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Introducing Negotiation and Drafting into the Contracts Classroom

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INTRODUCING NEGOTIATION AND DRAFTING INTO THE CONTRACTS CLASSROOM

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It is by now almost a commonplace to say that the first year of law school should include skills-focused opportunities in addition to the massive doses of legal doctrine and analysis that form the core of the first year curriculum.[1] Understanding contracts only through the lens of litigated disputes gives students a very limited picture of what lawyers do with respect to contracts and little opportunity to develop the skills of effective representation and artful and precise drafting needed to avoid such litigation. Moreover, the necessary emphasis on contract doctrine may obscure the degree to which many contract-related problems are answered less by a knowledge of the law than by effective understanding of client circumstances and needs and the ability to negotiate well on the client's behalf.

In the contracts classroom, skills training usually translates into exercises in drafting and/or negotiation of contracts or contract terms, which provides a critical counterweight to the study of contract doctrine.[2] Although a thorough treatment of both drafting issues and negotiating techniques cannot be

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1. *See, e.g.*, Phyllis G. Coleman & Robert M. Jarvis, *Using Skills Training to Teach First-Year Contracts*, 44 DRAKE L. REV. 725 (1996); Frank J. Macchiarola, *Teaching in Law School: What Are We Doing and What More Has To Be Done?*, 71 U. DET. MERCY L. REV. 531 (1994); Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409 (1986); Stacy Caplow, *Autopsy of a Murder: Using Simulation to Teach First Year Criminal Law*, 19 N.M. L. REV. 137 (1989); Philip G. Schrag, *The Serpent Strikes: Simulation in a Large First-Year Course*, 39 J. LEGAL. EDUC. 555 (1989); Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245 (1996); Franklin M. Schultz, *Teaching "Lawyering" to First-Year Law Students: An Experiment in Constructing Legal Competence*, 52 WASH. & LEE L. REV. 1643 (1995). To *say* that skills training should be included is different than actually incorporating it, of course. How widely such practices are used in the classroom is uncertain.

2. *See, e.g.*, SCOTT J. BURNHAM, DRAFTING CONTRACTS 1-3 (2d ed. 1993); Coleman & Jarvis, *supra* note 1, at 725; Macchiarola, *supra* note 1, at 537.; Peter Sivaglia, *Teaching the Drafting of Contracts*, N.Y. STATE BAR J., May-June 1998, at 46.

accomplished in the limited time available in a first year contracts class, helping students to see the importance of these concerns and develop a sensitivity to a few fundamentals will provide a crucial foundation for later learning. By negotiating one or more terms of a contract and reducing those terms to writing, students become aware of the complexity of and interplay among substantive, writing and "people" skills in the practice of law. While even basic negotiation skills are complex, a simple contract negotiation and drafting exercise invites students to experience and identify many of the forces at work.

By introducing a drafting and negotiation problem into the classroom, the teacher is also able to create an active learning environment, where students learn by doing rather than by thinking abstractly and talking. To teach effectively to the diverse students in our classrooms, it is critical to offer such opportunities, especially in the first year, when the standard emphasis on Socratic dialogue in the classroom creates a learning environment well designed for students who learn best through abstract conceptualization and reflective observation, but ill-suited for those whose learning strengths are centered in concrete experience and active experimentation.[3] Moreover, the introduction of many new concepts and a whole new language of discourse in the first year of law school may leave students bewildered and unsure of their own abilities, and confirming for them, through a simple negotiation and drafting exercise, that they are indeed competent to "do legal work," however simplified, can bring renewed energy and enthusiasm to other classroom endeavors.

The exercise we describe below was used in Professor Chomsky's one-semester class in contracts in the fall of 1998. By collaborating in the presentation of the problem we brought to the students expertise in contracts doctrine and drafting (Professor Chomsky) and in negotiation and other lawyering skills (Professor Landsman). As with other instances of team teaching, the collaboration also stimulated our own preparation and presentation, allowing us to design a better problem and respond more effectively to student-raised issues.

