

Workshop 5B

Teaching Representation, Strategy and Problem-Solving in an Interactive Class

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The materials attached illustrate some basics for the various sections of the Strategic Representation and Communication class as it was taught in the Spring 2010 semester.

1. The practice competencies taught during the semester
2. The Representation/Problem-solving Model used to organize the process of representation of a client.
3. Class Problem descriptions and representative Class Schedules.
4. Sample rubrics used for evaluation of the students' interview, counseling and negotiation performances.

PRACTICE COMPETENCIES

FOR “STRATEGIC REPRESENTATION AND COMMUNICATION” CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW

These specific tasks are taught in the context that the practice of law is an intentional and strategic process at all stages to solve a client’s problem. Students are encouraged to not only learn the tasks but also to self-evaluate, use intuition and develop good judgment from their experience.

1. Conduct an organized, flexible, and efficient initial interview with a new client about an unfamiliar legal problem.
2. Understand and be able to explain and communicate the basics of legal representation, including client goals and interests, fee arrangements and scope of representation.
3. Identify potentially relevant legal issues arising out of available facts.
4. Perform legal research to ascertain the applicable legal authorities and efficiently communicate how they apply to the legal issues presented by the facts.
5. Understand strategic thinking and identify possible solution options for their client.
6. Respect and value the client’s input and collaboration in exploring options to resolve the situation.
7. Evaluate solution options using criteria that are important to the client (cost, time, risk, result).
8. Understand the basic forms of dispute resolution in a litigation context (negotiation, trial, ADR) so as to explain to their client the means available to resolve a problem.
9. Understand how to prepare comprehensively to counsel the client.
10. Communicate to the client in clear and understandable terms the merits and risks of the current legal situation and of the various solutions or positions being considered.
11. Demonstrate honesty and integrity in delivering the above assessment to the client, including difficult or unfavorable facts.
12. Demonstrate a balance between legal objectivity and empathy with the client, acting appropriately as the client’s legal advisor while respecting the client’s role as ultimate decision-maker.
13. Seek from, and confirm with, the client clear and understandable authority to proceed to resolution and demonstrate the ability to work within the authority granted by the client.
14. Learn to develop a client story or narrative as a persuasive technique in advocacy.
15. Present the client’s most favorable factual and legal position, in writing, as part of the negotiation process.
16. Understand, prepare and appropriately use several types of persuasive approaches in a negotiation.
17. Anticipate the opponent’s positions and approaches and plan responses, including appropriate use of concessions in a negotiation.
18. Understand and abide by the ethical rules that govern a legal professional in a negotiation.
19. Be able to objectively evaluate their interview, counseling and negotiation performances and identify strategies for future improvement.

Lawyer as Investigator

LEARN

- Facts
- Goals & Interests
- Background, Market
- Other Perspectives

- *Interview*

Lawyer as Advocate

APPLY

- Plan for process, adapt to form
- Consider Style
- Clear goals, flexible approach
- Story & Theory

- *Advocate, negotiate*

Lawyer as Theorist

ANALYZE

- Legal context & Options
- Evaluate facts with law
- Frames & Causes

- *Research*

Lawyer as Strategist and Advisor

EVALUATE

- Predict Result & Cost
- Evaluate Risk
- Rank & Sequence Alternatives
- Get authority

- *Counsel*

CREATE

- Solution Options
- Substance & Form
- What to do?
- How to do it?

- *Collaborate*

Strategic Representation and Communication
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Civil Litigation Section Spring 2010
Class Problem and Schedule

Beginning in 2005, Prophecy Systems, a corporate computer solutions company, began developing a new web-based product for individual consumers named MyHome. After a limited demo release, development proceeded slowly and in 2008, Prophecy cut back on staffing for the project and the project manager resigned. In 2010 Prophecy Systems learned that Bravo!, an internet search company who had hired their former project manager was in initial testing of a remarkably similar program called ParkingSpot. In the interview, the clients are the Prophecy vice president who believes that the MyHome program has been “stolen” and the Bravo vice president who needs advice about a cease and desist letter from Prophecy about the ParkingSpot program. Legal issues presented are personal jurisdiction for internet-based business disputes, injunctive relief, trade secret or copyright violations and enforceability of restrictive covenants in employment agreements. For one legal issue, students must evaluate not only whether their facts support legal claims or defenses but also whether success on a legal claim will fulfill their clients’ goals and interests.

In the second part of the problem, Prophecy has filed a Complaint in a state court “business docket” and Bravo! has filed a Motion to Dismiss for lack of personal jurisdiction. The parties have completed their own investigations but have not commenced discovery. The results of the investigations provided to the students are not completely consistent with the initial facts provided by their clients and reveal both strengths and weaknesses of their positions. The business docket judge orders an early settlement conference before ruling on motions or permitting full discovery. In preparation for counseling, students collaborate to assess the entire legal situation and prepare to seek authority to negotiate a resolution. Options to resolve the matter include an outright purchase, licensing or a joint venture, all of which must be considered with their client in contrast to a predicted result at trial.

