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Empowerment and Recognition: Students Grade Each Other's Negotiation Outcomes

James Coben*

Editors' Note: Negotiating a settlement that satisfies a client's nonmonetary interests is immensely empowering for students. But all too often, student excitement about creative solutions to non-monetary problems blinds them to an abject failure to negotiate effectively for payments or benefits that their client needs, and that the other side was willing to offer. Or, conversely, they pay out far too much, often by not fully recognizing the time/value of money. How to make these points so they "take"? Coben here describes one solution – a form of peer assessment. After negotiating in pairs and recording settlement summaries which are standardized in format by the instructor (including discounting of all future monetary benefits to present value), students rank the quality of all settlements reached other than their own. The student's grade for the exercise depends on the average rank their settlement earned from the class as a whole. An added benefit arises when (almost inevitably) a number of settlements result in high grades for both negotiators in a competing pair - providing a powerful and very concrete illustration of Pareto efficiency.

> "Welcome to Lake Wobegon, where all the women are strong, all the men are good-looking and all the children are above average." (Garrison Keillor)

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Introduction

Ever had a conversation with one of your students like the following (after they complete a simulation negotiating on behalf of an injured party)?

Teacher: What do you think about your settlement? **Student:** It was great. I got everything my client wanted.

Teacher: I agree that your settlement really delivered on your client's

non-monetary interests like that much-wanted apology and ongoing staff sensitivity training. I'm curious though, what do you make of the settlement summaries detailing how other plaintiffs got much higher financial pay-outs in addition to the creative non-monetary benefits you successfully

negotiated?

Student: I was surprised by that. But money wasn't the main thing

that my client wanted so I still feel like I did a great job for

my client.

Or this one (with the first student's adversary in the same simulation)?

Teacher: What do you think about your settlement? **Student:** It was great. I got everything my client wanted.

Teacher: *You certainly delivered on your client's non-monetary inter*

ests, including that much-desired confidentiality clause and avoiding having to discipline a valued employee. I'm curious though, what do you make of the settlement summaries detailing how other defendants paid out far less money than you did in addition to meeting non-monetary needs of your

client and the other side?

Student: I was surprised by that. But money wasn't the main thing

that my client was worried about; most importantly, we

came in under the insurance limits.

Teacher: You're right about that. However, you probably also noticed

that you were much more generous than others in delivering a stream of future benefits to the plaintiff. I'm wondering how you valued the cost of providing free rent for the rest of plaintiff's life. Any idea what the present value of such a

benefit might be?

Student: What's present value?

Stripped of the upbeat positive reinforcement and my *curiosity* questions (o.k., busted, the "curiosity" only clumsily veils the intended negative critique), the *real* message is:

Getting all of your client's non-monetary needs met and getting (or paying) \$10,000 is not the same as getting the same needs met and getting (or paying) \$100,000. Moreover, by choosing to be unaware of the present value of a stream of future benefits you unnecessarily "paid" too much and in the process also gave up a great deal of negotiating leverage. Bottom line: In terms of the available monetary benefits you claimed (or gave away), you didn't actually do a very effective job for your client.

This chapter describes an experiment in how best to deliver the message so it will be heard. My answer: deliver it through fellow students, by having *them* collectively grade negotiation outcomes. This also serves a direct educational purpose, by giving students some actual responsibility for designing and conducting their own learning experience (see Nelken, McAdoo, and Manwaring 2009).

The Choice to Grade Outcomes

Until I began (in 2000) to use the exercise I describe here, I never graded students based on negotiation outcomes. Like many teachers, I am troubled by the rigid nature of scoreable exercises, which must by necessity narrowly frame the issues to be discussed, typically assign "points" only to a specific list of solutions, and in the process, often stifle student creativity in options generation and evaluation (see Susskind 2000: 323-324; Korobkin: 2009: 8). Grading without formal pre-identified scoring of issues and options is of course possible, but fraught with subjectivity (Korobkin: 2009: 8). Additional concerns include a chilling of student experimentation with different negotiation approaches and strategies (see Falcão, Competition Without Winners or Losers, in this volume), a risk of student-to-student alienation (see Ebner, Efron, and Kovach, Evaluating Our Evaluation, in this volume) and unrealistic pressure to settle – or to be more precise, what Lawrence Susskind reported as participant complaints about the "dominance of point trading over matters of ideology or principle" (2000: 324).

On the positive side, grading outcomes creates an obvious incentive for students to prepare a negotiation strategy thoroughly and implement it skillfully (Korobkin 2009: 8). Grading also forces the students and instructor to take advantage of the one specific form of feedback never available in "real life" – direct comparisons to how others have done with exactly the same information. As suggested by the teacher-student exchanges above, students all too frequently seem to believe they reside in a fictional Lake Wobegon, where all of their negotiated settlements are "above average." The reality, of course, is that some settlements simply are not as effective as others.

Empowering students to grade outcomes provides a powerful tool to resolve the problem of subjectivity inherent in instructor grading of complex and creative negotiated settlements. By choosing a simulation that includes a mix of monetary and non-monetary interests and settlement options, the ranking exercise helps students recognize just how easy it is to lose sight of the monetary aspects of a complex problem in the creative stew of non-monetary options-generation and creative problem-solving.

