

SPRING 2019 NEGOTIATION SYLLABUS Law 642

Professor Valery C. Behan

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Tues.-Thurs. 1:30-2:45

Room # 164

1. Course Overview:

Welcome to negotiations! The skills you will learn and practice in this class are ones that you can use for the rest of your life. Nearly every decision you make *with* another person requires negotiating, from deciding where to eat lunch together, to which car or house to buy.

Negotiation is at play even in common-place interactions with strangers, like in allowing a vehicle in the next lane to merge, or buying something off of craigslist. I believe all lawyers and law students would benefit from negotiation training, and personally found it to be the most useful class I took in law school.

As lawyers you will invariably negotiate much more than you will ever litigate. Most criminal matters are resolved through guilty pleas. For civil disputes many are settled without ever filing a case. Of civil cases filed, few (2%) end up being adjudicated (including trial, summary judgment, motions to dismiss, etc.); some 3% are voluntarily dropped and 95% are resolved through negotiation, mediation or arbitration. You will negotiate with opposing counsel many times more than you will ever face him/her in a courtroom. As a practicing attorney you will also need to negotiate with your own clients and even with the other attorneys and personnel in your own office.

2. Course Philosophy/ Objectives:

You will be learning the theory behind effective negotiation, but more importantly you will be implementing/practicing the skills and learning from one another's successes and mistakes. In addition to reading about and watching others negotiating, each of you will participate in four practice and five graded negotiations. For those who are not comfortable negotiating, these exercises should give you more confidence. For those who are already skilled negotiators the goal is to hone and improve upon these skills. Among other things, the exercises allow each student to learn for him/herself the importance of preparation, of setting high but defensible goals, of asking questions, of recognizing when to compromise, and of maintaining personal integrity and professional courtesy.

Conflict is inherent in negotiation, and the law school setting adds further *competition for grades*. This approximates the conflict and *competition for money* in the real world, but it doesn't follow that this must be unpleasant. It makes things exciting! Try not to give or take offense (don't be either a jerk or a whiner); and, like actors playing a role, don't take what happens during a negotiation personally. Remember you will be interacting with the same students throughout the semester, just as in the real world you will likely negotiate with the same opposing counsel in future negotiations. Effective negotiators (cooperative or aggressive) always treat each other with respect and courtesy. I want full effort but please don't be *full of yourself*. Keep in mind

that each of your graded exercises is only worth appx. **11%** of your grade. Remember to be PREPARED but also try and have FUN!

3. Course Materials:

The required texts are: (1) *Effective Legal Negotiation and Settlement* (7th ed.) (LexisNexis, by Charles B. Craver.; and (2) *Getting To Yes*, by Roger Fisher, William L. Ury and Bruce Patton (Penguin Books, May 3, 2011). Neither of these are the latest edition, but they are the ones we'll use and should be less expensive to buy used. ☺

Depending on which guest speakers are able to come during the second half of the semester and whether I decide to do a unit on Mediation during that time, you may be required to buy an electronic version of a mediation handbook. The cost is \$5.00 and I will let you know after Spring Break whether we'll need it or not.

4. Your TA is: Tosha Childs, contact email: tosha.childs@siu.edu

5. Audio visual Materials & Equipment:

Although it is not required, **I highly recommend that you either audio or video record* each of your negotiations**, especially those that are graded. Reviewing the recording is the best way to learn from the exercise. This is also the only way to protect yourself if a partner should claim you said or did something unethical during the exercise. You do not need to send me a copy of the recordings but if you would like me to review any I'd be happy to do so. (*Please make sure the other party is informed if you decide to record a negotiation).

6. Attendance:

Attendance is critical for this class. *Most* (but not all) Tuesdays you will be doing Negotiation Exercises *out of the classroom and attendance will not be taken*. Most Thursdays we will review the exercise from that week and discuss the technique and theory *that you will thereafter be expected to apply* in your future negotiations. Attendance is taken only on days we have class scheduled, and since we usually only meet once a week . . .

YOU CANNOT HAVE MORE THAN 3 ABSENCES WITHOUT PENALTY.

Each day missed, starting with the 4th absence, will result in a .10 reduction in one's final grade. Except for our first Lab period on Tuesday 1/29, when we will negotiate in class, the other days that are designated as a "LAB" period on the schedule are reserved for you to negotiate if you wish to. PLEASE KEEP this class time on **TUESDAYS clear of other appointments**, so as to always have this time to negotiate AND in case of schedule changes or if makeup classes. I will always be available for questions about an exercise during Tuesday class times so feel free to call.