For negotiation, based on the authority given by their client, they must plan how to present and persuade their opponents to consider their favored option and to bargain for the best result for their client. Students must also plan how to protect or volunteer information that has not yet been shared in discovery. This dispute can be resolved in several different ways and within a significant overlap of authority between opponents. After reaching a resolution, students are provided with each others’ secrets and limits of authority to inform their evaluation of their own negotiation results.

Week 1	<p>CLASS: Introduction/Lawyer's role</p> <ul style="list-style-type: none"> • Lawyering intelligences • Problem-solving Model • Preliminaries – conflict, competence, compensation • Attorney fees, fee letter worksheet • Interview assignment: the call from the client, the assignment to an associate: what is expected? • Where does an interview fit in the course of litigation? 	<p>CLASS: LEARN: Gathering facts/Interviewing clients</p> <ul style="list-style-type: none"> • Collaboration to anticipate subjects/issues for the interview • How to prepare for an interview on an unfamiliar topic? • Evidentiary quality of information and efficiency • Exercise: questioning for theory development – open, closed, directed • Client Interests vs. goals and objectives
Week 2-4	<p>Individual Client Interviews followed by fee letter including client goals, interests and scope of representation and written self-evaluation of interview after video review.</p>	
Week 5	<p>CLASS: ANALYZE: Problem framing/legal analysis</p> <ul style="list-style-type: none"> • How to identify legal issues for research? • Collaboration to identify legal issues for memo based on interview facts. • Identifying gaps, missing facts: how to manage for legal research. • How framing affects problem analysis. 	
Week 6	<p>OFF Legal Issue Memorandum due, then information about the further progress of the class problem distributed.</p>	
Week 7	<p>CLASS: CREATE: Situation review/Creating options/thinking strategically</p> <ul style="list-style-type: none"> • Collaboration to reach consensus on legal assessment: share legal memos & apply to new facts. • Creative techniques even lawyers can use to develop resolution options • Collaboration on solution options for the client in light of interests and goals 	<p>CLASS: EVALUATE: Assessing options /Determining strategy /Counseling role</p> <ul style="list-style-type: none"> • Evaluation criteria to apply • Explaining and accounting for risk and uncertainty. • Collaboration on counseling challenges – what is the role of an advisor? How to get authority to act on behalf of the client?
Weeks 8-10	<p>Individual client counseling sessions followed by letter to client (confirming assessment and settlement authority) and self-evaluation after video review.</p>	
Week 11	<p>CLASS: ADVOCATE: Persuasion Narratives/Story & theory of the case</p> <ul style="list-style-type: none"> • Persuasive techniques beyond argument • Power of story/framing techniques • Collaboration on story and theory for the client 	<p>CLASS: ADVOCATE: Styles/Forms of dispute resolution</p> <ul style="list-style-type: none"> • Personal conflict resolution style • Common forms of conflict resolution in civil litigation • Stages of negotiation and essentials to plan • Information sharing and protecting in negotiation for the client
Week 12	<p>CLASS: ADVOCATE: Negotiation planning</p> <ul style="list-style-type: none"> • Collaboration on approaches based on rights, interests, power • Planning and presenting the opening position with a target and limits • Staging the exchange of positions including concessions 	
Week 13	<p>Negotiation sessions. Students state an opening position in a demand letter and create a negotiation plan including parameters and predicted staging.</p>	

TRANSACTION PROBLEM DESCRIPTION
Strategic Representation and Communication
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Summary This problem involves the proposed sale of Vulcan’s Anvil, LLC (“Company”) owned by two people (“A” and “B”) who currently have very different (even conflicting) life and career needs and objectives. Counsel for each of the members of Company will all have to assess the “what is” in this problem and creatively guide their clients’ initial views of the deal in order to reach their respective client’s priority objective(s) through simulated interviews and counseling sessions (with actors) to meet those objectives in a Letter of Intent (“LOI”) to sell Company. They will then negotiate with each other on behalf of their respective clients to reach agreement on the principal terms of the LOI to be offered by Company. Company manufactures, installs and services a revolutionary protective insulator for metals industry melt furnaces and smelters. Company’s patented “super-refractory”, Vulcrum, is Company’s sole product and has just been proven in application.

Client A A owns 90% of Company, controls the sale decision, and wants to “cash in” before he “cashes in” once and for all. A manages everything at Company except for research and development, manufacturing, and installation and servicing. While the other owner, B, was out of the country, A verbally agreed in principal to sell Company. A’s recent health scare and family history and a serendipitous meeting with the Division President of P caused A to act without consulting B. After that meeting, the Division President sent a draft LOI, offering a lower price than discussed, and other unfavorable liability and payment terms. A believes the original price would be a windfall for him and B, and that even the offered price and terms represent a good start. A is very concerned about the financial legacy he will leave to his alma mater, new spouse, and estranged children, and believes his time to secure it is very limited.

