

NEGOTIATION  
Colin W. Wied  
University of San Diego Law School  
Spring Semester 2009  
Course No. LWLP560 01A, 3 units

**Class Hours**

Tuesday and Thursday, 5:00 - 6:45  
Room WH-3C

**Office Hours**

By appointment

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**Course Description**

Negotiation is an intrinsic part of our personal and professional lives. The course draws on principles taken from academic research on negotiation and illustrates them through practical exercises. The core of the course is a series of simulated negotiations that increase in complexity over the term. They are carried out both inside and outside the classroom. Bargaining styles, communication skills, and the various contexts in which negotiations take place are addressed, including lawyer/client, business transactions, and dispute resolution in family, business, personal injury, criminal and bankruptcy law cases. Enrollment is limited. The course is graded on a 4-tier Pass/Fail basis.

**Required Reading**

- Fisher, Roger, William Ury and Bruce Patton, *Getting to Yes*, 2<sup>nd</sup> ed. (1992)
- Folberg and Golann, *Lawyer Negotiation - Theory, Practice, and Law* (2006)
- Fisher and Shapiro, *Beyond Reason, Using Emotions as You Negotiate*, (2005)
- Thomas-Kilmann Conflict Mode Instrument
- Mofitt & Bordone, *The Handbook of Dispute Resolution* (You do not need to purchase this book. Copies of select chapters will be handed out.)
- CEB, *The Litigator's Guide to the Effective Use of ADR*, ch. 3, *Negotiation* (You do not need to purchase this book. Copies of chapter 3 will be handed out.)

Other readings will be distributed in class.

## **Journal**

You will be required to keep a short (3 - 4 pages weekly) journal of your reflections in either Word or WordPerfect format. It should contain lessons learned about negotiation from 1) the assigned readings, and 2) your experiences in and out of class each day; what worked and what did not. Learning negotiation theory by reading academic treatises is a start. Applying the negotiation principles and techniques is another matter altogether. Keeping the journal will ensure that you understand and can apply the principles. At the end of the course, you will annotate your earlier entries using a different font or footnotes. Annotating the journal entries gives you an opportunity to synthesize what you learned, and will give me a measure of what you have learned.

Journals are to be submitted to me by email on the following Wednesdays by 4:00 p.m.: Jan. 21, Feb. 18, Mar. 25. Your final annotated journal will be due on Apr. 23 by 4:00 p.m. I will read the journals, but will keep them confidential.

## **Attendance**

Every student is a necessary participant in each class, both for the negotiation exercise and debrief and other class discussion. In almost every class session, you will be paired with another student to negotiate a case simulation. Your absence will not only impair your learning, but others' as well. For this reason, prompt, prepared participation at every class is required. Excused absences are at the discretion of the instructor. They are limited to significant illness or personal emergencies, with notice in advance of class. (For reference, campus, professional or personal events generally do not qualify as excused absences. This would include student group meetings, firm socials, weddings - other than your own- or head-starts on vacation.) At the instructor's discretion, an unexcused absence can lead to low pass grade, and two unexcused absences will lead to a fail grade, absent exceptional circumstances.

## **Confidentiality**

This class is a lab in which you are allowed to experiment with what you do and what you say in negotiations and in class. By experimenting you will learn a lot about the effect you can have on others. You will probably learn more from your failures than your successes. To encourage open discussion, it is expected that everyone will treat what happens here as confidential.

In the various negotiation exercises you will be given confidential instructions (i.e., instructions meant only for your character. Please do not share these confidential instructions with students who are playing other roles in the exercises, for that would make the exercise meaningless. Also, do not talk about the facts in the exercises with other USD students. We want to be able to continue to use the most effective simulations.

## Grading

To qualify for a passing grade, the following performance is expected:

1. Preparation for all class assignments and active participation in the exercises and in the ensuing class discussions;
2. Regular class attendance; and
3. Thoughtful preparation and timely submission of the journal.

## Syllabus

The topics, activities and assignments for class sessions are set out below.

<u>Day</u>	<u>Class Focus</u>	<u>Class Activity</u>	<u>Pre-Class Assignment</u>
Class 1 Tues 1/13	<b>Introduction to Course: The Lawyer as Negotiator</b>  Stages of negotiation	Arbitration/Negotiation Role Play Exercise - <i>The Family Portrait</i>  Distribute handout (Moffitt & Bordone, Ch. 11)  Hand out TKI Supplemental Materials	Before class, answer the following questions in writing to be handed in at the beginning of class: 1. How do you presently deal with different kinds of conflict, personal and professional? 2. What interests you about negotiation? 3. What is your goal for this class?