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3. The references are to David Kolb's description of learning styles, which have been the foundation for much innovation in pedagogical methods in higher education. *See* D.A. Kolb, *Learning Styles and Disciplinary Differences, in* THE MODERN AMERICAN COLLEGE: RESPONDING TO NEW REALITIES OF DIVERSE STUDENTS AND A CHANGING SOCIETY (A.W. Chickering & Assoc. eds., 1981); James A. Anderson & Maurianne Adams, *Acknowledging the Learning Styles of Diverse Student Populations: Implications for Instructional Design, in* LAURA L.B. BORDER & NANCY VAN NOTE CHISM, EDS., TEACHING FOR DIVERSITY, 49 NEW DIRECTIONS FOR TEACHING AND LEARNING 19 (1992). *See also* Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning, in* Symposium: Seven Principles for Good Practice in Legal Education, 49 J. LEGAL EDUC. 401 (1999).

The Exercise[4]

The exercise we used involved an effort by Rick and Mary Sylvan to enter an agreement with the Cosmos, a jazz trio, for the Cosmos to play in a new restaurant and lounge being opened by the Sylvans. In order to simplify the problem so that students could concentrate on the process and not get bogged down in confusing detail, we presented a partially negotiated contract with only three terms remaining for agreement. The parties had already reached agreement on the number and length of appearances each week, who would provide which items of equipment, the text of a force majeure clause, who would provide various forms of insurance, and how often the band would be paid. We also specified that the band would operate under union rules, which provided for a minimum pay scale. The terms remaining to be negotiated were the salary, the length of time the contract would be in force, and the content of a non-compete clause.

As source material, we provided the students with six cases from the Minnesota state and federal courts that would outline for them the contours of the doctrine related to non-compete clauses, although we knew—and the students discovered—that the law provided little real guidance for their negotiating needs beyond establishing the outer boundaries of acceptability, which they were unlikely to demand (for the Sylvans) or agree to (for the Cosmos) in their negotiations. As is typical in such exercises, each student received both a "public" set of facts, shared by all parties, and a "private" set of instructions outlining some relevant concerns of their own clients related to the three undetermined contract terms.

Believing that by having to articulate their planning, students would be more thoughtful about their strategies and would better appreciate their own instinctive judgments, we assigned students to work in groups of two for their designated client. Each such team was paired with a team representing the other party, and opposing teams were instructed to exchange written proposals for the three open terms at least four hours before meeting in a face-to-face negotiating session.[5] We suggested that students "should be able to negotiate

4. This exercise is based upon materials developed by Roger Haydock, Professor of Law at William Mitchell College of Law.

5. One decision to be made in doing an exercise of this sort is whether to assign individuals to groups randomly or to engineer the combinations either to evenly distribute or to cluster students by race, gender, or other differences. *See, e.g.*, BARBARA GROSS DAVIS, TOOLS FOR TEACHING 151 (1993); S.B. Fiechtner & E.A. Davis, *Why Some Groups Fail: A Survey of Students' Experiences with Learning Groups*, A. GOODSELL ET AL. (EDS.), COLLABORATIVE LEARNING: A SOURCEBOOK FOR HIGHER EDUCATION (Pennsylvania State University 1992); K.A. Smith, *Cooperative Learning Groups*, *in* S.F. SCHMOBERG (ED.), STRATEGIES FOR ACTIVE TEACHING AND LEARNING IN UNIVERSITY CLASSROOMS (University of Minnesota 1986). We used a random approach, which in fact resulted in a diversity of combinations (*e.g.*, all females, all males, mixed groups by gender).

and reach agreement on the terms" and instructed them not to use stalling tactics or threaten to walk out during the negotiation. We included this instruction to ensure that students would reach agreement and therefore perform the drafting exercise and that, with no client needs really present, students would not be tempted to use extreme tactics as part of a no-stakes game. We gave the students no other instructions or guidance with respect to either negotiating techniques or drafting concerns, believing that the power of this first lesson would come from seeing the problems on their own—and from making mistakes and seeing the consequences. Hearing descriptions of negotiation styles and seeing rules or guidelines for drafting would have much more meaning for them after the experience than before. This approach is in keeping with the suggestions of Donald Schön in his reflections on professional education, which have been extremely influential in contemporary thinking on that subject. Schön views the architecture studio as a paradigm for professional education, describing a process in which students are given problems with relatively little guidance and are forced to think not only about the problem, but to think about how to think about the problem.[6]

The usefulness of this method was reflected in student comments on their experience:

- "My impressions about this project were a lot different at completion than they were when it began. I was somewhat skeptical in the beginning, because I felt that we were being turned loose with too few parameters on the methods of negotiation. I didn't know the difference between good and bad negotiation tactics. For example, I wondered, is it best to lowball an opponent, or does that show poor faith? I also wondered exactly what, if any, concrete doctrine we were supposed to be learning. However, by the time we completed the exercise, I felt that I had learned more by jumping in headfirst than I would have learned by pouring over some exhaustive set of negotiating rules . . . I see now that the process of negotiation is probably not as complicated as I thought it was. Essentially, like other of life's cooperative ventures, it required give and take, concession and demand."[7]

6. *See* DONALD SCHÖN, THE RELECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983) and DONALD SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS (1987). For discussion of application to legal education, *see* Donald Schön, *Educating the Reflective Legal Practitioner*, 2 CLINICAL L. REV. 231 (1995); Richard K. Neumann, *Donald Schön, The Reflective Practitioner and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401 (2000).

7. This and later quotations are from students' written reflections about the exercise. *See* text immediately following this quotation. Although we present the comments here as illustrating particular points about negotiation or drafting, our use of them does not adequately reflect the

Once they reached agreement, each set of negotiating teams was to turn in a packet that included a copy of each initial proposal of terms, the agreed terms, and a statement from each of the members of the group reacting to the experience of negotiating and drafting the agreement. We scheduled two days of debriefing and discussion about the experience a week after the submission date, one day to talk about negotiations and one to discuss drafting issues.

Lessons About Negotiating

Private instructions to the students about their clients' positions gave general parameters for the parties' choices, but the students had to decide for themselves whether to begin negotiations with proposals close to their desired outcomes or with more room for bargaining. Students also had to adopt a bargaining style or styles. Even without advance guidance from us urging them to focus on the process of negotiating, the students were naturally more conscious of issues of style and presentation because they had to plan the bargaining session with a partner and observe—and coordinate with—their partner during the session.

The students clearly recognized the presence of multiple bargaining styles and strategies, and the impact it may have had on the outcome:

- "The most interesting part of the project, I thought, was being able to observe the group dynamics that took place during the negotiating. While there were three of us representing the Cosmos, the Sylvans' side had only two representatives, and I think that had an effect on the results. Two people in the group had a more passive approach to the negotiations, one was a fierce advocate for our side, and two of us seemed to be somewhere in between—advocating for our clients, but wanting to do so as cordially as possible. Our different personalities and styles of negotiating reflected themselves in the final agreement more than I had expected."

Some students also commented explicitly about the effect of working on a team. Several mentioned having to first negotiate with their co-counsel in order to decide upon an initial offer. One said it took more time to create the initial proposal than to reach agreement with the other side. Others described the process of representing their client with a co-counsel:

- "My partner . . . sort of took the lead, and I piped in to substantiate his arguments and also to add depth to some of his statements. It actually made me wonder if it's usually better to have a lead negotiator in order to avoid a wrestle for control of the negotiations."
- "Because my partner was very lenient and understanding, at certain points I felt like he was on the other team! My driving objective was

ways in which they reflected the complexities of the process in which they engaged and the interrelationships among the various negotiating and drafting issues.

to represent the Sylvans at all costs. Who cares about the other fella, right? . . . At some points, it may have appeared to the Cosmos that my partner and I were not in agreement because I was aggressive and he was understanding. Rather than balance our strategy, this character difference between us may have weakened our stance."

- "All the preparation we did before the actual negotiations was very helpful too; we knew exactly what we were willing to agree to and what our arguments would be for each point, and we were able to counter most of the arguments that opposing counsel brought up without having to consult each other."

In the classroom hour devoted to talking about negotiating, we planned to introduce students to a few of the major theoretical principles and practical concerns at issue in negotiations, with the exercise providing a concrete context within which they might understand those concerns. The student comments, excerpted below, demonstrated how many insights the students had on their own and provided a foundation from which we could begin a classroom discussion of these issues. Among the issues we addressed with the students were the following:

Different approaches to bargaining and their effect on the outcome for the client. As we expected, the negotiating teams produced a broad range of results for the three terms upon which they were to agree. There were substantial variations in the agreed salary,[8] as well as in the length of time[9] and geographical and other limits[10] of the covenant-not-to-compete. We prepared handouts and an overhead display to show the students the variations among the terms they negotiated and begin a conversation about the reasons for the variations. The most salient variations occurred in the salary negotiations.