Client B B, a brilliant materials engineer who left a good job when he met A and agreed to join the start-up, owns 10% of Company and needs the job and the future potential of Company to support his young family, including a daughter with a severe genetic anomaly. He has no management, operations, finance, marketing or administrative skill to go with his technical genius. B is unhappy that A went ahead on this without him (while B took his daughter to a gene therapy specialist in Germany) and believes that A is giving away Company on the cheap. His 10% of the proposed price is not nearly enough to permit him to meet his current and future economic needs. Also, under the LLC’s Operating Agreement (“OA”), B would have been able to purchase up to an additional 20% of Company (at a low multiple of current earnings) in only a few more months (though he does not have the money to do so at this time). With that additional 20% he could block (control) the sale. The sale of Company would occur before that time. Unfortunately, under the OA, B’s rights to purchase are not accelerated by a sale of Company. A and B are not presently communicating outside of day-to-day business.

Purchaser P’s only role in the problem is as an “outside” party dealing separately with both A and B (communicated in the problem through memos/letters) and is not represented by students. P has concluded that it “must” have Company—but that the acquisition must happen promptly or not at all. This time urgency is an important factor in the dynamic between A and B. Because of competitive realities and industry synergies, the value of Company to P is far in excess of its value to other capital sources. P will not buy Company at anywhere near the stated price without keeping B on for at least one year and needs assurance that B cannot compete against P for an appropriate period thereafter. P needs to control/own all of B’s inventions and patents.

Some Research/Negotiation Issues

- The timing of the sale (before A’s options mature) and B’s unilateral actions raise issues of fair dealing, fiduciary duties and, ultimately, allocation between A and B of any sale proceeds
- Company owns patents on Vulcrum and the process to manufacture it, but the OA and history are ambiguous about whether Company or B owns the patent on the specialized equipment necessary to apply the material. B developed that equipment while employed by Company for use exclusively by Company, so Company probably has *unassignable* shop rights to the invention.
- The OA also has a non-competition provision that, if enforceable, would give P the kind of post-employment protection it wants with B, but does not give them B as an employee or inventor. B does not want to work for P. Specifically, he will not sign an employment agreement or non-compete, unless it is worth the amount of money he feels he should have gotten for sale of Company or, at least, what he needs for his family and future.
- P would prefer to purchase assets only—per standard policy—but would buy A’s interests only—at a very much lower price. This would at least give P control over Company and B’s non-compete and patents/shop rights. This factor adds an important dynamic to the negotiations between A and B.

**STRATEGIC REPRESENTATION AND COMMUNICATION
TRANSACTION PROBLEM (BABBITT)
SEMESTER CLASS PLAN**

Session	Topics	Interactions	Learning
1	Course overview and sign-up for all sessions; interview goals—learning facts, <i>interests</i> and objectives	Introductions; discussion of expectations and objectives for the course; student concerns	Understanding the course, its objectives and deliverables, and the students' expectations and concerns; the “intentional” practice of law; appreciating the importance of serving the client’s <i>interests</i> and objectives.
2	Interview technique; letter to confirm retention and other matters; fee and retention ethical considerations	Interview demo and comments; interview experiences	Appreciating: (1) the goals and structure of the interview; (2) the client’s perspective; (3) the “funnel” approach to questions; and (4) open-minded curiosity. Understanding the practical and ethical need for, and contents of, a <i>retention letter</i> .
3	Problem related questions; planning the interview; written interview plan and self-evaluation memo	Collaboration to <i>synthesize/plan interview topics</i> (also possible research questions)	Coherent approach to planning the interview; clarity about topics to be explored with client; appreciating the value of collaboration; understanding the <i>interview plan and self-evaluation</i> .
4-9	Interview sessions	Client	<i>Interviewing experience</i>
10	Research to be done; “client-centered” practice; counseling approach	Collaboration on <i>topics to be researched</i> ; shared thoughts about preferred relationship with client	Clarity about the topics to be researched and about choices one makes regarding the nature of the attorney- client relationship.
11	Creating solutions; transactional risk allocation tools; research memorandum	Collaboration on transactional risk allocation in this case; discussion of research memorandum	Appreciating blocks to creative solutions and creating solutions to meet interests; understanding the potential tools to allocate transactional risk; understanding the assigned memorandum.
12-13	No class		<i>Memo research and preparation</i>
14	Research outcomes and client/transaction impact; evaluating solutions; contacting opposing counsel	Collaboration on research outcomes; collaboration on counsel contact	Clarity on research outcomes; appreciating the connection between counseling and negotiation goals; strategies for <i>initial contact with opposing counsel</i> .
15	Counseling approach; planning counseling; written counseling plan and self-evaluation; confirming authority with the client	Counseling demo and comments; collaboration to plan counseling; discussion of counseling written assignments	Appreciating goals and structure of the counseling session; understanding the <i>counseling plan and self-evaluation</i> ; appreciating both practical and ethical need for, and contents of, <i>client authority confirmation letter</i> .
16-20	Counseling sessions	Client	<i>Counseling experience</i>
21	Negotiation elements, styles and tactics; written negotiation plan and assessment; ADR	Negotiation-communication experiences; collaboration on negotiation planning	Increased understanding of dynamics of negotiation, including “difficult” negotiators; understanding the <i>negotiation plan and assessment</i> and some alternative disputes resolution methods.
22	Negotiating strategy, planning and evaluation	Negotiation experience; collaboration to plan negotiation	Increased understanding of and comfort with the dynamics of negotiation.
23-26	Negotiation sessions	Opposing counsel	<i>Negotiating experience</i>

