

## NEGOTIATIONS

**RICHARD K. NEUMANN, JR.<sup>1</sup>    WHAT WE DON'T KNOW ABOUT DEAL  
NEGOTIATION BY LAWYERS**

**TINA L. STARK<sup>2</sup>                    CONTRACT DRAFTING: A PREREQUISITE TO  
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### **WHAT WE DON'T KNOW ABOUT DEAL NEGOTIATION BY LAWYERS**

A hundred years ago, it was dangerous to go to a doctor, who would frequently cause more harm than good. For two reasons, that is not as true today as it was then. One, of course, is technological progress in the form of diagnostic technology and medication. The other is that medical education figured out the thinking and skills needed to practice medicine effectively. Medical educators codified those things and then taught them to about five generations of medical students. One of the functions of professional education is not just to teach but also to figure out what *should* be taught – and thus to raise the standard of practice in the profession.

In medicine, the standard of practice is established through empirical evidence. Studies are done, with control groups and double-blind procedures, and the results are analyzed using sophisticated statistical techniques. The findings of one study are not treated as demonstrating anything definitively unless the results are confirmed in replication studies using different methodologies. In law, we do not hold ourselves to that standard. And because we don't, we are frequently ignorant – both about what lawyers do in practice and about how they could practice more effectively.

That is especially true with transactional practice. Only in the last ten years have we actually begun to teach people how to draft contracts in any systematic kind of way. It is certainly true that dispute resolution skills have also been neglected, but clinicians began studying them in earnest in the 1970's. We are only now beginning with transactional skills.

To put this into perspective, the Johns Hopkins teaching hospital was opened in 1889, and the Johns Hopkins medical school was essentially built around the teaching hospital, both physically and intellectually. By about 1910, it had become widely accepted

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that every respectable medical school should have its own teaching hospital and should use it not only to teach medical students on the words, but also to discover what should be taught – to study practice (in the empirical sense of study) while teaching practice.

### Thinking Empirically

Systematic and empirical thinking does not come easily into a mind trained in the common law, where anecdote is as persuasive as— and often more persuasive than — scientific evidence. Common law reasoning often proceeds in the following way: If I can think up an argument for something, and if I can illustrate that argument with anecdotes, the thing I'm arguing for must be true.

But a person whose inclination is on the other side of the issue will be laboring under the same cognitive illusion. That person will think up supporting arguments and find illustrative anecdotes as well. But that person and I can't both be right, even though we both have good arguments and memorable anecdotes. In fact, both of us are ignorant. Under Leszek Kolakowski's Law of the Infinite Cornucopia, an infinite supply of arguments exists to support any position you would like to take.

As long as we think in arguments, we will remain ignorant because arguments close off inquiry. And our ignorance is also based on the illusion that we already know whatever we could know about a particular subject. Imagine a circle about 18 inches across. It encompasses what could be known, but we tend to go through life assuming that it is also what we *already* know. We are not aware of what we don't know, so we imagine that we do know and what we could know are the same thing.

In reality, what we do know is much smaller. Imagine that inside the circle that's a foot in diameter is a much smaller one, perhaps an inch across. That's what we really do know. It's a tiny part of what we could know, but in every day consciousness we're not aware of the difference between the two circles. *We don't know how much we don't know.*

If you want to learn what lawyers really do in practice and how they could do it better, stop thinking in arguments and anecdotes and concentrate on what's inside the large circle but not inside the small one. That is where the discoveries can be found: outside the tiny circle of what you know and inside the big circle of what could be known.

As long as you think in arguments and anecdotes, you won't get out of the small circle because thinking in arguments and anecdotes smothers genuine curiosity and prevents empirical inquiry. If you want to be comfortable in the unknown and learn what's there, stop arguing and start asking questions about how you can learn the things you don't know.

How many empirical studies have we really conducted on what lawyers do -- what they actually do and what they could do effectively – in deal negotiations? I looked at all the back issues of the two leading negotiation law reviews<sup>4</sup> and counted the number of studies. In both cases, the number was zero. (At least it wasn't a minus number.) Empirical studies have not been undertaken on lawyers in deal negotiations. Even when empirical studies have been done with dispute negotiation, they often are not very good.

Typically, researchers who study negotiations of any kind will hire college students and put them in situations where they are being asked to negotiate the kind of issues that are

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<sup>4</sup> **ERROR! MAIN DOCUMENT ONLY.**HARV. NEGOT. L. REV., vols. 1-15 (1996-2010), and NEGOT. J., vols. 1-26 (1985-2010).

usually negotiated by people in their fifties who have twenty to thirty years of experience with those issues. Whatever the college students do, the researcher assumes is typical of what the people in their fifties with all that experience will do. It's a common criticism of these studies that the results are valid for only a very narrow population: sophomores we need the money researchers pay and can keep appointments for the research sessions.<sup>5</sup>

A better method was used by Gerry Williams in the 1970s and 1980s. He published one of the first real textbooks on negotiations. It was *Legal Negotiation and Settlement*.<sup>6</sup> In Phoenix and Denver, he went to a lot of lawyers and asked, "Who are the best negotiators in town?" Then he went to those lawyers and asked, "What do you do when you negotiate?" Then he correlated what they said with what the first group of lawyers said, and he hypothesized that certain negotiation styles are more effective than others. This is not a perfect methodology but it's based on real data from the real world. And it genuinely advanced our knowledge of negotiation. It's rarely been duplicated, partly because it takes a lot more work than academics are willing to invest in empirical research.

What usually substitutes for this kind of disciplined inquiry? We form beliefs based on assumptions, logic, and experience (anecdotes). But, in fact, social science regularly disproves what we assume to be true, even though we assume it because it looks as though logically it must be true.

Appellate procedure is based on an assumption that a trial judge knows more about the facts of a case than distant judges in a distant courthouse who can only read a cold record, a transcript of what happened at trial. After all, the trial judge sat there at trial and watched and heard the witnesses testify. This is perfectly logical, consistent with all we know about reality and common sense. It's also false.

Testing this principle – that hearing and seeing the witnesses would provide insights that reading a cold transcript could not – was popular among social scientists in the late 1980s and early 1990s. They constructed lots of different experiments with lots of grants until the grantors realized that the issue had been researched to death and the results were all the same.

Social scientists would conduct a fake trial. They would know – but the fact-finders in the room would not know – who the liars were and which witnesses were honestly mistaken and which witnesses were testifying truthfully and accurately. Then the social scientists would show a transcript of the trial to people who hadn't been in the room to see and hear the witnesses. In nearly every study, the people reading the cold transcript did a better job of figuring out who was testifying truthfully and accurately.<sup>7</sup> How could that be?