<p>Class 2 Thur 1/15</p>	<p>The lawyer's role in conflict resolution</p> <p>Negotiator styles</p> <ul style="list-style-type: none"> <li>- Competitive</li> <li>- Collaborative</li> <li>- Compromising</li> <li>- Avoiding</li> <li>- Accommodating</li> </ul>	<p>Discussion</p> <ul style="list-style-type: none"> <li>- Dawson's tactics</li> <li>- <i>The Verdict</i></li> <li>- <i>Death of a Student</i></li> </ul> <p><i>Thomas-Kilmann Conflict Mode Instrument</i> exercise</p> <p><i>Win as Much as You Can</i> exercise</p> <p>Hand out <i>Competitive / Distributive Negotiation Tactics</i> and <i>Litigation Risk Analysis</i></p>	<p>Read Folberg, ch. 1</p> <p>Purchase and bring <i>Thomas-Kilmann Conflict Mode Instrument</i> exercise to class</p> <p>Read Folberg, ch. 3</p> <p>Read TKI Supplemental Materials</p> <p>Read Moffit &amp; Bordone, ch. 11 (handout)</p>
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<p>Class 3 Tues 1/20</p>	<p>Distributive bargaining</p> <ul style="list-style-type: none"> <li>- Tactics</li> </ul> <p>Create Value</p>	<p>Discussion</p> <p>Negotiate and debrief <i>Rug Merchant</i></p> <p>Negotiate and debrief <i>Race Horse</i></p> <p>Introduction to principled negotiation</p> <p><i>Positional Bargaining</i> exercise</p> <p>Distribute <i>Interest-based Bargaining - a Three-step Approach</i></p>	<p>Read Folberg, pp. 45 - 61</p> <p>Read Handouts</p> <ul style="list-style-type: none"> <li>- Competitive/Distributive Negotiation Tactics</li> <li>- Litigation Risk Analysis</li> </ul> <p><b>Reminder - Journal due by 4:00 p.m., tomorrow.</b></p>
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<p>Class 4 Thur 1/22</p>	<p>Interest based bargaining</p>	<p>Discussion</p> <p>Negotiate <i>Tropical Plant</i></p> <p>Video - <i>Winners (Don't) Take All - the Difficult Task of Creating and Claiming Value in Negotiation</i></p> <p>Distribute <i>Opera Negotiation</i> parts</p>	<p>Read Fisher, ch. I &amp; II</p> <p>Read CEB, §§ 3.156 - 3.166</p> <p>Read handout - <i>Interest-based Bargaining - a Three-step Approach</i></p>
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<p>Class 5 Tues 1/27</p>	<p>Integrative bargaining</p> <ul style="list-style-type: none"> <li>- Interest based</li> <li>- cooperative</li> <li>- expand-the-pie</li> <li>- create value</li> </ul>	<p>Discussion</p> <p>Count the Camels exercise</p> <p>Negotiate and debrief <i>Opera Negotiation</i></p> <p>Video clips</p> <ul style="list-style-type: none"> <li>- distributive negotiation</li> <li>- integrative negotiation</li> </ul> <p>Distribute <i>Communication Techniques</i></p>	<p>Read Folberg, pp. 61 - 73</p> <p>Read Fisher, Ch. I &amp; II</p> <p>Read CEB §§ 3.167 - 3.188</p> <p>Prepare to negotiate <i>Opera negotiation</i></p>
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<p>Class 6 Thur 1/29</p>	<p>Communication</p>	<p>Discussion  - Listening  - Listening pitfalls  - Questioning  - Guarding information</p> <p>Discussion - Communication techniques</p> <p>Listening and Interviewing Exercise</p> <p>Video clips  - <i>Breakthrough Listening</i>  - <i>How to Say It</i></p> <p>Hand out <i>Eazy's Garage</i> roles</p>	<p>Read Folberg, pp. 124 - 131</p> <p>Read CEB, §§ 3.46 - 3.92</p> <p>Read Handout - <i>Communication Techniques</i></p>
<p>Class 7 Tues 2/3</p>	<p>Lawyer/client communication</p>	<p>Discussion</p> <p><i>Eazy's Garage</i>  - Client interview  - Negotiate <i>Eazy's Garage</i></p> <p>Debrief</p> <p><i>Lawyers &amp; Clients</i> video</p>	<p>Prepare for client interview in <i>Eazy's Garage</i></p>
<p>Class 8 Thur 2/5</p>	<p>Using emotions as a lens and a lever  - Appreciation  - Affiliation  - Autonomy  - Status  - Role</p>	<p>Class discussion of core concerns and your experiences in using them as a lens (to understand the behavior of yourself and others) and as a lever (to influence the behavior of others and yourself)</p> <p>Distribute handout - Cognitive Barriers</p>	<p>Read <i>Beyond Reason</i>, ch. 1 - 7</p> <p>For class discussion, prepare from your personal experience an example of each core concern - both as a lens and as a lever.</p>

