various parties that have been deposed. And there is an invoice -- again, similar to what Kirsten put up on the board -- here, one of the supervisors of the roofing company wrote on the invoice for a job request, "No Mexicans." And the plaintiff did not get the job. And so that's evidence right there, but there are defenses, obviously various other issues going on, on both sides. But we do give them some evidence, some things to go off of, so they can dig deeper and get into the negotiating.

In our J-Term class that Greg talked about with the insurance issue, the employment issue, and the business issue, we are going to provide the students with interrogatories, and then they'll have documents. And they need to respond to the other party -- what documents do they produce -- and then they'll review those documents dealing with privilege issues and relevance issues. But in our Transactions and Settlements class, we give them those documents already. That said, each party has documents that the other side may not have. The packet that the defendant's lawyers get is not identical to the packet that the plaintiff's lawyers get.

In your packet, as well, there is some information, teaching instructions, notes to someone who is teaching the class (other than the two of us, who have done this a number of times). And also, if someone other than the two of us is playing the client, there is some information, including goals and teaching outcomes that would be going to that person.

G. Duhl: Let me say one thing. So the liability issue is one issue. And they go back and forth on liability. The issue they struggle with the most is damages. They don't have any idea how to figure out if the damages are $10 million or if they're $10,000. So Jaclyn, why don't you explain that?

Sure, so we give them an assignment to do. Actually, we are just at this exact point in our semester right now, and our students' assignment for next week is to put together a settlement analysis, b forcing them to think about before their meeting with their client next week, and the clients are Greg and myself. I play the roofer and Greg plays the owner of the roofing company.

The students -- before they go into this meeting with the client -- come up with some understanding of what they feel are realistic numbers, what the plaintiff is looking for. They should have a reasonable idea of that. And also on the roofing company side, it is important to know what kind of case the plaintiff has. What's the worst case scenario, meaning if the roofing company went to court. The students show up to this client meeting, and the plaintiff is telling her lawyers -- the students are the lawyers-- "I think I deserve a half a million dollars." And the students are jotting that down. Well, we want to teach them, "No, your job is to answer for your client, 'Is that a realistic number? Why or why not?'" And we force them to figure that out before they show up to that meeting because they didn't quite understand that the first few times we taught the course. We're already into litigation here. They have enough information to figure out what is a realistic. And there's no exact case like this where they can say, "Every jury has always awarded $100,000, so that's the most you're going to get," but they can tell the client what is realistic: "Based upon the jobs that were withheld from you and X amount of money for each job that you did not get, here is a realistic amount of money you should be claiming." Obviously trying to force them to work on that client counseling skill. That's a primary skill that we focus on with this

assignment versus the distributorship agreement. And in the standstill agreement, they do an initial client meeting where they've never met that client before. They need to get facts and information from that client. In the settlement agreement project, they have already established a relationship with the client. But the way we explain it to them is things have gotten heated, and so the firm is putting some new lawyers from the firm on the case and they are those new lawyers. But they're not completely new to this, as they should have a lot of information. And their job right now is to gather some additional information from the client. But more important is [to] counsel their clients —tell them what they think of the value of the case and prepare the client for negotiations that are going to be coming up soon.

So their assignment for next week is to put together that settlement analysis exposure, forcing them to dig through the information, figure out what more information they need. But also when their client comes to them and tells them, "I'm not going to pay more than $10," or, "I think I deserve $10 billion," their job is to say, "Okay -- I understand what you're saying. But here is what -- if you went to court, here is the realistic range, and also we have a number of weaknesses in our case. And so that's the best case scenario. But obviously that's not likely to happen either. And let's figure out what you need, other than money. What are other issues that are important to you?" Forcing the students to put the counseling hat on, figure out -- in addition to money -- are there other interests that are important to the client other than money?