The answer will surprise every trial judge and every appellate judge because it upends the law's assumptions. The people reading the cold transcript were not distracted by myths about body language and tone of voice. They just looked at the content of what witnesses said in the transcript and compared it to what other people in the transcript said. The coldness of the record actually made them more effective as fact finders. Appellate

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<sup>5</sup> STEVEN D. LEAVITT & STEPHEN J. DUBNER, *SUPER FREAKONOMICS* 121 (2009).

<sup>6</sup> GERALD WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (West 1983).

<sup>7</sup> The research is collected in **Error! Main Document Only**. Olin Guy Wellborn III, *Demeanor*, 76 *CORNELL L. REV.* 1075 (1991).

judges in a distant courthouse are in a better position to decide the facts than the trial judge who saw and heard the witnesses testify.

Virtually everything in lawyering is subject to myths comparable to the one about trials judges and cold transcripts. That particular issue just caught the fancy of the social scientists, which is why we know it's not true. How many appellate courts in light of all that research have changed their ways? Zero. In the common law we are just not impressed by empirical evidence, which is one of the reasons why these studies haven't been done on deal lawyers.

So what do we have? What's said in print about deal lawyer negotiation is mostly in four books,<sup>8</sup> none of which is based on empirical knowledge. I like every one of these books, but *liking something* is a statement of emotion. I don't know empirically whether any of what these books say is true. A lot of what they say is consistent with common sense, experience, and logic, but that was also true of the cold record myth.

It might be that what deal lawyers actually do is not the same as what we think they do and what is effective in deal negotiations may not be what we think is effective. These four books are based on suppositions about what works. I like them. We all like them, but – although they seem to hold together well as bodies of thought – we have no idea whether they accurately describe reality.

Many lawyers would say something like “What the books say is consistent with my experience practicing law.” When you go to a doctor and the doctor proposes a course of treatment, you might ask, “What about this other kind of treatment I read about on the internet?” The doctor might say something like “In my clinical experience, that treatment does not work.” This is a statement in which you should have no confidence. Your follow-up question should be, “Tell me about the studies that have been published in peer-reviewed journals. What do they say about the thing I read about on the internet?” If the answer you get to that question is not satisfactory, you need another doctor, or at least a second opinion.

The doctor's personal experience is not empirical knowledge. He doesn't keep statistics. He's not an accurate reporter of the data because he's not collecting it systematically. He may even be miscounting. What he *remembers* as a 20% effectiveness rate might actually be a 60% effectiveness rate. He's busy trying to practice medicine and can't possibly remember what he sees in a statistically reliable way. And how does he know with an individual patient what the outcome was? If the patient doesn't report back, does that mean the patient recovered with the doctor's preferred treatment? Or does it mean that the patient gave up on this doctor and went to another one, who cured the disease using the treatment you read about on the internet? Either way, your doctor wouldn't know what happened.

When a lawyer tells you what works in his experience, that lawyer knows no more than the doctor you talked to. The beauty of Gerry Williams' methodology is that he

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<sup>8</sup> ROGER FISHER & WILLIAM L. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981) (focus on interests, not positions; invent options for mutual gain; insist on objective criteria; etc.); JAMES C. FREUND, *SMART NEGOTIATING: HOW TO MAKE GOOD DEALS IN THE REAL WORLD* (1992) (based on personal experience); ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000) (two chapters: “Challenges of Deal-Making” and “Advice for Making Deals”); WILLIAM L. URY, *GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION* (1991) (prepare by mapping route to agreement; reframe to solve problems; identify the other side's unmet interests; etc.).

established effectiveness through outside observers – those who had negotiated against the lawyers he was studying.

When you start to raise the question, among scholars of dispute negotiation, of what deal lawyers do, the scholars will make assumptions. For example, they will assume that deal lawyers are involved in the money, that the deal lawyers have something to say about the price or the delivery schedule or what is being bought. And you know this is not true. If a deal lawyer meddled in these matters on a daily business, as though he had some expertise in what's a good market price, that could cause serious confidence problems among clients.

People with dispute negotiation backgrounds are surprised by this because in dispute negotiation, if there's money, the lawyers are in charge of it. The client has the ultimate decision to make, but in tort negotiation, the client does not negotiate in advance what the money is and then ask the lawyer to solve the legal issues involved. The money is a legal issue in a tort negotiation. To a dispute negotiator, what a deal lawyer does can seem trivial. The business people have settled everything; what is the deal lawyer good for? But in fact what the deal lawyer does is interesting in part because the legal issues are interesting. They are the things that have to be done to protect the client against risk or at least reduce the risk and to enlarge the opportunities to make money. As a person with a dispute negotiation background myself, I have discovered late in life that what deal lawyers negotiate can be more interesting than what happens in the dispute negotiations.

### **BATNA**

A BATNA is a best alternative to a negotiated agreement. The concept has been a staple of dispute negotiation scholarship for a quarter century, since it first appeared in Fisher and Ury's *Getting to Yes*. The idea is that you should walk into a negotiation knowing in advance exactly what your alternative is if you fail to reach agreement. If you don't have a clear understanding during the negotiation of what your options are, you can't know whether the agreement that begins to take shape is in your own interests. If you can't do at least as well as your BATNA, leave. Sometimes you have to create a BATNA before beginning the negotiation. In other situations the BATNA already exists, and you need to investigate to find out what it is.

Deals involve two negotiations. The first, between the business people, settles the business issues: price, quantity, specifics of what's being bought, schedule, etc. The second occurs after the business people turn the deal over to the lawyers to "draw up the contracts" (a phrase that underestimates what deal lawyers actually do). The lawyers then settle the business, legal and drafting issues that must be agreed on to implement the principals' agreement.

These two negotiations intersect in interesting ways. For example, your client tells you "The other side agreed that they've gotta do X." Is this "gotta do" a covenant, a condition to your client's obligation to do Y, or both? If it's a covenant, the consequences of X's not getting done is that your client is theoretically entitled to damages. If it's a condition and the other side doesn't do X, your client doesn't have to do Y. If you ask your client whether she and the other side agreed to a covenant, a condition, or both, you might get a blank stare (or worse) – even if you try to explain the concepts in lay terms.

