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## Clinical Negotiating Achievement as a Function of Traditional Law School Success and as a Predictor of Future Negotiating Performance

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# CLINICAL NEGOTIATING ACHIEVEMENT AS A FUNCTION OF TRADITIONAL LAW SCHOOL SUCCESS AND AS A PREDICTOR OF FUTURE NEGOTIATING PERFORMANCE

CHARLES B. CARVER\*

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## I. INTRODUCTION

Since the vast majority of legal problems are resolved through negotiated arrangements instead of through adjudicated determinations, the possession of bargaining skills should substantially enhance one's ability to practice law. During the 1960's, innovative law professors began to recognize that simulated exercises could be employed in clinical courses to teach students about the negotiation process. James J. White at the University of Michigan<sup>1</sup> and Cornelius J. Peck and Robert L. Fletcher at the University of Washington<sup>2</sup> developed simulation models designed to improve the bargaining competence of future practitioners.<sup>3</sup>

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1. See White, *The Lawyer as a Negotiator: An Adventure in Understanding and Teaching the Art of Negotiation*. 19 J. LEGAL EDUC. 337 (1967); see also H. EDWARDS & J. WHITE, *THE LAWYER AS A NEGOTIATOR* (1977).

2. See Peck & Fletcher, *A Course in the Subject of Negotiation*, 21 J. LEGAL EDUC. 196 (1968); See also C. PECK, *CASES AND MATERIALS ON NEGOTIATION* (1980).

3. More recent articles discussing this topic include Ortwein, *Teaching Ne-*

During the past thirteen years, I have regularly taught a legal negotiating course based upon the White-Peck-Fletcher models. I have frequently wondered whether the fundamental skills being imparted in that clinical class are related to those talents developed in traditional law school courses. I have also contemplated the impact of such negotiation training upon the actual capacity of students to negotiate effectively in subsequent settings. I had suspected the existence of a minimal positive correlation between overall law school success and the results achieved in a clinical negotiating course, based upon the belief that many of the personal traits that contribute to academic success would similarly influence bargaining results. The same careful preparation and capacity to articulate one's thoughts in a cogent manner which might reasonably be expected to enhance an individual's academic performance might logically be presumed to have a similarly affirmative impact upon that person's bargaining achievements. I also thought that the skills being taught in my negotiation course would be likely to increase the ability of my students to negotiate in future contexts.

This article will explore the degree to which these two basic hypotheses have been substantiated. Statistical comparisons will be made between negotiation course performance and overall law school success. Comparisons of bargained results obtained in a Trial Advocacy class are made between students who had previously taken my Lawyer as Negotiator course and students who had not received such clinical training.

## II. NEGOTIATION COURSE METHODOLOGY

During the first half of the semester, the concepts covered in Edwards and White's *The Lawyer as a Negotiator* are explored, and different theories are developed from other sources.<sup>4</sup> The impact of verbal and nonverbal communication and psychological factors upon the negotiation process is considered. The manner in which the personal needs of the lawyers and clients and the different types of legal problems and relationships involved influence the bargained results is discussed. The various phases of the bargaining process are examined, along with the different techniques negotiators are likely to encounter. The way in which cultural differences and sex role expectations affect bargaining relationships is also considered. Specific issues pertaining to such topics as judicial settlement conferences, telephone negotiations, the commencement of litigation settlement discussions, and the enhancement of

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*gotiation: A Valuable Experience*, 31 J. LEGAL EDUC. 108 (1981); Coleman, *Teaching the Theory and Practice of Bargaining to Lawyers and Students*, 30 J. LEGAL EDUC. 470 (1980); Williams, *Using Simulation Exercises for Negotiation and Other Dispute Resolution Courses*, 34 J. LEGAL EDUC. 307 (1984); and Moberly, *A Pedagogy for Negotiation*, 34 J. LEGAL EDUC. 315 (1984).