Charting the results allowed students both to see the range of values—often rather startling to first-time negotiators who may think the range of reasonable agreement is small—and to begin to evaluate the possible effect on outcome of choosing a high or low opening bid or a more or less cooperative attitude in negotiations. We discussed with the students one way of describing

8. Salaries ranged from $1000 per week plus some incentive bonuses based on attendance to $1900 weekly, increasing after three months to $2050.

9. Restrictions began anywhere from ten days to two months before the Cosmos began to play for the Sylvans' facility and ended between three weeks and four months after the end of their engagement there.

10. All the agreements forbade the Cosmos from playing in the relevant metropolitan area, though some referred to the city boundaries, while others used highways or mileage from city downtowns or the Sylvan establishment as markers. One agreement used a complicated formula forbidding competition in a large area for the first four months of the contract, a smaller area for the next three months, and an even smaller area for the final two months. These variations were more interesting from the standpoint of drafting comprehensible and enforceable clauses than as reflections of different methods of negotiation. *See infra.*

negotiation methods, combining different negotiating styles (competitive vs. cooperative)[11] with varying negotiating strategies (adversarial vs. problem-solving).[12] Is one method more effective than another, we asked? How does one's own style and strategy affect, and how is it affected by, the styles and strategies of one's partner and opponent? Should one adopt a particular persona for the negotiating occasion, or should one develop one's natural style to be more effective, without changing it?

Many of the students saw the effect of different negotiating styles/strategies:

- "I was particularly intrigued by the variety of negotiating tactics and styles available. For example, my partner and I submitted an initial proposal consisting of mere starting points for the negotiation, while our rivals worked out a more detailed contract."
- "We were going to start out kind of unreasonable and see what we could get in terms of the length of time in the non-compete clause, but the Cosmos gave us more than we wanted or expected so we just took it."
- "The other side made a proposal which was quite a ways from being fair. My partner and I were maybe a little naive in being what we thought of as fair in our initial proposal. I thought this gesture would ease future negotiations. Fortunately, it did. Other people might have taken this as a sign of weakness and made later negotiations more difficult."
- "I have a natural tendency toward compromise and generosity, and these things seemed to work against the interests of my clients. I thought that it would be fairly easy to find middle ground, but this was not the case."

Competing aims at the core of the negotiation process: is the goal to come to a "fair" agreement or to attempt to win as much as possible for one's client? Many of the students struggled with this dilemma. They realized that negotiating is not litigating and discovered the tensions among gaining the best result for the client, cooperating and maintaining reasonable relationships with the other attorneys, advocating their client's position, and considering fairness in outcomes. One student noted that, in determining their initial proposal, he and his partner had made a concerted effort to balance the interests of their own clients and the other party. They found the other team apparently had done the same thing. Was this cooperative air "perhaps a bit subversive of the philosophy underlying the adversarial system," the student wondered?

11. *See, e.g.*, ROBERT M. BASTRESS AND JOSEPH HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING, 389-404 (1990).

12. *Id.*

- "Should we have aggressively advocated our clients' position, even at the expense of opposing counsel? My hunch is that perhaps such direct conflict should be left in the non-contractual realm. I think we struck a bargain beneficial to both parties, and that is really the goal of contract negotiations."

Other comments reflected the same struggle, though not always the same solution:

- "The main idea that I learned from our negotiation was that it was not supposed to be about 'winning or losing,' but it was to be about achieving an agreement between both sides which was satisfying. At first our group took on the attitude that we were either going to win or lose. After we exchanged proposals with the other group, we realized that arriving at a working agreement and forming a healthy relationship between both parties was much more important than attaining a huge salary or illogical terms brought about by arguing and holding an unreasonable attitude."
- "[A]n adversarial approach to negotiations only causes problems. When either side is concerned with 'winning' more than reaching a fair agreement, negotiations almost come to a complete stop."
- "It was difficult to strike the appropriate balance between insisting upon our clients' wishes and compromising to create an acceptable contract for both parties. While there is no need for hostility, a certain degree of firmness and inflexibility now seems necessary. In retrospect, my partner and I compromised too easily upon some issues."
- "We made an agreement to see each other's confidential information [after the end of negotiations]. Afterwards we were surprised with how much more aggressive we could have been, knowing the other side's facts."
- "The counsel for both [parties] set out to get as much for their clients as possible (and still maintain a friendly environment); at the same time, it seemed important to communicate to the other side that you were not trying to take advantage of their clients' interests. I believe these two factors are not mutually exclusive, but that obtaining the first depends in large part on establishing the second."