Your client doesn't know whether she agreed to a covenant or a condition or both, but you will settle that in the second negotiation – the lawyer-to-lawyer contract negotiation that follows. You would probably negotiate for both a covenant and a condition, the combination of which protects your client more than either alone would. The other lawyer

will try to figure out which is less risky for that lawyer's client. The other lawyer will take the position that your client gets one, not both, and that one just happens to be the less risky for the other side.

All of this will be informed by the way things are usually done in this kind of deal. If a party in your client's position typically gets both a covenant and a condition, the other lawyer will have a lot of difficulty persuading you to accept only one of them. On the other hand, if a party in your client's position typically gets only a covenant and you want a condition as well, you have the up-hill struggle. Depending on what's typically done and how uniform that practice is, you might not even bother with this issue and might concentrate on other issues. Or you might raise the issue as a bargaining chip only.

I've been talking about what lawyers might do in this situation. What do they *actually* do? How frequently do they do it that way? What arguments and strategies do deal lawyers use? How effective are they? Don't even imagine that you know the answers to these questions. You don't know, and I don't know. Without empirical investigation, all we know is anecdote, which is not real knowledge.

But here's a hypothesis on which, if we were at the race track, I'd be willing to put money down at the betting window: Although BATNA is a dominant factor in the business negotiation, in the lawyer-to-lawyer contract negotiation that follows, it does not drive the negotiation in the same way. Instead, it generally lurks in the background unless some issue pushes it back to being front and center.

Business people intuitively think in BATNA terms, even if they've never heard of the concept. If a buyer doesn't know how much money other sellers would be willing to accept for the same type of asset, or if a borrower doesn't know the interest rate that other lenders would charge, that buyer or lender will get snookered (a technical term) because of a limited understanding of comparison shopping.

In cutting the business deal, the business people must know what the alternatives are. When the lawyers begin their negotiations, the business people have already settled the conspicuous business issues where BATNA makes a difference. When the lawyers negotiate, their job is to memorialize that deal and, while doing so, to protect and advance the client's interests to the extent possible.

When you explain to dispute negotiation scholars that – despite all their assumptions – BATNA's are not of the driving force in a transactional lawyer's negotiation, and when you remind dispute negotiation scholars that perhaps half of what the legal profession does is transactional, eyes widen and sometimes jaws drop. What dispute negotiation scholars don't know about transactional negotiation is even more than you and I don't know. The reason is that many dispute negotiation scholars know very little about what transactional lawyers do,<sup>9</sup> which is reflected in the textbooks.<sup>10</sup>

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<sup>9</sup> See text, *supra*, at notes 4 and 8.

<sup>10</sup> **Error! Main Document Only.** The following textbook provides inadequate coverage and was written by authors with dispute backgrounds (who should have known better): STEFAN H. KRIEGER & RICHARD K. NEUMANN, *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* (4th ed. 2011) (3 pages). The following textbooks focus on dispute resolution, with almost no deals coverage: ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* (1990); GARY BELLOW & BEA MOULTON, *LAWYERING PROCESS: NEGOTIATION* (1981); CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (5th ed. 2005); JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW* (2006);

I'm not saying that BATNA's never come up in the life of a deal lawyer. Of course they do. I'm saying that I would bet on the hypothesis, which has not been tested empirically, that for deal lawyers BATNA does not drive the contract negotiation in the same way that it does for business people – or for lawyers do dispute negotiations. When might a deal lawyer think about BATNA's?

Suppose that in the course of the contract negotiation, one of the lawyers discovers a risk that the lawyer cannot reduce through negotiation and that is great enough that prudence requires a frank discussion with the client. The lawyer has discovered, in essence, that the deal isn't what the client thought it was. That discussion between lawyer and client will naturally and necessarily include some BATNA analysis. But this type of discussion is one that the lawyer would prefer not to have. The lawyer's job is to get the deal done by drafting a contract that implements the business peoples' agreement. Finding an issue that requires the client to think about BATNA raises the specter of the deal not getting done – the lawyer as deal-killer. At this juncture, the really good deal lawyer will think creatively and problem solve so that BATNA recedes from the foreground. It's not that deal lawyers don't think in terms of BATNA. They must. To do their job, they must understand what the BATNA is and which issues are significant enough that BATNA must be considered. Some clients will even delegate the negotiation of these BATNA-related issues to the lawyer. The point is that for us to teach students how to negotiate a deal, we as teachers must understand the different role BATNA plays in a contract negotiation.

### **Finding a Methodology that Works**

There are two tough clusters of issues here.

First, what methodologies will actually produce knowledge about transactional negotiations among lawyers? What would it take without using college students and putting them in the position of late career deal lawyers with 20 or 30 years of experience? What methodologies could we use, remembering that the subjects of this research are going to be, for the most part, highly paid people who might not see the value of cooperating with researchers? How are we going to get the knowledge from them? We are probably not going to get it directly. They are not going to let us follow them around and do time and motion studies on what they do. The methodological challenges are profound.

Second, what should the research agenda be? What should we try to find out? You could put that into two big categories. What do deal lawyers actually do in negotiations as opposed to what they think they do? And how could they do it more effectively? (Remember how research in teaching hospitals improved the standard of medical practice gradually over decades.)

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DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND PRACTICE* (2d ed. 2007); STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH R. COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (5th ed. 2007); THOMAS F. GUERNSEY, *A PRACTICAL GUIDE TO NEGOTIATION* (1996); ROGER S. HAYDOCK, *NEGOTIATION PRACTICE* (1984); CARRIE MENKEL-MEADOW, ANDREA K. SCHNEIDER & LELA P. LOVE, *NEGOTIATION: PROCESSES FOR PROBLEM-SOLVING* (2006); MELISSA L. NELKEN, *UNDERSTANDING NEGOTIATION* (2001); ALAN S. RAU, EDWARD F. SHERMAN & SCOTT R. PEPPER, *NEGOTIATION* (2d ed. 2002); CHARLES B. WIGGINS & L. RANDOLPH LOWRY, *NEGOTIATION AND SETTLEMENT ADVOCACY* (2d ed. 2005); GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983) (a pioneering book and still a classic).

When we ask people what they do, the answer is going to be consistent with their self-image and what they assume would cause other people to respect them.<sup>11</sup> They will say something that is consistent with the way they want to be thought of, and they won't be lying about it. They just won't be appreciating an objective empirical reality. We can't be objective about ourselves, what we do, and why we do it. Asking the subject of the research is not the best way to find out. (That was a flaw in Gerry Williams' methodology, but he was researching without the advantages later researchers would have had. And because he was a pioneer, he added to knowledge despite this flaw. Later researchers ought not to be able to claim that.)