4. See generally Craver, *The Fundamentals of Effective Legal Negotiations*, 7 ALI-ABA COURSE MATERIALS J. 5 (1983); CRAVER, *FUNDAMENTALS OF EFFECTIVE LEGAL NEGOTIATING* (1983).

seemingly weak positions are examined. While the negotiation process is being formally explored, the students are required to engage in three or four negotiation exercises. At the conclusion of each, the various results are disclosed and individual negotiations are evaluated in an effort to determine what techniques were successfully and unsuccessfully utilized. I endeavor to integrate the theoretical concepts with the students' simulated experiences.

During the second half of the semester, the class members engage in negotiation exercises which count toward two-thirds of their course grade. Each problem is structured in a duplicate bridge format. Everyone receives the same "General Information," and all of the individuals on the same side are provided with the identical "Confidential Information." Each side consists of two students, in an effort to simulate the fact that lawyers must not only negotiate with their respective opponents, but also with their own respective clients. For each exercise, participants are assigned different partners and different opponents. The results of each negotiation are rank ordered from high to low for each side, and this ordering scheme is used to grade each team's performance.<sup>5</sup> In an effort to induce the students to reassess, at the conclusion of the class, the impact of the theoretical factors upon their negotiating experiences during the semester, each is required to prepare a twelve to fifteen page paper pertaining to this interrelationship. This paper accounts for one-third of the course grade.

### III. STATISTICAL COMPARISONS

#### A. *Negotiation Results Compared With Overall Law School Success*

My first hypothesis concerned the relationship between the success achieved by students in my clinical negotiation class compared with their respective overall law school achievements. Negotiators who regularly obtain above-average results are usually well prepared individuals who can forcefully articulate their positions. They can logically analyze the relevant factual circumstances and applicable legal principles to determine the most generous result obtainable through a negotiated resolution. They must understand the negotiation process and the various verbal, nonverbal, and psychological factors which meaningfully influence that process. Since students who perform well academically are normally thought to be those who prepare carefully, adroitly apply legal doctrines to stated facts, and logically articulate their thought processes, I hypothesized that there would be at least some

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5. Carefully developed non-zero sum exercises which permit negotiating parties simultaneously to increase their respective satisfaction levels through appropriate trade-offs are designed to encourage resort to cooperative bargaining that will permit participants to maximize the combined return for both sides. However, only the respective point totals achieved for each side are used to determine the final rankings, since it is that particular result which is most relevant to each party's client.

minimal positive correlation between overall law school performance and the results achieved in my Lawyer as Negotiator course.

My initial task was to eliminate the bias which might have occurred if my final Lawyer as Negotiator rankings were used. One third of that final grade is attributable to student performance on a prepared paper which would presumably have involved skills analogous to those which would be considered when traditional law school performance was being evaluated. To insure that only clinical negotiation success would be weighed, my Lawyer as Negotiator students were ranked solely by their final bargaining achievement placements. They were then ranked by order of their respective law school grade point averages.

I had negotiation results and class standing data for the past eight years—five years at the University of California at Davis (1977-1982) and three years at the University of Illinois (1983-1985). A Spearman rank-order correlation was calculated for each of these years.<sup>6</sup> The results obtained are set forth in Table 1. The " $r_s - 0.10$  level" numbers indicate the coefficients needed for a statistically significant correlation [positive (+) or negative (-)] for such a sample size (N) at the 0.10 level of significance, while the " $r_s - 0.05$  level" coefficients provide such data for the 0.05 level of significance.<sup>7</sup>

TABLE 1  
SPEARMAN RANK ORDER COEFFICIENTS FOR  
NEGOTIATION RESULTS COMPARED WITH  
OVERALL LAW SCHOOL PERFORMANCE

Semester	N	$r_s$	$r_s - 0.10$ level <sup>8</sup>	$r_s - 0.05$ level <sup>8</sup>
Fall 1977	28	-0.0175	0.2490	0.3175
Spring 1979	26	-0.0834	0.2588	0.3299
Spring 1980	28	+0.0020	0.2490	0.3175
Spring 1981	25	-0.1329	0.2646	0.3362
Spring 1982	31	-0.0959	0.2360 <sup>9</sup>	0.3005 <sup>9</sup>
Fall 1982	29	+0.1236	0.2443	0.3113
Fall 1983	43	+0.1513	0.1978 <sup>10</sup>	0.2538 <sup>10</sup>
Spring 1985	42	+0.0131	0.2002 <sup>10</sup>	0.2569 <sup>10</sup>

