Teacher’s Manual

for

ESSENTIAL LAWYERING SKILLS

Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis

Fifth Edition

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Transition Guide

What Has Been Changed in the Fifth Edition

In many chapters minor changes have been at the sentence and paragraph level to improve readability.

Chapter 2 — Professionalism — has been reorganized, although the content is little changed.

Chapter 4 — Lawyering as Problem-Solving — has been rewritten. New material on convergent and divergent thinking ($4.3$) and cognitive biases and illusions ($4.4$) has been added. Some of the cognitive material had been in the 4th edition cognitive chapters, and new material has been added. Some of the 4th edition content in this chapter (Chapter 4) has been reorganized and streamlined.

Chapter 13 — The Story Model of Organizing Facts) discusses the most recent scholarship on legal storytelling and the relationship between techniques in legal storytelling and film making methods.

Chapter 16 — Investigating the Facts — includes an expanded discussion of techniques for fact investigation on the internet.

Chapters 21 and 22 — The Counseling Meeting with the Client and Overcoming Special Problems in Counseling — have been reorganized. Some of the cognitive material has been moved to Chapter 4, but that which relates directly to counseling remains here.

Chapter 23 — How Negotiation Works — includes a new discussion of ethical responsibilities in plea bargaining.

Chapter 25 — Developing a Negotiation Strategy — contains an expanded discussion of modes of communication in negotiation — including email and texting.
The Book’s Website

The textbook is supported by a website, which has three parts:

1. An online version of the teacher’s manual, from which you can print any pages you wish (including exercises or assignments you might wish to distribute to students).

2. A case file in a housing discrimination case including case documents (relevant statutory provisions and case law, office memoranda and materials obtained through fact investigation) and an audio file of an interview with a witness. A description of this case is contained in this Teacher’s Manual on pages 80-81. The website contains assignments in the areas of fact analysis, counseling, and negotiation and charts for use by students in preparing the assignments. A table of contents to the case file appears on page 6.

3. MP3 audio files in which we (Krieger and Neumann) describe our different methods for preparing for a negotiation for the purchase of a car. Students can easily imagine themselves conducting this type of negotiation, but we explain ways of doing it better. We don’t necessarily agree with each other.

On the site, you’ll see Student Materials and Professor Materials buttons. The case file and MP3 files (## 2 and 3 above) are under the Student button. The teacher’s manual is under the Professor button.

After the book’s shrinkwrap is removed, you’ll find inside the book an access code with the site’s address and an access code that can be used to get into the Student Materials. Students get similar cards with their books.

You’ll need a separate password to get into the Professor Materials. To get a password, contact Aspen either by email or by phone —

  email  legaledu@aspenpublishing.com.

  phone  1-800-950-5259
How the Teacher’s Manual Can Help You

Pages 7-26 of the teacher’s manual explain how to use the book in each of these situations:

• in a course on Interviewing, Counseling & Negotiation
• in a clinical course
• in a survey lawyering skills or lawyering process course
• in a course on fact investigation and analysis
• as a supplemental text in a course in Pretrial Litigation
• as a supplemental text in a Legal Writing course that has a practice skills component
• as a supplemental text in a doctrinal course that has a practice skills component
• in a course on Fact Investigation and Analysis

Pages 27–290 of the teacher’s manual explain the five parts of textbook. These pages also include exercises and assignments that can be used in teaching professionalism, interviewing, persuasive fact theory development, counseling and negotiation.

Pages 281–298 are an epilogue that touches, with humor, on the goal of being both an effective lawyer and a good human being, at least as the public would want to see in us.

Pages 299–314 are an appendix that sets out some suggestions for effective critiquing of student work.

Pages 315–328 are an appendix on course design and outcome assessment in skills courses.
Acknowledgments for the Teacher’s Manual

We are grateful for the suggestions of Deborah A. Ezbitski, John J. Francis, Monroe H. Freedman, Mitchell Gans, Marti Granizo-O’Hare, Lawrence W. Kessler, Kathryn Stein, and Carol Turowski and to Gary Blasi for assistance in development of syllabus for course in Fact Investigation and Analysis; Lauris Wren for assistance with Fact Exercise 10 (Problem A); and Thomas Devine for assistance with Fact Exercise 10 (Problem B). We are also grateful for research assistance provided by Emilio Iturrino, Michelle McGreal, Dayna Shillet, and Teresa Staples.

The material on the inclusive solution in Part I originally appeared in a different form in the Fordham Law Review. Fact Analysis Exercises 3 and 6 are derived from exercises developed with colleagues from the University of Chicago Mandel Legal Aid Clinic, 1979-87. Negotiation Exercise 4 and Negotiation Assignment 6 are adapted from exercises written by Lawrence W. Kessler, reprinted with his permission. Negotiation Assignment 4 is adapted from one written by Kathryn Stein, reprinted with her permission. Negotiation Assignment 1 was inspired by an assignment developed by Michael Wolfson. Much of the material on critiquing in Appendix A originally appeared in a different form in the Hastings Law Journal. A portion of Appendix B appeared in a different form in Legal Writing: J. Legal Writing Inst.
The Textbook’s Epigrams

Two epigrams appear together at the front of the textbook:

You know more than you think you do.
- Benjamin Spock

The lyf so short, the craft so long to learn.
- Chaucer

Juxtaposed, they pose a paradox. The first quote has been the opening sentence of Dr. Spock’s Baby and Child Care for many editions spanning more than half a century. The point has been to tell young parents that, in their new and frightening situation, their good common sense will be of more help than the authoritative opinions of experts. Law school has a way of suggesting to students that everything life taught them beforehand is useless. But good lawyering, like good parenting, is built — at least in part — on inner personal strengths developed long before.

The second quote was used as a motto by Gustav Stickley, the foremost furniture designer of the Arts and Crafts movement a hundred years ago. It will take students a very, very long time to learn how to lawyer. To become truly good, they have to continue learning years after they have left law school. It takes humility to do that.

Here’s the paradox: Although students know more than they think they do, they also need to learn much more than they might assume.
Case File on the Book’s Website
Oakhurst Tenants Association

Some of the fact analysis, counseling, and negotiation assignments in this teacher’s manual are based on a case file for the Oakhurst Tenants Association. The following case file documents are on the book’s website:

File Names
- Statutory and Case Materials
- Client Intake Memorandum
- Contact Memos
- Gonzales Interview Transcript
- Recording of Gonzales Interview
- Sloan Campaign Literature
- Lewis County Web Postings
- Town’s Open Records Act Response
- Environmental Impact Statement
- Code Compliance Report
- Application for Building Permit
- Town Council Meeting Minutes — 6/5/02
- Town Council Meeting Minutes — 3/5/03
- Town Council Meeting Minutes — 9/18/03
- Town Council Meeting Minutes — 8/10/05
- Deed for Sale from Oakhurst Realty to Windsor
- 2000 Census Data
- Crestwood Monthly Report
Using the Text in a Course on
Interviewing, Counseling & Negotiation

There are many ways to organize a course like this. The sample syllabus on the following pages represents just one of them. In many ways, it reflects the school at which the course has been taught and the teachers involved in the course. For you and your school, other approaches might work as well or better.

In a course on interviewing, counseling, and negotiation, one teacher could teach about 20 to 24 students while also teaching another course during the same semester — if the other course is not a labor-intensive one like a clinic or Legal Writing. If the teacher is teaching only Interviewing, Counseling & Negotiation, 36 to 40 students might be accommodated.

The sample syllabus is from a course where enrollment is so large that practitioners are hired as adjuncts to help teach workshops and critique videotapes. (They are called “subsection professors” in the syllabus.) A full-time faculty member supervises them, teaches the theory classes, and teaches one of the workshop subsections. Each subsection has eight to ten students.

There are two advantages to using adjuncts. First, they greatly enlarge the number of students who can take the course. And second, they bring an element of realism that full-time faculty cannot always provide. The best adjuncts to hire are those who are reflective about practice and who believe that most lawyering tasks can be done well in many different ways. But even the best adjuncts need detailed guidance on grading and other matters that full-time teachers seem to understand instinctively. (A memo to the adjuncts explaining grading follows the sample syllabus.)

The syllabus requires a student to keep a very abbreviated form of a journal. Journaling encourages students to reflect on themselves, their growth as professionals, and the issues that trouble and perplex them. Sandy Ogilvy has written a helpful article on the subject.1

Sample Syllabus
for a 3-Credit Course in
Interviewing, Counseling, and Negotiation

Structure of the Course: Students enrolled in the course are divided into subsections. When you registered, you were assigned to a subsection.

Two class meetings are scheduled per week. One lasts an hour. All students meet together then to discuss the skills covered by the course.

The other class lasts two hours. There, you meet with your subsection as a workshop to do exercises. In some weeks, you will instead meet during that time individually with your subsection professor to discuss a counseling or negotiation session that you videotaped. All of this is explained more fully below.

What You Will Do in This Course: Outside of class, you will counsel a client and negotiate twice with adversaries (other students in the course). One of the negotiations will be in a dispute setting. The other will be transactional (negotiating a contract, for example).

The out-of-class counseling and negotiations will be videotaped. You will meet with your subsection professor to critique your performance — but not to review the whole tape together from beginning to end. Instead, you will watch the tape privately beforehand and choose several passages that you would like to talk about. You might have questions about what was going on, or you might want suggestions on solving a problem, or you might want to talk about something you think went particularly well or badly. The subsection professor will watch the tape after you do and similarly choose a small number of passages. At the critique, you and the subsection professor will talk about the passages thus identified. That makes the critique more focused and allows you to set much of the agenda for the critique.

If you do not have access to a VCR where you live now, you can use one of the school’s VCR’s to prepare for the critique. Because the subsection professor will view the tape after you do, you must return the tape to room 104 as quickly as possible after the videotaped performance.

There are two counseling assignments: A and B. (See the course calendar at the end of the syllabus.) If you are the lawyer in assignment A, you will role-play the client in assignment B. If you are the lawyer in assignment B, you will role-play the client in assignment A. Assignment A is videotaped during week 5. Assignment B is videotaped during week 6.
You will also keep a journal and write two short memos and one longer one (explained below).

**Reading Assignments:** They tend to be bunched (see the calendar at the end of the syllabus), with heavy reading when a skill is introduced and light or no reading for several weeks thereafter. You will handle this better if you plan your time in advance. You could work ahead, doing some of the reading before the week in which it is assigned below. Or you could work ahead in other courses so that you have free time in this course’s heavy reading weeks. You cannot do a good job learning these skills unless you read the material in a contemplative way.

**Journal:** Your journal is for recording questions you want answered, issues you want to explore, and evaluations of your own performance. Immediately after the videotaped work (negotiations and counseling), you will write a journal entry evaluating your performance. Do this no later than the evening of the same day you do the interview, negotiation, or counseling session. If you wait until the next day, much of your thinking will be lost overnight. In addition, after you first watch each videotape (and before we meet), you will write another entry evaluating the performance again but this time as seen on the tape. When evaluating your work, some of the questions worth considering are

- what are your strengths?
- in what ways can you use your strengths while practicing law?
- what are your weaknesses?
- what will you do to improve in areas where you are weak?
- what else have you learned about yourself from this performance?

At times other those listed above, journal entries are good things to do but are not mandatory. You could, for example, write a journal entry before a performance to record what you think of your preparation, what you are confident about, and what you are worried about. At another time, you might write a journal entry to explore your feelings about the work lawyers do and what is happening to you as you study to become a lawyer.

Journal entries can be of whatever length you think appropriate. Keep your journal in a binder or something similar. Bring it to each of the three critiques. (You have an absolute right to keep your journal entries private from the knowledge of other students.)

**Memos:** You will write two short memos and one longer one. Before each of the two negotiations, you will write a short memo (three to five pages) explaining your negotiation strategy. And before you counsel the client, you will write a longer memo explaining your counseling plan. The counseling memo will require legal research. The others will not.
**Overview**

**How Final Grades Will Be Computed:** Each part of the course is worth a certain number of points, as follows:

- 15 points — performances in workshops
- 30 points — counseling session and memo
- 25 points — transactional negotiation and memo
- 25 points — dispute negotiation and memo
- 5 points — journal

The total number of points available is 100. At the end of the semester, we will total up each student’s points and assign a letter grade.

There is no way to remove subjectivity entirely from grading, but we try to limit its effect. Your work will be evaluated against a standard of what reasonably effective lawyers might do in similar situations. *Most professional tasks can be done well in many different ways. (And they can also be done badly in many different ways.)*

If you make all the required entries in your journal, you will get all five points available for journal work. Fewer than five points will be awarded only if you do not write all the required journal entries. In other words, what you write in your journal does not affect your grade — even where you criticize yourself. (Self-criticism improves learning and should not be penalized.)

There is no final exam.

**Attendance at Out-of-Class Events:** Included in the course calendar (below) are

- three videotaped performances (one counseling and two negotiations),
- three critiques of those performances, and
- one instance of client role-playing while another student counsels. (There are two counseling assignments. In one, you will counsel a client. In the other, you will play a client being counseled by another student.)

At each of these events, other people will carve out time on their schedules and be at a certain place assuming that you also will be there. Because other people depend on it, a good professional scrupulously honors time commitments.

Schedules for the videotaped assignments and the critiques will be distributed well in advance. If a time for which you are scheduled is inconvenient for you, and if you raise that problem...
within seven days after the schedule is distributed, we will find another time for you, no questions asked. (You do not have to justify the change.)

But after seven days, a request to reschedule must be supported by a verified excuse of the kind needed to reschedule an exam. If you do not appear at one of the scheduled events and if you have not supplied such an excuse, the grade for that aspect of the course will be reduced significantly. After a certain point, rescheduling becomes extremely difficult, and other people will be depending on you to be present and prepared.

Calendar Definitions: Some terms that appear on the course schedule below:

“assignments” require students to write a memo and to conduct a complete counseling session or negotiation on videotape.

“exercises” are the short performances done in workshops. A workshop’s exercises will be distributed no later than the preceding Thursday or Friday.

“main class meeting” is the one-hour class attended by all students together

“subsection meeting” is the one conducted by your subsection professor for workshops and critiques of videotaped performances

“workshops” are class meetings in which subsection professors work with small groups of students, who do short performances (5 to 15 minutes) for immediate critique without videotape, in a format like the one used in the Trial Techniques course.

Course Schedule

See definitions above.

before the semester begins: read Chapters 1-6

week 1
• read before first class: Chapters 7-8
• main class meeting: professionalism, clients, problem-solving and intro to client interviewing
• subsection meeting: first client interviewing workshop
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week 2
• read before first class: Chapters 10-12
• main class meeting: intro to fact analysis and theory development
• subsection meetings: second client interviewing workshop

week 3
• read before first class: Chapters 9 and 13-15
• main class meeting: more on facts and theories, plus intro to witness interviewing
• subsection meetings: third client interviewing workshop; begin witness interviewing workshop
• counseling assignment A distributed (end of week)

week 4
• read before first class: Chapters 18-22
• main class meeting: counseling
• subsection meetings: complete witness interviewing workshop
• counseling assignment B distributed (end of week)

week 5
• read before first class: Chapter 16-17
• main class meeting: fact investigation
• counseling memos for assignment A due on Monday
• counseling meetings for assignment A videotaped
• students who counseled in assignment A watch videotapes and turn them in for shipment to subsection professors

week 6
• no classes meet
• counseling memos for assignment B due on Monday
• counseling meetings for assignment B videotaped
• students who counseled in assignment B watch videotapes and turn them in for shipment to subsection professors

week 7
• main class meeting: intro to negotiation
• subsection meeting: subsection professors critique assignment A tapes
• read Chapter 23
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week 8
• read before first class: Chapters 24-25
• main class meeting: negotiation planning
• subsection meeting: counseling workshop
• transactional negotiation assignment distributed

week 9
• read before first class: Chapters 26-28
• main class meeting: negotiation face-to-face
• subsection meeting: first negotiation workshop
• students work on transactional negotiation memos

week 10
• transactional negotiation memo due Monday
• no main class
• subsection meeting: subsection professors critique counseling assignment B tapes
• transactional negotiations videotaped
• dispute negotiation assignments distributed
• students watch transactional negotiation videotapes and turn them in for shipment to subsection professors

week 11
• main class meeting: dispute negotiations
• subsection meeting: subsection professors critique transactional negotiation tapes

week 12
• main class meeting: negotiating against an unreasonable adversary
• dispute negotiation memo due
• dispute negotiations videotaped
• students watch dispute negotiation videotapes and turn them in for shipment to subsection professors

week 13
• main class meeting: negotiating against a more experienced adversary
• subsection meeting: second negotiation workshop
week 14

- main class meeting: professionalism revisited
- subsection meeting: subsection professors critique dispute negotiation tapes

Below is a memo that explains to adjuncts — the “subsection professors” of the syllabus on the preceding pages — how to grade.

Memo on Grading

To: [adjuncts]
From: [full-time faculty member]

Over the course of the semester, the maximum number of points available per student is 100, divided up as follows:

15 points — performances in workshops
30 points — counseling session and memo
25 points — transactional negotiation and memo
25 points — dispute negotiation and memo
5 points — journal

At the end of the semester, I will total up each student’s points and assign a letter grade.

In this course, we use a grading system that requires me to do all the math and to take responsibility for converting point totals to letter grades (so that if students complain about the letter grade, you can blame me). All you need do is divide student performances into three categories — “truly impressive,” “sufficient,” and “causes worry.”

Work is “truly impressive” if it stands out from what the class as a whole is doing. If your firm had an opening for a graduating student and you saw this kind of work, it might lead you to think about putting the student into the pool to be interviewed. (That’s not the same as saying that you would definitely interview the student, only that you’d be tempted to do so.) Out of 10 students, perhaps one to three might be in this category.
Work is “sufficient” if it doesn’t fit into either of the other two categories. The student shows signs of proficiency from time to time and with experience will probably become generally proficient. Usually, half to three-quarters of student work is “sufficient.”

Work “causes worry” if the student will have serious problems to overcome before becoming proficient. If you were to find yourself working with such a student in your office, you would consider worrying about the consequences. Out of 10 students, from zero to three might be in this category.

During the semester, please keep track of your judgments so that at the end of the semester you can report them to me. You don’t need to justify your decisions. Just tell me what they are at the end of the semester.

Here’s how you might handle different kinds of student work:

Performances in workshops (15 points): If at the end of the semester you categorize a student’s workshop participation as “truly impressive,” I’ll give the student the full 15 points. A “sufficient” student will get 10 points. A “causes worry” student will get five points. And a student who usually does not attend workshops will get zero points. (The last almost never happens.)

Counseling session and memo (30 points): Evaluate the videotaped performance, not the memo. The memo’s purposes are (1) to get the student to work out the analysis carefully and (2) to help you understand what the student is trying to accomplish on the tape. We do not grade it formally. The best time to make your categorization decision is near the end of the critique meeting with the student, rather than while viewing the tape. The critique often gives you additional information about the student’s approach. I usually write my decision down just before the end of the critique (otherwise, I forget). If you categorize a student as “truly impressive,” I’ll give the student 30 points. A “sufficient” student will get 20 points. A “causes worry” student will get 10 points.

Transactional negotiation and memo (25 points): Same as counseling session and memo, except that a “truly impressive” student gets 25 points; a “sufficient” student 16 points; and a “causes worry” student seven points.

Dispute negotiation and memo (25 points): Same as transactional negotiation and memo.

Journal (5 points): If a student seems never to be bringing a journal to the video critiques, tell me and I’ll ask the student to show me a complete journal. Otherwise, don’t tell me anything, and I’ll automatically give students the full five points (which the syllabus says they’re entitled to if they keep a journal).

In May, after I receive all these evaluations, I’ll add up each student’s points and then apply a curve to produce letter grades.
Overview

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Using the Text in a Clinic

One of the primary goals of a clinician is to teach students generalized methods for preparing or performing a particular skill. In other words, each time a student faces a negotiation, a client counseling session, or a witness examination in a particular case, she should not be reinventing the wheel. She should be asking herself similar questions and considering similar issues even if the ultimate conclusion will differ based on the circumstances of a case. The text helps clinical teachers accomplish this goal in two ways.

First, it can be used in a seminar to give students a context for handling their individual cases. For example, to teach preparation of negotiation strategy, the teacher can assign readings from Chapters 24 and 25; distribute materials from an actual case in which some students will be involved in an upcoming negotiation; and use the preparation of this case as a model for the entire class to use in planning negotiations for their own negotiations. Or, to demonstrate the use of the legal elements model for organizing facts, a teacher in a criminal clinic can assign chapter 11 and distribute copies of a recently-filed motion to dismiss the information and the district attorney’s response. In class, students can conduct simulated arguments on the motion, and the teacher can relate the discussion on the arguments to the readings. Students can then apply the generalized methods learned in the seminar to their actual cases.

The second way live client clinicians can use the text is in their supervisory meetings (“rounds”) with their students. When an event arises in a case requiring the use of a skill which has already been discussed in the seminar, the teacher can refer the student to the particular methods discussed in the class and the assigned readings for that class. With a basis for the discussion already in place, the teacher and student do not waste their time “starting from scratch,” but can quickly turn to a discussion of how those methods can be used in these particular circumstances. In fact, before the meeting, the clinician can assign the student the task of drafting a case memo or chart based on the class discussion. If, however, the skill has not been discussed in class, the teacher can still assign particular readings to the student before the meeting. At the meeting, she will need to review the readings, but the student will at least have some foundation for a discussion of the issues which need to be considered.

A sample clinic seminar schedule begins on the next page.
Sample Schedule for a
Clinic Seminar
(two hours per week)

I. Orientation

Class 1: Course goals and methods; evaluation method; assignment of cases
Readings: Chapters 1-6
Exercise: Persuasive Fact Analysis #1

II. Cross-Cutting Themes of the Course

A. Legal Theory of the Case

Class 2: Proving Your Prima Facie Case
Readings: Chapter 11
Exercise: Persuasive Fact Analysis #3

Class 3: Introduction to Clinic Substantive Law
Consideration of legal theory in the context of the relevant statutes and regulations on [substantive law area of Clinic]

B. Client Interviewing and Counseling

Class 4: Client Interviewing: Establishing Professional Relationship and Ascertaining Client’s Problem
Readings: Chapters 7-9, 12
Exercises: Client Interviewing Exercises 1 and 2

Class 5: Client Counseling
Readings: Chapters 18-22
Exercise: Select a Counseling Exercise
C. Fact Theory

Class 6: Developing a Thorough Chronology
Readings: Chapter 12
Exercise: Persuasive Fact Analysis #4

Classes 7 & 8: Presenting a Persuasive Story
Readings: Chapters 13-14
Exercise: Persuasive Fact Investigation 5

Class 9: Developing Circumstantial Evidence
Readings: Chapter 15
Exercise: Persuasive Fact Investigation 6

Class 10: Problems of Proof
Readings: Fed. R. Evid. 401, 602, 801-803, 901, 1002
Exercise: Persuasive Fact Analysis #8

Classes 11 & 12: Identification of Additional Evidence: Depositions
Readings: Chapters 15-17
Exercise: Persuasive Fact Analysis #7

D. Interest-Based Analysis for Dispute Resolution

Class 13: Negotiation Preparation
Readings: Chapter 23-24
Exercise: Negotiation #1

Class 14: Negotiation Simulations
Readings: Chapters 25-28
Assignment: Negotiation #1
Using the Text in a
Lawyering Skills
or
Lawyering Process Course

An increasing number of schools offer a survey course lawyering skills or lawyering process designed to introduce large numbers of students to the most basic skills lawyers use every day. Some of these courses are required; others are optional. Some are in the first year curriculum; others are intended primarily for second-year students. We wrote *Essential Lawyering Skills* for use as the text in such a course. The three skills most commonly covered in such courses — interviewing, counseling, and negotiation — are thoroughly explained in the text. A fourth skill — fact reasoning and especially persuasive factual analysis — fits naturally and easily into a survey skills course and is thoroughly covered in the text.

Using the Text in a
Pretrial Litigation Course

One of the authors taught Pretrial Litigation for 16 years. There are several good Pretrial Litigation texts on the market. We wrote *Essential Lawyering Skills* in part to supplement rather than to supplant them. We wanted to fill gaps left by the other books, which do an excellent job of explaining pleadings, motions, discovery, and the like.

Here are the subjects where we wanted to provide a more thorough treatment (with the relevant chapters in parentheses):

- professionalism as a way of thinking (Chapter 2)
- developing a factual litigation theory (Chapters 10-17)
- negotiation (Chapters 23-28)
- witness problems with observation and memory (Chapter 7)
- strategic thinking (Chapter 4)
- working with clients (Chapter 3)
- client and witness interviewing (Chapters 8-9)
- communications skills (Chapter 5)
Using the Text in a Legal Writing Course with a Practice Component

More and more Legal Writing programs are adding practice components in interviewing, counseling, or negotiation. Regardless of the skill chosen for a Legal Writing program’s practice component, first-year students can benefit from reading about professionalism (Chapter 2) and working with clients (Chapter 3).

Interviewing is probably the skill most readily adaptable to a Legal Writing course. It is the one most accessible to first-year students. And writing assignments are more realistic and challenging if the facts are presented in raw form, such as through a simulated interview or series of interviews in the classroom. A good selection would be an interview with the client followed by one or two witness interviews. Chapters 7-9 will form a good basis.

Fact reasoning is under-taught in law school. Every school should have a course in fact reasoning, but virtually none do. A Legal Writing program can make a creative contribution to the curriculum by developing a fact reasoning component -- which first-year students are fully prepared to handle. Chapters 10-17 explain factual theory development, and Chapter 7 adds some material on fact skepticism.

Counseling is a natural extension of the office memo portion of a Legal Writing course, although first-year office memos do not necessarily lend themselves to offering the client an array of options from which to choose. To include a counseling component, you may need to alter the office memo assignment so that students are able to report an array of solutions, rather than the narrower question of whether the client has a cause of action.

Negotiation is the most difficult skill in the book for first-year students to deal with. It requires strategic thinking and persuasive abilities that most first-year students are not yet prepared for. We are not suggesting that you abandon a negotiation component if you have one: you know better than we could ever hope to whether it is working well. If your practice component does focuses on negotiation, we suggest that you choose sections and chapters in Part V that are within the abilities of first-year students at your school.
Using the Text in a
Doctrinal Course
with a Practice Component

If you teach a doctrinal course and have added a practice component, we suggest that, in addition to the skills-based chapters directly relevant to your practice component, you consider assigning one or more of the introductory chapters as well: Chapter 2 on professionalism, Chapter 3 on working with clients, Chapter 4 on problem-solving, Chapter 5 on communications skills, or Chapter 6 on multicultural lawyering.

Using the Text in a Course on
Fact Investigation and Analysis

Several law schools have begun to develop stand-alone courses to examine issues in fact investigation and analysis. Such a course can introduce students to different methods for thinking about facts, brainstorming and developing new facts, investigating a case, and analyzing facts that have been gathered. These courses also provide students with opportunities to engage in fact investigation and analysis in simulations and actual field work. Many clinical courses use a “soup to nuts” approach, giving students a range of experiences in actual cases from initial client interview to legal research and fact investigation to negotiated resolutions or trials. In contrast, these stand-alone courses can focus students on one slice of an actual or simulated case – the fact investigation and analysis process – in different transactional, policymaking, or litigation contexts.

While a fact investigation and analysis course can rely solely on simulated exercises to give students opportunities for applying fact investigation methods in practice, inclusion of a field work component in the course can provide students with increased motivation to engage in the fact investigation process. Cases for field work can be obtained from the law school’s live-client clinic, local legal services offices, community organizations, or advocacy groups. A representative of one of these offices can orient a team of three to five students to the issue in a particular case or matter and consult with them as they engage in the fact investigation
These students do not have to be licensed under a student-practice order since they will not be acting as legal representatives but are able to play the role of consultants to the group or attorney.

The sample syllabus is from a course taught to 15 students in which they initially engage in simulated exercises in both litigation and transactional contexts and then work in teams of three to five on actual cases. For the first part of the semester, students engage in simulations of different skills and competencies in each class and then are required to use them in assignments for the following week. In the second part of the semester, students engage in their field work projects, reporting to the class on the progress of their investigations and then presenting a final report at the end of the semester.

Grades for the course are based on the written class assignments, the final report, and class participation.

Sample Syllabus
for a Course in
Fact Investigation and Analysis

Course Description: This course has three different goals. First, I want to introduce you to different methods of thinking about facts: marshaling evidence to establish legal elements; creating chronologies of events; and crafting overall persuasive stories. I want you to understand that these methods are not only applicable to litigation, but also to other types of lawyering such as transactional work, policy advocacy, and alternative dispute resolution. Most important, I want you to see that “facts” in a case are not fixed but gain or lose their significance based on their relationship to legal rules and other facts. Applying these methods, you will also learn how to organize facts in a case with a special focus on the use of document management software.

My second goal is to teach you different methods for analyzing the facts discovered, imagining additional sources of evidence that might exist, investigating those sources, and expanding theories of the case. We will discuss how to assess the admissibility of evidence under the applicable rules, to evaluate the credibility of specific evidence and witnesses, and to use expert consultants and specialized literature in the fact development process. We will also consider different sources of proof – open records laws, electronic and print materials, and formal discovery – and discuss the advantages and disadvantages of the use of each of these sources. In this context, we will consider the special problems faced with use of Internet investigation. Throughout these discussions, we will examine how the fact investigation and analysis process relates to development of case theory.

Finally, I want you throughout the semester to have hands-on experience in applying fact analysis and investigation methods in practice. I believe you will only be able to understand fully the
theories and methods of fact investigation and analysis if you have the opportunity to apply them. In simulated and actual cases, you will organize and analyze facts, brainstorm additional sources of proof, investigate facts, interview witnesses, and use the evidence discovered to develop case theories.

Class Format: This class has both a seminar and field work component. In the seminar, we will discuss general methods for analyzing and investigating facts in a case. In most classes, you will perform simulated exercises in class, for example, analyzing the facts in a case, interviewing a lay or expert witness, critiquing of social science study, or arguing objections about facts discovered. After many seminar classes, you will draft a written assignment based on materials discussed in that class.

For the field work, you will engage in fact investigation and analysis in an actual case. This semester, the class will be conducting fact investigations in three different cases. Each case will be handled by a team of five students. You will meet with the lawyers or agencies for which we are conducting the investigations; prepare planning memoranda for the research; obtain and review relevant documents; interview witnesses; and draft a fact investigation report for the respective agency or attorney. In the sixth week of the semester, I will assign the cases. As a group, each team will develop a fact investigation strategy for the case, individual members of the team will conduct different aspects of the investigation, and, in our last three cases, each team will present a report on its findings and analysis.

As shown on the attached class schedule, I have assigned seven different writing assignments for the semester.

Assignments 1-5 should require two to five written pages. Assignment 6 is a team project for all the students working on a particular case and should require four or five pages. For Assignment 7, each student on the team will be responsible for a particular aspect of the fact investigation report. Each section should require five to seven pages.

Grading

Written Assignments (90%): I will grade each assignment using the following scale: 3 – superior; 2 – proficient; 1 – needs improvement; 0–not submitted. Following is the weight I will give each assignment:

- Assignment 1 (Marshaling of Existing Evidence) 10%
- Assignment 2 (Hypothesis Development) 10%
- Assignment 3 (Fact Investigation in the in the Public Domain) 10%
- Assignment 4 (Public Record Requests Memos) 10%
- Assignment 5 (Interviewing Preparation) 10%
- Assignment 6 ((Strategy Memo – Group Memo) 10%
Class Participation (10%): This is a small class, and I encourage active participation by all the members of the class. For many classes, in addition to the readings for the class, I will assign a simulated exercise. While you are not required to submit any written product for those exercises, you should be prepared to perform them in class or discuss the relevant issues. For the classes without simulations, you should be prepared to discuss the issues raised by the readings.

### Course Schedule


**Assignment column:** Fact Exercises refer to Fact Exercises in this Manual.

<table>
<thead>
<tr>
<th>Class</th>
<th>Topic</th>
<th>Readings</th>
<th>Assignment</th>
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<tbody>
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<td>1</td>
<td>Thinking About Facts</td>
<td>ELS Chapters 10-13</td>
<td>Assignment 1: Fact Exercise 6</td>
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<tr>
<td>2</td>
<td>Hypothesis Development: Developing Additional Facts</td>
<td>ELS Chapters 15 and 17</td>
<td>Assignment 1: Fact Exercise 6</td>
</tr>
<tr>
<td>3</td>
<td>Fact Investigation in the Public Domain</td>
<td>ELS Chapter 16 Brant Houston &amp; Investigative Reporters and Editors, Inc., <em>The Investigative Reporter’s Handbook</em> (2009), chs. 3 &amp; 4</td>
<td>Assignment 2: Fact Exercise 8</td>
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<td></td>
<td>Course Title</td>
<td>Reading Material</td>
<td>Assignment</td>
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<td>4</td>
<td>FOIA/Open Records Act/Questioning Technique</td>
<td>ELS §16.3.2 Article on Public Records Requests</td>
<td>Assignment 3: Fact Exercise 10</td>
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<td>6</td>
<td>Witness Interviewing</td>
<td>ELS – Chapter 9 Simulations of Lay Witness Interview</td>
<td>Assignment 5A: Preparation for Lay Witness Interview</td>
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<td>7</td>
<td>Expert Interviewing</td>
<td>David A. Binder &amp; Paul Bergman, <em>Fact Investigation: From Hypothesis to Proof</em> (1984), Ch. 16 Simulations of Expert Witness Interview</td>
<td>Assignment 5B: Preparation for Expert Witness Interview</td>
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<td>8</td>
<td>Fact Investigation Strategies for Actual Cases</td>
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<td>Assignment 6: Fact Investigation Strategy Memo for Actual Case</td>
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<td>9</td>
<td>Critical Analysis of Social Science Data</td>
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<td>References</td>
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<td>10</td>
<td>Fact Investigation and the Ethical Rules/</td>
<td>ELS §16.4; ABA Model Rules of Professional Conduct 1.2(a); 3.3(a), (b), (c), (d); 3.4(b); 3.7; 4.1; 4.2; 4.3; 4.4; and 5.3</td>
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<td></td>
<td>Fact Investigation and Case Theory</td>
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<td>11</td>
<td>Litigation Discovery</td>
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<td>12</td>
<td>Group Report 1</td>
<td>Assignment 7: Final Report</td>
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<td>13</td>
<td>Group Report 2</td>
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<td>14</td>
<td>Group Report 3</td>
<td>Assignment 7: Final Report</td>
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Part 1

Becoming a Lawyer

Chapters 1-6

Learning How to Learn from Experience
(Chapter 2)

How can students learn how to reflect in action (see §2.1)? The answer helps to explain why law school is so frustrating to so many students and why learning how to practice any profession is frustrating.

Students can learn only a limited amount by asking skilled lawyers how and why they do what they do. We all find it very difficult to report accurately how we make decisions and why we make them. In professional work, Chris Argyris and Donald Schón distinguished between what they call “theories-of-action” and “theories-in-use.”

A theory-of-action is the explanation a professional gives when “asked how he would
behave under certain circumstances.” The professional might give that explanation because it is self-flattering, or because it agrees with the way the professional views life and the world, or merely because it seems logical and orderly. But something we enjoy saying is not necessarily accurate.

“[T]he theory that actually governs [a professional’s] actions is his theory-in-use, which may or may not be compatible with his espoused theory,” and a professional “may or may not be aware of the incompatibility between the two theories.” Although a professional’s theory of action can be obtained for the asking, the professional’s theory-in-use can be discovered only “from observations of his behavior.”

Students can learn only a limited amount by observing the behavior of skilled lawyers. A student does not know very much about what is skilled lawyering and what is not. It is hard enough for a student to identify lawyers who are skilled and lawyers who are not. And even skilled lawyers are skilled only most of the time. (They are capable of boneheaded errors because they are human.) And unskilled lawyers every once in a while do rise to acts of brilliance.

Students can learn more from explanations about how to lawyer effectively, such as the ones in the textbook. But no explanation can tell students everything they need to know. The reason why even the best explanations are not enough is the reason why education in any kind of professional school is frustrating and anxiety-provoking for students.

The process of reflecting-in-action can be fully explained only in words understandable to a person who already knows how to think like a professional. Although this might seem paradoxical, it is one of the characteristics of a profession, and it is true of all professions. It is also true in the arts and even in athletics. It is not true when students are asked to learn only memorizeable knowledge (as they were in undergraduate school). Students in a profession do learn knowledge (rules of law, for example), but they also acquire completely new methods of thought that cannot be memorized and that, in fact, can be articulated only with the greatest difficulty.

When Schön talked to students in architectural design studios and similar settings in professional education, he discovered that in the midst of their education for practice there was a profound sense of mystery. This feeling resulted from the fact that the students literally did not know what they were doing, and their

3. Id. at 7.
4. Id.
Becoming a Lawyer

teachers could not tell them — because what the teachers knew how to say the students could not at that point in their experience understand. The students had to have the experience of trying to do the thing before they would be ready to understand the kind of explanations that the teachers could give them about what they were doing.5

This is one of the classic frustrations of students who aspire to any profession. But it leads to the best method of learning how to solve professional problems.

**To master the art of reflecting in action, students need to reflect in action — many, many times.** To learn how to think professionally, students must “plunge into doing — without knowing, in essential ways, what [you need] to learn.”6 Some students find this frustrating as well because it presents another paradox: students must “exhibit, in order to learn, that which they most need to learn.”7 In other words, students and new lawyers learn to practice law through the following process:

[First,] you “learn by doing,” in [John] Dewey’s phase. In other words, you do the thing before you know what it is. Secondly, you begin to do it in the presence of a senior practitioner who is good at doing it and whose business is to try to help you learn how to do it. Thirdly, you [do] it with other people who are also trying to learn to do it.8

Students learn best when they enter the mystery confident that eventually they can “break it open.”9

This process never ends. Students will not master reflection-in-action or interviewing or persuasive fact analysis or counseling or negotiation anywhere in law school. They will not master them in their first five years of practice. The only way to master them is to continue to learn from experience, and from the experience of others, throughout one’s career.

Many of those whom we view as masters (in the medieval guild sense) do not think of themselves that way. They are more aware of how much they are still learning.


7. Id. at 139.


Learning from experience is a skill of its own and not necessarily one students already understand. To do well, they need to learn how to learn from experience.

**Participatory Attorney-Client Relationships**  
*(Chapter 3)*

This is a fruitful area for empirical research, and we hope somebody does it.

It is probably true that the overwhelming majority of skills teachers agree with at least most of what Rosenthal and Binder and Price (now Binder, Bergman, and Price) have to say. For the most part, we certainly do.

But there is little empirical evidence, aside from Rosenthal's exploratory and somewhat ambiguous study, to support that. It would be nice to know from empirical research — not just one study, but several using different methodologies — whether we are right and if so why. It would also be nice to know whether what skills teachers have been teaching has made much of a dent in practice — whether, in other words, the practicing bar is adopting the habits we have been teaching. It isn't enough to have anecdotal impressions of what the practitioners we know are doing. Scientific inquiry requires more.


**The Inclusive Solution**  
*(Chapter 4)*

On the question of whether Amy's voice is largely female and Jake's largely male, the empirical evidence is equivocal. Gilligan concludes that, while “most people” are in touch with “both voices in defining moral problems,” men tend to discourse in a justice voice and women in a caring voice.\(^{10}\) And Gilligan seems to be supported by Piaget's comparison of boys' games, which have a “jurisprudential” quality, and girls' games, where play is freer (although Piaget drew different inferences from the same data).\(^{11}\) (By the way, even though Piaget valued the legalistic quality of the boys' games, other research has shown that play unstructured by rules is closely related to a capacity for imagination.\(^{12}\))

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Although we haven’t conducted an up-to-date literature search, some studies find the distinctions drawn by Gilligan to be less than clear-cut.\(^\text{13}\) According to Ford and Lowry:

\[\text{[A]fter surveying the literature on moral reasoning, empathy and altruism, [Brabeck] concludes that sex differences in morality are at best minimal and are not consistently found. She raises the questions as to why so many people find Gilligan’s claims intuitively appealing and believe they speak to an essential truth, even when there is no clear empirical support, or in the case of moral reasoning, there is evidence which contradicts her claims. [Brabeck’s] answer is that we may be dealing with a mythic truth rather than an empirical truth [and] she suggests we may have some need to perceive males and females as morally different.}\(^\text{14}\)

Even though Ford and Lowry’s subjects “did not significantly differ in their use of the two orientations, ... they rated the justice orientation as masculine and the care orientation as feminine.”\(^\text{15}\) It may be that sexual stereotyping — particularly the ways in which men are trained to be inhibited about creativity and caring — may have conditioned both genders to treat as female behavior that in some societies might be considered more gender-neutral.\(^\text{16}\)

But in a law school, doctrinal creativity is cultivated, while problem-solving creativity is largely neglected and impliedly discouraged through a heavy concentration on doctrine. This discouragement is actually not peculiar to law schools. It is common in education generally, and it can be illustrated by what happened to Amy herself. She was interviewed again at the age of 15 and asked once more about Heinz’s dilemma.\(^\text{17}\) Although she reiterated some of the concerns she had spoken of when she was eleven, her answer was the one Jake had originally given — and at the age of 15 she mistakenly believed that when she was eleven she had given Jake’s answer!\(^\text{18}\) Not only had something of herself been drilled out of her in the intervening years, but the drilling was going on even during the interview that occurred when she was eleven — an interview that had something of the dynamic of many law school classroom dialogues:

\begin{quote}
As the interview proceeds ..., Amy’s answers remain essentially
\end{quote}


15. *Id.*


17. Remarks by Gilligan in *Feminist Discourse*, supra note 9, at 40.

18. *Id.* at 41.
unchanged, the various probes serving neither to elucidate nor to modify her initial response. ... But as the interviewer conveys through the repetition of questions that the answers she gave were not heard or not right, Amy's confidence begins to diminish, and her replies become more constrained and unsure. Asked again why Heinz should not steal the drug, she simply repeats, “Because it’s not right.” Asked again to explain why, she states again that theft would be a bad solution, adding lamely, “if he took it, he might not know how to give it to his wife, and so his wife might still die.” ... [T]he frustration of the interviewer with Amy is apparent in the repetition of questions and its ultimate circularity .... 19

One 30-year-old study reported that — although “Thinking-Judging” students and “Feeling-Perceiving” students earn comparable law school grades, undergraduate grades, and LSAT scores — “Thinking-Judging” students were both proportionally overrepresented in law schools (as compared with medical schools and undergraduate liberal arts schools) and more likely to graduate from law school and subsequently enter the practice of law. 20 Since then, events such as the rise of clinical education might have changed things, but if so, we do not know how much.


Part II

Interviewing

Chapters 7-9

Comments on the Text


§7.1 — The Differences between Facts, Inferences, and Evidence: Thoreau is often quoted as having said, “Some circumstantial evidence is very strong, as when you find a
trout in the milk.”\textsuperscript{21} In Thoreau’s time, milk was often bought directly from the farmer, who might be tempted to extend the product by adulterating it with water. Before indoor plumbing was common, the water might have come from the brook behind the barn. See also \textit{Pillars v. R.J. Reynolds Tobacco Co.}, 117 Miss. 490, 78 So. 365, 366 (1918) (“if toes are found in chewing tobacco, it seems to us that somebody has been very careless”). These are wonderful quotes, but we did not use them in the text because, as our colleague Monroe Freedman puts it, “an illustration of circumstantial evidence is best if it’s self-evident to the reader.” And students today know little about chewing tobacco or 19th century farm life.

\section{§7.2-7.3 — Myths, Science, Observation, and Memory:} When John Gregory Dunne reviewed former Senator Bob Kerrey’s memoirs, he began by quoting the novelist Wright Morris:

\begin{quote}
Anything processed by memory is fiction.\textsuperscript{22}
\end{quote}


\section{§8.3.1 — What to Ask Clients About:} In addition to things listed in the text, if there is any possibility that a defendant client might have an insurance policy that would cover liability or reimburse the defense of a lawsuit, the client should be asked about it. The typical homeowner’s insurance policy, for example, contains obscure forms of liability coverage that the homeowner is usually not aware of. The same can be true of a typical business’s comprehensive liability policy. But the insurer must be notified promptly and may disallow part or all of a claim otherwise. For that reason, it may be malpractice for an interviewing lawyer not to inquire about what kind of insurance is carried by a defendant client.

\section{Chapter 7 — Witness Interviewing:} Much of what Wydick says in the excerpted article also applies to client interviewing. We put it here because students seem to learn them more easily in the context of witness interviewing. In client interviewing, there are so many

\textsuperscript{21} The quote is genuine. See Henry David Thoreau, \textit{Journal}, Nov. 11, 1850, in 2 The Writings of Henry David Thoreau 94 (B. Torrey ed., 1906).

\textsuperscript{22} John Gregory Dunne, review of Bob Kerrey, \textit{When I Was a Young Man}, The N.Y. Rev. of Bks., June 13, 2002, at 4 (quoting from Paul Fussell, \textit{The Great War and Modern Memory} 205 (1975)).
other things to worry about — dealing with a stressed person, establishing the attorney-client relationship, etc. — that students have a difficult time focusing on the issues Wydick addresses. A better time is when you move on to witness interviewing.

**How to Teach Interviewing**

In a small-enrollment seminar on interviewing, counseling, and negotiation, it might be possible to have each student do a videotaped client interviewing assignment and another with a witness. But in a large-enrollment interviewing, counseling, and negotiation course, and in most other settings, classroom exercises are the only practical method. There are lots of challenges to teaching interviewing. But counseling and negotiation are more difficult to learn, and if individual attention for students has to be rationed, it is usually better to give individual attention in counseling and negotiation than in interviewing.

If you want to give a client interviewing assignment in which each student does a complete interview on videotape, see page 66 in this teacher’s manual.

In client interviewing, students seem to have the most difficulty learning sequencing broad and narrow questions (§8.3.2 in the textbook); listening actively and responding empathetically (§8.1.2); organizing and managing a complex factual inquiry (§§7.6 and 8.2.3); handling facts embarrassing to the client (§8.4.2), situations where the client is distraught (§8.4.3), and possible client fabrication (§8.4.4); and negotiating a fee (§8.4.6). The client exercises below deal with all these problems.

In witness interviewing, the big problems are listed in §9.1 in the textbook.

On the following pages are three sets of exercises. The first (only one exercise, really) is on the form of questions. The second set is several client interviewing exercises. And the third is a set of witness interviewing exercises.

**Question Formation Exercise**

The exercise appears in this teacher’s manual beginning on page 39. The answers begin on page 36.

People without lawyering experience ask and hear questions so spontaneously that they find it hard to analyze the form of a question and how it affects the person who will answer it. This exercise is meant to get students thinking about the form of questions.
Notes for the Teacher

The correct answers appear below and will be more clear if you look first at the exercise itself.

1. “Have you ever watched a television show called SpongeBob SquarePants?”
   f. narrow and nonleading
      (Asking for a yes or no answer makes a question narrow but not necessarily leading.)

2. “SpongeBob’s pants aren’t really square, are they?”
   e. narrow and leading
      (It’s leading because we can tell from the question which answer the questioner wants or expects.)

3. “What makes you think they are square?”
   b. broad and nonleading
      (Broad because the answer can be as big as the answerer wants without having to fight the question. Nonleading because we can’t tell what answer the questioner wants or expects.)

4. “What causes them to be square?”
   b. broad and nonleading
      (Same reasons. Questions 3 and 4 are the two meanings covered by the more common question, “Why do you think they’re square?”)
5. “What television shows do you like to watch?”

d. medium and nonleading
(This looks temptingly broad, but only the couchiest of couch potatoes could list an enormous number of shows.)

6. “What do you think of television as a force in people’s lives?”

b. broad and nonleading
(If the answerer is opinionated enough, the answer could go on for hours. And we can’t tell from the question what answer the questioner wants or expects.)

7. “On Sponge Bob Square Pants, doesn’t Squidward remind you of some teacher you had in high school?”

e. narrow and leading
(The questioner wants or expects you to say yes.)

8. “How do you like to spend your free time?”

b. broad and nonleading

9. “How did you spend last Thursday night?”

d. medium and nonleading
(This looks broad, but it won’t be answered that way. The answer might include a few items, such as “I went to a movie, studied for an hour or so, and went to bed.” If you want the full narrative, you’ll have ask something like “Could you tell me everything you did last Thursday night, from 6 pm until midnight, including everything you saw and heard — every detail you can remember?”)

10. “If you don’t like Elvis impersonators, why not?”
a. broad and leading

(It’s hard to ask a question that is both broad and leading, but this might qualify. It seems to call for a full explanation of the answerer’s thinking. But the wording suggests that the questioner wants or expects the answer to stop being hostile to Elvis impersonators.)

11. “Why is all modern rock ‘n’ roll descended from the music of either Bo Diddley, Chuck Berry, or both?”

a/b. broad and either nonleading or leading, depending on the context

(The answer might be so broad that it could be turned into a treatise. If the question comes after the answerer’s declaration that all modern rock ‘n’ roll is descended from the music of either Bo Diddley, Chuck Berry, or both, it is not leading because it asks why something the answerer has already said is true. But if the answer has not already stated this opinion, the question leads because it tries to pressure the answerer into adopting it.)

12. “What about the Beach Boys?”

(This could be almost anything except a narrow question. It’s here to illustrate that questions are often part of spontaneous interchange in which it’s not clear what either questioner or answerer are up to.)
Question Formation Exercise

On pages 113–116, the textbook explains how questions can be asked broadly, narrowly, or somewhere in between. On the same pages, the text explains the difference between leading and nonleading questions. Using these concepts, categorize the following questions. (You can treat this as a multiple-choice exercise and circle the letter before your answer.)

1. “Have you ever watched a television show called SpongeBob SquarePants?”
   a. broad and leading
   b. broad and nonleading
   c. medium and leading
   d. medium and nonleading
   e. narrow and leading
   f. narrow and nonleading

2. “SpongeBob’s pants aren’t really square, are they?”
   a. broad and leading
   b. broad and nonleading
   c. medium and leading
   d. medium and nonleading
   e. narrow and leading
   f. narrow and nonleading

3. “What makes you think they are square?”
   a. broad and leading
   b. broad and nonleading
   c. medium and leading
d. medium and nonleading

4. “What causes them to be square?”

a. broad and leading
b. broad and nonleading
c. medium and leading
d. medium and nonleading
e. narrow and leading
f. narrow and nonleading

5. “What television shows do you like to watch?”

a. broad and leading
b. broad and nonleading
c. medium and leading
d. medium and nonleading
e. narrow and leading
f. narrow and nonleading

6. “What do you think of television as a force in people’s lives?”

a. broad and leading
b. broad and nonleading
c. medium and leading
d. medium and nonleading
e. narrow and leading
f. narrow and nonleading

7. “On Sponge Bob Square Pants, doesn’t Squidward remind you of some teacher you had in high school?”

a. broad and leading
8. “How do you like to spend your free time?”
   a. broad and leading
   b. broad and nonleading
   c. medium and leading
   d. medium and nonleading
   e. narrow and leading
   f. narrow and nonleading

9. “How did you spend last Thursday night?”
   a. broad and leading
   b. broad and nonleading
   c. medium and leading
   d. medium and nonleading
   e. narrow and leading
   f. narrow and nonleading

10. “If you don’t like Elvis impersonators, why not?”
    a. broad and leading
    b. broad and nonleading
    c. medium and leading
    d. medium and nonleading
    e. narrow and leading
    f. narrow and nonleading

11. “Why is all modern rock 'n' roll descended from the music of either Bo Diddley, Chuck Berry, or both?”
Interviewing

12. “What about the Beach Boys?”

   a. broad and leading
   b. broad and nonleading
   c. medium and leading
   d. medium and nonleading
   e. narrow and leading
   f. narrow and nonleading
Client Interviewing Exercises

Exercises are done in class. (Assignments are done by students outside of class, ideally on videotape. If you are looking for an assignment, see page 66.)

On the following pages are three client interviewing exercises:

1. Broad and Narrow Questions
2. Active Listening and Responding Empathetically
3. A Full Interview (Terry Dresser), including
   a. Complicated Fact-Gathering
   b. Possible Client Fabrication
   c. Agreeing on a Fee

(We call them Client Interviewing Exercises 1, 2, and 3 to differentiate them from the Witness Interviewing Exercises that follow them in these pages.)

If class time is too limited to do all this, Client Interviewing Exercise 3 could be assigned in parts. You might, for example, ask a student to interview only to gather facts; or to gather facts and deal with possible fabrication; or to agree on a fee. It’s probably too much to ask the student to do all three parts.

For Client Interviewing Exercise 3, distribute the lawyer’s instructions before class to half the class and the client’s instructions to the other half. Distribute the Client Interviewing Exercise 1 and 2 instructions to all students in advance, but in class the students you call on to do Client Interviewing Exercise 1 or 2 should be the students assigned to role-play the client in Client Interviewing Exercise 3. That way, every student gets a chance to do some client interviewing.