One focus of research might be discourse and rhetoric. What do deal lawyers say to each other, and what works when they say it? To a person like me from a dispute negotiation background, the way deal lawyers talk to each other is charmingly genteel. "My client needs comfort on matter Z." It's a refreshingly civilized way of demanding a concession. How often do deal lawyers actually talk that way, and how does it compare with the way dispute lawyers talk? Does the difference really make any difference? If deal lawyers talked like dispute lawyers, would the negotiation dynamics change? There is an assumption that hardball negotiating among deal lawyers may be counter-productive in many situations. Is it true? What can deal negotiation tell us about dispute negotiation?

For a long time, it was widely believed that the dispute negotiator who makes the first offer incurs a disadvantage. The theory was that if you make the first offer, you telegraph expectations to the other lawyer about what you're willing to accept and what your settlement range is. The research suggests that that is not true. In fact, the dispute negotiator who makes the first offer often anchors the negotiation successfully at a number derived from that offer.

We ought to have suspected this long ago. When you walk into a new car showroom, the first offer has already been made. It's on the window of every car in the showroom and on the lot outside, and it's called the sticker price. If you were to tell a sales person that you'll accept that offer and buy the car at the sticker price, they will ring a little bell and everybody will come out and ask you to repeat it because they've never heard anybody say that before. But that's their first offer, and if you accept it, you've got a deal, although it's an awful deal.

For many car buyers, that first offer, although rarely accepted, creates an anchor, and the rest of the negotiation is framed by the question of how much less than the sticker price the buyer will pay. The purpose of the sticker price is to create that anchor. The most effective way to get around the anchor is to ignore it. Don't even look at the sticker, and if a sales person brings it up, refuse to talk about it. Instead, make the first *real* offer yourself. Find out how much the dealer paid to buy the car wholesale,<sup>12</sup> add enough money to cover the dealer's overhead and provide a reasonable profit, and then offer to buy the car for that price.

Because every one of us has experience buying cars, we ought to have understood long ago that making the first offer can create a favorable power balance for the offeror, but probably for 20 or 30 years the literature on dispute negotiations confidently advised us to

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<sup>11</sup>**Error! Main Document Only.** DONALD A. SCHÖN & CHRIS ARGYRIS, THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS 6-7 (1974, 1992).

<sup>12</sup> *Consumer Reports* will provide this information for a very small fee.



make the first offer. To make the first offer in some studies has absolutely no effect on the outcome. In other studies, it actually gives the offering party an advantage.

### **Challenges to Empirical Research**

We tend to make a lot of assumptions about deal negotiations, and we don't really know whether those assumptions are valid. An assumption I'm willing to make, although I'd really like to read some empirical evidence about it, is that confrontational, obnoxious behavior by a deal lawyer who is in negotiation with another deal lawyer is counter-productive. I hope that's true. But my hope is an emotional one because it reflects the professional world that I might enjoy living in.

How much lawyering actually adds value and how much of it is just over-lawyering – lawyers trying to solve problems that may never matter by negotiating issues that are highly unlikely ever to blow up. From what I've been able to figure out, this is a continual issue in deal work.

We could spend a lot of time ironing out the wording so that both your client and my client feel that our interests are protected. Shall we run up several hundred dollars or thousands of dollars in lawyers' fees on both sides to do that? On the other hand, if this issue stands less than a one percent chance of blowing up and if it does, will it cause only minor dislocation for both parties, are we wasting our client's time and money by doing so? Is this being done by the seat of the pants by deal lawyers? Are they able to make reasonably accurate projections of how to allocate their time and their client's money by doing so?

That would be a really interesting problem to research. My guess is that it would take years to put together and execute methodologically sound studies. And remember, one study doesn't settle anything empirically. In social science the research has to be repeated by other researchers using different methodologies on different populations and only after follow-up studies have shown that several different methodologies with several different populations produce pretty much the same result can we begin to have confidence that it's true.

When lawyers read papers published in empirical journals, such as medical journals, they do exactly what empirical researchers don't want them to do. Lawyers tend to read the first few paragraphs and then skip all the data and analysis of the data and get to the end to see what it all adds up to. If a lawyer likes the conclusion, then he'll cite to the article. If the lawyer doesn't like it, he might ask somebody who understands the methodology to identify faults in it so the lawyer can argue against the study's validity. Law school professors, writing law review articles, often treat empirical research in pretty much the same way: they'll use it to support their own preconceptions.

Before I'm no longer teaching, will high quality research, including replication studies permit us to say that we know the answer to some of the questions I've raised? I think the odds are against it, for several reasons: First, law faculty members tend not to think empirically and aren't interested in this kind of study. They would rather have knowledge more cheaply. Second, it takes a lot of investment in career time and grant money to do this, and both are increasingly hard to come by. Third, you need repeat studies to come to anything that could be called knowledge. It could be ten, twenty, or thirty years before we really have hard knowledge about these things.

What kinds of presentations among deal lawyers persuade as one deal lawyer talks to another deal lawyer? What kinds of arguments work? Arguments can be structured in a

number of different ways: arguments based on rights, arguments based on justice, and arguments based on mutual self-interest. How do you craft an argument that is more likely than another kind of argument that will work that deal negotiation? Do threats work? And threats could be delivered in lots of different ways. If a threat is capable of working, what method of delivering it gets results with the highest frequency, causing the least amount of damage in the process? Do calculated displays of anger ever work? Threats and anger are common in the repertoire of dispute negotiators. Sometimes you have to feign anger just to make a point – even if you are not really angry. Does this ever work in deal negotiations?

I haven't the faintest idea what the answers to these questions might be.

**TINA L. STARK**

## **CONTRACT DRAFTING: A PREREQUISITE TO TEACHING TRANSACTIONAL NEGOTIATION**

### **Introduction**

I first started thinking about how to teach negotiation in 1995 or 1996 when I was an adjunct professor at Fordham. I had created a new course, called Introduction to the Deal, and I had decided I would teach students skills that they were actually going to use when they practiced, and that one of the skills was going to be negotiation. I – of course – got every textbook that there was on negotiation. I read them all and unhappily concluded, “This has almost nothing to do with what I did when I was in practice.”

The issue, therefore, was what was I going to teach. Yes, I could talk about deal negotiations being cooperative rather than competitive or competitive but in a cooperative context. But the issue was what I was going to say after that. In the absence of published materials that worked for what I wanted to teach, I decided to focus on the negotiation of contracts.