Class 9 Tues 2/10	Cognitive barriers to communication	<p>Discussion</p> <p>Cognitive barriers exercises:</p> <ul style="list-style-type: none"> <li>- Reactive devaluation</li> <li>- Loss Aversion</li> <li>- Anchoring</li> <li>- Perception of fairness</li> <li>- Commitment bias</li> </ul> <p>Basketball video</p> <p>Hand out role plays for <i>Prado Scoot</i> and Savvy Negotiator Worksheet</p>	<p>Read Folberg, pp. 15 - 36</p> <p>Read handout - Cognitive Barriers</p>
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Class 10 Thur 2/12	Negotiation process: - Preparation	<p>Discussion</p> <ul style="list-style-type: none"> <li>- BATNA</li> <li>- WATNA</li> <li>- MLATNA</li> <li>- ZOPA</li> <li>- RP</li> </ul> <p><i>The Verdict</i> exercise</p> <p>Negotiate <i>Prado Scoot</i></p> <p>Debrief</p>	<p>Read Folberg, pp. 101 - 114</p> <p>Read CEB, parts I &amp; II</p> <p>Prepare to negotiate <i>Prado Scoot</i>, using Savvy Negotiator Worksheet (handout) and/or Negotiation Preparation Checklist at Folberg, pp. 110-112</p>
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Class 11 Tues 2/17	Negotiation Process - interaction - establish trust - initial & counter-offers - positioning - exchanging & refining information	<p>Discussion</p> <p>Negotiate <i>Oliver-Nelson</i></p> <p>Pass out role play parts for <i>Martha's Kitchen, Inc. v Winthrop Vision Systems</i></p>	<p>Read Folberg, pp. 114 - 131</p> <p>Read CEB, §§ 3.7 - 3.33 and Part III</p> <p><b>Reminder - Journal due by 4:00 p.m., tomorrow.</b></p>
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<p>Class 12 Thur 2/19</p>	<p>Negotiation Process - Bargaining</p>	<p>Discussion</p> <p>Negotiate <i>Martha's Kitchen, Inc. v Winthrop Vision Systems</i></p> <p>Pass out roles for <i>The PowerScreen Problem</i></p>	<p>Read Folberg, ch. 6</p> <p>Read CEB, Part IV</p>
<p>Class 13 Tues 2/24</p>	<p>Negotiation Process - Bargaining</p>	<p>Discussion - concession patterns</p> <p>Concession negotiation exercise</p> <p>Negotiate <i>The PowerScreen Problem</i></p> <p><i>The Hackerstar Negotiation</i> video</p> <p>Hand out roles in <i>When the Chips Are Down</i></p>	<p>Read Folberg, pp. 133 - 137</p> <p>Prepare to negotiate <i>The PowerScreen Problem</i></p>
<p>Class 14 Thur 2/26</p>	<p>Negotiation Process -Bargaining</p> <p>Commercial dispute</p>	<p>Video clip of the dispute in <i>When the Chips are Down</i></p> <p>Prepare to negotiate <i>When the Chips are Down</i> by completing the first 3 questions in the Negotiation Planning/Evaluation Form</p> <p>Negotiate <i>When the Chips are Down</i></p> <p>Complete the remaining questions in the Negotiation Planning/Evaluation Form</p> <p>Debrief</p> <p>Pass out roles for <i>Interactive v Giant Software</i> exercise</p>	<p>Read Folberg, pp. 137 - 140</p> <p>Read CEB, Part V</p>