The rhythms of a negotiating session: Negotiation is a process, one that requires participants to listen, remain flexible and respond to new circumstances. Negotiators must react to the style and strategies of opposing counsel, balance competing goals, understand how different parties may place different valuations on the same things and how that may be used in the negotiations, and keep their own goals in mind. Students were aware of these concerns:

- "I learned that contract negotiations operate best when the other party is willing to listen. Our negotiation went much smoother when the other side understood our points and we understood their points. It is also valuable to allow other people to take turns speaking. When one person engulfed the conversation, our negotiations made no progress."
- "It seems that open communication in a contract negotiation would be important, and that even if a person does not agree with what the other side wants, it seems important to at least give the *appearance* of empathy."
- "We were not real organized in our approach, in the sense that we did not go down the line in order of salary, duration and the restrictive covenant provision. However, this worked best for each side as a matter of give and take. Everything needed to be discussed in relation to each other, because certain terms were exchanged for others in another area of the contract."
- "We thought about the reasons for asking for what we did, and what would be the most effective arguments to make during the actual negotiation. When it came to the negotiation, though, I'm not sure we really considered the arguments of the other side. I did not listen for very much other than actual dollar figures and restrictive conditions. Even if the opposing counsel had good reason to ask for what they did, I ended up only hearing the bottom line."

Students were, likewise, aware of issues of bargaining strategy and connections among terms, especially where multiple terms were being discussed:

- "There were issues that we agreed about from the beginning and this was helpful to us in finding a middle ground."
- "I was amazed at how easy it was to talk our 'opponents' into what we wanted. We built a number of 'throwaways' into our proposal, and those items did seem to lead our opponents down the wrong path, which made it that much easier to carry the points that we felt were important."

Students recognized the uncertainties that plague a negotiating process, making it difficult to evaluate one's own degree of success:

- "The difficult part was judging whether the other party was presenting realistic terms under their circumstances. In the end, we were all satisfied with the negotiation, but didn't really know if we could have gotten more for our clients. Thus we exchanged the confidential facts afterward to see what the other party could really have offered. Unfortunately, you can't do that in a real negotiation."
- "The negotiations were difficult because I could not tell when the other person would give in or how long I should hold out . . . ."

They were aware that the need to reach agreement limited their options and thus affected both the negotiation and its outcome:

- "Not being able to walk out of the session changes the dynamics of the session. Participants needed to be more flexible and accommodating to strike a deal."
- "I know that it was not an option, but a few times I wanted to withdraw from the negotiations and say 'No deal!'"
- "I thought we made a fair initial offer, but they seemed to take the initial offer as a chance to submit something totally outlandish. The most frustrating thing about the process was that I could not walk away from the table, they knew I had to settle. If I had the opportunity, I would not have agreed to do business with the Cosmos."

Students also realized that parties have different perspectives regarding what is important and that their original assessments of what is important may change during the process. They also came to appreciate that other considerations may have as much effect on the negotiation as money:

- "I figured that we would deal most of the time with the salary. They agreed rather quickly... However, the non-competition clause became much more detailed than I would have ever anticipated."
- "One thing that I learned for the first time is that negotiations often involve factors less tangible than money."

The artful use of spoken language: Negotiators must appreciate the need for precision and the strategic use of vagueness to help reach agreement, the need for listening carefully to avoid misunderstanding, and the consequences of mistakes in communication and drafting:

- "I continue to be surprised by the difficulties people can have communicating... Trying to explain our ideas to our 'opposing counsel' was even harder [than avoiding miscommunication with my partner]. Things that we thought were pretty clear would end up being more tangled than either of us had anticipated."
- Everything you do and say is important: "I also learned to be much more careful about what I say—I made one or two off-hand comments during the negotiation that were later used against me. The attention to detail on specific language made me realize how hard it would be to get anything done if everyday conduct was held to a law student's interpretation of precise wording."
- An L.L.M. student who is a lawyer in Japan commented that "as everyone except for me spoke English so fast, I could not understand the content of the discussion very well and catch up with the discussion... I would like to recommend U.S. lawyers to speak English slowly at the meeting with Japanese people."