What you are going to hear today is a discussion by me about one of the core problems in teaching students how to negotiate contracts. As I was thinking through how I would explain the problem, I realized that many in the audience may never have seen a deal negotiation. Therefore, I started to think about how best to describe it: “In this circumstance, so and so would ask for this and then the other party would respond with a comment like this.” I thought: boring. So what I have done is to draft up some role-plays that I will intermix with my talk. I have asked some of your colleagues to take on the roles. The negotiations are going to be relatively simple, but you're going to see part of a typical contract negotiation. Contract negotiation is not the only kind of negotiation that deal lawyers do; but it's an aspect of the negotiation, and it's an aspect that law school negotiation textbooks don't address.

### **Contract Drafting as Prerequisite**

My thesis is that contract drafting – or at least some instruction in contract drafting – should be a prerequisite to teaching transactional negotiation. At Emory, our skills curriculum begins with contract drafting. We postpone the teaching of negotiation until students have learned how to draft. The theory is simple. We cannot teach students how to negotiate a contract unless they understand how a contract is put together and that means

they know how to draft it and analyze it. This pedagogy assumes the proposition, however, that when deal lawyers negotiate, they negotiate the contract. It also assumes that negotiating a contract somehow differs from other negotiations. It does.

Dispute resolution negotiations often focus on distributive issues. How large will the settlement be, and at what price can a breaching partner be bought out? Deal lawyers do address monetary issues, but it is often after the principals have agreed on price and other salient business terms without their lawyers' assistance or intervention. Frequently, the monetary issues that deal lawyers hash out are those where the lawyers have a superior understanding of what market is. For example, what percentage of purchase price should be the basket in the indemnity? That said, in many sophisticated transactions, it's really only once the principals conclude their negotiations that they turn over the deal to the lawyers and tell them to "paper it" – that is, to draft and negotiate the contract that will memorialize the parties' final agreement. If the contract doesn't do this accurately, then the parties don't get what they bargained for. This negotiation is sometimes referred to as "the negotiation of words." I think that that mischaracterizes and devalues the negotiation that follows. The negotiation of the contract continues to be a negotiation of the deal.

### **Drafters are More than Scriveners**

Drafters are more than scriveners. They must understand the full implications of the deal to be able to implement it. Rarely can a lawyer simply take a term from the letter of intent and repeat it verbatim and be done with that business term. Generally, the term in the letter of intent is a bottom line statement of what the parties have agreed to. But in order to achieve the parties' expectations, the contract may need to address that term in multiple ways. The drafter must know how to use the law and her drafting skills to memorialize the business deal so that it provides for what the parties agreed to, but does so in a way that advantages the client. Choosing the wrong words or the wrong contract concept can increase risk, decrease a party's control, or lose the client a monetary advantage.

A final point before we get to the role-plays. To draft a contract, a lawyer must understand business, the client's business, and the business deal. Therefore, to have students negotiate a transactional fact pattern they must understand some business basics. If they don't, they are not experiencing a real transactional negotiation. Drafting, the law, business, and the business deal are inextricably intertwined.

Now let's get to the role-plays.

### **Negotiation Exercise One<sup>13</sup>**

**Stark:** Let's assume that two principals have signed a letter of intent ("LOI") for the purchase of a business. One of the terms is the following: all consents are to be obtained. Before drafting the contract, the buyer's lawyer calls the seller's lawyer to introduce himself and to discuss the LOI. Here is part of the call. You'll see how it turns into a negotiation of the contract.

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<sup>13</sup> This material, along with additional pages of the handout, may be accessed at [http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010\\_Conference\\_Speaker\\_Materials/Stark/Stark\\_Handouts.doc](http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Stark/Stark_Handouts.doc)

**Buyer's Lawyer:** That brings us to the matter of consents. I'm sure in your review of the LOI you saw that our clients agreed that all consents were to be obtained.

**Seller's Lawyer:** Absolutely. That should be very simple to deal with. Let's make it a condition to closing.

**Buyer's Lawyer:** All right. That's helpful, but I think we need some additional provisions. If consents are dealt with only through a condition, that practically gives you an option. If you want out of the deal, you just fail to get a consent. We want the Seller to be obligated to put out effort to get all those consents. What if we add a covenant that the Seller shall obtain all the consents not obtained before signing?

**Seller's Lawyer:** I understand your point about the Seller needing to exert effort, and we're happy to covenant to do that, but the Seller cannot promise to obtain all the consents. The Seller doesn't control the parties who need to give consent. The Seller can't be in a position where a third party controls whether the Seller has breached the Purchase Agreement.

**Buyer's Lawyer:** Fair enough. Let's provide that the Seller shall use commercially reasonable efforts, so the issue is the level of exertion, rather than the success of the efforts.

**Seller's Lawyer:** Thank you. We appreciate that. But we'd like to add that we don't need to spend above a certain dollar threshold to obtain a consent. Would \$10,000 work?.

**Buyer's Lawyer:** I don't think that's a problem. I'll confirm that with my client.

**Seller's Lawyer:** Good. We can mark that business term "Done."

**Buyer's Lawyer:** Not quite. Before we sign on for this deal, we want to understand what risks we are taking with respect to the consents. Which consents have you obtained and which do you need to get? We'd like you to lay that out for us.

**Seller's Lawyer:** No problem. We'll give you a rep on that and the covenant and condition can tie into it.

**Buyer's Lawyer:** Now we're done. I look forward to working with you.

**Stark:** For those of you who are deal lawyers – have you heard a negotiation like that? I'm not aware of an example of a negotiation like that in a textbook.

This kind of negotiation will play out over and over. The business people cut a deal, but the contract remains to be negotiated. Without a sophisticated understanding of the interplay of the contract concepts, this negotiation would not have been possible, and neither lawyer would have appropriately protected his or her client. Knowing the basics of contract drafting was essential.

## Negotiation Exercise Two

**Stark:** Now let's turn to the more sophisticated example which will once again show the relationship between negotiation and drafting. Assume that a licensor and licensee have agreed that in the first year of a three-year term, the licensee will have the exclusive right to manufacture and market licensed products in States A, B, and C. Then, if sales exceed \$7 million in the first year, the territory will expand to include States D and E. Here is contract language that expressly incorporates the parties' stated agreement.

