

Law Partnership Negotiation Exercise

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This exercise involves the negotiation of certain partnership issues by two lawyers who are planning to form their own law firm. Each student assumes the role of one of the prospective partners and negotiates with another student playing the role of the other party. The exercise is intended to help students develop their planning, problem solving and negotiation skills, and to reinforce their knowledge of substantive partnership law. The fact pattern is intended to present a setting in which an interest-based approach to negotiation is indicated, and to demonstrate the importance of economic, business, relationship and personal issues in transactional law practice. Students are required to (1) prepare a written plan identifying, *inter alia*, the interests, options and alternatives of the parties with respect to certain issues concerning the proposed partnership, (2) develop a strategy and tactics for negotiation, (3) conduct negotiations, and (4) submit a brief report on the outcome of the negotiations.

The Law Partnership Negotiation Exercise is designed for use in a basic Business Associations course in law school. We used the exercise for the first time in Prof. Sylvia Lazos' class in the fall of 2000 at the University of Missouri-Columbia Law School. Based on our experience in that class, the exercise was revised and will be used in the spring semester Business Associations class. I also used the exercise this winter in my Business Planning class, with additional assignments regarding tax law and business formation issues.

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LAW PARTNERSHIP NEGOTIATION

BACKGROUND INFORMATION

Allocation of Profits/Losses During Partnership.

Generally. The methods by which partnerships allocate profits/losses depend on a number of factors, including the type of business (e.g. service, commercial or investment partnership), size of firm, philosophy of the partners, firm traditions and the current business environment (including the tax laws).

Law Partnerships. Law firms use various methods to allocate profits including the following:

- ✍✍ Annual allocations based on formulas that weigh a number of factors, such as hours billed, generation of client business, administrative work.
- ✍✍ Allocations to each partner of “units” or “points” that represent a fixed percentage of firm profits. In many firms, the units or points are reallocated annually by the partners (small firms) or management committee (medium and larger firms) based on one or more of factors such as hours billed, generation of client business, administrative work, and political power and influence within the firm.
- ✍✍ On the basis of seniority (a “lock-step” system)
- ✍✍ Equal allocations (generally small firms in which partners are of comparable power or worth to the firm)

In current practice, the amount of client business that an attorney brings to a firm is frequently a major factor in attaining and retaining partnership status, and in determining partner compensation.

Profits and losses for the firm are generally determined on an annual basis. Law partnerships usually authorize partners to take periodic advances against their entitlement to future profit distributions. These advances are called “draws”.

Allocation of Profits/Losses following Dissolution. Partnership law provides rules for the settlement of accounts following dissolution of a firm. However, law firms frequently include provisions in their partnership agreements that provide for continuation of the partnership and buy-out of a departing partner’s partnership interest. For example, a firm may pay a departing partner an amount equal to a specified percentage or multiple of his/her average profit allocation for the last several years, instead of calculating and paying the partner his allocated share of profits generated from matters during her/her partnership. Methods and terms of buy-out provisions may vary significantly from firm to firm. The application and terms of buy-out and valuations provisions often vary depending on the reason that a partner leaves a firm (death, retirement, disability, voluntary withdrawal for other employment, etc.) and the type of practice in which the firm or individual attorney engages.

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Capital Contributions. Capital contributions made by partners in a partnership often differ in type and amount. For example, it would not be unusual in investment and commercial partnerships for some partners to contribute all or most of the capital and for others to contribute services. Some partnerships use capital contributions as the basis for allocation of profits/losses. However, law firms generally derive their revenues primarily from providing professional services to clients. While partners may be required to make standard capital contributions, allocations are usually based on other factors considered more relevant to the production of revenue, such as the generation of client business and services rendered to clients or the firm. Capital contributions from attorneys entering established law partnerships are often payable over a number of years from future partnership distributions.

Financing/Creditors. A state's partnership law may shield partners of limited liability partnerships from personal responsibility for partnership obligations except those arising out of their own personal misconduct. However, it is likely that major creditors (including lenders and landlords) of a small, recently established firm will require each of the partners to fully and personally guarantee partnership obligations as a conditions of extending credit to the partnership.