Importance or irrelevance of "the law": Many students commented that they were not sure why they read the cases dealing with covenants-not-to-compete, while at least one group used the law they had learned strategically:

- "The Sylvans' counsel had proposed some extremely restrictive terms for the non-compete covenant which they must have known could never have been upheld by a court, and because of this, I assumed they were 'bluffing' with respect to the salary they were prepared to offer as well."

The role of representing a client: Negotiators should be conscious of the difference between speaking for oneself and speaking for one's client and the possible dissonance between lawyer and client goals. Ironically, students began to learn the importance of client contact and communication through the absence during the exercise of a live client with whom they could consult. They displayed awareness both of the need to take direction from a client and the conflicts that might arise:

- "There might be times when having clients present would facilitate the negotiation process by having them explain their position more fully than their lawyers could."
- "We managed to secure for our clients those terms we felt that we personally would have emphasized if we were the restaurant owners. However, we did not succeed in securing those terms we didn't see the purpose of... It was hard to argue for something we considered unreasonable...."
- "I found myself... possibly being a bit too quick to concede at times, and I had to keep in mind that I was representing someone else... I needed to realize that our true goal was to present our client as best as possible, and get the best deal we could."

The bounds of representation: Negotiators should be aware of the strategic, professional and ethical dilemmas facing attorneys in negotiations. They must consider how much information to share, whether (or when) it is appropriate to use deception or strategic intransigence, and what to do in the face of such tactics by opposing counsel. Again, students' comments showed their awareness of and struggle with at least some of these issues:

- "[W]e were misled about how urgent it was to sign the Cosmos... They also lied to us about how little they could accept, but I guess it is our fault for believing them."
- "The other thing that surprised and troubled me was what appeared to be the dishonest nature of negotiating. I had thought that it would teach about compromise and 'playing nicely' with others. Not at all. It seems to be about going after as much as you can possibly get (forget fairness!) and justifying it by saying that (1) the other side is doing the same thing; and (2) you are doing what is best for your

clients. Is this system conducive to fairness? It seems to encourage greed, manipulation and dishonesty."

Lessons about Contract Drafting

While many drafting considerations are integrally related to the bargaining process, others are matters of clarity of language and attention to detail and completeness. Drafting issues were raised primarily in student efforts to write a non-compete clause, though students were sufficiently engaged in the problem that many drafted additional clauses, perhaps as part of their efforts to bargain towards agreement on the three terms identified for resolution.

By comparing the various phrases in the non-compete clauses indicating the kinds of establishments in which the Cosmos could not play, students became aware of the problems associated with drafting even a relatively simple clause, especially one with undefined terms. Why did some forbid competition in only another restaurant/lounge while others included any "fair, bar, restaurant or nightclub"? Why did some extend that to "clubs, restaurants, bars, lounges, hotels or similar gathering places"? How did others decide to include "any food or beverage service establishment" or even "any public forum" (we had a few laughs about the first amendment there)? What did they mean by the words they chose and did they negotiate about them specifically? Why use the catchall "similar gathering places"? How would all these phrases be interpreted if conflict arose? The same kinds of variations occurred when they tried to list exceptions to the ban on competition, which ranged from "any party or private function" through "private parties, fairs, jazz festivals and other events if they do not conflict with their scheduled performances at Sylvan Shore" to "local jazz festivals when the ticket charge is $15 or more." We hardly needed to do more than display the various phrases the contracts used. Having thought through the issues during their negotiations, the students themselves could identify the drafting problems—and their own mistakes.

We were able to introduce a variety of drafting issues simply by collecting a set of clauses from their contracts and displaying them in class for discussion. Among them were the following:

- *Use of imprecise language:* What did it mean that Cosmos was "*not restricted to* public concerts in parks, fairs, arenas or similar venues"? What did it mean that the contract "will be *subject to* accidents, strikes, Acts of God, and conditions beyond the control of either party"? How can the non-compete clause operate "within a fifteen-mile radius of downtown St. Paul and Minneapolis," as the two downtowns are located ten miles apart?
- *Use of legalese:* Why say the contract was to be in operation "for a period of not less and not more than three months"?