Obviously, in this scenario, the roofer has been out of work for a significant amount of time, has a family, has debt that she needs to deal with. She's obviously feeling discriminated against and wants to start a campaign for civil rights and things of that nature, so it's not just, "Give me $500,000 and then I'm going to disappear." There's also an issue of an ongoing relationship. This roofer wants to continue working for this company if possible, and so, as Greg said, ultimately if and when the lawyers do reach an agreement, there's going to be an ongoing relationship because the company actually does not have enough money to give the roofer what she would be satisfied with to walk away. And so they compromise oftentimes, give her a lump sum of money, but then also arrange some ongoing work.

Next week is the client meeting— as we call it. After the students show up to class, we put them in a group. Of course, we can't do 24 one-on-one meetings in a three-hour time block. We just can't do it, and so we put them in a group of three or four students and we have them interview the client.

G. Duhl: We don't call them groups. We call them pods.

J. Millner: I was refraining from the term because I didn't think they'd understand that.

G. Duhl: No, but, as many of you know, some students cringe when you say group work. Tell them they're going to work in pods and they get excited.

Audience: And because?

J. Millner: Because Greg gets very excited.

G. Duhl: I get very excited, and I think it's something different. They don't think it's group work. They think it's pod work.

Yes, so try the term pods. We put them in pods. We put them in groups similar to a law firm. We tell them they have to plan this meeting. They are meeting with their client, and we encourage them to set an agenda for the meeting. We give them time in class to work with their partners, with the other people in their pods, to come up with a plan that they're going to use going forward for this actual meeting, encouraging them to identify clearly their roles. Pods, for example, will often appoint one group leader, and other people will serve various other roles. Sometimes they will divide up their roles by issue. And then they will have an opportunity to meet with their clients during this class period. And what we have them do for homework or outside class between this coming week and the following week is they put together a negotiation plan. We teach them throughout the semester that they don't just show up for a negotiation and start throwing numbers out and talking. They plan for a negotiation, and they plan very thoroughly for a negotiation. And so putting together this client meeting plan is the first step to planning for that negotiation.

To prepare for negotiating, we have them think about the additional information that they gathered from their client and have them come up with a plan, which includes thoroughly outlining and making sure that they're satisfying and meeting all of their client's interests -- their client's goals. We have them put together what we call an "interest chart." It doesn't have to be in a chart form. We try to teach it to them in that form, but it can be in a paragraph, explanation form. But we want to make sure that they have a checklist, some idea that these are the issues that are important to my client: money, civil rights, ongoing work, protecting family. So we have them put that together, and then, "How am I going to accomplish each of these interests of my client as I go into the negotiation?"

G. Duhl: And then anticipate the interests of the other side.

And focusing on, also, "My client wants $1 million. Well, the other side probably wants to give me zero." So if you show up to a negotiation, if you want to be prepared for that negotiation -- you need to try to stay ahead of the other party. When the opposing party says something to you, you don't want to look shocked. You want to be prepared for what their response is going to be to the extent you can.

Something that we struggle with explaining to students is, "You need to be prepared, but you also need to be flexible." And that's hard because when we tell them,

"You need to have a meeting plan, you need to have a negotiation plan," they struggle with sticking to their plan too much. To have this plan, I've got to stick with it; and we tell them, "If you stick to the plan too much, you're going to miss out on additional information that's unexpected that arises and unforeseen things that happen. You can prepare for your meeting but you've got be flexible."

It's the same thing when you get to the negotiation table. You plan to make the first offer. You might plan to offer, A, B, C, and D. But if opposing counsel does something unexpected, you need to be prepared for it, and you need to respond appropriately to it.

G. Duhl: And we don't give all the students the same information. I mean, if a student convinces us that we should pay more, we give that group or those students more settlement authority. If the student isn't persuasive, we coach but we, to some extent, coach in playing the clients. And based on how the negotiation is going and how strong the student's skills are, we give each group of students different information and authority.