My decision to grade negotiation outcomes came in part from the students themselves. When teaching an alternative dispute resolution survey course in the 1990s, I got in the habit of surveying my students on the first day of class and then would build the syllabus based on their input (see Lee, *Negotiating the Assessment Criteria*, in this volume). Regarding assessment, I always asked the following:

How important should the following class activities be toward calculation of your graded performance in this class (state percentages)?

__% Class participation

__% Simulation performance

__% Quizzes

__% Final exam or paper

__% Journal

__%Other(please identify:______)
100% Total

Perhaps not surprisingly in law schools, students always expressed a strong preference that a majority of the grade be based on what they knew best: a final exam or paper. But I was struck by the fact that simulation performance was almost always rated higher than twenty percent. And, in every class where I have administered the survey, being graded on simulation performance was always much more highly preferred than being graded on class participation (which rarely came in at more than ten percent) – perhaps confirming student agreement with the pejorative implications of Noam Ebner and Yael Efron's labeling of class participation assessment as "The Black Box" (see chapter of same name in this volume).

Given my desire to come up with a way to "teach" my concerns about how easy it is to lose sight of the monetary costs of creative solutions to complex problems, I chose to view their rankings as willingness to be graded on outcome and began to experiment.

I first used the exercise I describe here in 2000 and have used it with seven different law school classes, ranging in size from twenty-four to

thirty-six students; the details I offer below are based on results from Fall 2004 (the year when I had the largest number of negotiating teams).²

Sensitive to one of the commonly framed critiques of grading negotiation outcomes – fostering student-to-student alienation (see, e.g., Ebner, Efron, and Kovach, *Evaluating Our Evaluation*, in this volume) – I overtly invoked the survey results when introducing the exercise (perhaps, you may think, too aggressively given the data):

Graded Negotiation Simulation (25% of course grade) *Based on your desire that you be graded on simulation performance*, I will require that you participate in one graded, two-party negotiation simulation outside of class. You can choose your opponent or have one assigned to you. The grade for this simulation will be calculated as follows: 75% based on the objective outcome of the negotiation (the "presumptive-ly correct" grading of settlement outcomes will be derived from a class ranking exercise which requires each student to grade the outcomes of every settlement other than their own); 25% based on the quality of your pre-negotiation planning form, decision-tree, and post-negotiation self-evaluation form. General information about the negotiation exercise is already posted to the course website. You will receive confidential information in class (emphasis added).

Nuts and Bolts of the Exercise

For this exercise to succeed, you need a simulation that has a rich array of non-monetary interests, but also incorporates at least some distributive elements. In other words, look for (or create) a simulation where money is "in play" but students are likely to have their "eye off the ball" because of the rich array of other interests. Simulations that might yield settlements involving streams of future benefits of some kind are ideal (e.g., salary increases or decreases; profit-sharing; rent reductions/increases or freezes, etc.) because the range of possible settlements is quite broad, including opportunities for wildly dramatic variations in settlement present value.

I chose *Golden Years*, an exercise authored by Nichols Terry that is now published in the online instructor's manual for one of the commonly used alternative dispute resolution (ADR) textbooks in U.S. law schools (Riskin et al. 2009). *Golden Years* is a two-party simulation involving a dispute in a nursing home, over an alleged assault by an employee on an elderly patient. Like many simulations written for law school ADR classes, it reflects a "pro-integrative bias" (Ebner and Efron 2009: 253), in the sense that party interests are described almost

entirely as non-monetary.³ Nonetheless, there are monetary aspects to the problem: the plaintiff pays a specific monthly fee to live at the nursing home, she has incurred out-of-pocket medical expenses (only half of which are covered by her private insurance), and she will need future treatment; the defendant has a limited amount of insurance. For my purposes, I made two significant additions to the basic fact pattern: 1) I offered predictions of litigation outcomes for each side, providing sufficient information so each side could prepare a simple decision tree to frame litigation risk; and 2) I provided average rent increase information for the last five years (as a "seed" to directly encourage bargaining about future streams-of-rent reductions/freezes).

The exercise has six distinct phases: 1) student pre-planning; 2) the negotiation; 3) settlement reporting and self-evaluation; 4) postnegotiation classroom discussion to develop ranking criteria; 5) student ranking of settlement quality; and 6) appeals and grading. I will briefly discuss each phase in turn.

1) Student Pre-Planning

After students receive their general and confidential role-play information, I ask them to complete a negotiation pre-planning form⁴ and require them to complete a simple decision tree analysis that helps provide perspective on the likely litigation outcomes should negotiation fail (see generally Senger 2006). Of course, if you do not teach how to do decision tree analysis, this task could be eliminated and replaced in the simulation instructions with a direct assessment of likely litigation outcomes. The important thing is to prime students from the very beginning that, like it or not, this "interest-rich" problem may well have to be reduced to dollars and cents should negotiation fail.