Law partnership Negotiation

GENERAL INFORMATION FOR BOTH PARTIES

Over the past fifteen years, Kristina Yokomura has developed a successful law practice as a sole practitioner. Her clients are closely-held businesses of small-to-medium size. Kristina describes herself as a “corporate and transactional lawyer”; she does not do litigation work. When her clients need litigation services, she refers them to competent counsel. During the last year or so, she has been thinking about bringing a litigator into her practice in order to provide her clients with “full-service” representation. Kristina is confident that her corporate clients would send her a substantial amount of their litigation business if she had someone to do the work. She estimates that she could get at least \$175,000 of such business within a year and up to \$500,000 annually after a few years of building up the litigation practice.

Gross revenues from her corporate law practice average about \$400,000 each year; expenses run about 40% of this amount. There are three years remaining on Kristina’s current office lease. Although her offices are not large enough for an additional lawyer and secretary, space adjacent to her offices has recently become available. A lease on this additional space would be approximately \$30,000 annually. Kristina estimates that her other business expenses would increase by at least \$70,000 if she brings a litigator into her practice (including salary and benefits for a second secretary/receptionist, additional insurance, supplies, bar membership dues and fees, and interest on any loans to finance capital expenditures, etc.). She calculates first-year capital expenditures for office renovation, decoration, additional furniture and equipment, etc. at approximately \$25,000.

Kristina met Liam Oribe at a dinner last winter given by the chief executive of one of Kristina’s major clients, XYZ Industries. Liam is a senior associate in the litigation department at Miller, Loss & Steele (“ML&S”), where he has worked on a number of litigation matters for XYZ Industries. He has averaged around 1900 billable hours annually during his eight years at ML&S. His annual salary is \$100,000. Although Liam has a reputation as a hardworking, efficient and effective attorney, he is not generally considered to be a “people person”, and has not brought in any clients to ML&S. In December, the firm will vote on whether to admit Liam to the partnership. It is not likely that Liam will make partner. ML&S expects associates who are passed over for partnership to look for other employment and to leave the firm within a year.

Kristina and Liam met for lunch several times during the last few months and talked in general terms about the possibility of forming a law firm. Kristina originally suggested that Liam work as her associate under a one-year employment contract, with the understanding that they would discuss a partnership arrangement if “things worked out”. However, since Liam made it clear that he is interested only in a partnership opportunity, Kristina dropped the employment contract idea.

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Liam and Kristina have scheduled a short meeting to begin serious negotiations on the terms of a partnership agreement for a limited liability partnership. The first item on their agenda is to decide how to share the profits and losses of the partnership. In order to reach a reasonable agreement on profit/loss allocations, they will consider a number of other issues that will affect their financial arrangements, including the following:

- ✍✍ Methods of allocating profits/losses between the partners
- ✍✍ Capital contributions
- ✍✍ Guaranteed compensation
- ✍✍ Allocation between partners of any personal liabilities on loans, guarantees or other contracts incurred or assumed by any partner for the benefit of the partnership
- ✍✍ Rights to revenue generated from partnership clients if a partner withdraws or the firm breaks up for any reason

Kristina and Liam reside and practice law in the State of _____.

[or:

Kristina and Liam reside and practice law in a state that has adopted the Uniform Partnership Act (1997) **or**

Kristina and Liam reside and practice law in a state that has adopted the Uniform Partnership Act (1914) and **description of relevant limited liability partnership provisions.]**

LAW PARTNERSHIP NEGOTIATION
INSTRUCTIONS FOR PARTICIPANTS
[SEMESTER, YEAR]

ASSIGNMENT

1. This exercise involves a transactional negotiation between two lawyers who want to form their own law firm. You will play the role of one of these prospective partners and negotiate with another student in the class who will play the role of the other party. The purpose of this exercise is to help you develop your problem-solving and negotiating skills and to reinforce your knowledge of substantive partnership law.

2. There are two short writing assignments for this exercise: a negotiation plan and a negotiation report. They are described in the PREPARATION AND PLANNING and the NEGOTIATION sections below.