23. The idea for exercises involving discrete interviewing skills was suggested by Professor Lawrence Kessler at Hofstra Law School. This approach is similar to the one used in most trial advocacy courses in teaching witness examination. Direct examination, for example, is divided into different skills — formation of nonleading questions, development of the scene, introduction of documents — and students perform separate drills on each of these skills. Likewise, we have attempted to develop discrete drills for different aspects of interviewing.
Client Interviewing Exercises 1 and 2: You (the teacher) role-play the client, using any sets of facts you feel comfortable with. (On the following pages, there are lawyers’ instructions for these exercises but no client instructions.)

You probably do not need two separate fact patterns. One will probably suffice, and it can be a simple fact pattern. It need not be as complex as the one in Client Interviewing Exercise 3.

Client Interviewing Exercises 1 and 2 are “warm-up” exercises. They prepare students for Client Interviewing Exercise 3.

For each exercise, let a student interview you until you think the student has gotten the point of the exercise (how to progress from broad to narrow questions or how to listen actively and respond empathetically). Take good notes so that, when the student does something worth commenting on, you have the exact words. Then stop, interpret the student’s performance for the student and for the class, and then go on to the next student. To interpret, identify how the student was able to accomplish the task. Sometimes, it helps also to mention how the student went astray before finding the right way to do it. Keep these short — only a few minutes per student.

Client Interviewing Exercise 3: One student plays the client and another interviews. They get different memos (see below). The lawyers’ memo should be accompanied by a photocopy of your state’s statutes on the obligation of schools to report child abuse and on the adjudication of such complaints (see the lawyers’ memo for why).

A student might need eight to 12 minutes to do one of these exercises, and your interpretation might take another two to five minutes.

Client Interviewing Exercise 3 is based on the same facts as Counseling Assignment 3 (see pages 153–160 in this teacher’s manual). There is no reason why you can’t assign both the interviewing exercise and the counseling assignment. Just be sure that the students who act as lawyer here do so there as well, and that the students who role-play the client do the same there as well. But you do not need to assign both the interviewing exercise and the counseling assignment. You can use either without the other.
Client Interviewing Exercise 1

Broad and Narrow Questions

Lawyer’s Instructions

Your professor will role-play your client.

Your professor will tell you one or two facts, which constitute a small part of a larger story. You need to learn all the details. Interview to find out the whole story, using broad and narrow questions in an effective sequence.
Client Interviewing Exercise 2

Active Listening
and
Responding Empathetically

Lawyer’s Instructions

Your professor will role-play your client.

Your professor will tell you one or two facts, which constitute a small part of a larger story. Interview to find out the rest of the story. Use active listening techniques.
Client Interviewing Exercise 3
A Full Interview

Lawyer’s Instructions

To: students who will act as lawyers
From: your secretary
Re: Terry Dresser

Terry Dresser has made an appointment to see you about a problem involving Terry’s spouse and their children.

I asked Terry if this might involve a custody dispute with Dale, and the answer was no.

By the way, Paulette Charbonneau — the student who was working in this office — has just graduated and has quit. She is now on the road to Alaska, where she intends to take the bar exam. But Paulette overheard my conversation with Terry Dresser just before leaving and on a hunch photocopied for you some law she thought might be useful.

We have never represented Terry or Dale Dresser before.

Note to student-lawyers:

Terry and Dale are names that either a man or a woman might have. If the student playing the client is female, Dale is her husband. If the student playing the client is male, Dale is his wife.

In class, several students will interview Terry Dresser. The students who play this client will give somewhat different variations of the facts. In other words, your Terry Dresser may say things that are different from what other interviewers will hear from the same client.

Your custom is not to charge for the initial interview. After that, you charge $175 an hour. You will want a retainer of $2,000 after the interview but before you start work.
Client Interviewing Exercise 3
A Full Interview

Client’s Instructions

You will role-play Terry Dresser.

(Terry and Dale are names that either a man or a woman might have. If the student playing the client is female, Dale is her husband. If the student playing the client is male, Dale is his wife. The broad outlines of Terry’s story appear in this memo. Feel free to invent details to fill out the story. If other students play this client in class before you do, the details you add to the basic outline should not match theirs. The lawyer interviewing you should not get exactly the same facts that preceding lawyers got from other Terry Dresser.)

Information You Will Provide Freely

You (Terry Dresser) are married to Dale Dresser. You and Dale have two children and live in a prestigious suburb (choose one you are familiar with). The children are Jonah, age 10, and Ethan, age 8.

For the past 12 years, you and Dale have operated an export/import business called Trans-Borders, Inc. A factory owner in Korea who needs a certain kind of factory machine tool might call someone like you, give you the specifications, and pay you a commission for locating such a tool in the United States, buying it on behalf of the Korean customer, and shipping it to Korea. The same thing can happen in reverse (a U.S. seller contacts you looking for a foreign buyer, or a foreign seller contacts you looking for a U.S. buyer). You and Dale are hardly ever in the presence of the customer and almost never see the object being bought or sold. You work by telephone, fax, e-mail, and Federal Express. The objects being bought and sold are usually large and heavy and arrive by ship or, in an emergency, by air. Your offices are in the same prestigious suburb but not in your home. The business prospered until two years ago, when it faltered because you and Dale
began ignoring the needs of your customers, who went elsewhere.

During the past few months, both children have been struck with household metal objects, primarily on the back and stomach, with enough frequency that at any given time each child would have large and painful looking bruises. Skin was not cut, and bones were not broken. (The lawyer has not had the children examined for fractures or other internal injuries. You refuse to permit it.) Dale caused all these injuries. If the lawyer asks what Dale would probably say if interrogated by the police, you will tell the lawyer that Dale will probably deny having done it and blame you.

Last week, Jonah went to school with bruises all over the left side of his face. During the morning, the school called you at the office and asked how this happened. You said Jonah fell down some stairs. That evening, you asked Jonah what he told the school authorities, and he said he told them that he fell down some stairs. If the lawyer asks you how Jonah got these bruises, you will say that Dale hit Jonah with a belt.

You are afraid that school personnel may have told law enforcement authorities about the children’s injuries. Ask the lawyer whether there is any way to find out whether the school people have reported this. Ask, too, whether, if they haven’t, there is any way to stop them from reporting it. If the lawyer presses you to find out what you want to accomplish in this situation, talk about rebuilding the family’s life and preventing anyone from ever finding out about the child abuse.

You love Dale and do not want a divorce. You are convinced that Dale will never voluntarily accept treatment for the addiction, regardless of the consequences for you or the family.

This whole situation has put you under enormous stress, and you are suffering all the usual signs of stress: sleeping poorly, either overeating or loss of appetite (choose one), irritability, etc. (If the discussion with the lawyer goes into this, you can make up details.)

**Information You Will Provide Freely**

*If The Lawyer Asks for It*

You went through your financial files at home and brought some information (below) that you will give the lawyer if the lawyer asks for it.
You and Dale bought your present house three years ago for $865,000. Your mortgage payment is $4,200 a month, and your property taxes are $21,500 a year. You and Dale own a three-year-old Mercedes and a BMW bought new last year. The Mercedes was bought with cash, but the BMW was financed. The mortgage was last paid four months ago, and no loan payment on the BMW has been made in the last five months. The property taxes on the home are also in arrears; you do not know by how much. The BMW was repossessed last week, and the bank has threatened foreclosure on the home.

Your family’s personal adjusted gross income (from your 1040’s) was as follows in recent years:

- five years ago: $342,098
- four years ago: $359,132
- three years ago: $377,991
- two years ago: $403,538
- last year: $183,661

So far this year, income has continued to decline at a drastic rate.

You and Dale have always filed joint tax returns. You are confident that you have paid all your taxes, and you are not worried that IRS might want more.

You have no investments, substantial bank accounts, or other liquid assets.

Information You Will Provide If The Lawyer Builds in You a Feeling of Trust

You and Dale tried cocaine for the first time last year, and both quickly became addicted. Through heroic efforts and under a doctor’s supervision, you were able to stop using cocaine eight months ago and have been clean since then. Dale is still addicted.

You do not know whether the police are aware that Dale is still addicted or that drugs have been and are in your house.

You and Dale have bought cocaine from low-level dealers on the street (although not on the streets of your suburb). But since you broke your addiction, you have had no idea where Dale gets cocaine.
The lawyer might ask you whether you or Dale smuggled drugs through your import/export business. Your initial answer is no. If the lawyer presses you, however, say that you cannot say for certain that Dale has not. In the last few months, as Dale realized that you were trying to break your addiction, Dale became more and more secretive.

Information You Will Provide
Only If the Lawyer Persuades You
That It Is in Your Best Interests to Do So

You have struck the children, too. But Dale has hit them much harder than you have, and all the injuries have been caused by him. (Make up the details that you will most easily be able to remember.)

When the lawyer first asks you whether you have hit the children, you can lie and say no if you believe that this client would lie to this lawyer at the moment the lawyer asks the question. In deciding that, consider how and when the lawyer asks the question, and whether the lawyer's behavior has inspired trust.

If you lie and the lawyer later challenges you, respond as you think this client would, considering how the lawyer is handling the situation. You can choose any response on a range between admitting the truth and walking out on the interview.
**Witness Interviewing Exercises**

Exercises are done in class. On the following pages are three witness interviewing exercises:

1. Motivating the Witness to Talk to You
2. Getting the Facts and Taking a Written Statement (Grady Wren)
3. Getting the Facts and Taking a Written Statement (Maze Phipps)

All of these exercises grow out of one set of facts. The page headed *Facts Common to Witness Interviewing Exercises 1 through 3* can be distributed to all students, regardless of the roles they play.

**Witness Interviewing Exercise 1:** Here, you (the teacher) role-play the witness. (Most students are not very good at role-playing hostile or indifferent witnesses.) The facts peculiar to the Witness Interviewing Exercise 1 witness are set out on pages 55–57. (Do not give these to students.)

You can quickly run through the class, giving each student a very brief period of time to motivate you to talk. Between students, you might — if it seems useful — step out of role and say a few sentences about what the preceding student did.

You can gradually shorten the time as you go from student to student. It is reasonable (though generous) to give the first student about a minute and a half, while the last student might get half a minute or less.

**Witness Interviewing Exercises 2 and 3:** The dynamics in these two exercises are identical. They are duplicate exercises so that, with each, half the class can interview. Assign half the students to act as lawyers in Witness Interviewing Exercise 2 and the other half to role-play clients. Reverse the roles for Witness Interviewing Exercise 3.

The themes here are both how to handle witnesses and how to analyze facts. There is a *Rashomon*-like character to this. Wrenn and Phipps both saw the same thing but remember it very differently (and neither remembers it exactly as the Witness Interviewing Exercise 1 does).

If you are pressed for time, you can have students interview in relays: one picks up where another leaves off. It’s not necessary to ask every student to take a statement. For those students you do ask to take a statement, let each do a complete job. The other students will learn a lot by watching and hearing your comments. You might give each statement-taking student 10 to 12 minutes.
To: all students

Facts Common to Witness Interviewing
Exercises 1 Through 3

(Witness Interviewing Exercises 1 through 3 are derived from a single set of facts, described below. The lawyers learned the following from reading police, EMS, medical, and other records. Unless a particular fact is repeated in a witness's instructions, it is not known to the witness. The incident described below happened exactly three months before the date of the class in which you will interview witnesses.)

Turk Delancey fell down on the sidewalk in the middle of the 1800 block of Vine Street, in front of Phipps Grocery. A telephone call to 911 was placed from a coin-operated phone located inside Phipps Grocery. An EMS ambulance and a police car were sent to the scene. (EMS is Emergency Medical Services. It is not a city agency. Instead, it is a private organization that provides services under a contract with the city.)

The police car arrived first. When the officers stepped out of the car, Delancey was still prone on the sidewalk, and his arms and legs were thrashing about in twitching motions. The officers eventually tried to put handcuffs around his wrists. This was difficult because his arms were in motion.

When the EMS ambulance arrived, the police officers had handcuffed Delancey and were struggling to get him into the back seat of the police car. One of the two EMS technicians walked over to the police, and a short conversation ensued. The officers left Delancey on the ground and departed.

The EMS technicians examined Delancey, put him on a stretcher, and took him to the emergency room at Mercy General Hospital. The medical records there show that Delancey had suffered an epileptic seizure; that one of his arms was broken and the other fractured; that four of his ribs on the right side were broken; and that he was wearing a Medic-Alert bracelet identifying him as an epileptic. (The Medic-Alert Foundation sells bracelets to people with chronic conditions that might be misunderstood by authorities or would need special attention in case of emergency.) The doctor who examined Delancey
did not write anything on his chart about whether he might have been intoxicated.

Delancey is 34 years old. In the past 15 years, he has been arrested nine times for minor charges like public drunkenness and disturbing the peace. The hospital records list a home address that is a single-room occupancy hotel.

The police officers are Gus Shaefer and Joe Minsky. Both are medium height and build with brown hair. Shaefer is 45 years old. Minsky is 27. The EMS technician who talked with them is Pat O'Donnell. The other EMS technician is Rita Hernandez.

Delancey is now suing the city, alleging that his injuries resulted from an assault by police officers.
Interviewing

NOT to be given to students

Facts Known Only to the Exercise 1 Witness
(who is role-played by the teacher)

(The facts provided here are background. You would not reveal them to a student who tries to interview you unless the student has broken through your resistance and really motivated you to talk.)

You are Pat O’Donnell, an EMS technician who responded to the 911 call involving Turk Delancey in the middle of the 1800 block of Vine Street. Because your job involves high-pressure emergency work, you have lots of excuses for not being especially available. (You might offer different excuses to different students.)

When you and your partner arrived, two police officers were trying to shove Delancey into the back seat of a police car. His arms and legs were twitching in a way characteristic of a grand mal seizure. You walked over to the police and asked what happened. Without looking at you, one of the police officers (who was preoccupied with Delancey) said, “Mind your own business.” You said, “I am Emergency Medical Services, and this man appears to be having an epileptic seizure. The smartest thing you can do is let us examine him.” The officers let Delancey slump to the ground, stared at you for a moment, removed the handcuffs, and then got in the police car. After the sound of radio chatter could be heard from the police car, the officer sitting on passenger side of the front seat looked out the window at Delancey, who was on the ground being examined by you. Then the police officers drove away.

After the police left, you put Delancey on a stretcher and took him to the emergency room at Mercy General Hospital. You were careful with his arms because they looked severely bruised and lacerated and might have been broken. You noticed that Delancey was wearing a Medic-Alert bracelet identifying him as an epileptic.

You have heard that Delancey is now suing the city over his treatment by the police officers. You do not want to talk to either side. Patrol cops have complained in lots of ways about EMS technicians. You think they are whining, but the friction creates
problems. EMS’s contract is up for renewal soon, and you are afraid that if some incident gets blown out of proportion, EMS might fire somebody to appease the police. You do not want to talk to Delancey’s lawyer because you are afraid of what that lawyer will do with what you say. You do not want to talk to the city’s lawyer because you would tell the truth, which would create more friction. (The city’s lawyer might complain to your boss that you are uncooperative, but you are less worried about that. You will tell your boss that you will do whatever she wants, as long as it doesn’t involve dishonesty on your part.)
Witness Interviewing Exercise 1

Motivating the Witness to Talk to You

Lawyer’s Instructions

Your professor will role-play the witness. Both sides are interested in interviewing this witness. You have no reason to believe that the witness will want to talk to you. Because you might meet immediate resistance, prepare in advance to deal with it. List all the reasons you can think of why this witness might not be eager to see you, and think up ways of dealing with each reason, if you happen to be confronted with it.

The witness is Pat O’Donnell, one of the EMS technicians who treated Turk Delancey. Start to interview O’Donnell.
Witness Interviewing Exercise 2

Getting the Facts and Taking a Statement
(Grady Wrenn)

Lawyer’s Instructions

(In class, several students will interview Grady Wrenn. The students who role-play this client will give somewhat different variations of the facts. In other words, your Wrenn may tell you things that are different from what other interviewers will hear from the same client.)

You represent Turk Delancey and have sued the city to recover for Delancey’s injuries. Grady Wrenn owns a gas station across the street from the place where the incident happened, and you want to know what Wrenn saw.

Interview to learn what Wrenn knows about the facts. Be careful to explore the following:

1. What would Wrenn be able to testify to? You want to know the favorable and the unfavorable.

2. What exactly are all the details? (Do a cognitive interview.)

3. What other evidence can Wrenn point you to?

4. If you think Wrenn is wrong about something, should you try to change Wrenn’s mind now? Or would it be wiser to wait and impeach at trial?

After you have finished learning all the facts this witness knows, assume that you think that the witness might be willing to sign a statement. If asked to by your professor, try to take the witness’s written statement.
Witness Interviewing Exercise 2

Getting the Facts and Taking a Statement
(Grady Wrenn)

Witness's Instructions

(The broad outlines of your story appear in this memo. Feel free to invent details to fill out the story. If other students play this witness in class before you do, the details you add to the basic story outline should not match theirs. The lawyer interviewing you should not get exactly the same details that preceding lawyers got from other Grady Wrenns. Do not be a talkative witness. Provide information only if asked for it.)

Information You Will Supply If Asked

You own a gas station across the street from Phipps Grocery, which is where the drunk-looking guy fell down a few months ago. You do not know his name. You've seen him on the street a few times. He looks like a street person — not frightening, but he might be on something like alcohol or drugs. Sometimes, he has a kind of spaced-out look.

You had just finished putting gas in a customer’s car when you saw this guy fall to the ground. You ran across the street to see if you could help. His arms and legs were twitching, and his head was bumping the concrete. You held his head up a little to prevent that. His eyes were open, but he didn’t seem to be seeing anything.

After a few minutes, a police car arrived, and two officers got out and went to the man’s assistance. They tried to stop his arms from flailing around. You thought that was a good idea because these uncontrolled body movements might be harmful. You continued to hold his head until one of the officers said to you, “Please step back” — which you did.
The police officers both are medium build with brown hair. One is middle aged, and the other is young. The man who fell on the sidewalk had light brown hair and was tall and a little thin.

The officers tried to get the man to his feet and into the police car, apparently to take him to a hospital. They struggled for a while to put handcuffs on him, apparently to control his movements so they could get him into the car and put a seat belt around him for his own protection. Just as the officers were about to do that, an EMS ambulance pulled up.

One of the EMS people walked over to the officers and said, “Don’t they train you in how to handle somebody having an epileptic seizure? You’re going to injure him.” The older officer said, “Mind your own business.” He was looking at the man they were trying to get into the police car and apparently didn’t realize that the person who has spoken to him was from EMS. The EMS person said, “We’re EMS, and this is a medical problem. Let people who know what they’re doing deal with it.”

The police officers looked at the EMS person, and then they put the man on the ground. They unlocked the handcuffs and stepped back. After the EMS people got the man on a stretcher and started putting him into the ambulance, the police got into their car and drove off.

You did not see the police do anything violent to the man who fell on the sidewalk.

Information You Will Supply If You Feel Comfortable Talking to the Lawyer

While you were holding the man’s head, you got some blood on your hands. A small amount of blood was coming from the back of the man’s head, apparently because his head had hit the sidewalk several times before you got to him. You noticed the blood before the police arrived. After they asked you to step back, you went into Phipps Grocery for a moment and asked Phipps if you could wash your hands in the sink in the back room. Phipps agreed. You rushed there, washed your hands, and hurried back to the street because you thought the officers might need some help.
Information You Will Provide Only
If the Lawyer Persuades You To

Although you don’t recall the names of the police officers involved in this incident, you have dealt with them before. Last year, a guy with a gun tried to rob you. You’ve had the gas station for nearly 20 years, and this is the only time anybody ever tried to do that. The robber had you emptying the cash register into a paper bag. A customer at the pumps saw the gun through the plate glass window and called the police on a cellular phone. These two officers arrived almost instantly and disarmed the robber as he walked out of your office. You were extremely grateful and were impressed with their courage and professionalism. At the robber’s trial, you were the first witness to testify. The older officer testified right afterward and you stayed to listen to his testimony, which — again — seemed very professional.

What to Do if the Lawyer
Tries to Take a Written Statement

The lawyer might try to take a written statement and ask you to sign and initial it in various places. You will decide whether and how much you will cooperate. You can make any decision you want, as long as it is based on what the lawyer says and in general how she or he handles the situation. You are nervous about signing anything handed to you by a lawyer. If the lawyer reduces your nervousness, you might be willing to sign. If the lawyer does not reduce your nervousness, refuse.

If anything in the statement the lawyer writes out is inaccurate, point that out to the lawyer.
Witness Interviewing Exercise 3
Getting the Facts and Taking a Statement
(Maze Phipps)

Lawyer’s Instructions

(In class, several students will interview Maze Phipps. The students who role-play this client will give somewhat different variations of the facts. In other words, your Phipps may tell you things that are different from what other interviewers will hear from the same client.)

You represent the city and are defending against Turk Delancey’s lawsuit. The police officers have told you that they thought at the time that Delancey was drunk. They have seen him on the street and consider him an alcoholic. Police department policy is to arrest drunken people lying on sidewalks. Maze Phipps owns Phipps Grocery.

Interview to learn what Phipps knows about the facts. Be careful to explore the following:

1. What would Phipps be able to testify to? You want to know the favorable and the unfavorable.
2. What exactly are all the details? (Do a cognitive interview.)
3. What other evidence can Phipps point you to?
4. If you think Phipps is wrong about something, should you try to change Phipps’s mind now? Or would it be wiser to wait and impeach at trial?

After you have finished learning all the facts this witness knows, assume that you think that the witness might be willing to sign a statement. If asked to by your professor, try to take the witness’s written statement.
Witness Interviewing Exercise 3

Getting the Facts and Taking a Statement
(Maze Phipps)

Witness's Instructions

(The broad outlines of Phipps's story appear in this memo. Feel free to invent details to fill out the story. If other students play this client in class before you do, the details you add to the basic outline should not match theirs. The lawyer interviewing you should not get exactly the same facts that preceding lawyers got from other Maze Phippeses. Do not be a talkative witness. Provide information only if asked for it.)

Information You Will Supply If Asked

You own and operate Phipps Grocery, which is a small store in the middle of the 1800 block of Vine Street. You were the one who called 911 when Turk Delancey fell to the sidewalk outside your store. You saw him fall, thought this could be dangerous to him, walked over to the coin phone, and called 911.

You couldn’t leave the store because you were the only person working at the time, and you can’t leave inventory and the cash register unattended. But your front door was open. Delancey was about ten feet outside your door, and you were standing at the register about five feet inside the door.

After the police officers arrived, they tried to put handcuffs on his wrists. Delancey's arms were flailing around, and Minsky (the younger officer) got mad and slammed his foot down on Delancey’s forearm. You heard a crunching sound. Then
Minsky kicked Delancey twice in the ribs. Shaefer (the older officer) pulled Delancey up, shoved him up against the police car, and tried to restrain his arms so Minsky could get the handcuffs on him, which Minsky was able to do. Both Shaefer and Minsky were cursing during this time.

Then the EMS ambulance arrived. One of the two EMS people walked over to the police and asked what happened. Without looking at the EMS person, Shaefer (who was preoccupied with Delancey) said, “Mind your own business.” The EMS person said, “We’re Emergency Medical Services. This guy looks like he’s epileptic. Back off and let us take care of him.” The officers let Delancey slump to the ground, stared at the EMS person for a moment, removed the handcuffs, and got into the police car. After a minute or two, they drove away. The EMS people examined Delancey. After the police left, the EMS people got him on a stretcher and took him away.

Delancey had been in the store just before he collapsed. In fact, he was walking away from the store when it happened. He had bought a quart of milk and some fruit.

Delancey has sandy blond hair, is about 5'8" tall, and weighs about 165 lbs.

Information You Will Supply If You Feel Comfortable Talking to the Lawyer

Although there wasn’t much street noise, a couple of buses did pass during the incident. You don’t recall when.

Delancey is a pain in the neck. He’s the kind of person who disputes prices at the cash register while half a dozen people are waiting in line behind him. You don’t dislike him; he’s just a difficult customer. He did not do anything annoying when he was in your store immediately before this incident.

Information You Will Provide Only If the Lawyer Persuades You To

You have had contact in the past with the two cops involved in this incident, and you dislike them. Your store has a deli counter, where a customer can order sandwiches to take out. Other police officers sometimes come in and order sandwiches. You make the sandwiches. The officers ask how much they owe you. You refuse payment. And they
smile, pretend to be pleasantly surprised, and express sincere gratitude. Cops usually need to eat a meal on the job. It’s good business for you to give them sandwiches for free. If everybody in the neighborhood knows police officers might be in your store at any time, it’s a deterrent to problems. But Shaefer and Minsky are different. They saunter in arrogantly, order the sandwiches, and leave without even saying thank you. They never offer to pay, and they act like you owe them meals. This insults you, and you feel ripped off.

You thought you did smell alcohol on Delancey’s breath while he was in the store just before he collapsed. It smelled like beer. He did not, however, seem drunk.

**What to Do if the Lawyer Tries to Take a Written Statement**

The lawyer might try to take a written statement and ask you to sign and initial it in various places. You will decide whether and how much you will cooperate. You can make any decision you want, as long as it is based on what the lawyer says and in general how she or he handles the situation. You are nervous about signing anything handed to you by a lawyer. If the lawyer reduces your nervousness, you might be willing to sign. If the lawyer does not reduce your nervousness, refuse.

If anything in the statement the lawyer writes out is inaccurate, point that out to the lawyer.
Interviewing

Client Interviewing Assignment

Unlike exercises, which are done in class, assignments are done by students outside of class — ideally on videotape.

If you want to give a client interviewing assignment in which each student does a complete interview on videotape, Client Interviewing Exercise 3 (Terry Dresser, pages 44, 47–51) can be converted for that purpose simply by deleting anything in the instructions that limits it to a classroom exercise. It has worked well in either form — as an exercise or as an assignment.

Witness Interviewing Assignment

Witness Interviewing Exercises 2 (Wrenn, pages 52, 58-61) and 3 (Phipps, pages 52, 62–65) can be converted to out-of-class assignments for videotape in the same way as Client Interviewing Exercise 3 can (see the top of this page).
Part III

Persuasive Fact Analysis

Chapters 10-17

Comments on the Text

These chapters introduce students to different methods for analyzing, investigating, organizing, and presenting facts in a case. This part of the book focuses primarily on “facts” in the context of legal disputes and litigation, not transactional work (e.g., the drafting of contracts, wills, or real estate agreements). Much of the analysis, however, is applicable to both litigation and nonlitigation situations.  

Chapter 10 debunks the notion that “facts” in a given case are simply true or false and shows how perception and recall of “what really happened” depend on methods people use for processing information. The chapter discuss the importance of two insights from cognitive psychology on these methods: the concept of “schemas” for organizing information and Jerome

24.  See Jane B. Baron, Intention, Interpretation, and Stories, 42 Duke L.J. 630 (1992 (contending that the drafting of wills entails the organization of facts to tell stories).
Bruner’s distinction between paradigmatic and narrative modes of thinking about facts. The sources cited in footnotes 3 and 8 are helpful background reading on these subjects, especially Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* (2000); W. Lance Bennett & Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* (1981) and Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. Rev. 1 (1984). This chapter expands on the discussion in Chapter 7 on observation, memory, facts, and evidence. The theme of both chapters can be summarized in the last paragraph of the excerpt from Professor Monroe Freedman’s text in Chapter 7:

[T]he process of remembering is not one dependent on “memory traces,” which can be played back as if by playing a stylus into the groove of a phonograph record. Rather, the process is one of active, creative reconstruction, which begins at the moment of perception.

Even the “facts” in a case presented in a video-tape are not cut and dry. An excellent example of the importance of information processing issues even about seemingly objective proof, such as tape recordings, is the defendants’ successful arguments about the video tape of the Rodney King beating in the state criminal trial. Upon viewing a portion of the video tape on television, the general public reaction was that the police officers were guilty of beating Mr. King. As the prosecution argued to the jury, “you have a videotape in this case which shows impartially without bias what happened that night.” The defense, however, asserted that the video was not a perfect witness. As one defense attorney argued, for example, the tape did not show the fear of the officers as they attempted to apprehend a person they perceived as a dangerous man on drugs. The tape, he continued, was “a two-dimensional illusion that began after the incident started and did not tell the whole story of what happened.” Putting aside issues of race and desensitization caused by the continual viewing of the tape, these arguments apparently persuaded the jury.

Based on psychologists’ insights on how people reconstruct reality, in the next three chapters, we discuss three models lawyers can use for organizing facts: the Legal Elements (Chapter 11), the Chronology Model (Chapter 12), and the Story Model (Chapter 13).


27. Prosecutor Begins Closing Arguments in King Case, Star Tribune, April 21, 1992, at 7A.

Chapter 11: Under the Legal Elements Model, lawyers identify the generic elements for the particular claim or defense, state each of them as factual propositions (expressing each element in terms of the facts of the particular case), and marshal facts in support of these propositions. This process of viewing the facts in the context of legal rules serves a number of functions for the legal system. It provides an easily generalizable method for applying law to the myriad fact situations that arise in our society. It also gives the legal system an appearance of legitimacy by "evoking the kind of automatic sense of validity" of purportedly fixed rules. Finally, the use of generally established propositions of law communicates a notion to the public that the law is highly reliable. By providing purportedly generalizable, fixed, and reliable rules for processing facts, the use of this model by lawyers and decision-makers imbues our legal institutions with an image of credibility.29

Chapter 12: Under the chronology model, lawyers structure the facts in a time line identifying gaps and possible internal inconsistencies. This approach assists lawyers in viewing the facts in the context of a temporal sequence of episodes. In addition to the study discussed in the first paragraph of Chapter 12, other studies have also shown that persons have an innate tendency to reconstruct events in chronological order. In one study, researchers found that when the same case was presented by parties in two different manners — the traditional witness-by-witness format and a purely chronological sequence — mock jurors were more likely to render verdicts for the party which used the sequential approach.30 Apparently, they found the case easier to understand when events were presented in temporal sequence.

Unlike the paradigmatic approach which narrowly focuses on facts as a means to support legal propositions, the chronological approach expands the notion of facts by viewing them as a series of causes and effects through a span of time. This allows lawyers to compare the chain of events with their scripts for similar situations and to assess the internal consistency of the different episodes. Based on chronologies, lawyers can identify strengths and weaknesses in their cases and place the facts in relation to their mental scripts of what should have happened. Lawyers can then develop fact investigation strategies to resolve any inconsistencies and to fill in the gaps.

Chapter 13: Under the third approach, the Story Model, the lawyer organizes the facts in the framework of a story that attempts to give "meaning" to the facts. Binder and Bergman combine the chronological and story models, defining a "story" as "a detailed, chronological narration of interrelated events with a beginning point, connecting points and a termination point."31 For several reasons, we disagree with this definition. As described in §13.6 of the text, some stories are best not presented in a chronological format. We all know from the movies,


for example, the effectiveness of flashbacks, flash forwards, episodic plotlines, multiple perspectives, or dream or phantasy interludes. More importantly, good stories do not merely set forth a description of interrelated events. Rather, through the particular description of these events, they “endow experience with meaning.” The audience wants to know not only what happens next but what this is all leading to, what it all means.” We have all experienced situations when a friend tells us a lengthy story, and when she finishes, we are left unfulfilled, asking, “So what?” The goal of the storyteller is to provide some moral for the story.

The debate over the relationship between the narrative and paradigmatic processes can be endless. One commentator, though, observes, “I find compelling evidence for the proposition that storytelling provides a means of interrogating the reasoning process. Storytelling does not replace rational analysis entirely, but complements it. Emotions play a decisive role in helping us to distinguish between value-laden alternatives where each may be logical, yet nonetheless irreconcilable.”

Chapter 13 sets forth recommended steps to take in organizing the facts into a persuasive story. Following is a list of those steps with some additional comments:

1. **Identify uncontested facts** (§13.2). Binder and Bergman use the term “established facts” for what we call “uncontested facts.” We prefer the “uncontested facts” because “facts” are not, by their nature, fixed or established. Given the context of the particular fact in a case, a lawyer determines whether or not to dispute each fact.

2. **Identify the audience** (§13.3). An effective legal storyteller “‘retails’ cultural knowledge from the audiences’s stock of practices produced by the culture at the ‘wholesale level.’” Trial lawyer Jeremiah Donovan suggests that it is helpful to think of storytelling as a conversation in which the teller is trying to connect with the listener. He observes, “When I talk to juries in my closing argument, I think back to my bachelor days, and the jury is my date. We just saw a movie and we’re drinking coffee and talking about the movie. I talk about the trial

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35. Troutt, supra note 28, at 92 (footnotes omitted).


as if it were the film we just saw.”

3. Develop a Unifying Theme (§13.4). A good metaphor for describing a story’s theme is the “soul” of the case.  

One of the factors we suggest in the text which should be considered for brainstorming an effective theme is the injustice which has been done (or will be done). It is important, however, to focus on the schemas of the particular audience. What may be an injustice for one decision-maker may not be one for another. Consider, for example, the theme used by the defense in the Emmett Till case, a murder case tried in Mississippi in 1955. The African-American victim asked a white woman out on a date. The defendant, the woman’s husband, later kidnapped and shot him and dumped the body in a river. At trial, the defense adopted the theme that “There are people in the United States who want to destroy the way of life of Southern people,” and that outsiders had planted a body in the river that was not in fact the alleged victim. The jury acquitted the defendant.

Another consideration in developing a unifying theme is the identification of a “stock story” which speaks to the audience. In the O.J. Simpson criminal case, for example, the prosecution developed a narrative around the theme of “the uncontrollable wife batterer who, despite his affable public persona, is capable of shocking violence, even murder.” But the defense chose a more compelling counter-narrative, at least in terms of the schemas of that particular jury: “the claim that racist police officers had fabricated evidence to ensnare a black male defendant.”

4. Choose persuasive images (§13.5). In selecting these images, it is, of course, necessary to evaluate whether or not the uncontested facts, or at least some credible facts support the picture, the lawyer wants to draw about particular characters. While you can paint your client as a saint, you need the facts to support this picture.


41. Truett, supra note 28, at 87 n.251. See also Jane E. Larson, “A Good Story” and “The Real Story,” 34 J. Marshall L. Rev. 181.187-91 (2000) (use of the stock story of “woman as survivor” in a breach of promise to marry case). To help students identify stock stories, we suggest that you encourage them to read some of Aesop’s fables to find ones which suggest a theme for their cases. Several websites contain collections of these tales. See, e.g., http://www.aesopfables.com.
A good example of the effective employment of persuasive images is the use by a Texas company of a popular commercial’s slogan in a case against a New York investment banking firm tried in Dallas. “The commercial featured a cook who tried to feed his cowboys salsa made in New York instead of a local ... brand. The cowboys became enraged and shouted, ‘New York City! Get the rope!’” The Texas company legal team used a graphic at trial of a Texas flag about to lasso an organizational chart of the New York firm’s executives. “These images not only pegged the defendants as prototypical ‘outsiders’; their associative logic also invited a familiar sentiment: ‘Get the rope!’”

5. Select a Story Genre (§13.6).


In terms of sequencing, some commentators suggest that postmodern audiences may actually find meaning in facts when they are presented episodically. They have observed that contemporary narrative forms have radically departed from the standard chronological approach and that lawyers must adjust their storytelling to conform to these changes. Accordingly, they suggest that the episodic format might actually be more in tune with contemporary storytelling techniques than the standard chronological sequence.

Consider ... the impact of the quick-cut montage, the rapid juxtapositioning of sound and image in contemporary film and television, particularly in television advertising. These same techniques can be seen again in the 30-second sound bite on the news, or the 90-second summation on L.A. Law or in the glitzy channel-surfing emulations of MTV. Given the potency of these audio-visual techniques, the more staid images and plodding plot forms of previous generations, along with a world-view that they presuppose (typically featuring the evidentiary smoking gun as part of the airtight Sherlock Holmesian causal-analytic/mystery-expose format) may be losing their grip upon popular belief. Today, the power of silent, rapid associations (as if unreeling scenes from some subliminal mythological tale) may more readily do the trick on truth-

Indeed, postmodern audiences may accept episodic stories with no traditional ending. Alan Dershowitz, for example, recommends that criminal defense lawyers warn fact finders (especially jurors) that life is not a Chekovian narrative, that they do not have to find the same meaning in a case that they would find in a traditional story.44

Besides the five steps discussed in the text, a sixth step may be helpful in certain cases: the creation of a role for the audience. In some cases, the lawyer may want to consider whether she wants the audience to play an active or passive role in the construction of the story.45 From a literary criticism standpoint, most good stories leave certain elements to the audience’s imagination. As one critic has observed, “[i]t is only through inevitable omissions that a story will gain its dynamism. [These omissions give us the opportunity] to bring into play our own faculty for establishing connections — for filling in the gaps left by the text itself.”46 From the lawyers’ point of view, however, this issue is not so clear. In some cases, lawyers want to adopt the literary approach and give the audience some leeway in actively filling in gaps. They want the decision-maker to play an active role in the narrative process. But in other cases, unlike the writer of fiction, lawyers want to design their stories with few gaps to leave very little to the decision-maker’s imagination.

The choice of audience role depends, in large part, on the lawyer’s assessment of the strength of the “facts” which will be presented at the hearing. A lawyer will usually want to cast the fact finder in a passive, conservative role when she wants it to rely solely on the “facts.” Especially when the uncontested facts strongly support your case, you might want to present your story as a simple, unambiguous tale. In many criminal cases, for example, prosecutors, will want the jury to focus solely on the evidence presented and to discourage jurors from taking any active role in story construction. Under this approach,

[t]he facts are something that happened ... years ago. The jury’s job is to discern those facts by observing fossils in the evidence .... Resolving the issue of the defendant’s intent [for example] is simply a matter of perceiving a reality which certain facts inherently possess and which their fossilized remains in the evidence therefore ‘prove.’ Reality does not need to be created. It is already out there, in the


44. Alan M. Dershowitz, Life is Not a Dramatic Narrative, in Law’s Stories 99, 109 (1996).


events.\textsuperscript{47}

If, however, the lawyer wants to take advantage of ambiguities in the facts of a case, she might want the decision-maker to use its imagination and play an active role in the construction of the story. In other words, instead of focusing on the reality of the “facts” presented, her story might want to use gaps in chronology to demonstrate alternative meanings to the events.\textsuperscript{48}

Consider the films in which the director has left it to his audience to make meaning out of the events presented. Indeed, in a criminal trial, the defense lawyer might actually want to cast the jury as a character — the hero — in the story who will reject the prosecutor’s total reliance on the established facts in the case. After showing the uncertainties in the facts of the case, the storyteller can address her listeners, “So what I’m really asking you to do is what I think will probably be one of the hardest things you have ever been required to do in public which is to stand up and at some point and look over at the defendant and while looking at him vote not guilty of charges brought against him.”\textsuperscript{49}

Chapter 14 provides a brief description of how these three models can be used in presenting a case. For a helpful discussion of some of the specific techniques for using the chronology and storytelling models in witness examination, see Albert J. Moore, \textit{Inferential Streams: The Articulation and Illustration of the Trial Advocate’s Evidentiary Intuitions}, 34 UCLA L. Rev. 611 (1987).

Chapter 15: Using the three fact organization models as a springboard, this chapter discusses ways of strengthening the persuasiveness of facts. Following is a list of background reading and additional comments on particular sections of this chapter:


\textbf{§15.2.2}: The distinction between tangible and oral sources of proof is a bit artificial. Often oral descriptions will be necessary to lay the foundation for admission of a tangible source of proof. Fed. R. Evid. 901. For example, in a homicide case, witnesses will need to testify in regard to the location of the murder weapon and to establish that the weapon was in fact the one used in the incident. But once the necessary foundation has been laid, the weapon does speak for itself, and the trier of fact is not required to engage in the same kind of credibility assessment that is necessary

\textsuperscript{47} Amsterdam & Hertz, \textit{supra} note 45, at 102 (1992). This study of the closing argument of a prosecutor found repeated references to the phrases, “in fact” and “the fact that.” \textit{Id.} at 102 n.126.

\textsuperscript{48} \textit{Id.} at 104.

\textsuperscript{49} Sherwin, \textit{supra} note 43, at 74.

**§15.3.1:** In cases heard in a tribunal in which rules similar to Fed.R.Evid 701 are followed, characterizations and opinions are usually inadmissible. See, e.g., Fed. R. Evid. 701.

**Chapter 16:** This chapter explores methods for investigating facts in a case. It starts with the actual story of the fact investigation in a political asylum case by students in a law school clinic. Using this case as a reference point, the text then discusses methods for identifying additional sources of proof and for tracking down additional sources. Many law students are lazy about this process, merely typing terms in a search engine and giving up when the “answer” does not immediately pop up on the screen. The lesson of this entire chapter, including the story at the beginning, is that fact investigation requires lots of tenacity. Lawyers need to rely on non-computer, as well as computer resources, must be prepared to hit dead ends, and must critically evaluate the credibility of each source of information discovered. Especially when using the Web, students need to assess the quality of the information which they retrieve.

**Chapter 17:** The final chapter of this part of the text considers methods for responding to the adversary’s facts. Again focusing on the three models for organizing facts (legal elements, chronology, story), this chapter discusses ways to attack the adversary’s sources of fact; the adversary’s inferences from circumstantial evidence; the adversary’s contextual facts; and its overall story.

**How to Teach Persuasive Fact Analysis**

**Schemas and Processing of Facts (Chapter 10):** Most students have difficulty understanding that “facts” in a case are not simply true or false. A client in a clinic or simulated interview will claim that a certain event occurred, and students will immediately assume this assertion is true, at least until another witness contests the fact. And in those instances in which other witnesses tell a different tale, most students will assume that one story must be true and the other must be false, not that there could be a more accurate amalgam of the two or a totally different version. Often they will conclude that the last story they heard is the correct one. And in a clinical setting where students are negotiating with an aggressive, experienced opposing attorney, they will simply believe that his version of the events must be true because “He really sounds as if he knows what he is talking about!” Perhaps because in most law school classes facts are “given” in cases or hypotheticals and the focus is primarily on the interpretation of legal doctrine, most students are not very adept at analyzing facts.

To debunk the notion that facts are either true or false and to introduce students to methods for thinking about facts, we suggest you start with a general discussion of schemas and
the processing of information. Some of your students will have encountered these concepts in
their undergraduate psychology courses, but they probably have never applied them. Fact
Exercises 1 and 2 give them this opportunity.

Fact Exercise 1 encourages students to think about the use of schemas in analyzing facts. Give
the class five minutes to identify three facts about themselves about which no one else in
the class knows. Two of the facts should be true, the third false. Then, go around the class,
have each student state their set of three “facts,” and write them on the board. After all students
(and you) have identified their sets of facts, go set-by-set and ask the class to discuss which of
the facts is a lie. After the discussion, have the “subject” student identify his or her false fact.

Try to focus the discussion on the truth or falsity of the facts on the students’ schemas. As
students vote on what particular fact is a lie, ask them what “role” schemas come into play
(the class’ general assumptions about law students); what “person” schemas are used
(experiences other class members have had with this particular student); and what script
schemas are employed (expectations about the description of this particular fact). Although
some students will want to cross-examine the subject student about his or her facts, we
discourage lengthy questioning. Rather, we suggest that you ask the questioner why she is
asking the particular question and show how it relates to her schema about the particular person
or events. The goal of this exercise obviously is not to determine which facts are lies, but rather
to reflect on the process by which we assess the truth or falsity of facts. Indeed, classes usually
get the most insight from a student who stumps them.

Fact Exercise 2 concerns the process by which we filter the stimuli we experience (§10.3
of the text) and construct stories from this information. Before class, arrange for a disruption
during your lecture, and after the event ask each student to write up a description with as much
detail as possible. For the exercise to work most effectively, the disruption should have some
ambiguity (for example, if the disruption is an argument in the hallway, the subject of the
encounter should be unclear; if someone runs into the classroom to take your belongings, his
or her face should only partially be visible, and the lights should be turned off; the person(s)
involved in the incident should be much older than the most members of the class). This
increases the possibility of the construction of different versions of the story.

After the class has written their stories, have a number of students read them in class. Once
you have two or three different versions, discuss with the storytellers the different factors
which may have influenced their accounts: (1) their location in the room; (2) the lighting; (3)
their activity (taking notes, reading, snoozing) at the time of the event; (4) their emotional state
at the time of the event; (5) any other distractions in the room; (6) prior experiences with similar
events; and (7) any schemas they used in “filling in the blanks” in telling the stories. Focus on
specific differences in details (e.g., the age, height, or weight of the persons) identified by the
observers. After this discussion, you or the actors may want to describe “what really happened.”
But, since the purpose of this exercise is to focus on the way we process facts, not on how we
determine “what really happened,” it may be better to leave things ambiguous.

Use of Charts for Organizing Facts: The text provides a number of suggested charts
for organizing facts. We strongly suggest that you encourage students to use similar charts when working on their simulated cases or actual cases in a Clinic. As we state in Chapter 11, these charts reflect the kind of thinking used by effective lawyers in preparing their cases. While experienced lawyers might not take the time to write down their thinking in a chart format, we suggest that students do so until they know thoroughly how to use the analytical processes involved.

While some students are enthusiastic about the use of charts because they provide a structure for organizing thinking, others can be very negative, complaining that the charts are just “busy work.” Even when you give them an assignment to draft a chart, they will merely go through the motions and do a very superficial job. We have found that the most effective response to this kind of attitude is to show the student explicitly how the methods reflected in the charts can result in a more successful trial, negotiation, or brief. In drafting a chronology, for example, many students neglect significant details about crucial events. Lecturing them about the importance of contextual facts will probably only have a limited effect. But if you ask the student (either in a supervisory meeting in a Clinic or a class session on a simulated problem) to give you a direct examination or negotiation argument based solely on the chronology, they start to see how the deficiency in the fact analysis can impact the presentation of the case.

You should encourage your students, however, to adapt the charts to the requirements of the particular case. In a lengthy, complex case, for example, every episode on the chronology will probably not require the same attention to detail as the most significant events. As we advocate throughout the text, students should exercise judgment in determining the amount of detail necessary for a particular chart.

**Legal Elements Model of Organizing Facts (Chapter 11 and §15.1):** Charts 11A, 11B, and 11C provide a model for organizing facts in terms of the legal elements of the case. You begin by identifying the generic elements under the relevant statute, rule, or case law and identifying the source of the element under the applicable law; you then state the element as a factual proposition (factual statement of the element in terms of the particular case); and finally, you should marshal the facts you have discovered and identify the sources of those facts.

The process of identifying elements is a subject of most first-year legal writing courses. For this reason, very little time needs to be taken in this course on this issue. It is important, however, to emphasize the necessity for identifying the source of each element, the same process used when marshaling facts in support of elements.

The next step in the process — restatement of the generic element as a factual proposition — usually needs some explanation. As described in the text, this process provides a segue between the legal elements and the facts. Students often have difficulty with this step: at one extreme simply replacing the subject in the statute or rule with the names of the plaintiff or defendant, or, at the other extreme, specifying particular evidence in support of the element. The goal is to have students identify the particular **factual conclusion** the lawyer wants the trier-
of-fact to reach after it has heard all the evidence.\(^5\)

Given the discussion in the text of paradigmatic reasoning, it is sometimes helpful to analogize to the syllogistic process in logic: the element is the major premise, the facts are the minor premise, and the conclusion is the factual proposition that you want the trier-of-fact to accept. It may also assist the class to distribute some pattern jury instructions from your jurisdiction which restate elements as factual propositions. When students can see that these concepts are actually used in practice, they become much less reluctant to use this approach.

Students also experience difficulty with the final step in the process — marshaling the facts in support of each of the factual propositions. Instead of identifying particular facts supporting the propositions, many students merely restate the factual proposition. In an assault case, for example, their charts might look like this:

<table>
<thead>
<tr>
<th>Factual Propositions</th>
<th>Facts</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant Siegel intended</td>
<td>Siegel intended</td>
<td>Longo statement to Officer Lutz</td>
</tr>
<tr>
<td>To cause victim Longo serious physical injury to victim</td>
<td>To cause Longo serious physical injury.</td>
<td>Longo statement to Officer Lutz</td>
</tr>
</tbody>
</table>

You need to encourage students to examine witness statements and other documents carefully and use exact words from those materials in their charts. Otherwise, a thorough analysis cannot be made of the strength and weaknesses of the facts identified. Here is an improved version of the chart:

<table>
<thead>
<tr>
<th>Factual Propositions</th>
<th>Facts</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant Siegel intended.</td>
<td>Siegel screamed at Longo, “You’re not going to treat me like this any more!”</td>
<td>Longo’s statement to Officer Lutz</td>
</tr>
<tr>
<td>To cause victim Longo serious physical injury to victim</td>
<td>Siegel raised vase over Longo’s head</td>
<td>Longo’s statement to Officer Lutz</td>
</tr>
</tbody>
</table>

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Fact Exercise 3 gives students the opportunity to apply the Legal Elements Model and assess the legal sufficiency of their facts (§15.1). In this exercise, some students argue directed verdict motions against other students in the class. For a clinical course, we recommend that you use an edited transcript from an actual trial or hearing conducted by prior students in the Clinic. (This makes the assignment much more “real” to the class.) In a simulation course, we recommend that you use a transcript in a small, discrete case. 51 You should try to select a case in which the meaning of one or more of the legal elements is ambiguous (in fact this is true in most cases) and in which the plaintiff’s (prosecutor’s) presentation of evidence in its case-in-chief has some holes, creating the possibility that the motion will be granted.

During the argument, you should play the judge and ask questions of the different “attorneys” about the standards for consideration of the motion, their interpretation of the meaning of particular elements, and the specific language of the testimony or exhibits upon which they are relying. When students begin to argue issues about the weight to be given particular evidence, try to focus them on the relevant legal sufficiency issue for a directed verdict motion. As the students argue, take detailed notes on the way they describe the particular elements which must be proved and the evidence upon which they are relying.

After the arguments, ask the class which side should have won the motion and then have a few students give their reasoning. This should provide a good segue into the issue of the standard for consideration of a directed verdict motion. Then, as a class, develop a legal elements chart for this particular case. Have the class read directly from the applicable statute or case authority to identify the particular elements of the cause of action, and then have the class restate the elements as factual propositions referring to particular depictions of these propositions made in the arguments. Again referring to the actual arguments, have the class next try to marshal the facts in support of each of the elements.

At this point, the class should address whether the plaintiff (prosecutor) has produced enough evidence to establish each element. As explained in §15.1, this question requires examination of two issues: (1) the legal meaning of each element and (2) the sufficiency of the facts produced in support of that element. For the first issue, have the class try to identify those elements with ambiguous meaning. This is not the time to teach the class the way courts have construed the meaning of these elements. Your goal is to have the students understand that elements can be subject to numerous meanings, and most importantly for this discussion, that restatement of a generic element as factual proposition helps lawyers identify the meaning they want to give to that element in this particular case. As to the second issue, have the defendant’s lawyers argue why the facts presented by the plaintiff (prosecutor) were insufficient. Just as you had the class focus on the exact language of the text of the statute or case law, direct them to the precise language of the testimony or exhibit and have them consider whether it actually

supports the element. To encourage your students to think in terms of further fact investigation, ask the class, “If you were representing the plaintiff or prosecutor, what stronger facts would you have tried to produce at trial to support the element?”

Fact Analysis Assignments 2 and 3 (pages 128 and 129) provide opportunities for students to engage in this process of assessing the legal sufficiency of the facts themselves using an actual case file. The file is on the textbook’s website. This housing discrimination case is based on an actual case handled by the Hofstra Law Reform Advocacy Clinic. (While the names and some of the facts have been changed, many of the documents are similar to those in the actual court filings.) The case concerns the students’ client Oakhurst Tenants Association, a group of Latino tenants in an apartment building who allege that they are being displaced because of the Town of Crestwood’s hostility to day laborers in the area. They also assert that the Town has attracted Windsor Development to purchase the building, evict all the tenants, and renovate the building into luxury apartments. The case file includes relevant statutes and caselaw; office memoranda documenting interviews with the tenants and a community organizer, and a telephone conversation with Windsor’s attorney; documents obtained from the Town under the Open Records Act concerning the decision to redevelop the property; and documents reflecting community hostility to Latinos and day laborers. It also contains an audio file of the interview with the organizer.

The case against the Town arises under the Fair Housing Act (“FHA”), 42 U.S.C. §3604(a), which prohibits any person from refusing to rent, sell, or “otherwise make unavailable or deny” housing because of race or national origin. The caselaw provided on the book’s website, Jim Sowell Construction Co. v. City of Coppell, 61 F. Supp. 2d 542 (N.D. Tex. 1999) describes the factors courts consider in determining whether a government body’s land use decision violates the “otherwise make unavailable or deny” requirement of the FHA.52 Fact Analysis Assignment 2 asks students to develop a legal elements chart for a case against the Town. This task is fairly straightforward, requiring students to identify the elements set forth in the FHA and the Sowell case and to read all the documents to marshal evidence in support of each element. While some of the elements raise statutory construction issues (e.g., whether a Town can be a “person” under the “FHA”), the primary focus of this assignment is on the sufficiency of the evidence in the extensive case file to prove the Sowell factors. Unlike many simulated exercises, this process requires a close reading of all the documents in the file to filter out irrelevant information and identify relevant evidence.