6. See H. BLALOCK, JR., SOCIAL STATISTICS 416-17 (1972).

7. At the 0.10 level of significance, the probability that the determined correlation has occurred by chance is one in ten, while at the 0.05 level it would be one in twenty.

8. The Spearman  $r_s$  coefficients for the 0.10 and 0.05 levels of significance were obtained from Table A10 of the Appendix to W. CONOVER, PRACTICAL NON-PARAMETRIC STATISTICS 456 (1980).

9. These coefficients were obtained by extrapolation from Table A10 which only included  $r_s$  values for Ns from 1 to 30.

10. These coefficients were calculated by use of the  $r_s$  approximation formula contained in W. CONOVER *supra* note 8, at 456.

The rank-order coefficients obtained for the eight years demonstrate slightly positive correlations between negotiation results and overall law school performance for four years and slightly negative correlations for the other four years. However, none of the computed rank-order coefficients establish a statistically significant correlation for any year at the 0.05 or even 0.10 level of significance. This result necessitates rejection of the initial hypothesis which suggested an affirmative correlation between law school grades and clinical negotiation achievement. The rather unequivocal findings indicate the complete absence of any meaningful relationship between the two pertinent variables.

It is interesting to note that the results suggesting the absence of any statistically significant correlation were obtained for eight separate years involving a total of 252 students at two different law schools. Nonetheless, it is possible that if similar rank-order tests were performed by clinical negotiation teachers at other law schools some dissimilar results might be ascertained. It would, however, be surprising if any substantial relationship were determined.

One possible explanation for the unexpected absence of any statistically significant correlation between law school grades and clinical negotiation results might involve the relatively homogeneous nature of law school matriculants. Typical students at both the University of California at Davis and the University of Illinois had obtained undergraduate grade point averages in excess of 3.5 on a 4.0 scale and had scored above 650 on the LSAT. If the academic capabilities of the students included in my study were basically indistinguishable, one might expect to find no meaningful differences between Lawyer as Negotiator class results and overall law school performance. However, this explanation cannot be substantiated. Professors teaching traditional law school courses have generally found that well-drafted examinations normally produce an expansive range of responses that permit reasonable demarcations among the various students. Few would suggest that student homogeneity has precluded the drawing of meaningful distinctions with respect to student performance in regular courses.

#### B. *Trial Advocacy Negotiation Results as a Function of Previous Legal Negotiating Skills Training*

Law teaching traditionalists have frequently questioned the adoption of skills courses based upon their belief that practical lawyering skills cannot be taught effectively through the use of simulation exercises. Many of these individuals have suggested that such practical competence must necessarily be developed following law school graduation in apprentice-like settings. Skills course teachers, on the other hand, have intuitively maintained that such lawyering proficiencies can be developed through simulation techniques.<sup>11</sup>

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11. It is interesting to note that practitioners appear to believe that simulation

During the 1982-83 and 1983-84 academic years at the University of Illinois, circumstances fortuitously arose which permitted me to determine tentatively whether traditional lawyering skills can be efficaciously taught in law school negotiation courses. My limited enrollment Lawyer as Negotiator course was offered each fall to third year students, most of whom participated in the Trial Advocacy class throughout the academic year. During the Spring 1983 Trial Advocacy course, Professor Michael Graham asked me to develop a negotiation exercise for his Trial Advocacy students. I delivered two one-and-one-half hour lectures describing the negotiation process and the factors which most influence bargaining results. The class members were given a negotiation problem. The settlements they achieved were graded. Many of the students from my prior Lawyer as Negotiator course suggested that they performed more successfully than the other participants because of the previous negotiation training they had received.