2) The Negotiation

In addition to framing the exercise as honoring their collective choice to be graded on outcome, I have always offered students the option to choose their opponent rather than have one assigned. This seems to significantly lower student anxiety about grading, especially because I typically assign this exercise toward the end of a course when class members well know each other's strengths and weaknesses (or at least their respective reputations). To date, I have always required students to negotiate one-on-one as lawyer-agents, rather than in lawyer-client teams; in my experience, law students often push-back against team grading (something I suspect is far less likely to occur in business or public policy programs). I limit the negotiation period to ninety minutes, so that students have some structural limitations to confront. And I have either required that students

complete the negotiation outside of class, or if in class, I choose not to observe in order to reduce instructor-induced grading pressure.

3) Settlement Reporting and Self Evaluation

I require that one member of the pair type up their settlement (so that I can easily compile all settlements into a single ranking document). I do not require "formal" agreements. Rather, I request students to provide "the key elements; do not worry about technical format or legal boilerplate." How students respond is always fascinating, ranging from "bare-bones" to multi-paragraph, multi-page prose.⁵

4) Post-Negotiation Classroom Discussion

The class immediately after the due date for settlements and selfevaluation is devoted to simulation debrief. Prior to class, I review the settlements, note common elements, and calculate settlement ranges, but I do not yet distribute all of the settlements to the students. I begin class with a very open-ended invitation: "Let's generate the criteria you want to use to grade the settlements" (see generally, Lee, Negotiating the Assessment Criteria, in this volume). From there, I listen and record, playing the role of facilitator. Students usually start off by sharing their confidential role-play information.⁶ The disclosures trigger a robust discussion about client interests. As might be expected, some students initially lobby for settlement criteria that match specific features of their own agreements. This tactical approach has always been cut off rather quickly, when one or more students object by pointing out that criteria should not be based on any one individual's settlement terms. Consensus on this particular point is automatic; indeed, I believe this student-imposed switch from settlement endorsement to more generalized discussion is what makes the rest of the exercise so effective. Students rapidly generate lists of settlement attributes. I record and display them to the group and facilitate discussion about organization and ranking. Interestingly, students who played one role in the simulation are often the most effective in succinctly articulating the elements of an effective settlement agreement for the other side. I end class by summarizing the consensus on attributes of an effective settlement, which I later distribute in writing to the students as part of the formal ranking assignment. A typical set of attributes for Golden Years is reproduced in section five below.

5) Student Ranking of Settlement Quality

Immediately following the class discussion, I prepare a memo summarizing the class consensus on "attributes of the best agreements" and give them final instructions on how to rank. Here is the introduction and attribute summary:

As I hope you can tell by now, defining negotiation "success" is one of the things I hope you learn something about in this class. As today's discussion made clear, it is not necessarily an easy thing to get a handle on – especially in the artificiality of simulation/role play where there isn't a living, breathing client to tell you whether or not to accept a deal.

During our discussion, you collectively identified the following attributes of the best agreements reached in the Golden Years negotiation:

From Plaintiff's Perspective

- Apology
- Access to friend Dale
- Remain a resident in the home
- Room close to dining hall
- Policies updated to help forestall similar problems
- Out-of-pocket expenses covered (\$10,000)
- Clear consequences for nurse Susan Gross
- Parameters set on relationship of Susan Gross and plaintiff
- Staff training

From Defendant's Perspective

- Confidentiality
- Total monetary damages paid under insurance cap (\$200,000)
- Policies updated to help forestall similar problems
- Plaintiff relocated to different ward
- Minimize total value of what's paid out the door
- "Inside" \$ better than "outside" \$ (i.e., investments that benefit all residents better than cash paid just to plaintiff)
- Release of claims
- Clear timelines

I choose not to opine in any way on this class consensus regarding settlement attributes – again as a way of empowering the students to decide how ranking should occur. In a way, I view this summary as akin to jury instructions: the class is given a societal consensus on what *the law* should be, but once they are charged with ranking, they bring their common sense and individual sense of fairness to the task. And in that spirit, here is my specific invitation to rank:

Now it's your turn to individually rank the settlements (EXCEPT YOUR OWN). By next Monday (start of class), please email me a list of your rankings; alternatively, you may bring a hard copy to class. First, look at the 17 settlements (other than your own) from the perspective of the plaintiff in this case – rank the settlements in order with the first settlement listed being the best and the last settlement listed being the least effective. Second, look at the 17 settlements other than your own from the perspective of the defendant in this case – again, rank the settlements in order with the first settlement listed being the best and the last settlement listed being the least effective. The lists certainly do NOT have to be reverse mirror images of one another (though you may decide that is appropriate); indeed, in some past semesters, there have been top-ranked agreements from both sides' perspectives – the ultimate "win-win" of negotiation. Whether you think that is appropriate for any agreements this year is completely up to you. (My ranking form is reproduced as Appendix A).

One semester, where the classroom discussion involved considerable discussion about how much detail an agreement should have and how comprehensive a release should be, I added the following:

After class, I heard from several students that it would be unfair to grade settlements based on content not expressly covered in class (i.e., the significance of getting a release of claims, when we have not discussed in detail what a release is). That is a fair concern – at least from the perspective of making clear that I am not asking you to rank based on eloquence of the drafting or completeness as a legal document – that is for a different course than this one. Here, the focus is on overall interests of the clients.