3. Schedule and Due Dates:

✍✍	Negotiation Plan Due Date	[Date]	
✍✍	Negotiation		[Date]
✍✍	Negotiation Report Due Date	[Date]	

4. You should have the following materials for this exercise:

✍✍	List of Assigned Roles and Negotiation Partners
✍✍	General Information for Both Parties
✍✍	Confidential Information (Assigned Role)
✍✍	Background Information Sheet
✍✍	Suggested Reading List

Please do not share your confidential information or the results of your negotiation with anyone in the class who has not completed his or her negotiation session.

5. Required reading assignments for this exercise:

- ✍✍ Pages 71-81, 87-96, 119-126 in Chapter III of DISPUTE RESOLUTION AND LAWYERS, (abr., 2nd ed., 1998) by LEONARD L. RISKIN & JAMES E. WESTBROOK
- ✍✍ Pages 3-5 in GETTING READY TO NEGOTIATE: THE GETTING TO YES WORKBOOK (1995) by ROGER FISHER & DANNY ERTEL
- ✍✍ Pages 119-31 in BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE (1999) by G. RICHARD SHELL

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PREPARATION AND PLANNING

1. Preparation and planning are important elements in the negotiation process. Carefully review the information sheets and the relevant statutory and case law. If you do not understand any of the business aspects of the problem, ask questions and/or do the necessary research.

2. Prepare a written negotiation plan. Methods of planning vary with the individual planner and the type of negotiation – there is no single correct approach. Your plan may be in any form you choose (e.g. outline, memorandum, chart), but must address the following points:

(a) Information: What information do you need from the other party; what questions will you ask during the negotiation? What confidential information will you share with the other party? Is there any confidential information that you do not plan to disclose?

(b) Interests: What are the underlying wants, needs and concerns that you will try to satisfy through this negotiation (why do you want to do this deal)? Which is the most important. How do you think your partner would answer these questions from his/her perspective?

(c) Options: What are the possible areas of agreement between the parties? Of disagreement? Are trade-offs possible? What agreements might satisfy the interests of both parties?

(d) Standards: Are there criteria and standards that you can use as “objective authority” to explain or support any options you may propose (e.g. estimates of income/expenditures, billable hours, clients brought to firm, “default provisions” of the law, methods used by other firms)? Which might your partner use?

(e) Alternatives: If you do not reach agreement in this negotiation, what are your alternatives? (What else can you do satisfy your interests?)¹ What do you think your partner’s alternatives are?

¹ Obviously, a negotiated agreement should result in a better outcome for you than your alternatives. An objective of the planning process is to correctly identify your alternatives and those of the other party, and to use this information effectively in negotiation. In *GETTING TO YES* (2nd ed., 1991.), Fisher, Ury & Patton recommend that you identify and develop “BATNA” (the Best Alternative to a Negotiated Agreement), and use it as “the standard against which any proposed agreement should be measured” (at p.100). In their view, BATNA is the only standard “which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would
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(f) Proposals: Based on your identification and analysis of the parties' interests, options, standards and alternatives, what are your proposals for agreement?²

3. You may include any additional points or issues in your negotiation plan that you find helpful in planning your approach. For example, some authorities recommend preparing a "balance sheet" listing the pros and cons of various choices you may face in the negotiation, or listing the order and nature of each concession you expect that you or the other party will make. For additional information on negotiation planning, strategies and tactics, see the Suggested Reading List.

4. Consider your strategy and tactics. (A strategy is a plan for satisfying your interests; a tactic is a way to implement a strategy.) How will you approach the negotiation? Will your strategy be competitive or collaborative or a combination of both? How will the negotiation session begin? What issues will you discuss? In what order? Easy or hard issues first? What information do you need from the other side? What information will you disclose? Will you be the first party to propose specific terms for the agreement (i.e. specific percentages for profit allocations between the partners)? If so, will your proposals be extreme or moderate? Think about how you can use communication skills and signals (verbal and non-verbal) during the negotiations: your tone, phrasing, gestures, attitude.

NEGOTIATION

1. A negotiation session lasting approximately one hour will be held during class on **[Date]**. You may continue negotiations outside of class, if you wish. There is no requirement that you come to an agreement on all or any of the negotiation issues.

