

This email is to all students in the class with general comments about the first paper.

I just sent students separate emails with comments on your individual papers. The comments are in “balloons” which should be visible when you open the document. If not, go to the “review” tab, click the “show markup” drop-down menu, and make sure that “comments” is checked.

The purpose of the assessment papers is to help students develop the habit of assessing and improving their skills. In this case, we are focusing on negotiation skills, but this assessment process can be used to develop any legal or other skills. This should help you write your next two papers in this course, perform in the various simulations we will do, and act as a lawyer after graduation.

The assessment and improvement process is simple conceptually but hard in practice (much like negotiation itself). It entails self-awareness using the ideas in this course, attention to difficulties, analysis of options for dealing with difficulties (including consideration of advantages and disadvantages of the options), and developing a set of potential responses that you can use without having to think them up on the fly. The goal is for you to observe yourself “in the moment” (or “be mindful”) and develop calculated strategies that are likely to be effective in the next moment.

I was very pleased that you all took the assignment very seriously and discussed important negotiation issues. This is an illustration that even in a short simulated negotiation, you can identify challenging issues worth analyzing. Indeed, you could use this same process to analyze difficulties in the very short scenes we have been doing in class.

The papers addressed issues such as difficulty in reaching agreement (especially when there is a large gap in positions of the two sides), selecting the best approach in negotiation, balancing being assertive and cooperative, challenges in using the counteroffer process, difficulties in negotiation with limited information, the goal-setting paradox, lack of sympathy for one’s client and lack of confidence in one’s case, exploring both sides’ interests and creating value, deciding how much information to disclose to the other side, the best amount and timing of concessions in a counteroffer process, preparation for negotiation, dealing with a more knowledgeable counterpart, dealing with many things going on simultaneously in negotiation, and maintaining a good relationship with a counterpart during a counteroffer process.

On the other hand, most students did not follow the instructions. Hopefully, this experience and feedback will help you do better on the last two papers. I’m sure that by the end of the semester, every student in the class can improve significantly in your written analysis as well as your ability to consciously manage the negotiation process.

I have designed a series of simulations to provide you with experiences for you to learn from. A key element is how much effort you put into the process. I encourage you to use the 30 seconds before we start simulations to really focus on your role and possible

strategies for interacting more effectively. I also encourage you to take a few minutes after each simulation to complete the self-assessment form and reinforce the habit of learning as much as possible from your experiences.

**Elements of the Papers.** The best papers grappled with difficult issues, providing detailed and insightful analyses of the interactions, analyzing advantages and disadvantages of alternative strategies in as much depth as possible given the limited length.

Some papers discussed a challenging issue but didn't discuss other possible strategies and analyze the advantages and disadvantages of the strategies. This is an important analysis to help you decide what strategy to use in difficult situations in the future. As noted on page 3 of the instructions for the paper, this was a critical factor in scoring the papers. In your next two papers, most of your discussion should focus on this.

Some papers did not present issues that seemed especially difficult and/or focused on more than one issue and "spread themselves too thin." Some papers made general statements about negotiation dynamics without much discussion of the particular interactions in your simulations. These papers really need to use the facts of your interactions to illustrate and analyze the issues. On the other hand, some papers mostly just told the story of your interactions without much analysis of the issues as described above.

Despite my instructions to the contrary, some papers referred to the interest-based, positional, or ordinary legal negotiation models. The discussions generally demonstrated that these concepts are confusing and it wasn't clear that the students understood what they referred to. You should avoid referring to the negotiation models in the last two papers. Instead, I suggest that you use clearer terms such as the ones in my suggested framework.

I am attaching a sample paper based on this simulation. Of course, it is not perfect but provides a good illustration of how to write papers satisfying the requirements of this assignment. In addition to addressing all the elements of the assignment, the analysis made good sense.

**Discussion of Interests.** Many students wanted to find ways to satisfy both parties' interests and create value. I think that this is a good impulse and you should keep it in mind throughout this course (and your experience in practice) to consider when it might be appropriate. As described in the book, it is not always appropriate and it has some real risks, which is one reason that lawyers generally don't use it.

Some students think of an "interest" in settling and/or staying out of court. While this is technically true and people sometimes have particular concerns about court, I think that the real interests usually are something else, such as wanting a reasonable result or managing risks appropriately.