The case against the developer is more complex. It arises under the fictitious state’s Human Rights Law which creates a cause of action against any person who acts in concert with another person in an unlawful discriminatory practice and provides a remedy for punitive damages. The case file also contains the relevant sections from the Restatement (Second) of

52. Students should only consider the disparate treatment claim under the FHA, the elements of which are set forth in Sowell. As of the publication date of this Manual, the viability of a possible disparate impact claim under the FHA is uncertain. See Inclusive Cmty Project, Inc. v. Tex. Dept. Of Housing & Cmty Affairs, 747 F.3d 275 (5th Cir. 2014), cert. granted, 135 S.Ct. 46 (2014).
Torts on concerted action theory and punitive damages. Fact Analysis Assignment 3 asks students to develop a legal elements chart for a case against the developer. Unlike Fact Analysis Assignment 2, this process will require more analysis of the meaning of the particular elements. Students, for example, should consider the interpretation of the “knowing” and “substantial assistance” elements for the concerted action theory and the “outrageousness” element for punitive damages. Also, unlike the prior assignment, the evidence-marshaling process will require more focus on identification of relevant circumstantial evidence showing the connection between the Town and the developer.

Each of these assignments can be used independently of each other. Because of its complexity, we suggest using Fact Analysis Assignment 3 for more advanced students.

**Chronology Model for Organizing Facts (Chapter 12 and §15.3)**: Most students have had some experience, even dating back to elementary school, drafting time lines. Unfortunately, however, they have not been required to use much precision in drafting these chronologies. When asked to write a time line for the case, most will quickly jot down obvious dates and events with only vague references to sources and leave out substantial details. The major goal in teaching the chronological model for organizing facts is to show students the importance of attention to details.

Fact Exercise 4 provides a vehicle for honing this skill. In a clinical course, have students draft a chronology in a case immediately after the initial interview. In a simulation course, select a fairly simple case file and have actors or other teachers in the course play a witness. We have found that most students ignore the last column assuming that they have obtained all the necessary information. They are reluctant to consider areas for further investigation and believe they have the full story. To address this problem, you need to walk them through this series of questions to help them develop areas for further fact investigation and more complete chronologies:

1. **According to your scripts for this particular transaction or event, what episodes can you hypothesize happened before the first event on your time line and after the last event?** As discussed in Chapter 12, most students begin their time lines too late in the sequence of events and end them too early. In a car accident case, for example, they will start the chronology just before the accident occurred and end it right after the ambulance has left. Students need to expand their scope of the relevant events.

2. **How can your conclusions in the episodes column be fleshed out into statements of fact?** Many students have the tendency to parrot conclusory statements or characterizations by their clients or other witnesses without seeking specific details. Time lines are often replete with these kinds of descriptions: “the defendant’s car was speeding”; “it was very dark on the street”; “the weather was horrendous.” This is especially a problem with conversations. Many students do not give the content of the speech but merely characterize it.
3. **What additional facts will bring the scene of a particular episode to life?** Often trial advocacy instructors teach students the basic foundation rules for direct by asking students to consider “lights, camera, action.” Likewise, here, you want your students to consider not only the central action of each episode but also the location of the event, the lighting, the weather conditions, other persons present, the relationship of the parties to each other, and other facts that lay the context for the episode. To help students see the gaps in the picture, it is often helpful to ask students to question each other about the surrounding details of a particular episode.

4. **Why did the parties act as they did in a particular episode?** Especially when the client has acted inconsistently with prior behavior, the student will want to explore her motivations.

5. **How credible are the student's sources of proof? What more credible sources of proof are available?** Have students consider the spectrum of possible sources of proof discussed in §16.2: documents and other tangible evidence; other witnesses with better perception, recall, and demeanor; and witnesses with less biases or prejudices.

Throughout this process, some students will invariably complain that, “I tried to get this information from the client, but she didn’t remember!” At this point, remind them of the techniques discussed in §9.4 and discuss alternative methods for obtaining the information. It is often helpful to assure the student that most lawyers do not obtain the client’s version of the story at the first interview. Sizable entries in the Gaps/Inconsistencies column are a sign of good, not sloppy, lawyering.

Fact Analysis Assignment 1 (page 126) provides students with an opportunity to consider the chronological model for organizing facts after fact investigation has begun. Using the Oakhurst Tenants Association case file, it asks students to draft a chronology based upon all the documents provided. This process will help students recognize that even after fairly extensive fact investigation in a case, major gaps in the chronology will still exist. Also, by identifying the sources of the evidence, students will have a chance to assess the credibility of particular witnesses and items of evidence.

**Story Model for Organizing Facts (Chapter 13 and §15.5):** Of the three models for organizing models for organizing facts, this one presents the most difficult problems for some students. Those students who hope to pursue careers as litigators, especially as criminal defense attorneys, usually understand the model and are quite adept at developing persuasive yarns. But others are clearly skeptical that theories of narrative technique can have any applicability to the practice of law. To respond to this attitude, it is helpful to refer students to the quotes in the article in the text by nationally-known litigator Gerry Spence or to show a tape from Court

53. Gerry Spence, supra note 39, at 73.
TV of persuasive storytelling in an opening statement or closing argument. In one of our classes, a disbelieving class was won over when a criminal defense lawyer gave a testimonial on how she used narrative techniques in preparing her cases.

Fact Exercise 5 introduces students to the use of these techniques in practice. Students are asked to draft stories in one of their cases (in a clinical setting) or for a simulated case file. Although you could ask them to write opening statements or closing arguments in a case, such an assignment can undermine the purpose of the exercise. With an opening or summation assignment, most students will run to a trial advocacy text and try to parrot one of the suggested traditional approaches to those skills. They will become bogged down in the procedures of trial advocacy, will often focus on the legal theories of the case, and may ignore the purpose of the exercise: effective storytelling. Indeed, when we give this assignment, we explicitly ask the class to ignore legal theories and concentrate on creative writing. Some students have actually written poems and plays about their cases which have used stirring images and persuasive themes.

At the same time, it is important that students understand the limitation of legal storytelling that they are constrained by the uncontested facts in the case. For that reason, we ask them to draft a chronology of the episodes in the case before drafting their stories. We tell the class to base their stories on the facts as related in the chronology, not on some fictional version of the events. We also have one student write a story from our client’s perspective and another to draft a story from the opponent’s viewpoint. In this way, students can examine how the same set of facts can be fashioned into, at times, radically different accounts.

Students bring their stories to class. We begin by reviewing the factors for persuasive storytelling discussed in Chapter 13 and writing them on the board: (1) identification of uncontested facts; (2) identification of the audience; (3) development of a unifying theme (students seem to enjoy the retelling of the story of the Magid of Dubno); (4) choosing persuasive images; and (5) selecting a story genre — sequencing, perspective, tone. We suggest writing on the board a quote from Hannah Arendt, 

> When the storyteller is loyal to the story, there, in the end, silence will speak. Where the story has been betrayed, silence is but emptiness.  

Then ask your students “to sit around the campfire,” tell their stories, and determine whether the stories speak to them.

Have one student tell the client’s story and immediately thereafter have the other student

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54. Hannah Arendt, *Isak Dinesen*, in Men in Dark Times 95, 97 (1968). Alternatively, you can read the class Walt Whitman’s *When I heard the Learn’d Astronomer* from *Leaves of Grass*, and ask the students whether the stories presented speak to them like the astronomy professor’s lecture or an experience gazing in silence at the stars.
tell the countertale from the opponent’s perspective. Referring to Arendt’s quote, ask them which of the stories speaks to them and which leave them in silence. Try to focus the discussion on the factors discussed in the text:

1. *Did the story effectively deal with the uncontested facts in the case?* Have each student identify the most negative fact for her side and ask the class how the different stories handles those facts (downplays them, explains them away, or emphasizes them).

2. *Does the story speak to the audience which will be hearing the case?* Have the students telling the stories identify the nature of the decision-maker in their case. Often students will write stories which might be effective for a class of law students but unpersuasive to a particular judge or to a jury in your locale. Have them explain the process they used in adapting their stories to the particular audience. Also, ask them whether the stories met Leitch’s “principle of enjoyment” discussed in the text.

3. *Is the theme compelling?* Have the storytellers state their themes in one sentence and then have the class evaluate whether their stories communicated them. Ask the class what portions of the story conveyed the theme and what seemed inconsistent with it. Have the class itself try to recraft the theme or redesign the telling of the facts to communicate it more effectively.

4. *Were the images persuasive?* Ask the class what particular images of the parties or episodes jumped out at them and what left them cold. One of the benefits of this exercise is to have students consider the importance of the use of persuasive images in oral presentations. Whether they are arguing to a judge or jury or negotiating with an adversary, the effectiveness of their description of the facts will depend, in part, on the kinds of images used.

5. *Was the sequencing appropriate for this story?* Most students will use the traditional chronological method. Ask them whether this is the kind of story where a flashback or episodic approach might be more persuasive. In a case with a very dramatic central action (for example, a tragic accident), will an initial description of that event catch the audience’s attention for the entire telling of the tale?

6. *Did each storyteller select the most effective perspective from which to tell her story?* Have the class consider alternative perspectives: first person, a witness to the event, or a third-party narrator. In the seminar for a Housing Rights Clinic course, some of the most persuasive stories of breach of warranty were

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55. We have only used this exercise in a small (10 to 14 student) clinical seminar. In a larger class, we suggest that you break the class into smaller groups and go from group-to-group as students evaluate the persuasiveness of each other’s stories.
told from the viewpoint of the tenant’s child witnessing the deplorable conditions.

7. **Was the tone appropriate for the story?** Many students simply adopt the serious, somber tone expected in most legal writing. Have the class consider the effectiveness of different kinds of tones (from the humorous to the outraged) to reflect the themes they have chosen for their stories.

In your evaluation of the stories, you may also want to assess the structural integrity of the stories using the analysis described in §15.5 of the text. Does the story take into account the three or four best facts presented in the adversary’s story? Are the theme and images of the characters consistent throughout the story? Oftentimes, students introduce their stories with sympathetic portraits of their clients which are later belied by their client’s action or words. Finally, how has the storyteller handled ambiguity in her story? Does she confuse the listener or use ambiguity to her advantage?

Throughout this discussion, it is helpful to explore how these storytelling techniques can be used in actual practice. For those second- or third-year students who have taken trial advocacy courses, discuss how the unifying theme concept can be used throughout a trial from questioning in voir dire to opening statement to witness examination to summation. Have the class consider how the image you want for your client can be highlighted in her direct examination. Or using the storytelling model, ask how her chosen perspective or tone can be used in closing argument. For first-year students, have the class examine how these narrative techniques can be applied in writing briefs or negotiating with adversaries. Explore how a theme can be presented in a brief’s statement of facts or how a lawyer’s tone or use of images can affect the course of a negotiation. By showing how these techniques have some practical application in actual lawyering skills, you can address some of the skepticism that this exercise is merely an academic enterprise.

In a clinical program with different clinics specializing in particular subject-matter areas, we suggest a clinic-wide storytelling event after each clinic has concluded its class on Fact Exercise 5. Students in each clinic vote on the most persuasive story from their clinic. Then, at a program attended by all clinic students, the best stories from each clinic can be read. Such a program can give students the opportunity to see how the storytelling process works in different subject-matter areas and the fit between particular cases and their genres and themes. It also gives them the chance to learn more fully about the work of other clinics in a setting which is not focused solely on legal doctrine.

**Thinking About Facts (Chapters 11-13):** While Chapters 11-13 describe different frameworks for analyzing the facts in a case, after an examination of each of those methods, it is helpful to have students use all of them in the context of a particular case. Such an exercise allows students to consider the differences and relationship between the three frameworks. Fact Exercise 6 provides that opportunity by asking students to draft legal elements charts and a chronology based on a client intake memo in an actual or simulated case. Instead of requiring the drafting of a complete story, the exercise asks students to develop a six-to-ten word story for
the case. In this age of Twitter, students like the challenge. We suggest that instructors tell the
class about Hemingway’s six-word story: “For sale: baby shoes, never worn.” Then, ask the
students to try to encapsulate their clients’ stories in a single tweet.

**Assessing Circumstantial Evidence (§§15.4 and 17.3):** Most students understand
the difference between direct and circumstantial evidence, but they are seldom reflective about
the strengths or weaknesses about the arguments they make about circumstantial evidence. In
a negotiation or closing argument, they will rely on a certain item of circumstantial evidence or
the testimony of a particular witness without serious consideration of its credibility. Binder,
Bergman, and Moore’s model presented in Chart 15A is a very helpful tool for assisting
students in assessing their circumstantial evidence.

Since in a vacuum, Chart 15A appears to be a mere exercise in logic, we recommend
that you use Fact Exercise 7 to give students the opportunity to apply the model in practice. In
this exercise, you distribute to the class the remainder of the transcript (the defendant’s case-in-
chief and plaintiff’s rebuttal) in the case you used for the Directed Verdict exercise (Fact Exercise
3). Ask students to prepare closing arguments and have them make the arguments in class.
Before the arguments, emphasize that you want the class to focus on the credibility of particular
evidence or witnesses, not on the strengths or weaknesses of the legal case. Also, ask the class
to take notes during the arguments, identifying those arguments that seem most effective and
those that are least effective.

During the arguments, take notes on the presentation of the different arguments. We
like to organize our notes in the categories identified in Paul Bergman’s Credibility Model 56 and
develop a flowchart of the parties’ responses to each other:

**Credibility of Testimony**

<table>
<thead>
<tr>
<th></th>
<th>Plaintiff’s Arguments/Responses</th>
<th>Defendant’s Arguments/Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Consistency with Common Experience</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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56. Bergman, supra note 50, at 66-68.
After the arguments, have class members give examples of arguments they considered most effective. If the argument concerns inferences drawn from testimony, have the class “deconstruct” the circumstantial evidence using Chart 15A. On the board reproduce the chart and ask the student who made the argument to restate the facts (circumstantial evidence) she argued. Have the student check the transcript or exhibit to assure that her account is correct. Frequently, students will be sloppy in the reading of the testimony, and it is important to require a close reading of the text.

If the rendition is correct, ask the student for the inference she wanted to draw from this evidence. Then have her state explicitly the generalization that links the evidence to the inference. For some students, this is not an easy process. They intuitively see the connection between the facts and conclusions but have difficulty expressing the underlying premise that underpins their thinking. A useful technique is to have them use the following formula to develop a generalization: “When X [the facts] occur, Y [the conclusion] must occur.” You might also want to discuss the relationship of this chart to syllogistic reasoning: the generalization is the major premise, the facts are the minor premise, and the inference is the conclusion.

<table>
<thead>
<tr>
<th>Internal Consistency</th>
<th>Consistency with Established Facts</th>
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</table>

<table>
<thead>
<tr>
<th>Credibility of Witnesses</th>
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<table>
<thead>
<tr>
<th>Expertise</th>
<th>Plaintiff’s Arguments/Responses</th>
<th>Defendant’s Arguments/Responses</th>
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<tr>
<th>Motive</th>
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<tbody>
<tr>
<td>Demeanor</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Socio-Economic Status</td>
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</tbody>
</table>
At this point, ask the class to assess the strength of the particular generalization. Does everyone in the class accept the underlying premise? Will the judge, hearing examiner, opposing attorney, or jury in this particular case buy this generalization? An audience with what particular biases or prejudices will agree with the generalization? Often the class will see that by articulating the generalization, we start to see flaws in our arguments.

We suggest using this process for three or four arguments presented by the students. Arguments about the credibility of witnesses can be deconstructed in the same way as arguments about testimony are assessed. For example,

<table>
<thead>
<tr>
<th>Facts</th>
<th>Generalization</th>
<th>Conclusion</th>
</tr>
</thead>
<tbody>
<tr>
<td>O'Brien is a friend of the plaintiff.</td>
<td>When a witness is a friend of the party, he is biased for that party.</td>
<td>O'Brien is biased for the plaintiff.</td>
</tr>
</tbody>
</table>

During this discussion, ask the class to use the “Except when/Especially when” analysis described in §15.4 to test the strength of the generalization. Have them identify what facts will buttress a particular generalization and what will undermine it. Often opposing students will use the same circumstantial evidence to draw two different inferences. While taking notes during the presentation, it is especially helpful to identify such arguments. When you show the class how diametrically opposed inferences can be drawn from the same facts, they begin to see that fact analysis is not simply throwing one or two facts before the decision-maker but requires crafting of facts into a persuasive package.

Finally, especially in a clinic class or in classes in which students have had trial advocacy experience, we suggest that you discuss the use of this process in the preparation and trial of a case. Here are some examples:

1. **Significance of the “Except when/Especially when” analysis to fact investigation.** This analysis helps lawyers identify areas for further formal and informal discovery.

2. **Importance of articulating the generalization in closing argument to the judge or jury.** Decision-makers may not understand your argument unless you explicitly walk them, step-by-step through your thinking process.

3. **Help in responding to a relevancy objection.** If an objection is made to a line

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of direct or cross examination concerning a witness’s credibility, the articulation of the generalization underlying the inference forms the basis for the response.

4. **Assistance in development of voir dire questions.** By assessing the generalization, a lawyer can identify the type of jurors who would be most likely to accept key generalizations and the questions she will ask in voir dire to identify such jurors.

5. **Development of witness examinations.** This process helps a lawyer develop lines of question for both direct and cross examination to elicit facts that will support her “especially whens” for her circumstantial evidence and her “except whens” to her adversary’s circumstantial evidence.

**Development of Additional Facts (Chapters 15, 16, and 17):** Fact Exercise 8 gives students the opportunity to apply the different factual theory models for identifying and obtaining additional facts. The exercise asks the students to prepare for the deposition (or interview) of a witness from the opposing side by identifying areas for fact investigation and developing areas for questioning. For this exercise, the class is asked to consider three different purposes of fact investigation: (1) exploration of additional contextual facts; (2) identification of other sources of proof; and (3) development of facts supporting your existing circumstantial evidence or undermining your adversary’s circumstantial evidence. Either another instructor in the class or a former student should play the role of the deponent.

In a shoplifting case, for example, where a store security guard has filed a report on the incident stating that the defendant “placed the video game in his coat pocket,” in preparing the defense questioning of the security guard the student might identify several goals: (1) investigation of the contextual facts of the incident (the location of the event, the store’s lighting, the congestion in the aisles, other persons present, the position of the guard in relation to the defendant, the biases and prejudices of the guard); (2) exploration of other sources of proof (other eyewitnesses or other reports of the incident); or (3) testing of the circumstantial evidence (since the client was only wearing a light jacket, the game could not have fit in his pocket).

In class, have students conduct the depositions or interviews. Ask the witness to leave the room, and, have the student identify the goals of the deposition before she does the questioning. (In our experience, if you wait until the student has completed her questioning, her examination will meander from topic to topic. The goal of this exercise is to teach students how to clearly focus their fact investigation.) Then have the student describe her questioning strategy to achieve this purpose. Have the class give the student suggestions on fine tuning her approach. Bring the witness into the room and have the student begin the questioning. The witness should be coached to be evasive so the student needs to probe to get helpful information. If the student reaches a dead end, have other students in the class volunteer to continue the questioning.

After the deposition or interview, have the class assess the success of the questioning. Ask the class to model how they would use the witness’s answers in a negotiation with the
adversary’s attorney, in cross examination, in closing argument, or in developing further fact investigation. As part of the critique, you should refer to the other sections of the text on client and witness interviewing (§§8.3 and 9.4) and focus on the effectiveness of the questioning strategy. In this way, you can relate fact investigation methods to interviewing techniques.

Fact Exercise 10 provides students with the opportunity to engage in fact investigation of records in the public domain in an actual or simulated case. The exercise includes simulated problems for cases in three different subject-matter areas: political asylum, tax, and criminal law. Fact Exercise 11 requires students to consider development of additional evidence in the context of drafting a request for public records under a state open records law or the Freedom of Information Act.

Relationship of Fact Analysis and Rules of Evidence: In clinical seminars and upper-level simulation classes in which students have already taken the basic evidence course, Fact Exercise 9 is a helpful class in relating the fact analysis concepts discussed in the text to the rules of evidence. In this exercise, you ask your student to draft a summary judgment affidavit for a client in compliance with the rules of evidence. (As an alternative you can ask students to draft a direct examination of a client. The drawback with this approach is that students because overly concerned with the form of the questions and ignore other evidentiary concerns.)

In class, begin with a short review of the Federal Rules of Evidence, identifying five basic objections: (1) Relevancy (Rule 401); (2) Personal knowledge (Rule 602); (3) Authentication (Rule 901); (4) Hearsay (Article VIII); and (5) Best Evidence (Rule 1002). Then have the drafter of the affidavit read it aloud as if she is the witness, have another student act as objecting attorney; and ask another student to play the role of the judge. As objections are made, ask the class to consider the relationship of the particular evidentiary rule to the fact analysis chapters. As to relevancy issues, for example, relate the rules to the Legal Elements Model and witness credibility. In regard to personal knowledge and authentication, demonstrate how the establishment of contextual facts (foundations) — required by the rules — actually helps the witness paint a more vivid picture of the event. As to the hearsay rules, ask the class to consider how the foundation for a hearsay exception or an admission of a party opponent strengthens the credibility of the out-of-court statement. And in regard to Best Evidence, relate the rule to the text’s discussion of tangible and oral sources of proof. §15.2.1.

As objections are sustained (at times you will play the role of appellate judge reversing decisions of the student judge), have the drafter give alternative language and ask the class to consider the effect of the additional foundational language on the persuasiveness of the story.

Fact Exercises

On the following pages are eight exercises that can be used to teach fact investigation and persuasive fact analysis in classroom or seminar settings:

1. Schemas
2. Processing of Information
3. Legal Elements Model
4. Chronology Model for Organizing Facts
5. Story Model for Organizing Facts
6. Thinking About Facts
7. Circumstantial Evidence Exercise
8. Development of Additional Facts
10. Fact Investigation in the Public Domain
11. Investigating Public Records

Some of the exercises are self-explanatory. Those that are not are preceded by a page of notes for the teacher.
Notes for the Teacher

The exercise appears on the page after this one.

The idea for this exercise has been discussed on the LAWCLINIC Listserv, a service of Washburn University School of Law Library.

This is a good exercise for a first class. It not only helps students start to consider the importance of schemas in assessing truthfulness of a story, but it also helps to “break the ice” for the class. At first, students may feel that this exercise is a bit hokey, but when you explain the purpose to them (and tell them you want them to lie), they become engaged. Students also become more involved in the exercise if the teacher participates with her three “facts.”

We have used this exercise in a small group seminar setting (10 to 12 students). A larger class can be divided into small groups which work independently to identify the “truths” and “lies.”
Fact Exercise 1

Schemas

In §10.3 of the text, a study is discussed in which eighty-five college students were each asked to compose stories about themselves or what they had done and to tell their stories to the remaining students. Half were directed to tell false stories; the other half were instructed to tell true stories. The audience members were then told to record their evaluations of the truth or falsity of each story told. The results of this study showed that the assessments of the truth of the different stories was not related to the actual truth or falsity of the story. Instead, the researchers found that the believability of stories was correlated with the storyteller’s ability to craft a well-structured story.

In this exercise, we are going to try to replicate this study. Each of you should identify three personal facts about yourself which no one else in the class knows about (e.g., your activities before coming to law school; your hobbies and interests; your accomplishments; your travels). Two of those facts should be truthful, the third should be a lie. As a class, we will attempt to guess the lie.
Fact Exercise 2:

Processing of Information

Notes for the Teacher

The exercise appears on the page after this one.

Start the class with a lecture on schemas and Bruner’s different modes of thinking. After the class is lulled into a passive lecture mode, have a disruption created in the class. For example,

1. Two people begin arguing loudly outside the classroom. They both come into the room continuing the argument, and both run out in anger; or

2. Someone runs into the classroom, turns off the lights, takes your notes, soda can, and/or books from your lectern and exits the room.

Then hand out the next page or read it to the class.
Fact Exercise 2

Processing of Information Exercise

Without conferring with anyone else, immediately write down a description of what has just occurred. Describe in detail each of the persons involved (ages, heights, weights, clothing), their precise actions, and what they said. Try to include as many details as possible.

Then write down what you were doing at the time of the incident.
Notes for the Teacher

The exercise appears on the page after this one.

In a small group class (12 to 14 students), you will probably want all students to argue the motion. In a larger class, you can divide the class into smaller groups to allow all students to argue or select students to have four or five arguments. Four or five arguments of the same motion do not become overly repetitive because most students state the factual propositions differently and marshal different facts in support of the propositions.
Fact Exercise 3

Legal Elements Model Exercise

The assignment for the next class is the simulated argument of a directed verdict motion [motion for judgment as a matter of law] in [case name].

Students 1 through 6 on the attached list should each prepare an argument for the defendant in favor of her motion for a directed verdict, and students 7 through 12 should prepare arguments in response to the motion on behalf of the plaintiff. Student 7 will respond to student 1, student 8 will respond to student 2 and so on. The argument for each side should take approximately five to eight minutes.

Attached are relevant pleadings in the case and excerpts from the transcript of the proceedings. For purposes of this assignment, assume that this is a jury case and that you are arguing the motion at the conclusion of the plaintiff's case. Your argument will be made to the judge, outside the presence of the jury.

The attached materials include the [the relevant statutes and/or case law] and [the rule and/or a case describing the standard for determination of a directed verdict motion]. No further research is required.
Fact Exercise 4

Chronology Model for Organizing Facts

Interview a new client and try to obtain the necessary information and documents to develop a detailed time line. After the interview, draft a Chronology chart for this case using Chart 12A. In drafting this chart:

1. Provide as much detail as possible in the episodes column focusing on relevant contextual facts, §15.3;

2. Note the precise identity of the source and consider its credibility; and

3. In the final column, identify all the possible gaps and inconsistencies which you will want to explore in further interviews with the client or other fact investigation.
Fact Exercise 5

Story Model for Organizing Facts

In this class, we will evaluate the persuasiveness of your client’s facts in terms of the credibility of her entire story.

For this class, each team should draft a chronology for the case using Chart 12A. Include each and every episode relevant to the case (as in direct examination, keep asking yourself, “what happened next” after inserting each event on the outline). Make sure to identify all gaps and inconsistencies.

Then, one member of each team on the attached sheet should draft a short story (two or three pages, double-spaced, maximum) describing the events in the assigned [or simulated] case in a manner most persuasive to our client; the other member should draft a short story describing the events in their case in a manner most persuasive to our opponent. All the facts in the stories should be based on information in your chronology; do not fabricate any facts. Using the model described in Chapter 13, try to make the story as persuasive as possible; don’t just repeat the client’s or opponent’s statements. If it makes your story more persuasive, you can present it in a nonchronological fashion, e.g., as a series of discrete episodes. Be creative: try to use persuasive images and metaphors and attempt to develop a common theme. If you want, try your hand at poetry or play writing.

Because this class is focusing on factual, not legal theory, please avoid any references to causes of action, legal rights, case law, or statutes. In other words, don’t argue the legal issues in the case. Think of this as a creative writing assignment, not a legal drafting project.

In class you will read your stories and we will evaluate their persuasiveness.
Fact Exercise 6

Thinking About Facts

Notes for Teacher

The exercise appears on the page after this one.

This exercise provides an opportunity for students to view the facts of the case through three different types of lenses – legal theory, chronology, and storytelling – after the initial interview in a case. Attached to the instructions are two possible intake memos which can be used for the exercise. Intake Memo A is based on Miller v. William Chevrolet, 326 Ill. App. 3d 642, 762 N.E.2d 1 (2001), and Intake Memo B is based on Dobosz v. State Farm Fire & Casualty Co., 120 Ill. App. 3d 674, 458 N.E.2d 611 (1983).

In class, the teacher can work with the students as a group in developing these charts and imagining possible stories. In the alternative, after classes on legal theory, chronology, and storytelling, the teacher can use this exercise as an assignment and ask students to submit a written memo for feedback.
Fact Exercise 6

Thinking About Facts

Attached is a client intake memo written after a client interview and a short description of preliminary legal research. No further legal research is required.

For this case, draft

1. Legal Elements Charts (Charts 11B and 11C in Essential Lawyering Skills);
2. A chronology (Chart 12B in Essential Lawyering Skills); and a
3. Six-to-ten word story (tweet) about the case.
Intake Memo A

[You just interviewed a new client, Alexander Samos. This memo contains your notes from that
interview. You are now reviewing your notes alone in your office.]

CLIENT INTAKE MEMORANDUM

CLIENT: Alexander Samos

ADDRESS: 615 Lombard
Oakdale

DATE OF INTERVIEW: February 3, 2009

LEGAL PROBLEM: Problem with purchase of used car

Eight months ago, Alexander Samos, a 37 year old electrician with an eighth-grade
education, went to the Midtown Chevrolet dealership and told the salesman, Edward
Warren, that he was looking for a used vehicle. Mr. Samos, whose second language is
English, had not dealt with the dealership on any prior occasion and called his decision to
look at its cars "spur of the moment." After discussing available cars and financing with
Warren, Mr. Samos took a Nissan Altima (different than the one he eventually purchased)
home for the night as a test drive.

The following day, Mr. Samos returned the car to the dealership and began
discussions about the 2005 Nissan Altima that he ultimately purchased. Warren told him
that the car was "executive driven" and that it was a "great used car." The sticker stated,
"2005 NISSAN ALTIMA, 4 DOOR GLE $14,500. AS IS–NO WARRANTY."

Upon his decision to purchase the Altima, Warren prepared a number of
documents for Mr. Samos to sign. These documents, which Mr. Samos shows you, include
a retail installment contract with a purchase price of $13,999; an odometer disclosure form
showing 31,248 miles; a handwritten vehicle sales order; a typed vehicle sales order; and
a certificate of title. The retail installment contract contains the typed word "used" in a
box designated "New or Used." Both vehicle sales orders contain checks in the "Used" box
of a section which also contains boxes titled "New" and "Demo." None of these
documents make reference to the car's prior owner. The front of the certificate of title
lists "ENTERPRISE AUTO RENTAL OF INDIANAPOLIS" as the original owner. The back
of this title contains a section labeled "First Re-Assignment By Registered Dealer Only" under which Midtown Chevrolet is listed as dealer and Alexander Stamos is listed as purchaser. Mr. Samos admits signing all the papers. Although Mr. Samos does not remember in detail each form he signed, he did recall that he was neither pressured nor rushed to complete the paperwork.

Mr. Samos admits having driven the Altima since its purchase without any serious malfunction. But recently, his friend looked closely at the certificate of title and found that the previous owner was an automobile rental company. Mr. Samos states that he interpreted Warren’s statement "executive driven" to mean that the car had previously been used by high ranking employees of either Nissan or Midtown Chevrolet and feels that he was deceived into purchasing the car because he relied on that statement. Mr. Samos admits he knew he was purchasing a used car, but did not know, nor did he inquire further, about the Altima's history or previous owner.

Mr. Samos wants any damages to which he is entitled.

**PRELIMINARY LEGAL RESEARCH**

Fraud has been said to comprise anything calculated to deceive and may consist of a single act, a single suppression of truth, suggestion of falsity, or direct falsehood, innuendo, look or gesture. The elements of common law fraud are (1) false statement of material fact; (2) defendant's knowledge that the statement was false; (3) defendant's intent that the statement induce the plaintiff to act; (4) plaintiff's reliance on the statement; and (5) plaintiff's damages resulting from reliance on the statement.

CLIENT INTAKE MEMORANDUM

CLIENT: Ralph Kuzinsky

ADDRESS: 1251 Ridgewood
Andover

DATE OF INTERVIEW: April 27, 2009

LEGAL PROBLEM: State Farm Insurance Co.’s Refusal to Pay Claim on Homeowner Policy

Ralph Kuzinsky (“RK”) is a 35-year old electrical engineer who has been employed at Midwest Utilities since 2005. He lives with his wife Sylvia Vondrasek (a high school English teacher) at the above address. They moved to the area for his job at Midwest Utilities. They have no children.

RK and his wife purchased their home at the above address in July, 2007. Before closing on the house, he contacted State Farm Insurance Co. to purchase homeowners’ insurance. He called a State Farm agent, Glen Williams (recommended by a friend) to inquire about obtaining homeowners’ insurance. Williams told RK that it would take a long time to explain the policy itself, but indicated that he would send RK a brochure which would show exactly what the policy covered. Williams recommended the "All-Risk" policy and said it was the "Cadillac of the line” and that it would cover everything and insure against all risks.

RK showed me a copy of the attached brochure which he said he received from Williams. RK examined the brochure and, believing that the “All-Risk Policy” provided the coverage he needed, he called Williams and asked him to issue an “All-Risk Policy” for his house.

RK remembers receiving a transmittal sheet from Williams for the insurance in the mail a few weeks later, but denies ever receiving a copy of the policy. For that reason, he
never read the policy. RK says he never called Williams to request a copy of the policy because he did not think insurance companies typically sent policies to purchasers. He renewed the coverage in 2008.

In early March of this year, water leaked through the walls of the basement and sump pump pit, causing the sump pump to stop and allowing water to accumulate in the basement. The total of the damages was $10,820. Immediately after the incident, RK called Williams. Williams told him that he had in fact sent RK a copy of the policy along with the transmittal letter. RK submitted a claim for the damages caused by the leak, but State Farm sent him a letter denying coverage asserting that the policy excluded that type of water damage. At that point, RK called Williams for a copy of the policy, and Williams sent a copy to him.

RK showed me the policy sent to him by Williams. It excludes loss from “Water Damage” which is defined as

a. flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;
b. water which backs up through sewers or drains, or
c. natural water below the surface of the ground, including water which exerts pressure on, or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure.

RK believes State Farm owes him the full amount of the claim. He wants to know the range of his options.

**PRELIMINARY LEGAL RESEARCH**

An insurer may be estopped to rely on an exclusionary clause in the insurance policy where descriptive brochures or solicitation materials distributed by the insurer misrepresent coverage. The estoppel concept as applied to insurance contracts is premised on the rationale that, where the insurer’s representations, through its agents or advertising materials, are intended to and do induce a person to secure a certain policy, the insurance company should be bound by its representations and the reasonable expectations of coverage created thereby. The language used by the insurer should be considered in light of the natural response that language would evoke in any prospective policyholder.

Fact Exercise 7

Circumstantial Evidence

Notes for the Teacher

For this exercise, use the same case you assigned in Fact Exercise 3.

The exercise appears on the page after this one.
Fact Exercise 7

Circumstantial Evidence Exercise

While in our storytelling classes we focused on “macro” factual theory (presenting an overall persuasive story), in this class we will concentrate on “micro” factual theory: the examination of credibility of individual items of evidence and particular witnesses. We will discuss this issue in the context of methods for developing persuasive circumstantial evidence.

In this class, you will conduct simulated closing arguments in [case name]. Attached is the transcript of defendant’s case-in-chief. Your closing argument should be based on the entire transcript. Your argument should focus on the facts, rather than the law. Concentrate on credibility issues for particular items of evidence and for particular witnesses. Your argument will be made to a jury.

Students 7 through 12 on the attached list should each prepare an argument for plaintiff and students 1 through 6 should prepare arguments in response for defendant. Each student will be given 8 minutes to make his/her argument; plaintiff’s counsel may reserve a portion of that time for rebuttal.
Fact Exercise 8

Development of Additional Facts

Notes for the Teacher

The exercise appears on the two pages after this one. For this exercise, the case material can be an actual clinic case or a simulation. Either Intake Memos A or B included in Fact Exercise 6 can be used for a simulation.

In a first-year class, we recommend modifying the exercise to an interview of the opposing party. The specific purpose of this exercise is examine methods for developing additional facts in a case, not to focus on deposition techniques. In a clinical setting, however, this is a good exercise for preparing students for conducting and defending depositions.
Fact Exercise 8

Development of Additional Facts Exercise

In this class, we will discuss methods for identifying additional evidence through simulated depositions. One student will conduct the deposition, and the other will defend the deponent.

In one of your cases [or in a simulated case], select one of these purposes for a deposition of the opponent and draft an outline for questions:

1. Identify a significant episode on your chronology and develop areas of examination to explore the contextual facts of the episode and support your client’s versions of the events;

2. Identify a contested issue on your Legal Elements or Chronology Charts and develop areas of questioning to identify other sources of proof that might corroborate your client’s story; or

3. Identify a hotly contested element in the case and existing circumstantial evidence that supports either your client’s or your adversary’s position on that element. Then state the inference you draw from this evidence and the generalization that underlies that inference. Brainstorming the “except whens” and “especially whens,” consider what facts would support your existing circumstantial evidence or undermine your adversary’s circumstantial evidence.

Select a potential deponent from your opponent’s side to examine in regard to this evidence and prepare approximately 10 minutes of questions to achieve your purpose (you should ignore the introductory deposition litany or questions concerning topics other the element or evidence you have selected). Your goal is either to develop additional contextual facts, corroborating sources, or circumstantial evidence that will support


**a particular element.** Don’t try to cover too much material; your emphasis should be on thoroughness of questioning, not on the number of areas covered.

In class, we will conduct the depositions. One of the instructors will be the deponent.

By noon, [date], *please provide me* with a memo, setting forth your goals and areas for questioning.

In preparing your deposition outline, consider

1. How you want to use the deposition answers for further fact investigation, at trial, or in a negotiation;

2. Methods for exhausting a subject matter area or probing the witness’ story;

3. Methods for supporting your generalizations about existing circumstantial evidence; and

4. Similarities/differences between client interviewing and depositions.
Fact Exercise 9

Fact Analysis and the Rules of Evidence

Notes for the Teacher

The exercise appears on the page after this one.

This exercise is only appropriate for clinical or simulation classes in which the students have completed the basic Evidence course. Besides giving students some insight into the relationship of the rules of evidence to fact analysis, this exercise gives students an opportunity to apply concretely the evidentiary rules. Indeed, after this exercise, many students express the sentiment, “Now, I finally understand the rules of evidence!”
Fact Exercise 9

Fact Analysis and Rules of Evidence Exercise

In our past classes, we have discussed preparing your factual theory of the case: creating a persuasive story and developing inferences from known facts. Facts only have significance in a case, however, if they can be admitted into evidence. In developing your factual theory, therefore, you must consider whether you can prove each of your items of evidence at trial. In this class, we will focus on the issues raised by these problems of proof.

To facilitate our discussion of these issues, each of you should draft an affidavit in response to a motion for summary judgment in one of your cases. First, choose one cause of action in your case and list on a single page all the legal elements you (or, if we represent the defendant, the plaintiff) must prove to establish the prima facie case for that cause of action. Complete the Legal Elements Chart (Chart 11C) for this claim. Then, assume that your opponent has moved for summary judgment on that cause of action. Select a contested element of the cause of action and draft an affidavit for your client presenting evidence on that element.

In that affidavit, attempt to present evidence of a conversation or the contents of a document in regard to the contested element. In drafting the affidavit, consider the requirements that affidavits shall be by a person having personal knowledge of the facts and should comply with the rules of evidence. Do not be concerned about the precise form of the affidavit (I have attached a general form for your use). An affidavit is simply a written statement of testimony under oath. Concentrate on developing an adequate evidentiary foundation for the conversation or document.

In class, each of you will argue the legal sufficiency of your affidavit. For purposes of this exercise, assume that the Federal Rules of Evidence apply.
Fact Exercise 10

Fact Investigation in the Public Domain

Notes for the Teacher

This exercise appears on the seven pages after this one.

This exercise gives students the opportunity to investigate facts using the Internet, electronic databases, such as LEXIS and WESTLAW, and print records in the public domain. While this exercise has been used in a course devoted entirely to Fact Analysis and Investigation, it can also be assigned in a clinical course in which the caseload requires investigation of facts available in the public domain. The purpose of this exercise is to demonstrate that fact investigation, especially using electronic media, requires more than a quick Google search. This exercise also requires students to focus their investigation on the applicable legal standards and to assess the credibility of the sources they identify. For these reasons, we suggest that before assigning this exercise, instructors, preferably with the assistance of a reference librarian, introduce students to the different resources available for systematic fact investigation and strategic methods for the investigation process.

While instructors can draft problems for this exercise in their subject-matter area, they can also use the problems attached to the exercise. These problems are in three different subject-matter areas: political asylum, tax counseling, and criminal law. Such diverse problems are useful in highlighting the point that fact investigation is as important in transactional work as litigation.

The instructor can either use this exercise as an out-of-class assignment or can assist students in class while they investigate these problems on their computers.
Fact Exercise 10

Fact Investigation in the Public Domain

Attached are three different problems which require investigation on the Internet, electronic databases, and/or print records in the public domain. Select one of the exercises and draft the memo requested. No further legal research is required. Please provide precise citations to all the source material you use in your memos and give a detailed play-by-play of the process you followed in finding these materials.

Reading: Essential Lawyering Skills (5th ed.), Chapter 16
Problem A

You are an attorney in a legal services office which specializes in political asylum cases. Your client is a gay man from Mali who states that he has suffered past persecution on account of his homosexuality. [Note: under applicable caselaw, gay men can qualify as a particular social group for the refugee definition.] He comes from a strict Muslim country, and his father beat him savagely because he thought the client was too feminine. These beatings took place both in their house and in public. The client also says that the father killed one of his older brothers who was also gay. The client says he was attacked in school regularly for being gay and that he was attacked on the street for being gay.

Draft a memo for your supervisor providing evidence to support your client’s claim providing sources for your information.

Applicable Law

Immigration and Naturalization Act

§101(a)(42)

The term "refugee" means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

§ 208 Asylum

(b) Conditions for granting asylum. (1) In general. (A) Eligibility. The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary
of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

(B) Burden of proof. (I) In general. The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A). To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden. The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination. Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.
Problem B

You are in private practice and represent the Rapkin Foundation, a private family foundation. Your client is publishing a Request for Proposals (for charitable grants from your foundation) which it would like to send to five tax-exempt charities. Because your client is a private foundation (as opposed to a public charity), it must spend $1 million of foundation funds before the end of the year or be liable to pay an otherwise avoidable excise tax.

Your client has established the following guidelines for grant recipients:

1. The recipient must be a public charity (as opposed to a private foundation);
2. The grant must be for the purpose of either (i) enhancing the arts or (ii) furthering medical research;
3. The Trustees are concerned about the issue of excessive salaries in the non-profit world and will not grant to an organization in which any executive earns more than $450,000;
4. No more than twenty percent (20%) of the organization's annual budget may be devoted to fundraising costs; and
5. The recipient must be organized in and be operated within the United States. Priority will be given to organizations operating within New York City, the home of the foundation's founder.

Because of the tax consequences of this matter, your client has asked you to identify at least five organizations meeting these criteria to which invitations might be sent.

Draft a letter to your client identifying possible organizations to invite to apply for grants, describing the relevant information about these them, and providing citations to the sources of your information.
Applicable Law

Internal Revenue Code

§ 501. Exemption from tax on corporations, certain trusts, etc.

(a) Exemption from taxation.--An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

....

(c) List of exempt organizations.--The following organizations are referred to in subsection (a):

....

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

§ 4942. Taxes on failure to distribute income

1. Initial tax

There is hereby imposed on the undistributed income of a private foundation for any taxable year, which has not been distributed before the first day of the second (or any succeeding) taxable year following such taxable year (if such first day falls within the taxable period), a tax equal to 30 percent of the amount of such income remaining undistributed at the beginning of such second (or succeeding) taxable year.
**Problem C**

As a new attorney at the Public Defender’s office you are the second chair in a second-degree burglary case. The District Attorney has provided your office with statements from the complainant and witnesses. The complainant identifies your client as the person whom she saw in her bedroom around 10:30 p.m. just before she screamed, prompting the intruder to flee. The complainant’s brother, who had been sitting in the complainant’s living room when the complainant screamed, identified your client as the intruder and says he chased the intruder through the neighborhood streets. Finally, a neighbor states that he had seen your client in the area earlier in the day and had joined the complainant’s brother’s chase, losing sight of defendant only when he ran into an alley.

Your client tells you that he was in the neighborhood of the burglary earlier that day but drove to Bridgeport, CT around 9:00 p.m. day to visit his girl friend. She wasn’t at home so he drove back around 1:00 a.m. He remembers using his cell phone in Bridgeport to call his mother and friends.

Your co-counsel on the case wants to know if you can identify some possible expert witnesses who can testify from the cell phone company’s records that your client was in Bridgeport at the time of the incident. She wants to know the qualifications of the experts you have identified, what possible methods could be proffered by the expert to pinpoint your client’s location at the time of the incident, and whether those theories are generally accepted in the scientific community.

Draft a memo responding to your co-counsel’s questions providing sources for all of your information.
Applicable Law

*People v. Ostro, 67 State 2d 819, (1986)*

The order of the Appellate Court should be reversed, and a new trial ordered.

Defendant was convicted of stabbing a man to death in a parking lot on West 39th Street, near 9th Avenue, in Andover, based upon the testimony of a single eyewitness. At trial, defendant testified that, at the time that the crime was committed, he was 11 blocks away, on West 50th Street, and that, earlier in the evening he had been walking on 8th Avenue, past 39th Street, one-half block from the parking lot, but was never closer than that to the crime scene. The trial court denied defendant's request for an alibi charge, without explanation.

This was error. As we noted in *People v Mintz*, "If the proof as to an alibi raises a reasonable doubt in the minds of the jury as to whether the accused was present at the place and time where and when the crime was committed, the accused is entitled to have the defense fairly treated like any other defense and is not obliged to establish that it was impossible for him to commit the act charged. If under the evidence tending, if true, to prove an alibi, it may have been possible for the defendant to have committed the crime, it is still for the jury to determine whether, if the evidence is true, he availed himself of the possibility it afforded. If the proof as to an alibi, when taken into consideration with all the other evidence, raises a reasonable doubt as to defendant's guilt, he is entitled to an acquittal." Inasmuch as the gist of the defendant's testimony was that he was elsewhere, and thus someone else committed to the crime, he was entitled to an alibi charge in accordance with these principles.
Fact Exercise 11
Investigating Public Records

Notes for the Teacher

This exercise appears on the page after this one.

This exercise requires students to draft requests for public records from government agencies in a simulated case. Public records requests – either pursuant to a state Open Records Act or Freedom of Information Law or the federal Freedom of Information Act – are important tools for fact investigation in such diverse areas as criminal defense, legislative advocacy, or community development work. Especially in transactional work or in cases in which discovery is unavailable or the client’s fact investigation budget is limited, the use of such statutes can be essential for obtaining all kinds of public records.

This exercise gives students the opportunity to read the applicable public requests statute closely to identify its procedural requirements and to understand both the benefits and limitations of these laws. It also encourages students to consider the different kinds of public records which may exist to help in establishing a claim or defense. Finally, it raises important drafting issues, requiring students to frame their requests in ways that elicit full disclosure without inviting “overly burdensome” objections.

While this exercise uses the eviction case set forth in Negotiation Assignment 3, it can be adapted to any simulated or actual case in an instructor’s subject matter area.
Fact Exercise 11
Investigating Public Records

As a student in a law school clinic, you represent Grace Barry in an eviction case. The facts of the case are set forth in Negotiation Assignment 3. Because formal discovery is not allowed under the court rules, your supervisor wants you to seek government documents under [your state’s open records statute] or the federal Freedom of Information Act, 5 U.S.C. §552. Singleton is located in [state].

Please draft a request for documents to one of the following agencies:

1. Singleton Housing Authority;
2. Singleton Police Department; or

Using the analysis described in chapter 15 of Essential Lawyering Skills, identify additional contextual facts, corroborating sources, or circumstantial evidence that you may be able to obtain from the selected agency to support a particular element of your client’s defense or fill in a gap in your chronology.

When drafting your requests, make sure to comply with the requirements of the applicable statutes and write questions that are relevant to the particular legal theories of the case. Consider how the agency might try to evade full disclosure. In addition to the letter, please draft a short memo, explaining why you are requesting each document.

Readings: Essential Lawyering Skills (5th ed.), Chapter 15 and §16.3.2
Fact Analysis Assignments
(from the textbook’s website)

On the following pages are copies of the Fact Analysis Assignments on the textbook’s website. A description of the case used for these assignments is on pages 80–81.

1. Chronology Model
2. Legal Elements Model (Town)
3. Legal Elements Model (Windsor)
Assume that you have just started a law school clinical course and have been assigned the case of your new client, the Oakhurst Tenants Association. The date is May 10, 2006, and the leases for the tenants in the association terminate on May 31.

Your supervisor has asked you to develop a chronology for the case. Using the case materials and the following chart, draft a chronology.

Reading: *Essential Lawyering Skills* (5th ed.), Chapter 12

<table>
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<th>Episode</th>
<th>Source</th>
<th>Gaps/Internal Consistency</th>
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CASE FILE: OAKHURST TENANTS ASSOCIATION

Fact Analysis Assignment 2: Legal Elements Model
(from the textbook’s website)
(Town)

Assume that you have just started a law school clinical course and have been assigned the case of your new client, the Oakhurst Tenants Association. The date is May 10, 2006, and the leases for the tenants in the association terminate on May 31.

Your supervisor has asked you to consider the viability of a claim by the tenants against the Town under the Fair Housing Act. Using the case materials and the following chart, develop a legal elements chart for such a claim.

Reading: Essential Lawyering Skills (5th ed.), Chapter 11

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<th>Elements</th>
<th>Factual Propositions</th>
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Assume that you have just started a law school clinical course and have been assigned the case of your new client, the Oakhurst Tenants Association. The date is May 10, 2006, and the leases for the tenants in the association terminate on May 31.

Your supervisor has asked you to consider the viability of a claim by the tenants against Windsor under the Human Rights Law. Using the case materials and the following chart, develop a legal elements chart for such a claim.

Reading: *Essential Lawyering Skills* (5th ed.), Chapter 11.

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Part IV

Counseling

Chapters 18-22

Comments on the Text

The Lawyer-Client Relationship in Counseling: Perhaps the hottest issue in counseling — and one where skills teaching and professional responsibility teaching conduct parallel debates — is the question of how directive our advice to clients should be. The traditional, paternalistic view was that a lawyer should “control” the client. The reaction to that was the client-centered counseling first espoused by David Binder and Susan Price (see page 22 in the textbook). In its purest form, expressed in the first Binder and Price book and less so in their later book (again, see page 22 in the text), client-centered counseling presents options to the client without even a hint of the lawyer’s opinion about which option is best. More recently, Deborah Rhode, David Luban, William Simon, and others have argued that lawyers should counsel directly, especially where clients contemplate doing things that their lawyers find less than moral. Thomas Shaffer has tried to carve out a middle ground where a lawyer

Counseling

will raise moral issues in counseling without being directive about it. The Shaffer and Rhode/Luban/Simon schools are vibrant in the field of professional responsibility. In skills teaching — especially in clinical teaching, where clients tend to be impoverished — those schools of thought are less well accepted, and various forms of client-centered counseling have more respectability.

In the text, we take no position on this. We believe that all three schools are right — and all of them are wrong. It is wrong to be purely client-centered with a powerful client who wants to do terrible things. And lawyers don’t have the wisdom needed to tell all clients what is moral and what is not. There are times when a lawyer should be humble, and there are times when a lawyer should speak truth to a powerful client.

An effective lawyer should be able to counsel in any of several different modes — to counsel without any hint of the lawyer’s preferences; to counsel while stating preferences, though modestly; to counsel while raising moral issues in a dialogue; or to counsel while telling the client that certain options are immoral and the lawyer will not tolerate them. Each of these is appropriate in some situations and not in others, and an effective lawyer can identify the right mode of counseling for the situation and for the client.


Transaction Costs, Expected Value, the Time Value of Money, and the Effect of Tax (pages 262–266 in the textbook): Most students do not realize that doing or changing anything costs money (transaction costs); that whenever a future event is uncertain, the event can be valued accurately only by multiplying the gain or loss by the likelihood of the event (expected value); that future money is worth less than the same amount of money now (the time value of money); and that taxable events are worth less than untaxed events (the effect of tax). Trying to teach this material is not easy. Some students are allergic to math, and most students would rather make legal arguments than math calculations. But lawyers who do not understand this material risk malpractice. If you have too many other things to teach in a limited amount of time, these pages are certainly candidates for omission. If you do teach them, we have two suggestions.


First, you might devise a classroom exercise, in a kind of litigation your students with which your students will be familiar, comparing a settlement offer with the prospect of trial. The textbook does this a little, but students understand it better if you have them work through a different example in class.

Second, if any of your students have business backgrounds, you might call on them while leading the class through the exercise. When successful answers come from the class, students seem to feel better about this material.

Some of these concepts come up again with structured settlements (pages 329–331 in the textbook). In a simulation negotiation course, we have often seen students representing plaintiffs harm their (simulated) clients by agreeing to structured settlements that the students did not understand.

**Obstructionist Counseling (pages 273-277 in the textbook):** Neumann has used the Ebola situation (textbook pages 275–277) as a counseling assignment, and most students told the Army not to get involved, even if the result of inaction could be to infect the neighborhood with Ebola. That reaction is troubling, for the reasons described in the textbook.