2. Negotiation Report. For class on **[Date]**, prepare a brief negotiation report (1-2 pages) responding to the following questions:

- (a) Which role did you play? Who was your partner?
- (b) How long did your negotiations last?
- (c) Describe your negotiation strategy and tactics. Did you follow the strategy and tactics you planned to use?
- (d) What strategy and tactics did your partner use?

be in your interest to accept" (at page 100). BATNA is generated by "(1) inventing a list of actions you might conceivably take if no agreement is reached; (2) improving some of the more promising ideas and converting them into practical alternatives; and (3) selecting, tentatively, the one alternative that seems best" (at page 103).

² In *GETTING PAST NO* (Rev. Ed., 1993, at pages 24-26), William Ury suggests that you formulate proposals for each of the following: (1) the agreement you want - a high but realistic goal that satisfies your interests and enough of the other party's interests so that it might be acceptable to him/her; (2) an agreement you would be content with - a less than perfect agreement that would satisfy your basic interests; and (3) an agreement you could live with - one that is at least marginally better than your BATNA. Ury's advice is to "aim high", keeping in mind standards of fairness and the other party's BATNA (at page 25).

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✍️ What about loans to the partnership from a partner? Should they bear interest? Does or should the other partner have personal liability for the repayment of portion of the loans to the lending partner?

✍️ If the partnership breaks up, who has the right to continue representing the clients of the firm? To any revenues generated after the split from matters begun during the partnership term?

LAW PARTNERSHIP NEGOTIATION

CONFIDENTIAL INFORMATION FOR KRISTINA

Kristina has been quite successful over the last fifteen years, but is concerned about the future of her practice. She does not litigate, so she recommends other lawyers to her clients if they need litigation services. Although she has always been careful to recommend qualified litigators who are either sole practitioners or with firms that do not have corporate practices, some of her clients have begun to use litigators from “full-service” firms. She is concerned about losing clients to these firms, especially since a number of the executives who send her business are nearing retirement age. Furthermore, a number of her clients are approaching the size at which it would make sense for them to hire in-house counsel for their corporate and transactional legal work. In fact, XYZ Industries recently offered her a position as its first in-house general counsel, at an annual salary of \$250,000. Kristina refused the offer because she enjoys private practice and values her independence; she would not be interested in an in-house position unless the compensation was much higher. Kristina has recommended several candidates who are being considered by XYZ Industries for the in-house counsel position.

Kristina estimates that she will lose about \$75,000 of corporate and transactional business annually when XYZ hires in-house counsel. However, because of her long-term relationship with XYZ and the likelihood that the general counsel will owe his/her position to Kristina’s recommendation, Kristina is confident that she will get a substantial amount of the company’s litigation business if she adds a litigator to her practice. Kristina intends to devote the time she allocated in past years to XYZ Industries to generating new client business. Kristina is outgoing, confident, well-connected, and convinced that she can drum up new business if she gets the time to try. She is also tired of 60-70 hour workweeks. Long-term, she would like to concentrate on rainmaking activities (including presentations at conferences and writing articles for publication), and hire other attorneys to do most of the legal work. Kristina is used to running her own show, and envisions herself as the benevolent senior partner of a small, friendly firm.

Kristina has invested a substantial amount of time investigating Liam, and knows that he is a well-respected and hard-working attorney. She thinks that they would get along well, and that a joint practice would benefit them both. Hiring Liam would also be a plus in obtaining litigation work from XYZ Industries; the chief executive officer of the company has mentioned to Kristina that Liam does great work on an efficient and timely basis. Kristina would prefer to hire Liam as an associate this year, and decide about a partnership later. Putting together a partnership is time-consuming and expensive, and if things do not work out, a dissolution and wind-up will be disruptive and costly. However, she understands the importance of partner status to Liam.

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She is willing to work out a partnership arrangement if Liam is reasonable about financial matters, and if she can get out of the partnership whenever she wants with her assets and book of business intact. She would like this deal to happen, but she is not desperate. If she and Liam cannot come to an agreement, she will look for another litigator.