Strategic Representation and Communication
Case Western Reserve University School of Law
David M. Benjamin
Criminal Litigation Section
Spring 2010
Class Problem

On January 4, 2010, Mark Everright successfully concluded a week long jury trial of the eminent domain claim of his client, Pat Klyde. Mrs. Klyde, who owns the oldest home in Casual County's Village of Hayseedville built by a member of the Village-founding Hayseed family, had a portion of her back yard taken by the Village for expansion of its sewer plant. Mrs. Klyde refused the Village purchase offer of Twenty-Five Thousand Dollars (\$25,000.00) for her property and pursued the matter to jury trial, where she was awarded One Hundred Twenty-Five Thousand Dollars (\$125,000.00). Ecstatic at his client's result, Everright, Klyde's 57 year old attorney with a spotless criminal record, retreated to the Barrister's Inn across from the Casual County courthouse for lunch. Everright spent the balance of the day at the Barrister's Inn, a regular meeting place for him and many of his fellow attorneys after most work days.

On this day, Everright, a sole practitioner his entire career, a career largely devoted to successfully trying a wide variety of cases on his clients' behalf, spent the afternoon drinking and regaling all who would listen about his current client's eminent domain trial success. As the business day ended, Everright was joined by several of his friends, and the pandemonium continued. The group stayed for dinner, with Everright washing down his Steak Poivre with a bottle of Merlot, topping that off with some after dinner drinks. Finally, after his friends had departed, Everright left the Barrister's Inn, slid behind the wheel of his 1996 Silver Mercedes C280 convertible, at about 9:15 p. m. heading North toward his Borealis home, a half hour away.

He reached the intersection of North Prospect and State Rte. 15, intending to turn left on Rte. 15, when he encountered a red light. Once the light turned green, he turned left onto State Rte. 15, behind a slow moving tractor trailer. In a hurry to get home, he went left of center, attempting to get around the truck, and hit the accelerator to get around the truck quickly. As he looked up, he saw a Ford F-150 truck, driven by Owen D. Mend, heading straight at him. While he slammed on the brakes, he hit the truck head on, hitting his head against the windshield, knocking him unconscious. He was transported to the nearby Casual County Hospital, and admitted, regaining consciousness at approximately 1:45 a. m., to learn, among other things, that his blood had been withdrawn at approximately 1:00 am. Mend, the driver of the other vehicle, was transported to the same hospital, where he was treated and released.

As a result of these circumstances, Everright was charged with the following crimes: Aggravated Vehicular Assault (F-1), Vehicular Assault (F-3), OVI (M-1) Reckless Operation (Minor Misdemeanor) and Left of Center (Minor Misdemeanor). He has requested that your firm represent him in these matters.

I have omitted my class schedule as it is substantially the same as my colleagues.

**STRATEGIC REPRESENTATION & COMMUNICATION
 SPRING 2010 – PROFESSOR JEAN MCQUILLAN
 INTERVIEW EVALUATION**

Student _____ Date: _____ Client: _____

	Comments
I. PREPARATION/ORGANIZATION	
Your interview plan considered the information available about the client and anticipated and prepared for likely areas of factual and legal inquiry.	
You were well organized but flexible in performance – you used your interview plan as a guide but were able to deal effectively with any unexpected information	
If appropriate, you obtained and/or used written material that was relevant to your client's situation	
Before concluding you explained what your client should expect to happen next and covered any follow-up contact	
II. PROFESSIONAL ROLE	
You demonstrated respect, interest and avoided inappropriate judgment of your client or the situation	
You responded appropriately to any questions or concerns from your client	
You clearly explained the fee arrangements for this representation	
III. ASCERTAINING FACTS	
You used open-ended or non-directive questions to learn about the situation from your client.	
You listened, avoided assumptions and followed-up to understand, to fill in details and/or to confirm important issues or facts	
You considered the evidentiary quality of information from your client and/or sought other sources to fill gaps.	
IV. SEEKING CAUSES, INTERESTS & GOALS	
You sought to understand why the situation occurred and to gain some understanding about your client's background, demeanor or context	
You sought to identify and understand your client's goals <u>and</u> interests	
You sought to identify and understand any non-legal concerns (such as finances, reputation, relationships, moral values, business values etc.)	
SCORE (15 points possible)	