**How to Teach Counseling**

We call in-class role-plays exercises and out-of-class work assignments. Counseling exercises are explained below. Counseling assignments appear beginning on page 134.

**Counseling Exercises**

You can use two classroom counseling exercises that do not require any advance preparation by students.

1. **Developing options before meeting with the client:** The teacher chooses a situation, well reported in the media, where somebody has had to make a difficult decision and where the public has not been told the options that person considered before deciding. The class is told that this person is their client, and they are asked as a group to develop and evaluate all the options that are worth presenting to the client.

   For example, during 1998 and early 1999 one of the authors used the decision President Clinton had to make in January of 1998 right after his deposition in the Paula Jones
case. The deposition occurred on a Saturday, and the now-famous conversation with Betty Currie happened the following day. On Tuesday, a political advisor (and non-lawyer) named Dick Morris was reporting to Clinton the results of an overnight poll suggesting that the public would forgive adultery but not perjury. (So much for the reliability of overnight polls.) Somewhere between the conversation with Currie and the one with Morris, Clinton had realized that he was in profound difficulty. Otherwise, the conversation with Morris would not have happened. It is hard to imagine that during those 48 hours he did not ask his lawyers to lay out the options available. Even a year afterward (January 1999), this was a challenging classroom exercise. The students had a year’s worth of hindsight, but they did not have the decades of professional experience available to Clinton’s lawyers. That’s almost an even trade. (Without knowing things that will probably never become public, it’s not fair to penalize Clinton’s lawyers for the decision he did make: clients do on occasion reject good advice.)

This example has become stale, however, and we are not recommending that you use it. In 1997, the same author used an exercise in which a prominent person has an extra-marital affair and later is told by the ex-paramour that a child was born as a result. The prominent person will suffer in obvious ways if this is true and if other people learn of it. What are the options? This version of the exercise later evolved into Counseling Assignment 2 on pages 144–152 of this teacher’s manual.

2. **Explaining the options to the client:** Pick a non-law subject about which you have special expertise. It might involve a hobby or a job you might have had before you went to law school. Imagine a situation in which someone would need to make a decision relying on your expertise. Describe the situation to the class and ask for a volunteer to role-play the person making the decision. (Make sure the volunteer doesn’t have the same kind of expertise you do.)

Then counsel that person in class, but make only some concessions to the fact that that person does not know as much as you do. Explain the options too quickly; use terms of art unnecessarily and define only some of them; and assume that the person being counseled knows things that they in fact do not know. This is what many students (and lawyers) will instinctively do anyway because too much of their time is spent talking to people whose knowledge level is the same as theirs.

When you are finished, ask the class to critique your work. (This has some morale benefit as well, because you have been and will be critiquing theirs.) Most students will quickly complain about the things you did wrong. Then ask how, if they had been the person being counseled, they would have wanted to be counseled. This is the point: to help students see counseling the way the client experiences it.
Counseling Assignments

Assignments are done by students outside of class — ideally on videotape. (Exercises, discussed on the preceding pages, are done in class.)

On the following pages are four counseling assignments.

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Counseling Assignments 3 and 4 (Dresser and Fahey) are more complex than the first two.

An additional counseling assignment appears on the textbook’s website and concerns the Oakhurst Tenants Association case (see page 173). A description of the case can be found on pages 80-81.

To give each student the opportunity to counsel a client and a taste of what clients experience while being counseled by lawyers, you need use only two assignments. (In each assignment, half the students role-play clients and the other half counsel them.)

In each assignment, a good counseling job can be accomplished in a 30 minute meeting with the client. The best teaching will happen if the meetings are videotaped and the teacher critiques each student individually after teacher and student have separately viewed the videotape (see Appendix A to this teacher’s manual, pages 299-314). The critique will be more focused if the teacher and student watch the videotape before — rather than during — the critique.

The student who role-played the client need not attend the critique. But it is a good idea to encourage this “client” to give feedback to the student who acted as lawyer. You could instruct the lawyer-student as follows:

You can learn a lot if the student who role-plays your client tells you frankly afterward how he or she experienced the counseling meeting. After you are out of role, please ask your client to explain how things went and what the client appreciated and did not appreciate (among the things you did) and what the client would have
appreciated (among the things you did not do). If one or both or you is about to run off to class, you might make an appointment to talk with the other student.

To teach students how to prepare to counsel, it’s a good idea to ask them to write a memo before meeting with the client. You might tell students something like this:

Your counseling memo should lay out the client’s options, their advantages and disadvantages, and their likelihood of success. It will require some legal research. You can use any resource you want except discussion with a member of the bar. Check the Model Rules of Professional Conduct to learn your ethical obligations concerning issues that might occur while counseling this client. (If you foresee no ethical issues, you need not report on them in your counseling memo.) It will probably take five to ten pages, doublespaced, to resolve the counseling issues, but these are not a required minimum and maximum. You need not describe in the memo how you will explain the alternatives to the client.
Counseling Assignment 1

Pat Bronski
(the Sgt. Pepper tapes)

Notes for the Teacher

The client’s Uncle George told the client to take possession of valuable tape recordings of the Beatles that had been in the trunk of the uncle’s car. The next day, the uncle died. The client might or might not be the owner of these tapes. One recording company is already pressuring the client to sell them. The client would like to make money out of this situation and does not know what to do.

The assignment consists of three memos, which are reproduced on the following pages. The first (addressed to “all students”) goes both to those who will act as lawyers and those who will role-play Pat Bronski. The second goes only to students who will role-play Pat Bronski. The third goes only to students who will act as lawyers.

The lawyer is confronted with four problems.

First, the client might not actually own the tapes. Students who remember the law of gifts from first-year Property are tempted to say that although there is some ambiguity in the facts, the elements of a gift are — or are not — present. But that is treating the client’s facts as though they were an exam question in Property. Realistically, it will be very difficult for the client to prove the elements of a gift, which is what the client will have to do. There were no witnesses to Uncle George’s conversation with the client. And the client lied to Uncle George’s widow Felicia, who is also the executor of Uncle George’s estate, when the client denied knowledge of the tapes’ whereabouts. Given the value of the tapes, this will not make a good impression on a fact-finder if the issue is litigated.
(Because of the problem explained in the next two paragraphs, a good plan for action will find a way to convert Felicia from an adversary into an ally — which might not be easy, since she has been lied to by the client.)

The second problem is two-fold. First, somebody else might have superior rights to the contents of the tapes under copyright law. And second, the client almost certainly is prevented by trademark law from using the Beatles’ name in trade without the permission of the current owner of the trademark or service mark. (For a lot of reasons, it is an open question whether the sounds that Uncle George recorded were protected by copyright. In fact, the copyright variables here are so great that a student is solidly right if, after an hour or two in the library, the student says that it is extremely difficult to predict how the courts would treat this situation. The recordings were made without the knowledge of the authors of the work (the Beatles), in versions other than the ones later copyrighted, and before the compositions could be fixed in tangible form by the authors themselves. The recording was made in a foreign country at a time when sound recordings under U.S. law did not have the protection they do now and at a time when U.S. copyright was governed by a statute that was later superseded by a comprehensive recodification in 1978.)

But something else is absolutely clear: Whoever now owns the copyright to Sgt. Pepper can tie the client up in court for in a long and expensive lawsuit if the client tries to sell the tapes. And the Beatles’ name cannot be put on an album without permission from whoever now owns their trademark or service mark, assuming one exists. On the other hand, whoever has legitimate possession of the tapes can prevent the copyright and mark owners from making money from the tapes, simply by refusing to make them available for copying. A good plan for action will take advantage of this. The client, Felicia, and the copyright and mark owners can make the largest amount of money as quickly as possible if they do not fight about whose rights are more important. They can maximize their gain by cooperating, as soon as a negotiation among them establishes the proportions through which they will split up the profits. (Planning that negotiation is not part of this assignment. But the lawyer should offer it as an option to the client.)

The third problem is that the client might be prosecuted for theft. The circumstances through which the client gained possession of the tapes might look to the authorities like looting the assets of a person (Uncle George) who was at death’s door. But the authorities would probably intervene only if Felicia complains to them.

The fourth problem is a practical one. The negotiations with the copyright owner and the marketing of the tapes to a record company are jobs for a specialist in copyright or entertainment law (which exceedingly few students can claim to be). A wise general practitioner would recommend to the client that a specialist be brought in to collaborate in doing this work. Some careful students will think of this, but it’s not essential to doing a good job on the assignment.
TO: all students

RE: Pat Bronski

What Happened at the Initial Interview

The client's background, as explained in the initial interview: Pat Bronski is 24 years old and works as a flight attendant for Delta Airlines, earning $35,000 a year.

Pat Bronski's Uncle George was an assistant recording engineer for Sgt. Pepper's Lonely Hearts Club Band in the 1960's. To record the album took about 700 hours of studio time over four months because the Beatles were continually rewriting and rerecording. By the end, each song had changed enormously, and no one could remember the way the song had sounded the first time the Beatles played it.

Just before Uncle George died last year, he gave Pat Bronski about 20 hours of tape recordings from the Sgt. Pepper sessions. He told Bronski that he had brought his own tape recorder into the studio and made these recordings secretly.

Uncle George had a heart attack and was taken to Memorial Hospital. The next day, in the intensive care unit, he told Bronski that in the trunk of George's car, which was parked in his driveway, was a briefcase which Bronski should “take home and keep in a safe
Counseling

place.” Bronski said that the car was probably locked, and George said it wasn’t. Bronski drove to George’s home, opened the driver’s door, pulled the lever that opened the trunk, removed the briefcase, and drove away. It appeared that no one was inside George’s house at the time. The next day, George had another heart attack and died.

Sgt. Pepper was recorded at Abbey Road Studios in London. George had worked as a recording engineer for Capitol Records in Hollywood and moved to England when he married Bronski’s Aunt Felicia, a British citizen. They were still married and living together near the client’s home when Uncle George died. In the year since his death, Aunt Felicia has asked Bronski three or four times if Bronski knows where these tapes are, and Bronski has said no. Bronski does not know why George told Bronski to take the tapes, but Bronski assumes that if he had wanted Felicia to have the tapes, he would not have told Bronski to take them away.

The problem: Bronski listened to the tapes and did not like them. The music seemed harsh. Bronski likes Cowboy Junkies, Emmy Lou Harris, and the kind of country music that does not get played much on the radio.

Two weeks ago, Bronski worked a Delta flight from New York to Tokyo. Bronski got into a conversation with a passenger who turned out to be an executive with Akagi, a Japanese recording company that does business world-wide. Bronski mentioned Uncle George’s tapes, and the executive wrote down Bronski’s name and address.

Last week, two Akagi employees knocked on Bronski’s apartment door in New York and asked to hear the tapes. They seemed to be trying to figure out if the tapes were what Uncle George had said they were. When they were satisfied, they offered Bronski $25,000 for them.

The Akagi people offered Bronski a contract to sign and a check for $25,000. Bronski nearly signed but thought it would be better to consult a lawyer first. The Akagi people tried very hard to persuade Bronski to sign the contract, accept the check, and turn over the tapes on the spot. Finally, they gave up and asked Bronski to call them with a decision as soon as possible.

Two days later (late last week), Bronski told all this to the lawyer who is about to counsel Bronski on what to do. The lawyer advised Bronski not to discuss this directly with Akagi, and that if the Akagi people called again to tell them to contact the lawyer.
Before the Beatles recorded *Sgt. Pepper* in 1967, nearly all rock songs were 2½ to 3½ minutes long and very simply organized. The songs were short so that they could fit on the small records — called “singles” or “45’s” — that had one song on each side and a big hole in the middle. An album was just a collection of songs that had already or could have been released as singles. Put another way, an album was really six singles (twelve songs) combined on one long-playing record. At the time, all rock music was a variation in one way or another on a very short and simple formula.

In the year or two before *Sgt. Pepper* was released, some bands began to break out of this mold. Some songs were too long to be issued on singles, and some were structured in more complicated ways. But it was *Sgt. Pepper* that revolutionized rock music. *Sgt. Pepper* was the first record that was itself an unrepeatable performance. It was a studio creation that could not be duplicated on stage. It was also a unified piece of art divided into songs, rather than a collection of songs that coincidentally happened to be on the same album. (In that way, it was like classical music — for example a symphony or concerto divided into movements.) And the songs were structured in new and strange ways. People sat around for hours trying to find everything that was “hidden” in the music. *Sgt. Pepper* started alternative rock and album-oriented rock, and it popularized acid rock. To this day, it nearly always wins when pollsters ask people to name the best or most influential rock album ever made. It would be understatement to say that George’s tapes are of enormous historical value.

The lawyer has listened to the tapes. The sound quality is excellent, and the lawyer recognizes the voices of Paul and Ringo. The other voices seem authentic. The lawyer has no opinion about the music.

**Billing:** Bronski signed a retainer agreement for a $175 hourly rate and gave the lawyer a check for $2,000.
TO: students role-playing Pat Bronski

Additional Facts for the Client

Your lawyer is not aware of the contents of this memo. You can decide whether to share them with the lawyer.

The Akagi people have called you every two or three days since they met with you. They ask what they can do to help you agree to sell them the tapes. You say that you do not know yet and hang up. You refused to talk specifics with Akagi. But before you tell Akagi to deal with you through your lawyer, you want to hear what advice the lawyer will give you. You want to hear the lawyer’s plan for dealing with this situation before you let the lawyer negotiate on your behalf.

If you can get $25,000 for these tapes, that would be wonderful. You’ll take as much as you can get. But taking big risks here makes you nervous. For example, you would rather have a 100% chance of getting $25,000 than a 50% chance of getting $75,000 because that is also a 50% chance of getting $0.

George was your father’s brother.
TO: lawyers for Pat Bronski

Additional Facts for Lawyers

Your client is not aware of the contents of this memo. You can decide whether to share them with the client.

You have telephoned four different acquaintances in the music industry. You did not tell them about Bronski or the tapes, but you asked about Sgt. Pepper and its market value today. From what you were told, you have concluded the following:

The Sgt. Pepper album that was released in 1967 continues to sell today as a CD. Sales are steady but not brisk.

Bronski’s tapes, however, might be another matter. Millions of now-aging baby boomers today remember Sgt. Pepper as a momentous event that signalled a big change in popular culture. To hear the album’s early development — for example, an embryonic Day in the Life or Lucy in the Sky with Diamonds that are very different from what the songs eventually became — would be a revelation. And now that all these baby boomers are hitting late middle-age and are suffering from a nostalgia that younger people find tedious, there is probably a huge market for the tapes made by Pat Bronski’s uncle.

You suspect that if the tapes are truly Bronski’s property, they can be sold for far more than $25,000. But because the tapes are unique, their value is difficult to estimate.

The Beatles set up a company called Apple Corp. to handle their copyrights and other intellectual property. At one time, Apple Corp. owned the copyright to the 1967
Sgt. Pepper album. You do not know whether Apple still owns it, or whether it has been sold to another company.

It also appears that one or more of the Beatles have registered a trademark or service mark to prevent others from exploiting the name or image of group or of an individual Beatle. If a trademark or service mark has been registered, no one can use it in commerce without permission of the mark’s owner. You have asked a trademark search firm in Washington to check the registrations in the Patent and Trademark Office to be sure, and you have not yet been informed of the result. But your acquaintances in the music industry tell you that they assume the existence of a registered mark because the only time the Beatles’ name seems to be used in trade is in connection with their albums and movies, and because it would be an easy image to exploit profitably (using a Ringo look-alike in a commercial, for example).

You have checked the files in the local probate court. George did not have a will. Felicia has been appointed the administrator of his estate. Under state law, she is the only beneficiary of that estate. (Whatever George owned at the time of her death will become Felicia’s property after the estate goes through the process of probate.)

By the time you meet with the client again, you will have spent 9.5 hours on this matter.
Notes for the Teacher

The client has been approached by a young man claiming to be the client’s natural son who was adopted and raised by others. The client in fact did give up a baby for adoption around the time this young man would have been born, but the client does not know whether the two are the same person. If this were to become public, it would hurt the client politically, and the client might lose an inheritance.

The assignment consists of three memos, which are reproduced on the following pages. The first (addressed to “all students”) goes both to those who will act as lawyers and those who will role-play Sandy Rawlins. The second goes only to students who will role-play Sandy Rawlins. The third goes only to students who will act as lawyers.

There are four problems here:

First, is the client really the parent of this young man? DNA testing will reveal the answer, but a lab employee asked to test DNA for this purpose could easily recognize the client’s name, after which we should not be surprised to read about it in the newspapers. A student who predicts this problem and suggests a way of preventing it shows good practical judgment. One way is to construct a situation in which only one or two medical people will know the client’s identity, and they will have a direct relationship with the client creating a duty of confidentiality, the violation of which will be malpractice.
Second, if the client is the parent, what will the client want to do about it? The client seems both concerned and disconnected at the same time. There is some risk that the client might later regret not doing something parent-like soon after the young man came forward. The young man will certainly remember the client’s response, and it may define their relationship afterward. At the same time, the client has espoused strong views about family responsibility. If the client fails to satisfy the client’s own principles, there may be a later feeling of remorse. The legal issues here are only in the background, but this is the sort of counseling that clients often need and lawyers ought to know how to do.

Third, there is political risk to the client if this situation becomes public knowledge. Student responses to this will range from the purely legal (get Beck to sign a confidentiality agreement) to the creatively strategic (tell the voters now). The purely legal may be strategically self-defeating: if Beck signs and breaks a confidentiality agreement, Rawlins has no real remedy, and the confidentiality agreement could alienate the public more than anything else. This might be a good opportunity to talk about how narrowly technical lawyering can cause more harm than good when the lawyer ignores the big picture.

Fourth, the client fears being written out of an aunt’s will if the aunt ever finds out. Maybe the client is right and maybe the client is wrong. One of the insights the lawyer can provide is that the way the client handles the situation has a lot to do with the way people will react to it. A good student will want to brainstorm with the client to see whether the greater danger is in being honest with the aunt now or in hiding something that will only look worse if it comes out later. It may be hard to predict whether it ever will come out later. But a prudent lawyer should worry about the young man’s capacity to cause harm to the client if the young man becomes annoyed.
TO: all students

RE: Sandy Rawlins

What Happened at the Initial Interview

The client’s background, as explained in the initial interview: Sandy Rawlins is 41 years old and not married or engaged to be married. Rawlins has a home in Washington DC and another in Lincoln, Nebraska.

Rawlins is from the family that owns the Standard of Omaha insurance company. At the moment, that fortune is controlled by Rawlins's elderly Aunt Emily, whose will names Rawlins as sole heir. All Aunt Emily’s other relatives are more distant than Rawlins is. Rawlins and Aunt Emily are on good terms but not especially close. Aunt Emily is 84 years old. (She is really Rawlins’s great-aunt, but everyone in the family calls her Aunt Emily.)

Rawlins’s assets are the following: a home in Lincoln without a mortgage (Rawlins rents an apartment in Washington); two cars, one in each city; the furniture in both homes; and about $145,000 in savings. Rawlins’s income consists of a federal government salary, plus $50,000 a year from a trust Aunt Emily set up. At Aunt Emily’s death, the trust will dissolve and the principal will become Rawlins’s property.

Rawlins has never worked in the insurance industry and knows little about insurance. After graduating from college, Rawlins went to graduate school in political
science and worked in the Peace Corps for a few years. After leaving the Peace Corps, Rawlins was elected to the Nebraska state legislature at the age of 27.

After one term in the legislature, Rawlins was elected to Congress and is still serving there. Rawlins is known as a strong advocate of family values and for that reason is respected and trusted among the voters at home. Aunt Emily is pleased by Rawlins’s views and political career.

**The problem:** Right after Rawlins finished college, Rawlins took a one-week vacation in the Caribbean. This was a graduation gift from the family, and Rawlins went alone to a quiet resort on a small island. Rawlins was exhausted and wanted a few days to sit on the beach and read magazines. The person in the next room was of the opposite sex and also traveling alone. The two of them became friendly and made love once, on the night before Rawlins returned to the States. Neither of them was interested in a longer-term relationship, but a child was born nine months later and immediately given up for adoption.

Last week, a young man named Josh Beck telephoned Rawlins to say that he thinks Rawlins is his parent. Beck said that he is 19 years old and that he grew up in and still lives in Chicago. When he graduated from high school, his parents told him that he was adopted and that they do not know who his birth parents are. Beck went to a family friend who works in an adoption agency, and the friend, after checking some records, told Beck that one of his parents is Rawlins.

Rawlins asked Beck if he had contacted the other birth parent, and Beck said that he had not because he could not locate that person.

A few days after this conversation, Beck flew to Washington at Rawlins’s expenses, and the two spent a few hours together. Beck seemed like a nice and responsible person, but Rawlins did not feel that they really “hit it off.” There did not seem to be any natural emotional connection between them.

Beck told Rawlins that he was taking a year or two off before going to college. He was filling the time working at a construction job. Beck said that his adoptive father is a school teacher and his adoptive mother manages a grocery store. Rawlins got the impression that Beck loves his adoptive parents and is happy to have grown up in their home.
A child adopted at birth is given a new name, which is not disclosed to the birth parents. In almost all states, adoption records are sealed so that the child and adoptive parents cannot learn the identity of a birth parent and a birth parent cannot learn who the adoptive parents are or what the child's new name is.

If Rawlins were known to be the parent of an out-of-wedlock child, the consequences, politically and with Aunt Emily, might be disastrous. It is possible that the voters and Aunt Emily could forgive Rawlins. But Rawlins doubts that that is possible.

Beck did not ask Rawlins for money or anything else.

Rawlins has had no contact with the other parent since the birth and does not know where the other parent lives. Rawlins has no idea whether Josh Beck is the child who was born on that occasion. Rawlins says that there is a slight physical resemblance between Beck and Rawlins — enough to suggest the possibility of parentage but not enough to make it persuasive. The lawyer asked Rawlins to explain that, and Rawlins said, "If you saw him and me in a crowd, you would not assume that we are related. But if somebody pointed to us and raised the question of parent and child, you would say, 'Maybe.'"

Rawlins told the lawyer, "The voters in my district will be very distressed if this becomes public, and many of them will vote against me in the next election. I don’t know whether in a few years I’ll be sweeping floors or running a cash register for a living. All I know is how to legislate and win elections, and if Aunt Emily cuts me off, I’ll have nothing to fall back on." Rawlins wants to prevent anybody from finding out about Beck.

Rawlins also expressed some fear of not fulfilling a responsibility to Beck, but Rawlins did not seem to have a clear idea of what that responsibility might be. Rawlins asked the lawyer whether Rawlins should consider paying for Beck to go to college. Rawlins seemed to have a hard time imagining an emotional relationship with him.

**Billing:** Rawlins agreed to pay an hourly rate of $175 and paid a retainer of $5,000 by personal check.
TO: students role-playing Sandy Rawlins

Additional Facts for the Client

Your lawyer is not aware of the contents of this memo. You can decide whether to share them with the lawyer.

If the lawyer asks you about the person with whom you had the one-week fling in the Caribbean, you can give that person any name and description you want. Decide on these things before meeting with the lawyer so that you don’t have to make them up on the spot.

This assignment is written so that the client can be role-played by either a man or a woman. The circumstances of the birth will, of course, differ.

If you are female, this is what happened: You (Rawlins) got in touch with the father as soon as you realized you were pregnant. You and the father scraped up enough money for you to go to Chicago, give birth there, and immediately give the child up for adoption. You chose Chicago because it is a big city. (Make up details that you will find easy to remember. Do so before the meeting with the lawyer so that you don’t have to create a story on the spot.) The father was not present when the child was born, but both you and he signed papers agreeing to the adoption and giving up your rights as parents.

If you are male, this is what happened: You (Rawlins) were contacted by the mother as soon as she realized she was pregnant. You and the mother scraped up enough money for her to go to Chicago, give birth there, and immediately give the child up for adoption. Chicago was chosen because it is a big city. (Make up details that you will find
it easy to remember. Do so before the meeting with the lawyer so that you don’t have to create a story on the spot.) You were not present when the child was born, but both you and the mother signed papers agreeing to the adoption and giving up your rights as parents.

You are terrified of what your constituents might think. You are also terrified of Aunt Emily and her reaction if she ever finds out about this. And you are worried that at a moment when you would really be expected to act on your moral principles by taking responsibility as a parent, you might not.

You are wondering whether there is some way of finessing this, so that Josh keeps quiet, you pay some money, and this never gets in the press.

That’s assuming you are the parent. You are also troubled by not knowing whether you really are Josh’s parent.
TO: lawyers for Sandy Rawlins

Additional Facts for Lawyers

Your client is not aware of the contents of this memo. You can decide whether to share them with the client.

You had Josh Beck checked out privately. He is 19 and did graduate from high school in Chicago. His adoptive parents do work at the jobs Beck described. You turned up no arrest record, although if Beck had been arrested as a juvenile, those records would have been sealed and you would not have known of them.

At the initial client interview, you were struck by how Rawlins did not seem to realize that there is more to being a parent than paying support. You also are unsure whether Beck really is Rawlins’s child.

DNA testing can determine with near certainty whether Rawlins is the parent. But your experience in life has taught you that whenever an important or well-known person is involved, nothing that claims to be confidential is guaranteed to be that. If you hire a DNA testing service, there is a possibility that an employee might leak the results to a newspaper. It might be unlikely, but it’s still something to worry about.

In case you have not already taken the course in Wills, Trusts & Estates: Aunt Emily could have named other relatives or charities as her heirs but has not done so. She could write a new will at any time, giving Rawlins everything or nothing. You do not need to know anything else about wills for this assignment.
It is not unusual for a member of Congress who is defeated for reelection to stay in Washington and become a lobbyist, earning more money than while in office.

Professionally, you are skeptical about Beck’s story of persuading a friend to open up an adoption file. You suspect that in most places the friend could be fired for doing that.

At the time you have the scheduled meeting with the client, you will have spent ten and a half billable hours working on this matter.
Counseling Assignment 3

Terry Dresser

(drugs and family abuse)

Notes for the Teacher

Although the client has broken free of a drug habit, the client’s spouse is still addicted. As a result, the family’s business is being destroyed, and the spouse has been violent with the couple’s children. The client wants to know how to keep the children’s school from reporting the parents to the child protection authorities.

This assignment is based on the same facts as Client Interviewing Exercise 3 (see pages 43, 47-51 in this teacher’s manual). There is no reason why you can’t assign both the interviewing exercise and the counseling assignment. Just be sure that the students who act as lawyer here do so there as well, and that the students who role-play the client do the same there as well. But you do not need to assign both the interviewing exercise and the counseling assignment. You can use either without the other.

The assignment consists of three memos, which are reproduced on the following pages. The first (addressed to “all students”) goes both to those who will act as lawyers and those who will role-play Terry Dresser. The second goes only to students who will role-play Terry Dresser. The third goes only to students who will act as lawyers.

The client is in a crisis situation but seems to be in denial about it. This family is on the verge of losing all its assets, and it seems inevitable that the child welfare authorities will intervene because of the abuse. Once that happens, the spouse’s drug problem will become apparent, and the spouse will probably be arrested. There is even a risk that the client will be arrested because of the client’s own past abuse.

This client needs the kind of advice that makes all this clear, together with a plan for salvaging as much of the situation as possible. A good plan would offer reasonable prospects of keeping the children with the client and providing income soon. That probably means getting
the spouse out of the picture. Although the client resists that, the lawyer needs to persuade the client of all the risks created by the spouse’s continued presence in the home.

This assignment has opportunities for teaching fact analysis. Where is the spouse getting the drugs? Is there any income left to buy them with? Is the spouse using the family business to smuggle them into the country? (If that’s true, the spouse could be dealing with some extremely dangerous people and might already be under investigation by one police force or another.) What actually was destroying the business? (Students assume that it was neglect when there might have been worse causes.) Is there any way the client can revive the business without the spouse’s help?
TO: all students
RE: Terry Dresser

What Happened at the Initial Interview

Terry Dresser (the client) is married to Dale Dresser. They have two children and live in a prestigious suburb. The children are Jonah, age 10, and Ethan, age 8.

(Terry and Dale are names that either a man or a woman might have. If the student playing the client is female, Dale is her husband. If the student playing the client is male, Dale is his wife.)

The facts: For the past 12 years, the Dressers have operated an export/import business called Trans-Borders, Inc. A factory owner in Korea who needs a certain kind of factory machine tool might call someone like the Dressers, give them the specifications, and pay them a commission for locating such a tool in the United States, buying it on behalf of the Korean customer, and shipping it to Korea. The same thing can happen in reverse (a U.S. seller contacts them looking for a foreign buyer, or a foreign seller contacts them looking for a U.S. buyer). The Dressers are hardly ever in the presence of the customer and almost never see the object being bought or sold. They work by telephone, fax, e-mail, and Federal Express. The objects being bought and sold are usually large and heavy and arrive by ship or, in an emergency, by air. The Dresser’s offices are in the same prestigious suburb but not in their home. The business prospered until two years ago, when it faltered because the Dressers had begun ignoring the needs of their customers so that trade went elsewhere.

The Dressers’ personal adjusted gross income (from their 1040’s) was as follows in recent years:
Counseling

<table>
<thead>
<tr>
<th></th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>five years ago</td>
<td>$342,098</td>
</tr>
<tr>
<td>four years ago</td>
<td>$359,132</td>
</tr>
<tr>
<td>three years ago</td>
<td>$377,991</td>
</tr>
<tr>
<td>two years ago</td>
<td>$403,538</td>
</tr>
<tr>
<td>last year</td>
<td>$183,661</td>
</tr>
</tbody>
</table>

So far this year, income has continued to decline at a drastic rate.

The Dressers bought their present house three years ago for $865,000. Their mortgage payment is $4,200 a month, and their property taxes are $21,500 a year. They own a three-year-old Mercedes and a BMW bought new last year. The Mercedes was bought with cash, but the BMW was financed. The mortgage was last paid four months ago, and no loan payment on the BMW has been made in the last five months. The property taxes on the home are also in arrears; the client does know by how much. The BMW was repossessed last week, and the bank has threatened foreclosure on the home.

The Dressers tried cocaine for the first time last year, and both quickly became addicted. The client says that through heroic efforts and under a doctor’s supervision, the client was able to stop using cocaine eight months ago and has been clean since then. The client says that Dale is still addicted.

During the past few months, both children have been struck with household metal objects, primarily on the back and stomach, with enough frequency that at any given time each child would have large and painful looking bruises. Skin was not cut, and bones were not broken. (The lawyer has not had the children examined for fractures or other internal injuries. The client refuses to permit it.) The client says that Dale has caused all these injuries. The lawyer asked what Dale would probably say if asked by the police. The client said that Dale would probably deny having done it and blame the client.

**The immediate problem:** Last week, Jonah went to school with bruises all over the left side of his face. During the morning, the school called the client at the office and asked how this happened. The client said Jonah fell down some stairs. That evening, the client asked Jonah what he told the school authorities, and he said he told them that he fell down some stairs. The lawyer asked the client how Jonah got these bruises, and the client said that the spouse hit Jonah with a belt.

The client is afraid that school personnel may have told law enforcement
authorities about the children’s injuries. “Is there any way,” the client asked, “to find out whether the school people have reported this? If they haven’t, is there any way to stop them from reporting it?” When the lawyer pressed the client for something resembling goals, the client talked about rebuilding the family’s life and preventing anyone from ever finding out about the cocaine addiction or the child abuse.

The client has also struck the children, but Dale has hit them harder and caused all the injuries.

Billing: The client signed a retainer agreement for a $175 hourly rate and gave the lawyer a check for $4,000.
TO: students role-playing Terry Dresser

Additional Facts for the Client

Your lawyer is not aware of the contents of this memo. You can decide whether to share them with the lawyer.

Dale has not figured out that you’ve consulted a lawyer. You do not know whether the police are aware that Dale is still addicted or that drugs have been and are in your house.

If the lawyer doubts your story that Dale has hit the children harder than you and caused all the injuries, it will be appropriate for you to get annoyed. You told the truth,

You and Dale have always filed joint tax returns. You are confident that you have paid all your taxes, and you are not worried that IRS might want more. You have no investments, substantial bank accounts, or other liquid assets.

You love Dale and do not want a divorce. You are convinced that Dale will never voluntarily accept treatment for the addiction, regardless of the consequences for you or the family.

You and Dale have bought cocaine from low-level dealers on the street (although not on the streets of your suburb). But since you broke your addiction, you have had no idea where Dale gets cocaine.

The lawyer might ask you whether you or Dale smuggled drugs through your import/export business. Your initial answer is no. If the lawyer presses you, however, say that you cannot say for certain that Dale has not. In the last few months, as Dale realized
that you were trying to break your addiction, Dale became more and more secretive.

If the lawyer asks whether you can operate the business on your own, the answer is no. You’ve tried, and you need Dale. If the lawyer asks whether you have job skills, the answer is yes. You are fluent in French and Spanish, and until you and Dale set up TransBorders, you wrote advertising copy for a living.

This whole situation has put you under enormous stress, and you are suffering all the usual signs of stress: sleeping poorly, either overeating or loss of appetite (choose one), irritability, etc. (If the discussion with the lawyer goes into this, you can make up details.)

Your sister lent you the $4,000 you paid the lawyer.
TO: lawyers for Terry Dresser

Additional Facts for Lawyers

Your client is not aware of the contents of this memo. You can decide whether to share them with the client.

From everything the client says, you doubt that Dale will voluntarily accept treatment for the addiction. You assume that if the client had to choose between the children and the spouse, the client would choose the children, but you do not know whether that is because of your reading of the situation or because of your values (which the client might not share).

You have not gotten an answer yet from local government about how much the house's property taxes are in arrears.

The Dressers appear to have paid all their income taxes, and you have no reason to believe that IRS or the state income tax authorities have given the Dressers a second thought.

You believe what the client told you about the injuries (that Dale caused them all).

You have not spoken to the police, the child protective authorities, or the school. You believe that speaking to them might arouse their interest.

By the time you meet with the client again, you will have spent eight hours on this matter. The family has equity in the home, but you are not optimistic that it could be used to pay your fees beyond the retainer.

The retainer check has cleared.
Counseling Assignment 4

Jesse Fahey
(the caught baseball)

Notes for the Teacher

The client has caught a record-setting baseball that is now worth a lot of money. The client has asked the lawyer for advice on what to do next.61

Advantages of This Assignment

This assignment has four advantages:

First, it teaches important lessons about the practical world. Where is the ball now? Has the client insured it? Those things did not come out in the initial interview. If the lawyer asks about them in the counseling session, the client will say that the ball is in a kitchen cabinet, and that it is uninsured. A careful lawyer, in an initial interview would have asked both these questions and would have gotten the ball into a safe deposit box by nightfall and insured within days. A lawyer’s paramount duty is to foresee disasters and do what is needed to prevent them, not just in pure legal technicalities, but also in practical ways that would not occur to clients because in ordinary life most people are not worried about disasters. To help students playing lawyers here, we give them some hints in the lawyer’s memo. A sharp student will wonder about storage and insurance and become alarmed at the client’s answers. Storage and insurance have another practical effect as well: On a $19,000 annual income, this client cannot afford indefinitely to store and insure this ball. That narrows the range of options.

61. Dayna Shillet helped research this assignment. Mitchell M. Gans made important suggestions.
Second, the assignment requires students to work out a clear-cut set of options, each of which can have a dollar value attached to it. Students will tend to define options vaguely, as in “You can sell the ball.” That is meaningless to the client, who already knows that the ball can be sold. What the client needs from the lawyer is a more precise definition of each option, as in “You can sell the ball for something in the range of $X to $Y and after paying transaction costs and taxes will have something in the range of $Z to take home.” This is something that lawyers have to do all the time, and it is one of the most important ways in which lawyers clear away the fog so that a complicated situation can be resolved. In all fields of practice, students need to learn how to work out numbers that define the value of options (see page 16 in the textbook). Students will not do this perfectly. In fact, different students will come up with different sets of numbers. That is ok, as long as none of the numbers are poorly thought out. Students have to start learning this somewhere, and their first efforts will not be perfect. We have not specified the transaction costs in the assignment, just to see whether some students will research, for example, auction fees. If you’d rather give them transaction costs, you can make up some reasonable numbers and distribute them as an addendum to the assignment.

Third, the assignment shows students how many things can have tax consequences that change everything, and it teaches them how to deal with that. Some students may dislike tax, but the subject is not optional in the practice of law. Even in areas where you might think tax doesn’t matter, it can matter. Even in criminal practice, it matters. If the client is sentenced to pay a fine, are there any circumstances in which the fine might be tax-deductible? (Before you say no, imagine that the client is a business and the fine is for a crime that has regulatory overtones. The answer might still be no, but it is not as easy.) Are there any circumstances in which the criminal defense lawyer’s fee might be tax deductible? If the client needs to pay expert witnesses to defend against a criminal charge, are there any circumstances in which those costs might be tax deductible? (For simplicity, we limited this assignment to federal tax issues and told students to assume that the state would not tax any part of the situation.)

And fourth, it shows students how to deal with uncertainty about the law while counseling a client. It is unclear whether the taxable event is catching the ball or selling it. There are good arguments on both sides. They are summarized in the memo to the student who role-plays the lawyer (see page 169-172). We explain the ambiguity in the law to the student so that even a student with no tax background can understand it and explain it to the client. Some articles on the ambiguity are referred to in the memo to the lawyers. You might want to put them on reserve in the library.

The Client’s Options

Here is an outline of the options. (We have not worked out the numbers because tax rates will inevitably change, perhaps several times, during the life span of this teacher’s manual. That is particularly true of gift and estate tax rules.)
One option would be to sell the ball, probably at auction. Uncertainty about when the tax must be paid can be minimized if the sale occurs before the end of the tax year. The uncertainty is there because the law is unclear about whether the taxable event is catching the ball or selling it. If those two events happen in the same tax year, the ambiguity does not have to be resolved to figure out when the tax is due. Income from the sale will be reduced by transaction costs (auctioneer’s and attorney’s fees, for example) and income tax.

A second option would be to keep the ball indefinitely as a personal souvenir. If the client keeps the ball until the client dies, it goes into the client’s estate, which after death would pay estate tax on the amount of the estate’s value that exceeds the nontaxable part of an estate. The client can probably avoid estate tax by setting up a trust that would own the ball, but to do that the client would have to pay for storage and insurance and for lawyer work to set up the trust. And if the taxable event turns out to be catching the ball (rather than selling it) this year the client would have to pay income tax on the ball’s value. In addition, the ball might lose value if another home run record is set in some future year.

A third option would be to keep the ball and rent it out, whenever possible, to businesses and museums that would display it to the public. There would still be storage and insurance costs, but the income, which would be taxable, might be enough to offset them. Otherwise, the tax situation is similar to the second option.

A fourth option would be to turn the ball over immediately to the home team or the player who hit the home run. The IRS has announced that it would treat this as the equivalent of a declined prize and that no tax would be due. This option is worth zero dollars, but it would achieve all of the client’s nonmonetary goals. Nobody who has caught any prior home run record ball has done this.

A fifth option would be to give the ball to a charity, such as the baseball Hall of Fame. The ball would be income to the client but deductible in limited ways against taxable income. The deductibility of a capital asset given to a charity is limited by complicated rules that students do not need to understand. Depending on the circumstances, only 50%, 30%, or 20% of the value of a donated capital asset like this is tax deductible. All students need to know — and even the most tax-allergic of them tend to figure this out — is that the client would owe a huge tax bill because the gift to charity does not fully negate the income represented by the ball.
To: all students

Counseling Assignment 4

Jesse Fahey
(the caught baseball)

Introduction

The issues here involve the law of property and of federal taxation. (If you are playing the role of the lawyer and have not taken a tax course, your separate lawyer’s memo explains what you need to start with about tax.) Assume that all the tax questions are federal, and that the state will not tax any part of this situation.

The incident involved happened at a baseball game. You do not need to know anything about baseball to do a good job as lawyer or client. The few facts about baseball that matter are fully explained in this memo. In fact, the only important baseball fact is that the client caught a certain baseball. If you are allergic to sports, don’t worry. Baseball does not matter. Property law and tax are what matter.

Assume that the initial interview between lawyer and client happened on October 2 and that the counseling meeting will happen on October 6. This is not last October. It is next October. In other words, pretend you are working in the future. The reason will become apparent in the next few paragraphs.

What Happened at the Initial Interview
**The facts:** In baseball, a player with a stick called a bat tries to hit the ball and run around white sacks called bases. If he hits the ball so far that it goes over the grassy outfield and lands beyond the playing field (such as in the bleachers, where spectators sit), the player is said to have hit a home run, and that is considered the best thing he could have done.

In 2001, a baseball player named Barry Bonds set a new record for the largest number of home runs hit in a single season. Bonds hit 73 home runs that year. Home run records are probably the most well-known accomplishment in sports. A baseball season begins in the first week of April and ends late in September.

During next year’s baseball season — the season that in real life has not yet happened but that you are pretending has just ended — another player, Manuel Gonzalez, set a new and higher home run record, hitting the record-setting ball on September 29.

The client’s friend, George Mahoney, got two tickets to the September 29 game in which both Gonzalez would appear. It was the last game of the season. George asked the client to attend with him. The client was not particularly interested and agreed to go only because George did not want to go alone. The tickets were for seats in the bleachers beyond the outfield.

Near the end of the game, Gonzalez, hit the ball into the bleachers, and the client caught it. This was the player’s last home run of the season, and it set the new record. (If everything else about baseball in this memo confuses you, do not worry. The only important thing is that the client caught the ball that had set the record.)

After catching the ball, the client put it in a pocket and would not let anyone touch it, not even George (who sat next to the client through the entire incident). After the game, the client took the ball home.

Since then, the client has been besieged with phone calls from journalists wanting interviews and from other people who want to buy the ball. The highest offer so far has been $500,000. The client suspects that it could be sold for more than that.

Gonzalez has told journalists that he would like the ball back for sentimental reasons, but that he does not want to pay a lot of money for it because that would appear crass.
The client's job is to deliver flowers for a florist's shop. The client spends most of the work day driving a van with flowers in the back. The client's salary is $19,000 a year.

**The problem:** The client thinks it would be nice to make some money from this incident, but the client would also like to treat the ballplayer fairly, if possible. The client is a little embarrassed by media coverage that suggests the client is greedy.

The client is afraid of making a mistake here. The client suspects that some sort of taxes might have to be paid if the ball is worth a lot of money. And George wants the client to sell the ball and split the proceeds with him. George says that if it were not for him, the client would not have been at the game in the first place. The client resents this and says, “I only went to the game to do him a favor.”

**Billing:** The client signed a retainer agreement for a $175 hourly rate and gave the lawyer a check for $2,000, which the client borrowed from the clients' parents.
To: students role-playing Jesse Fahey

Counseling Assignment 4

Jesse Fahey
(the caught baseball)

Additional Facts for the Client

(You can discuss the facts with as much knowledge of baseball as you personally feel comfortable with. If you know absolutely nothing about baseball, then the client knows absolutely nothing about baseball — and that’s ok. After all, the client did not take the initiative in going to this baseball game. If you know a lot about baseball, that’s fine, too, but be careful. This is a property and tax question, and if you and the lawyer spend a lot of time talking baseball, the lawyer will not be able to counsel you within 30 minutes.)

Your lawyer is not aware of the contents of this memo. You can decide whether to share them with the lawyer.

You are willing to pay George a small amount of money to avoid trouble if you have to. But you do not think you owe him anything, and you do not even consider him a friend any more.

You know that baseball players earn millions of dollars a year. If you give the ball
to Gonzalez, and if you then have tax problems, you think Gonzalez should pay your taxes.

You would like to make some money here, but you do not want to be greedy (or appear greedy to others).

Do not volunteer the following, but do provide the information if asked: If the lawyer asks you where the ball is now, the answer is that it is at home in a kitchen cabinet. If the lawyer asks whether you have insured the ball, the answer is no.
To: lawyers for Jesse Fahey

Counseling Assignment 4

Jesse Fahey
(the caught baseball)

Additional Information for Lawyers

(You can handle the facts with as much knowledge of baseball as you personally feel comfortable with. If you know absolutely nothing about baseball, then the lawyer you are playing knows absolutely nothing about baseball — which is fine. If you know a lot about baseball, that's fine, too, but be careful. This is a property and tax question, and if you spend a lot of time dealing with baseball, you will not be able to counsel the client within 30 minutes. All of the relevant baseball facts are already in these memos.)

You talked to a colleague who specializes in sports law. You asked who owns the ball. The colleague said that as long as the ball stays on the playing field, it is owned by the team or by Major League Baseball (the colleague wasn’t sure which). Once it leaves the playing field and goes into the spectators’ area, many though not all commentators consider it abandoned property. Paul Finkelman, Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball? 23 Cardozo L. Rev. 1609 (2002).

After it becomes abandoned property, the first person to possess it becomes the new owner. (If you need to know more about property law, you can find it in the library.) The colleague also said that the ball could be worth much more than $500,000, and that you might want to do some research to find out what similar items have been sold for.
You did some fact checking and learned the following about the history of home run record-setting baseballs: The classic record was set at 60 home runs by Babe Ruth in 1927, and Roger Maris hit 61 home runs in 1961. But people did not pay lavish money for sports memorabilia in those days. In 1998, a player named Mark McGwire hit 70 home runs, and the record-setting ball was auctioned off for $3,005,000. In 2001, when Bonds hit 73 home runs, the 73d home run ball landed in a group of people, and two of them sued each other for the ball, which had not yet been sold as of the date of the sources you read. (You might want to check again to see whether the ball has come on the market.)


Ozersky went home and kept the ball overnight in a drawer in his bedroom. The next day, he took it to work to show it to his friends. Two days later, he put it in a safe deposit box and “scrambled to find insurance.” Then, for seven weeks, he allowed a baseball team to display it. After that, he put it back in the safe deposit box for a month, although he did carry it to a press conference in a backpack. Then, for two weeks he allowed two other organizations to display it to the public. Finally, it was sold at auction three and a half months after Ozersky caught it.

Before McGwire hit the record-setting ball in 1998, the Internal Revenue Service issued a press release stating that if the person who catches it were to return the ball promptly to the player or the team, that person “would not have taxable income” based on “an analogy to principles of tax law that apply when someone immediately declines a prize or returns unsolicited merchandise. There otherwise would be no gift tax in these circumstances. The tax result would be different if the fan decides to sell the ball.” IRS Press Release, IR-98-56 (Sept. 8, 1998). (A fan is someone who watches ball games.) Ozersky decided to sell the ball and pay the tax.

You also talked to a colleague who specializes in tax law and learned the following: The ball is income to the client, and the client will have to pay tax on it one way or another unless the client promptly returns the ball according to the IRS press release. (There is a controversy about when the client would have to pay the tax, about which more later.) When caught, its value is the value of the record-setting ball, not the value of an ordinary baseball. If somebody else pays the tax on the client’s behalf, the amount that other person pays is treated as income for the client, and the client would have to pay income tax on it.
Your tax colleague also told you that if the client keeps the ball until the client dies, it goes into the client’s estate, which would have to pay estate tax on the amount of the estate’s value that exceeds the nontaxable part of an estate. If the client gives the ball to a recipient that IRS does not consider a charity, the client would have to pay gift tax on the amount of its value that exceeds $12,000. (The giver pays gift tax, not the person receiving the gift.) But if the client gives the ball to a charitable organization recognized as such by IRS, there is no gift tax, and the client can deduct some — but not all — of the value of the donation from taxable income on that year’s income tax return.

And your tax colleague told you that there is actually a controversy about whether the taxable event is catching the ball or selling or otherwise transferring the ball to someone else. A taxable event is an event that creates a duty to pay tax. This should matter a lot to your client. If the taxable event was catching the ball, then on September 29 the client had income equal to the value of the ball, and the client will owe tax on that income soon. If the taxable event will be selling the ball, the client owes no tax now and will owe no tax until the client sells or transfers the ball to someone else.

Here is the reasoning that would support the idea that the taxable event was catching the ball: A caught record-setting home run ball is like finding lost money in the street. It is what tax people call “an accession to wealth” because it increases the finder’s wealth immediately. An IRS regulation provides that “Treasure trove, to the extent of its value in United States currency, constitutes gross income for the taxable year in which it is reduced to undisputed possession.” Treasury reg. § 1.61-14(a), T.D. 6272, 22 FR 9419. Since the client has undisputed possession of the ball, he owes tax on it for this tax year. Your tax colleague referred you to some articles that support this theory: Joseph M. Dodge, Accession to Wealth, Realization of Gross Income, and Dominion and Control: Applying the “Claim of Right Doctrine” to Found Objects, Including Record-Setting Baseballs, 4 Fla. Tax Rev. 685 (2000); Sheldon L. Banoff & Richard M. Lipton, More on Historic Homers: Do Auction Prices Control?, 90 J. of Taxation 189 (1999).

Here is the reasoning that would support the idea that the taxable event will be selling or otherwise transferring the ball: For two reasons, the IRS and the courts have not historically enforced the treasure trove regulation where the found item was not cash. First, until a found item other than cash is sold, estimates of its value, even from skilled appraisers, are only estimates (this is called a valuation problem). Second, until the item is sold, the finder might have no way to pay the tax (this is called a liquidity problem). There are no valuation and liquidity problems when the found item is cash because we know what cash is worth and it can be used to pay the tax. In a number of analogous situations — commercial fishing, farming, and ranching, for example — IRS considers the
taxable event to be selling the fish, a crop, or livestock, not the catching of the fish, the harvesting of the crop, or the birth of the livestock. Your tax colleague referred you to an article that supports this theory. Lawrence A. Zelenak & Martin McMahon, Jr, *Taxing Baseballs and Other Found Property*, 84 Tax Notes 1299 (Aug. 30, 1999). Although this theory makes a great deal of sense, most tax professionals would instinctively say that the taxable event is catching the ball.

To be in a position to counsel the client, you will need do some reading in the library.

For billing purposes, assume that by the time you meet with the client again, you will have spent 9.5 hours on this matter.
Assume that after your meeting with your clients on April 27, 2006, you speak with Douglas Flisk, the attorney for Windsor who offers each of your clients $3,000 in relocation expenses if they leave the building by May 31, 2006.

1. What are advantages and disadvantages of this offer for your clients?

2. Prepare a plan for counseling them about this offer.

Readings: Essential Lawyering Skills (5th ed.), Chapters 20–21
In these chapters, we introduce students to the basic theories of negotiation, methods for preparing to negotiate, styles and rituals of negotiation, and the process of following through on negotiation plans. This part has two underlying themes: (1) a lawyer’s approach to negotiation must be flexible and (2) a lawyer’s effectiveness in a negotiation depends, in large part, on her ability to communicate persuasively with the other attorney and other side. As to the first theme, unlike some commentators, we do not express a preference for problem-solving over adversarial negotiation. We provide some of the factors lawyers should consider in adopting a particular approach (§§25.3 and 25.8) and recognize that most negotiations include both problem-solving and adversarial aspects. Moreover, we do not set forth rigid “stages” of negotiation because most bargaining is quite fluid. In Chapters 23 and 24, we give students a model for considering the context of negotiations (Interests/Rights/Power) and later discuss
how this model can be used when different issues arise, but shy away from a formal approach to the negotiation process.

As to the second theme, we urge students to reflect on every communication they make throughout a negotiation. A lawyer’s style, arguments, questioning, anger, or threats should all have the purpose of persuading the other side. (See §§23.1, 26.1.1, 27.2.2, 28.2, and 28.3.1). Throughout this Part, we warn students against emotional reactions to the conduct or arguments of the other side and arguments that are nothing more than pontifications.

Chapter 23: Here, we describe our Interests/Rights/Power model for considering the context of a negotiation, the two basic approaches to negotiation strategy (problem-solving and adversarial), the roles of a lawyer in negotiation, and the relevant ethics rules.


Section 23.3 presents the two primary approaches to negotiation. The following sources can be referred to for further reading on different theories and models for negotiation: Robert M. Bastress & Joseph D. Harbaugh, Interviewing, Counseling, and Negotiating: Skills for Effective Representation 350-404 (1990); Roger Fisher & William L. Ury, Getting to Yes: Negotiating Agreement Without Giving In 3-14 (2d ed. 1983); Donald G. Gifford, Legal Negotiation: Theory and Applications 14-18 (1989); Thomas D. Guernsey, A Practical Guide to Negotiation 1-6 (1996); Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 U.C.L.A. L. Rev. 754 (1984); Robert H. Mnookin, et al., Beyond Winning: Negotiating to Create Value in Deals and Disputes (2000). Although Bastress and Harbaugh provide an extensive review of the literature on negotiation theory, we find that students in an introductory course become confused by the theoretical abstractions and are better able to apply the two primary approaches we discuss.


Chapter 24: Here, we provide methods for assessing the different parties’ interests, rights, and power and present suggested charts for organizing this assessment. Some students have difficulty distinguishing between rights and power. Although the difference is a bit artificial, we believe it is important to distinguish between the ability to resort to a neutral standard for resolving issues (“rights”) and the ability to coerce the other party without resorting to enforcement of legal rights (“power”). Because law students often focus solely on rights-based
methods for resolving disputes or issues, it is helpful to address both noncoercive methods for addressing a client’s problems (interest-based approaches) and coercive methods outside of the legal realm (power-based approaches).