Kristina expects gross revenues for the first year of the partnership to be about \$500,000: \$325,000 from her corporate practice (assuming the \$75,000 reduction in corporate business from XYZ Industries when it hires a general counsel), and \$175,000 from the litigation business she expects to get from her corporate clients. She thinks expenses should run about \$285,000 (based on her average expenses for prior years, plus her estimates of the capital expenditures and additional annual expenses for the partnership). Kristina expects her capital contributions to the partnership will include (i) office equipment, decorations, furniture, law books and supplies with a fair market value of \$45,000, (ii) the office lease, and (iii) a cash operating account with a current balance of \$35,000. She wants a \$10,000 capital contribution from Liam; she thinks this would both demonstrate and reinforce his commitment to the partnership. It would also help pay for first-year capital expenditures. However, depending on his financial condition (he and his wife recently had twins), she is willing to accept \$5000.00

Kristina wants to allocate profits and losses on a fixed percentage basis. Of course, she expects to get a high allocation and most of the firm's profits; she will be the one putting up the capital, the office lease, the clients, and putting in the long hours. Even with a high percentage of the profits, she will be taking a substantial reduction in income. (Fortunately, she can afford the reduction for a few years; she has done very well in the stock market.) She does not think Liam will be very busy during the first year of the partnership; the \$175,000 of litigation business she anticipates bringing into the firm should not take up more than 900 hours or so of Liam's time. Given this light work load and his talent for organization, Kristina wants Liam to take over some of the administrative duties of the partnership and handle the computer and other technology issues – at the most, she figures these duties will require about 250 hours per year. She realizes that Liam will not make much money for the first few years with a low profit allocation, but she figures that is his trade-off for the partnership opportunity and the first year's light workload. When he contributes more to the firm in billable hours and capital, they can renegotiate the allocations. She is willing to provide in the partnership agreement that they will review allocations on an annual basis. If Liam thinks he needs more income than a reasonable allocation of partnership profits will provide, he can accept her original offer to work as an associate for an annual salary of \$75,000, and they can consider a partnership arrangement at a later date. Although an employment arrangement would probably cost Kristina more than giving Liam a small percentage of partnership profits, it would certainly make life a lot easier if practicing together does not work out. .

It is likely that any major creditors of the partnership will require both Kristina and Liam to give personal guarantees of certain partnership obligations. Kristina expects the partners to share the liabilities under any such guarantees. She also expects Liam to assume personal liability for a portion of (i) the repayment to her of any loans she makes to the partnership or advances she makes on its behalf, and (ii) her obligations under the existing office lease.

LAW PARTNERSHIP NEGOTIATION

CONFIDENTIAL INFORMATION FOR LIAM

Given that the major qualification for partnership at ML&S is bringing in client business, Liam believes it is unlikely that he will be offered partnership. For the last eight years, he has devoted himself completely to the practice of law, and has not had any time for client development. He knows that the partners at ML&S do not regard him as a “people person”. In his opinion, it depends on which people you mean. ML&S’ clients (advertising and investment banking types) are not people he relates to easily; he does just fine with those who have a more technological bent – XYZ Industries, for example. Liam majored in computer science in college and has some ideas on how he could develop a practice with respect to evolving “internet law”. At this point, however, he sees no reason to develop business for ML&S. Although Liam has started to consider his career options, he is in no great hurry to find another position. He is considered an excellent and productive attorney, and does not think the firm will rush him out the door. He has contacted several legal recruiters, and has gone on a few interviews for both in-house litigation positions and law firm jobs. However, corporate life does not appeal to him, and a substantial book of client business is a requirement for partnership at most law firms. He is very interested in the possibility of going into partnership with Kristina. She has a fine reputation and established clients, and he thinks that they would have a good working relationship. Most importantly, he would be the only litigator at the firm. This would be an opportunity for him to build his own department and practice. In twenty years, he envisions himself as a senior partner of a prosperous, cutting-edge, sizable law firm. Although Kristina suggested hiring him as an associate for a one-year trial period, Liam wants a partnership. He believes this is the best way to insure Kristina’s commitment to the development of a litigation practice. Besides, many of his friends and acquaintances will be making partner at their firms this year – he has his pride.

He is concerned about how to survive financially through the first few years of developing the partnership’s business. He recently became the father of twins. Their birth, and the continuing rise in housing prices and interest rates, induced him to purchase a home that is not comfortably within his means. Unfortunately, he will not be able to make a capital contribution to the firm - the down payment for the house used up all his savings. However, he figures his administrative work could be considered a contribution to the firm.