In addition to distributing the actual full, unedited text of the settlements prepared by the students, I provide an additional set of rankings information (about which I have chosen to be silent in class up to this point) – the reduction to present value of any direct monetary payments or other calculable monetary benefits (e.g., rent reduction or rate freezes, rent forgiveness, etc.). All actual dollar payouts or measureable future discounts on rent are reduced to present value.⁷

Why no advance warning? A primary teaching goal is to illustrate how easily the joy of creative problem-solving in an interest-rich problem can lead to a devaluing or lack of recognition of the monetary aspects of the problem. I strongly suspect that signaling in ad-

vance that I will "monetize" all settlements will very likely change the bargaining, by encouraging "claiming" behavior and leading students to structure deals where money "trumps" other interests.

Here is how I describe this financial aspect of the ranking exercise to my students:

As I noted during class discussion, there is an extraordinarily wide range of dollar value delivered to plaintiff in these eighteen settlements (by my quick calculation, it's a range between \$12,000 to in excess of \$400,000). My summary is attached below (reducing all benefits to present value using a 3% discount rate). I am not showing you this to suggest that settlements should be ranked based on this particular approach; indeed, as noted in class, there are tremendous advantages in most cases for a defendant to deliver value through reduced revenue streams, rather than to pay out direct dollars. Moreover, dollars (whether cash or benefit streams like reduced rent) were but a small part of this particular negotiation given each party's respective interests. However, my experience in practice (and in simulations like this) is that people undervalue future streams of benefits (both the value received and the cost of providing). To be a superb negotiator, you need to have a clear understanding of what value you are delivering and at what cost.

I then list the monetary value of each settlement, using the categories of benefits provided by the students in their respective settlement documents. Here is an excerpt showing the typical broad range:⁸

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Settlement #12
$ 5,000 cash payment
$414,036 waive residential fees for life: $516,624
$419,036
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Settlement #8

\$7,500	for past medicals
\$2,500	for future psych
\$2,000	for furniture
\$197,001	permanent rent freeze
\$5,000	update community area
<u>\$46,000</u>	private room at no additional cost: \$54,000
\$260,001	

Settlement #15 \$35,000 damages \$10,000 medical expenses \$25,000 punitives \$70,000 Settlement #14 \$10,000 medical bills \$2,000 private room for four weeks \$12,000

I also provide a summary list (stating only the monetary total), ranking the settlements from highest monetary value to lowest.

6) Ranking Compilation, Adjudicating Appeals, and Grading

After I receive each individual student's ranking, I tabulate the average ranking for each settlement and prepare a summary chart, grouping the settlements into three categories: above average, average and below average (see Appendix B). Ranking is always done by comparing students only to others who have had the same side in the problem – as a way of controlling for the inherent advantages or disadvantages in bargaining power built into the problem (see Korobkin 2009: 8).

To date, I have never informed the class in advance what specific grade correlates to their above average/average/below average consensus. Quite frankly, I prefer retaining the unbridled discretion as yet another way to avoid/minimize the risk of student-to-student alienation. Interestingly, not a single student has ever asked for this information. How tough to "grade"? I take a presumptive approach as follows:

- Top third (above average): A/A-
- Middle third (average): B/B+
- Bottom third (below average): C/C+

In the memo where I circulate the ranking results, I invite the students to weigh in if they disagree with the class consensus of the merits of their settlement. To date, I have provided very little framework for how appeals should be drafted, stating only the following:

If you believe the quality of your agreement has been undervalued and should be graded more highly than the class consensus suggests, send me an email "appeal" with your-reasoning. I will consider your appeal and respond to it in writing when I grade the exercise.

The responses have been surprisingly thoughtful and persuasive, often demonstrating superb self-awareness, solid strategic thinking regard-

ing client interests, and familiarity with course materials. Typically, about half of the students in the "below average" settlement ranking file appeals. Here is a "successful" appeal by a student representing the defendant:

I believe my classmates unfairly ranked our settlement low for Defendant Greenacres. It appears that the present monetary value of the settlement may have been disproportionately considered, while it does not seem our classmates gave as much weight to all of Greenacres's interests that were met by our settlement. Yes, our settlement was more expensive than the other settlements, but we also met Greenacres's needs more completely – even more so than some of the top-ranked settlements. For instance, of the three top-ranked settlements (for Defendants), none provided for future dispute resolution, while [top-ranked settlements] also did not set expectations for resident and staff behavior. Yet our settlement, with perhaps one exception, met every need our class had articulated:

- we obtained a nondisclosure agreement (and a release),
- we avoided trial and its attendant publicity (also potential ensuing Board investigations),
- we retained Susan Gross.
- we had a low out-of-pocket payment,
- we ensured Pat was happy,
- we maintained employee and patient morale, and
- we put forth one of the most comprehensive processes (of any settlement) to avoid this situation in the future.

Although we did not specifically include a review process for resident placement, we did (1) provide residents the opportunity to submit anonymous comments and complaints to management and (2) provide a formal means of dispute resolution available to staff and residents. We had calculated (perhaps erroneously) a present value of \$183,000 for the rent savings (calculations attached), and I knew we would lose substantial revenue by fixing Pat's rent, but I weighed this against a Board investigation, possible closure, and the potential of not being indemnified by my malpractice carrier should Pat prevail at trial. In addition, by ensuring nondisclosure and a release, I could (hopefully) prevent my insurance premiums from increasing as a result of the settlement. These savings were, to me, counterbalanced by the fixed rent.