All three methods for resolving disputes or issues are interrelated. “The relationship among interests, rights, and power can be pictured as a circle within a circle within a circle .... The innermost circle represents interests; the middle, rights; and the outer, power. The reconciliation of interests takes place within the context of the parties’ rights and power. The likely outcome of a dispute if taken to court or to strike, for instance, helps define the bargaining range within which a resolution can be found. Similarly, the determination of rights takes place within the context of power. One party, for instance, may win a judgment in court, but unless the judgment can be enforced, the dispute will continue. Thus, in the process of resolving a dispute, the focus may shift from interests to rights to power and back again.”

The chapter concludes with a discussion of client authority and the issue of structured settlements.

Chapter 25 provides a framework for building from the interests/rights/power assessment to a negotiation strategy.

In §25.5.2, we provide a case study of a city’s attempt to close down a group home for people with AIDS for use of the brainstorming process in developing a problem-solving strategy. This study is based on an a case handled by the Hofstra School of Law Housing Rights Clinic several years ago (the names and some minor facts have been changed). The students and supervising attorneys in the Clinic developed the problem-solving strategy discussed in the text. Despite the students’ efforts to use such a strategy, however, the city never expressed any interest in engaging in serious problem solving. The discussion between Cassini’s attorney and the City Attorney in §26.1 reflects the type of response the students received from the city. It kept insisting that the group home owner close the home as a condition for dismissal of the case.

Frustrated in their attempts to use a problem-solving strategy, the students switched to a more adversarial approach and pressed HUD to intervene. The HUD investigator energetically pressured the city, and top city officials gave the orders to have the case dismissed — even before the HUD complaint was resolved. Subsequently, the city agreed to settle the HUD case by paying the Clinic’s client $6,000 in damages for the emotional stress of the criminal case.

This case is a good example of the limitations of the use of a problem-solving approach.

61. William L. Ury, et al. Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict 8-9 (1988). The authors’ distinction between obtaining a court judgment and enforcing it is not entirely correct. Enforcement of a judgment can entail resort to rights-based approaches (e.g., garnishment or levying personal property). The economic power of the creditor, however, can influence the ability to use those methods to enforce a judgment.
Obviously, if both sides will not agree to engage in the process, this approach will fail. In the Clinic’s case, the students, by abandoning this approach and using adversarial methods, achieved the client’s interests. From a purely policy point of view, this may not have been the best result. The neighborhood, for example, remained overburdened with group homes and substandard conditions, the city continued to have political problems with the neighborhood, and city workers still had safety fears. But the city’s refusal to engage in problem-solving bargaining led to this outcome.

In §25.5.1 we discuss different methods for engaging in the brainstorming process. Based in part on methods discussed fully in Robert H. Mnookin, et al., Beyond Winning: Negotiating to Create Value in Deals and Disputes 12-17 (2000), this discussion explores ways of “creating value” for each part beyond the most obvious: consideration of differences between the parties; identification of noncompetitive similarities between the parties; and examination of ways to explore existing resources.

**Chapter 28:** In this chapter, we discuss some of the most basic concepts needed to produce clearly drafted agreements that protect the client. We are not trying to teach contract or stipulation drafting. But the goal of the negotiation is the written agreement. That is what will govern the parties afterward. We added this coverage for two reasons. First, when students have no understanding of what that agreement should contain, their negotiations tend to be more superficial. And second, when lawyers treat the written agreement as an afterthought, they often fail to preserve in the document (which they might permit the other side to draft) the full benefits they achieved in the oral negotiation.

**How to Teach Negotiation**

**Necessity of Preparation (Chapters 24-25):** Although it may seem surprising, in our experience teaching law students negotiation skills can be more difficult than teaching them trial advocacy skills. Learning trial skills requires the mastering of forms of communication (e.g., the litanies for the various evidentiary foundations) which, to most students, are novel and exciting. For that reason, they are fairly open to instruction in that area. In regard to negotiation, however, students have bargained in various ways before, and many feel that there is very little to learn.

By the time they are in law school, many students assume that they are quite adept at negotiation and resist lengthy discussions about preparing in advance for negotiation. At the one extreme, in a live client clinic, many students, when asked what they should do after an initial client interview, will respond, “I think I can just pick up the phone, call the other side, and work out a deal.” When asked whether they should research the basic law in the area or investigate some facts about the parties’ interests or the background of the case, they seem bewildered that they would have to waste their time on such extraneous matters. At the other extreme, some students in a simulation negotiation course will rigorously research the legal
issues as if they were about to argue to an appellate court, and, ignoring any issues in regard to the interests or power of the parties, will focus solely on legal argumentation to persuade the opposing party.

Our primary goal in teaching this subject is to instruct students that effective negotiation, like trial and appellate advocacy, requires special preparation and communication skills. One of those skills is the ability to adequately assess the entire context for the bargaining. We have found that the use of Charts 24A, 24B, 24C, and 24D helps students understand that there may be more to resolving a case than a quick phone call or a creative legal argument. Negotiation Exercise 1 is an effective vehicle for introducing students to those charts (see pages 183-186 in this teacher’s manual).

Website Negotiation Assignments 1 and 2 give students a more extensive opportunity to identify the interests, rights, and power of parties based on materials in a case file. These assignments are based on the case file in the Roe Tenants Association case contained on the textbook’s website. For the assignments, see pages 183 and 184 in this teacher’s manual. A description of the case can be found on page 80–81.

Negotiation as Communication (Chapter 25-28): All of this discussion about preparation can lead a student to the mistaken conclusion that once her plan is developed, she merely needs to present it to the other side, and the parties will reach a deal. Students, therefore, need to understand the importance of communication in negotiation — both in the presentation of the client’s positions and the response to the other side. Negotiation Exercises 3 and 4 are helpful in highlighting the importance of this skill (see pages 185–186 and 187–188 in this teacher’s manual).

Following Through on the Plan and Negotiation Tactics (Chapters 27-28): At some point in either a simulation or clinical course, most students will perform a complete negotiation simulation. All the Negotiation Assignments provide instructions for such negotiations.

In critiquing these simulations (or for that matter, an actual negotiation in a clinic), we find it helpful to develop a flow chart presenting a play-by-play of the different statements made during the bargaining. Before the tape is played, review each side’s negotiation plan, identifying the approach(es) they selected to make. Then, on a board or white pad, draw a line down the middle and, as the tape proceeds, note the different positions/ proposed options/ questions/ offers/ concessions/ arguments/ threats made during the bargaining. When the tape is finished, return to the negotiation plans and ask the students if they followed through on the plan. Ask them to identify the crucial turning points in the bargaining. Were they planned? Did they benefit or hurt each side? Did the attorneys present their positions clearly? Did they listen closely? How did they respond? Did they use their style effectively?

By writing the play-by-play down, students can visually see the progress of the
bargaining, the effect of the different communications, and their ability (or inability) to follow through on their plans.

**Realities of Negotiation:** Many negotiation simulations are very artificial. Student negotiations against students, for example, do not address the very real power imbalances that exist once students negotiate with experienced adversaries in the real world. And time limits for videotaped simulations distort the reality that often negotiations occur over weeks or months or occur in quick ten or fifteen minute sessions outside of a courtroom.

To address this problem, we have attempted to draft some of our exercises and assignments with these issues in mind. In Negotiation Exercise 4, we have presented the hypothetical of a seasoned lawyer trying to use his experience to assert power over the student. We suggest that you have an experienced lawyer friend (ideally unknown to the students) come to the class to negotiate against students. This will give them a flavor of who they might be against in practice. The discussion in §24.4.2 about shifting power imbalances can be used to illustrate ways for responding to such an attorney.

Using Negotiation Assignment 2, you might consider requiring students to perform a negotiation under the pressure of a fifteen minute time limit. Faced with these limitations, some students will simply abandon any strategic approach to negotiation. In evaluating this assignment, have students consider how they can keep to their plans even under time pressures. Although such an assignment might not be helpful in a purely simulation course, it can be very beneficial in a live client clinic where the pressures of court calendars force parties into expedited bargaining.

Finally, Negotiation Assignment 1 tries to replicate ongoing negotiations by providing a discussion of the lengthy bargaining leading to the current round.

**Negotiation Exercises**

Exercises are done in class and focus on a discrete negotiation planning method or negotiation skill. Students prepare exercises before class and perform them either before the whole class or in small breakout groups. Assignments, on the other hand, are done by students outside of class. The simulated bargaining assignments should ideally be videotaped for critique. If you need an assignment, see pages 189–192.

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62. The idea for exercises involving discrete negotiation skills was suggested by Professor Lawrence Kessler at Hofstra Law School. This approach is similar to the one used in most trial advocacy courses in teaching witness examination. Direct examination, for example, is divided into different skills — formation of nonleading questions, development of the scene, introduction of documents — and students perform separate drills on each of these skills. Likewise, we have attempted to develop discrete drills for different aspects of negotiation planning and execution.
We include four exercises which can be used with any actual or hypothetical fact background. If you are looking for a fact pattern, you can use any of the ones in the negotiation assignments that begin on page 189.

Negotiation Exercises 1, 2, and 3 are drills for negotiation planning. Depending upon the level of your students’ ability and the length of your class time, you might want to devote an entire class to each exercise or combine different exercises for the same class. One of us who teaches in a live-client clinic, for example, uses Negotiation Exercise 1 for fairly complex three-party cases and finds that it takes almost an entire two-hour seminar to identify adequately all the different interests, rights, and power.

If you want to use Negotiation Exercises 1, 2, and 3 to prepare for the students’ performance of a full negotiation, we suggest that you divide the class into two sections — those who will be representing one side in the negotiation and those representing the other — and distribute the confidential materials accordingly. Separately, the two sections can develop their strategies.

In Negotiation Exercise 1, you give the class a fact pattern for a negotiation and ask them to draft the assessment charts. Then, in class, replicate all three charts on the board in three columns: Interests, Rights, and Power. Start with the first column, have them identify the interests of the different parties they have written on their own charts and their assumptions about the parties’ interest priorities. Ask them if they need any more information — from the client or about the other side — that would help them assess the parties’ interests better. Next, in the rights column, have the class identify the different rights which are applicable, the additional information they need on that subject, and their predictions about who will prevail in the rights arena. Then, have the class do this same analysis about power issues. Finally, for both the rights and power columns, ask the class how the relationship between the parties can be changed. Throughout this discussion, do not worry about class silence. Just as in any brainstorming session, allow the class time to develop their own ideas.

When you have completed the chart on the board, many in the class will see that this case — and the issues involved in the negotiation — are a bit more complex than they assumed. To give the class an idea of the benefits of these charts in planning, it is helpful to end the exercise by asking the class if their assessment of the interests priorities suggests any mutually-agreeable columns. Then ask if their assessments of rights and power suggest better alternatives for the particular client than negotiation.

Following up on this exercise, Negotiation Exercise 2 walks the class through the development of a negotiation strategy. Write the completed chart from Negotiation Exercise 1 on the board try to identify your client’s and the other side’s BATNA’s. As noted in the written

63. For the rights chart, use Chart 24B for a dispute-resolution negotiation and Chart 24C for a transactional negotiation.
Negotiation exercise, it is important to emphasize that in practice a lawyer needs to speak to her client to determine her assessment. Indeed, you might want to ask some students to model a counseling session (with you as the client) in which they present the assessment charts to the client and work to develop a BATNA. Next, return to column 1 (Interests) and ask students what mutually-agreeable solutions are suggested by the class’ identification of the different parties’ interests. Finally, referring to the entire chart and considering each of the factors listed in §25.3, have the class determine which approach(es) to take initially in the bargaining. As we say in the text, it is important to emphasize that a mixed approach (adversarial on some issues and problem solving on others) might be appropriate and that a lawyer’s strategy can change in response to the other side’s strategy.

In Negotiation Exercise 3, students are asked to craft a plan for the approach they have selected for the negotiation and are asked to present it and respond to the other side in a simulated drills. For these drills to be effective, you should tell the students to assume that the introductory rituals are completed and that they are making their initial offers (in an adversarial approach) or presentations (problem-solving approach). You might want to stop one student in the middle of a drill and ask for a volunteer to “take the torch” and continue the bargaining. The purpose is not to determine who can eventually reach a better deal, but to evaluate the students’ ability to communicate and respond to the other side.

In regard to presentation of positions, take notes on the precise language used by the student in stating the initial offer or invitation to problem solving. Then ask the class to evaluate the effectiveness of the presentations. For an offer, is it credible? Does it demonstrate the client’s commitment to the offer? Is it adequately justified? Are the consequences of rejection articulated? For an invitation to problem solving, does it identify accurately the interests of the parties, present a solution that addresses those interests, and does it open the door to joint development of other options? It is helpful to focus on the common thread between both types of presentations: a credible communication to persuade the other party to respond. Then, after discussing the strengths or weaknesses of the presentation, ask the class for ways to reformulate it to make it more effective.

As to responses to these initial presentations, it is important to focus on the student’s ability to listen to the other side. Oftentimes, students are so eager to make their own presentations that they ignore what the other side is saying. Referring to the exact words used (which you have taken in your notes), point out when such situations arise. Then, have the class evaluate whether the response was consistent with the student’s selected strategy. Did she remain on course, become distracted by the other side’s presentation, or make a deliberate decision to change strategy? Are concessions communicated with specific justifications? Is reluctance to problem solve met with further invitations to brainstorm? What attempts are made to help the other side “save face”?

While Negotiation Exercise 3 concerns presentation of strategy, Negotiation Exercise 4 addresses another communication issue in negotiation: style. This exercise presents different drills in which students must select either a combative or cordial style to present their initial
positions and to respond to several hypothetical situations: an opponent’s using his experience to intimidate; an adversary’s storming out of a meeting; and his misrepresentation of facts. In critiquing these drills, the most important point to emphasize is the strategic use of negotiation style. A lawyer’s style should be aimed at influencing the adversary, not simply at expressing emotion.
Negotiation Exercise 1

Interests/Rights/Power

In Chapter 24 of the text, a method is presented for assessing the interests, rights, and power of the different parties to a negotiation. In class, we will attempt to perform this process in preparation for a negotiation. Attached are materials for a negotiation between [name of parties].

Before class, try to identify the interests, rights, and power of the different parties, and draft Chart 24A, Chart 24 B [for a dispute] or 24C [for a transaction], and Chart 24D. In drafting these charts, consider

1. What are each parties’ interest priorities?

2. What steps can be taken by either party to change the rights and power relationship?

3. What additional information do you need from your client to adequately assess the interest/rights/power context?

4. What additional information do you need from the other side or another source to adequately assess the interests/rights/power context?

In class, we will compare the different charts which you have drafted and discuss these questions.

Readings: Chapter 24
Negotiation Exercise 2

Developing a Negotiation Strategy

In the last exercise, we identified the different interests, rights, and power of the different parties. In this exercise, we will develop a strategy for your client in the negotiation.

In reviewing Charts 24A, 24B or 24C, and 24D, write a strategic memo addressing the following questions:

1. What do you believe are your client’s and the other side’s BATNA’s? (Of course, in practice, you will need to speak to your clients to determine their assessments of their BATNA’s.)

2. What sources of value can you identify for the parties beyond the most obvious (see §25.5.1)?

3. What mutually-agreeable solutions are suggested by your identification of the different parties’ interests and sources of value?

4. What approach(es) do you think will be most effective for your client in this negotiation? Considering the factors listed in §25.3 of the text, why have you selected the particular approach(es)?

In class, we will discuss your memos.

Readings: §§25.1-25.3, 25.5, 25.8
Negotiation Exercise 3

Crafting a Negotiation Plan

In the last exercise, you drafted a strategic plan for your negotiation on behalf of your client. In this exercise, you will complete your preparation for the negotiation by crafting a plan to execute your strategy and will conduct simulated negotiation drills to evaluate the effectiveness of your plan. Based upon your strategic plan, draft a planning memo, addressing the following issues:

1. Adversarial Approach
   a. Draft your estimations of the bargaining ranges of both parties (Chart 25B).
   b. Considering the factors of specificity, justification, and consequence, draft your initial offer.
   c. Identify your justifications for different concessions.

2. Problem-solving Approach
   a. Will the other side be reluctant to engage in problem-solving bargaining? If yes, how are you going to handle the other side’s reluctance to problem solve?
   b. How can you allow the other side to “save face?”

3. Information Bargaining
a. What information do you want to gather in the negotiation?

b. What information do you want to reveal in the negotiation?

c. What information do you want to conceal?

In class, students representing [plaintiff] and [defendant] will perform fifteen minute simulations executing on their plans, and we will critique the effectiveness of the plans.

Readings: §§25.4-25.6, Chapter 27
Negotiation Exercise 4

Negotiation Styles and Tactics

In this exercise, you will perform different drills on negotiation style. In [case name], assume that the following situations arise in the negotiation: Students 1-5 represent [name of party], and students 6-10 represent [other party]. In class, you will perform simulated drills on each hypothetical.

1. You are making a telephone call to start negotiation discussions. Decide on the style (combative or cordial) that is most consistent with your strategy. Communicate this style in your initial presentation or response.

2. The negotiation has just commenced, and the other side’s attorney opens the discussion with the following statement:

   We aren’t going to get anywhere in this negotiation unless you come to your senses on [particular issue]. I have been practicing [in these courts or in this town] for twenty years. I know you’re new to this, but after you have been around for awhile, you will know that there is no way that you are going to get what you are asking. I’m not going to waste my time because you are a new attorney.

   Decide on what style to use in responding. If the opposing attorney continues with this style, will you change yours?

3. The negotiation is going nowhere on [particular issue]. The other side’s attorney stands up and walks to the door and says,
I’ve never dealt with such an unreasonable adversary! I don’t know what they taught you in law school, but negotiation means compromise. If you and your client aren’t going to make some concession, we’re not going to waste any more time. I’m appalled by your behavior and am going to call your supervisor!

Considering your strategy, decide whether you want bargaining to continue. If so, what response can bring your adversary back to the table? If not, what response can leave the door open to further negotiations?

4. The other attorney says [here insert a misrepresentation about the evidence]. How do you respond?

Readings: Chapter 26, §28.3.
Negotiation Assignments

Assignments are done by students outside of class. The simulated bargaining assignments should ideally be videotaped.

Website Negotiation Assignments 1 and 2 (see the next page) are similar to Negotiation Exercise 1. They require students to draft Charts 24A, 24B, and 24D identifying the interests, rights, and power of the parties in the Roe Tenants Association case, the file for which is contained on the textbook’s website. While Negotiation Exercise 1 focuses on the use of this process for a limited fact pattern, these assignments give the students the opportunity to draft these charts based on a larger case file. Website Negotiation Assignment 1 asks students to complete the charts for bargaining with the Town; Website Negotiation Assignment 2 asks students to complete the charts for bargaining with the developer, Windsor.

You can use either or both of the assignments or combine the assignments to consider the issues raised by preparing for multi-party negotiation. Website Negotiation Assignment 1 gives students the chance to consider the process of identifying the interests of a governmental party with its inherent power. Website Negotiation Assignment 2 offers the opportunity for consideration of preparing to negotiate an innovative legal theory with a private party with significant reputational interests. Combining the assignments will allow students to consider ways of playing off the two adversary parties.

There are several ways you can use these assignments. You can assign them like Negotiation Exercise 1, asking students to prepare their charts and then compare them in class. Given the size of the case file, you might want to divide the class into three-student teams. You can also ask students to prepare the charts (contained on the textbook’s website), electronically send them to you for comment, and return them for further fine tuning. Finally, you can assign students to prepare charts for representation of Town or the developer and then have students engage in negotiation simulations.

The assignments contained in this Teacher’s Manual are for both transactional and dispute resolution negotiations.
If you are teaching negotiation skills in general, it is a good idea for each student to do both kinds of negotiations (transactional and dispute resolution). On the other hand, if you are teaching negotiation in context — in a Criminal Justice Clinic, for example, or as part of a Contract Drafting course — you will probably assign one kind of negotiation but not the other.

On the following pages are six assignments, with confidential materials for each party:

1. transactional (restaurant) Walkowiak and Batter 197–204
2. civil dispute (lead paint) Bevans v. Newcombe Realty 205–218
3. civil dispute (eviction) Barry agst. SHA 219–231
4. plea bargaining ADA agst. Smith 232–253
5. civil dispute Wallace, Star Auto, and BMAC (three parties; consumer fraud) 254–269
6. transactional/dispute (house sale) Rossi and Kravitz 270–282

(Another source of negotiation assignments is the Center for Dispute Resolution at Willamette University College of Law. Each year, the Center publishes a new collection of simulations, which can be purchased for a nominal fee. The Center’s phone number is 503-370-6046.)

We provide a set of instructions to students (see pages 193–195) that can be used with any of these assignments. In addition to these instructions, you might consider six decisions:

1. Will students get all their information from instructions on paper, or will you allow them also to talk, before negotiating, with the clients?
2. Will students be required to turn in a pre-negotiation memo?
3. Will students be allowed to communicate with each other before the negotiation meeting?
4. For the negotiation meeting, will students be given 30 minutes — or a more urgent 15 minutes (see below)?
5. How will students record their agreements?
6. Will a student’s grade depend in part on what results the student obtains in the negotiation?

1. Talking with the clients: We have sometimes allowed students to talk with their
“clients” before negotiating. For example, in Negotiation Assignment 1 (the restaurant negotiation), we have sent all the students who will represent Walkowiak to a room where, as a group, they can try to learn her sensibilities on a human level while, in another room, the rest of the class was doing the same thing with Batter. When we do this, students seem more energized about the assignment and take it more seriously. Occasionally, some students misunderstand what they heard in these sessions, but not apparently at a higher rate than students misunderstand (or forget about) the written instructions alone.

2. A memo: To teach good preparation, you might ask students to write a negotiation plan before meeting with their adversaries. The model instructions require students to plan, but not to reduce their planning to a memo. (In many courses, there isn’t time for that.) If you want students to write a memo, you can add an instruction like this at the end of the Preparation section of the model instructions:

   Write up your planning as an informal memo to the file. An appropriate length might be three to five pages double-spaced.

3. Pre-meeting communications: We are experimenting with allowing the students to communicate with each other by email before meeting face-to-face, the email taking the place of the phone conversations that happen between lawyers in real life. We limit the communications to email and require students to attach copies of the email correspondence to their settlement sheets because we also videotape and want a complete record of the negotiation for critiquing and grading purposes. (Because we are still experimenting, this is not reflected in the instructions to students in this teacher’s manual.) In the instructions for Negotiating Assignment 5 (“Deceptive Consumer Practices”), we suggest that students representing different parties negotiate together privately.

4. Length of the negotiation meeting: The model instructions say 30 minutes, which is common in negotiation teaching. If you are videotaping, 30 minutes is ample to get material to critique, and more tape time will exhaust the teacher who critiques. We have experimented with longer periods, such as 45 minutes or an hour, but we find that students waste most of the extra time. Every once in a while, one or two students will complain that in part-time law office jobs they never see issues like these disposed of in as little as 30 minutes. The answer is that everything in a pedagogical setting has to be simplified somewhat just to get the teaching done, and if real life conditions were to be replicated exactly, they would have to read six-inch thick case files and keep time sheets.

Another timing possibility is the expedited discussion that happens when the parties or a judge or the circumstances put pressure on the lawyers to settle right now or else. If you want students to negotiate in this context instead of the 30 minute meeting mentioned in the model instructions, you can substitute the following in the model instructions under Negotiation Performance:
Negotiation

Transaction Negotiation: The parties have mutually decided that negotiations have been going on too long. They have agreed that if they cannot reach a deal in fifteen minutes, they will break off discussions. You are standing with the opposing attorney in the hallway outside of the negotiating conference room, and you must select the most effective approach to reach a good settlement for your client. You will be taped for exactly fifteen minutes. At that time, you will either have a settlement or the talks will be off for good.

Dispute Resolution Negotiation: Your case is set for trial today. The judge has given you fifteen minutes to try to settle the case, or your case will be on trial. You are standing with the opposing attorney in the hallway outside of the courtroom, and you must select the most effective approach to reach a good settlement for your client. You will be taped for exactly fifteen minutes. At that time, you will either have a settlement or be on trial.

5. Recording agreements: We give students a settlement sheet to fill out, recording their names, their clients, whether agreement was reached, and if so its terms and whether it was final or tentative.

6. Grading can be used to inject realistic incentives. In real life, we are rewarded, or not rewarded, based on the results we achieve. In negotiation, if we get a good settlement, we are paid more in a contingency fee situation or, in other billing arrangements, the client sends us more business or recommends us to others. If the other side is foolishly obstinate, that is not an excuse for us. Our job is to get results. This is hard for students to get used to, but if they are really to understand negotiation, some portion of their grade might be based on what they get for their client. The model instructions do not address grading. If you want grades to reflect at least partly the results achieved, you might add something like the following to the model instructions:

Two-thirds of the grade will be based, as objectively as possible, on results achieved. If the only issue is money, this part of the grade will be a simple mathematical computation based on the number of dollars in your agreement. If your clients’ goals are more complex, I will, in computing this component of your grade, try to determine how much of your client’s goals you accomplished. For negotiations that do not produce a settlement, I will ask a lawyer or teacher who specializes in the subject of this negotiation to estimate what would happen to these parties without a settlement, and that estimate will be treated as the result.

The remaining third of your grade will be based on my subjective assessment of the skills you showed in planning and conducting the negotiation.
Student Instructions for Negotiation Assignments

For this assignment, you will perform on videotape a full negotiation in [name of case].

Preparation

Before the negotiation, prepare a negotiation plan:

1. Assess the parties' interests, rights, and power (Charts 24A, 24B or 24C, and 24D in the text), identifying any additional information you need on any of these areas;

2. Identify your client's and the other side's BATNA's;

3. Determine which approach (adversarial or problem solving) you will take in the negotiation;

4. Either: a. For an adversarial approach, estimate the bargaining ranges, determine your initial offer, and develop a concession strategy; or

   b. For a problem solving approach, brainstorm mutually-agreeable solutions, develop responses to the other side's reluctance to problem solve, and consider ways of allowing the other side to “save face”; and

5. Select a negotiating style.
To prepare, you can use any resource you want except the advice of a member of the bar. Do, however, check the Rules of Professional Conduct [or, if you are in a Code state, the Code of Professional Responsibility] to learn your ethical obligations.

**Negotiation Performance**

The negotiation will last no more than 30 minutes. You can do whatever you want during this time. But all conversations with your adversary must be on camera.

If questions come up during the negotiation about which you have not received prior authority from your client to agree, you can work out a tentative agreement of the kind that can be submitted to a client for approval. In this course, you do not actually have to contact your client afterward to get approval (although you certainly would in real life).

In real life, if you were to reach agreement, you would draft a contract to reflect it. But this is not a drafting course. Instead, before you leave the negotiating room, fill out and sign the settlement sheet you received with the assignment. If you have haggled over and agreed on specific wording, include it in quotation marks in a way that makes clear what the quoted words are supposed to do. Immediately after the negotiation, [here tell students how to submit the document to you]. The drafting does not have to be elegant, just legible.
Negotiation Results Form

1. Student/Client: __________________________ / __________________________

2. Student/Client: __________________________ / __________________________

3. How did this negotiation end (check one)? ___ a final agreement ___ no agreement ___ a tentative agreement (issues arose for which we had no client instructions)

4. Terms of the agreement (if one was reached):

________________________________________________________

________________________________________________________

________________________________________________________

________________________________________________________

________________________________________________________

________________________________________________________

________________________________________________________

5. Signatures:

________________________________________________________

________________________________________________________
Negotiation Assignment 1

Hiring a Chef

Ann Walkowiak and Keith Batter
(the chef and the restaurant owner)

Notes for the Teacher

Walkowiak is a well-respected Seattle chef. Batter owns a Manhattan restaurant and wants to hire her. They have turned the negotiation over to their lawyers.

On salary, the settlement range is huge. (There are other important issues.) Walkowiak wants at least $125,000 and will be surprised and very pleased if her lawyer can get $150,000. Batter won’t pay more than $175,000, and he will be surprised and pleased if his lawyer can get Walkowiak to agree to $150,000. Each party has misjudged the expectations of the other, and Walkowiak has probably underestimated the cost of living in Manhattan.

That means that on the salary issue, it will be easy to reach an agreement. But it also means that each side runs the risk of swindling itself, and that will often be the side that does not make the first offer. For example, if Batter’s lawyer offers $140,000, Walkowiak’s lawyer will either accept or go through the motions of running the offer up a bit, perhaps to $145,000. Walkowiak’s lawyer will be overjoyed with the result and leave the negotiation feeling that everything that the client could have hoped for on this issue had been accomplished — only to find out later that $175,000 was possible and that Batter would have happily settled for something in the $160,000 range.

In life, this problem is much more common than students think. In fact, it is part of most
consumer negotiations for the purchase of new automobiles. The dealer deliberately deflates the buyer’s expectations with an unrealistically high sticker price on the window of the car and hides from the buyer what it cost the dealer to buy the car at wholesale. When the buyer gets the dealer to agree to sell the car for less than the sticker price, the buyer feels as though a victory has been won, even though the dealer still makes a substantial profit and usually would have been willing to sell the car for less. In a legendary Hollywood negotiation in the 1930’s, Edgar Rice Burroughs, the author of the Tarzan books, agreed to let the first Tarzan movie be made for $10,000 in royalties, which was a very large amount of money at the time. After the contracts had been signed, the studio head told Burroughs he was a terrible negotiator because the studio would have paid at much as $50,000. Burroughs replied that the studio head was the one who was a mediocre negotiator because Burroughs would have been willing to let the movie be made for free, just to boost the sale of the books.

This is an important lesson for students to learn. In negotiation, the goal is not to satisfy the client’s expectations, because those expectations might be unrealistic. The goal is to get as much from the situation as you can. During the negotiation, one of the lawyer’s primary tasks is to figure out how much is possible, and a negotiator should not agree to anything before learning whatever can be learned about the range of possibility.

The overwhelming majority of students will not instinctively use easily accessible tools — such as the Internet and the Lexis News library — to learn about the restaurant industry, the relative cost of living in Seattle or Manhattan, and other relevant information, even if your instructions permit factual research. If you want to teach students to be resourceful, you can make an issue of this, either before or after the students negotiate. If you want to do it before the negotiation, you can explicitly tell them that they will be graded in part on how well they educate themselves on the industry in question, and that you will expect creativity and resourcefulness. If you want to make an issue of it after the negotiation, spend a total of one hour on the computer and in a general library, report to the students everything that you found in such a short period of time, and show how their negotiations would have been different if they had been better prepared.

Batter’s lawyers might be tempted to try too hard by telling the other side that Walkowiak will not be getting offers from the other restaurants. But a lawyer on Batter’s side exercises good judgment by not using this particular piece of information to gain an advantage. If Walkowiak hears this news via Batter, she will probably refuse to work for him under any conditions. She has no way of knowing whether his meddling influenced the other restaurants to lose interest in her, and his conversations with the other restaurant owners do not make him seem very trustworthy.

This assignment was inspired by one created by Professor Michael Wolfson of Loyola Law School in Los Angeles.
To: students representing Walkowiak

Confidential Information for Students
Representing Ann Walkowiak

Ann Walkowiak is the chef at Cascade, a restaurant in Seattle. Restaurant ratings websites list Cascade as one of the three or four most admired restaurants in the city. In Seattle, she is considered a star chef. Her last name is pronounced “wal-ko-vee-ak,” and a lot of people in Seattle know how to say that.

Walkowiak trained by working as a sous chef under Lucia Lavagetto, a legendary chef at Fog, an internationally renowned restaurant in Mendocino, California, for a five-year period that began 11 years ago and ended six years ago. From then until three years ago, she worked at two lesser known Seattle restaurants. Since then, she has been the chef at Cascade. Last year, she was written about favorably in The New York Times, Travel & Leisure, and Bon Appetit.

Walkowiak has hired you to negotiate a possible employment contract with Keith Batter, the owner of Aurora, a restaurant in Manhattan. These are notes from your prior interview with her:

Walkowiak has been thinking lately about leaving Seattle for a broader market. In the last few weeks, she has had serious but preliminary discussions with the owners of the following restaurants: Octavia (in San Francisco); Cadiz (in Beverly Hills); and the Stevenson Grill (in Chicago). She thinks that the clientele at Cadiz might be too stuffy to appreciate the kind of cooking she would like to do. The Stevenson Grill is an interesting restaurant, but it’s too small and too well defined already to give her room to blossom. Octavia is a promising possibility, but the owners there have so far only spoken in generalities: they respect her work, etc. They have not made an offer. Walkowiak
believes, however, that eventually she can probably coax an offer out of at least one of these three restaurants.

Last week, Batter met with Walkowiak (over dinner at another Seattle restaurant) and said that he would like to see whether an agreement could be worked out for Walkowiak to take over the kitchen at Aurora. Walkowiak said that she was not comfortable negotiating such a thing on her own and would like to turn it over to an attorney. Batter said that was fine with him because he was tied up with other matters and it would save him time if his attorney could do the negotiating.

Aurora is a prestigious New York restaurant that has had a decline in popularity over the last two years. After a star chef left to start his own restaurant, Batter tried having underlings cook the star’s old dishes. But the magic was gone, and Aurora is no longer a hot place to dine. When Walkowiak met with Batter, he tried to portray Aurora as it once was, but she has checked around and has been told of its true condition. She told you that if things continue, the next time the restaurant is reviewed in the New York Times, it might even be called a place fit only for tourists. She could give it new life and might enjoy the challenge.

Walkowiak has no idea what a chef of her skills is worth in New York. She earns $90,000 a year in Seattle. Walkowiak has a friend who lives in Manhattan. The friend lives at about the same standard of living that Walkowiak enjoys in Seattle, and the friend earns $125,000 a year. Walkowiak will not settle for less and believes that she should get more, although she doubts she could get anything over $150,000. In Seattle, Cascade provides her with free health insurance coverage, a free $100,000 life insurance policy, and two weeks of vacation.

Walkowiak also asked her friend how much it will cost to move to New York, and the friend said it might cost as much as $8,000 or $9,000. Walkowiak asked why, and the friend said that it might take several trips to New York to find an apartment; that landlords will want two or maybe even three months’ security deposit; that a real estate broker will charge a fee equal to one or two months’ rent; and that you cannot find a decent apartment without going through a broker. (Walkowiak assumes that she will rent for a year or two and take her time deciding whether to buy a home.)

It is much more important to Walkowiak, however, that she have total control over the menu and the kitchen. That means the authority to hire and fire every kitchen employee and to buy supplies from whatever vendor she thinks best, regardless of price. (A restaurant is made up of the kitchen staff — cooks, etc. — and the dining room staff —
maitre d’s, waiters, etc. It would be unusual but not unheard of for a chef to control the
dining room staff as well as the kitchen staff.)

Most importantly, creative control means the freedom to decide what goes on the
menu, which might mean replacing every dish currently on the menu. Walkowiak is not
willing to negotiate the menu dish by dish. She wants the authority to replace anything she
wants to whenever she wants to, without having to get approval. That would include
authority to replace the entire menu, if she feels like it, on her first day on the job.

Changing the menu includes changing the restaurant’s cost of doing business
because the raw ingredients of one dish might be more expensive than the ingredients of
another. Walkowiak will agree to work within a budget only if it is necessary to save the
deal. She does not have to stay within a budget at Cascade, and there the restaurant is
doing well financially. She does not want to be straight-jacketed by accountants.

If Walkowiak can’t reach a satisfactory agreement with any of the restaurants
mentioned here, she is willing to stay in Seattle for another year or two to build up her
reputation further. Or she could accept an offer she has just received from Toulouse, a
restaurant in New Orleans that will pay her $130,000 and give her complete menu control
immediately. Fringe benefits would be the same as Cascade, and New Orleans is cheaper
to live in than Seattle or New York. Toulouse is a very nice restaurant, but going to New
Orleans would be somewhat of a gamble for Walkowiak because she is not sure her style
would be well received there. Although New Orleans is a great restaurant city, the cuisine
there is unique.
To: students representing Batter

Confidential Information for Students
Representing Keith Batter

Keith Batter owns Aurora, a restaurant in Manhattan. He also owns some other businesses, the most important of which are two hotels in Boston, a resort in Vermont, and another in Maine. Batter wants to hire Ann Walkowiak as the chef at Aurora, and because of the press of other matters, he has asked you to handle the negotiations.

These are notes from your prior discussion with Batter:

Aurora is a prestigious New York restaurant that has had a decline in popularity over the last two years. After a star chef left last year to start his own restaurant, Batter tried having underlings cook the star’s old dishes. But the magic was gone, and Aurora is no longer a hot place to dine. No bad reviews of the restaurant have appeared in the press, but revenue is down. Because no bad reviews have appeared in the press, Batter hopes that Walkowiak does not know how desperate Batter is for an infusion of creative talent.

Walkowiak is the chef at Cascade, a restaurant in Seattle. Restaurant ratings website list Cascade as one of the three or four most admired restaurants in the city. In Seattle, she is considered a star chef. Her last name is pronounced “wal-ko-vee-ak,” and a lot of people in Seattle seem to know how to say that.

Walkowiak trained by working as a sous chef under Lucia Lavagetto, a legendary chef at Fog, an internationally renowned restaurant in Mendocino, California, for a five-year period that began 11 years ago and ended six years ago. From then until three years ago,
she worked at two lesser known Seattle restaurants. Since then, she has been the chef at Cascade. Last year, she was written about favorably in The New York Times, Travel & Leisure, and Bon Appetit.

Restaurant ratings websites have shown only a slight deterioration in Aurora's ratings. Batter thinks that is because many of the posted comments are probably based on meals eaten before Aurora's prior star chef left.

Batter knows that Walkowiak wants to leave Seattle and has been talking to three restaurants: Octavia (in San Francisco); Cadiz (in Beverly Hills); and the Stevenson Grill (in Chicago). He knows the owners of all three restaurants, and they have told Batter that they have already decided to hire other chefs and will not be making offers to Walkowiak.

Last week, Batter flew to Seattle and ate several meals at Cascade. They were enchanting and showed exactly the creativity he wants at Aurora. He then met with Walkowiak over dinner at another Seattle restaurant and said that he would like to see whether an agreement could be worked out for Walkowiak to take over the kitchen at Aurora. Walkowiak said that she was not comfortable negotiating such a thing on her own and would like to turn it over to an attorney. Batter agreed to negotiate this through attorneys.

The prior star chef was paid $225,000 a year. Batter is not willing to start Walkowiak at that salary, but he is willing to go as high at $175,000. He doubts that she would agree to less than $150,000. He would like to pay her as small a salary as she would not finding insulting. He believes that if she resents the salary, it will poison the relationship and he will just lose her to another restaurant.

Batter is not sure that Walkowiak understands how much it costs to live in Manhattan. Seattle is much less expensive than Manhattan.

In the initial interview, you asked Batter about profit-sharing plans. He said that the managers of the Boston hotels and the Vermont and Maine resorts participate in profit-sharing plans but get lower base salaries than they would without a profit-sharing plan. He had never thought before about putting a chef on a profit-sharing basis and is not opposed to the idea now, except that the base salary would have to be lower. You asked what the restaurant's pre-tax profits were two years ago (the prior chef's last full calendar year of employment) and last year (during which the prior chef left) and what they will probably be this year. This is what Batter told you:
Pre-tax profit is the surplus left after all operating expenses have been paid but before taxes have been paid. Batter has not authorized you to agree on a profit-sharing plan with Walkowiak. If Walkowiak will not agree without a profit-sharing plan, you can work out a tentative deal, conditional on Batter’s approval.

Batter provided the prior chef with free health insurance coverage, a free $50,000 life insurance policy, and four weeks of vacation. He is willing to give Walkowiak the same, except for the four weeks of vacation. He insists that she start at two weeks of vacation because the restaurant will need her presence intensely during the first few years. He also insists that she not take this vacation until next August. (August is a slow month in prestige restaurants.)

If Walkowiak insists on being reimbursed for the cost of moving her furniture, etc., to New York, Batter will has authorized you to pay her $2000. He knows that the move will probably cost at least twice that because of all the hard work and incidental expenses involved in finding an apartment in New York, but Batter will agree to pay more than $2000 "only if it’s essential to save the deal." Under no circumstances will he pay more than $5000.

The question of chef’s authority is more complicated, however. Batter believes that good chefs have artistic personalities, and in the arts — music, ballet, painting, drama, fiction — creative people want as much control as possible. They do their best work when in control, but if they are in total control they might bankrupt any business they work for because, in his view, artistic people usually lack business sense. Batter draws an analogy to the film director who will spare no expense to make his masterpiece, even if it loses money at the box office; it’s the responsibility of the studio executives to make sure that doesn’t happen.

For a chef, control means deciding what goes on the menu, what supplies are purchased for the kitchen, and who works in the kitchen. (Employees in the dining room — maitre d’s, waiters, etc. — are rarely under a chef’s control, and Batter will never agree to give Walkowiak control of the dining room staff.) Batter is willing to let Walkowiak hire and fire in the kitchen as she pleases. That will not increase the cost of doing business, and she will need a team she can work with. But Batter feels a sense of obligation to current
employees, and he will not let her fire any of them without his approval.

He is willing to let her do the buying within reason. If it costs about what he’s spending now, that’s fine. If it costs a little more, maybe two or three percent more, he thinks he can live with that. Any increase significantly larger than that might defeat the purpose of hiring a new chef. So he will not agree to a contract that would permit Walkowiak to increase the cost of raw ingredients by more than three percent over existing expenses.

As to the menu, Batter loved what he saw at Cascade, but he worries that if Walkowiak were to change the Aurora menu overnight, she might alienate people who are still eating at the restaurant. Batter would prefer that she go gradually and keep dishes that people still want to eat, regardless of whether she likes them.

Although Walkowiak is Batter’s first choice, he believes that if he cannot reach a satisfactory agreement with her, he will eventually be able to find another chef who can solve Aurora’s problems.
Negotiation Assignment 2

Lead Paint Litigation

Notes for the Teacher

Both sides are under pressure to settle now. The plaintiffs need money, and the defendants are faced with a preliminary injunction that could be reversed on appeal but will hurt them badly before that can happen.

Landlord lead paint abatement liability differs radically from state to state. When we use this assignment, we give students some New York statutes and case law, but, depending on where you are teaching, that might not realistically represent your local law or practice. For realism, we suggest that you provide students with the statutes and case law that govern your locality. If your local law is particularly unfriendly to one of the parties, you might want to tinker with the facts to even things up. If you do that, you do not need to rewrite the fact pattern. Just write an addendum describing your new facts and distribute it with the assignment.

If you want to use the New York authorities we use, here they are:

New York Real Property Law section 235-b


McCants v. Thompson, 285 A.D.2d 967, 727 N.Y.S.2d 676 (4th Dep’t 2001)


Richardson v. Simone, 275 A.D.2d 576, 712 N.Y.S.2d 672 (3d Dep’t 2000)
**Lead Paint Negotiation**

The Bevans family sued their landlord, Newcombe Realty, after their daughter was diagnosed with lead poisoning. They pleaded three causes of action. The first alleged a violation of the warranty of habitability. The second alleged negligence in Newcombe’s renting an apartment that Newcombe knew or should have known to be dangerous to occupants. The third alleged negligence in Newcombe’s attempts to abate the lead paint. The complaint and answer are attached.

Immediately after commencement of the lawsuit, the Bevanses moved for an order preliminarily enjoining Newcombe for as long as the lawsuit is pending. The court granted the injunction on October 31. The order is attached.

At the hearing on the preliminary injunction motion, the Bevanses offered the following evidence:

1. Axel and Corrine Bevans testified to the facts alleged in the complaint.

2. Their pediatrician testified that on July 9, Lauren Bevans’ lead blood level measured 48 micrograms of lead per deciliter of blood (abbreviated 48 μg/dl).

3. A technician at an environmental laboratory testified that
a. three paint samples extracted from the walls of the apartment on July 17 showed that 8.6%, 13.9%, and 16.2% of the samples was lead by weight

b. according to guidelines established by the U.S. Department of Housing and Urban Development and the U.S. Environmental Protection Agency, all three samples exceed levels calling for removal or encapsulation of the paint (a process called “abatement”)

c. six dust samples taken from various spots on the floor of the apartment on July 17 showed 2237 micrograms of lead dust per square foot (abbreviated 2237 μg/ft²), 1645 μg/ft², 3190 μg/ft², 980 μg/ft², 95 μg/ft², and 2654 μg/ft²

d. five of the six floor dust readings violate HUD and EPA guidelines (the exception was the 95 reading)

e. six dust samples taken from the same spots on the floor on December 22 showed 4670 μg/ft², 8237 μg/ft², 7271 μg/ft², 4419 μg/ft², 5209 μg/ft², and 9823 μg/ft²

(If you want to know more about the measurements mentioned above, or about lead poisoning generally, use any Internet search engine and search for things like the following: “lead paint”, “lead poisoning”, “abatement”, and so on. Ignore websites for commercial abatement companies, and concentrate on sites for government agencies and medical authorities.)

The Bevans’ lawyer has hired Professor Leonid Saltz of Cornell Medical School. Professor Saltz specializes in treating children who have been lead-poisoned, and he will be at expert witness for the Bevanses at trial. On October 26 (after the preliminary injunction hearing but before the court ruled on the preliminary injunction motion), Newcombe’s lawyer deposed Professor Saltz.
At that deposition, Professor Saltz testified as follows: He has examined but not treated her. It is too early to tell for sure what neurological injuries she has suffered, but he believes that he sees incipient attention deficit hyperactivity disorder, a permanent affliction that could require special schooling. Public school districts are required to provide that special schooling, but they sometimes do it badly. Some parents find it necessary to pay for private schooling instead. Lauren is likely to have behavioral problems in school and as an adult. Substance abuse is higher among people who were lead-poisoned in childhood, but no study has concluded that a majority of lead-poisoned children grow up to be substance abusers. On average, people with attention deficit hyperactivity disorder earn lower annual incomes, and on average, their working lives are shorter.
AXEL BEVANS; CORINNE BEVANS; and
LAUREN BEVANS, an infant, by her
father and natural guardian,
Axel Bevans,
    Plaintiffs
v.

NEWCOMBE REALTY CO., INC.

Defendant

COMPLAINT

The plaintiffs allege as follows:
1. Plaintiffs Axel Bevans and Corrine Bevans are married and the parents of Lauren
   Bevans, who was born February 29, 2000.
2. Defendant owns the apartment building at 65 Chilton Street, Fairview.
3. From April 15, 2001, to August 5, 2001, the plaintiffs resided in apartment 23
   at 65 Chilton Street.

FIRST CAUSE OF ACTION
(Warranty of Habitability)

4. The plaintiffs reallege paragraphs 1 through 3, above.
5. Throughout the plaintiffs’ tenancy in apartment 23 at 65 Chilton Street, lead
dust generated from lead paint on walls and other surfaces so poisoned plaintiff Lauren
Bevans that in July 2001 she was hospitalized.
SECOND CAUSE OF ACTION
(Negligence)

6. The plaintiffs reallege paragraphs 1 through 5, above.

7. The defendant, through its employees, either should have known or, on information and belief, actually did know before Lauren Bevans was poisoned that apartment 23 contained dangerous levels of lead paint.

THIRD CAUSE OF ACTION
(Negligence)

8. The plaintiffs reallege paragraphs 1 through 7, above.

9. When the plaintiffs informed the defendant of the events in paragraph 5, above, the defendant's own employees, who have no training in lead abatement, tried to strip the paint in apartment 23 with power sanders.

10. As a result, all of the plaintiffs' personal property was contaminated with lead paint dust, and, to protect their health, they were compelled to leave the apartment permanently and abandon large amounts of personal property.

WHEREFORE, the plaintiffs request a judgment against the defendant
(a) awarding the plaintiffs damages of three million dollars for personal injury inflicted on Lauren Bevans, property loss and damage inflicted on Axel and Corrine Bevans, and pain and suffering inflicted on all the plaintiffs,
(b) enjoining the defendant from renting apartments in any building where lead paint is exposed and from removing lead paint in such a building except by contracting the work to a lead paint abatement specialist,
(c) awarding the plaintiff attorneys fees as well as costs and disbursements in this action, and
(d) providing such other relief as this court finds just.

{indorsement omitted}
AXEL BEVANS; CORINNE BEVANS; and
LAUREN BEVANS, an infant, by her
father and natural guardian,
Axel Bevans,

Plaintiffs

v.

NEWCOMBE REALTY CO., INC.

Defendant

ANSWER

The defendant answers as follows:
1. The defendant admits the allegations in paragraphs 2 and 3 of the complaint.
2. The defendant denies the allegations in paragraphs 7, 9 and 10 of the complaint.
3. As to paragraph 5 of the complaint, the defendant denies causation and denies
information sufficient to form a belief about the other allegations in the paragraph.
4. The defendant denies information sufficient to form a belief as to paragraph 1
of the complaint.

AFFIRMATIVE DEFENSE

5. Plaintiffs Axel and Corrine Bevans should have prevented plaintiff Lauren Bevans
from eating dust from floors, and their conduct is the cause in law and in fact of plaintiff
Lauren Bevans’s injury.
ORDER

AXEL BEVANS; CORINNE BEVANS; and
LAUREN BEVANS, an infant, by her
father and natural guardian,
Alex Bevans,

Plaintiffs

v.

NEWCOMBE REALTY CO., INC.

Defendant

ORDER

It is hereby

ORDERED that the defendant shall, by November 16 of this year, deliver to each
of its tenants at 65 Chilton Street in Fairview, a copy of this order and the complaint and
answer in this action, and it is further

ORDERED that, during the pendency of this action, the defendant and its offers,
agents, and employees are preliminarily enjoined from conducting any painting, sanding, or
paint removal of any kind to the interior or exterior of the building at 65 Chilton Street,
Fairview, unless the surfaces to be worked on have been tested by an environmental
laboratory for lead, the defendant has contracted with an abatement contractor to work
the surfaces where the lead content exceeds two percent of the paint by weight, and a
copy of that contract and an abatement plan has been filed in this court and served on the
plaintiffs or their attorney and on every tenant at 65 Chilton Street.

ORDERED that, during the pendency of this action, the defendant and its offers,
agents, and employees are preliminarily enjoined from contracting new tenancies with
prospective tenants not living in 65 Chilton as of the date of this order except for
apartments that have been certified by an environmental laboratory to have no paint with
a lead content exceeding two percent by weight.

{judge’s signature omitted}
To: students representing the Bevans family

Confidential Information for Students
Representing the Bevans Family

Lauren Bevans has received a treatment that the doctors call chelation. Medical people use chemicals to leach lead out of her muscles, organs, and bones, and it leaves her body in urine. Chelation will remove much but not all lead. And no medical procedure will repair damage that has already been inflicted on her nervous system.

The cost of medical treatment so far has mostly been covered by insurance, but the Bevanses have had to pay about $2,000 out of their pocket for medical expenses. The cost of future medical care is impossible to predict. Lauren might suffer diminished intelligence, but there is nothing medicine can do to remedy that. If she turns out to suffer from a learning disability or something else that is treatable, treatment and additional educational expenses could be substantial, but it would still be impossible to predict the cost.

The Bevanses have moved into another apartment. The costs of moving, including a real estate agent’s fee, came to $4,800. Of their property, solid objects such as wood tables were cleaned by an abatement company at a cost of $6,500. On advice of both the environmental lab and the abatement company, they threw away other things, especially anything with fabric. Replacing these items cost $26,450.

Axel Bevans is an assistant manager at the Nassau Hilton Hotel and earns $65,000 a year. Corrine Bevans had been a sixth grade teacher but stopped working the December before Lauren was born.
If this lawsuit were to go all the way to trial, a judgment would not be issued until two to five years from now. You believe there is a 60% likelihood of a verdict in your favor, and that if a jury did return a favorable verdict, it would be somewhere between $500,000 and $2,000,000. Because you have not yet done any discovery, you are not confident of your ability to predict, except that if you actually got $2,000,000, it would be because everything along the way broke in your favor (shocking evidence revealed in discovery, sympathetic jury selected, etc.)

Normally, you would refuse to negotiate before completing discovery, but the preliminary injunction puts Newcombe in a terrible position. Newcombe might be willing to settle on good terms to prevent the preliminary injunction from taking effect. You have not yet had a chance to have an expert vocational economic analyst study Lauren’s situation and estimate how much less she would earn over her lifetime. That makes you very hesitant to settle fast, although the Bevanses’ need for immediate money and Newcombe’s difficulties with the preliminary injunction might combine to make settlement now both necessary and advantageous.

In the meantime, if Newcombe were to appeal the preliminary injunction, you predict a 60% likelihood that the Appellate Division would vacate it, but that it would take up to a year to get a decision from the Appellate Division. You were surprised that the trial court judge gave you as much relief as she did.