He has reviewed Kristina’s estimates for revenue and expenses, and knows that she does not expect substantial profits for the first year of the partnership. Although it will be a hard sell, he needs a minimum compensation guarantee in case the litigation

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business Kristina anticipates bringing into the partnership does not materialize. He can justify a compensation guarantee for a number of reasons. For one thing, he expects to bring in litigation work from XYZ Industries. ML&S spreads client matters among different associates in order to encourage client loyalty to the firm instead of to individual attorneys. However, after Liam completed his first case for XYZ, its chief executive officer, Gino Schwartz, asked ML&S to assign Liam to the company's litigation matters in the future. Liam believes that Schwartz will continue to send him this business when Liam leaves ML&S. Annual billings by ML&S for XYZ litigation matters have averaged about \$150,000; this business would be more than enough to cover Kristina's estimates for first year capital expenditures and additional annual expenses of the partnership. Secondly, he is willing to take on all the administrative work of running the partnership, and of upgrading technical services for the firm. Kristina's communication and computers systems are circa 1989, and he anticipates spending many hours bringing them into the 21st century. Kristina's estimate of \$25,000 for capital expenditures is too low. What Liam has in mind for technical upgrades will put the number closer to \$40,000 - but he believes the additional investment will pay off quickly in terms of efficiency and quality product. Thirdly, he thinks that future growth in the corporate law business will come from representation of new, high-tech companies; any litigation clients he attracts could also be a new source of corporate work for Kristina. All in all, he thinks a minimum compensation guarantee of \$85,000 would be fair (along with any excess of his profit share over this amount). In the event that the new firm's litigation work is less than anticipated for the first year, he will have time for some legal writing. He has been approached by a legal publisher to write a guide on alternative dispute resolution in contractor/subcontractor disputes, but has never had the time to devote to it. The guide would give him an additional \$5000-\$10000 in income, depending on sales.

With respect to profit allocation, Liam believes that the partner who does the work on a matter should get at least half of the profits from it; the partner who brought in the client should get some portion, and the rest should be divided between the partners. If a partner withdraws or the partnership splits up, the allocation of profits made or generated (including from receivables and unbilled time) up to the date of the withdrawal or split-up should be made as usual. After that, it's every lawyer for himself/herself. The attorney chosen by the client to handle or complete a matter should get all the revenue it generates after the date of withdrawal or split-up.

LAW PARTNERSHIP NEGOTIATION

SUGGESTED READING LIST

The following is a short list of books and articles relating to the topic of negotiation.

BOOKS

1. Robert B. Cialdini, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (2d ed. 1993) (social psychology and communication)
2. Roger Fisher, William Ury and Bruce Patton, *GETTING TO YES* (2d ed. 1991)
3. Stephen Goldberg, Frank E.A. Sander and Nancy Rogers, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (3rd ed., 1999)
4. David A. Lax and James K. Sebenius, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986)
5. G. Richard Shell, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* (1999)
6. Douglas Stone, Bruce Patton and Sheila Heen, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (1999)
7. William Ury, *GETTING PAST NO* (1993)

ARTICLES

1. Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO STATE LAW JOURNAL 41, (1985)
2. Ronald J. Gilson & Robert H. Mnookin, *Foreword: Business Lawyers and Value Creation for Clients*, 74 OREGON LAW REVIEW 1 (1995)
3. Peter R. Jarvis & Bradley F. Tellam, *A Negotiation Ethics Primer for Lawyers*, 31 GONZAGA LAW REVIEW 539 (1995/96)
4. Russell Korobkin and Chris Guthrie, *Psychological Barriers to Settlement: An Experimental Approach*, 93 MICHIGAN LAW REVIEW 107 (1994)
5. Russell Korobkin and Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEXAS LAW REVIEW 77 (1997)
6. Craig McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1 (1998)
7. Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269 (1999)
8. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, (1980) AMERICAN BAR FOUNDATION RESEARCH JOURNAL 926-35
9. Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA LAW REVIEW 1219 (1990)

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DRAFT II OF TEACHER NOTES

LAW PARTNERSHIP NEGOTIATION EXERCISE

1. INTRODUCTION

This exercise is designed for use in a basic Business Associations course. It involves the negotiation of certain basic financial provisions by two lawyers proposing to establish their own law firm partnership. It is intended to help students develop their problem solving, planning and negotiation skills, and to reinforce their knowledge of substantive partnership law.