I have been extremely generous in my adjudication of appeals. Why so generous? First and foremost, the "public" ranking of settlements by itself encourages critical thinking about how best to change ineffective negotiation behavior. I see very little educational value in punishing students who engage in effective self-critique through investing seriously in their appeal process. Piling on with an adverse grade just does not feel necessary. Am I guilty of grade inflation? You decide.

Results

The Collective Gasp

Suffice it to say, it is a breathtaking revelation to most students when they see the range of economic benefits reduced to present value. A range as vast as \$12,000-\$419,000 in eighteen negotiations using exactly the same facts stimulates everyone's curiosity – especially when almost every student's post-negotiation self-reflection (in true "Lake Wobegon" fashion) implies they got a good agreement for their client. 10 I always save time in the next class meeting to "hear" and discuss the collective gasp, which includes wonderfully rich conversation about how important (or unimportant) the monetary value should be in the context of this particular problem. Because I choose to teach about decision tree analysis in my negotiation courses, I also use the debriefing to focus on how and why negotiators often departed from their predicted litigation outcomes - \$50,000 from plaintiff's perspective; \$22,500 from defendant's perspective (see Appendix C). The vast majority of defendants offer far more monetary benefits than the analysis would predict as economically rational (correctly reflecting the reality that other interests often trump purely rational monetary concerns). Plaintiffs often obtain monetary benefits exceeding their predicted litigation outcome (powerfully reinforcing that decision tree analysis is not a perfect method to determine client bottom lines or frame aspirational goals).

The Non-Tyranny of Numbers

I have been pleasantly surprised that rankings are by no means completely dictated by the present value calculations. While it is generally true that on average students "rewarded" high dollar value settlements for plaintiffs and "rewarded" low value settlements for defendants, the detailed results showed sensitivity to the clearly expressed non-monetary needs of the clients. For example, the highest monetary settlement for plaintiff (well in excess of \$400,000 based on free rent for life of the plaintiff) was ranked eleven out of eighteen from plaintiff's perspective, presumably on the collective consensus that

the agreement did not meet the much more pressing expressed need of the plaintiff to have close access to her dear friend Dale. Likewise, the fourth lowest dollar value settlement negotiated by defendant was ranked eleven out of eighteen from defendant's perspective, presumably because it failed to provide a much desired confidentiality clause.

A Welcome Surprise

Only once has there not been at least one settlement rated "above average" and at least one settlement being rated "below average" from both plaintiff and defendant perspectives. In other words, both plaintiff and defendant, in the same simulation pair, might be judged to have achieved excellent – or exceedingly detrimental – outcomes for their client. Frankly, I did not anticipate this result when I first designed the exercise. It turns out to be a very powerful illustration of how parties can negotiate complex problems involving monetary and non-monetary benefits and still end up with "win-win" outcomes. Indeed, students frequently tell me that this is the greatest surprise of the exercise.

Conclusion

I will continue to use this graded exercise in my negotiation classes. Here are four things I will be experimenting with in the future; I encourage others to do the same, should they take on this approach:

- 1) Although I always discuss present value calculations in class before we do this exercise, I have not yet explicitly required students to calculate the present value of their settlement proposals as part of their pre-negotiation planning. ¹¹ I will do so in the future by adding this question to the options portion of the pre-negotiation planning form I require students to complete.
- 2) The post-negotiation self-reflection form I have been using strongly orients towards "problem-solving" through its suggested prompts. I wonder if this unintentionally sends the message, like the simulation itself, that distributive bargaining over monetary issues is to be undervalued. I will draft a more balanced post-negotiation reflection invitation, by among other things, explicitly asking students to consider the total monetary value of their settlement (reduced to present value) and asking them to reflect on how that settlement was "pitched" to the other side.
- 3) As noted above, I have not told students in advance that all the monetary elements of their settlements will be reduced to present value as part of the ranking exercise. I will do so in some future iterations of the exercise as a way to test my assumption that advance notice may skew the bargaining in ways that undermines settlement creativity and options generation.

4) This past summer was the first time I used this exercise without first getting student buy-in through an advance survey of their grading preferences. Anticipating some push-back, I revised the description of the exercise in my syllabus to elaborate a bit more on my ultimate grading authority and the availability of appeals:

The "presumptively correct" grading of settlement outcomes will be derived from a class ranking exercise which requires each student to grade the outcomes of every settlement other than their own. As the instructor, I reserve the ultimate authority to deviate from "presumptively correct" class consensus assessment; students whose outcomes are deemed below average will be encouraged to file brief, informal "appeals" to explain why the class undervalued the quality of their settlement. Well-reasoned appeals will merit a grade bump for the exercise.

I did not get any questions from students or concerns expressed in teaching evaluations about my choice to empower students to grade.

As for recognition, I confess this exercise was never intended to deliver the kind of "acknowledgement and concern for each other as fellow human beings" that is the hallmark of transformative mediation's use of the term (Bush and Folger 1994: 20). Keeping in mind a much more modest goal – "recognition" as "acknowledgement of achievement" – this exercise consistently delivers for students.