### *Definitions*

**“Original Territory”** means Maine, New Hampshire, and Vermont.

**“Extended Territory”** means Delaware, Maine, New Hampshire, Rhode Island, and Vermont.

### *The Grant of the License*

**2.1 Grant of License.** By signing this Agreement, the Licensor grants the Licensee an exclusive license to manufacture and sell Licensed Products, during the Term, in the Original Territory. However, if the Licensee's sales for the first year of the Term exceed \$7 million, this exclusive license is with respect to the Extended Territory for the second and third years of the Term.

However, the question once again is whether additional provisions are necessary to assure the licensee that it has indeed received an exclusive license. That exclusivity is fundamental to the licensee's business deal because if a third party has concurrent, competing rights, that could gut the licensee's ability to exploit that license. With these provisions as background, here is the negotiation:

**Licensee's Lawyer:** Thanks for getting us the draft of the contract so quickly. We really appreciate the turnaround time. I have a couple of points that I'd like to talk through with you with respect to the grant of the license and its exclusivity. The first point is fairly basic. In the grant, the contract uses the word “sales.” That, of course, is an accounting term and on its own is too vague. I suggest that the finance people get together and work out a definition. I think that could eliminate problems down the road.

**Licensor's Lawyer:** Absolutely. Good suggestion. What else is on your list?

**Licensee's Lawyer:** As you know exclusivity is very important for us. Without it, we can't fully exploit the license. We wouldn't be going into this deal if we had to compete with another company to sell Licensed Products in the territory.

**Licensor's Lawyer:** Absolutely. That's consistent with the business deal. What if we give you a rep and warranty that we haven't granted any licenses to any person in the Original Territory?

**Licensee's Lawyer:** That's fine, but does that mean that you have granted licenses in the Expanded Territory?

**Licensor's Lawyer:** Well, in State D, there is a license. But it shouldn't present a problem if your client meets the \$7 million threshold because it terminates at the same time as the end of year one of the Term.

**Licensee's Lawyer:** What about State E?

**Licensor's Lawyer:** No license.

**Licensee's Lawyer:** Ok. We'd like the agreement to reflect all that information. Can we get reps and warranties on all that?

**Licensor's Lawyer:** Not a problem. What about the following language? My speedy, well-trained associate (who went to Emory) drafted it as we were talking. And just so we're clear, if there's anything wrong with the provision, the student went to Northwestern.

### 3.1 Other Licenses Granted.

- (a) **Original Territory.** The Licensor has not granted any other license for the manufacture and sale of Licensed Products in the Original Territory for all or any part of the Term.
- (b) **States D and E.** The Licensor has granted one license for the manufacture and sale of Licensed Products in State D. That license terminates on the last day of the Term's first year. The Licensor has not granted any license for the manufacture and sale of Licensed Products in State E for all or any part of the Term.

**Licensee's Lawyer:** That's very helpful, but I think that we still need additional comfort. The reps speak as of the day of signing. My client is still at risk that your client might in the future grant licenses that would then compete with its license. We'd like some protection against that. We drafted up some proposed language that we'd like you to look at:

#### 4.1 New Licenses with respect to the Expanded Territory.

The Licensor shall not grant any license for the manufacture and sale of Licensed Products in the Expanded Territory for all or any part of the Term.

**Licensor's Lawyer:** Let me talk this through with you. I think we're going to need to distinguish licenses in the Original Territory and the additional states in the Expanded Territory. A covenant prohibiting any other licenses with respect to the Original Territory makes sense as that is the Licensee's exclusive territory throughout the Term. But States D and E are a little more complicated. My client may want to make some money off of State E between now and the end of the first year of the Term.

**Licensee's Lawyer:** Yes. I can see that as a possibility. What if there's permission to grant a license for Year 1?

**Licensor's Lawyer:** We'd prefer to be able to grant a license for multiple years but to be obligated to terminate it if your client reaches the \$7 million threshold. We want to have something in place if your client doesn't reach the threshold. If we don't, we could lose millions of dollars in sales while we reach an agreement with someone else.

**Licensee's Lawyer:** Presumably, your contract with the other party would include that you had the discretionary authority to terminate, so there'd be no claim of breach against you for terminating.

**Licensor's Lawyer:** Yes; that's fine. To recap: We would have discretionary authority to grant a license for State E for all three years, but that license would be terminable by my client if your client reaches the \$7 million threshold.

**Licensee's Lawyer:** I'm not comfortable with the other contract being tied specifically to our reaching the threshold. I don't want to be in a third

party fight over who has a right to the license because we did or did not reach the threshold.

**Licensor's Lawyer:** I understand, but I'll need to check that point with my client. It may be difficult to cut a deal if we seemingly have the right to end a contract for no reason. But to keep things moving, let's assume they're terminable just on notice. But for clarity, we'll include in our contract with you that we will terminate the other contract if you meet the \$7MM threshold. Does that work in concept?

**Licensee's Lawyer:** Yes. Thank you. One final point for discussion. We need to deal with State D and years 2 and 3 of the Term.

**Licensor's Lawyer:** What if we set it up the same way as with respect to State E, but have it apply with respect to just the last two years of the Term?

**Licensee's Lawyer:** That should work. Thank you. We too have a speedy Emory associate. Here's her work, but I'll take the same caveat that you did about Northwestern.

**4.1 Other Licenses with respect to the Original Territory.** The Licensor shall not grant any license for the manufacture and sale of Licensed Products in the Original Territory for all or any part of the Term.

**4.2 Licenses with respect to States D and E.**

(a) **State D.** The Licensor may grant to any Person a license for the manufacture and sale of Licensed Products in State D for the second and third years of the Term. However, under that license, the Licensor shall have the discretionary authority to terminate that license so that the Person has no license with respect to years 2 and 3 of the Term. The Licensor shall exercise that discretionary authority if the Licensee is entitled to a license for the Expanded Territory in accordance with Section 2.1.

(b) **State E.** The Licensor may grant to any Person a license for the manufacture and sale of Licensed Products in State E for all or any part of the Term. However, under that license, the Licensor shall have the discretionary authority to terminate that license so the Person has no license with respect to years 2 and 3 of the Term. The Licensor shall exercise that discretionary authority if the Licensee is entitled to a license for the Expanded Territory in accordance with Section 2.1.

**Licensor's Lawyer:** One quick reaction. By stating "any Person" that seems to limit our ability to divide the license among several licensees. We may want different licensees for different years of the term.