If the Appellate Division were to vacate the preliminary injunction, that would not change your predictions about winning damages at trial. The jury would probably not even be told that there had been a preliminary injunction. The only effects of vacating the preliminary injunction would be to relieve Newcombe of the obligations imposed by the injunction and to reduce the likelihood that the trial judge would give you a permanent injunction at trial. You can’t predict how much vacating the preliminary injunction might discourage the trial judge from giving you a permanent injunction. It would depend on the Appellate Division’s reasons for vacating the preliminary injunction, the way the evidence goes at trial, and how the jury decides the damages issues. As you learned in first-year Civil Procedure, judges decide equitable remedies like injunctions; juries decide legal remedies like damages; juries decide fact issues in a law claim; and where the same fact issue arises in an accompanying equity claim, the judge adopts the jury’s determination. A big damages award based on shocking evidence can encourage a judge to grant related equitable relief, but that’s not dispositive, especially if the judge thinks the jury got carried away.

The Bevans want as much money as you can get from this negotiation. If you can get $400,000 now, without any more court appearances or motions, they will take it —
but very reluctantly. They are afraid of expenses in the future for Lauren’s medical care and education and would obviously like a settlement well into the seven-figure range. But they also need money soon. You have explained that discovery might turn up evidence that would support a much higher verdict than $400,000, and you have also explained how long it would take to get to trial and to defend a favorable judgment on appeal. The Bevanses are not optimistic that the delay and the risk of losing at trial would be worth it. They tend to reason things through realistically and are neither risk-averse nor easy gamblers. They need money soon.

Before they moved out, the Bevanses told every other tenant they knew about what had happened to Lauren. They assume that gossip spread this news throughout the building, and they feel that they have fulfilled any moral obligation they might have to other tenants. You sought the injunction as a bargaining chip.

The Bevans family retained you on a contingency fee basis. They agreed to pay you expenses as you incur them plus one-third of any judgment resulting from trial or one-quarter of any negotiated settlement, whichever applies.

Expenses include fees charged by the court, the costs of deposition transcripts, and fees charged by expert witnesses. You have billed the Bevanses for court fees of $350 and expert witness fees of $4,650, but the Bevanses have not paid that bill yet. You do not know when they will. If you prepare fully for trial, you anticipate additional expenses, billable to the Bevanses, of about $15,000 in expert witness fees, etc.

If Newcombe offers to pay a settlement over a period of years (rather than all at once up front), that settlement would be worth less than receiving the same amount of money immediately because money received now can be invested and earn income in the meantime. This is called the time value of money. A settlement paid out gradually over time is called a structured settlement.
To: students representing Newcombe Realty

Confidential Information for Students
Representing Newcombe Realty

The preliminary injunction puts your client in a very difficult situation. Whenever there is a vacancy, they cannot rent the apartment to a new tenant without removing the lead paint in it. There are 80 apartments in the building. In a normal year, a dozen of them might turn over. All the apartments have lead paint in them. When the preliminary injunction and the pleadings are served on the other tenants, turnover might increase, but Newcombe can’t predict by how much. Abating each apartment would cost between $15,000 and $25,000 depending on the size of the apartment. The walls can be encapsulated by attaching new sheetrock over each wall, but all the door jambs and window frames will have to be replaced or stripped of paint by an abatement company using special procedures.

Newcombe’s employees tell you that they always knew the apartments had lead paint in them, simply because the building was constructed in 1922. But they did not realize that lead dust could be generated so easily from the paint.

It is true that no employee of Newcombe’s has ever taken a course in lead paint abatement or worked for a company specializing in lead paint abatement. But the Newcombe people believe they can figure out on their own how to remove lead paint.

If this lawsuit were to go all the way to trial, a judgment would not be issued until two to five years from now. You believe there is a 40% likelihood of a verdict in your favor, and that if a jury returned an unfavorable verdict, it would be somewhere between $100,000 and $2,000,000. Because you have not yet done any discovery except the deposition of one expert, you are not confident of your ability to predict, except that the
plaintiffs would have to be very lucky to get $1,000,000.

In the meantime, if Newcombe were to appeal the preliminary injunction, you predict a 80% likelihood that the Appellate Division would vacate it, but that it would take up to a year to get a decision from the Appellate Division. You were shocked that the trial court judge issued the injunction.

If you can get an agreement that dismisses this lawsuit and vacates the preliminary injunction before November 16, Newcombe is willing to pay the Bevans family up to $600,000. Newcombe wants to pay as little as possible, however. You sense that if you can get them out of this mess very quickly and for less than $500,000 (including your fee), they would be so happy that they might steer most of their litigation work to you. (They have used you three or four times in the past. They tend to spread their work over several law firms.)

Normally, you would refuse to negotiate before completing discovery, but the preliminary injunction puts your clients in a terrible position, and they are eager to get out from under it. If the Bevanses refuse to settle before November 16 (see the preliminary injunction), Newcombe will offer them less because after that date the preliminary injunction will begin to hurt Newcombe financially.

Newcombe carries no insurance that would cover this liability or pay your legal fees. They would have a hard time coming up with a lot of money immediately. It would be cheaper for them to pay out money over a period of years. If a settlement is paid out gradually (rather than all at once up front), that settlement would cost less because Newcombe would have to borrow money and pay interest on a settlement paid out entirely now. This is called the time value of money. A settlement paid out gradually over time is called a structured settlement.

Newcombe feels no moral responsibility to the Bevans family or to any other tenant. Newcombe’s position is that, first, this child could have been poisoned from lots of sources, such as lead in the home of somebody the child visited, and second, even if the lead paint was the source of the lead in her bloodstream, the parents should have supervised her properly to prevent her from eating dust.

Newcombe retained you on an hourly basis. You have done about $15,000 of hourly work so far. You have billed all of it, and the bills are being paid promptly. An immediate appeal from the preliminary injunction would cost at least $10,000, including
your fee and the cost of the transcript. Newcombe has made it clear that they will start
becoming unhappy with the expense of representation when your bills reach into the
$40,000 range. Going to trial would easily cause that.
Negotiation Assignment 3

Eviction for Criminal Activity

Notes for the Teacher

This assignment is based on a case recently handled by students in Hofstra’s Housing Rights Clinic. After extensive negotiations over a two-week period, the students and the Housing Authority lawyer reached a settlement five minutes before jury selection was about to begin. Although the names of the parties and a few of the facts have been changed, the fact pattern reflects the basic personal, political and social context of the actual case. Indeed the issues raised by HUD’s “One Strike and You’re Out” policy have arisen in a number of cases throughout the country.

Since the publication of the first edition of this manual, the United States Supreme Court has ruled that the “One Strike and You’re Out” policy is consistent with the Anti-Drug Abuse Act of 1988 and its legislative history and is constitutional. *HUD v. Rucker*, 535 U.S. 125 (2002). After this decision, HUD issued an interpretative letter urging Public Housing Authorities to be guided by common sense in exercising their discretion under the policy. Excerpts from the *Rucker* decision and the HUD letter are provided to the students for use in their negotiations.
In this assignment, the two parties have a variety of different interests, rights, and power. Ms. Barry is angry with her treatment by the housing authority, is concerned that her family will become homeless, and wants professional help for Sally. The housing authority has an interest in strict enforcement of the “One Strike and You’re Out” policy but does not want to lose at trial. It also feels pressure from City officials and HUD. In regard to rights, the case raises a number of legal issues: whether the policy was properly posted; whether the housing authority exercised its discretion reasonably in this case; whether the hearing complied with the lease provisions; whether Sally acted in self defense; and whether the housing authority waived its right to evict by failing to send a prompt notice of termination. And in terms of power, Ms. Barry has the Tenants Association behind her and perhaps could attract sympathetic media attention. The housing authority has the power to adopt and enforce safety regulations, and, even if it lost this case, could try to make things unpleasant for Ms. Barry at the complex.

The facts here can form an excellent basis for Negotiation Exercises 1, 2, and 3. It requires students to focus on the social and political context of a case. Students can assess the different interests, rights, and power, and determine, based on this assessment, whether an adversarial or a problem-solving approach will be most advantageous to their “client.”

Used as an assignment for a full negotiation, the fact pattern gives students the opportunity to evaluate the effectiveness of the approach they have selected. Many students will begin by focusing solely on rights-based issues, arguing, for example, that the housing authority did not waive its right to evict, that Sally was acting in self-defense, or that the Rucker decision conclusively allows the housing authority to evict Ms. Barry. In our opinion, those arguments are basically irrelevant. The important issues are the type of counseling program for Sally and the necessity for reports on the program to the authority. The focus of the bargaining should be on ways to provide counseling services for Sally (what both parties want), assurances to the authority that Sally is not going to engage in criminal activity again (the authority’s interest), and that Sally’s confidentiality is preserved (Ms. Barry’s interest). The fact pattern gives students an opportunity to engage in problem solving on these issues.

In the actual case, the parties agreed for a dismissal of the case without prejudice. Ms. Barry agreed to send Sally for evaluation in the County program and to notify the authority if Sally withdrew from the program. If she withdrew, the authority would have a certain time period in which to ask for reinstatement of the case. Then, the case would go to trial. In any case, Ms. Barry could move to dismiss the case with prejudice.
To: all students

Negotiation Assignment 3

Eviction for Criminal Activity

Background

Grace Barry lives in an apartment in a low-rise public housing complex in Singleton, a small city with a population of 25,000, an hour’s commute from a large city. Singleton is diverse both economically and racially. On the ocean front, it has million-dollar mansions inhabited by executives who work in the large city; further inland, there are more modest homes in predominantly white middle-class neighborhoods; and towards the shopping district, African-Americans and Latinos live in small homes and two-flats. For years, political power in the city has been in the hands of the more affluent community. The public-housing project where Ms. Barry lives was built in the mid-1960s in the southwest corner of the City under pressure from the state government.

The complex has ten buildings with eight units each. All of the inhabitants have low-incomes, and most are African-American. It is owned and managed by the Singleton Housing Authority ("SHA"), a state-created body whose board is selected by the mayor. The tenants’ rent is based upon their income. The difference between the market rent and the amount paid by the tenant is subsidized by the United States Department of Housing and Urban Development ("HUD"). SHA is subject to HUD regulations.

Ms. Barry is a 54 year old African-American and lives in the complex with her four grandchildren (ages 8, 10, 14, and 16). She has resided in the complex for 30 years. On
March 5 of this year, Ms. Barry’s 16 year old granddaughter, Sally Barnett, was arrested for second degree assault on the grounds of the complex for attacking a man (21 year old Randy Arnold). On April 23, pursuant to HUD regulations and Ms. Barry’s lease, SHA’s Tenant Relations Specialist, Thelma Jones, sent Ms. Barry a notice terminating her lease because of this arrest and advising her of her right to a hearing to contest the termination. In May, Ms. Barry and Sally attended the hearing before the SHA’s Executive Director Myron Simmons. Subsequently, Mr. Simmons sent Ms. Barry a letter finding against her and giving her until June 30 to leave the apartment.

Given her low income, Ms. Barry had nowhere else to move and remained in the apartment after June 30. The SHA then brought an eviction case against her in City Court. The complaint alleged, in relevant part

The term for which said Premises were rented by Defendant expired and terminated on June 30, pursuant to the provisions of the lease, after the default of the Defendant thereunder. The tenant defaulted under the lease as follows: A member of your household engaged in "criminal activity" at or near the premises in violation of the “One Strike and You’re Out” policy. Specifically, Sally Barnett was arrested on March 5 for second degree assault.

After being served with the complaint, Ms. Barry went to a law school clinic which agreed to accept her case. Her student attorneys filed a jury demand and an answer denying the allegations in the complaint and alleging the following affirmative defenses:

1. The “One Strike and You’re Out” policy is not a valid lease provision because it was not validly promulgated;

2. Even if the policy was validly promulgated, SHA has waived its right to bring this case. While the alleged criminal activity took place on March 5, SHA waited until April 23 to terminate the tenancy; and

3. The termination hearing violated the lease because the hearing officer was not an impartial, disinterested party.

The case is set for jury trial on August 17 of this year. The jury will be selected from Singleton’s voter registration rolls. Sally’s criminal case has not yet been set for trial. In the meantime, the alleged victim, Randy Arnold, has left town. A negotiation meeting between the attorneys for Ms. Barry and the SHA is set for August 5.
Relevant Documents

*Letter from Singleton Police Department Dated March 25*

To Singleton Housing Authority:

The subject below has been arrested for Penal Law violations. Eviction proceedings should be commenced at once.

*Sally Barnett did stab Randy Arnold with a pair of scissors on March 5, 20:26 hours. Sally is granddaughter of Grace Barry.*

*Portions of Testimony at the SHA Hearing*

Barry: Before this incident, Randy Arnold has been known to hurt other people in the projects area. He has been escorted from the property by police force and has been arrested. Two weeks before the incident, my granddaughter came to me and told me that he was bothering her. So I politely went over and talked to Randy. I said, “What is Sally doing to you?” He says nothing. I said, “Why are you bothering her?” He was drunk. So I asked him in a nice, polite way, “Randy, would you please leave her alone?” He said, “Ms. Barry, I’ll leave her alone.”

So I left it like that. I didn’t come to the Housing Authority. I didn’t call the police cause I felt like you know, you know, most of the kids here, what age they are, they all listen to what I have to say. So, I felt like he was not gonna hurt her no more.

Then, a few weeks later, I go to the Tenants Association meeting, and Sally comes crying, telling me that he was spitting in her face and threw gravel and then grabbed her over by the playground while she was minding her own business. At the time I didn’t know what happened. I went outside. One of the ladies told me to go upstairs and call the police and let them
know what happened. So by the time I got upstairs the police were already coming to my house, and Sally said she was defending herself. Someone spits on you, you don’t know whether they have AIDS or what. I’m sorry, I’m sorry what happened.

I went down to the police station. They explained to me that Randy has a record of hurting other people and stuff. And he was not even supposed to be on the project’s property.

Before this incident, I never saw the “One Strike and You’re Out” policy posted in the rent collections office. I am a member of the Tenants Association and visit those offices frequently, but never noticed such a posting.

Simmons: Sally, can we hear from you?

Sally: She told you the whole story.

Simmons: Where did you obtain the scissors?

Sally: I got it from someone. I asked for it.

Simmons: When you asked for it, did you know what he was going to do?

Sally: I didn’t know he was gonna spit in my face. It was just a reaction.

Simmons: Where were the scissors?

Sally: In my waist.

Simmons: How long did you have it in your possession?

Sally: I don’t know. Not for long.

Simmons: An hour or two?
Sally: It happened so fast.

**May 20 Letter from Myron Simmons to Grace Barry**

While I am sympathetic with your situation, the housing authority must enforce its “One Strike and You’re Out” policy. As you know, Singleton, and the complex in particular, has experienced a serious increase in crime over the past year, and the only way we can address this problem is to strictly enforce the policy.

Your neighbors told the police that Arnold and Sally got into a fight, Sally obtained scissors from a friend and stabbed him in the stomach. At the hearing, Sally and you confirmed this. Such behavior cannot be tolerated. It endangers the safety of all the residents in the complex.

We regrettably must terminate your tenancy as of June 30.

**Relevant Lease Provisions and Law**

**One Strike And You’re Out Policy**

In order to reduce crime, especially drug-related activity, in its subsidized buildings, HUD has adopted regulations requiring housing authorities to evict tenants engaged in criminal activities. HUD policy, however, encourages these authorities to handle these cases on an individualized basis and to exercise reasonable discretion in light of all the relevant circumstances.

In January of this year the SHA Board adopted the “One Strike and You’re Out” policy effective February of this year. This policy reads

Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of tenants’ residences by persons in the immediate vicinity of the premises; any criminal activity that threatens the health or safety of any on-site property management staff responsible for managing the premises; or any drug-
related criminal activity on or near the premises, engaged in by a resident, any member of the resident’s household, or any guest or other person under the resident's control shall be grounds for termination of tenancy.

Ms. Barry’s Lease

Paragraph 10: Changes in Lease Provisions

Any changes in the future in the lease in order to comply with HUD regulation or SHA requirements to maintain safe and sound premises will be posted in the rent collection office and will become effective and binding on the date as noted in the postings.

Paragraph 12: Termination Hearings

Termination hearings shall be heard by an impartial, disinterested person appointed by SHA, other than a person who made or approved the termination under review.

Case Law and Administrative Interpretations

“[HUD’s One Strike and Your Out policy] allows a local public housing authority to evict a tenant when a member of the tenant’s household or a guest engages in
drugs-related criminal activity, regardless of whether the tenant knew, or had reason to know, of that activity. ... [The policy] does not require the eviction of any tenant who violated the lease provision. Instead, it entrusts that decision to the local housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from ‘rampant drug-related or violent crime.’” *HUD v. Rucker*, 535 U.S. 125, 127-28, 133-34 (2002).

(After the *Rucker* decision HUD issued letters to public housing authorities encouraging them “to be guided by compassion and common sense in responding to cases involving the use of illegal drugs ... and to consider the seriousness of the offense and how it might impact other family members” and asserting that public housing authorities “are not required to evict an entire household — or, for that matter, anyone every time a violation of the lease clause occurs.”)
Negotiation Assignment 3

Eviction for Criminal Activity

Confidential Information for Grace Berry’s Lawyer

Your client is both terrified and angry. On the one hand, she is very worried about being evicted. She has lived in her apartment for over thirty years and has nowhere else to move. She has no relatives in the area and fears that she and her grandchildren will become homeless if she is evicted. On the other hand, she says that the SHA has been becoming more and more arbitrary. The Tenants Association, in which she is a member, has complained about a new policy that all tenants must carry identification cards and notify the Authority when they leave their apartments for more than a day. Your client feels that the SHA is using the incident with Sally as a test case. She acknowledges that there are real problems with crime at the complex, especially involving drugs. But this is not a drug case. The Association backs her up; they will pack the courtroom to protest the “One Strike and You’re Out” policy.”

She is also very concerned about Sally’s emotional condition. Since the incident, she has been very quiet. She will not talk to anyone about it. When the topic is raised, she just starts crying. Her teacher recommends that Sally get some counseling.

In regard to the incident, your client confirms her testimony at the hearing. She does say, however, that there had been talk in February at one of the Tenants Association meetings about the “One Strike and You’re Out” policy. But she never saw any posting of the policy.
She would prefer to have the case dismissed and have the SHA reconsider its “One Strike and You’re Out” policy.” In the alternative, she would like to have the case adjourned six months, and, if there are no further problems with Sally, the case will be dismissed.

She is willing to have Sally go to a counseling program, and Sally seems amenable to the idea. But your client is very concerned about confidentiality issues. The local counseling center, the Singleton Youth Center, is run by the city and is closely connected with local officials, including Myron Simmons. She would feel much more comfortable with sending Sally to the County Youth Center. She also want total control of any treatment plan with no interference from the SHA, the City, or the Court.

If the SHA will not agree to any of these ideas, she gives you authority to agree to a solution that will address her interests of keeping her family together and protecting her family’s privacy. Otherwise, she will go to trial. And the Tenants Association will support her.

Your supervisor tells you that the City Judge on this case, Judge Ingram, is unpredictable. He will probably allow almost everything into evidence (even the hearsay police records) and allow the jury to make its decision. The jury pool will most likely consist of middle-class and upper middle-class residents of Singleton, although we might be surprised to see one or two jurors from less affluent sections. Most people in Singleton are very concerned about the increase in crime, and many have blamed this problem on the lax policies of the SHA. In several recent cases, the Appellate Court has reversed Judge Ingram for not following established precedent, but most of the judges on that court are tough on “law and order” issues.
Negotiation Assignment 3

Eviction for Criminal Activity

Confidential Information for SHA’s Lawyers

Myron Simmons, representative of your client, is very concerned about enforcing the “One Strike and You’re Out” policy. Local politicians are very concerned about the rise in crime in Singleton and several of those arrested were tenants at the complex. The mayor has come down hard on the SHA Board to become more active in fighting crime. HUD also has been encouraging housing authorities to evict tenants when members of their households engage in criminal activity. Simmons has only recently become Executive Director of the SHA and wants to show he means business.

This incident, while involving only a teenager and an attack on a recognized hoodlum, was especially egregious. It occurred in the complex yard with many other tenants and young people looking on, Sally was not in any real danger, and she was carrying the scissors on her. Although he likes Ms. Barry, Simmons wants to teach the tenants a lesson that such conduct is absolutely prohibited.

But he does not want to lose at trial. There is a Tenants Association which has been very ineffectual, but he fears that a jury verdict against the SHA will allow the tenants to feel that the “One Strike and You’re Out” policy has no teeth. He believes the policy was posted in January of this year but has no record of its posting and admits that when he checked the board in the rent collections agency after Ms. Barry’s hearing, it was not
there. The SHA waited until April 23 to send the termination letter because of a backlog in work at his office.

Ideally, Simmons wants an agreement that Barry will leave. He is willing to give her three months or even longer to move out. As an alternative, he will agree to dismiss the case on the condition that Sally leave the apartment and never return. And she can only visit with the permission of the SHA. Any violation of this agreement, and the SHA can automatically evict Barry.

If these positions are not acceptable, Simmons will agree that Sally can stay as long as she gets into a counseling program at the Singleton Youth Center, a local program for “troubled youth.” He would want monthly reports from the Center to the SHA and the Court on Sally’s treatment plan and progress. If Sally drops out of the program, SHA can automatically evict Barry.

If Barry does not agree to any of these ideas, Simmons gives you authority to agree to a solution that will address SHA’s interest of strong enforcement of the “one Strike and You’re Out policy” and assure that Sally does not engage in criminal activity. Otherwise, he will take his risks at trial.

Your supervisor tells you that the City Judge on this case, Judge Ingram, is unpredictable. He is very concerned about protecting the Singleton community but wants to appear fair to all segments of the City. He will probably allow almost everything into evidence (even the hearsay police records) and allow the jury to make its decision. But, given that Barry is represented by a law school Clinic, he might be a stickler on the law. The jury pool will most likely consist of middle-class and upper middle-class residents of Singleton, although we might be surprised to see one or two jurors from less affluent sections. Most people in Singleton are very concerned about the increase in crime, and many have blamed this problem on the lax policies of the SHA. This attitude should help us. In several recent cases, the Appellate Court has reversed Judge Ingram for not following established precedent, but the most of the judges on that court are very tough on criminal issues.
Negotiation Assignment 4

Criminal Charges of Narcotics Possession, Driving While Intoxicated, and Driving While Ability Impaired by Drugs

Notes for the Teacher

This assignment provides the opportunity for two different types of pleas bargaining. In Assignment 4A, prosecutors and defense attorneys negotiate in an office or a courthouse hallway. In Assignment 4B, rather than negotiating directly with one another, the prosecutor and defense attorney are required to make arguments before the presiding judge in support of their respective positions concerning an appropriate sentence if the defendant pleads guilty as charged. For purposes of the second assignment, either the instructor or a student can play the role of judge. An instructor has the option of dividing the class into two groups one assigned to Assignment 4A, the other to Assignment 4B or can assign the entire class to one of the assignments. The same students should not be assigned to both assignments. The same confidential materials are distributed to the attorneys for each party for either Assignment 4A or Assignment 4B.

This assignment presents a host of problems and issues which arise in the context of plea bargaining. It provides a vehicle for exploring the option of problem-solving, as well as adversarial, plea bargaining. It gives students opportunities to engage in information bargaining. And it raises serious ethical issues for both attorneys.

In examining the interests of each side, both attorneys will readily identify the obvious interests of the parties: the defendant seeks to secure a non-jail disposition, and the District Attorney is concerned with deterring this repeat-offender from future criminal behavior. But a deeper analysis will reveal other interests. The defendant, for example, has been chronically
depressed for the past decade facing difficult family and personal problems and hopes to return to her social work practice in the future. On the other hand, she has no intention of actually giving up occasional use of crack, considers drug treatment programs to be almost equivalent to jail, and only reluctantly would agree to an out-patient drug treatment program. Likewise, the District Attorney’s Office has a number of interests. While one of the D.A.’s plea bargaining guidelines favors a disposition which would entail substantial jail time because the defendant was previously sentenced to 30 days incarceration, other factors in the guidelines (the time lapse between the previous charges and the present one and the need for the defendant to participate in a drug treatment program) suggest a less severe disposition. Moreover, the message to the Assistant District Attorneys in the closed meeting that they should maximize plea bargained dispositions suggests an institutional interest in settlement, rather than trial.

These different interests give the lawyers the opportunity to engage in creative brainstorming to develop a drug treatment program for the defendant that can effectively help her to return to her professional practice and allows the District Attorney’s Office to say that it is maximizing the welfare of the County’s citizens.

The assignment also gives the attorneys an opportunity to use rights-based arguments in more traditional adversarial plea-bargaining. The defense attorney approaches the negotiation table with several valuable bargaining chips. There are serious problems with the prosecutor’s case. The DWI charge looks weak because the only evidence of intoxication of which the defense is aware are those described in the complaint (red, watery eyes; the smell of alcohol on the breath; unsteady on the feet). The defense, however, is armed with reasonable, exculpatory explanations for each of these indicia (red, watery eyes caused by crying after an emotional disagreement with boyfriend, who is a witness to this fact; the smell of alcohol on the breath resulting from ingestion of alcohol, but in an amount and during a time-period which would not lead to intoxication; unsteady on the feet because of a documented medical condition, narcolepsy). Even the defendant’s alleged refusal to submit to breathalyzer and urine testing can apparently be explained away by her verified medical condition. Thus, the defense attorney will be able to argue that the DWI charge is unsupportable, either as a misdemeanor or as a felony.

From the defendant’s initial vantage point, the narcotics possession case also looks problematic as the drugs were not found on the defendant. Indeed, if defense counsel can verify his client’s claim - - perhaps through the Assistant District Attorney herself - - that the police officer had to dig in a pile of refuse for the contraband, then there would appear to be clear reasonable doubt as to whether the recovered crack-cocaine actually belonged to the defendant. Finally, if there are exculpatory explanations for the defendant’s apparent intoxication, and there is reasonable doubt concerning her alleged possession of narcotics, then the pending Driving-While-Ability-Impaired-by-Drugs charge must fail as there is no other evidence to support it.

The Assistant District Attorney will probably approach the bargaining table with serious reservations about her ability to prove the narcotics possession charge based upon her police-
Negotiation

witness' statements about his observations and actions at the scene. Therefore, the prosecutor will doubt the strength of the Driving-While-Ability-Impaired-by-Drugs charge, as well. But she will feel that her DWI case is a strong, clear winner. Her star witness, the arresting officer, has described defendant at the scene as an obviously and outrageously intoxicated individual (as evidenced by the overwhelming stench of booze, the half-empty bottle in the car, the ridiculously poor performance on the field-sobriety tests and the defendant's inability to remain standing, the fact that the defendant actually lost consciousness at the scene, and that she then refused breathalyzer and urine tests, evidencing her own guilty-minded recognition that those tests would have provided chemical evidence of her extreme intoxication).

This information from the arresting officer, combined with the defendant's prior DWI conviction and the District Attorney's legal right to present the DWI charge to the Grand Jury as a felony, will lead her to believe that she has the upper hand at the negotiation table. Indeed, she can use power-based bargaining, threatening the defendant with a felony conviction and up to four years imprisonment if the defendant does not immediately accept whatever plea bargain she offers on the misdemeanor DWI.

Given the relative strengths and weaknesses of each side's legal case, the assignment provides an opportunity for lively adversarial bargaining focusing primarily on the legal arguments about the relative merits of each side's case and the Assistant District Attorney's threat to recharge the DWI misdemeanor charge as a felony. Since such an approach, however, has the potential for resulting in a deadlock of arguments and counter-arguments, the assignment also is a good vehicle for showing how a mixed approach (using legal arguments to persuade the other side to problem solve) can lead to a resolution. See §23.3.3 of the text.

The assignment also raises some important issues in regard to informational bargaining. Naturally, each attorney will want to reveal positive information about his/her case during the negotiation which will come as a terribly unpleasant surprise to the other lawyer. Before negotiations commence, the prosecutor will be entirely unaware of the defendant's well-documented narcolepsy, which could provide an innocent explanation for some of the defendant's most apparently damning conduct during the incident. On the other hand, the defense, not yet having received discovery materials at this early stage in the case, does not know that the police found a half-full bottle of whiskey in defendant's car at the scene. Moreover, defense counsel does not yet know that, according to the arresting officer, Deborah Smith did not just have the odor of alcohol on her breath, as stated in the complaint, but that she was "stinking drunk." This evidence goes a long way toward undermining the narcolepsy defense. The attorneys will need to consider the strategic issue of the appropriate point in the negotiation to reveal their positive evidence. And the opposing attorneys will need to handle these revelations during the bargaining.

In regard to the negative information that each attorney knows about his/her case, the lawyer will need to consider whether or not there are any benefits to revelation of this evidence. While the Assistant District Attorney, for example, knows that the narcotics charge may be unsupportable and that the defense will learn about the weakness of this charge during the
discovery process, he/she may decide to reveal this information both to demonstrate good faith and to focus on the strength of the DWI claim.

The negative confidential information provided for each side in the assignment also raises ethical issues. Defense counsels, for example, needs to decide how strongly they can express their client’s “interest” in a drug program, since she is less than enthusiastic about such a program. Defense attorneys must also consider whether it is ethical to argue that they have a witness to their client’s sobriety, since that witness, the boyfriend, cannot honestly testify on that matter. Likewise, the prosecutors face similar ethical issues. They know that the narcotics count is essentially unsupportable and need to consider the ethics of arguing the strength of this charge, especially if they are asked directly by defense counsel about the circumstance surrounding the officer’s recovery of the drugs. The defense might also politely inquire about the rumors they have heard concerning the D.A.’s need to dispose of cases. At that point, the prosecutor must obviously tread carefully in order to preserve any advantage in the negotiation, yet comply with professional responsibility rules.

Assignment 4A provides a setting for the negotiation in which the defense attorneys do not face the pressures of their client’s incarceration, and the attorneys negotiate outside of court. Assignment 4B raises some additional challenges. First, in Assignment 4B, a judge (either played by a teacher or other student) will participate in the negotiation process. Obviously, an out-of-court negotiation session with the adversary is relatively informal and calls for a very different demeanor than a negotiation conference before a judge. Second, the “facts” each side stresses in an Assignment 4B negotiation should be different than those stressed in Assignment 4A bargaining. In Assignment 4B, the defendant is offering to plead guilty to all three charges, in the hopes of securing a non-jail sentencing commitment from the judge, and the People will be objecting to such a commitment. Thus, during this conference, neither side should be focusing on the strength or weakness of the proof, as that evidence is no longer relevant; the defendant has already agreed that she will plead guilty to the charges. The only issues in contention now are the manner in which the public and the defendant will be affected by the opposing dispositions sought. In this way, Assignment 4B provides a good opportunity for problem-solving negotiation facilitated by the judge.

Finally, the Alford case cited in Assignment 4B addresses an important ethical issue in plea bargaining. In light of the prosecutor’s mandatory jail offer, the defense counsel has been forced to pursue the only negotiation path left: bypass the prosecutor, and leave sentencing solely in the court’s discretion, by offering to plead guilty to the docket. The defendant, however, has repeatedly stated that she did not actually commit two of the offenses on the docket: DWI and Driving While Impaired by Drugs. Students might wonder whether the defense attorney can suborn perjury by permitting his client to declare her guilt of these offenses under oath during a plea allocution. In addition, the prosecutor, as a representative of the People and an officer of the court, has a duty to ensure that this defendant, who openly maintains her innocence, receives a trial so that the question of guilt or innocence can be properly determined by finder(s) of fact. Alford provides each side a mechanism for addressing these ethical problems.
To: All Students

Negotiation Assignment 4

Criminal Charges of Narcotics Possession, Driving While Intoxicated, and Driving While Ability Impaired by Drugs

Background

*Information Contained in RAP Sheet and Criminal Justice Agency Paperwork*

The defendant, Deborah Smith, is a 52 year old woman. She has been unemployed for ten years. She lives with her elderly father, who supports her. She resides in Bradford County. The defendant has been arrested three times in the past. All of these arrests occurred eight years ago within several months of each other. The most recent of the defendant’s prior arrests culminated in a conviction, which was entered upon a guilty plea, for Driving While Intoxicated (Vehicle and Traffic Code section 1192.3), a misdemeanor, punishable by a maximum of one year incarceration. The defendant was sentenced to 30 days in jail as a result of that conviction.

The two earlier arrests on her record were for Simple Possession of Narcotics (Penal Code section 220.03), a Class A misdemeanor, also punishable by a maximum of one year in jail. Both of the narcotics arrests resulted in convictions upon guilty pleas to the reduced charge of Acting Disorderly (Penal Code section 240.20). The defendant received a sentence of five days community service, which she successfully completed, as a result of the first Acting Disorderly conviction. The second conviction for Acting Disorderly, which was entered only six weeks after the first and three months before the DWI arrest, resulted in imposition of ten days incarceration.
Criminal Complaint

CRIMINAL COURT OF THE CITY OF BRADFORD
PART APAR COUNTY OF BRADFORD

THE PEOPLE OF THE STATE OF NEW YORK

STATE OF ASPEN
BRADFORD COUNTY

DOCKET NUMBER: xx/8650

DEBORAH SMITH, DEFENDANT.

Police Officer Walter Rudnick of the Third Precinct, Shield Number 286, being duly sworn, deposes and says that on or about January 3 of this Year at approximately 3:40 a.m., in the westbound lane of Westlake Boulevard, approaching the intersection of 13th Avenue, in the County of Bradford, State of Aspen,

The Defendant committed the offenses of:

Penal Code sec. 220.03: simple possession of narcotics
Vehicle and Traffic Code sec. 1192.3: driving while intoxicated
Vehicle and Traffic Code sec. 1192.4: driving while ability impaired by drugs,
In that the Defendant did: knowingly and unlawfully possess a controlled substance; drive while intoxicated; and drive while ability impaired by drugs.

The source of deponent’s information and the grounds for deponent’s belief are as follows:

Deponent states that, at the above-stated time, date and place of occurrence, deponent observed the Defendant, Deborah Smith, operating an automobile bearing license number XCV-496 in an erratic manner, in that the tires of the automobile Defendant was driving twice crossed the double-yellow line in the center of the roadway. Upon effectuating a stop of the vehicle, deponent observed Defendant throw a small object from the vehicle window. Deponent retrieved said object, which was a glassine envelope containing crack-cocaine. Deponent observed that defendant’s breath smelled of an alcoholic beverage; that she had red, watery eyes and slurred speech; and that she was unsteady on her feet. Deponent further states that Defendant refused to submit to a breathalyzer test and a urine test.

Deponent further states that the basis for deponent’s belief that the glassine envelope recovered from the ground where Defendant threw it contained crack-cocaine is the extent of deponent’s education and training in the identification of narcotic substances and the manner in which said substances are packaged, including crack-cocaine, and the fact that deponent has made numerous previous arrests for possession of crack-cocaine and that said substances, after being subjected to laboratory testing, were, in fact, determined to contain cocaine, and that based upon the appearance of the substance recovered from the ground where defendant threw it, and the manner in which said substance was packaged, namely in a glassine envelope, deponent believes that said substance is crack-cocaine.

False statements made in this document are punishable as a Class A misdemeanor pursuant to section 210.45 of the Penal Code

________________________
Date Signature
Relevant Statutes

Penal Code section 220.03. Simple possession of narcotics

A person is guilty of criminal possession of narcotics when he knowingly and unlawfully possesses any amount of a narcotic drug. Simple possession of a narcotic is a class A misdemeanor.

Penal Code section 70.15. Sentences of imprisonment for misdemeanors

(1) Class A misdemeanor. A sentence of imprisonment for a class A misdemeanor shall be a definite sentence. The term of incarceration, if any, shall be fixed by the court, and shall not exceed one year.

Vehicle and Traffic Code section 1192.3: Operating a motor vehicle while under the influence of alcohol

No person shall operate a motor vehicle while in an intoxicated condition. Driving while intoxicated is a misdemeanor punishable pursuant to section 1193 of this Code.

Vehicle and Traffic Code section 1192.4: Operating a motor vehicle while under the influence of narcotics

No person shall operate a motor vehicle while the person's ability to operate such a motor vehicle is impaired by the use of a narcotic drug. Driving while ability impaired by narcotics is a misdemeanor punishable pursuant to section 1193 of this Code.

Vehicle and Traffic Code section 1192.5: Felony operation of a motor vehicle while under the influence of alcohol

No person shall operate a motor vehicle while in an intoxicated condition. A person who does so, and who has been convicted of driving while intoxicated within the ten years immediately preceding the commission date of instant offense, shall be guilty of a Class E felony.
**Vehicle and Traffic Code 1193: Sanctions**

Driving while intoxicated or while ability impaired by drugs:

(A) Misdemeanor offenses. A violation of sections 1192.3 and 1192.4 of this Code shall be punishable by a fine of not less than five hundred dollars nor more than one thousand dollars, or by imprisonment in a penitentiary or county jail for not more than one year, or by both such fine and imprisonment.

(B) Felony driving while intoxicated. A person who operates a vehicle in violation of section 1192.5 of this Code shall be guilty of a class E felony, and shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars or by a definite period of imprisonment, to be determined by the court, of not more than three years, or by both such fine and imprisonment.

**Penal Code section 65.00: Sentence of probation**

1. Criteria. The court may sentence a person to a period of probation upon conviction of any crime if the court, having regard to the nature and circumstance of the crime and to the history, character and condition of the defendant, is of the opinion that: (i) institutional confinement for the term authorized by law of the defendant is not or may not be necessary for the protection of the public; (ii) the defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision; and (iii) such disposition is not inconsistent with the ends of justice.

2. Periods of probation.

   (a) The period of probation shall be as follows: (a) For a felony, the period of probation shall be five years.

   (b) For a Class A misdemeanor, the period of probation shall be three years.
Penal Code section 65.02. Split sentences, jail time and probation

1. Criteria. The court may sentence a person upon conviction of any crime to a sentence which is split between jail time and probation if the court, having regard to the nature and circumstance of the crime and to the history, character and condition of the defendant, is of the opinion that limited jail time, coupled with post-release probationary supervision (as detailed in Penal Code section 65.00) is appropriate to the rehabilitative needs of the offender.

2. Duration of split sentence. The period of jail time and probation which can be imposed upon a defendant as part of a split sentence shall be as follows: (a) Ninety days incarceration, with a period of five years probation to follow, in the case of a felony; and (b) Thirty days incarceration, with a period of five years probation to follow, in the case of a misdemeanor.

Penal Code section 65.05. Sentence of conditional discharge

1. Criteria. The court may impose a sentence of conditional discharge for an offense if the court, having regard to the nature and circumstances of the offense and to the history, character and condition of the defendant, is of the opinion that neither the public interest nor the ends of justice would be served by a sentence of imprisonment and that probation supervision is not appropriate.

2. Sentence. When the court imposes a sentence of conditional discharge, the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment or probation supervision, but shall be subject, during the period of conditional discharge, to such conditions as the court may determine.

3. Periods of conditional discharge. The period of conditional discharge shall be as follows: (a) Three years in the case of a felony; and (b) One year in the case of a misdemeanor.

Penal Code section 65.10. Conditions of probation and of conditional discharge

When imposing a split sentence pursuant to Penal Code section 65.02, a sentence of probation pursuant to Penal Code section 65.00, or of conditional discharge pursuant to Penal Code section 65.05, the court may, as a condition of the sentence, require that the
defendant undergo medical or psychiatric treatment and/or participate in an alcohol or substance abuse program approved by the court.

**Criminal Procedure Code section 170.20: Replacement of misdemeanor charges with felony charges.**

At any time before entry of a guilty plea to, or commencement of a trial on, a misdemeanor charge, to the extent warranted by the facts or circumstances of the case, the prosecutor may elect to supercede the instrument containing the misdemeanor charge with an indictment charging a felony.

**Commentary to Criminal Procedure Code section 170.20**

Section 170.20 provides the District Attorney with the right to recharge a misdemeanor as a felony if the acts committed by the defendant constitute a felony under the law. Often, a prosecutor is not aware of all the facts at the time charges are originally brought. For instance, many code sections in Aspen dictate that conduct, which would otherwise constitute a misdemeanor, rises to the level of a felony based upon past crimes committed by the defendant. The prosecution, however, is often unaware of the contents of a given defendant’s criminal record until charges are filed, and the defendant’s criminal record is generated based on fingerprints taken during the booking process. Regardless of the reasons why any particular case is initiated as a misdemeanor, section 170.20 allows the District Attorney to re-file any misdemeanor case as a felony, so long as the elements of the felony statute can be established and the case can be successfully presented to the Grand Jury before trial commences. Once a guilty plea is entered on a misdemeanor charge, however, or trial commences on the misdemeanor, double jeopardy attaches, and the District Attorney’s ability to supercede with felony charges is finished.

**Local Court-Approved Treatment Programs for Eligible Offenders**

There are a variety of court-approved programs in Bradford County for therapeutic treatment of individuals suffering from psychiatric ailments, alcohol abuse, and/or substance abuse. Each of these programs is licensed to treat all three categories of disease in one setting, and offers group as well as individual therapy. Both in- and out-patient services are available, and both types of therapy offer a range of intensity levels. The least intensive out-patient program consists of six weekly forty-five-minute group sessions. The most intensive program consists of daily multi-hour individual and group sessions at an in-patient
facility and requires a twenty-four month commitment. The programs are flexible and carry out any reasonable specific “therapy order” fashioned by the court as part of a sentence.

Each program has a liaison who reports periodically to the sentencing judge on court-ordered patients’ performance. A criminal defendant is permitted to participate voluntarily in one of these programs only if he/she pleads guilty to an offense acceptable to the District Attorney as well as the court, and, as part of his plea bargain, the defendant agrees to the following condition: Should the defendant be discharged from the court-approved program due to material non-compliance with reasonable therapeutic demands, the court shall have the power to re-sentence the defendant to the maximum period of incarceration permitted by law for the offense to which the defendant-patient pled guilty.
To: All Students in Group 1

Assignment 4A

Assume that the defendant was arraigned one week ago and bail was set in the amount of $500. Defendant’s father collected the bail money that night and posted it, securing the defendant’s release. The case has been scheduled for a conference before the judge eight days from now. The Assistant District Attorney and defense counsel have arranged a meeting at the District Attorney’s office today, during which they intend to negotiate with one another in advance of the scheduled court appearance. Each side should be prepared to suggest to his/her adversary an appropriate resolution of the case in light of its relative strengths and weaknesses.
To: All Students in Group 2

Assignment 4B

Assume that, at arraignment, before either the prosecution or defense conducted any investigations, the Assistant District Attorney made an offer of a plea to 1192.3 and a one-time-only recommendation of thirty days incarceration, based solely upon the fact that defendant received the same disposition eight years ago. The defendant rejected the offer. Bail was set in the amount of $500. Defendant’s father made every effort to collect that sum, but fell short. Defendant is thus being held in jail during the pendency of the case. There is a court conference scheduled for today, eight days post-arraignment, during which the prosecutor will be expected to make, and justify, a new offer on the case. The defense is expected to appeal to the judge for a non-jail sentencing commitment if Ms. Smith agrees to plead to all three charges. If she pleads guilty to all charges, she will need to declare her guilt under oath during a plea allocution. Each side should be prepared to suggest to the court, and each other, an appropriate resolution of the case in light of its relative strengths and weaknesses.

Additional Relevant Case Law for Assignment 4B

“Where strong evidence of actual guilt substantially negate[s] a defendant’s claim of innocence and provide[s] strong factual basis for the guilty plea, and [the] state ha[s] a strong case ... so that [the] defendant, advised by competent counsel, intelligently conclude[s] that he should plead guilty [and avail himself of a favorable promised sentence upon the guilty plea] rather than be tried for [the charged offense and risk a potentially harsher sentence], the court commits no constitutional error in accepting [a] guilty plea despite defendant’s claim of innocence.”

Negotiation Assignment 4

Criminal Charges of Narcotics Possession, Driving While Intoxicated, and Driving While Ability Impaired by Drugs

Confidential Information for Assistant District Attorneys

Upon discussing the case with the arresting officer, P.O. Walter Rudnick, you learn the following: At the time of the charged incident, the defendant appeared to be extremely intoxicated. Her words were so slurred that she was nearly incomprehensible and was “falling down drunk.” The defendant failed the field sobriety tests miserably. Specifically, when he required her to hold her arms out and touch her nose with her right index finger, she poked herself in the eye on the first attempt. On the second attempt, she missed her own face entirely and ended up touching her neck with her index finger, rather than her nose. He then asked the defendant to walk the white line at the side of the road. In attempting to do so, the defendant tripped over her own feet and fell to the ground. He then had to pick her up from the ground, put his arm around her, and escort her to the squad car, where she promptly fell asleep.

Upon an inventory search of defendant’s vehicle, other officers found a half-empty quart of Jack Daniels whisky under the driver’s seat.

Back at the precinct, it took a great deal of effort to wake the defendant. Once awakened, she refused to submit to either a breathalyzer or urine test. She also refused medical treatment for the cut she sustained on her forehead when she fell to the ground during the field-sobriety testing at the scene. Rather, she repeatedly told the officer all she wanted to do was go back to sleep, which the officer states he allowed her to do after fingerprinting and photographing. She then returned to the jail cell.
When asked about the circumstances surrounding the recovery of the crack-cocaine, Rudnick indicates that he saw the defendant toss a small object out the passenger window of the car as she pulled to the curb in response to his lights and siren. He admits that he saw only a momentary blur and was incapable of determining, at that moment, exactly what the object was. But, he says, it appeared to be the right size, shape and color to be a clear glassine envelope of crack. That’s what led him to search the ground. He also acknowledges that it took some time - - perhaps half a minute - - and some digging in the dark and litter-filled gutter to find the crack-cocaine which the defendant discarded. Officer Rudnick thinks fingerprinting the glassine envelope which contained the drugs would not be worth-while because he picked it up with his own bare hands at the scene. In addition, he kept it in his pocket for more than an hour, during which time any prints would have been rubbed off, prior to vouchering the package during the booking process. Rudnick also says that he and his sergeant handled the glassine envelope again with bare hands during the vouchering process. Thus, any prints on it at this point would likely belong to him and his sergeant, not the defendant.

Bradford District Attorney’s Memorandum to All New Prosecutors Containing Internal Confidential Guidelines concerning Plea Offers:

Welcome aboard! Please read the following guidelines carefully, but keep in mind that they are just that: guidelines. They should not be followed to the letter and are intended only to provide topics for your consideration. I expect that each of my Assistant District Attorneys will exercise his/her own carefully considered discretion in extending offers. I hired each of you because I believe you have sound judgment. That being said, I nevertheless want everyone to be aware of the following considerations - - even though many are self-evident - - and take each into account before formulating offers on your cases.

Plea Bargaining Factors:

1. The seriousness of the defendant’s conduct and the number of charges pending against the defendant.

2. The strength of our case. As you know, the burden we carry is proof beyond a reasonable doubt. Where the evidence leaves questions about our ability to secure a conviction after trial, you must remain appropriately flexible in your offers. Indeed, I would rather that you settle for a guilty plea and a relatively lenient sentence than an acquittal after trial. If the entire case looks weak, it should be disposed of with the highest plea offer you believe the defendant will accept. If the case or any of the pending charges looks particularly strong, however, then you should feel free to make your offer higher than you otherwise might, so long as justice is served in the process.
3. The number, recency and type of prior convictions are critical factors in offer formulation. As a general rule, if the defendant has a long record, or has been convicted in the past for the same or similar offense(s), the offer must require ample jail time - particularly if the defendant has already served time for a prior conviction and has nevertheless remained undeterred from criminal behavior. Indeed, an offer extended to a defendant on a pending case must be substantially more severe than the last sentence he received for a similar or same offense. Thus, if the defendant served 6 months last year for a comparable offense, he should be offered substantially more now - - 1 year or 9 months, for instance. (This simply comports with common sense. If 6 months did not deter him in the past, then something more is required if we have any hope of deterring him this time.) However, a lapse of a substantial period of time immediately prior to the current charge, during which the defendant has remained arrest-free, should be considered in the defendant’s favor. Indeed, under circumstances where there has been an extensive period of law-abiding behavior, it may be appropriate to disregard the record entirely and extend the same offer you would to a first-time offender.

4. The defendant’s attitude. Is the defendant remorseful? Cooperative? Compliant?

5. The impact on the community. Always remember that every citizen of Bradford County is affected by your decisions, and it is they - - the People - - whom you represent. Fashion your offers so that the welfare of the People of Bradford is most likely to be maximized.

6. Rehabilitation. If there is credible information that a defendant is in need of, and would actually be benefitted by, therapy of any kind — anger management, psychiatric, alcohol or drug abuse programs, etc. — and that the defendant is genuinely receptive to such treatment, offers should attempt to accommodate those needs. Defendants with a positive attitude who voluntarily participate in programs have a much greater chance of turning their lives around. If we can facilitate true rehabilitation, then we should do so. However, that does not mean that crimes should go unpunished. It is imperative to balance the aims of rehabilitation with deterrence. Even a defendant who can be rehabilitated in some respects by therapy may also be in need of incarceration as a way of deterring future criminal behavior. Indeed, one could argue that because, criminal behavior, by definition, is deviant, every criminal offender needs therapy. Most criminal offenders need punishment, too, in order to learn that crime does not pay. For many, incarceration is very effective punishment in that regard. Each defendant, however, is unique and some disorders, including addiction, may be appropriate for straight,
court-approved therapeutic programs, depending on the facts and circumstances of your case.

Bottom line, use your judgment. I know you will all make me very proud.

**Excerpt from a recent closed meeting during which the District Attorney addressed his Assistant District Attorneys**

I know we're all feeling extremely strained these days. The Bradford Police Department is conducting very productive sweeps in many neighborhoods because of local complaints about crime. As you are all aware, we have a record number of open cases right now. The police are doing the right thing, and I applaud them on behalf of Bradford’s citizens. However, we are currently in a difficult predicament. The budget has not yet been settled and I don’t have the authority to hire new Assistant District Attorneys yet. It will be at least a few more months. I spoke with the Police Chief who said his Department has no intention of slowing down right now. So, for the time being, we’ll just have to sweat it out. I know you’re all over-loaded with cases and I appreciate the personal sacrifices and many extra hours each of you is putting in. In order to alleviate some of the pressure, I want to give you all the go-ahead to dispose of as many of your cases as you can - - appropriately, of course, and with justice in mind. However, justice requires setting priorities within the means available, and there’s only so much any one office can do. Accordingly, if you can dispose of a case with something less than you might otherwise be willing to offer, without giving away the farm, do so. Now is not the time for us to be creating extra work for ourselves. And, whatever you do, don’t breathe a word of this meeting to anyone. The defense bar in this county will go wild if they hear that our offers might go down even a smidgen!

Nevertheless, with an eye toward maximizing dispositions, remember to stick to our sentencing policy as closely as you can. Obviously, you should not interpret what I’m saying as a license to do anything less than justice. As you all know, many of your cases will just have to be tried. Good luck, team.

***

While reviewing the file in an attempt to formulate an offer, you note that, in light of the defendant’s prior DWI conviction, it is an option to submit the case to the Grand Jury under the authority of Criminal Procedure Code section 170.20, in an effort to secure an indictment against the defendant for felony DWI pursuant to Vehicle and Traffic Code 1192.5.
Negotiation Assignment 4

Criminal Charges of Narcotics Possession, Driving While Intoxicated, and Driving While Ability Impaired by Drugs

Confidential Information for Defense Lawyers

Based upon discussions with your client, you learn the following: Ms. Smith was on her way home from the house of her boyfriend, John Bass, where she had one or two mixed drinks, both Jack Daniels and Coke. There was no more than one shot of alcohol in the drink(s). Ms. Smith explains that she consumed these over the course of more than six hours and was absolutely not intoxicated.

When asked about the drugs allegedly recovered, Ms. Smith admits that she and her boyfriend both use crack-cocaine recreationally, but states that neither of them did so that night. She indicates that they were very upset with each other and were having an emotional discussion about the possibility of ending their five-year relationship. Ms. Smith states that she finally left her boyfriend’s home shortly before 4:00 a.m., after he confessed to having feelings for another woman. Ms. Smith explains that she was heart-broken and cried non-stop from the moment she got in her car. She indicates that she probably was weaving, and definitely had red watery eyes when the officer pulled her over.

The client admits to having thrown a crack-pipe and one glassine envelope of crack-cocaine out the window of the car, because she did not want the cop to find them in the glove compartment where she keeps her stash. She says that she threw the contraband right into a big pile of garbage at the curb. She states that she saw the officer digging around for a while before he found the glassine envelope and that he never found the pipe. Based on her prior contacts with the law, Ms. Smith states, she believes the D.A. would have a hard
time proving at trial that the drugs were hers. Nevertheless, she indicates a willingness to admit the drugs are hers if doing so will keep her from doing additional jail time. Indeed, she vehemently declares her willingness to confess to anything and everything - - homicide, if necessary - - in order to avoid further incarceration.

