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TERRY WHITE: A TWO-FRONT NEGOTIATION EXERCISE*

PHILIP G. SCHRAG**

I. INTRODUCTION

In the 1980s, teaching the theory and art of negotiation has become more important than ever in the curricula of law schools. As the cost of full-scale litigation has risen, the pressure on litigants to settle short of trial has increased, and the development of alternative dispute resolution mechanisms has become a priority of the bar.¹ The literature on negotiation has multiplied,² and law school texts have been published³ to support an increasing number of courses in negotiation.⁴

In response to increased interest in teaching law students about the negotiation process, several simulation exercises have been published. Students in these exercises assume the roles of lawyers, who then negotiate intensely with each other, based upon prefabricated written instructions which summarize what their clients

* © 1986 by Philip G. Schrag. The *Terry White* exercise was developed collaboratively by the teaching staff of the Center for Applied Legal Studies at Georgetown University Law Center. The author of this article drafted the exercise originally and has several times played the role of Pat Stone. The case was based on litigation defended by David Koplow, who has also played Stone. Lisa Lerman, who originated the role of Terry White and played it for three years, helped focus the analysis of the exercise on lawyer-client relationships in addition to adversary relationships and negotiating outcome. Jane Aiken, Joyce McConnell, Alice Dueker, and Karen Bouton also played the role of Terry. Along with J.P. Ogilvy, all of us helped shape the materials from year to year and participated as well in developing the structure for the classroom analysis of students' experience.

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¹ Frank Sander has recently summarized these developments: "we have also [recently] seen the inauguration of many new disputing institutions, such as the Neighborhood Justice Center and the minitrial. A number of state legislatures have enacted enabling legislation of some kind. Many bar associations now have 'ADR' (alternative dispute resolution) committees. Since 1982 there exists even a foundation (the National Institute of Dispute Resolution or NIDR) that is devoted exclusively to the furtherance of alternative dispute resolution." Sander, *Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles*, 34 J. LEGAL EDUC. 229 (1984). Sander provides several references which offer an overview of these developments. *Id.* at 229 n. 2.

² See, e.g., R. FISHER & W. URY, *GETTING TO YES* (1981); H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); O. YOUNG, *BARGAINING* (1975); Menkel-Meadow, *Towards Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984). See also the bibliography in G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 193-207 (1983).

³ See, e.g., H. EDWARDS & J. WHITE, *THE LAWYER AS NEGOTIATOR* (1977); G. BELLOW & B. MOULTON, *NEGOTIATION* (1981); G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983).

⁴ The 1984-85 catalogs for the following law schools, among others, advertise offerings in negotiation: Albany; Arizona State; Boston University; Brigham Young; Brooklyn; Capital; Creighton; CUNY; DePaul; Duke; Georgetown; Harvard; Hofstra; Mississippi College; North Carolina; Northeastern; Northwestern; Notre Dame; Pace; Pepperdine; Puget Sound; Stanford; SUNY; Tulane; Temple; the Universities of Alabama, Bridgeport, California, Colorado, Dayton, Denver, Maine, Nebraska, Oklahoma, San Diego, San Francisco, Toledo and Utah; Vermont; Washburn; Washington and Lee; Western New England; West Virginia; William and Mary; and Yale.

are seeking.⁵ After the negotiations have been completed, the students, their instructors, and perhaps other observers critique the student performances.

Unfortunately, these exercises fail to simulate a central aspect of legal negotiations. Every practicing lawyer knows that when she seeks to avoid or settle litigation, she must usually negotiate on two fronts at once. The negotiation with her adversary is paralleled by a simultaneous and often equally intense negotiation with her own client or clients. The second negotiation, and the two-front character of the negotiating process, is omitted from the published negotiation exercises; in these simulations, the clients do not exist. Handed only a few printed pages in which a starting position is set forth, the students acting as lawyers have no opportunity to flesh out additional facts by interviewing their clients. They are unable to counsel their clients about alternative settlement possibilities. They cannot ascertain their clients' reactions to aspects of the other side's offer as it evolves. They do not experience and therefore cannot study the common phenomenon of feeling that one's adversary is being more reasonable than one's own client. They do not feel the bind of being tugged in opposite directions by the people with whom they are dealing. Because half of the process of consensus-formation is absent, students in a negotiation simulation tend to focus excessively on outcome and on the competitive rather than the collaborative aspects of negotiation. Because they are unable to explore with a client the interests that underlie the client's apparent positions, they cannot easily experiment with the non-positional methods of bargaining advocated by Fisher and Ury.⁶ At the end of the negotiating process, they are unable to obtain client consent to the outcomes that they have arranged.