Class 15 Tues 3/3	Negotiation Process -Bargaining  Moving toward closure	Discussion  Negotiate <i>Interactive v Giant Software</i> exercise  Debrief	Read Folberg, pp. 143 - 159  Prepare to negotiate <i>Interactive v Giant Software</i> exercise
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Class 16 Thur 3/5	Negotiation Process - Bargaining - The End  Dealing with impasse  Drafting the settlement agreement	Discussion  Video - <i>Moving Targets</i> (Reneging role) play  Drafting settlement agreements: - Deal points - Representations and warranties - “Boilerplate” provisions	Read Folberg, pp. 171 - 191  Read CEB, Part VI  Read Folberg, pp. 191 - 200
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SPRING RECESS  
NO CLASS, TUES 3/10 & THUR 3/12

<p>Class 17 Tues 3/17</p>	<p>Hard Bargaining</p> <ul style="list-style-type: none"> <li>- deliberate deception</li> <li>- lack's authority</li> <li>- Intimidates</li> <li>- Annoys or frustrates</li> <li>- personal attacks</li> <li>- chisels &amp; renegs</li> </ul> <p>Introduction to negotiation in criminal cases</p>	<p>Discussion</p> <p>Guest speakers: Bonnie Dumanis, District Attorney Thomas Warwick, Esq., criminal defense lawyer</p> <ul style="list-style-type: none"> <li>- Ripeness/discovery</li> <li>- Fact/law investigation</li> <li>- Client relations <ul style="list-style-type: none"> <li>= don't oversell</li> <li>= communications</li> </ul> </li> <li>- Litigation alternatives; \$ tension between client and attorney</li> <li>- Relationship with counsel</li> <li>- Distributive bargaining techniques</li> <li>- Integrative bargaining techniques</li> <li>- Dealing with hardball/welching</li> </ul> <p>Pass out roles in <i>Commonwealth v McGorty</i></p>	<p>Read Getting to Yes, ch. 6 &amp; 7</p> <p>Read CEB, §§ 3.193 - 3.154</p> <p>Read Folberg, pp. 53 - 61</p>
<p>Class 18 Thur 3/19</p>	<p>Criminal case negotiation</p> <ul style="list-style-type: none"> <li>- principal-agent tension</li> <li>- relationship building</li> <li>- value creation</li> </ul>	<p><i>Commonwealth v Mc Gorty</i></p> <ul style="list-style-type: none"> <li>- Client interviews</li> <li>- Negotiate the case</li> </ul> <p>Debrief</p>	<p>Prepare for roles in <i>Commonwealth v Mc Gorty</i></p>

<p>Class 19 Tues 3/24</p>	<p>Commercial dispute negotiation - Distributive - Integrative</p>	<p>Guest speakers: Donald A. English, Esq. and Alan Brubaker, Esq.</p> <ul style="list-style-type: none"> <li>- Ripeness/discovery</li> <li>- Fact/law investigation</li> <li>- Client relations <ul style="list-style-type: none"> <li>= don't oversell</li> <li>= communications</li> </ul> </li> <li>- Litigation alternatives; \$ tension between client and attorney</li> <li>- Consider mediation</li> <li>- Relationship with counsel</li> <li>- Distributive bargaining techniques</li> <li>- Integrative bargaining techniques</li> <li>- Dealing with hardball/welching</li> </ul> <p>Video - <i>The Stanford Video Guide to Negotiation (The Sluggers Come Home)</i></p> <p>Distribute <i>Trask Divorce</i> roles</p>	<p><b>Reminder - Journal due by 4:00 p.m., tomorrow.</b></p>
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<p>Class 20 Thur 3/26</p>	<p>Divorce settlement negotiation</p>	<p>Guest speaker: Hon. Ned Huntington, San Diego Superior Court Judge (Ret.)</p> <ul style="list-style-type: none"> <li>- Dealing with hardball</li> <li>- Handling emotions</li> <li>- Communication with and between clients;</li> <li>- Litigation alternatives; \$ tension between client and attorney</li> <li>- Custody; property division; support; tax issues</li> <li>- Mediation in family law</li> </ul> <p>Negotiate <i>Trask Divorce</i></p> <p>Distribute roles for the <i>Carter Estate Problem</i></p>	<p>Prepare to negotiate the <i>Trask Divorce</i></p>
<p>Class 21 Tues 3/31</p>	<p>Probate case negotiation</p>	<p>Guest speaker: Timothy G. Riley, Esq.</p> <ul style="list-style-type: none"> <li>- Dealing with hardball</li> <li>- Handling emotions</li> <li>- Communication with and between clients;</li> <li>- Litigation alternatives; \$ tension between client and attorney</li> <li>- trust/probate administration</li> <li>- estate &amp; income tax issues</li> </ul> <p>Negotiate <i>Carter Estate Problem</i></p> <p>Distribute <i>Costless Warehouse parts</i></p>	<p>Prepare to negotiate the <i>Carter Estate Problem</i></p>