COMMENTS: _____

**STRATEGIC REPRESENTATION & COMMUNICATION
 SPRING 2010 – PROFESSOR JEAN MCQUILLAN
 COUNSELING EVALUATION**

Student: _____ Client: _____ Date: _____

I. PREPARATION/ORGANIZATION (5 points)	
Your counseling plan showed mastery of the information available, identified areas of discussion and how to present sensitive, uncertain or controversial topics.	
You were well organized but flexible in performance – you used your plan as a guide but were responsive to your client’s reactions and needs including whether any written material or visual aids were helpful to your client.	
Before concluding, you explained what your client should expect to happen next and covered any follow-up contact.	
II. ASSESSMENT OF SITUATION (5 points)	
You reviewed the facts known, goals and interests with your client, <i>as appropriate</i> , for clarification, update or confirmation.	
You assessed the merits and risks of your legal position in clear, simple and understandable terms adapted to your client’s level of sophistication and understanding <i>as well as</i> your client’s interest and need to know.	
You faced any difficult and unfavorable facts with honesty and integrity. You demonstrated a balance between empathy and objectivity.	
III. CREATION AND EVALUATION OF OPTIONS (5 pts)	
You collaborated about options: asked your client for input, shared your ideas as appropriate and created a list of workable options.	
You discussed how the workable/viable options may satisfy the interests and goals of your client and conveyed the relevant, important consequences of the workable options – e.g. cost, time, risk, results, effects.	
You addressed, as necessary, any risk and uncertainty of the workable options in ways that were helpful to your client’s decisions and adapted to your client’s tolerance for risk.	
IV. OBTAINING AUTHORITY AND DECISIONMAKING (5 points)	
You explained your client’s role in making decisions and how negotiation works. You explained your obligation and commitment to act in your client’s best interest in reaching a solution to their problem.	
When you provided your advice about any decision you clearly described the basis for that advice and how it related to your client’s best interests. You balanced your opinion with respect for your client’s ultimate decision.	
You successfully obtained clear and understandable authority from your client to negotiate on their behalf whether about money or about other issues that may be part of a negotiated agreement.	
SCORE	

COMMENTS: _____

**STRATEGIC REPRESENTATION & COMMUNICATION
SPRING 2010 PROFESSOR JEAN MCQUILLAN
NEGOTIATION EVALUATION**

Student's Name: _____ Client: _____ Date: _____

Negotiation Performance	Comments
You effectively asked questions and gathered information to inform your negotiation strategy. You protected information about your client and their situation when appropriate. (2)	
You adopted an overall approach (style) and adjusted it as necessary in response to your opponent's approach and/or to any difficult situations. (2)	
You used more than one type of persuasive approach. You avoided unjustified positions and effectively offered explanations or reasons for concessions or changes of position you made. (3)	
You actively sought to meet and exceed your client's expectations while acting within the limits of the authority given by your client. (2)	
SCORE (9 points)	

COMMENTS:

Strategic Representation and Communication

Competencies for the "Lawyer as Advocate" Phase

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STRATEGIC REPRESENTATION AND COMMUNICATION

- Planning the end from the beginning – the strategy of "reverse engineering"
- *Getting to Yes*, Fisher, Ury and Patton
 - Handout – Ultimatum Game
 - Like "Silent Negotiation," it illustrates the impact that the inability to communicate (negotiate) can have on the outcome

STRATEGIC REPRESENTATION AND COMMUNICATION

- Demonstrate the ability to work within the authority granted by the client.
 - Collaborative practice
 - Opposing counsel contact (transaction problem)
 - The "walk North" problem
 - Negotiation experience

**STRATEGIC REPRESENTATION
AND COMMUNICATION**

- ▣ Learn to develop a client story or narrative as a persuasive technique in advocacy.
 - Collaboration/practice within the problem
 - Class exercise – The “Hollywood Setup”

**STRATEGIC REPRESENTATION
AND COMMUNICATION**

- ▣ Class exercise – The “Hollywood Setup”
 - Who are the defendant and plaintiff?
 - What is the cause of action?
 - Who is the “good guy” in this story and why?
 - Did that change for you when you learned who the plaintiff is?
 - Does that explain the need for a “hyperbolic” story for the plaintiff in this case?
 - Takeaways:
 - Be creative (even a little outrageous) to be persuasive
 - A story “based” on the facts, sets a frame and framework more powerfully than facts alone
 - A good story can even stand the “truth” on its head
 - The impact of even the best story is undercut by bad grammar

**STRATEGIC REPRESENTATION
AND COMMUNICATION**

- ▣ Present the client’s most favorable factual and legal position, in writing, as part of the negotiation process.
 - Demand letter (civil dispute problem)
 - Negotiation plan (criminal and transaction problems)

STRATEGIC REPRESENTATION AND COMMUNICATION

- ▣ Understand, prepare and appropriately use several types of persuasive approaches in a negotiation.
 - Negotiation plan and negotiation experience
 - Types (Bastress & Harbaugh, Craver)
 - Argument
 - Appeal
 - Threat
 - Promise
 - Ridicule and Humor
 - Silence
 - Patience/persistence

STRATEGIC REPRESENTATION AND COMMUNICATION

- ▣ Anticipate the opponent's positions and approaches and plan responses, including appropriate use of concessions in a negotiation.
 - Collaborative practice based on the problem
 - Negotiation experience

STRATEGIC REPRESENTATION AND COMMUNICATION

- ▣ Understand and abide by the ethical rules that govern a legal professional in a negotiation.
 - Client involvement and prerogative
 - Sharing (or not) of information
 - What is and what is not prevarication in a negotiation?

