Integrating a Workshop on Negotiation and Drafting into a Contracts Class

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By Stephen A. Gerst, Phoenix School of Law

In my second semester contracts course, I included a “negotiation and drafting workshop” for the last four class periods. The purpose of the workshop was to provide an opportunity for students to learn how to apply their substantive knowledge to the skills of negotiation, collaboration, and drafting. Each of the four class periods was scheduled for one hour and twenty-five minutes. Fifty-eight students were enrolled in the course.

First Class Period
Prior to the first workshop class, the students researched an article, treatise, book, or on-line resource on the subject of negotiation. I asked each student to prepare to share with the class five things of importance to the negotiating process.

The first workshop class began with a brief discussion on contract drafting and how it differs from other types of legal writing. One of the key concepts was that the drafting of the contract begins during the negotiation process. The discussion then shifted to the “negotiated contract” as distinguished from the “adhesion contract.” During this phase, students shared their findings on the principles of negotiation from their research assignment. These principles, which included negotiation strategies, were listed on the board for discussion.

Second Class Period
Before the second workshop class, the class was divided in half. One-half of the class was to represent a property owner who wanted to build a cabin in the mountains. The remaining half of the class was to represent the building contractor. Each student was randomly paired with another student to form a lawyer team to represent one of the clients. Each lawyer team was sent a “confidential memorandum” from the client authorizing the team to negotiate a contract for the building of the cabin, within the parameters of the client’s desires. The property owner and building contractor memoranda differed regarding each client’s desires with respect to construction cost, payment terms, the remedy for a delay in completion, dispute resolution, change orders, and indemnification in the event of injury to third persons. Students were to formulate their strategies and proposals before class and be fully prepared to negotiate toward reaching a resolution on the legal and factual issues.

The second class period was devoted entirely to the negotiation process. Student lawyer teams representing the contractor were paired with student lawyer teams representing the property owner. Two employees of the law school were enlisted to play the role of the general contractor and the property owner. The employee-role players attended class and were available to student lawyers who needed to “consult with their client” regarding any issue that was beyond the authority granted in the memoranda.

“I took an entire year of Contracts and never saw an actual contract.”

Third Class Period
Before the third class, each student team drafted a proposed agreement based on the results of the negotiations. Resources available to the students included a monograph written by Joseph Kimble of the Thomas Cooley Law School entitled, “A Brief Introduction to Drafting Contracts” and on-line resources on contracts drafting, such as the AdamsDrafting web site, www.adamsdrafting.com.

The first part of the third class period we reviewed types of contracts that are in common use, including:
(1) a real estate sales agreement, (2) a landlord-tenant rental agreement, (3) an employment agreement, (4) a publication agreement, and, (5) a construction loan agreement. Students noted the differences in length, style, and contents of the contracts.

During the remainder of the class period the student teams collaborated in the drafting process and worked on wording, clarity, and style. By the end of class, students were close to having a final draft to present to their client for approval and signature.

Fourth Class Period
The homework assignment for the fourth class was to complete the final draft of the contract in collaboration with the other team. The final agreements were then sent to me electronically before class.

In the fourth class period, we reviewed each of the contracts on the overhead — continued on page 9
Teaching with (light-hearted and well-intentioned) Sarcasm

By Harriet N. Katz, Rutgers Camden School of Law

If you have teenage children, you may know that sarcasm can teach. At least, I think it was helpful when our kids were learning to drive. “Driver’s ed” courses can teach specific rules. I wanted to point out bad attitude, which is really what kills teen drivers, and show how to respond safely. The Schuykill Expressway was my classroom. (In Philadelphia that road’s name is pronounced officially “skoo’-kl” and unofficially “sure-kill”.) Another driver swerves around me without signaling, or passes at a reckless speed? I would say, as if speaking directly to the bad example “Sorry, buddy, I’ll just get out of your way. I forgot this is your road.”

I suspect I’m not the only professor who compares our adult students to our kids. So here is something I put together recently.

Tips for lowering your grades on negotiation reflection papers:

1. Defend yourself. Don’t think critically about anything you or your negotiating partner did wrong, you wouldn’t want the professor to think you don’t already know everything. Your prof’s talk in class about being aware of need for self-improvement is just blah-blah, she doesn’t really mean it.

2. (a) Describe what you did but don’t bother with theoretical terms from the text. Your prof already knows those, don’t even try to organize the paper logically. Clear organization, well crafted sentences, words used precisely — these are ways to impress an English Comp instructor, you can forget them a

OR

(b) Just name the theoretical concepts, and don’t waste time with application to the facts of your problem. After all, you’re just writing to show that you can recite back the theory terms from the textbook. “The TV producers seem to have more power in this negotiation than the writers right now because of their BATNA but the writers have some power, too, eventually” is all you need to say. It would take too long to add that “the producers’ power during the Writers’ Guild strike is created by their vast array of immediately available alternatives to fill the airwaves (reality shows, sports, old movies) while the writers’ edge in the long run may be the reluctance of advertisers to buy airtime with no promise of huge audiences attracted by new material for popular shows — in negotiation theory terms, the producers’ power comes from better alternatives now, and the writers’ power comes from their ability to reduce the value of the producers’ alternatives eventually.”

3. Write poorly. Use words carelessly, don’t even try to organize the paper logically. Clear organization, well crafted sentences, words used precisely — these are ways to impress an English Comp instructor, you can forget them after undergrad, or possibly even after high school. Don’t fall for the idea that clarity always matters.

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