Notes

¹ In some contexts, this may not be possible. In law schools, including my own, it has become increasingly common for the administration to demand that evaluation methods be declared *before* student enrollment, on the theory that the course syllabus is a contract that students have a right to rely on. For those of you teaching in contexts other than law, all I can say is "I'm not kidding." By way of illustration, here is the orientation guide I received from the William S. Boyd College of Law in Las Vegas, where I taught negotiation in the summer of 2012:

You should think of the syllabus as a contract between you and the students, stating the policies and practices that will be enforced throughout the semester....The syllabus should clearly state your policies on class attendance, punctuality, grading, class participation, quizzes or writing assignments, and anything else that could affect a student's grade or ability to complete the course requirements. It should clearly state how a student's performance will be evaluated – specifically, whether and to what extent the grade will be based on one or more exams or quizzes, a paper, class attendance, class participation, and classroom presentations or simulations, and how these different components of the grade will be weighted in calculating the final grade....As the teacher, you must

adhere to the policies in your syllabus – for example, class attendance, class participation, and grading. Students rely on the syllabus in deciding whether to stay in the class or drop it during the drop/add period, and they are entitled to plan their semester according to the workload indicated on the syllabus. For example, if the syllabus states that the only written assignment will be an open-book final exam, then you should not decide later in the semester to make it a closed-book exam, or to add a research paper. If you promise a take-home exam, you should adhere to that promise. If you wish to maintain some flexibility about certain matters, make sure that your syllabus reflects that. For example, if you are not sure whether your final exam will be in essay or multiple-choice format, your syllabus should not promise a specific format.

- ² I regret not thinking like a researcher when I first started using this exercise. In particular, as is described later in this chapter, one of the unanticipated benefits was the quality of student "appeals" of their outcome grade. I kept my grading forms that I prepared to respond to their appeals, but I failed to retain the appeals themselves – all of which came in as emails which I chose not to archive or print. That is a mistake I will not make in the future when I next teach negotiation. ³ For example, according to plaintiff's confidential instructions, "[a]bove all else, Pat wants to remain at the home. Moving at this late date in her life would be extremely difficult. Pat feels let down by [the nursing home administrator] and feels that some sort of apology is due. She also worries that this type of thing could happen again to one of the other residents. In general, Pat seems to have little interest in either money or material possessions." ⁴ I require students to: a) identify and rank their client's interests and anticipate the other side's interests; b) identify their client's best alternative to a negotiated agreement (BATNA) and worst alternative to a negotiated agreement (WATNA) and anticipate the other side's BATNA and WATNA; c) generate a range of options to satisfy their interests, with an explicit invitation to identify those options likely to be attractive to the opposing party; and d) identify what their opening offer will be and the opening offer that they anticipate from the other side. ⁵ Settlement #15 reads as follows:
 - \$35,000 in Damages
 - \$10,000 in Medical Expenses
 - \$25,000 in Punitive Damages
 - A move to the Paragon Wing to be near Dale
 - No more contact with Nurse Susan Gross
 - Hot food, when hot food is being served
 - And Bingo on Tuesdays

Settlement #14 takes a much more detailed approach, reading as follows: Monetary:

- Green Acres will pay Pat \$10,000 to cover medical bills
- Green Acres will pay the additional costs of a private room (\$500 a week)
- Pat will be allowed to stay in private room to heal (parties anticipate it will be approximately 4 weeks, however Pat's doctor will decide when she is ready to return to a non-private room)
- If Pat is already healed to the point that she can return to a nonprivate room, she will have the option of staying another week in her private room during her Paragon trial period (see below)

Living Arrangements:

- Pat will have the choice to live in Paragon or South Ward.
- Susan will only work in North to ensure that she does not run into Pat and Pat will not run into her.
- Pat will have a one week trial period in the Paragon Ward. During the trial period, she will maintain her private room, which is adjacent to Paragon. When she wakes up she will go to the Paragon Ward, she will have a "homeroom" and she will live as a resident during the daytime. The "homeroom" will be the room that she will live in if she becomes a resident of Paragon Ward. During this trial period, she will sleep in her private room. Pat will have the option to do this for one week. In the event that Pat does not like Paragon Ward, she can simply return to her private room, day or night. This will ensure that Pat is not bound to a living arrangement that is not to her liking.
- After the trial period, Pat will then decide if she wants to live in the Paragon Ward or the South Ward. All parties are concerned that Pat will not like living in a ward where people are non-ambulatory, require high supervision and may have medical conditions such as being critically incontinent. All parties want to ensure that Pat is empowered to make her own decisions about her living arrangements and that her health concerns match those of the ward.
- If Pat chooses South Ward she will be transported by wheelchair to and from her meal times in Paragon. She will not be required to walk. Pat will not have food brought to her. Wheelchair transportation will be provided to ensure that she is comfortably able to go to the dining hall. She will be taken to meal time at the same time as everyone else. This is to ensure that she will be served hot meals and that she will be able to have meals with her friend Dale.
- During her trial period she will be in contact with Leslie James. Pat will inform James after her "trial week" as to which ward she prefers

Prevention of further incidences:

- There will be a yearly mandatory training of all staff that could count towards continuing education credits.
- The topic of the mandatory formal training will be centered on how to deal with difficult patients and the issues unique to caring for challenging geriatric patients.
- There will be another mandatory seminar that would further deal with the challenges of working in a geriatric facility. The forum could include, speakers, round table discussions or role playing.
- The seminar and the yearly training will be held six months apart from each other. This is to ensure that such issues are addressed every six months.
- Green acres will implement safeguards aimed at addressing contentious relationships between patients and staff. The goal is to prevent animosity from escalating into harmful situations as was the case here.
 - Nurses will be required to chart personal or behavior problems with patients. Charting such problems will assure that management will know of such poor relationships. At Green Acres, as in other nursing homes, management regularly reviews patient charts. The goal is that even though Susan Gross was in charge of North Wing, her supervisor would have learned of the

- deteriorating relationship between her and Pat by seeing it in Pat's chart. Staff will also be encouraged to seek assistance for relationships that are deteriorating, such as the relationship between Pat and Susan.
- As an additional safeguard, patients will have access to a complaint form in order to write down problems and concerns regarding the nursing staff. The forms will go directly to the administration. The purpose of this is so that patients in Pat's position could make sure their complaints and concerns can go directly to administration.
- In the future, Green Acres Administration will make best efforts to check in with patients being moved between wards so that residents will have a voice in the process. If a patient it transferred, the administrative staff will check in with that patient within two weeks of his or her transfer.
- The goal of this section is to be aware of contentious relationships between staff and patients and to take a proactive role in dispute resolution before situations become out of hand.

Reassurance Meeting:

- Leslie James will meet with Pat within 5 business days of this settlement in order to reaffirm to Pat that there are no hard feelings, that she can stay at the nursing home, that her needs and wellbeing will be valued and that she can expect an ongoing future relationship. Confidentiality:
- The entire incident will be kept completely confidential between the two parties and a confidentiality agreement will be signed by all parties in the next 24 hours. Once the confidentiality agreements are signed, all provisions of this settlement will go into effect.
- The meeting between James and Pat will be in a confidential location to ensure privacy.
- ⁶ To date. I have relied on this oral exchange of information rather than a sharing of written role-play materials. My experience has been that hearing confidential information from a former adversary has more impact than simply reading it. ⁷ Unless students explicitly provided a time limitation for rent adjustments in their settlement summary, I valued freezes in annual rent as a cost savings to the plaintiff for the full nine years of her average life expectancy. ⁸ I have left the original settlement numbers in place in this list so you can see how students actually ranked the quality of that particular settlement in the detailed settlement rankings reproduced as Appendix B. ⁹ Settlements (in order of monetary value delivered to plaintiff):

Monetary Value
\$419,036
\$260,001
\$255,000
\$238,501
\$230,422
\$229,422
\$216,001
\$ 70,000
\$ 70,000
\$ 65,000
\$ 60,000

16	\$ 56,086
9	\$ 50,000
18	\$ 42,808
5	\$ 33,000
6	\$ 30,000
10	\$ 15,500
14	\$ 12,000

Median (\$67,500) Average (\$130,709)

¹⁰ The tremendous settlement range I have typically experienced in this exercise apparently is not remarkable. See, e.g., Craver 2010: 338 (reporting that his students' negotiation results over thirty-five years of teaching and training "do not vary by ten or fifteen percent, but by ten, fifteen, or even fifty fold!"). ¹¹ Interestingly, a number of students include this information without my specific request; others explicitly state present value assumptions in their settlement agreements, though not always accurately. ¹² Shorter Oxford English Dictionary 5th Edn. 2002. New York: Oxford University Press.

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Visiting and Adjunct Professor's Orientation Guide. 2012. William S. Boyd School of Law (copy on file with author).

Appendix A

Your name:	
Your settlement number:	

Look at the 17 settlements **other than your own** from the perspective of the plaintiff in this case. Rank the settlements in order with the first settlement listed being the best and the last settlement listed being the least effective.

Second, look at the 17 settlements **other than your own** from the perspective of the defendant in this case. Again, rank the settlements in order with the first settlement listed being the best and the last settlement listed being the least effective. The lists certainly do NOT have to be reverse mirror images of one another (though you may decide that is appropriate); indeed, in some past courses, there have been top-ranked agreements from both sides' perspectives – the ultimate "win-win" of negotiation. Whether you think that is ap propriate for any agreements in this class is completely up to you.