**STRATEGIC REPRESENTATION
AND COMMUNICATION**

- ▣ What is and what is not prevarication in a negotiation?
 - Class discussion, e.g.; if NOT TRUE, consider the following:
 - "My client told me five minutes before we met that he could not raise the funds to go that high." or "We can't go above that amount."
 - "We believe the Operating Agreement pages were switched in my client's copy after she signed this to include a non-compete." or "My client never discussed this, does not recall ever seeing it in the document, and, frankly, never would have signed it if she had."
 - Handout – Questions About Threats and Bluffs

**STRATEGIC REPRESENTATION
AND COMMUNICATION**

- ▣ Be able to objectively evaluate their interview, counseling and negotiation performances and identify strategies for future improvement
 - Except for the negotiation experience, these are completed after viewing their own tape and that of at least one of their colleagues
 - "Keep or change" analysis
 - Required, but ungraded (except as to effort)
 - Returned with Professor's comments

ULTIMATUM GAME

Assume that I will give you \$100 to divide with another designated person. You will be matched with that person by a random process and neither of you will ever be told the name of the other person. You are to make a written offer to divide the \$100—so much for you and so much for the offeree. If the offeree agrees to your proposal, the money will be divided in that way. If the offeree rejects your proposal, you will have to return the money to me and neither of you will get anything. The offeree will be given the same information about the rules of the game.

What offer would you make?

_____ for you

_____ for the offeree

If you were the offeree in this game, what is the lowest share of the \$100 that you would accept. That is, at what point would you say that the amount you are to receive is so low that you would refuse to deal at all and take nothing rather than take a lower share.

_____ lowest acceptable offer

23 INTRODUCTION

24 The story is a classic Hollywood set-up only a screenwriter could imagine. A young
25 businessman, with no background in accounting or law, not yet the age of 30, with a business
26 busting at the seams and blooming explosively, publicly controversial for his First Amendment
27

2 protected business; a certified public accountant from one of the country's elite schools, with the
3 east coast pedigree and recommended by one of the world's leading accounting firms; and an
4 IRS bounty program that invites accountants to find a client, retain a client, and then oversee
5 million dollar tax mistakes undisclosed to the client, then, quietly leave the company, wait about
6 a year, and report the tax mistakes, again without telling the client of the mistakes, in order to
7 split the profit with the IRS from the taxes, penalties and interest now due from the accounting
8 mistakes, while the IRS tries to place the publicly controversial young businessman in prison for
9 the purported accounting mistakes overseen by the accountant and the accountant seeks to profit
10 from. The accountant profits immensely, with \$10,000,000 his potential reward, with every
11 mistake he oversees making him as much as millions of dollars in bounty rewards; the IRS
12 profits handsomely, setting up controversial political figures for potential prosecution, while
13 reaping millions in penalties and interest they would never otherwise receive if the accountant
14 did their job correctly, only the client loses.
15

QUESTIONS ABOUT THREATS AND BLUFFS

Embezzlement case:

1. As counsel for a company victimized by an employee embezzler, would you threaten to take the case to the prosecutor unless the employee repaid the money by a certain date? Yes No

2. As counsel for the company, would you threaten to take the case to the prosecutor unless the employee repaid the money, plus the company's investigative costs, plus your fee? Yes No

3. As counsel for the company, would you say that you will intervene with your friend the prosecutor to see that he seeks the maximum penalty against the perpetrator unless he repays the money? Yes No

Real estate sale case:

1. As counsel negotiating the sale of a house for a client, would you say that you have an offer from another party to buy the house for \$100,000 if that was untrue? Yes No

2. As counsel for the seller, would you insert a "red herring" issue into the negotiation (e.g., falsely insisting that your client will not include the range, refrigerator, etc. in the deal) in order to drop that issue later for a higher price? Yes No

3. As counsel for the seller, would you say (falsely) that the buyer's counsel should "make your best offer now" because I have to get to a meeting with another buyer who is really eager to deal. Yes No

**WASHBURN UNIVERSITY SCHOOL OF LAW, INSTITUTE FOR
LAW, TEACHING AND LEARNING (ILTL)**

**TEACHING REPRESENTATION, STRATEGY AND PROBLEM-
SOLVING IN AN INTER-ACTIVE CLASS**

JEANNE M. McQUILLAN

DAVID M. BENJAMIN

MICHAEL R. BABBITT

CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW

**WASHBURN UNIVERSITY SCHOOL OF LAW,
INSTITUTE FOR LAW, TEACHING AND
LEARNING (ILTL)**

- My colleagues and I develop a situation, be it a criminal matter, a civil matter, or a transactional situation. Strategic Representation and Communication, a required course for second year students, is a course in which students gain experience in handling client matters by dealing with a simulated "real-life" situation, in which they need to interact with a "client" and handle a matter from intake to ADR resolution

WASHBURN UNIVERSITY SCHOOL OF LAW, INSTITUTE FOR LAW, TEACHING AND LEARNING (ILTL)

- Strategic Representation and Communication, a required course for second year CWRU Law students, is a course in which students gain experience in handling client matters by dealing with a simulated “real-life” situation, in which they need to interact with a “client” and handle a matter from intake to ADR resolution.
- The students are given a simulated legal matter, developed by my colleagues and I, with attendant factual information, and required to interview the “client”, review the factual information, identify the attendant legal issues and prepare a memo on them, and develop a theory about the handling and successful resolution of the matter.