2. OBJECTIVES

Our culture depicts lawyers most frequently as litigators, and our law schools instruct students primarily through the analysis of appellate case law. It is not surprising that many students associate law practice with adversarial activities, and assume that problems and conflicts are resolved primarily by reference to legal principles and rules. Students are less familiar with transactional law practice, which emphasizes preventive law, planning, counseling, problem solving, drafting and negotiation. This exercise is designed to accomplish the following objectives:

To Explore the Use of Interest-Based Methods of Negotiation in the Context of a Relationship-Based Business Transaction. Commentators differ on whether, and in what context, an “interest-based” approach to negotiation is appropriate or effective. Certain types of business transactions appear to be inherently adversarial (e.g. hostile take-overs), and most business transactions have some adversarial aspects. Generally, however, the parties and their representatives in business negotiations expect the contemplated transactions to produce a mutual benefit. This exercise contemplates the formation of a law firm partnership; a voluntary, relationship-based enterprise. It is intended (i) to create a scenario where an interest-based approach to negotiation is clearly appropriate and (ii) to demonstrate that economic, business, relationship and personal issues are likely to be of primary importance to parties to transactions, rather than legal principles or rights.

To Assist in the Development of “Lawyering Skills”; and to Reinforce Knowledge of Substantive Partnership Law through Practical Application. In this exercise, students practice certain “lawyering skills” in the context of a business transaction. After reviewing certain information provided with respect to the parties and the proposed partnership, and applicable case and statutory law, the students are required to (i) identify, and assign priorities to, the interests of the prospective partners, (ii) generate

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and assess the options for agreement between the prospective partners, (iii) identify and assess alternatives to agreement by the prospective partners, (iv) develop strategy and tactics for the negotiation, and (ii) conduct negotiations.

The students play the roles of the parties, not their attorneys, so that they can exercise flexibility during negotiation without consideration of whether they have the requisite authority from a client..

3. TIMING AND ASSIGNMENT

The problem should be assigned after or concurrently with class sessions on partnership law. The assigned reading for the exercise is from Chapter III (“Negotiation”) in Riskin and Westbrook’s *DISPUTE RESOLUTION AND LAWYERS (ABRIDGED 2D. ED, 1998)*, and several short readings on negotiation planning and strategies and law firm practice. Two weeks prior to the negotiation session, the students are assigned roles, divided into negotiating pairs, and provided with a packet of materials containing instructions, party and background information, and a short list of supplemental readings relating to the topic of negotiation. The class time allocated for this exercise is as follows:

?? Distribution of materials and review of instructions	15 minutes
?? Lecture: review negotiation concepts, and economic and law firm practice considerations	25-50 minutes
?? Negotiation Session	50 minutes
?? Debriefing Session	50 minutes

Students spend time outside of class preparing for the negotiation and debriefing session, and are required to prepare a written negotiation plan and negotiation report. The negotiation plan must cover specified points relating to (i) the motivations and options of the parties to the negotiation, (ii) the negotiated outcomes the parties hope to achieve, or are willing to accept. These requirements are designed to direct the students toward an interest-based approach to the negotiation. Students should be encouraged to consider various strategies and tactics so that they are prepared to alter their game plans if necessary during the negotiation. The second writing assignment is a negotiation report in which the students respond to a brief list of questions relating to the results of the negotiation and the performance of the parties. The purpose of this assignment is to help students focus on their performance and help them prepare for the debriefing session. The negotiation plan is due at the beginning of the negotiation session. The negotiation report is due at the beginning of the debriefing session.

The students negotiate during class time for approximately 50 minutes, and may continue their negotiations outside of class if they wish. The instructor may find it useful to observe parts of each negotiation. In order to elicit a relatively contemporaneous and accurate reaction to the negotiations from the students, the debriefing session can be held during the next scheduled class following the negotiation session. The instructor may

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prefer to schedule the debriefing for a later class in order to allow additional time for students to continue negotiations if they so desire, and to write the negotiation report. The instructor may also prefer to review the negotiation reports before the debriefing in order to help guide the session.