From Plaintiff Perspective	From Defendant Perspective
1)	1)
2)	2)
3)	3)
4)	4)
5)	5)
6)	6)
7)	7)
8)	8)
9)	9)
10)	10)
11)	11)
12)	12)
13)	13)
14)	14)
15)	15)
16)	16)
17)	17)

Appendix B

Details for Plaintiff's Settlements (based on student rankings only)

Rank	Monetary Value (present value)	Settlement Number	Average Ranking	# of Top 5 Rankings	# of Bottom 5 Rankings	Top 5 rankings less Bottom 5 rankings
ABOVE AVERAGE						
1	\$30,000	6	5.28	19	2	+17
2	\$230,422	7	5.37	19	2	+17
3	\$70,000	3*	5.72	18	1	+17
4	\$216,001	4	6.39	17	4	+13
5	\$260,001	8	6.85	13	2	+11
6	\$65,000	1*	7.0	16	3	+13
AVERAGE						
7	\$60,000	17	7.57	10	4	+6
8	\$12,000	14	9.08	8	10	-2
9	\$42,808	18	9.23	6	8	-2
10	\$15,500	9	9.23	10	7	+3
11	\$229,422	12	9.5	9	7	+2
12	\$419,036	2	9.52	7	7	0
13	\$255,000	13	10.2	5	5	0
BELOW AVERAGE						
14	\$12,000	11**	11.23	5	17	-12
15	\$70,000	16	11.41	1	11	-10
16	\$56,086	5	11.64	6	15	-9
17	\$60,000	15**	12.94	2	15	-13
18	\$42,808	10	13.11	2	16	-14

^{*} Indicates ranked above average by both plaintiffs and defendants.

^{**}Indicates ranked below average by both plaintiffs and defendants.

Details for Defendant's Settlements (based on student rankings only)

	y res-	nt		S 5	tom	- Jlk-
Rank	Monetary Value (pres- ent value)	Settlement Number	Average Ranking	# of Top 5 Rankings	# of Bottom 5 Rankings	Top 5 rankings less Bottom 5 rankings
ABOVE AVERAGE						
1	\$12,000	14	4.47	23	0	+23
2	\$15,500	10	4.67	24	0	+24
3	\$42,808	18	5.76	20	1	+19
4	\$70,000	3*	5.87	20	3	+17
5	\$65,000	1*	6.20	19	2	+17
6	\$50,000	9	6.36	15	3	+12
AVERAGE						
7	\$60,000	17	7.47	6	1	+5
8	\$56,086	16	8.31	10	5	+5
9	\$30,000*	6	9.14	11	11	0
10	\$260,001	8	9.51	8	10	-2
11	\$33,000	5	9.61	9	11	-2
12	\$216,001	4	10.18	2	5	-3
13	\$255,000	13	10.76	2	8	-6
BELOW AVERAGE						
14	\$70,000	15**	11.73	3	14	-11
15	\$229,422	11**	11.90	1	8	-7
16	\$238,501	2	12.17	0	12	-12
17	\$419,036	12	13.44	2	22	-20
18	\$230,422	7	13.69	0	21	-21

^{*} Indicates ranked above average by both plaintiffs and defendants.

^{**}Indicates ranked below average by both plaintiffs and defendants.

Appendix C

Decision Tree Models

Excerpt From Plaintiff's Confidential Information

"You think that a jury fully informed of the conduct of the facility <u>might</u> go as high as \$40,000-50,000 for pain and suffering, and <u>might</u> really let Green Acres have it with an award of punitive damages. Though these things are notoriously hard to predict, based on the case law and jury verdicts in your jurisdiction, you would put the odds as follows:

Likelihood that jury will find:

80% Defendant liable 20% Defendant not liable

Likelihood of damage amounts IF defendant liable

(includes paid and suffering and the \$10,000 in past and future medicals)

60% \$50,000 20% \$35,000 20% \$15,000

Likelihood that punitive damages will be awarded

50% No punitives50% Punitives awarded

If punitive awarded, likelihood of an amount:

20% \$100,000 30% \$50,000 50% \$20,000

A "Model" Tree (plaintiff's perspective)

Damages if Jury Finds Liability

.8 x .6 x \$50,000 = \$24,000 .8 x .2 x \$35,000 = \$5,600 .8 x .2 x \$15,000 = \$2,400 \$32,000

Punitive Damages if Jury Finds Liability on Underlying Claim

.8 x .5 x .2 x \$100,000 = \$8,000 .8 x .5 x .3 x \$50,000 = \$6,000 .8 x .5 x .5 x \$20,000 = \$4,000 \$18,000

Combined Total: \$50,000

Excerpt from Defendant's Confidential Information

"Through careful exposition of the difficulties associated with the care of institutionalized geriatrics, you believe that you could persuade a jury to return a verdict for the defense or at least to keep the damages within reasonable amounts. Though these things are notoriously hard to predict, based on the case law and jury verdicts in your jurisdiction, you would put the odds as follows:

Likelihood that jury will find:

50% Defendant liable 50% Defendant not liable

Likelihood of damage amount IF defendant liable

(includes pain and suffering and the \$10,000 in past and future medicals)

20% \$50,000 50% \$35,000 30% \$15,000

Likelihood that punitive damages will be awarded

70% No punitives

30% Punitives awarded

If awarded, likelihood of an amount:

10% \$100,000 50% \$50,000 40% \$20,000

A "Model" Tree (from defendant's perspective)

Damages if Liable

.5 x .2 x \$50,000 = \$5,000 .5 x .5 x \$35,000 = \$8,750 .5 x .3 x \$15,000 = \$2,250 \$16,000

Punitive Damages if Liable on Underlying Claim

 $.5 \times .3 \times .1 \times $100,000 = $1,500$ $.5 \times .3 \times .5 \times $50,000 = $3,750$ $.5 \times .3 \times .4 \times $20,000 = $1,200$ \$6,450

Combined Total: \$22,450