- *How and whether to control future renegotiation:* Why include the phrase: "This contract will not be extended"? What did it mean when a group included the phrase: "This contract is non-negotiable"?
- *Defining breach:* If the contract says "non-performance will result in a proportional loss in wages and profit-sharing," what happens if only one or two of the three trio members show up for the evening? Is that non-performance? And what would be a "proportional loss in wages and profit-sharing"?
- *Imprecise specification of terms:* The contract that specified performance four nights a week neglected to say *which* nights. Could the band play Monday through Thursday and still be in compliance?
- *Redundancy*: One contract allowed either party to "nullify" the contract with two weeks notice any time after three weeks from signing. A second provision allowed the Cosmos to nullify the contract with two weeks notice if the band (working on percentage of the gate) earned less than a specified amount for a three-week period. Why include the second clause when the first was so comprehensive?
- *Defining when the contract effectively begins:* If the non-compete clause is to operate beginning one month before "the inception" of the contract, does that mean when it was signed? When the band is scheduled to play for Sylvan Shores?
- *Use of confusing descriptions when simplicity is possible:* Why say the contract "will be six months in duration with an option to renew after three months. At the end of the first three months either party can break the contract with no penalty. This contract will commence October 1, 1998 and continue through March 31, 1998." Is this a six-month contract with the possibility of cancellation after three months? A three-month contract with the possibility of renewal for an additional three months? How is renewal or termination to be exercised? If the option to cancel is exercisable by either party, is that also true for the option to renew? Why say the contract would be "broken" if there are no penalties?
- *Punctuation problems:* "Cosmos will agree to restrict its performances for two weeks before the beginning of the contract, for the duration of the contract and for two months from the time the contract has terminated in accordance with the following restrictions: . . ." Without a comma before "in accordance," the subsequent phrases seem to be about how the contract will be terminated, when in fact the language that follows listed the non-competition restrictions.
- *Defining obligations after breach:* Since the contract provides only for the band to receive a salary from the Sylvans, did the parties really mean to say that "if *either* party acts so as to void the contract, they are obligated to pay the other side the agreed-upon base salary for the

duration of the contract"? What did it mean to say that upon cancellation of the contract by the lounge for excessive absences of unacceptable conduct by the trio, "the band will be obligated to pay the lounge for the duration of the contract"?

- *The difficulty of creating meaningful standards of performance:* Is it wise to say that "reasonable standards of conduct are required of the band at all times" but that "the definition of reasonable standards of conduct will be up to the discretion of the owners of the lounge"? What is "reasonable standards of conduct" for a musical performance group? (Are jazz combos judged by the same standard as heavy metal groups?)
- *Deciding whether to include the parties' purposes in the contract language itself:* Was it a good or bad choice to preface the covenant-not-to-compete with explanations of the interests of each party in negotiating that covenant?

In addition to the specific issues raised by individual clauses, we talked with the students about more general drafting and planning concerns—*e.g.*, the power that often derives from being the drafter and why contract language is therefore often construed against the drafter; the tension between wanting simplicity but needing precision; considering who will later interpret contract language and the standard that will be used; anticipating future problems and determining how best to avoid them with contract language; guarding against unintended consequences from the terms; the risks and benefits of vagueness—most of which they recognized as they did their own drafting work.[13] The range of drafting and planning concerns that we were able to address using the student-written clauses was thus considerable, and the students were extremely responsive precisely because they had invested time and effort in the problem and *experienced* the problems before we named them. Even an exercise as simple as the Sylvan-Cosmos contract could also be used as a springboard for

13. Students explicitly discussed some of these issues in their submitted comments on the process. One, for instance, said he "thought our contract would be fairly short, and it turned out to be fairly long . . . because we each had a few things we wanted spelled out in detail . . . [We tried] to keep the vagueness to a minimum in order to ensure that everyone knew what was being agreed to." Another discussed her group's negotiations to clarify one particular term, which resulted in a choice of vagueness over precision. She stated:

> The one issue that created problems was determining whether the management should have the discretion to determine when the band had an acceptable excuse for not playing. The Cosmos did not want the management to have total control over determining whether the band had an acceptable excuse. The management felt that since they were paying the band to show up, they had a right to determine if the band had upheld their end of the agreement. Both sides determined that it was useless to create a list of situations where the band was excused from playing.