The Terry White Educational Simulation printed immediately after this article attempts to avoid these pitfalls by enabling students to interact frequently, over the course of about a week, with simulated clients; like attorneys in actual litigation, the students are constantly acting as go-betweens while also applying their own creativity to a legal problem. As in real life, this exercise does not limit its participants to the single skill of negotiation, but also permits them to counsel their clients in a number of ways. Two law school instructors play the client roles,⁷ and

⁵ The materials for several well-constructed legal negotiation exercises based on written instructions to the lawyers are printed in H. EDWARDS & J. WHITE, *TEACHER'S MANUAL FOR THE LAWYER AS NEGOTIATOR* (1977).

⁶ FISHER & URY, *supra* note 2, at 41 ff.

⁷ If only one instructor is available to administer this exercise, a trained assistant (such as a teaching assistant) could play the other client role. Intuition warns against having one instructor play both client roles, and the experience of Joel Rabinowitz in a course on negotiating corporate acquisitions confirms the wisdom of enlisting an assistant. After playing both roles at once, Rabinowitz says that the "greatest weakness [was that] by acting as *both* clients, [I] may have had too much influence on the form which the final deal took, and may thus have diminished the value of the negotiating experience. . . .Next year I would hope to find another faculty member to act as one party while I act as the other. . . ." Rabinowitz, *Negotiation and Drafting in a Substantive Course in Acquisitions and Mergers*, 23 J. LEGAL EDUC. 470, 474 (1971).

although the time demands on the instructors are greater than in more traditional modes of instruction, the period during which the instructors are required to be available to the students is relatively short.⁸

The general format of the exercise involves a reading assignment⁹ and four active phases. In the first phase, students examine their materials and work in pairs¹⁰ to plan their negotiation strategy. Then for several days students work as individuals¹¹

⁸ *Terry White* is a successor to two other negotiation exercises that the author helped to develop. See THE BINS MINI-SIMULATION ASSIGNMENT, reprinted in Meltsner & Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581, 628 (1976); M. MELTSNER & P. SCHRAG, TOWARD SIMULATION IN LEGAL EDUCATION, 533-80 (2d ed. 1979) [hereafter cited as TOWARD SIMULATION]. In *Bins*, a plea-bargaining exercise, one of the lawyers has a client (played by another student), but the other lawyer is a prosecutor who is free to make strategic decisions on her own. Experience with *Bins* suggests that student clients are better than no clients, but that instructor-clients are better still, both because they understand fully the pedagogical objectives of the exercise (and can pursue those objectives in role), and because the knowledge that they gain as clients enables instructors to be much better prepared to lead a class reviewing the exercise.

The negotiation exercise in TOWARD SIMULATION does involve two instructors as clients. But unlike *Terry White*, that exercise is not self-contained. Students engage in it toward the end of a course which consists of a semester-long simulated lawsuit. The facts available to the lawyers, as they begin to negotiate, are the facts that they have developed through interviewing, investigation, and discovery over a period of weeks. *Terry White* will prove much more useful to instructors who do not want to devote an entire semester to a single simulation problem.

⁹ The purpose of the reading assignment is to acquaint the students with some negotiation theory, in order to orient them to their task. My colleagues and I have administered the exercise as part of a clinical offering that covers numerous other skills and involves students in about 15 hours per week of live client representation in addition to periodic simulation exercises. See Aiken, Koplów, Lerman, Ogilvy & Schrag, *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047 (1985). Accordingly, we are constrained to keep the reading assignment for this intensive exercise fairly short, and we ask the students to read only the first chapter of GETTING TO YES. In a course on negotiation (or on interviewing, negotiation, and counseling) we would probably assign several readings, encompassing different approaches to negotiation, before students engaged in this exercise.