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- The students are divided into two groups or "firms." They represent one of the clients to a matter. In my situation, that is either the Prosecutor or the Defendant. Actors are brought in and supplied a "script." The script sets forth both the facts we wish them to disclose as well as the "difficulties" we wish to develop for the attorney-law students.
-

**WASHBURN UNIVERSITY
SCHOOL OF LAW, INSTITUTE FOR LAW,
TEACHING AND LEARNING (ILTL)**

- Capital City Municipal Court Casual County, Ohio
- Ticket No. 7932
- Name: Mark Everright
- Street: 32 Buttercup Lane
- City, State Borealis, Ohio Zip 49999
-
- License Issued Mo. 04 Yr. 09 Expires Birthdate 2013
- State: OH
- SSN_____ D. O. B. Mo. 04 Day 22 Yr. 52
-
- Race: W Sex: M Height: 6 – 04 Weight: 165 Hair: Whi
- Eyes: Blue

4511.33 A1 (MM)

Pavement	X Snow	No. of
Lanes 2		

Visibility	X Night
Weather	X Snow

Traffic	X Moderate
Area	X Commercial
Crash	X Yes

Accompanying criminal charge: Yes Total

No. of Offenses: 4

To Defendant: SUMMONS X Personal

Appearance Required

You are summoned and ordered to appear
at Capital City Municipal Court 150 Main
Street, Capital City, Ohio

At 8:30 a. m. 01/11/10. If you fail to appear
at this time and place you may be arrested
or your license may be cancelled.

This summons served personally on the
defendant on 01/08/10.

The issuing/charging law enforcement
officer states under the penalties of perjury

**CASUAL COUNTY HOSPITAL
LABORATORY REPORT**

Recently certified by the Ohio Department of Health as being in full compliance with Ohio Revised Code requirements to draw and analyze blood samples to determine content of alcohol in those samples

We analyzed a sample of Mark Everright's blood that was withdrawn from him, in compliance with all Ohio Revised Code and Ohio Department of Health regulations, @ 1:15 a. m. on the morning of January 5th, 2010. That sample contained 0.165% alcohol in his whole blood. Should there be any questions or concerns, please contact the undersigned.

/s/ John Nevarong, Laboratory Director, M. S. D. D.

WASHBURN UNIVERSITY

**SCHOOL OF LAW, INSTITUTE FOR LAW,
TEACHING AND LEARNING (ILTL)**

- Additional information provided to law students:

PENALTIES

OPERATING VEHICLE UNDER THE INFLUENCE RC 4511.19(A),(G) - 6 POINTS

No. and Type of Offense	Degree of Offense	Incarceration	Fines	Treatment	License Suspension	Driving Privileges ^{1,2}	Restricted Plates/ Interlock	Immobilization/ Forfeiture
1 st in 6 years [simple OVI, low test or drug]	M-1	3 days jail or DIP. ³ Up to 6 months.	\$375 - \$1,075	Optional	Class 5 (6 months to 3 years)	After 15 days	Both optional	No
1 st in 6 years and either: [a] high test, or [b] refusal with prior in 20 years	M-1	6 days jail or 3 days jail and 3 days DIP. ³ Up to 6 months.	\$375 - \$1,075	Optional	Class 5 (6 months to 3 years)	After 15 days	Plates required for high-end. Interlock optional.	No
2 nd in 6 years [simple OVI, low test or drug]	M-1	10 days jail or 5 days jail and 18 days HAEM and/or CAM. ⁴ Up to 6 months.	\$525 - \$1,625	Alcohol/drug assessment and recommended treatment mandatory.	Class 4 (1 to 5 years)	After 45 days	Plates required. Interlock required if alcohol-related, optional if drug.	90 days immobilization if registered to Δ ⁵
2 nd in 6 years and either: [a] high test, or [b] refusal with prior in 20 years	M-1	20 days jail or 10 days jail and 36 days HAEM and/or CAM. ⁴ Up to 6 months.	\$525 - \$1,625	Alcohol/drug assessment and recommended treatment mandatory.	Class 4 (1 to 5 years)	After 45 days	Plates required. Interlock required if alcohol-related, optional if drug.	90 days immobilization if registered to Δ ⁵
3 rd in 6 years [simple OVI, low test or drug]	Unclassified misdemeanor	30 days jail or 15 days jail and 55 days HAEM and/or CAM. ⁴ Up to 1 year.	\$850 - \$2,750	Alcohol/drug addiction program mandatory.	Class 3 (2 to 10 years) ⁶	After 180 days	Plates required. Interlock required if alcohol-related, optional if drug.	Forfeiture if registered to Δ ⁷
3 rd in 6 years and either: [a] high test, or [b] refusal with prior in 20 years	Unclassified Misdemeanor	60 days jail or 30 days jail and 110 days HAEM and/or CAM. ⁴ Up to 1 year.	\$850 - \$2,750	Alcohol/drug addiction program mandatory.	Class 3 (2 to 10 years) ⁶	After 180 days	Plates required. Interlock required if alcohol-related, optional if drug.	Forfeiture if registered to Δ ⁷