As a result of this difficulty, the students agreed to a clause stating a general standard and giving broad discretion to the Sylvans to apply it.

addressing more comprehensively the principles of contract drafting and planning if more time were available in the classroom.

Lessons We Learned

The primary lesson we learned from incorporating this exercise in class was that students can learn enormous amounts from any such effort even if the problem itself is very simple and untested and only a small amount of time is devoted to the problem. While it is impossible to teach students how to negotiate and draft a contract in a single exercise and two days of conversation, our experience showed that it *is* possible to raise significant issues about lawyers' skills even under such constraints. Tactical thinking, ethical considerations, and questions of bargaining strategy raised in our simple exercise are crucial parts of "thinking like a lawyer," usually missing from the first year curriculum. Including a negotiation and drafting exercise is at least a good start at correcting this imbalance. We also confirmed through our experience the enormous value in collaborative work between skills teachers (clinicians) and substantive first-year instructors.[14] We know that we can improve upon the problem and our use of it, and that increased benefits would result from coordinating such exercises with other first-year courses, with legal writing programs, and with upper-level practice courses. Innovation is hard work, however, and the success of our efforts should encourage others to take even a small first step.[15]

As we look ahead, we have considered several ways to improve the exercise. First, although we were able to learn about the students' negotiating processes through their written and oral comments, we and the students would learn more if we could have observed their negotiations more directly, allowing us to comment on what we had witnessed. Direct observation of multiple negotiating sessions is extremely time intensive; however, given the size of traditional first-year classes. Alternative possibilities include using adjuncts or teaching assistants to observe the negotiations, assigning one student in a group of three or five to be an observer/recorder, having each session videotaped for the students to review, or asking each participant to describe the negotiating process in detail, not just reflect on the experience. Each of these methods would produce more data about the process, though it would still be difficult to provide evaluative criteria.

14. One of us (ML) has also successfully worked with a first-year civil procedure teacher in creating drafting, discovery and mediation exercises. The collaborations so far have been individual, though much would be gained through more extensive and comprehensive collaboration with and among first year faculty.

15. For extremely helpful guidance on crafting a simulation exercise, see Jay M. Feinman, *Simulations: An Introduction*, 45 J. LEGAL. EDUC. 469 (1995).

We also suffered constraints from the absence of clients with whom the students could consult and who could provide additional information sought by the students. (One student noted that he was "frustrated in trying to work within a hypothetical. I wanted to know more [facts].") In response, we may consider acting, or having other students act, as the clients, with specific, and perhaps differing, instructions on behavior—some to be reasonable, some unreasonable, some pushovers, some intransigent—to see how the student lawyers relate to and work with their clients. Having simulated clients would also allow us to incorporate a brief counseling session, although this would expand the exercise beyond its original scope and make the exercise more time consuming.

Finally, to expand the drafting opportunities and to tie legal analysis more closely to other lawyering skills, we might include as an undetermined term a clause more controlled or affected by legal doctrine. Students would then be forced to understand doctrine from case precedent and perhaps a relevant statute and to apply the doctrine to determine the scope and content of a clause.

With or without the improvements noted, we are convinced of the benefits from including an exercise of this type in the first year contracts class. Some colleagues have been skeptical of the efficacy of teaching skills to first-year students. One can raise questions about the "unreality" of the process we used: nothing was at stake, there were no real clients or problems to solve, the exercise was ungraded, the students were not directly observed in their work, and the problem was too simple. The nature of our students' work product, however, as well as the quality of their reflections on the process and their engagement with the issues in the class discussions, show that this kind of exercise can be valuable even on a limited scale. In addition to acknowledging how much they thought (and we knew) they had learned about the processes of negotiating and drafting, many students stressed how much they found they cared about the negotiation, how seriously everyone took it, despite the fact that it carried no grade and was about fictional people. The students themselves made clear how well the experience worked: "I was surprised to see how much I cared about getting the best deal I could for the Sylvans . . . I think the exercise helped me to re-connect with the real reason I wanted to be an attorney, which is to help people to solve their problems with minimum anxiety."