Some students think of avoiding trial as creating value. While this is literally true, people usually wouldn't consider mere settlement in itself to be creating value. Rather, there would need to be something in addition to a mere exchange of money for a release that the parties value differently, such as increasing the total amount of the settlement in exchange for spreading the payments over time. Creating value is based on parties' subjective values and thus may be intangibles such as an apology, recognition of fairness, etc.

**Communication Process in Negotiation.** Different negotiation processes are commonly used in particular types of cases. In personal injury cases, lawyers typically use a counteroffer process, though they sometimes focus primarily on shared norms about what the likely outcomes would be. They rarely focus very much on each others' interests or seek ways to create value, especially when insurance companies are involved. Virtually everyone would prefer to focus only on a payment of money. Insurance companies want to get the cases off their books, plaintiffs' attorneys want recoveries from which they can collect their contingency fees, and plaintiffs want the money to spend as they choose.

Some students seemed to assume that settlements would be itemized, but that rarely happens in real life. Instead, plaintiffs usually just get an unitemized lump sum (after deduction of attorney's fees and costs). Based on this misimpression, some students tried to create value by allocating parts of the settlement to particular elements of damages.

Much more common in a situation like this, lawyers would use their respective positions about each of the items (including allocation of fault and effect on the plaintiff's depression) as indicators of the likely court outcomes (i.e., legal norms or MLATNAs). Of course, both sides take positions favoring their side and so most lawyers figure that the MLATNA would be somewhere in the middle. Much of the negotiation is about deciding where in the middle it would be. Sometimes lawyers just split the difference, especially if the difference is relatively small. Much of the time, this is where the lawyers argue about the law, facts, and likely dynamics in court (e.g., sympathy for a plaintiff).

Not surprisingly, some students struggled with the counteroffer process, wrestling with the problems discussed in chapter 5. It can be a challenging process, especially if you aren't used to it and/or it doesn't fit your personality or values. This is a problem if you are too generous or accommodating, as the other side may see this as a sign of weakness and try to take advantage of you (and more importantly, your client). The counteroffer process is very common for lawyers and you should find a way to get comfortable with it and/or try to shift to a different process. In particular, you should be able to take strong positions (especially at the beginning of a negotiation) while being polite and maintaining good relationships with your counterparts. It really helps to explain your reasoning and show that it is at least possible to get the results your offer is based on (even though they may be unlikely). Experienced lawyers know how the counteroffer process works and generally aren't offended by extreme offers – if they

don't seem too extreme. Of course, it can be a challenge to figure out the point where a position becomes too extreme.

As described in chapter 5, I think that all three of the communication processes are legitimate and have advantages and disadvantages. Hopefully, through this course and your work outside this course, you will become more comfortable and skilled using all of them.

**Relationships with Counterpart Lawyers.** Several students expressed an interest in maintaining a good relationship with their counterparts, which was particularly relevant given that you were told that you already have a good professional relationship with your counterpart in this case. While you should do what you can to maintain good relationships, this should never outweigh your duty to advance your clients' interests. If your counterparts are reasonable, they won't expect you to sacrifice your clients' interests. If they ask you to do something you can't do, you can explain your situation and explore other options that might satisfy both sides. Conversely, if your counterpart is acting like a jerk, you should generally avoid the temptation of showing that you can be a bigger jerk if that would undermine your clients' interests.

**My Assessments of the Papers.** I wrote a lot of comments on individual papers and you shouldn't assume that they necessarily reflect problems with your analysis or affect the scoring. They are generally to provide more information, often referring to my understanding about typical patterns in "real life," and I recognize that you wouldn't know some of this.

I purposely gave you this assignment to provide you with feedback early in the semester which counts only for a small portion of your final grade. I expect that students who got lower scores on this paper will improve their performance and scores on the next two papers.

Almost all the scores were 12, 13, or 14. Don't take out your slide rules to extrapolate to final grades. I wasn't using fractions. Of course, a single number cannot fully reflect the extent to which papers satisfied the requirements of the assignment. Some papers with the lower scores had good qualities and some papers with the higher scores had room for improvement.

Consider these as signals to help guide you in writing your next paper. Note that the next two papers will be a little longer, though you will have a lot more simulation experience you can analyze.

Before you write your next paper, review the instructions which really reflect what I look for as I read and score papers. I am attaching a copy for your convenience and a copy is available in the "syllabus" section on TWEN.

If you have any questions or want to discuss your paper, please let me know.