7. Classroom Behavior:

Behavior in class and during the negotiation exercises must conform to the Honor Code: “Law students are expected to uphold the standards of professional conduct that are reflected in this Code, which includes obligations to be honest, [and] to act in a manner that is civil toward others...” (Introduction, SIU School of Law Honor Code.) Any student who is not civil will be asked to leave the classroom and will be counted absent for that day.

8. Workload:

The American Bar Association standards for accrediting law schools contain a formula for calculating the amount of work that constitutes one credit hour. According to ABA Standard 310(b)(1), “a “credit hour” is an amount of work that reasonably approximates: (1) not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time.” A 50-minute classroom hour is considered an hour. This is a 3-credit hour class that meets twice a week (two 75 minute blocks). As stated earlier, for this class **most Tuesday sessions will be Lab periods** in which you actually negotiate. Negotiations normally last about the same time as a class period or approximately 75 minutes, but sometimes they can last longer. The amount of assigned reading for class, and out of class preparation for the negotiation exercises (including the self-assessments and the peer assessments) should take you at least 3 hours for each, or 6 hours per week. This added to class/lab time would total 9 hours per week.

9. Grading: 450 Points Possible

- a. **Appx. 45%** of your grade (**200 points**) is based on your performance in four of the five **graded exercises**. (The lowest exercise score will be dropped). For each exercise, the student with the highest raw score for his/her side will get 50 points. The next highest raw score will receive 48 points and so on. Record your score right on the TWEN drop box, and if there is a score sheet, fill in the details of your agreement, double check your math, and attach it to that by Wednesday @ 5:00 pm.

Example of Scoring/Ranking of Graded Exercises:

Scores Ranked	Side A	Side B
<i>1st (highest score)</i>	50	50
<i>2nd</i>	48	48
<i>3rd</i>	46	46
<i>4th</i>	44	44
<i>5th</i>	42	42
<i>6th</i>	40	40
<i>7th Or No Settlement</i>	38	38

**If two or more students tie they will share the same rank/score.*

***Note: If we have an odd number of people in our class you may need to negotiate with a person who has taken this class before and has agreed to participate in an exercise for pro bono credit. This person will not be ranked nor affect your ranking.*

- b. **Appx. 45%** of your grade (**200 points**) is based upon your performance on the **FINAL EXAMINATION**. You will be tested from lectures (including guest lectures) and your readings. It will consist of some matching and multiple choice, mostly short answers, and short summaries. If you do the READINGS and TAKE NOTES IN CLASS, it is not difficult. **FINAL EXAM DATE= Monday, May 6th at 8 am.**
 - c. **Appx. 10%** of your grade (**50 points**) will come from your writing across the curriculum (WAC) assignments: (1) **2 points** possible for your *Erin Brokovich* paper; (2) **30 points** for the BAR-TYPE ASSESSMENT (Date and Details to follow); and **18 points** possible for your combined self and peer assessments (Explained in Section 10 below).
 - d. **Reading Quizzes for Extra Credit: (?? Points).** Pop quizzes may be given at the beginning of class from time to time to make sure you have read the material for the day. They will only be worth from 1-5 points each but will be added on to your final score.
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10. Assessments:

Self-assessments and peer-assessments **are helpful tools to improve one's negotiating skills.** After each exercise you are **required to post onto TWEN:** (1) **a self-assessment** (*that only I and your TAs can view*) **written right onto the drop box itself** at the same place you write in your score and attach your scoresheet (if there is one for that exercise) each Wednesday by 5:00 pm; and (2) **a separate peer assessment (PA)** (*that all may view*) posted on the FORUM discussion for that week. These may be posted anytime Wednesday (up until midnight) for full credit. A late SA or PA will get half credit.

- (a) **Self-Assessments (SA)**- (9 Total= 1 after each of the 4 ungraded and 5 graded exercises; each worth 1 point). Again, TYPE each SA right ONTO the DROPBOX for the exercise (those not typed onto the drop box will not be read and will result in a 0 for the assignment). A short paragraph is all that is needed, but it **should reflect what you have learned from the exercise.** At minimum each SA must include your name, your side, your total points for the exercise and who you negotiated with, then: (1) how you prepared for the negotiation; (2) what your specific goals were for each item to be negotiated; (3) what your bottom line/ or walk-away point was for each item; (4) what you did well; and (5) what you could improve upon.