To test the hypothesis that Lawyer as Negotiator students achieved more favorable results on the Trial Advocacy negotiation exercise than the other class members, I compared the grades earned by the two groups. The twenty individuals who had taken my fall term Lawyer as Negotiator course achieved a 4.58 grade average on a 5.0 scale, while the other ninety-four Trial Advocacy participants earned a 4.36 average. This same phenomenon was replicated in the Spring of 1984 with regard to the students who enrolled in Professor Gerard Bradley's Trial Advocacy course. Those thirty-one persons who had taken the Lawyer as Negotiator during the fall term achieved a 4.66 grade average compared to a 4.43 average for the other ninety-three participants.<sup>12</sup>

To determine whether there was a statistically significant difference between the higher negotiation exercise grade averages achieved by the Trial Advocacy students who had previously taken my Lawyer as Negotiator course and the lower averages earned by the participants who had not received such prior clinical training, a t-test analysis was performed.<sup>13</sup> The results of this analysis are set forth in Table 2, with "t-0.10 level" being the minimal t score needed to establish a statistically significant difference at the 0.10 level and "t-0.05 level" being the minimal t score pertaining to the 0.05 level.

The results for both years establish a statistically significant difference between the Trial Advocacy negotiation exercise grade means for the two

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exercises can be used to teach negotiation skills, since increasing numbers are enrolling in continuing legal education programs which use simulations to explicate the negotiation process.

12. No similar comparative data were available for the 1984-85 academic year since (1) my Lawyer as Negotiator course was taught during the spring semester when the Trial Advocacy class was performing its negotiation exercise and (2) Professor Bradley decided not to grade the negotiation results achieved by his Trial Advocacy students during that term.

13. The procedures used to perform the t test are described in L. HOROWITZ, *ELEMENTS OF STATISTICS FOR PSYCHOLOGY AND EDUCATION* 269-73 (1974).

TABLE 2  
 TRIAL ADVOCACY NEGOTIATION EXERCISE RESULTS AS A  
 FUNCTION OF PRIOR CLINICAL NEGOTIATION TRAINING

Academic Year	1982-1983	1983-1984
No. With Prior Negot. Training	20	31
No. Without Prior Negot. Training	94	93
Mean Grade for Those With Prior Negot. Training (On 5.0 Scale)	4.58	4.66
Mean Grade for Those Without Prior Negot. Training (5.0 Scale)	4.36	4.43
t-Test Coefficient	1.94	2.48
t-0.10 level <sup>14</sup>	1.29	1.29
t-0.05 level <sup>14</sup>	1.66	1.66

subject groups at the 0.10 and 0.05 levels of significance. These findings are even more impressive than they might initially appear when it is remembered that all of the Trial Advocacy students were provided with two one-and-one-half hour presentations on the negotiation process. It is possible that greater differences between the two groups of participants would have occurred had the individuals who had not previously taken the Lawyer as Negotiator course not been provided with such instruction.<sup>15</sup>

#### IV. IMPLICATIONS

The findings obtained in this study have established two statistically significant hypotheses: (1) the absence of any meaningful correlation between

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14. Values for the "t-0.10 level" and "t-0.05 level" coefficients are taken from Table A-2 in L. HOROWITZ, *supra* note 13, at 436-437. Since it was hypothesized that there would either be no statistically significant difference between the Trial Advocacy negotiation exercise grade averages of the two defined groups or that the grade averages of those students who had previously taken the Lawyer as Negotiator course would be higher than for those participants who had not taken that course, the t-test coefficients at the 0.10 and 0.05 levels were ascertained for a one-tailed, rather than a two-tailed, test.