**Licensee's Lawyer:** Understood. We'll deal with that in our redraft.



Now, the negotiation you just heard is in my mind a classic contract negotiation. The parties had agreed on the business deal, and the lawyers were to memorialize it. But to memorialize it they needed to do much more than use pretty language to restate what was in the LOI. That was only the starting point. To implement the agreement that had been negotiated, the lawyers needed to understand the implications that the agreement would have on both parties' businesses. With that in mind, they had to think about how to advance and to protect their own client's interests while accommodating the business interests on the other side. To do this, they needed the right contract drafting tools and needed to be able to analyze the contract provisions that the other side drafted. Without knowing how to draft, they could not have conceptualized or resolved the issues. And to state what I hope is apparent, those issues were a mix of business, law, and drafting.

Now, as professors we face an important pedagogical question. Does dispute resolution negotiation pedagogy suffice to teach our students how to negotiate a contract? I think you know where I am going to come out on that. I don't think it does. Deals fundamentally differ from litigation. Therefore, it should not be surprising that what we need to teach and how we teach it should differ. That is not to say that there are not substantial overlaps. There are. But as transactional education develops, it is incumbent on us to understand the differences and to create an appropriate pedagogy. Thank you.

## HOWARD KATZ

### NEGOTIATION AS A FOUNDATIONAL SKILL

#### Introduction

I come to you as someone who has thought about and written about pedagogy. I have been on curriculum committees at several different schools and have thought about where a course in negotiation fits into the overall curricular scheme. Jacki Knapman<sup>14</sup> was going to talk a little bit more about the nitty gritty of designing the negotiation course. I will address that a little bit and refer you to the handout that is in your materials.<sup>15</sup>

Before I get started I am going to make a disclaimer. I recognize that every school has different facts on the ground. So the disclaimer I make about anything I say - even if it's said with great certainty - is that everything is prefaced by a Quaker query: "have you considered this?" And I would add to that the observation that I don't think any of us can be entirely certain of anything, as Richard demonstrated earlier in his talk.

#### The Case for a Required Negotiation Course

I want to make the case that negotiation is a foundational skills course and therefore is more important and should be more central to the law school curriculum than it currently

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<sup>14</sup> Jacki Knapman is an Adjunct Professor at Elon University School of Law who regularly teaches a Negotiations course.

<sup>15</sup> See Howard E. Katz & Jacki Knapman, *Negotiation as a Foundational Skills Course* (Conference Handouts), [http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010\\_Conference\\_Speaker\\_Materials/Katz/Katz\\_and\\_Knapman\\_Conference\\_Handouts.docx](http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Katz/Katz_and_Knapman_Conference_Handouts.docx).

is. I may be preaching to the choir. There may be a certain amount of self-selection in this room. But when I was at this conference two years ago, I noticed that when people talked about negotiating contracts and doing drafting exercises someone would raise the question, “how much instruction do you actually give the students about negotiation?” or “how much time do they spend on it?”. Even with people already sensitive to teaching skills as opposed to teaching doctrine, the answer would be something like, “oh, we give a twenty minute overview on the basic theories of negotiation.” Or, “we just throw them in the break-out rooms and kind of let them work that out and then get to drafting the deal.” And so it occurred to me that even in a universe of people who are sensitive to the importance of skills (broadly defined, including transactional skills) as opposed to purely doctrinal professors, negotiation was not being accorded much importance as a foundational skill.

I am making two related arguments. The first is that if you are a transactional professor it is in your enlightened self-interest to lobby at your school for a more central role for the basic negotiation course (or a negotiation module attached to some other course). The second is that the basic negotiation course stands on its own in terms of meriting that attention. I'll also talk about how those points relate to some of the things that Richard and Tina said. But I think some of the connections will be obvious.

I will say at the outset that I am sympathetic to what Richard is saying in terms of empirical research. I was an early correspondent with Bill James (who is sort of the founder of modern baseball statistics). But I will also say that just because we don't know everything that negotiators do, and particularly what transactional negotiators do, doesn't mean we shouldn't try to teach the basics and teach what we **do** know, as long as we are fairly well convinced that we're not teaching things that are totally erroneous. I think teaching negotiation acclimates our students to a different way of thinking about what they do in law school than traditional doctrinal courses, and that is important in and of itself. Even if we don't have all that empirical knowledge yet.

### **Objectives of the Course and the Implications**

When we think about where the negotiation course should fit into the curriculum, there are several related objectives that come to mind. I draw this partly from the conference two years ago as well as from other discussions. The first and most obvious is imparting knowledge about that particular skill. For example, we should have a course in transactional negotiation because we want to teach students how to do transactional negotiation (and they are not learning it somewhere else). Second is setting the table for further instruction in a given skill. That's where I hope you will see why the case that Tina made and the case that I am making are not contradictory. Third, we want to make clear -- particularly when we're teaching any kind of skills, including transactional skills -- that “skills” are an integral part of law school.

There's a phrase that's now going around in the world of finance -- the “new normal.” You may or may not believe that there is a “new normal” after the financial meltdown. But in law schools, I think that anyone who does skills training (including transactional skills training) is really at one level trying to make the case to students that the doctrinal, analytical thing that we do in the first year (what was it called by the Carnegie Commission -- the cognitive apprenticeship?) shouldn't be the only norm. There are competing norms. Lawyers do different things; law students have to do different things. I will come back to this because it's important in terms of my case for the timing of the negotiation course. The fourth point about the course is this -- because we're talking about a

different kind of course, we have to think about whether that course might appeal to different students than the ones who are successful at what is the “old normal.”

So what are the implications in terms of placement in the curriculum? I'm not going to read through the entire list, but you can see in the handout the kinds of things that I believe students don't learn or at least don't learn systematically in other courses. Of course, if a student takes a transactional drafting course in their second or third year or if they take another skills course, yes, they may get some of these. But many students never get them in the core curriculum in many conventional law schools in the first two years. I will come back to this point because it relates to what Tina was talking about. One example -- understanding their own position and how to present it using the competitive and cooperative style. Another one - anticipating the reaction of others to their argument. Yes, students recite in class and yes, students do moot court. But I would argue it is not as systematic as it would be in a negotiation course. Strategic decision-making; both on-the-fly-decision-making and more rigorous kinds of decision-making. For example, I don't think most students see a decision tree anywhere else in the law school curriculum. And with whatever limitations there are on quantifying decisions, it is a tool like other tools that we should teach our students.