Self-Assessment Example: "Ex. A. Val Behan, defendant's rep., total points 250; partner John Doe. 1) How I prepared for the negotiation: I looked up comparable settlements for this type of injury and researched the law on comparative fault in the jurisdiction. 2) My goal for the settlement amount was for the defendant (my client) to pay no more than \$300,000 and I also wanted the plaintiff to sign a non-disclosure agreement. 3) My client's absolute bottom line/ walk-away point was for him to pay \$400,000 with a non-disclosure agreement. 4). What I did well-- Near the start of negotiations, I used bracketing successfully; in other

words, I was also able to give a counteroffer that placed my goal exactly in the middle of their initial offer and mine. They asked for \$500 K, my goal was \$300 K, so I started off offering \$100 K (and I had figures to back up that amount). 5). Things I could improve-a couple of times I think I made two concessions in a row, and I was nervous and didn't hold my ground on X; next time I'll plan out my concessions ahead of time, and”

(b) Peer Assessments (PAs) are brief entries you should post onto our class TWEN forum page critiquing the person you negotiated with. (9 Total= 1 after each of the 4 ungraded and 5 graded exercises; each worth 1 point).

A discussion will be labeled after each exercise (e.g., *Peer Assessments for Practice Exercise #1*). Identify: your name/side and the name of your opponent/her side. Then list: (1) **what your opponent did well during the negotiation** (*at least one thing*); and (2) **give some suggestions for improvement** (*at least I mistake they made/ something to improve upon*).

**Note: Many of us are uncomfortable giving criticism (even constructive criticism) to others, but this is very important! You're the only one who has seen the negotiation and are in the unique position of helping your opponent improve. So if you write something like, "nothing can be improved –it was great" you will get a .5 point reduction.*

Peer Assessment Example: *“My name--defendant. Opponent's name--plaintiff. 1. O did an excellent job making me feel comfortable, asking questions about my underlying interests, and listening. O also deflected my question about X which 2. As for suggestions, O may want to be watch out for verbal leaks. At one point he said, “I don't think I could go much higher than Y” so I knew he could go higher He could also”*

11. RULES for ALL NEGOTIATIONS EXERCISES:

- a. Before negotiating an exercise, you may NOT READ the other sides' Confidential Info. You may not discuss anything regarding your side's Confidential Info with any student who represents the other side. **Nor may you discuss it with anyone who has taken the class before.** A violation of this rule will result in a failing grade for the class and disciplinary action.
- b. While negotiating do not show your Confidential Information sheet(s) to opponents; however, you may disclose some of the factual/legal information set forth in your Confidential Information if it helps your client in the negotiation.
- c. While negotiating neither side may disclose any of the specific information pertaining to their side's scoring system. (They may say that one item is valued twice as much by their client than another item, but they may not disclose that any item is worth “x” points.)
- d. After final terms are reached, negotiators may read Opponent's Confidential Info. & Scoring System Info. With this information you can both try to expand the pie. (*This*

means that without lowering the points of either side, one or both sides are able to figure out a distribution of items/terms so that at least one side gets--but ideally both sides get--more total points.)

- e. Negotiators may not make any knowing misrepresentations of material law or fact during their interactions. Representations concerning their side's value system (what their client wants/does not want) or what they are willing to accept (settlement intentions) shall not be considered representations of "material fact." Such "puffing" and "embellishment" is considered "nonmaterial" information [Model Rule 4.1]. Anyone who violates this rule will receive the lowest score for the exercise in which the representation is made, and I may increase their opponents' score at my discretion.
- f. Unless otherwise directed, do not discuss settlement talks or any agreement achieved with any other Negotiation Course members, except your partner or opponents, until the time limit for all of the groups has expired.
- g. After a negotiation exercise, the "attorneys" must sign a joint agreement including all the terms. It does NOT NEED TO BE TURNED IN, but must be kept in case of disagreement as to the terms and/or point calculation. It is for your own protection and so that you can get used to documenting and attesting to the terms agreed to after every negotiation in the real world too. The negotiation is not considered finished until the terms are initialed by each party's representative.
- h. All negotiations must be completed by 3 pm on each Wednesday. Scores or score sheets (and self-assessments) are to be submitted by 5 pm. [2 points will be deducted from your final exercise score or your score/score sheet is posted AFTER 5 pm.]
- i. Remember that a bad deal is worse than no deal! If during a negotiation you are at or near your client's bottom line, you will probably get the lowest score on the negotiation. Therefore, it behooves you to tell the other side that if you cannot get more for your client then you will take a non-settlement. (This would be the same score you'd likely get anyway, but would also put them at the lowest score for their side.) If you are serious about this option, the other party will likely give some more concessions, since they don't want to get the lowest score either. (With some exercises there are built in options for non-settlement; for example, you may be able to flip a coin or roll dice for your result. If this is the case, make sure your settlement is better than what you've calculated your worst result would be if you decided to roll/flip/etc.)
- j. If there is no settlement the parties still must initial each other's final offers and each must POST his/her final offer. Please do this right on the drop box itself, labeling your name and side, the opposing counsel's name, writing NON SETTLEMENT and detailing your last offer and what points you would have received for it had it been accepted.