Right. And the same thing goes for those client meetings. That's why we do feel the importance of us or another faculty member playing the client, somebody who can judge how well are these students [doing] in this meeting. Some students are counseling me well, if I'm playing the client, and they're giving me logical explanations, they're telling me they're understanding my interests, they're feeling for me, and they are being realistic, saying things such as, "And I think that you're demanding too much. That might force the other side to walk away." All of those things that a lawyer should be doing. I'm going to give them different authority that's going to be better for their interests than another student. If I say, "I need $1 million," and they're jotting down "$1 million," well I'm not going to give them a more realistic view because that's not realistic. If your attorney isn't giving you advice, you're not going to change your opinion, so we take that into account both in the meetings as well as throughout the negotiation.

The following week, they come to class and they begin negotiating. The clients are available to them while they are negotiating, but we don't limit the negotiating just to the classroom. As Kirsten said, there's negotiating that happens in practice in-person, by phone, and by e-mail. Sometimes in practice, I negotiate a case, and I won't even see the other party. It is common to do phone, e-mail, sometimes mediation where you don't see the other party, so we put it on them to establish the process for how their negotiation is going to happen. We do like to see some of it in person to see how it's going, but we also have them copy us on various e-mail correspondence so we can monitor it that way, as well.

As Greg said, we tell them that they are not required to reach a settlement. We don't want them to feel that artificiality of the time constraints. "You have three hours, and

at exactly 9:00 you need to have a settlement done, no matter what it is." Usually they do reach a settlement because we do give them the opportunity to negotiate outside of class and give them time for that. But, as Greg said, oftentimes there's at least one group that does not, and that's fine. We tell them, "If you feel it was not in your client's best interest to reach a deal, then you go and you litigate."

G. Duhl: We probably give them about three weeks inside and outside of class to negotiate, and then an additional week to draft the settlement agreement. And this builds on the standstill and there's back and forth in track changes, and the document just keeps going back and forth until they get an agreement that we're willing to sign. And it ends when we're willing to sign it. If we're not willing to sign it, they go back to work, and again, the process of drafting the settlement agreement -- if they do it in pairs, they have to work with one other pair.

And I guess I should just say one thing: Assessing negotiation is very hard because we have rubrics for drafting. We have rubrics for client meetings. We have rubrics for reflective memos, but the rubric for negotiation is r hard. And we use a couple of factors to evaluate the students. One is observation. Second is all the information they're giving us, the negotiation plan, for example. Further, every week they have to tell us where they're l leaving off. Every draft that goes back and forth we have to be copied on.

We do have them do reflective memos. We have them do journaling in a different way. They have to keep a log of their perceptions of other students -- strengths, weakness, things other students do well and things they do poorly. Now, they're confidential to an extent. - If Judy's evaluating the other people in the class, we're not going to say, you know, "Joe, Judy said you're an asshole," but what we will do is say, "Joe, you know, eight people in the class are perceiving you as a little bit too aggressive." So that's another factor that we use to evaluate the students.

And we are somewhat interested in outcome. It's not the sole factor. It's not even half the evaluation, but by that time they get to the settlement agreement exercise, they have had enough experience that if they get a crappy outcome, they're not going to do as well on the assignment as if they have a better outcome. So using all those pieces together, we're able to do a pretty good job giving them a score on the negotiation.

You want to see if there's any questions?

Yeah, I was going to say let's take some questions now, and I'm going to sit down and we can all answer questions. And then if we have time at the end we'll do the ethics lab. Otherwise, we'll hand it out and make sure everyone gets a copy of it.

Audience: That's the biggest difference you've articulated yet between the transaction and the settlement part -- is the transactional side failure to agree is not an option. You know, the client says make this happen. We want to buy the shopping center. Make the deal. It's not an option to go back to the client and say, you know, that the lawyers on the other side were being unreasonable. "I can't get a contract." That's just the last deal he'll ever do.

G. Duhl: Well, what if they can't because of financial terms?

Audience: They just have to.

G. Duhl: You mean they have to because it's a class, or they have to in real life?

Audience: Real life.

G. Duhl: Okay.

Audience: Our particular class has MBAs and JDs. So the MBAs do the business work, and the JDs do the -- there's never been an issue on the business deal. And it's always the lawyers. It's always the lawyers.

G. Duhl: Right, and in our distributorship agreement, both the companies have no other options. They had to get the deal done, so –that is what they do.