When asked about refusing breathalyzer and urine tests, Ms. Smith indicates that the officer never even offered to let her take those tests. She states that, had she been given the opportunity, she certainly would have consented because she knows she wasn’t intoxicated - - either by alcohol or drugs. She states that, rather than discussing breathalyzer and urine tests, the officer only subjected her to ridiculous and embarrassing demands at the scene, during which an endless stream of other cars passed by while their occupants gawked and laughed at her. The cop repeatedly made her try to touch her finger to her nose and try to walk the white line at the side of the road. She explained that all of the stress of the evening - - including the heart-wrenching discussion with her boyfriend, being stopped by the police, being forced to perform “dog tricks” at the scene, and suffering the humiliation caused by jeering people in passing cars - - finally overwhelmed her and caused her to have a “sleep attack” right there on the street.

When asked to clarify, Ms. Smith explains that she has narcolepsy and must have fallen asleep during the ordeal. She remembers nothing after trying to walk the white line and stumbling. The next thing she recalls is waking up the following morning with an aching head and a big bruise over her brow when the police came to the jail cell she was in and escorted her to court for arraignment. Ms. Smith indicates that her family physician, Dr. Robert Moore, M.D., can confirm that she suffers from a severe form of this disorder.

In response to inquiry concerning her background, Ms. Smith indicates that she has been in bad shape for the last decade. She explains that, almost ten years ago to the day, she lost her mother unexpectedly to a brain embolism. Having been raised an only child, she was intensely close to her mother. In the aftermath of her mother’s death, she experienced a depression so deep that it was debilitating, leaving her unable to continue working. She states that, in addition, because she was so lonely and her judgment was so poor during that period, she became involved with a man who treated her terribly and who regularly used crack. She soon began turning to crack, and sometimes alcohol, in order to make herself feel better. That’s when she was arrested three times in the course of a year. After serving time in jail as a result of prior arrests, she explains, she regained some control. She broke up with the guy who was abusing her and was more careful about her behavior in public. She continued to use crack privately, however, as a way of attempting to cope with her continued severe depression. When prompted, she states she supposes that crack could be a contributing factor to her depression, but denies that she’s an addict.
Rather, she explains, she smokes because crack is one of the few things in her life that make her feel happy. As a result, she admits, she has no intention of actually giving up occasional use of the drug.

When asked what she wants to happen in this case, the client states again that all she is really concerned about is being out of jail. She would prefer not to have yet another conviction on her record, as she has a degree in social work and hopes to return to practice some day. Her primary worry, however, is incarceration. When asked about therapy as a possible alternative to additional jail time, Ms. Smith reluctantly agrees to participate in a drug treatment program and abstain from using crack while in a program, if it’s absolutely necessary. She explains, however, that some in-patient programs - - and she’s been a resident at more than one - - are almost as bad as jail. She indicates that, as far as she’s concerned, treatment programs are all useless and, indeed, often do more psychological harm than good. But she states that, if a program is the only alternative to more jail time, she’ll be the best patient the program ever had. She indicates a strong preference for an out-patient program.

An interview with John Bass confirms that he and Ms. Smith were together at his house between 9:00 p.m. and 3:45 a.m. on the date in question. Mr. Bass explains that they were both drinking and that he got drunk. He believes Ms. Smith was also drunk, but can’t say for sure. He was too loaded himself to really know. He volunteers his willingness to lie on this point, however, and testify that his girlfriend was sober, if doing so would help her.

Mr. Bass also confirms that Ms. Smith fled his house in tears because of a new girl in his life. When asked, Mr. Bass states that, at least while she was with him, Ms. Smith did not smoke crack that night. He states that he gave her some earlier in the night, though, and that he doesn’t know if she got a chance to smoke it before getting pulled over. When asked how much crack-cocaine he gave her that night, he can’t remember. He states, though, that it was probably three or four glassine envelopes.

You also confer with your client’s physician, Dr. Moore, who confirms that Ms. Smith is narcoleptic. Upon request, the doctor prepares the following letter describing the disorder and its manifestation in the client:

To Whom it may Concern:

Deborah Smith, a patient of mine for the last 15 years, suffers from narcolepsy. This disorder often exhibits extreme symptoms. In Ms. Smith’s case, this occurs especially when she finds herself operating under stressful conditions. Narcolepsy, as experienced by Ms. Smith, is characterized by cataplexy. Cataplexy involves the
sudden, bilateral loss of muscle tone, which results in unexpected falls. Sudden, extreme fatigue can also overcome those who suffer from this type of narcolepsy. When overcome by such fatigue, the result can be staggering, imbalance, and an inability on part of the patient to stay awake. When in the grip of one of these “sleep attacks,” as they are more commonly known, the patient can be dreaming while awake. This can result in drooping eyelids, hallucinations, and slurred speech. These symptoms, as set forth in the Diagnostic and Statistical Manual of Mental Disorders (DSM IV), are commonly recognized in patients with narcolepsy and have been personally observed by me in Deborah Smith.

Please do not hesitate to contact me, should you need additional information or further clarification.

Very truly yours,

Robert Moore, M.D.
(555) 777-3000

***

In reviewing the file, you become concerned that the District Attorney’s Office might exercise its authority under Criminal Procedure Code section 170.20 and decide to put the case before the Grand Jury and secure a felony indictment against Ms. Smith charging Vehicle and Traffic Code section 1192.5.

Based upon conversations with a much more experienced local attorney, however, you learn that there are rumors of an unspoken policy which just went into effect at the District Attorney’s Office as a result of a recent dramatic increase in arrests by the Bradford Police Department. Specifically, it is rumored that the D.A.’s “secret” policy calls for the disposition of as many cases as possible - - which would necessitate more flexible plea bargaining by the prosecutors - - in light of the District Attorney’s current record-high caseload.
Negotiation Assignment 5

Deceptive Consumer Practices

Notes for the Teacher

This assignment is a three-party negotiation concerning alleged deceptive practices in the sale of a new car. The plaintiff, an elderly retired man on a fixed income, alleges that he visited Star Auto, a car dealership, to purchase a used car. He asserts that after he gave his own car to the salesman for an appraisal, the salesman returned to say he had sold the car. Then, plaintiff alleges that the salesman pressured him into purchasing a new car for almost $20,000 and to finance it with BMAC with payments of $360 a month. Plaintiff could not make the payments, and the new car was repossessed. The plaintiff has sued Star Auto for conversion of the car and Star Auto and BMAC for deceptive practices. BMAC has counterclaimed for the deficiency.

While this assignment raises some interesting factual and legal issues (e.g., whether the salesman in fact did sell the car during the appraisal and told the plaintiff the dealership had no used cars for sale; whether the plaintiff was creditworthy for financing; and whether any deceptive acts were committed “knowingly” under the state Deceptive Trade Practices Act), the focus of this assignment is on the effect of the procedural context on the parties’ valuation of the case. To support his deceptive practices claim against BMAC, the plaintiff has requested documents from the company about its policies and standards for approving or rejecting financing agreements. Plaintiff’s attorneys hope to show that under those policies, he was not creditworthy, and therefore, approval of the agreement was deceptive. In the alternative, he seeks to show that these policies on their face encourage defaults by targeting limited income consumers for financing agreements with payments they cannot afford. BMAC’s attorneys strongly contest this request arguing that the documents sought are trade secrets. Accordingly, the document request creates value in the case for both plaintiff and BMAC.
The legal authority provided in the assignment on the trade secrets privilege is mixed. Under that case law, the trade secret privilege is not overcome simply because requested documents would provide information generally relevant to the subject matter of an action or helpful to preparation of a case. The party contesting the privilege must present prima facie evidence that the requested information is directly relevant to a material element of a cause of action and further that it would be unfairly disadvantaged in its proof absent the trade secret. The judge in the case is a loose cannon; he could rule for either party.

This case also raises contextual difficulties for Star Auto. The dealership has been the subject of an investigation by the Attorney General Consumer Affairs Division into the legality of its sales practices. While that office has found no evidence of fraud, it has expressed interest in this case to plaintiff’s attorneys. Star Auto knows that while the salesman in this case has been quite successful, he often goes “over the line” in his sales tactics.

While this procedural context provides the plaintiff’s attorneys with good arguments at the bargaining table, his client wants a quick settlement. He feels that the case has dragged on too long and wants to have another used car as soon as possible so he can regain the independence he feels a car gives him. He is not very concerned about claims for punitive and treble damages but would like Star Auto to acknowledge its wrongdoing.

Accordingly, the common noncompetitive interest for all the parties is a speedy resolution: for plaintiff so he can have a car; for BMAC so it can avoid an adverse ruling on the motion to compel production of documents; and for Star Auto, so it can avoid further scrutiny by the Attorney General. This negotiation gives negotiators the opportunity to assess the role of arguments about the rights about the parties – the factual disputes in the case, the strengths of the plaintiff’s causes of action, and the merits of the trade secrets arguments – when the parties are primarily interested in avoiding any decision on these issues. If, on the one hand, attorneys for plaintiff focus primarily on the merits of the trade secrets privilege arguments to leverage a larger damages claim from BMAC, they run the risk of impasse and harming their client’s interests. If, on the other hand, they focus on a quick resolution of the case without a ruling on the motion, their client may obtain a more modest damages settlement but get the used car he wants for transportation.

The assignment also gives students the opportunity to consider the dynamics of negotiations involving more than two parties. While, at first glance, Star Auto and BMAC appear to have common interests (a low payout to plaintiff and quick resolution of the case), they actually have some diverse interests. While Star Auto wants to maintain a good relationship with BMAC, the company that finances most of its deals, it resents the pressure often exerted on it by BMAC and blames the company for this case. BMAC, on the other hand, feels that Star Auto’s salesman’s questionable sales tactics caused the problem in this case. They both want the other party to pay any damages. Attorneys for Star Auto and BMAC will need to consider whether or not to air these issues in front of plaintiff’s lawyers or meet together privately and make the plaintiff a packaged deal. In fact, plaintiffs may try to meet separately with either Star Auto or BMAC.
Finally, this assignment raises issues of non-monetary protections in closing the deal. If Star Auto offers to give the plaintiff credit towards a used car, plaintiff’s attorneys will want to negotiate a warranty for that car. Star Auto, for its part, will want a confidentiality agreement to protect it from disclosures to the Attorney General. And BMAC may request similar protections. Obviously, the opposing party may want to place a value on any of these protections.

This assignment is based on an actual case handled at the SMU Civil Clinic. Immediately before the judge’s decision on the motion to compel, the parties reached an agreement. The car dealership and financing company agreed to pay the plaintiff $3,000, which he used to purchase a used car.
To: All Students

Negotiation Assignment 5

Deceptive Consumer Practices

Background

This case concerns the purchase of a new Chevrolet Impala by an elderly man, Sam Wallace, from Star Auto Sales for $19,941. To purchase the car, Mr. Wallace traded in his ten-year old Cadillac Coupe DeVille and made a $250 down payment. Mr. Wallace signed a Retail Installment Sales Contract with Star Auto on May 1 of last year requiring him to pay $361.20 a month for 60 months. Star Auto immediately assigned that contract to Better Motors Acceptance Corporation (“BMAC”). After making one payment, Mr. Wallace returned the car to Star Auto two months later, telling the dealer that he could not make the payments. Star Auto treated the return as a repossession, and, after notice to Mr. Wallace, sold the car. BMAC then notified Mr. Wallace that he owed a deficiency of $3,000.

Mr. Wallace has sued Star Auto and BMAC alleging that they fraudulently induced him into buying the car and misrepresented to him that he was financially eligible for credit. Star Auto and BMAC filed a general denial, and BMAC counterclaimed for the $3,000 deficiency. The parties have engaged in pre-trial discovery. Mr. Wallace has requested production of documents from BMAC concerning its policies on determining
creditworthiness of consumers, and BMAC has objected to this request. The court decision on Plaintiff’s motion to compel production of these documents is pending. Meanwhile, a negotiation meeting of all attorneys for all three parties has been scheduled for next Wednesday. Either before or during this bargaining session, attorneys for any of the parties may negotiate together privately.

**Plaintiff’s Complaint**

In his complaint, Mr. Wallace alleges that on May 1 of last year he went to Star Auto to look for used cars for sale. He did not bring the title to his Coupe DeVille with him because he intended only to see what was available to him. He told the Star Auto salesman, Ronald Conti, that he was looking around for a good used automobile. Instead of directing Mr. Wallace to Star Auto’s Used Car Department, Mr. Conti said that he did not have any used cars on the lot but could try to find something for him.

At the salesman’s request, Mr. Wallace gave him his Coupe DeVille for the purposes of evaluation and appraisal for a trade in. The salesman returned from the appraisal without Mr. Wallace’s car and informed him he had sold the car for $1,000. He assured Mr. Wallace that he should not worry and promised to find something for him. He then showed Mr. Wallace a new Chevrolet Impala. Because, with the sale of the Coupe DeVille, Mr. Wallace had no transportation, he agreed to purchase the Impala. He was concerned about his ability to pay for the car, but the salesman told him that he could finance the sale through BMAC.

Mr. Wallace is sixty-seven years old and lives by himself in a studio apartment. He has no job or savings. His retirement and Social Security income is $1,000 a month. Despite this limited income, BMAC approved the financing agreement for the car.

Mr. Wallace signed a retail installment sales contract for the Impala. The cash price for the car was $19,941. Mr. Wallace paid $250 as a down payment, and Star Auto credited him with $2,691 as the trade in value for the Coupe DeVille. BMAC financed the $17,000 unpaid balance at an annual percentage rate of 10% for 60 months. Mr. Wallace agreed to make monthly payments of $361.20.

As a first cause of action in his complaint, Mr. Wallace alleges that Star Auto sold his Coupe DeVille without his consent. For conversion of property, he seeks return of that car or its value from Star Auto and punitive damages of $2,000.
As a second cause of action, Mr. Wallace seeks relief against both Star Auto and BMAC under section 50 of the state Deceptive Trade Practices Act (“DTPA”). He alleges that Star Auto knowingly made false, misleading, and deceptive representations to him that the company did not have any used cars on the lot when in fact it had such cars for sale at another lot two blocks away and that it had sold Mr. Wallace’s car for $1,000 when in fact it had not.

He also asserts that both Star Auto and BMAC violated section 50 of the Deceptive Trade Practices Act (“DTPA”) when they knowingly made the false, misleading, and deceptive representation that Mr. Wallace was creditworthy to purchase the Chevrolet Impala. He alleges that he repeatedly told Star Auto of his limited income, and Star Auto said it would “take care of everything”; that Star Auto and BMAC knew Mr. Wallace had not demonstrated his creditworthiness and did not disclose such information to Mr. Wallace; and Star Auto and BMAC failed to disclose this information to induce him to buy the Impala.

For violation of the DTPA, Mr. Wallace seeks the return of his $250 down payment; the value of his Coupe DeVille ($1,750); and $6,000 in treble damages.

Mr. Wallace has filed a jury demand.

**Defendants’ Answers**

Both Star Auto and BMAC, by their respective attorneys, filed general denials. BMAC filed a counterclaim for the $3,000 deficiency (the difference between the sale price of the Impala after repossession and Mr. Wallace’s obligations under the retail installment contract at the time of the repossession).

**Relevant Materials Requested/Obtained in Discovery**

1. **Mr. Wallace’s Credit Application**: On this application, Mr. Wallace discloses that he is retired and has Retirement and Social Security Income of $1,000 a month; he has paid in full for the last car (ten-year old Coupe DeVille) he financed; that he has no other creditors; and that he lives in a subsidized senior citizen complex with a rent of $175 a month.
2. **Star Auto's Used Car Appraisal Form for the Coupe DeVille:** This form, dated April 30 of last year, shows that the odometer reading was 120,819 miles, the salesperson was Ronald Conti, and the appraised value was $100. In the comment section, the appraiser wrote, “Worn Out.”

3. **Resale Form for Coupe DeVille.** That form reflects that Star Auto resold the Coupe DeVille to Nick Booker on May 6 of last year for $600.

4. **Retail Installment Sales Contract.** This contract lists the Cash Price for the car as $19,941 and deducts $250 as a down payment, and $2,691 as “Net Trade-In” from the ten-year old Coupe DeVille, leaving an “Unpaid Cash Balance” of $17,000. It also states that this $17,000 balance will be paid at an annual percentage rate of 10% over 60 months with monthly payments of $361.20. Total of Payments is noted as $21,672, and Total Sales Price (total of all payments) is listed as $24,613. The contract is signed by Mr. Wallace and the Business Manager of Star Auto. It also states that “The Seller intends to assign this contract to BMAC” and shows two BMAC logos at the top of the front page.

5. **BMAC’s Policies on Approving Credit.**

Mr. Wallace has served a Request to Produce Documents on BMAC requesting the following:

1. All corporate policies, procedures, standards, and guidelines, which pertain to the approval or rejection of Star Auto retail installment sales contracts by BMAC.

2. All agreements between BMAC and Star Auto pertaining to the financing of retail installment sales contracts by BMAC.

BMAC objected to producing these on the grounds of the trade secrets privilege. Mr. Wallace’s attorneys have filed a motion to compel production of these documents, and BMAC has filed opposition papers. At the time of this negotiation, the parties are awaiting a decision by the court on this motion.
Applicable Law

Section 50 of the Deceptive Trade Practices Act

(1) A consumer may maintain an action under this section if any person’s use of a false, misleading, or deceptive act or practice constitutes a cause of damage.

(2) In a suit filed under this section, each consumer who prevails may obtain:
   (a) the amount of actual damages found by the trier of fact; and
   (b) if the trier of fact finds that the conduct of the person was committed knowingly, the trier of fact may award as punitive damages not more than three times the amount of the actual damages.

(3) For purposes of this section, “Knowingly” means actual awareness of the falsity, deception, or unfairness of the act or practice giving rise to the consumer’s claim. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

Rule 508 of the Evidence Code

A person has a privilege, which may be claimed by the person or the person’s agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

Case Law Construing Rule 508

“Allowance of the trade secret privilege may not be deemed to ‘work an injustice’ within the meaning of Evidence Code §508 simply because it would protect information generally relevant to the subject matter of an action or helpful to preparation of a case. If a trade secret privilege is asserted, a balancing of interests is necessary to determine whether the exemption will be allowed."
“The party contesting the privilege must present prima facie evidence that the requested information is directly relevant to a material element of a cause of action and further that it would be unfairly disadvantaged in its proof absent the trade secret. That party must show that failure to disclose the information would ‘work an injustice’ within the meaning of Evidence Code §508 because one side would have evidence — reasonably believed to be essential to a fair resolution of the lawsuit — which was denied the opposing party.”

Negotiation Assignment 5

Deceptive Consumer Practices

Confidential Information for Mr. Wallace's Attorneys

Your client is frustrated by the case. He came to your office because he feels Star Auto stole his car. For all of his adult life, Mr. Wallace has owned an automobile. Especially now, in his later life, he feels a real need for a car to get around. He lives at a senior citizens complex at the edge of town with very limited access to public transportation. He hates to be dependent on the senior citizen center bus, and without his car, feels a total lack of independence. On his own, he cannot do his own shopping, get to his doctors, visit his friends, go out for a meal or drink, or just drive around town. Mr. Wallace thought that your office would quickly get his car back, but now he feels the case is bogged down in the pre-trial process. He wonders if he will ever have a car again.

Mr. Wallace also is angry and a bit embarrassed that he was duped by Star Auto’s salesman, Mr. Conti. In the past, he always purchased either a new or used car on credit, made his payments on time, kept up the maintenance on the car, and used it until it died on him. He prides himself on always having had a good credit record. He also thinks of himself as a fairly shrewd consumer and can’t understand how he fell for Conti’s line that the dealership did not have any used cars and that Star Auto would “take care of everything.” Your client admits that when he went to Star Auto he would have liked to buy a new car and that he may have even said something like that to Conti, but he knew it wasn’t feasible given his limited income. He is sure he told Conti he only had the funds to buy a used car, but Conti was very reassuring, explaining to him that without any other credit obligations, he could easily pay for the Impala. Conti didn’t seem to pressure him, but just kept saying very confidently, “You’ll be able to do it. You
don’t have any other financial obligations. Just think what it will be like to drive the Impala!” Your client knows he could have gone to another dealership, but once Conti told him his car had been sold, he got very worried and felt he had no other alternatives.

When you show your client the appraisal report for the Coupe DeVille dated April 30, your client says he may have gone to Star Auto on that date, not May 1, but he’s pretty certain that he gave permission for Conti to get the appraisal the same day he purchased the Impala. Mr. Wallace tells you, “As I get older my memory gets a little shaky. But even if I went to Star Auto on the 30th, I bought the Impala on the same day they stole the Coupe DeVille. I just picked it up the next day.” Your client also says that he knows a lot about cars, had cared for the Coupe DeVille, and it was not “worn out.” In fact, he thought he could have driven it for another 30,000 miles or more.

Your Internet research shows that the trade-in value for a ten-year old Coupe DeVille with 120,000 miles was $375.

You have also spoken with the State Attorney General’s Consumer Affairs Division. They have received a few complaints about questionable sales practices at Star Auto but have not yet been able to discover any solid evidence of fraud. They want you to keep them informed of the status of the case.

Finally, you have a suspicion that BMAC may be engaging in predatory lending practices. It may be targeting vulnerable low-income consumers for financing, offering financing on deals even when they know the borrowers will probably default. BMAC would then make a profit from large up-front payments and/or large deficiencies after repossession. While in this case Mr. Wallace did not make a large up-front payment, BMAC’s finding that a retired elderly man on a fixed income was creditworthy seems very irregular. Even if BMAC’s policies do not, on their face, show overt predatory practices, they may demonstrate that Wallace should not have been approved for credit, and, therefore, in this particular case, BMAC’s conduct was deceptive. Some other lawyers in town have been talking about bringing a class action against BMAC or some other car financing companies on these grounds.

Judge Green, who will be ruling on the motion for production of documents, is a bit of a loose cannon. He is certainly not “pro-consumer,” but on procedural issues he is not predictable. In some cases, he gets exasperated with parties for fishing expeditions in discovery; in others, he has sanctioned parties for withholding documents. Under the state’s procedural code, neither party can immediately appeal Judge Green’s decision on the motion but must wait until a final judgment in the case.
Your client tells you that he wants this case settled as soon as possible. Most importantly, he wants to have a car to be able to get around on his own. Preferably, he would like Star Auto to return his Coupe DeVille. But if that is impossible, he wants a car that will last him for another two or three years. He also wants a refund of his $250 down payment. When you ask your client about the $2,000 in punitive damages sought against Star Auto and the $6,000 in treble damages sought against BMAC and Star Auto, he is ambivalent. He wants Star Auto to acknowledge that they deceived him. He doesn’t feel that upset about BMAC, but he understand that BMAC may have been encouraging Star Auto to engage in its deceptive practices. He certainly will not pay any of the $3,000 deficiency. He also thinks that $2,000 or $3,000 – either from Star Auto or BMAC – in addition to the refund of the down payment and the return of his Coupe DeVille (or an equivalent car) would satisfy him. At the end of your counseling session, he reiterates that his primary concern is to have a reliable car that he can use for at least several years to come.
Negotiation Assignment 5

Deceptive Consumer Practices

Confidential Information for Star Auto’s Attorneys

Your client views this case as a nuisance. Ronald Conti is one of its most successful sales people, but your client’s manager acknowledges that at times Conti goes too far in pressuring customers into a deal. Conti is adamant that Wallace came to the dealership to buy a new car and that Wallace freely agreed to trade in the car after the appraisal. But given the discrepancy between the value of the car noted on the appraisal form ($100) and the trade-in value listed on the retail installment sales contract ($2,691), the manager admits that Conti probably told Wallace that the dealership would give him an extremely good deal on his Coupe DeVille if he purchased the Impala. In fact, sales people at Star Auto (and other dealerships) often use this technique, and Conti has often inflated trade-in values but not by this magnitude. On balance, your client feels that this is a case in which Conti may have gone a little bit over the line, but Wallace’s lawyers have blown this conduct out of proportion.

While your client sees nothing wrong with Conti’s methods (Wallace actually paid less for the Impala than he should have), your client is concerned that this case could result in closer scrutiny of its sales practices. A few months ago the State Attorney General Consumer Affairs Division sent its investigators to interview your client’s managers. Your client has not heard anything further from the Attorney General, but is concerned that this little case not become anything bigger.
In regard to BMAC, Star Auto merely has the customer complete the credit application form and sends it to the BMAC local office for approval. BMAC makes the final credit determination. Often in the spring, BMAC has a campaign after the doldrums of winter to encourage dealerships to increase the number of contracts financed with it. While Star Auto resents the pressure from BMAC, it wants to keep a good relationship with BMAC, its primary financing company. Your client’s manager confides with you, however, that she thinks that BMAC, not Star Auto, should have to pay any damages to Wallace. If BMAC hadn’t put the pressure on it last spring and then approved this contract, no suit would ever have been brought.

Star Auto is willing to refund Wallace his $250 down payment and to give him a credit of $1,000 for the purchase of one of their used cars. (Obviously, it cannot return the Coupe DeVille because the car has already been sold to a third party.) Your client doesn’t feel it should pay much more; if it did, the flood gates would be open to other lawsuits like this one. In light of the Attorney General’s investigation, however, it would be willing to give Wallace a credit of $2,000 towards the purchase of a new car. In any event, Star Auto wants a confidentiality agreement that any settlement will not be disclosed to anyone else.
Negotiation Assignment 5

Deceptive Consumer Practices

Confidential Information for BMAC’s Attorneys

While your client is confident that its financing practices are proper, it has a real concern for Wallace’s request for production of documents concerning those practices. Lately, legal services and consumer lawyers in the area have been bringing cases against mortgage and other financing companies alleging predatory practices. They assert that these companies target vulnerable consumer groups for deceptive lending practices knowing that borrowers will default and then make their profits from large up-front payments or deficiencies after foreclosure. BMAC is adamant that it does not engage in such practices and notes that Mr. Wallace did not make a large up-front payment (in fact, Star Auto inflated the trade-in value of the Coupe DeVille by $2500 over the appraised value). Your client is concerned, however, that once Wallace’s attorneys get their hands on BMAC’s policies on assessing creditworthiness, they will attempt to develop claims for future suits – possibly even a class action.

Judge Green, who will be ruling on the motion for production of documents, is a bit of a loose cannon. He certainly is not “pro-consumer,” but on procedural issues he is not predictable. In some cases, he gets exasperated with parties for fishing expeditions in discovery; in others, he has sanctioned parties for withholding documents. Since your client has no right under the state’s procedural code to appeal an adverse ruling on the motion until a final judgment in the case, your client would like to settle this case quickly before Judge Green rules.

Your client is willing to waive the $3,000 deficiency but “on principle” does not feel it owes anything more to Wallace. BMAC feels that if any party engaged in
Negotiation

debtable practices, it was Star Auto, and the dealership should pay any punitive damages. Conti’s conduct seems suspect, and your client has heard that he has a reputation for using questionable tactics to get deals. But, given its concern about the production of documents, BMAC will pay a maximum of $2,000 to get rid of the case. If Wallace will not accept that offer, then BMAC will take the risk of an adverse ruling from Judge Green. If that occurs, you will seek a protective order from the court limiting Wallace’s lawyers use of the documents to this case.
Negotiation Assignment 6

Sale of a House

Teacher’s Notes

Negotiation Assignment 6 concerns a negotiation for the purchase of a house. This transaction seems to be breaking down and might be on the verge of transforming itself instead into a dispute. Even in localities where lawyers do not represent the parties in routine house sales, a situation like this could easily lead one party or both to bring in legal representation.

This assignment works well in part because some students have themselves purchased or sold property, and many others will have watched their parents do it. In addition, the issues involved are not complex. Indeed, the legal issue concerning the effect of the binder is one that can be handled by first-year students who are taking the basic Contracts and Property classes.

This fact pattern can be used for discrete exercises or for a full negotiation assignment. If it is used as a fact pattern for Negotiation Exercises 1, 2, or 3, you should focus the discussion on the interests involved with each of the different issues separating the parties and raise the issue of the possible conflicting interests of the same party. Ms. Kravitz’s last offer, for example, reflects an interest in major repairs to the house but also an insistence on a move-in date of August 1. The fact pattern provides a good vehicle for a discussion of how a lawyer counsels a client when she is prioritizing interests and determining her BATNA. It also raises some interesting questions about informational bargaining. Given the last offers of the different parties, what information does the “client” want to obtain about the other party, what confidential information should be revealed, and what information should be concealed?
This is also a good fact pattern for Exercise 4. In many negotiations for house sales, tempers flare, and parties (and their attorneys) have to consider the appropriate response.

As an assignment for a full negotiation, this fact pattern gives students the opportunity to engage in mixed approaches to negotiation. Some students will use a pure adversarial approach and attempt to bargain solely over the numbers and/or the validity of the binder. Others, probably more successfully, will attempt to problem solve each of the issues trying to find mutually-agreeable solutions which address both parties’ needs. On the move-in date issue, for example, they should determine that one of Kravitz’s highest priorities is moving in by August 1, but one of Rossi’s highest priorities is protection if Kravitz does not get a mortgage commitment. They should try to develop solutions to this problem. When it comes to the “end-game” in the negotiation, the attorneys will probably engage in adversarial bargaining to wrap up a deal. At the end of the negotiation, it is important for the negotiators to summarize the specifics of the deal, not just congratulate themselves on the settlement.

As in the exercises, a full negotiation for this fact pattern raises challenging information bargaining issues. In the critique of the negotiation, ask the attorney why she withheld certain information from the confidential facts. Students sometimes assume that acknowledging a client’s interests is a sign of weakness. In some cases, however, it actually facilitates settlement.
To: all students

Negotiation Assignment 6

Sale of a House

The Parties and the Transaction

Assume that this negotiation happens in June.

Bill Rossi is selling his house to move to North Carolina, and Rhoda Kravitz is the prospective buyer. A negotiation meeting is set for June 25.

Rossi, a successful surgeon, and his wife have owned the house for 18 years. He has two children, the youngest of whom is 32 years old. He is selling because he has just retired. He is 68 years old. He is enthusiastic about moving to a condominium adjacent to a golf course. He can’t wait to devote himself to refining his game.

Kravitz is a 37-year-old attorney. She is a divorced mother of two children (six and four-years old) who live with her. She would like to move into the house immediately so that her children can begin the school year (September) in the neighborhood schools.
The House

The house is a four bedroom, two and one-half bathroom colonial on one-third acre property in a prestigious suburb. The house has a finished basement and a first-floor family room. It is about one mile from the commuter railroad station in a very well-established upper middle-class neighborhood of mature homes. This 2,700 square foot home is one of the smaller ones in the neighborhood.

The furnishings include many valuable antiques which have the following appraised values:

<table>
<thead>
<tr>
<th>Item</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bedroom set</td>
<td>$6,000</td>
</tr>
<tr>
<td>Sofa</td>
<td>4,000</td>
</tr>
<tr>
<td>Dining room set</td>
<td>12,000</td>
</tr>
<tr>
<td>Cabinet</td>
<td>12,500</td>
</tr>
<tr>
<td>2 Original paintings (living room)</td>
<td>16,000</td>
</tr>
<tr>
<td>1 Original painting (bedroom)</td>
<td>12,000</td>
</tr>
</tbody>
</table>

Total 62,500

The parties previously discussed Rossi’s desire to sell most of the furnishings as a condition of the sale but have not agreed on the amount of items to be sold. Rossi has taken the position that Kravitz should purchase all of the pieces and sell those that she does not want to save him the aggravation of dealing with the sale from North Carolina.

The Binder

The parties agreed to a purchase price of $475,00 on June 2 of this year. A one-page written binder was executed. It contained the date, the name of the parties, the address of the property, and the purchase price. Kravitz gave a $4,750 check to Rossi’s real estate broker to be held pending the final sale. Rossi orally told Kravitz, “I’m willing to leave the house on a moment’s notice.” The parties agreed on a date for the
engineer’s inspection and a tentative date for the signing of the contract. Both parties agreed and understood that the normal practice is for the buyer to place 10% of the purchase price in escrow with the seller’s attorney upon the signing of the contract. The escrow funds are normally refunded if a mortgage is not acquired.

**The Engineer’s Report**

The engineer’s inspection reveals the following: The house was built in 60 years ago. It has the original bathrooms. The kitchen was remodeled 35 years ago, but the appliances are in poor condition. The roof was last redone 20 years ago and should be replaced. The house is brick, and the bricks have never been pointed (spaces filled in). The heating system is the original oil/hot water system. The hot water comes directly off the main boiler. The boiler shows significant rusting, and the system is very energy inefficient. The house has central air-conditioning which was installed 35 years ago. The system cannot effectively cool the second floor if the external temperature exceeds 85 degrees and is very energy inefficient. A new system would save approximately $750 a year in energy costs.

**The Post-Inspection Negotiations**

After receipt of the engineer’s report, the parties attempted to negotiate the adjustment of price for repairs and acquisition of furnishings and the move-in date. These negotiations failed.

**Kravitz’s Last Offer**

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Binder Price</td>
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</tr>
<tr>
<td>Repairs</td>
<td>- 85,000</td>
</tr>
<tr>
<td>Furnishings</td>
<td>+ 16,000</td>
</tr>
</tbody>
</table>

*Modified Offer* 406,000

Kravitz has also made the sale contingent upon her being able to move into the premises, on a rental basis, on August 1, at a rental of $3,500/month.
Here is the basis for her last offer:

1. **Reduction in price to reflect “repairs”:** Based on the engineer’s report, Kravitz believes that it will cost her the following to make the house livable:

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Air conditioning for the second floor</td>
<td>$10,000</td>
</tr>
<tr>
<td>New heat and hot water system</td>
<td>$8,000</td>
</tr>
<tr>
<td>New roof</td>
<td>$10,000</td>
</tr>
<tr>
<td>Repointing bricks</td>
<td>$5,000</td>
</tr>
<tr>
<td>New kitchen</td>
<td>$22,000</td>
</tr>
<tr>
<td>New bathrooms</td>
<td>$30,000</td>
</tr>
</tbody>
</table>

   **Total Anticipated Expenses:** $85,000

   The $10,000 for a new roof includes $3,000 for removing the old roofing, which is not technically necessary under applicable building codes.

   The $30,000 for new bathrooms is the total of $15,000 for each of the full baths. The half bath is adequate for her needs.

2. **Increase in price to reflect purchase of furnishings:** Kravitz isn’t enthusiastic about buying the furniture, but she does like the bedroom set, one of the pieces of living room art and the sofa. Kravitz agrees that the appraised values are accurate for insurance purposes, but doesn’t think that sales at these prices are likely. She feels that the antique market is too unstable for firm predictions of actual sales prices.

   Appraised Value of Furnishings that Kravitz likes total: $21,000

   Her offer to purchase at: $16,000

3. **Rental and deposit amounts/Move-in date:** Kravitz still wants the property but is insistent on moving in and paying rent starting August 1. She is willing to pay what the parties can agree upon as the market value rent — $3500/month — with a two month security deposit.

4. **The legal validity of the offer and deposit:** Kravitz takes the position that the Binder is not a valid contract since critical terms of the agreement are missing.
Rossi’s Last Offer

<table>
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<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Binder Price</td>
<td>$475,000</td>
</tr>
<tr>
<td>Repairs</td>
<td>- 12,000</td>
</tr>
<tr>
<td>Furnishings</td>
<td>+ 65,000</td>
</tr>
</tbody>
</table>

**Modified Offer** 528,000

Rossi also rejected Kravitz’s demand to move into the house prior to obtaining a mortgage commitment. He has, however, offered Kravitz the option to move into the house one week after she has a bank commitment to grant a mortgage, at the $3,500 monthly rental.

Here is the basis for Rossi’s final offer:

1. **Reduction in price to reflect “repairs”**: Rossi feels that the kitchen and bathroom are beautiful. He likes the elegance of an old fashioned look and is totally unsympathetic to the notion that he should pay for these expenses. He sees them as “remodeling,” not “repairs”. Further, he feels that such “appearance” matters should never be costs borne by the seller. He has lived in the house the way it is and likes it. In regard to the kitchen, he does recognize that the appliances are old — refrigerator, stove, dishwasher (estimated replacement cost — $3,000.). He also feels that a roof that does not leak should not be touched, and that if it is touched, should not have the prior roofing removed since that is an unnecessary expense. He does concede that the bricks need some work and that $5,000 is a ballpark figure. Rossi also concedes that the air conditioning is not too effective, but thinks that a second zone would be an “improvement” to the house, not a “repair”. He doesn’t want to pay for it. He claims that a new blower for the A/C will solve the problem for $4,000.

2. **Increase in price to reflect purchase of furnishings**: Rossi wants Kravitz to purchase all of these items at their appraised value. Rossi has said that they could be sold for much more at auction, but doesn’t want the aggravation. He expresses irritation at her offer of less than the appraised value for the few items she is willing to purchase.

3. **Rental and deposit amounts/Move in date**: Rossi is adamantly opposed to the request of Kravitz to rent while awaiting mortgage approval. In his view despite the high
income of Kravitz, too many mortgage applications are denied. He keeps saying, "If she
doesn’t get the mortgage I will have lost months for sale potential, have the trouble of
getting them out of the house, and will have the cost of maintaining both the
condominium and the house." He is, however, willing to consider rental after mortgage
approval.

4. The legal validity of the offer and deposit: Rossi takes the position that price plus
description of property plus deposit equals a valid contract.
To: students representing Rossi

Confidential Information for Rossi

Rossi’s wife is 63. She is not happy about either his retirement or the decision to move to North Carolina. She has not worked for over ten years, due to a mild case of Parkinson’s Disease. She, however, has many friends in the area and is hesitant about having to reestablish her life.

Rossi, however, would like to sell the house as soon as possible since he fears that his wife will change her mind if the house is on the market for a prolonged period of time. Kravitz represents the only purchase offer since the house was put on the market last September.

The house was purchased eighteen years ago for $215,000.

He is aware of the fact that he is going to make a handsome profit on the sale. He is, therefore, more flexible on the money issues than prior negotiations have revealed.

The real problem is his fear that he will be stuck with a tenant who has not been able to get a mortgage. He has told you that his motto has always been, “Money talks ....”
He authorizes you to be willing to concede to the following if necessary, and, has given you the AUTHORITY to modify the details as long as you stick with his basic interests: no immediate access, unless handsomely compensated and no significant discount for remodeling.

1. Kravitz deposits 15% of the purchase price upon the signing of the contract with the understanding that the FULL 15% would be defaulted to Rossi if Kravitz did not get a mortgage by the required date.

2. Kravitz pays $15,000 for the furnishings that she wants and pay $50,000 as a deposit against the sale receipts of the remaining furnishings. Rossi will put the $50,000 in escrow. If the sale of the remaining furnishings exceeds that amount, Rossi keeps the $50,000 and Kravitz keeps the proceeds. If the sale does not equal the $50,000, Rossi will compensate Kravitz for the difference between the receipts and the $50,000. Rossi feels that this avoids any economic loss to Kravitz but puts the burden of arranging everything on her. He feels that this is fair since she wants to move in immediately and has, thereby, created this problem for Rossi.

3. If Kravitz accepts the above two proposals, Rossi would agree to knock another $25,000 off the sale price to reflect seller’s remodeling desires.

In summary, here is the proposal:

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<tbody>
<tr>
<td>Binder Price</td>
<td>$475,000</td>
</tr>
<tr>
<td>Repairs</td>
<td>-12,000</td>
</tr>
<tr>
<td>Remodeling</td>
<td>-25,000</td>
</tr>
<tr>
<td>Furnishings Kravitz wants</td>
<td>+15,000</td>
</tr>
<tr>
<td>Escrow for furnishings</td>
<td>+50,000</td>
</tr>
</tbody>
</table>

**Modified Offer** 503,000

Immediate move in at $3500 rental with forfeit of a 15% deposit if mortgage commitment is not obtained by the date agreed to in the contract.
To: students representing Kravitz

Confidential Information for Kravitz

She loves the house, the space, the location and the school system.

Kravitz is aware of the inconvenience that the immediate occupancy demand will impose on Rossi. She is confident that she will get a mortgage and wants you to work out an arrangement that would satisfy Rossi.

Kravitz does not know the exact price paid by Rossi for the house, but is well aware of the enormous inflation in the real estate market over thirty years.

Kravitz strongly dislikes the dining room set and the other pieces of art. She, however, would not turn down a bargain, and might be willing to buy all of the stuff for half the appraised value.

Kravitz has suggested the following proposal: although she has given you AUTHORITY to modify the terms to make the deal. She does, however, insist that you stick to the basic parameters: immediate access and money for repairs.

1. **Immediate move-in date.** To gain the immediate move-in date, she is willing to offer up to the following terms to reflect the risk to Rossi:

   (a) Kravitz will pay $5,000/mth rent rather than the market rate of $3500.

   (b) She will further agree to a one-year rental at the $5,000/mth rate. The rental obligation will be voided at the time of the closing.
She feels that this will protect the seller. He will get between $15 and $20 thousand dollars in rent for the months in-between the signing of the contract and the closing. If, and she doubts this, she fails to get a mortgage, he will get a total of $60,000 rent for the year. Further, she will agree to allow the house to be shown to prospective buyers during the period of the rental. But she wants him to agree to permit her to buy the house at the agreed upon price if she gets a mortgage within the year. If she gets the mortgage belatedly, she wants the past rent payments in excess of $20,000 to be taken off of the amount owed.

2. **Repairs** She will reduce her request for “repair” reduction in price by as much as $55,000 (A/C, Roof, Bricks, Heating and Kitchen). She included the kitchen because the engineer said that the stove, refrigerator, dishwasher, etc. were in need of replacement. Their cost would be $3,000, but she would like you to push for the full kitchen amount ($22,000).

3. **Furnishings** She wants to revoke her offer to buy any of the furnishings. Instead, she authorizes you to let her be talked into agreeing to pay to transport all of them to any antique auction house selected by Rossi. She wants 10% of the gross sale price as compensation for doing this.

In summary, here is her proposal:

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<tbody>
<tr>
<td>Binder Price</td>
<td>$475,000</td>
</tr>
<tr>
<td>Repairs</td>
<td>- 30,000</td>
</tr>
<tr>
<td><strong>Modified Offer</strong></td>
<td>445,000</td>
</tr>
</tbody>
</table>

1) One year rental at $5,000/mth, and,

2) 10% of sale price of furnishings in exchange for arranging shipment.

3) Kravitz WANTS to buy the house. If you do not work out a deal, and you cannot convince the partner that the other side was completely unreasonable, your firm will lose her corporate business. They will not be happy, and you may be fired!
Website Negotiation Assignments

On the following pages are the Negotiation Assignments drawn from the Roe Tenants Association case file on the textbook’s website:

1. Town
2. Windsor
CASE FILE:
Roe TENANTS ASSOCIATION

Website Negotiation Assignment 1: Town

After you have prepared your legal elements chart for the tenants' Fair Housing claim against the Town, your Clinic supervisor asks you to develop a chart in preparation for your negotiation with the Town.

Using the case materials and the following charts, prepare a negotiation plan for assessing each party's interests, rights, and power.

Reading: Essential Lawyering Skills (5th ed.), Chapter 24
### ASSESSMENT OF PARTIES’ INTERESTS

<table>
<thead>
<tr>
<th>Types of Interest</th>
<th>Clients’ (Tenants’) Interests</th>
<th>Town’s Interests</th>
</tr>
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<tbody>
<tr>
<td>Financial</td>
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<tr>
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## ASSESSMENT OF PARTIES’ RIGHTS

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<th>Analysis of Claims</th>
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<td>Legal Theory/Defenses</td>
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What additional information is needed to reach a deal?  
Who is likely to prevail?  
How can the rights relationship be changed?
## ASSESSMENT OF PARTIES’ POWER

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<tr>
<td>Expertise</td>
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</table>

What effect do these power relationships have on the dispute?

How can the power relationship be changed?
CASE FILE:
OAKHURST TENANTS ASSOCIATION

Website Negotiation Assignment 2: Windsor

After you have prepared your legal elements chart for the tenants' Human Rights Law claim against Windsor, your Clinic supervisor asks you to develop a chart in preparation for your negotiation with the Windsor.

Using the case materials and the following charts, prepare a negotiation plan for assessing each party's interests, rights, and power.

Reading:   Essential Lawyering Skills (5th ed.), Chapter 24
## ASSESSMENT OF PARTIES’ INTERESTS

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</table>

What effect do these power relationships have on the dispute?  

How can the power relationship be changed?
1. A surgeon, an engineer, and a lawyer were arguing about which profession is older than the others. The doctor pointed out that on the Fifth Day, the deity took out one of Adam’s ribs, an act of surgery that would make surgery the oldest profession. The engineer pointed out that on the First Day, the deity created the heavens and earth out of chaos, which would make engineering the oldest profession. “But,” said the lawyer, “who do you think created the chaos?”

2. Multiple choice question:
   A lawyer is someone who
   
   a. approaches each new case with an open mouth
   b. helps you get what’s coming to him
   c. both a. and b.
3. In court, a witness's testimony was filled with statements like “I think the meeting happened on July 14th” and “I think the defendant sat at the head of the table.” On cross-examination, the lawyer for the other side challenged this by saying, “What you think doesn’t matter. Tell us what you know.” “Oh, I’m sorry,” the witness replied, “I’m not a lawyer, so I can’t talk without thinking.”

4. Prove that Moses was not a lawyer.

The Ten Commandments are concise and can be understood the first time you read them.

5. A young lawyer meets the devil at a bar association meeting, and the devil says, “If you give me your soul, and the soul of everyone you hold dear, I’ll make you the managing partner of your firm.”

“So,” says the lawyer, “what’s the catch?”

6. A client looks at his mail and finds something sent by his lawyer. He opens the envelope and finds this:

“Dear Charlie: This morning I was walking on the sidewalk and thought I saw you on the other side of the street. I walked across to say hello, but it turned out to be somebody else.

“One-twentieth of an hour — $20.00”

7. A lawyer, a doctor, and a clergyperson were stranded by shipwreck on an island within sight of the mainland. The water in between was filled with sharks. The doctor volunteered to swim to the mainland for help. After about a hundred feet, the sharks made straight for her, and she had to swim back to the island. The clergyperson volunteered next, hoping for divine intervention, but he, too, had to turn around quickly. Then the lawyer tried it. The sharks let him through, and he returned on a Coast Guard boat to rescue the other two.

“Why didn’t they eat you?” asked the doctor and the clergyperson.

“Professional courtesy,” replied the lawyer.
8. Everybody thinks that sharks and lawyers are both predatory. What else do they have in common?
Oral aggression.

These are typical of the jokes laypeople tell about lawyers. This is not a recent phenomenon. It’s been going on for centuries.64

What do these jokes tell us about how the public views our profession?65 Jokes like these cause laughter because the audience automatically agrees on a perception assumed by the jokes — that lawyers are all mouth, or greedy, and so on. Try reading each joke again and asking yourself what its assumed perception is.

Of course, these jokes are unfair. They do not describe the lawyers we like and are friends with. They do not describe us. But the public wouldn’t have told — and laughed at — these jokes and their predecessors for centuries unless a significant part of the bar created impressions that make the jokes funny.

Neumann sometimes ends a semester by telling, in class, about a half-dozen of these jokes. Then he asks students to listen to the jokes a second time and extract from them what much of the public thinks of us. After telling the jokes again and getting the class to formulate

64. H.L. Mencken, in A New Dictionary of Quotations 665-669 (1942) collected a large number of ancient proverbs (for example, “The Devil makes his Christmas pie from lawyers’ tongues”) and quotations (for example, Keats: “I think we may class the lawyer in the natural history of monsters”). The proverbs come from all over Europe. The quotes come from Shakespeare, Swift, Benjamin Franklin, Samuel Johnson, Coleridge, Wordsworth, Dickens, and others. In the 16th century, Shakespeare could get a guaranteed laugh from an audience by having an insurrectionist exclaim, “The first thing we do, let’s kill all the lawyers.” II Henry VI, Act 4.

65. Every time the public is surveyed about the confidence one feels in dealing with people in various occupations, lawyers come out near the bottom. In a Gallup poll, “only 14% ... gave lawyers high marks for honesty and ethical standards, ... below every other category except insurance salesmen, advertising practitioners and car salesmen.” John Tierney, Bar Sinister: Lawyers Earn the Public’s Wrath, N.Y. Times, May 13, 1999, at B1. In a survey undertaken by the ABA, “only 19% of the respondents expressed confidence in lawyers’ work compared with a 50% confidence rating for doctors.” Gary M. Stern, Polishing the Image: Lawyers Appear Low in Public Status, Moving Some Bar Groups to Action, Nat’l L. J., Sept. 16, 2002, at A1.
a list of what the public doesn’t like, he tells students that one of the ways to be a good human being, an effective lawyer, a happy lawyer, and a prosperous lawyer is never to do any of the things that cause people to tell these jokes.

Some good examples of the best side of lawyering — lawyer behavior that engenders deep client loyalty and respect — are described in an ABA Journal article entitled What I Like about My Lawyer, which we suggest that students read.

Here are some more jokes:

9. A clergyperson and a lawyer died on the same day and ended up in heaven. St. Peter took them to their rooms. The clergyperson’s room was tiny, with a folding cot and a bare light bulb hanging from the ceiling. The lawyer got the most lavish suite in the place with a 48-inch plasma television, a whirlpool bath, and so on. The clergyperson took St. Peter aside. “I devote my life to serving the divine will. I get a little cell, and the lawyer gets the works. Why?” “Oh,” said St. Peter, “we have more clergypeople than we know what to do with, but this is our first lawyer.”

10. An ambulance arrived at the scene of an auto accident, and the paramedics jumped out and ran to the driver, a lawyer, who was injured. As they tried to treat him, the lawyer moaned about his car. “My Hummer is ruined,” he said. “Hey,” said one of the paramedics, “you got something else to worry about. Your left arm’s been ripped off.” “Oh, no!” said the lawyer. “My Rolex, what happened to my Rolex?”

11. A lawyer was so fond of arguing that he refused to eat any food that agreed with him.

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67. In this Epilogue, we’ve excluded jokes that reflect misunderstandings about court systems or general hostility to a profession that specializes in resolving disputes. We’ve included only jokes that reflect the public’s fears and suspicions about lawyers as people. Some material comes from Deborah Ezbitski, Steve Johansen, and Maureen Kordesh.
12. Define “lawyer.”

A mouth with a life-support system.

13. Three research labs had been using rats for experiments but replaced them with lawyers. The first lab switched because the scientists were getting too attached to the rats, a problem that would not happen with lawyers. The second lab switched because there seems to be an infinite supply of lawyers, an advantage not offered by rats. The third lab switched because there are some things that even a rat will refuse to do.

14. A doctor stood by the bedside of a hospital patient who needed a heart transplant. “We have three hearts,” said the doctor, “and you can choose among them. One came from a young athlete in peak physical condition who died in an accident. Another came from a person who won the Nobel Peace Prize. The third came from a lawyer who had practiced law for 40 years.”

“I’ll take the lawyer’s heart,” said the patient.

“Why?” asked the doctor.

“Oh,” said the patient, “I want a heart that’s never been used.”

15. In French, “avocat” means both lawyer and avocado. Why would the French use the same word for two entirely different things?

Both have hearts of stone.

16. A lawyer was in the hospital for surgery. The last thing he was aware of before the surgery was lying down and going under the anesthetic. Hours later, he awoke in a room with curtains drawn across the windows. “Why are the curtains closed,” he asked a nurse. “The whole block across the street is burning down,” she replied, “and we didn’t want you to think the operation had failed.”
17. A man is flying in a hot air balloon and realises he is lost. He reduces height and spots a man down below. He lowers the balloon further and shouts:

“Excuse me, can you tell me where I am?”

The man below says: “yes you’re in a hot air balloon, hovering 30 feet above this field.”

“You must be a lawyer” says the balloonist.

“I am” replies the man. “How did you know.”

“Well” says the balloonist, “everything you have told me is technically correct, but it’s no use to anyone.”

[And now, the corollary:]

The man on the ground says “you must work in business.”

“I do” replies the balloonist, “but how did you know?”

“Well”, says the lawyer, “you don’t know where you are, or where you’re going, but you expected me to be able to help. Now you’re in the same position you were before we met, but somehow it’s my fault.”

18. How many lawyers does it take to change a light bulb?

Such number as may be deemed to perform the stated task in a timely and efficient manner within the provisions of the following agreement: Whereas the party of the first part, also known as “the Lawyer,” and the party of the second part, also known as “the Light Bulb,” do hereby and forthwith agree to a transaction wherein the party of the second part (Light Bulb) shall be removed from the current position as a result of failure to perform previously agreed upon duties, to wit, the lighting and illumination of the area ranging from the front door, through the entry way, and terminating just inside the living area, demarcated by the beginning of carpet, the party of the first part (Lawyer) shall, with or without elevation through means of ladder, stepstool, or chair, grasp the party of the second part (Light Bulb) and rotate the party of the second part in a counterclockwise direction, with every possible caution by the party of the first part (Lawyer) to maintain the structural integrity of the party of the second part (Light Bulb), provided that failure to maintain such structural integrity of the party of the second part shall not be deemed a material breach of this agreement, and the party of the first part (Lawyer) shall, upon completion of counterclockwise rotation, dispose of the party of the second part (Light Bulb) in any trash container the party of the first part shall, in his sole discretion, select, whereupon the party of the first part (Lawyer) shall grasp the party of the third part (New Light Bulb) and rotate the party of the third part clockwise until it is protected from the forces of gravity and emits the form of energy generally known as light.
19. A truck diver is passing through New York City and stops at a bar for a beer. Another man enters the bar, wearing a suit and a bow tie and carrying a briefcase. “Are you a lawyer?” the bartender asks. “Yes, I am,” the man replies. The bartender pulls out a shotgun and blows the lawyer away. “Why did you do that?” asks the truck driver. “You must be from out of town, pal,” says the bartender. “It’s open season here on lawyers at this time of year. You don’t even need a license.” “Sounds great to me,” chuckles the truck driver, who has had some experience with lawyers.