Basically the case in chief for negotiation as an important course is based on those things that students otherwise will get little of in their other courses. This means either that the course should be required, or it should be strongly suggested, and/or schools should make more slots available so that more students are able to take the course. That's my basic case for the merits of the course. I'd like to give you one example of how that relates to what previous speakers said. While it may be true (and maybe Richard will allow me to say this contingently) that most deal negotiation is cooperative rather than competitive, that would mean nothing to a student if the student hasn't even been exposed to the difference between cooperative and competitive negotiation. Most law students tend to gravitate to the competitive, even if in the transactional negotiation world it's almost all cooperative. If the students have already seen in a basic negotiation course the difference between those two, have been forced out of character in role plays, and have seen that maybe the cooperative method has something to be said for it (and may even be the more effective or the only method they can use in a deal), there is a pay-off that an upper-level transactional skills professor will get from the students having had the basic negotiation course.

That is just one example. I would like to dwell for a moment on the point about students flourishing and blossoming in skills courses. Those of you who teach skills courses probably don't need to be told this. But I will tell you -- doctrinal professors absolutely do. I speak as someone who is primarily a doctrinal professor. This is just not something in the consciousness of doctrinal professors. There are some students who don't do well in what we consider to be the norm of law school -- the first and second year; the doctrinal, analytical process. And then you get them into a different setting, whether it is a negotiation course or whether it is a transactional course or some other skills course. And some of those students blossom. And that's good not only because now they have succeeded at some part of law school. It also may motivate them. They now see, “oh, this is what lawyers do” and therefore may be more motivated to do better in their doctrinal courses because they want to do what lawyers do. And they didn't realize this because they never saw it in the first two years of law school. This is part of the case for the negotiation course -- the fact that it allows some students to flourish and “speaks” to a different kind of student.

I would summarize my argument -- my case for why negotiation should be considered a more important course than it currently is -- as follows. Most schools require or strongly suggest a course in trial advocacy. And while it is true that many lawyers will litigate, **all** lawyers and all human beings will negotiate. That's the basic case for the importance of the course.

### **Placement of the Course in the Curriculum**

Now, let me address the question of where the course should be in the curriculum and how it is delivered. Everything that I have said argues for moving negotiation (either as a course or as a significant module) earlier in a student's career. And the idea is first, teaching the basic skill and then, giving students the opportunity to refine their skills and to use them in other contexts. If they take the course in the second semester of their third year, obviously they are not going to be able to do this.

I want to take into account something Tina suggested, which is that you can't learn how to negotiate transactionally until after you've taken the contract drafting course. I would suggest that if a student has had the basic course (on negotiation) the table has been set. The professor in the upper-level course doesn't have to go through those basics of negotiation; doesn't have to break students of that inclination to be competitive rather than cooperative. This allows the transactional negotiation instruction to start at a higher plateau. This goes back to my earlier theme - establishing the "new normal." If you wait until the third year to make skills courses available, then students basically view the first two years of law school as normal, as the only thing that law school is about. You then wait until the third year to say, "now here's a couple of other things you might want to know about because you might actually be able to use them in your lawyering career".

I also refer back to another point I made earlier -- the one about inspiring students. If you reach some of those students in the second semester of the third year, that doesn't really have a huge pay-off for them, or for the school, or for you and other instructors at the school. But if you can reach those students in the third or fourth semester (or perhaps even earlier) and show them that there is some part of law school that they can grab on to, or that can inspire them to be more motivated to do the more conventional doctrinal work in law school, I think there is a pay-off for all concerned. I think that the pay-off for the transactional professor in the upper level should be obvious -- the ability to start at a higher plateau; to be able to build on some of those foundational skills. That's why what I'm saying doesn't contradict what Richard and Tina were saying. I think that the two viewpoints really can co-exist.

### **Delivering the Course in a Cost-Effective Manner**

Even if a faculty buys some or all the arguments I have made, there is always the reservation about delivering skills instruction in a cost-effective manner. And so I come to the last part of the presentation. This is the part that Jacki Knapman was going to cover in greater detail. I will just summarize what she would have said, addressing the issue of how to deliver more sections of the course if you're going to tell students that it's an important course. By the way, the models that we have suggested in the handout may also be suggestive of ways of delivering other skills courses such as contract negotiation. The idea is to use a combination of one or more full-time professors (who lay out the basics and who design the basic curriculum) along with adjunct professors. The adjuncts are used in a more supervised way than perhaps adjuncts are used at some law schools. Their small sections may be oriented to the adjunct's particular area of practice. I think one of the lunch talks

tomorrow is about the use of adjuncts, and that discussion may dovetail with some of things I'm saying here.

There are different models for integrating full-time professors with adjuncts. The handout sets out some alternatives. The basic premise is that it's hard to ask an adjunct to address the theoretical distinctions in negotiations, or to ask an adjunct to map out an entire course. But if negotiation is something that lawyers do all the time – and, parenthetically, if transactional drafting is something that lawyers do all the time -- then I think it makes sense to have the basics laid out by a full-time professor, with the adjuncts bringing their practice experience to the course (dovetailing with the general outlines of the course as laid out by the full-time professor). This makes it possible to deliver more student slots for a course like the basic negotiation course, or for that matter, a course like transactional drafting. The handout sets out different options for scheduling -- when the full-time professor meets with the students versus when the adjunct meets with the students. And it suggests what the full-time professor must provide to the adjunct professors. In the case of the basic negotiation course, that includes a basic outline, instruction on how to run a role play (including how to debrief), and assistance to the adjuncts in writing up their own practice experiences as role-play exercises. It may be that the full-time professor has enough in his or her files to be able to provide some or all of those role plays to the adjunct, with instructions on documentation (what the students do before and after the negotiation in terms of a written product that goes along with the negotiation itself). I think you can see how this same model can be adapted to delivering a drafting course.

The handout then addresses the content of the first two class sessions in the semester. We suggest certain things that the full-time professor needs to lay out to relieve the burden on the adjuncts of reinventing the wheel and reinventing the course. Basic instructions in such things as - how to prepare for the negotiations; what does the other side want?; what's your goal?; what's the other side's bottom line?; what's your side's BATNA (best alternative to a negotiated agreement)? Again going back to what Richard said, your side's BATNA may be less important in a transactional negotiation than in other kinds of negotiation. But wouldn't be it great if, when you get that student in the upper-level transactional negotiation course, they already know what a BATNA is? Then you can just tell those students that the concept they learned earlier may be less important here than it was in their previous negotiation class. That allows you to begin the instruction at this higher plateau.

That's the basic case for the negotiation course being important. That's the basic case for offering it earlier in the law school careers of students and for encouraging more students to take it. And if you're convinced of that, we've suggested some ways in which your school can make the course available to more students so they can derive all the wonderful benefits that the course has in store for them. Thank you very much.