4. ACTIVITIES

This exercise is designed for use in a basic Business Associations course for second year law school students at the University of Missouri-Columbia School of Law.³ These students have been exposed to the basic principles of negotiation and alternative dispute resolution through exercises integrated into their first year substantive law and legal writing courses. Approximately one hour of class time is set aside for an lecture reviewing negotiation basics, discussing the points covered in negotiation plans, and on economic, structural and practical aspects of law firm partnerships. An instructor who uses this exercise with students who have not any exposure to negotiation may wish to devote more class time to the introduction of interest-based negotiation theory, strategies and tactics. In the first trial of this exercise, we found that students tended to discuss “interests” in their negotiation plans, but frequently focused on “positions” during actual negotiations. An instructor with additional class time available, or who can call upon the assistance of another instructor, may find it beneficial to divide the class into sections by assigned roles (one section of “Kristinas”, one of “Liams”) and spend 20-30 minutes discussing interests, alternatives and options with each section with particular reference to the assigned roles.

The business organizations course for which this exercise is designed is the first introduction to business law and issues for many students. They are not expected to consider tax and accounting issues.⁴ As evidenced by their negotiation reports, some students in the first trial of this exercise indicated unfamiliarity with or confusion over certain business and practical aspects of the problem. The instructor may wish to address some of these issues in a pre-negotiation lecture:

- ☞☞Necessity of focusing on practicalities as well as legal rights; (e.g., Will a person with contractual liability actually be able to pay? What if income or expense estimates are not accurate? How are net profits calculated for a partnership? What is the difference between “allocation” of profits and “distribution” of profits?)
- ☞☞Necessity of planning for losses and liabilities, as well as profits and gains
- ☞☞Differences between service, investment and commercial partnerships.

¹ I also used the exercise in an upper level Business Planning class, with additional assignments regarding tax issues.

⁴ Students should be informed of basic “conduit” status of a partnership for tax purposes. However, our students are not expected to consider other tax or accounting issues.

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We use the debriefing session to focus on both (1) the students' efforts to integrate problem solving with substantive partnership and other relevant law; and (2) the process used by students in their attempts to reach agreement during the negotiation process. The following is a list of questions that may be of use to the instructor during the debriefing session with respect to the negotiation planning and process.

Planning and Preparation Issues:

- ?? What are the interests of Kristina? Liam?
- ?? What options did you develop to meet these interests during your planning process?
- ?? What did you determine was your best alternative to negotiating an agreement with your partner? What could you have done prior to the negotiation to develop your alternatives?
- ?? Did "default" provisions of [UPA OR RUPA] influence your planning in any way?
- ?? How did you reconcile your position on right to profits from client matters generated after a break-up of the partnership with [UPA OR RUPA] and applicable case law?
- ?? Did preparing the negotiation plan help you organize your thoughts? Generate new ideas?
- ?? Would you change the way you plan future negotiations, based on your experience in the negotiation session?

Negotiation Issues:

- ?? What was the tone of your negotiations? How was it established? How did it effect the negotiations?
- ?? How would you describe your strategy? Competitive, interest-based? How would you describe your partner's?
- ?? How did the negotiations begin? What issue was discussed first?
- ?? Do you think your time was spent efficiently during the negotiation?
- ?? Did you follow your planned strategy during negotiations? Why or why not?
- ?? Did your partner react during the negotiations as you anticipated?
- ?? Did you come to any agreements?
 - ?? If so, what were they? General commitments or specific agreements? Do you think they were "fair"? What criteria are you using to determine "fairness"? How were agreements generated? Proposals by one side? Brainstorming? Did any one appear to want the agreement more than the other?
 - ?? If not, why do you think you were not able to agree?
- ?? What standards, criteria (if any) did you use during the negotiation?
- ?? Which tactics worked for you? for the other party? Which tactics did not work?
- ?? What do you think you could have done more effectively? What mistakes did you make?

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?? What did your partner do effectively? How could your partner have improved his or her performance?

5. MATERIALS

- ?? Instructions for Law Partnership Negotiation
- ?? Background Information Sheet
- ?? General Information for Both Parties
- ?? Confidential Information for Kristina
- ?? Confidential Information for Liam
- ?? List of Assigned Roles and Negotiation Partners
- ?? Suggested Reading List

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