While driving away, the truck driver hits a classic New York City pothole, causing the truck to hit a light pole. While trying to crawl out of truck cab, he realizes that he is surrounded by a crowd of people in suits, all of them throwing their business cards at him and yelling at him not to move until the ambulance arrives. The truck driver pulls a pistol from his glove compartment and starts shooting into the crowd.

As he pauses to reload, a police officer arrives, orders the truck driver to drop his weapon, and slips handcuffs on him. “But they’re in season, aren’t they?” protests the truck driver. “Well, sure,” replies the police officer. “But you can’t bait them.”

Numbers 20 and 21 have the same characteristics as the material above although, strictly speaking, they might not be jokes:

20. In a cartoon, Dilbert sits in a lawyer’s office. The lawyer explains the advantages of using living trusts to minimize probate. Dilbert asks whether this means that he has go through a big hassle “created by lawyers” to avoid going through another, even bigger hassle, also “created by lawyers.” The lawyer looks at his watch, does a quick calculation, and estimates how much, based on his hourly rate, Dilbert will pay for the time it took to make that remark.

The following has circulated on the Internet purporting to be an Associated Press story. It might be that — or it might be a joke.


21. In California, more than 600 lawyer hopefuls were taking the State Bar exams in the Pasadena Convention Center when a 50 year old man taking the test suffered a heart attack. Only two of the 600 test takers, John Leslie and Eunice Morgan, stopped to help the man. They administered CPR until paramedics arrived, then resumed taking the exam.

Citing policy, the test supervisor refused to allow the two additional time to make up for the 40 minutes they spent helping the victim. Jerome Braun, the State Bar’s senior executive for admissions, backed the decision stating, “If these two want to be lawyers, they should learn a lesson about priorities.”

Finally, the ultimate lawyer joke:

22. Question: How many lawyer jokes are there?
   Answer: Only three. The others are documented case histories.  

Appendix A

Critiquing Student Work

Here are some suggestions for effective critiques of student work:

1. **Prepare for the critique, and have the student prepare as well.**

   If either teacher or student is unprepared for the critique, it will waste the time of both. Although a critique is by nature spontaneous, it works best when the teacher selects in advance a relatively small number of issues and uses the performance to develop those themes. Critique is much less productive where it is largely an unthematic discussion of the details of technical skills.

   The student’s preparation should enable her to speak to the goals of the performance, the methods chosen to achieve those goals, the skills used, issues of professionalism raised by the performance, and the process through which the performance was planned. If the performance was videotaped, the student should view the entire tape *before* the critique. If the performance was acted out but not videotaped, the student should, among other things, at least try to relive mentally its details.
Student journals are especially helpful in getting to students to reflect in a skills course. (Sandy Ogilvy has written a good article on integrating journals into skills teaching.\textsuperscript{71}) When a student videotapes a performance, it is a good idea to require a journal entry right after the performance and a second entry after the student has seen the tape. Students tend to focus in the first entry on feelings and in the second on a more objective view of the work. Both are important, and if the student brings both entries to the critique, the student is better prepared and can set much of the agenda.

2. Begin the critique in a constructive way.

At a time scheduled for a critique, the student sits down in your office. Your instinctive response might be to start telling the student what you think. Often, that way of beginning creates additional problems.

A more effective approach is to ask the student to help develop the agenda. That not only minimizes confrontation, but it sometimes turns up problems you might have missed, as well as material that might show your diagnosis to have been wrong (and that the student otherwise would have to bring up defensively later).

A coldly delivered assessment at the outset can arouse so many barriers to critique that whatever discussion ensues is likely to have little effect on the student. Imagine a critique that begins like this:

\textit{Teacher:} I think that in this negotiation you probably conceded more than was necessary to get the few concessions you obtained. Your adversary had a better sense of the leverages available to both sides, and you seemed not to have a coherent negotiating strategy. Your offer-and-demand pattern made your lack of planning obvious to your adversary, who took advantage of it. And the threats you made were empty and were delivered in a way that gave your adversary an excuse for a temper tantrum, which intimidated you.

Compare the opening phase of a critique in an architectural design studio, vividly recalled by both teacher (named Dani) and student (Michal) eight years after the event:

\textit{Dani:} ... Toward the end of the semester, I saw Michal was struggling with her work, [which] I asked her to show

It was uninspired, institutionalized, and the whole thing looked a little like a motel. I did not like it, but I did not say so. I just asked Michal if she liked what she was doing.

Michal: The evening before the session with Dani, I remember thinking, This is not what I want. ... And [when] he asked, ‘What do you think? Do you like it? What do you feel about it?’ ... I was able to tell him the truth, that it really was not at all what I wanted and that, actually, I wanted ... three things .... First, ... I want nature to be predominant. I also told him, I want it to be a social experience for the groups that visit .... And the third thing is, I want it to be a place that will develop their senses — that will sensitize them to changes, to feel. [After the critique] I came home and sat down and [started reworking the building]. That evening I was very focused and I finished the building layout.  

This is a beautiful beginning. Had the teacher expressed his judgment, the student’s sense of failure would have been confirmed and deepened, and her later creativity inhibited. But instead the student becomes energized. She is able for the first time to articulate what has bothered her about her own work, and, after further discussion, she starts on a redesign that turns out to be far more valuable than the original. The critiquer has helped her reach an intensity and concentration that people in the arts sometimes call “focus” or “flow.”

A law teacher might begin by asking, “What was your goal?” That question sounds more lawyer-like. It is certainly keyed to a standard of effectiveness. And it is something that eventually must be talked about. But Dani’s questions are better. They rip away the curtain of defensiveness: in the student’s mind they change the subject from “What was wanted of me?” to “What can I accomplish here, and how can my teacher help accomplish it?”

A surprising number of students have some sense of what they have not done well in a performance under critique. When a teacher begins a critique with a question like “How do you think it went?” — or just “How do you feel about it?” — many students begin to say things that are already on the critiquer’s list of problems to discuss.

73. Id. at 144-50.
74. Id. at 150.
After the student has listed her concerns, you can convert them into an agenda, adding items that were on your list but not mentioned by the student:

Teacher: You mentioned that you might not have explained the options very clearly for the client, and that when the client later became extremely worried, you didn’t know what to do. Let’s talk about both those things as well as a couple of others ....

3. Have a discussion.

Don’t talk at the student.

When a critiquing teacher talks at a student, the student often pretends to think whatever the teacher seems to want the student to think. That is less a dialogue than a lecture punctuated with little applauses in the form of student comments aimed at pacifying and impressing the teacher. Students do not learn much from this.

If critique consists solely of pointing out all the student’s errors and telling the student how to do the job in a way the teacher considers “right,” it will lead to empty mimicry, rather than mastery.

Teachers tend to perform at their best when they and their students learn together, even though at different levels. When students are professed to, they cease to be active participants in an adventure and instead start doing what years of formal education have conditioned them to do — preparing to please the teacher by dutifully absorbing his or her thoughts and words so that they can reproduce them at an appropriate moment to get the grade that is their prize for doing that.

4. Don’t judge a student performance by what you would have done under the same circumstances.

Effective critique avoids two extremes. At one extreme, the teacher lacks objectively conceptualized standards, and the teacher’s evaluations therefore seem inconsistent, arbitrary, and even whimsical. At the other extreme, the standards are so rigid and so personal that the teacher coerces students into imitating the teacher. But the goal of critique is not to turn the student into a clone of the teacher: a critiquer’s purpose is instead to help the student find ways of thinking that are effective and that at the same time work within the student’s personality. Some things a student might do are always wrong and can be fixed in only one or two ways per fault. Others are always wrong but can each be fixed in a number of ways
— often more ways than the critiquer alone can imagine. Still others work badly in some situations but well in others. And still others are not really wrong at all but just offend the critiquer’s taste.

A good critiquer is dogmatic only about those things that are always wrong and that can be fixed in only one or two ways. As to other matters, a good critiquer is careful to separate true ineffectiveness from taste that the critiquer simply does not share. As to things that work well in some situations but not in others, the critiquer’s goal is to help the student understand the difference. And as to those things that are always ineffective but admit of many solutions, a good critiquer teaches students how to choose among the solutions.

John Gardner described the corresponding problem in the teaching of fiction:

Nothing is easier than to give the student specific actions, even specific sentences, that will solve his story’s problems; and at a certain point in the young writer’s development it may perhaps be valuable to do such things, so that the student can get the hang of it. But basically what teachers need to teach students is not how to fix a particular story but how to figure out what is wrong with the story and how to think about alternative ways of fixing it. ... I’ve frequently worked with writing assistants — young writers with successful first novels — whose inexperience as teachers led them to focus on finding the best solution to problems in the writing placed in their care, led them, in other words, to show the student writer what to do to make his fiction work. In case after case, when I myself looked at the student’s work later, I felt there were a number of possible solutions to the problems ... and that in suggesting only one solution, the one he himself would choose, my assistant had done an unwitting disservice to the student. What the beginner needs to learn is how to think like a novelist. What he does not need is a teacher who imposes his own solution, like an algebra teacher who tells you the answer without showing you how he got there, because it is process that the young writer must learn....

In the architectural design studio, Dani suggests, in quick sketches, several ways in which Michal might accomplish what she wants: in her words, he “very freely went over all kinds of possibilities.” As Donald Schön points out, “[i]t is important here that Dani suggests many ways — not one best way — to achieve the effects Michal wants. He does not instruct her in the best way to do it; he works with her to open up a range of possible means for her

76. Schön, supra note 72, at 145 (emphasis added).
experimentation.” In effect, the student has been told, “You must judge your work — and I will join you in judging it — on the basis of your success in producing what you intend.”

Students react better when evaluations are expressed purely in terms of the performance’s practical effectiveness, a standard that students can accept as objective if it is explained carefully. (“I think the typical judge would react to this argument in the following way ... and for the following reasons ....”) A good critiquer demands and encourages at the same time. Students should feel that the teacher likes them, wants them to succeed, but expects the painful effort needed to reach professional standards. Students begin resisting when a teacher talks about personal preferences (“I don’t like ....”). If a teacher cannot conceptualize a criticism in an impersonal way, either the teacher does not really understand what is wrong or, in truth, nothing is wrong.

And we ought to be humble about our own ability to know how we as professionals would behave in given situations. When a professional “is asked how he would behave under certain circumstances, the answer he usually gives is his espoused theory of action ... to which he owes allegiance, and which, upon request, he communicates to others.” But “the theory that actually governs his actions is his theory-in-use, which may or may not be compatible with his espoused theory,” and he “may or may not be aware of the incompatibility between the two theories.” Although a professional’s theory of action can be obtained for the asking, his theory-in-use can be discovered only “from observations of his behavior.” In other words, what we say we do is not necessarily what we really do.

5. **Identify strengths and weaknesses.**

In a balanced critique, the student’s weaknesses and strengths are both identified. If the student has done anything well, it is a good idea to let the student know, but in a way that suggests that the comment is not an act of charity. And critical judgments are best directed at the performance as an event and not at the student as a professional. If the teacher’s manner implies that the performance can be separated from the student, the student can more easily shed the thinking that caused whatever failures the performance might represent.

77. *Id.* at 152.

78. *Id.* at 153.


80. *Id.* at 7.

81. *Id.*
6. Express your evaluation in a precise and concrete way.

Vague and unspecific comments have little effect on students. In a trial practice course, if the student is told only, “You didn’t control the witness,” the student has not been given an explanation of the idea or ideas on which improvement would have to be based. The student has not yet understood some concept of control — a principle, an idea, a theory — and the teacher must find that concept. And the theory must be tied down to the performance. If no examples of noncontrol are analyzed in the critique, the student will not learn how to identify and fix questioning that does not do the job.

7. Be careful about role masks.

Both teachers and students hide, at times, behind role masks. A researcher once administered a psychological inventory to 94 first-year law students (all male) to test the hypothesis that professional success (in this case, first-year grades) could be correlated with personality characteristics. No such correlation was found, but the researcher was shocked by the personality profiles. He found that the law students sampled wear a social mask and attempt to make a strong and definite impression on others; they act and react in great measure on the basis of the social role which they have adopted and which they feel is expected of them .... While they publicly project strength, activity, and enthusiasm, their private personality is one of awkwardness, defensiveness, and nervousness. 82

The researcher concluded that the students “are frequently engaged in playing a part ... and have not as yet really dealt with their genuine feelings. It is unlikely that the experience of law school will change this pattern” because of the emphasis in law on posturing and role-playing, which, according to the researcher, might have been one of the things that made law attractive to these students in the first place. 83

Role masks frustrate the critiquer trying to reach the real student. A student not hiding behind a role mask is less defensive and more self-reflective.

83. Id. at 874.
Even if role masks are strikingly common in law, they are not unknown in other professions. For some people, they might be a more or less inevitable response to what Donald Schön has called the “paradox of ... having to plunge into doing — without knowing, in essential ways, what one needs to learn.”\textsuperscript{84} That paradox occurs when students are asked — as they must in a professional school — to acquire completely new manners of thought that cannot be memorized and that, in fact, can be articulated only with the greatest difficulty. A student naturally feels vulnerable and inadequate upon realizing that what must be learned cannot be explained. Although some students are able to deal with these feelings simply by discussing them openly, others try instead to protect themselves by acting out a perceived role of lawyerliness, projecting more in appearance and gaining less in substance.

An intellectually secure student needs no role mask and encounters the mystery of professional work confident that she can eventually “break it open.”\textsuperscript{85} Describing the process of teaching in architecture design studios, Schön wrote that such a student “must be able to put aside what she knows in order to enter into the as yet unknown world of someone else, to experience a zone of uncertainty where, having given up for the moment her usual ways of seeing, she is still unconnected to the other’s way of seeing. For this, she needs a capacity for cognitive risk-taking [and] the strong sense of self on which this capacity depends.”\textsuperscript{86}

If a student is adamant about living behind a role mask, the critiquer can do little, other than showing patience, receptivity, and encouragement. Some role-masked students may be able at times to come out from behind their masks and accept difficult advice. But that does not happen easily, and the effect might be transitory. The extent to which a student’s ego feels threatened can be reduced somewhat by giving the student some genuine evidence that he or she is respected as an individual and liked. Evidence can include an openness of manner on the teacher’s part, a general spontaneity, a receptiveness to the student’s point of view. A student can be persuaded to grow only where the teacher has created what John Gardner called “a general atmosphere of helpfulness.”\textsuperscript{87} Many criticisms are best expressed as advice.

A role mask can be equally damaging in a teacher. Teachers may be encouraged to don role masks by their experience in practice, where posturing and role-playing predominate, or by the general culture of law, even in legal education. To students, a role-masked teacher is not genuine, but only the aggregate of all the roles the teacher tries to play. And genuineness is one of the most valuable resources a teacher can have.

\textsuperscript{84} Schön, \textit{supra} note 72, at 166.

\textsuperscript{85} \textit{Id.} at 166.

\textsuperscript{86} \textit{Id.} at 139.

\textsuperscript{87} Gardner, \textit{supra} note 75, at 81.
8. Be careful about the need of some students to mimic.

Some students hear evaluation in terms of what the teacher “wants.” Beginning students sometimes express this openly: “Would you give me a better idea of what you want?” “This work was very hard; I didn’t know what you wanted.” “Thank you for spending extra time with me; I think now I understand what you want.” At more advanced levels, the sentiment is less directly expressed — perhaps because some students begin to feel ambivalence about the effect of mimicry on their own independence — but it is still often acted upon. Some mimicking students “counterlearn” because, instead of learning, they limit themselves to a temporary performance of whatever they believe the teacher “wants,” while others “overlearn” because, with diligent literalism, they treat the critiquer’s commentary as “a set of expert procedures to be followed mechanically in each situation.”

Mimicking is not the same as modelling. Many very good lawyers, at various points early in their careers, decided to adopt some particular paradigm of lawyering that might have been exemplified by a senior practitioner they knew. A young lawyer models herself after a senior lawyer because, at the time, the young lawyer believes it is the right thing to do. (Mimicry is superficial imitation without that internal commitment.) As the young lawyer matures, she might refine the model she has adopted or reject it and change course, but the struggle with the model is, for many people, a healthy part of the process of gaining maturity.

The urge to mimic subverts an education. It is based on the idea that an education is a game, with a score and rules that should be clearly set out, rather than an experience through which the student becomes intellectually and emotionally larger and stronger. Perhaps, the urge to mimic is related to “the current mood of vocationalism and consumerism,”

which afflicts students in virtually all professions, making them “resistant to the demands of any reflection on practice that does not promise immediate practical utility.”

To confront this problem, a teacher can make clear that the most important subject of critique is the process through which the student creates a performance, which involves decisions the student must make and be responsible for. If a student speaks of what the teacher “wants” (or words to that effect), the teacher can reorient the discussion toward a standard of professional effectiveness. It sometimes helps to talk about the difference between

88. Schön, supra note 72, at 154-5.

89. Id. at 313.

90. Id.
a professional school (where standards of effectiveness can be identified) and an undergraduate school (where students are not being prepared for practical work, where teachers lack standards geared to real-world effectiveness, and where grades are often based on a teacher’s seemingly arbitrary personal preferences).

Occasionally a teacher can use mimicry to shock students into understanding something of intellectual independence. Bernard Greenhouse, the cellist of the Beaux Arts Trio, was taught by Pablo Casals:

He would play a phrase and have me repeat it. And if the bowing and the fingering weren’t exactly the same as his ... he would stop me and say, “No, no. Do it this way.” And this went on for quite a few lessons. I was studying the Bach D-Minor Suite and he demanded that I become an absolute copy. ... [F]inally, the two of us could sit down and perform and play all the same fingerings and bowings and all the phrases alike. And I really had become a copy of the Master. It was as if that room had stereophonic sound — two cellos producing at once. ... And at that point ..., he said to me, “Fine. Now just sit. Put your cello down and listen to the D-Minor Suite.” And he played through the piece and changed every bowing and every fingering and every phrasing and all the emphasis within the phrase. I sat there, absolutely with my mouth open, listening to a performance which was heavenly, absolutely beautiful. And when he finished, he turned to me with a broad grin on his face, and he said, “Now you’ve learned how to improvise Bach ....”

One cannot avoid suspecting that, before Greenhouse, Casals must have had legions of students eager to imitate the master; that he had struggled to help them become themselves in spite of their urge to become him; and that he had finally discovered that he could break the cycle of mimicry by overindulging it and then shocking the student into the realization that there are an infinite variety of ways to be professionally effective.

9. Be careful about persuasion-mode thinking.

Persuasion-mode thinking is described in §2.2.10 of the textbook, together with its opposite, inquiring mode.

The very qualities many lawyers use to project forcefulness can inhibit both teaching and learning. In a student, persuasion-mode thinking blocks learning. In a teacher, it is often seen as manipulative and controlling. Even where the teacher’s persuasion-mode tendencies

91. Quoted, id. at 176-77 (emphasis in original).
are very slight, a persuasion-mode student, conscious of the teacher’s authority, easily sees “paternalism and arrogance.”

Few teachers intend to aggrandize themselves at the expense of their students; few are unfeeling; few compete over interpretations of work product just to win. Yet many are perceived in these ways. Because of the setting, almost anything that teachers and students say or do is ambiguous. Each communication has several plausible meanings, ranging from the most positive to the most negative. The most common scenario begins with a teacher statement intended as helpful but heard as attack. The student, concerned about being attacked, responds defensively. The teacher does likewise, for the same reason. Each side believes, with some justification, that it joins the attack reluctantly and in self-defense.

Persuasion-mode behavior is a counter-productive force in a critique. A student locked into persuasion mode behavior is more interested in a power struggle than in learning, although such a student is often at the same time polite and deferential. Even worse, a teacher locked into persuasion mode behavior has a very limited capacity to “reach” students who feel themselves confronted, rather than helped.

A teacher with a non-combative affect should not be confident that he or she is immune from persuasion-mode behavior. (No one who has wanted and gotten a legal education is immune to it.) Nor should a teacher be confident that a student lacks persuasion-mode resistances merely because the student seems friendly. Even when accompanied by pleasantness and charm, persuasion-mode behavior is recognized by others — although not always consciously — and those others tend to react defensively where authority is at issue and ego and other self-interests are at stake.

Critiquing can be much more effective in inquiring mode. In 1952, in a now-famous talk on teaching, Carl Rogers said that “anything that can be taught to another is relatively inconsequential”; that when he examined the results of his own teaching, “either damage was done, or nothing significant occurred”; and that consequently he was no longer interested in being a teacher and was “only interested in being a learner.” Put less abstractly, Rogers concluded that when he professed wisdom (“taught”), his students did not learn anything significant, but that they could learn a great deal if he and they learned together. Teaching can be defined as creating a situation in which others learn.


93. Id. at 327-28.

94. Quoted by Schön, supra note 72, at 89-90.
Ultimately, a teacher and student can be fully effective in their respective roles only when each can lay aside persuasion-mode instincts and, in a spirit of inquiry, build the pedagogical equivalent of a therapeutic alliance. The teacher must gain enough self-knowledge to be able to identify his or her own persuasion-mode behavior and enough self-discipline to be able to eliminate it from critique. At the same time, the teacher must be able to recognize persuasion-mode responses in students, who use them as defenses in the very threatening situation in which they find themselves. And the teacher must be able to inspire sufficient trust and show enough leadership that — to the extent possible — students can feel safe and encouraged to respond with inquiry, rather than persuasion.

How can a teacher both inquire and guide at the same time? With surprising frequency, a critiquer’s better idea is not as good as some other ideas that teacher and student could discover together through discussion. And a student can be deeply and constructively moved by hearing of the critiquer’s own perplexity and curiosity, especially where they show that the critiquer’s own thinking has evolved during the course of the discussion. Graham Strong has pointed out that “a good critiquer mixes freedom with control and tends to exert more control as to structure and to leave more freedom as to substance, in the common search for meaning.”

10. Be careful about other manifestations of student anxiety.

Some students are deafened by anxiety: their need for reassurance is so compelling that their memories seem not to record criticism. A student deafened by anxiety may become unusually passive in a critique, saying little more than “Uh, huh,” “Yes” or “I understand.” When that happens, a critique is not actually happening because there is no give and take. And a critique will not truly begin until the teacher’s questions draw the student out and get the student actively engaged.

On the other hand, rationalizing can cause a student to think of an apparently good reason for everything, even if the reason the student gives is not the real cause of what happened. A student who did something merely because it seemed pleasant at the time can — on the spur of the moment in a critique — provide a perfectly logical reason that is insincere because it was not in the student’s head at the time of the performance. “Rationalization,” Thomas Shaffer has written, “is a lawyer’s style and pretense.” And Chapter 5 of the text explains in detail why students’ self-justifying memories about their work are unreliable. A student who states a rationalization with an air of self-confidence may at the same time feel a desperate desire for help with the very problem the rationalization covers up.


11. End the critique in a way that gives the student a summary of the main lessons of the critique.

Pick out the main themes of your assessment: the two, three, or four most important things the student should take away from the discussion. The student should be able to leave informed, persuaded, and motivated.

12. If you do a Socratic critique, ask questions in a sincerely open-minded way.

What Kingsfield did in law school classrooms is not Socratic at all. The accurate term would be “Langdellian,” after Christopher Columbus Langdell, who instituted the case method of teaching at Harvard in the 19th century. The Langdellian method does not work in the classroom and in fact has been abandoned there because it never really worked very well in large groups and because there is so much doctrine to teach today that classroom teachers do not have time to ask students questions any more except as “garnish to lecture” or as “a way to make lectures more palatable.”

Law teachers and law students are so used to the hostile reaction that the Langdellian method evokes that they incorrectly assume it to be the natural response to any teaching method based on questions posed by the teacher. But a lecturing teacher — even one who throws in a few questions as “garnish” — is in total control of the classroom. On the other hand, when a teacher asks questions and is willing to deal with whatever answer the student gives — in other words, when the teacher asks in inquiring mode — power is being shared with the student. For the teacher, the route can take unexpected turns, and the teacher joins the students in learning because the dialogue can enrich even an expert’s understanding.

Socrates said that his role in teaching is that of a mental midwife, the student being the true parent of his or her own knowledge. Socrates’ goals were not merely to convince the student, but to build independence, “to make every pupil realize that the truth was in the pupil’s own power to find, if he searched long enough and hard enough, refusing all ‘authoritative statements’ and judging every solution by reason alone.”


Of all the things that years of critiquing can teach a teacher, perhaps the three most prominent are how little the teacher knows; how little can be known; and how to work constructively despite one’s own ignorance — by asking questions. In a critique, the teacher often does not know the student’s purpose, analysis, or strategy — or even of some of the underlying truths toward which the critique is headed. The act of teaching often reveals to the teacher that what might have seemed simple and straightforward is so subtle and complex as to be knowable only much greater difficulty than originally supposed. Against all this professorial ignorance — hard as that ignorance may be for students to imagine — questions can often be acts of gentleness and generosity, rather than the feats of aggression that traditions of cross-examination and Langdellian classes might suggest. John Gardner wrote that good critiquers of fiction try to understand and appreciate [what the student has] written. ... If they cannot understand why [it] is as it is, they ask questions. ... It takes confidence and good will to say, ‘I don’t understand so-and-so,’ rather than, belligerently, ‘So-and-so makes no sense.’ It is in the nature of stupid people to hide their perplexity and attack what they cannot grasp. The wise admit their puzzlement ..., and when the problem material is explained they either laugh at themselves for failing to see it or they explain why they couldn’t reasonably be expected to understand, thus enabling the author to see why he didn’t get his point across.  

Sometimes, a teacher has to ask questions to which the teacher knows the correct answer. (This is known as Socratic slyness.) The purpose is to get the student to see that what the student did is inconsistent with what the student knows. This is the “destructive” part of a dialogue, intended to destroy false thinking. When the student sees the point, the teacher can do either of two things. The teacher can stop and go on to something else. Or the teacher can continue asking questions in a “constructive” phase, intended to build new knowledge. In the constructive phase, there might be a little slyness, but for the most part the teacher and student should be inquiring together and willing to accept solutions that neither had thought of in advance. And the constructive phase need not be preceded by a destructive phase. If the student is already perplexed, there might be no false knowledge to destroy.

A teacher who is trying to help the student develop some aspect of a professional personality can build an alliance — and to some extent minimize the harm caused by Socratic slyness — by openly identifying, at some point, the questions for which the teacher has never found a wholly satisfactory answer, or about which the teacher has changed his or her mind over the years, or about which reasonable lawyers disagree. In both kinds of situations, the proper comment can galvanize a student who will feel less tested and more challenged. And an alliance can also be promoted by giving the student evidence that the teacher has an investment in the student’s success. The teacher should seem more interested than distant;

should lean forward at the tough moments; and should show a little happiness when the student accomplishes something.

13. If you do a socratic critique, ask questions in an effective sequence.

Taking into account the student’s state of understanding and the underlying logic of the subject, build a sequence of questioning that leads the discussion where it needs to go. The questions cannot be asked in a random sequence: they must propel the student in the direction to be traveled, each question either building on an earlier answer or creating the groundwork for a later question.

The questions should go precisely in the direction of dialogue travel. Where you want to elicit something the student knows already, the student can be reminded (“You recall that ....”) or asked a leading question (“The other side has moved for a preliminary injunction?”). Where you want to elicit something that the student could devise with minimal thought, it can simply be stated or elicited with a leading question unless there is ample time and the student seems to be enjoying the dialogue. Otherwise, you not only waste time but appear to be playing a guessing game. Where you want to inject a piece of information — as opposed to an insight — to which the student has not yet been exposed, you can explain it.

New teachers learning to critique try to do dialogues that seem purposeless and abortive. These are the most common faults:

- failing to identify why the student does not understand (the false knowledge to be destroyed)
- failing to design questions that expose that misunderstanding to the student
- breaking off the destructive phase before the student gets the point
- asking the ultimate question before other questions have caused the student to develop the ideas needed to answer the ultimate question
- asking similar questions repetitiously until both teacher and student are frustrated (rather than asking questions that start with what the student knows and then build cumulatively toward the teacher’s goal)
- asking open-ended questions to elicit information that both teacher and student know the student already knows
- using a dialogue for matters too simple to merit one
Every new teacher does many of these things. They disappear gradually with experience.
Appendix B

Course Design and Outcome Assessment in Skills Courses by Stefan H. Krieger & Serge A. Martinez


The text introduces students to the essential skills necessary for representation of clients in a wide variety of legal contexts. Rather than focusing solely on the nuts and bolts of performance of particular skills, it examines the cognitive processes underlying such performance. This approach is supported by cognitive science theory and findings on expertise which suggest that mere performance of skills by students in a clinical or simulation
setting does not necessarily mean they will be able to transfer their learning into practice. This research demonstrates the importance of understanding the nature of expert reasoning and designing skills courses in ways that foster the development of this type of reasoning. It also shows that outcome assessment in skills courses must take into account the attributes of expert reasoning, not just the surface performance of particular skills.

Cognitive scientists have found that as professionals move from novice to expert, they acquire certain cognitive processes that aid them in their decision making: mental schemas, cognitive flexibility, and adaptive expertise.

A. Expert Mental Schemas

Cognitive scientists posit that experts’ knowledge is organized around schemas which allow them to organize their experience efficiently. Schemas are “ordered patterns of mental representations that encapsulate all our knowledge regarding specific objects, concepts, or events.”\(^{101}\) Developed from repeated encounters with similar experiences, “[a] schema can be viewed as a coded expectation about any aspect of an individual’s life, which dictates which characteristics of a given event are attended to, which are stored for the future, and which are rejected as irrelevant.”\(^{102}\) The framework around which these coded expectations are developed is the basic knowledge of the profession.\(^{103}\)

In law, for example, the anchors for our schemas are basic legal doctrine (e.g., contract, tort, property, evidence, and agency law, the rules of procedure and professional responsibility). As novice lawyers delve into practice, the doctrinal framework helps them to organize their experiences, and they begin to construct schemas for approaching particular types of legal problems. And as they accumulate experiences, these schemas assist lawyers in handling new and unfamiliar cases more effectively and efficiently. From a cognitive perspective, expert lawyers during a client interview, for example, are not always consciously considering each element of a particular tort claim and deductively crafting a theory. Rather, their schemas developed from past experiences in similar cases – and structured around basic legal doctrines – help them to semiautomatically focus their inquiry on those elements.

In regard to the acquisition of expertise, researchers theorize that as a result of greater experience in a particular domain, experts use their well-developed schemas to reflexively


\(^{102}\) Id.

filter out irrelevant data and focus on relevant information to come to a solution. Experts automatically use their schemas to delve into the deep structure of a situation (its systematic properties) and seek to reformulate it to reach a decision based on domain knowledge and previous experience.

**B. Cognitive Flexibility.**

Cognitive scientists also assert that the application of knowledge by an expert in handling ill-structured problems requires the simultaneous consideration of multiple concepts that are individually complex. An ill-structured problem is characterized by some of the following conditions:

1. The place to begin to define the problem is usually not clear;
2. There are many contingencies to take into account;
3. How to weigh and assess the various interdependent variables is uncertain;
4. One has to continuously reframe and reconsider what one is doing in light of new information and shifting calculations; and
5. The goals to be sought are frequently subject to debate and refinement and are not usually susceptible to clear measurement.

Legal problems by their very nature, often arise under uncertain conditions and are, therefore, ill-structured.

Given the uncertain nature of ill-structured problems, cognitive flexibility theorists posit, experts do not passively relate situations to prior experiences or retrieve well-developed schemas. Rather, when faced with a problem, they construct meaning about the situation using the given information in conjunction with their prior knowledge and schemas. The prior knowledge that is brought to bear is itself reconstructed on a case-by-case basis rather than merely retrieved from memory. This process requires the flexible use of preexisting knowledge and the ability to use multiple schemas and view a problem from different conceptual perspectives.

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108. *Id.*
C. Adaptive Expertise

Finally, in examining the nature of expertise, cognitive scientists distinguish between routine situations in which the practitioners use standard strategies to efficiently solve problems and novel situations in which they must develop innovative strategies to solve problems. Adaptive expertise theory posits that experts must be able to function in both types of situations. Without efficient use of schemas, a practitioner’s attention is overwhelmed with details; without some innovation, one cannot handle new problems that often arise in ill-structured domains. The most effective experts have the metacognition to distinguish between these two types of situations and to judge when to be efficient and when to be innovative.

Research has indicated that this metacognitive ability reflects a deep, theory-based understanding of the domain. With that understanding, adaptive experts are able semiautomatically to distinguish between those situations which require only the use of standard schemas and those which demand more deliberate and innovative reasoning. It also helps them recognize situations in which their knowledge is limited, and consultation with those with more expertise in the domain is required. And similarly, this deep understanding assists experts in identifying those problems which require collaboration with other practitioners both within and outside of their domain.

II. Attributes of Optimal Learning

Activities and Environments

Empirical studies also demonstrate that the acquisition of the expert cognitive processes described in the prior section requires particular types of learning activities and environments: repeated experiences with clear goals; gradual increases in complexity; feedback; and motivating environment.

109. Patel, supra note 105, at 188.


111. Id. at 13.

A. Repeated Experiences with Clear Goals

Repeated performances of an activity by students have limited value unless the experiences are designed to focus on clear tasks. Faced with performing an act with multiple, ambiguous, or open-ended goals, students are often likely to experience cognitive overload. Without clear goals, they have difficulty becoming attuned to the deep structure of situations and are unable to identify the relevant and irrelevant information in a particular situation. Consequently, they will be handicapped in developing the necessary schemas for handling similar tasks in the future. And with such multitasking, they will have little opportunity to repeat their performances with enough precision to correct their errors and improve their skills.

Accordingly, cognitive science theories show that skills teachers need to structure their exercises with clear goals to allow students to pay close attention to the task at hand. They should try to limit the number of legal issues so that their students do not become overwhelmed by multiple, complex legal theories. Similarly, the cases assigned should have minimal procedural and evidentiary distractions. Moreover, instructors should provide repeat similar experiences so that students can focus with precision on areas for improvement, monitor their performance, and work to correct their errors. And then when these goals are met, teachers should develop a new set of precise goals so that their students can achieve increased levels of performance.

B. Gradual Increases in Complexity

Even if the goals are clear and unambiguous, effective learning may not take place unless the experiences are designed with attention to the boundary between boredom and anxiety. On the one hand, if the challenges of a particular exercise greatly exceed students' skills sets, they feel anxious and are unable to learn from the experience. They have difficulty processing all the information required for tackling the situation. Accordingly, optimal learning cannot occur if students do not feel they have a chance of completing a task. Teachers, therefore, should design tasks that take into account the students’ preexisting knowledge so that the task can be understood after a brief period of instruction.

On the other hand, if the repeated experiences consistently demand the same level of complexity, students become bored and have little incentive to improve their performance. Without the feeling that the stakes are being raised, students do not acquire the cognitive skills that can assist them in learning from experience. With repeated tasks of gradually increased complexity, when students overcome challenges, they feel more capable and skilled. They begin to develop the cognitive flexibility to use multiple schemas and view a problem from different conceptual perspectives. Accordingly, by designing exercises for students that
require them both to build on their prior experiences and also overcome challenges of new ones, teachers can give students a learning environment conducive to effective learning.

C. Feedback

Cognitive science theories also demonstrate the importance of feedback during the process of repeated experiences. As discussed previously, teachers need to design exercises with clear goals so that students have the opportunity to develop schemas for handling similar situations. But for optimal learning to take place, students also need to receive feedback so that they can measure their progress in achieving their goals. Indeed, studies have shown that, “[i]n the absence of adequate feedback, efficient learning is impossible, and improvement minimal even for highly motivated subjects. ... [M]ere repetition of an activity will not automatically lead to improvement in ... accuracy of performance.”

Moreover, by explicitly focusing students on the differences between routine and novel problems, effective feedback can help students begin to distinguish between routine and novel problems and to start to develop the metacognitive process required for expert performance.

The effectiveness of feedback depends considerably on the nature of the activity. Most cognitive scientists contend that immediate feedback is essential so that students, with the memory of the activity fresh in their minds, can assess their performance. Also, the feedback must be informative so that students can identify specific performance goals for the future so they can work on addressing their performance errors.

Some studies also suggest that the most effective feedback may come from an individual’s own insights from witnessing the results of her performance. K. Anders Ericsson, for example, claims that physicians are most motivated to improve their practice when they see immediate results from their actual diagnoses and treatments. Apparently, the opportunity to assess one’s own performance provides unique motivation to improve performance. Some of the best feedback, therefore, may not come from the traditional critiques by teachers or coaches, but rather from the results of the activity itself.

D. Motivating Environment

Ericsson observes that “[A] number of conditions for optimal learning and improvement of performance have been uncovered. The most cited condition concerns the subjects'
motivation to attend to the task and exert effort to improve their performance.”\textsuperscript{115} Obviously, teachers can motivate students in their repeated experiences through the identification of precise goals, the design of exercises that take into account their existing skill sets but offer challenges, and the opportunity for immediate, informative, feedback. But the cognitive science literature suggests that more is needed for optimal learning than the use of particular teaching or coaching techniques. Individuals must feel motivated to engage in the activity.

Flow theory provides some guidance in identifying those circumstances that can motivate students to attend to their tasks and improve performance. “Flow” occurs when a person is completely immersed in an experience.\textsuperscript{116} This flow process nurtures the development of creative and expert performance. A key component of flow is the opportunity to become deeply involved with the activity. To achieve such involvement, an individual needs to find a relatively close connection between the demands of the project and her ability to act and to have the capacity to concentrate without distractions from the task at hand.

To motivate students to optimal learning in their repeated experiences, therefore, skills teachers need to design learning environments that give their students the opportunity to become deeply involved in their activities. In structuring these surroundings, teachers should consider how to provide easy access to the information that will help students engage in the particular activity without distraction, ways of providing stimulation from others engaged in similar activities, and surroundings that provide support, the necessary feedback, and the opportunity for fine-tuning performances. The insights from flow theory also suggest that not every kind of case assigned in a skills course will create this type of motivation. In our experience, students became most deeply involved in cases – even simulations – when they feel that the clients whom they are representing have been treated unjustly.

III. Designing Skills Courses to Foster Optimal Learning

A. Simulations

While simulation courses, by their very nature, can easily be designed to allow for repeat experiences with limited substantive issues, minimal procedural and evidentiary distractions, and increasing complexity, without the feedback from actual clients and judges, such courses are limited in their capacity to provide the kind of motivation for improving performance which fosters optimal learning. Moreover, because of the artificial setting of

\textsuperscript{115} Ericsson et al., supra note 113, at 367.

simulations, students do not experience the same kind of motivation that they can have when they represent an actual client confronting a perceived injustice.

Some skills teachers suggest that motivation can be created by teaching the students about the benefits of their pedagogy, giving them a clear sense of direction for the development of their skills, and pervasive video recording and post-performance evaluation.\textsuperscript{117} While we have no doubt that students can be motivated somewhat by a clear sense of direction and a desire to improve their performance, the experience of representing an actual client to challenge an injustice and receiving feedback in the process from clients and judges is significantly different and, in our opinion, preferable to simulated exercises.

Some of the motivation of actual cases, however, can be obtained through well-designed simulation exercises. As is generally recognized,

\begin{quote}
Good simulations need to be designed with a realistic context which will both involve the students and make what they learn transferable to a wide variety of lawyering circumstances. The closer to reality the problem is, the more likely the student will behave as if she is dealing with an actual problem for actual clients. In turn, the student is more likely to appreciate that both the indeterminacy of facts and the reality of professional and human issues are an integral part of being a lawyer.\textsuperscript{118}
\end{quote}

Accordingly, if simulations appear too artificial or unrealistic, student performances will become nothing more than “cut and paste” jobs. The exercises need to provide students with the motivation to continue to fine-tune their performances. In this context, several factors should be considered in designing simulations.

First, the exercises should concern areas of the law that have minimal procedural and evidentiary distractions, have rich factual contexts, raise few substantive issues, and challenge injustices in the clients’ lives. Many small administrative law cases are ideal vehicles for such exercises. In cases in areas such as public housing termination hearings; Medicaid denials; unemployment compensation disputes; public utility terminations; or denials of veterans’ disability benefits, students can handle simulations of cases that have significant impact on their “client’s” housing or subsistence. These cases are often fact-intensive which provide rich opportunities for interviewing, counseling, fact analysis, and negotiation. Such cases can easily be crafted into exercises for different levels of complexity and factual context. In most of these administrative fora, few procedural and evidentiary rules apply, the cases can be

\begin{footnotesize}
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\item\textsuperscript{117} See, e.g., Lamy S. Farmer & Gerald R. Williams, Address, The Rigorous Application of Deliberate Practice Methods in Skills Courses 15-16 (UCLA/IALS Sixth International Clinic Conference: Enriching Clinical Education 2005).
\item\textsuperscript{118} Paul S. Ferber, Adult Learning Theory and Simulations–Designing Simulations to Educate Lawyers, 9 Clin. L. Rev. 417, 444 (2002).
\end{itemize}
\end{footnotesize}
designed to involve only one or two substantive legal issues, and the role of the hearing examiner or administrative law judge is limited to assessment of credibility and fairness issues.

To develop exercises of varying complexity for these kinds of issues, we suggest that teachers review files of attorneys who have practiced in the particular area or, if accessible, files from friendly agency staff members. Obviously, the facts of more complex cases can be tweaked to limit the issues for the particular simulation. Such files reflect actual situations, not contrivances by law professors. Based on these files, teachers can craft detailed scripts for the “clients” that describe not only the facts of their cases but also the persona of the clients, adversaries, and other third parties.

Second, to increase the realism of the simulations, actors should be used for the simulated clients, and actual hearing examiners or practicing attorneys should adjudicate the cases. Feedback from other students performing as clients or instructors acting as hearing examiners likely will have much less impact than assessments from unknown third parties. While it has become fairly common for skills-based courses to use actors for simulations, little empirical data exist as to the particular benefits of such a practice. In one study in the health professions, however, the researchers compared students performing a nursing skill with a mannequin, a real patient, and an actor. They found that students who practiced with a mannequin did not master the skill, but students who practiced with an actor-patient mastered the skill most quickly. The researchers concluded that students who practiced with actors preferred learning in an environment with purpose and authenticity. Accordingly, by using actors who are given carefully drafted scripts and who are trained to portray complex characters, as well as actual hearing examiners or attorneys acting as fact finders, simulated exercises have the potential to provide students with an environment that encourages learning from experience.

Finally, to reproduce the experience of actual client representation, we suggest the use of a “real-time lawyering process.” Under this approach, the instructor gives students the opportunity to experience practice in real time. Preferably with a practitioner in the area, the teacher should hold a short training session on the applicable law. At this meeting, students can engage in mini-simulations to get a feel of the process. Then, a few days later, the students should meet and interview their clients and, over the course of only one or two days,
prepare their cases and represent their clients at hearings or in negotiations. This short time span should motivate them to become deeply engaged with their cases. Ideally, with a cadre of actors, students can then replicate the experience two or three times over a period of several weeks. With exercises of increasing complexity, optimal learning can be achieved through repetitive practice, feedback, and the ability to fine-tune their skills.

B. Live-Client Clinics

Although we strongly believe that lawyering skills can best be learned by representing real clients in actual situations, the traditional model for clinical education is not designed to teach most skills in an optimal way. We know from experience that students in a clinic are highly motivated by the responsibility of representing live clients and can get caught up in the representation of their clients, and, as professors, we provide a helpful environment and expert guidance. Clinics, however, are slow and inefficient by design, with students representing a few clients (in some cases a single client) throughout their time in the clinic. As a result, there is usually very limited opportunity for repeated skills experiences. Feedback from courts and administrative bodies – and even from clients – about their performance is generally not immediate. In fact, in many clinics it may not come during the student's tenure in the clinic at all. Goals come from the clients, and are therefore not guaranteed or even likely to be narrow or clearly defined. In addition, where live clients are involved, there are competing concerns that make choices about which goals are pursued messy and imprecise. Even clinics with a very narrow subject-matter focus are not likely to present the kind of controlled environment that is necessary for effective learning.

This is not to suggest, however, that a clinical setting could not be created to teach skills more effectively. While the literature on this subject is sparse, it appears that several clinics have had success with courses designed to meet some of the optimal learning goals described above. Ian Weinstein, for example, writes about the effective learning experience in a clinic in which students represent clients in violation and misdemeanor cases in a high-volume court in New York City.122 Many of the virtues he identifies about his clinic reflect the development of an optimal learning environment: (1) in his clinic, students work on small, predictable cases that require a relatively limited knowledge base; (2) the cases provide manageable legal puzzles whose solutions are usually well understood; (3) the cases are complex enough to offer a learning opportunity, but simple enough so that almost all of the students are able to develop useful cognitive models about them; and (4) students are motivated by the knowledge that they are making a difference in their client's lives.

Specifically, Weinstein relates,

In our cases, bail arguments are good teaching and learning tools because they are small in scope, controlled by a detailed statute, based on rich facts to which we usually have very good access (our clients know a good deal about themselves), well understood by the teachers, and can make a real difference in our cases. ... The arguments are typically brief, lasting one to three minutes and including roughly three points: strong community ties, weak prosecution case, and minimal prior court history are typical. These arguments can be polished into shining little gems which can motivate, serve as models, and make a real difference to our clients.\footnote{123}

In a similar vein, Kimberly Thomas describes her clinic focused on representation of actual clients in sentencing proceedings in misdemeanor cases.\footnote{124} She contends that such proceedings are conducive to teaching the skill of crafting case theory in large part because in many lower courts the sentencing law system is not complex; evidentiary rules are relaxed in these proceedings; the factual development of the case will usually have occurred prior to sentencing; these hearings are often good fora for using stock images and stories from popular culture; and the decisions at these hearings are critical to the client and may affect future decisions made at probation and parole hearings. Finally, she observes that the multiplicity of differing narratives that can be told in these cases furnishes a rich context for teaching students the craft of case theory development.

Besides small criminal cases and sentencing hearings, a number of other clinical caseloads potentially could provide similar skills experiences. Small administrative cases could give excellent opportunities for repetitive practice in the clinical setting. Unemployment compensation hearings, for example, usually raise fairly limited substantive law issues, are informal proceedings, concern issues of perceived injustice, and generally provide the students with feedback from the hearing officer. In regard to interviewing, counseling, storytelling, and negotiation skills, they give students the opportunity for representing clients in repeat cases. Likewise, small claims cases may be conducive to effective repetitive practice, especially if the clinic caseload is focused on a particular type of case, for example, warranty of habitability claims by tenants. By limiting the cases to those with a common substantive legal theory, as well as a claim of injustice, students have the opportunity to engage in repetitive skills experiences without the distractions of formal court procedures.

\section*{IV. Outcome Assessment in Skills Courses}

While from the title of this book it might be tempting to assume that assessment in skills courses should focus primarily on performance of essential lawyering skills, the research...
described in this Appendix suggests that the assessment process requires much more than examination of student ability to perform particular tasks. This research demonstrates that expert practice has a number of cognitive attributes: the use of schemas; the facility to connect different concepts and to recognize their interaction and variations across contexts; and the ability to distinguish between routine and novel situations and to adapt one’s reasoning to the particular problems at hand. Serious assessment of outcomes in skills courses, therefore, requires an examination of the student’s acquisition of these attributes.\textsuperscript{125}

Unfortunately, the recent Carnegie Report\textsuperscript{126} downplays cognitive processes as a factor in assessing students in experiential courses. For the authors of the Report, performance should be the primary focus of outcome assessment in such courses. They assert that “[s]ound assessment [of lawyering skills] must include an evaluation of students actually performing.” Touting the assessment process in medical training, the Report notes that in the early years of medical school, students are evaluated on their ability to take medical histories and perform physical examination on actors playing the role of standardized patients; later, they are observed by supervisors in their interactions with actual patients; and still later, they are assessed in their residencies on a wide range of other “technical and interpersonal skill.” The Report recommends the use of a similar approach of ongoing performance assessment in law school skills programs.\textsuperscript{127}

Besides its reference to assessment in medical school, the Report cites no support demonstrating a correlation between assessment of performance and development of expertise in lawyering skills. Indeed, it does not even cite any empirical evidence supporting performance-based assessment in medical training. The authors of the Report simply argue that since expertise is exhibited by particular types of behavior, performance should be the focus of assessment of lawyering skills.

While Carnegie is correct that performance assessment has become quite the rage in medical education, very little empirical research exists on whether such methods are valid measures of clinical competence.\textsuperscript{128} In fact, however, as described in Part I, cognitive research has shown that expert practice entails more than particular kinds of behavior in concrete situations but involves the use of different cognitive processes. Accordingly, any serious

\textsuperscript{125} We obviously do not posit that law schools can prepare students in three years to become expert practitioners but only that students, upon graduation, should have been begun to acquire some of the attributes of expertise. Most recent cognitive science studies show that it takes people at least ten years of intense involvement with a skill or profession to acquire expertise. Ericsson, supra note 114, at 572; Ericsson, supra note 113, at 366.


\textsuperscript{127} Id. at 117, 171-175.

\textsuperscript{128} Geoff Norman, So What Does Guessing the Right Answer Out of Four Have to Do with Competence Anyway? 77 BAR EXAMINER, Nov. 2008, at 18.
assessment in skills courses needs to focus not only on performance but on the development of those processes.

While it is easy to assess a test-taker's performance with a standardized patient or client, it is much more difficult to determine whether the reasoning process of a test-taker demonstrates any of the attributes of an expert. Quite simply, it is impossible to peer into someone’s head; “thinking cannot be observed by other people.” But that difficulty should not inhibit skills teachers from attempting to assess the cognitive processes used by students in performing skills.

In medical schools, one of the experimental methods now being tested to assess cognitive competence is the use of the “think-aloud” interviewing methods employed in cognitive science studies of the reasoning process. The purpose of using this method is to replicate as closely as possible the actual cognitive process of the subjects. Under the “think-aloud protocol, researchers ask subjects during the interview to verbalize their thoughts spontaneously as they emerge in attention. Even though use of this method does not provide a perfect match between subjects’ thoughts and reports, researchers have found consistently strong evidence that this method results in a strong correlation between the two.

In the experimental medical education studies, interviewers provide medical residents with scenarios of patient problems describing a patient’s history, symptoms, and the proposed case management. The residents are asked to think aloud as they read, to summarize the case history, and to evaluate the proposed case management. The interviews are recorded and transcribed. The researchers then review the transcripts to analyze the reasoning used by the residents.

We have started to replicate these medical school experiments in our clinical program. We begin the semester giving students a hypothetical client problem in the respective clinic’s


130. Telephone interview with Vimla Patel, Professor of Biomedical Informatics, School of Health Information Sciences, University of Texas Health Sciences Center, Houston, TX (Mar. 28, 2010).

131. Researchers have also found that if subjects are asked to recall their reasoning process after a long delay, the completeness and accuracy of recall is impaired, and subjects are prone to infer their thoughts as opposed to correctly recall them from memory. Ericsson, supra note 129, at 429, 430.

132. Id. at 430.

133. E-mail from Vimla Patel, Professor of Biomedical Informatics, School of Health Information Sciences, University of Texas Health Sciences Center, Houston, TX (Mar. 31, 2010 8:23 p.m. EDT) (on file with authors).
subject-matter area. We then ask the students to think aloud as they read the problem, identify the interests of the client, articulate the applicable legal standards, and provide a course of action in the case. These interviews are then recorded and transcribed. At the end of the semester, we repeat this process using a similar, but more complex problem in the same subject-matter area.

We then code the transcriptions attempting to assess the students’ acquisition of schemas for handling these types of problems; their facility in connecting the different concepts and to recognize their interaction and variations across contexts; and the ability to distinguish between routine and novel situations and to adapt one’s reasoning to the particular problems at hand. Thus far, we have found this method to be very helpful in identifying areas in which students have acquired – through their skills work – the basic strategies for decision-making in practice and those in which they need some improvement. It has also helped us to reflect on our design of our clinic courses and the methods we use to teach skills.

Obviously, more testing and research will be required before we are able to evaluate even tentatively this approach to outcome assessment. But this future research should help skills teachers understand more fully the role cognition plays in practice and to develop methods for assessing not only our students’ performance in practice but also their thinking in practice. Examples of our student interviews are posted on the website <studentlegalreasoning.info>. We invite other skills teachers to use this method of assessment and to share their experiences with us.

134. To lessen the anxiety of these assessments, we have clinicians others than the students’ supervisors conduct both the sessions at the beginning and end of the semester.