15. One might question whether the different results achieved on the Trial Advocacy exercise reflect the fact that the majority of students who had previously decided to enroll in my Lawyer as Negotiator course enjoyed the bargaining process more than the Trial Advocacy participants who did not do so. My experience has indicated that most of the students in my class have had minimal familiarity with or understanding of the negotiation process. Furthermore, I should note the fact that from eighty to ninety students generally endeavor to register for the limited-enrollment Lawyer as Negotiator class each year, with the number actually enrolled being ran-



overall law school performance and the results achieved with respect to the simulated exercises undertaken in my Lawyer as Negotiator course; and (2) the presence of a positive correlation between prior clinical negotiation training and performance on Trial Advocacy class negotiation exercises. The first hypothesis is probably the more definitive of these findings, since it was verified for eight separate years with respect to students at two different law schools, and it included the results of five or six distinct negotiation exercises for each year's class. The second conclusion is more tentative, because it only covered two years and the results of a single Trial Advocacy negotiation for each year. Nonetheless, it did pertain to more students.

It would be beneficial for legal negotiating teachers at other law schools to engage in similar research to determine if they would replicate the obtained results. It would also be informative if teachers of other clinical skills courses, such as client counseling and trial practice, would compare the practical performances attained in their respective classes with overall law school success. If no statistically significant correlations were found, this might lead to the conclusion that traditional academic performance and clinical performance are entirely distinct and unrelated.

Studies such as the seminal empirical research undertaken by Professor Gerald Williams<sup>16</sup> pertaining to factors affecting the negotiating reputations of practicing attorneys should be expanded to ascertain whether or not there is any statistically significant correlation between their previous academic records and their bargaining achievements in the real world. An additional study should be undertaken to determine whether there is any meaningful relationship between the undergraduate grade point averages and/or the LSAT scores achieved by individuals and their results in clinical law school courses and their ultimate negotiation performance in practice. While undergraduate GPAs and LSAT scores may be predictive of academic performance in traditional law school courses, they may or may not be predictive with respect to success in practical endeavors. If such admissions criteria were determined to be unpredictable of performance in skills courses, it might be appropriate for law schools and the Law School Admissions Council to seek to ascertain factors which would be predictive regarding such fundamental areas.

If there is no correlation between overall law school performance and one's ability to achieve results in clinical situations, law firms might need to reconsider their degree of reliance upon class rank during the hiring process. Since the capacity of practitioners to engage in client counseling, to negotiate, and to engage in litigation is crucial to their ability to be effective attorneys, it might be appropriate for hiring committees to place greater emphasis upon the performance demonstrated by applicants in clinical courses.

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domly selected. It is thus likely that many of the students in the Trial Advocacy class who did not have the opportunity to take the Lawyer as Negotiator course would have done so had more spaces been available.

16. See G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983).

The fact that there was a statistically significant difference between the higher negotiation results achieved by the Trial Advocacy students who had previously taken the Lawyer as Negotiator course and the lower averages attained by the participants who had not received such prior clinical training would certainly suggest that basic lawyering tasks can be effectively taught in an academic setting. If future empirical studies of a similar nature conducted at other universities were to replicate these findings, law schools that have been reluctant to adopt such skills courses might want to reconsider their disinclination. While I do not believe that law schools can or even should undertake to provide courses pertaining to every practical aspect of legal practice, I do believe that results such as those obtained in my study should encourage curriculum committees to think seriously about the adoption of legal negotiating and client counseling courses. The skills taught in these classes and those imparted in most trial advocacy programs would certainly prepare students for the basic demands of legal practice.

#### V. CONCLUSION

The empirical data evaluated by me have demonstrated the absence of any meaningful correlation between overall law school performance and the results achieved by students engaged in simulated exercises in my Lawyer as Negotiator class. My data, however, indicate the presence of a statistically significant relationship between prior legal negotiating training and the results subsequently attained in Trial Advocacy negotiation exercises. The former finding should cause one to question the traditional belief that law school grades are a reliable predictor of an individual's ability to perform the tasks which must be regularly undertaken by practicing attorneys, while the latter determination should bolster the contention that practical lawyering skills can be efficaciously taught in law school settings.

