

Reading Group: Negotiation in Commercial Litigation
LAWS 899

Professor Justin W. Dixon

Class Days / Hours: Jan. 5-9, 9:00 AM – 12:00 PM

Room: 286

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Course Summary

While many law students pursue transactional, criminal, family, or personal injury practices, a smaller group will specialize in complex commercial litigation—representing sophisticated clients in high-stakes civil disputes. Success in this practice area requires strong negotiation skills. However, “negotiation” is not a required law school course. As a result, many students enter law practice and must learn these essential skills through observation and trial-and-error.

This course will focus on core, practical negotiation concepts that students can not only apply within the context of commercial litigation disputes, but everyday life. The course will center on two negotiation books—one which is taught in almost every negotiation course in the country and the other that adds a layer of practical considerations when approaching a negotiation. Besides these foundational readings, students will be immersed in two “case studies,” which are real-world civil disputes involving parties spanning from individuals to global financial institutions. These case studies will be used to facilitate class discussion and students will be expected to apply the negotiation theories and “best practices” outlined in the foundational readings in said discussions. Lastly, the course will culminate in a mediation simulation, where students will be assigned roles of client and counsel for one case study. This mediation simulation, and the preparation that will go into the simulation, will allow students to put negotiation theory into practice.

Course Expectations

This course is graded on a **Pass/Fail** basis. To receive a passing grade, students must:

- Complete all assigned readings and written work.
- Be actively engaged in class discussions.
- Participate fully in all negotiation and simulation exercises.

Course Materials

Required Texts:

- *Getting to Yes: Negotiating Agreement Without Giving In*
- *Bargaining for Advantage: Negotiation Strategies for Reasonable People*

Case Studies:

- *BDO USA, P.C. v. Freeman et al.*
- *Capital Bank, N.A. v. First National Bank et al.*

Course Assignments and Readings

I. Book Reports (35% of Grade)

Getting to Yes must be read before the first class and will be discussed throughout the first day. Students will read *Bargaining for Advantage* before the second class. For both required readings, students must submit 3-4 page (12 Times New Roman, double spaced) book reports. Each report should include (a) a clear, concise overview of the book, (b) a description of the book's central themes and concepts, and (c) a discussion of how applying the book's concepts could have helped you during a prior negotiation.

Both reports must be submitted before the last day of class on Friday, January 9, and the reports must be prepared in writing and submitted in hard copy. Although the book reports are technically not "due" until the last day of class, students may elect to turn in the required reports at any time during the class. In any event, students will still be expected to have read both books before the days marked for book discussion.

II. Written Memos (35% of Grade)

Students will be provided two "case studies" that will be discussed throughout the course. Students will be expected to complete written memos based on hypothetical situations presented to them flowing from the facts of these matters. The two written memos will be a settlement authority memo to the student's respective client and a mediation statement that will be used during the mediation simulation on Friday, January 9.

III. Class Exercises and Class Participation (30% of Grade)

As with all negotiation theory, you must actually negotiate to gain valuable insight into the negotiation process and learn how to handle the challenges presented when negotiating high stress, high dollar commercial disputes.

The main class exercise will be a simulated mediation that will occur on Friday, January 9. Students will be split into groups and assigned roles of either client representative or lawyers representing the parties in *BDO USA, P.C. v. Freeman et al.*

Besides this main simulation exercise, students will be expected to engage on the subjects discussed during class and provide meaningful, constructive dialogue on the subject matter. Participation, thoughtfulness, and overall engagement is key.

IV. Class Readings and Assignments

| Day | Date | In Class | Assignment (To Be Completed Before Class) |
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| 1 | 1/05 | <p>Course Introduction & Foundations of “Principled Negotiation”</p> <ul style="list-style-type: none"> • Course Overview and Introduction • Role of Negotiation in Commercial Litigation • Tenets of “Principled Negotiation” • <u>Class Discussion</u> - <i>Getting to Yes</i> • <u>Negotiation Exercise</u> – Salary Negotiation • <u>Case Study</u> – Overview of <i>BDO USA, P.C. v. Freeman et al.</i> | <p>Read-</p> <p><i>Getting To Yes</i>, pp. 1-147</p> <p><i>BDO USA, P.C. v. Freeman et al.</i> Complaint</p> |
| 2 | 1/06 | <p>Client Considerations (Institutional v. Individual), Negotiation Fundamentals, Case Assessment, and Strategy Formation</p> <ul style="list-style-type: none"> • Negotiation Fundamentals (Risk Assessment, Preparation, Leverage) • Setting the Stage for Future Negotiations in Complex Commercial Disputes – Dealing with Your Client and Opposing Counsel • <u>Class Discussion</u> - <i>Bargaining for Advantage</i> • <u>Case Study</u> – <i>Capital Bank, N.A. v. First National Bank et al.</i> | <p>Read-</p> <p><i>Bargaining for Advantage</i>, pp. 1-159</p> <p><i>Capital Bank, N.A. v. First National Bank et al.</i> Complaint</p> |
| 3 | 1/07 | <p>Negotiating Discovery Obligations and Minimizing Disputes</p> <ul style="list-style-type: none"> • The role of discovery in complex commercial litigation. | <p>Read-</p> <p>FRCP 26, 33, 34, 36</p> |

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| | | <ul style="list-style-type: none"> • Custodians, E-Discovery, Document Hosting. • Lessons Learned – Applying <i>Getting To Yes & Bargaining for Advantage</i> in the Context of a Discovery Dispute • Negotiation Tactics in Direct Party Discovery v. Third Party / Non-Party Discovery • <u>Class Discussion</u> – Discovery Case Study Memos | <p>Write-</p> <p>Discovery Case Study Memo</p> <p>Minimum 4-page memo summarizing four federal court decisions related to a discovery dispute involving FRCP 33, 34, 36, or 45. The report will provide a concise overview of the “facts,” the parties discovery dispute, the court’s ultimate ruling, and an assessment of whether you believe the court decided the case correctly.</p> |
| 4 | 1/08 | <p>Introduction to Mediation</p> <ul style="list-style-type: none"> • What is Mediation? • When to Mediate? And with Who? • Leverage and Mediation • Mediation Tactics – Applying <i>Getting to Yes</i> and <i>Bargaining for Advantage</i> Principles to the Mediation Process • <u>Class Discussion</u> – Settlement Authority Memos | <p>Read-</p> <p>Mediation Handout, pp. 337 - 405</p> <p>Write-</p> <p>Settlement Authority Request in <i>Capital Bank, N.A. v. First National Bank et al.</i></p> <p>Complete the distributed settlement authority template. When completing the template, pay special attention to the ultimate settlement authority requested, the negotiation strategy expected to employ in negotiations with opposing counsel, when you believe would be the proper time to engage in negotiations, and general bid / ask and opening offer strategy.</p> |

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| 5 | 1/09 | <p>Mediation Cont.</p> <ul style="list-style-type: none"> • <u>Negotiation Exercise</u> – Mediation in <i>BDO USA, P.C. v. Freeman et al.</i> • Reflect on Course, Further Resources | <p>Read-</p> <p>Re-read <i>BDO USA, P.C. v. Freeman et al.</i> Complaint</p> <p>Write-</p> <p>Mediation Statement in <i>BDO USA, P.C. v. Freeman et al.</i></p> <p>See mediation statement handout</p> |
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