Class 22 Thur 4/2	Gender, culture and race	<p>Guest speaker: Gregg Relyea, Esq.</p> <p><i>Costless Warehouse</i></p> <ul style="list-style-type: none"> <li>- Client interview (30 minutes)</li> <li>- Negotiate (1 hour)</li> </ul> <p>Hand out study guide for <i>Price Negotiations</i></p>	<p>Read Folberg, ch. 9</p> <p>Prepare for client interview and negotiation in <i>Costless Warehouse</i></p>
Class 23 Tues 4/7	Price Negotiations	<p>Video - <i>Price Negotiations</i></p> <p>Debrief</p>	<p>Read study guide for <i>Price Negotiations</i></p>
Class 24 Thur 4/9	Mediation	<p>Discussion</p> <ul style="list-style-type: none"> <li>- Court imposed (why?)</li> <li>- Alternatives <ul style="list-style-type: none"> <li>= Early neutral evaluation</li> <li>= Judicial settlement conference</li> <li>= mediation</li> </ul> </li> </ul> <p>Guest speaker - Hon. Howard Weiner</p> <p>JAMS Video Skills of a Mediator</p>	<p>Read Folberg, ch. 12 &amp; 13</p>
Class 25 Tues 4/14	<p>The 6 principles of persuasion</p> <ul style="list-style-type: none"> <li>- Reciprocation</li> <li>- Scarcity</li> <li>- Authority</li> <li>- Consistency</li> <li>- Consensus</li> <li>- Liking</li> </ul>	<p>Video: <i>Principles of Ethical Influence</i>, by Dr. Robert Cialdini</p> <p>Debrief</p> <p>Distribute <i>The Law of Mediation &amp; Negotiation - Statutes &amp; Cases</i></p>	<p>Handout</p>

<p>Class 26 Thur 4/16</p>	<p>The law of negotiation</p>	<p>Discussion</p> <ul style="list-style-type: none"> <li>- Confidentiality</li> <li>- Enforceability</li> <li>- Fee Shifting</li> <li>- K attorney fee clause made reciprocal</li> <li>- Sliding scale recovery agreements</li> <li>- General release; waiver</li> <li>- Setting aside settlement agreements for fraud, misrepresentation, duress</li> <li>- Attorney malpractice</li> <li>- Settlements requiring court approval</li> </ul> <p>Distribute roles for <i>Cubit Properties</i> and <i>The Ditch</i></p>	<p>Read Folberg, ch. 11</p> <p>Read handout - <i>The Law of Mediation &amp; Negotiation - Statutes &amp; Cases</i></p> <p>Research and prepare to discuss whether the law in <i>Home Ins. Co. v Zurich Ins. Co.</i> (i.e., finality trumps fraud) is the same in other jurisdictions.</p> <p>Is there a way (in California) to avoid the result in <i>Home Ins. Co. v Zurich Ins. Co.</i>?</p>
<p>Class 27 Tues 4/21</p>	<p>Ethical issues in negotiation</p>	<p>Discussion</p> <p>Negotiate <i>Cubit Properties</i></p> <p>Negotiate <i>The Ditch</i></p> <p>Distribute Ch 2 &amp; 18, Mofitt &amp; Bordone, <i>The Handbook of Dispute Resolution</i></p>	<p>Read Folberg, ch. 10</p> <p>ABA Model Rules of Professional Conduct 4.1</p> <p>California Guidelines of Civility and Professionalism</p> <p><b>Reminder - Annotated Journal due by 4:00 p.m., Thursday, 4/23</b></p>
<p>Class 28 Thur 4/23</p>	<p>Review</p>	<p>Discussion</p> <p>Video - Patrick Cleary, <i>Skills, Techniques and Strategies for Effective Negotiations</i></p> <p>Seinfeld Clip</p>	<p>Read handout:, Ch. 2 &amp; 18, Mofitt &amp; Bordone, <i>The Handbook of Dispute Resolution</i></p>