Audience: And in real life, when they come to us and they say, just, "You're being jerks, we just can't do it," the answer is, "That's just not an acceptable answer." And that's -- so far, that's the biggest difference between your settlement where continuing on in the litigation is an option where in a transaction it's not.

J. Millner: I think the way we address that is this -- in the distributorship agreement, if the client's telling [them to] go back and go get a deal, the –students are going to go back and get the deal. Whereas in the litigation context, as you said, there is that other option; and if the client feels, "Okay I prefer to go to litigation," then they're going to say to us as clients, "Forget it. Let's go to litigation."

Audience: The flip side of that is that it imposes obligation[s], and it's a skill you can help teach them on how to communicate. If they really think there's a problem, how will they communicate that to their client? You can't force them to agree to something that's bad for their client. What they have to learn is how do they communicate to the client this is a problem. We've got to solve it, but this is a problem that you're going to accept to make this deal.

G. Duhl: That's a good point.

Audience: I have a comment and a question: One of them is that's why negotiation across the board is so important -- because there's a little bit of difference between negotiating in a deal setting and negotiating in a litigation setting. In the litigation setting, you know basically where your settlement might be.

But my question goes back to the question I asked Kirsten. Tina has this structure for doing a deal that involves preamble, and background, and definitions, and then she goes on in the middle with all the action sections. Is there a structure that you have students look at for a settlement agreement? Obviously, there's actual sections in the middle that are unique to the agreement. But is there that sort of macro structure? Because I found it difficult to translate what Tina's book is all about into trying to teach a settlement agreement. There's a lot of things that aren't reps and warranties.

J. Millner: You're right, and that's part of why we teach, again, the class together -- so that students have the framework for a contract with those sections before they get to the settlement agreement. We do give them some samples -- in the packet that you have there -- we give them some samples of a settlement agreement; but we tell them, "In practice you're going to have a million samples, and some of them are terrible and some of them are better than others, and you need to pick and choose what you think is appropriate." We haven't found that perfect book like Tina's book for the settlement context. G. Duhl: Jaclyn gives a lecture on the differences between settlement agreements and transactional agreements, and she talks about [how] you don't need all the boilerplate in a settlement agreement. It's a little more informal. We give them numerous examples, and we spend half an hour going through some of the differences and give them forms – again, just like they have the forms for the deals -- and we encourage them to use forms. We give

them a model civil rights settlement, a model standstill agreement. Some are good. Some are crap. We use some from past years, and we haven't found the magic handout --

Audience: Or even the magic article or something.

G. Duhl: That would be a great article to write: the difference between drafting a settlement agreement and drafting a transactional.

Audience: I really want to, but I don't know the answers.

G. Duhl: Right. Part of [it] is it's different sets of lawyers who write the different types of agreements.

Audience: It's also cross-disciplinary. I run a business, but I'm also neutral. And so a lot of the stuff comes from the AAA and others -- Spider and others -- have real good resources that you can use. Even though they're generally for ADR, they still really apply here. And so that's another good place to look.

G. Duhl: Give students access to those. Encourage students to use those samples.

Audience: I use some of those materials when I'm teaching them about negotiation -- some of the AAA training materials -- because some of that stuff is actually better than some of the stuff I've seen from the legal side.

Audience: When you're teaching that intensive course -- Deals and Dispute Resolution -- how does that count toward your teaching load for the year?

G. Duhl: It counts [as a class] or – actually, to be honest with you, we get paid for an overload, but it counts as a class. It's a 3-credit class. It's just like any other 3-credit class.

Audience: What are the prerequisites for the one-week deals and --

G. Duhl: No prerequisites. The goal is [to] attract as many students as possible, and prerequisites to me are just a hurdle. [For] Transactions and Settlements, there's no prerequisites except first-year Legal Writing and Contracts. And then Deals and Dispute Resolution builds on Transaction and Settlements, but we don't require substantive law prerequisites, the idea being that that's an opportunity for them to explore the substantive law[that] they're interested in.