- k. Occasionally a party might hold out for ridiculously high points or a dollar amount much higher than anyone else on the plaintiff/prosecution side; or an insanely low dollar amount (much lower payout) or otherwise demand many more points than anyone else on the defense/defendant's side. If this party refuses to budge even after a non-settlement is proposed by opposing counsel; and if as per rule j. they both initial the final offers, and the other party had a reasonable offer and takes a non-settlement; then, **in my discretion I may** award the person who had the reasonable final offer the lower of (i) the points his/her last offer would have garnered OR (ii) the median grade for the exercise. Such action would not affect the ranking of any other students.

NOTE 1: Room 164 is always free Tuesdays from 1:30-2:45. You may reserve other rooms at the office, or use any open room or meet at any pre-arranged location. You can even negotiate via email, telephone or internet chat (but you'll see that meeting in person produces better results).

*NOTE 2: Besides our first Lab period you are not required to negotiate Tuesdays from 1:30 to 2:45 in our classroom, but **keep in mind that it is a time that you, me, and your classmates have free in your schedules.** (Remember--I WANT YOU TO KEEP THIS TIME FREE OF ALL OTHER APPOINTMENTS, to negotiate if necessary or if we need a make-up class for some reason.) But since partners will be assigned and exercises given out on Thursdays, it is perfectly fine to negotiate with your partner any time after class on Thursdays (Thursday pm, Friday, Saturday, Sunday, Monday, Tuesday or even Wednesday as long as you finish by 3 pm).*

*NOTE 3: Please **check email each day and respond quickly to your partner's requests to meet.** Also be considerate of each other's time. No negotiation need go longer than 1.5 hours or so.*

12. Contacting Me:

Please **contact me anytime** via email at behanvalery@gmail.com please do NOT use my SIU email as it's often wonky (don't use valbehan@siu.edu; I don't have it on my phone and rarely check it). As an Adjunct Professor I do *not* have regular office hours, but I usually have time before class and you can also make an appointment to meet with me other times as well. In an emergency or for questions during an exercise you can text or call me at **618-521-1847**.

13. Emergency Procedures:

Southern Illinois University Carbondale is committed to providing a safe and healthy environment for study and work. Because some health and safety circumstances are beyond our control, we ask that you become familiar with the SIUC Emergency Response Plan and Building Emergency Response Team (BERT) program. Emergency response information is available on posters in buildings on campus, available on BERT's website at www.bert.siu.edu, Department of Safety's website www.dps.siu.edu (disaster drop down) and in Emergency Response Guideline pamphlet. Know how to respond to each type of emergency.

Instructors will provide guidance and direction to students in the classroom in the event of an emergency affecting your location. It is important that you follow these instructions and stay with your instructor during an evacuation or sheltering emergency. The Building Emergency Response

Team will provide assistance to your instructor in evacuating the building or sheltering within the facility.

14. Notice of Recording Policies:

You are not authorized to make your own recording of this class, and classes will not be recorded. Such recordings would have little value anyway because of the nature of the class (much of which is discussion by students away from a microphone) and the fact that I often teach from all around the room (also away from the microphone). I am of course willing to provide a suitable substitute for ADA compliance purposes, or would allow it if DSS deems it necessary (see 15. below) and I am informed so that I can adjust my teaching to stay behind the podium.

It is an Honor Code violation to create or distribute recordings when the instructor has prohibited either action [Honor Code I.E.1.g].

15. Disability Policy:

Disability Support Services provides the required academic and programmatic support services to students with permanent and temporary disabilities. DSS provides centralized coordination and referral services. To utilize DSS services, students must come to the DSS to open cases. The process involves interviews, reviews of student-supplied documentation, and completion of Disability Accommodation Agreements. See <http://disabilityservices.siu.edu/>. Upon completion of a Disability Accommodation Agreement with DSS, students should bring the agreement to the School of Law Registrar's Office to ensure the School of Law provides the proper classroom and examination accommodations.

16. Saluki Cares:

Resources are available on campus for students with physical, emotional, financial, or personal needs. The purpose of the Saluki Cares program is to develop, facilitate and coordinate a university-wide program of care and support for students in any type of distress—physical, emotional, financial, or personal. By working closely with faculty, staff, students and their families, SIU will continue to display a culture of care and demonstrate to our students and their families that they are an important part of the community. For Information on Saluki Cares: [\(618\) 453-5714](tel:618-453-5714), or siucares@siu.edu, <http://salukicare.siu.edu/index.html>. At the School of Law, Assistant Dean Judi Ray is also available to help students access university resources. Her email is judiray@siu.edu, and her phone number is [618-453-3135](tel:618-453-3135).

17. SCHEDULE WKS 1-8 SPRING 2019: (Posted Separately under Syllabus Tab)