Either: [a] 4 th or 5 th in 6 years, or [b] 6 th in 20 years [simple OVI, low test or drug]	F-4	60 days local incarceration, up to 1 year, or 60 days prison, with option of additional 6 to 30 months.	\$1,350 - \$10,500	Alcohol/drug addiction program mandatory.	Class 2 (3 years to life)	After 3 years	Plates required. Interlock required if alcohol-related, optional if drug.	Forfeiture if registered to Δ ⁷
Either: [a] 4 th or 5 th in 6 years, or [b] 6 th in 20 years (and high test or refusal)	F-4	120 days local incarceration, up to 1 year, or 120 days prison with option of additional 6 to 30 months.	\$1,350 - \$10,500	Alcohol/drug addiction program mandatory.	Class 2 (3 years to life)	After 3 years	Plates required. Interlock required if alcohol-related, optional if drug.	Forfeiture if registered to Δ ⁷
2 nd felony lifetime [simple OVI, low test or drug]	F-3	60 days prison. Up to 5 years.	\$1,350 - \$10,500	Alcohol/drug addiction program mandatory.	Class 2 (3 years to life)	After 3 years	Plates required. Interlock required if alcohol-related, optional if drug.	Forfeiture if registered to Δ ⁷
2 nd felony lifetime, and either: [a] high test, or [b] refusal	F-3	120 days prison. Up to 5 years.	\$1,350 - \$10,500	Alcohol/drug addiction program mandatory.	Class 2 (3 years to life)	After 3 years	Plates required. Interlock required if alcohol-related, optional if drug.	Forfeiture if registered to Δ ⁷
1 st or 2 nd felony lifetime with RC 2941.1413 specification	F-4 (1 st felony) F-3 (2 nd felony)	F-3 penalties set forth in boxes above, and 1, 2, 3, 4, or 5 years prison consecutive to same.	\$1,350 - \$10,500	Alcohol/drug addiction program mandatory.	Class 2 (3 years to life)	After 3 years	Plates required. Interlock required if alcohol-related, optional if drug.	Forfeiture if registered to Δ ⁷

¹ No privileges may be granted on suspension imposed on offender who, within the preceding six years, has had three or more convictions or guilty pleas. RC 4510.13(A)(3).
² First Ohio Revised Code OVI conviction results in one-year commercial driver's license (CDL) disqualification and second anytime results in lifetime disqualification, regardless of vehicle involved RC 4506.16(D). Also, CDL operators are subject to lower alcohol and controlled substance levels plus separate offenses under RC Chap. 4506.
³ DIP³ is driver intervention program certified under RC 3793.10 provisions. See RC 4511.191(G)(1)(c).
⁴ HAEM⁴ is house arrest with electronic monitoring. "CAM" is continuous alcohol monitoring. Within 60 days, court must issue finding of lack of jail space. RC 4511.19(O)(3).
⁵ Waiver may be granted, under conditions in RC 4503.235, for "family or household member," if completely dependent on vehicle and immobilization would be undue hardship.
⁶ But, court has authority to reduce the minimum period of a Class 3 suspension from two years to one year. RC 4510.13(A)(2)(b).
⁷ If vehicle forfeiture is required and title is assigned/transferred, offender may be fined value of vehicle per national auto dealers' association publications. RC 4503.234(E).

OPERATING VEHICLE AFTER UNDERAGE ALCOHOL CONSUMPTION RC 4511.19(B),(H) - 4 POINTS

No. of Offense	Degree of Offense	Incarceration	Fines	Treatment	License Suspension	Driving Privileges	Restricted Plates/ Interlock	Immobilization/ Forfeiture
1 st in 1 year	M-4	0-30 days jail	\$0 - \$250	Optional	Class 6 (90 days to 2 years)	After 60 days	Optional	No
2 nd or more in 1 year	M-3	0-60 days jail	\$0 - \$500	Optional	Class 4 (1 to 5 years)	After 60 days	Optional	No

PHYSICAL CONTROL WHILE UNDER THE INFLUENCE RC 4511.194 - 0 POINTS

No. of Offense	Degree of Offense	Incarceration	Fines	Treatment	License Suspension	Driving Privileges	Restricted Plates/ Interlock	Immobilization/ Forfeiture
Any	M-1	0-180 days jail	\$0 - \$1,000	Optional	Class 7 optional (up to 1 year)	No restrictions	Optional	No