¹⁰ Pairing the students for purposes of planning strategy usually provides each student with a critical backboard for her thinking and leads to more thorough analysis than students acting alone would engage in. On the superiority of problem-solving in groups, see Haft, *Business Decisions by the New Board: Behavioral Science and Corporate Law*, 80 MICH. L. REV. 1, 8-15, 22-23, 32-45 (1981). With regard to pairing for experiential legal education, see Meltsner & Schrag, *Scenes From a Clinic*, 127 U. PA. L. REV. 1 (1978).

¹¹ Permitting students to negotiate as individuals rather than as members of a team gives each student much more contact with her client, particularly if instructors administering the exercise retain the suggested rule restricting lawyer-client contacts to telephone calls. But perhaps few instructors could accept the intrusion on their time that would follow from dealing with more than about 12 negotiators (half of a class of 24). To use this exercise in a large class, therefore, it might be necessary to create negotiating teams of two or three. In that case, the instructor might want to consider meeting the negotiators face-to-face so that all of them observe all aspects of the lawyer-client interactions. If face-to-face meetings take place, careful attention to boundaries will be necessary to prevent the instructor's ordinary roles from intruding on her credibility as a client. For example, she might restrict meetings to a reserved room, other than her law school office, which would be designated as the client's home or office, so that phone calls and visits from faculty colleagues do not make it harder for the student negotiators to accept her role-playing. Some guidance for faculty members who seek to create a role-

and try to settle a lawsuit, communicating with adverse counsel and with their own clients as they see fit. In the third phase, each negotiator writes a short paper analyzing the key factors that influenced the outcome of her negotiation. Finally, the instructors emerge from their client roles to lead a classroom analysis of the dynamics of the negotiations, with as much attention paid to lawyer-client relationships as to the bargaining between attorneys.

After a brief overview of the Terry White problem, this article becomes an instructor's manual. It offers suggestions for those desiring to administer the exercise, including advice on modifying and supplementing the printed materials, acting in role as clients, and conducting the classroom evaluation. The exercise materials immediately following the article may be reproduced for distribution to students without further permission.

II. OVERVIEW OF THE PROBLEM

The Terry White exercise involves a fairly typical debt collection lawsuit, in which one student is a collection lawyer and the other a legal services attorney. White has some colorable legal defenses to the claim, but as is typical in merchant-consumer disputes, the major disagreements between the parties involve disputed questions of fact more than arguments about law.¹² Students are divided into two groups of equal size. All of the students are given an identical set of procedural instructions. With respect to their initial information about the case, however, different versions of the facts (representing information from clients) are made available to the groups.

Terry White¹³ is employed, but at a relatively low wage, as a fast-food cook. White was approached, at home, by a door-to-door encyclopedia salesman and ended up buying, pursuant to an open-end credit agreement, a twenty-volume encyclopedia and dictionary. White's default in paying for the books was triggered by a partial loss of income, but legal issues are present as well. A key inducement to the purchase was the promise of a Bible with a name embossed in gold on the cover. Relying on this promise, White told a sister that this gift would be coming her way. Two weeks later, the salesman reneged on the promised Bible. White also

playing atmosphere in which they are taken seriously as clients is found in TOWARD SIMULATION, *supra* note 8, at 117-23.

¹² In this sense, the exercise responds to Professor Anthony Amsterdam's criticism that contemporary legal education overemphasizes the skill of "predicting . . . the legal results in a given fact situation" at the expense of teaching students about the more common practitioner's experience of having to assess the risks associated with several alternative sets of facts, each of which might ultimately become the set established in the mind of a decisionmaker. See Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 614-15 (1984).

¹³ Unisex names have been given to the principal characters so that they can be played by male or female instructors. Avoiding gender-identified pronouns has caused the student materials to become slightly stilted in places, a small price to pay to enable instructors to use them without retyping.

recollects a promise that the deal could be cancelled at any time, with the company obtaining repossession of the books; the company relies on the written agreement that the contract could be cancelled within four days of signature. Having no use for the used books, the company has sued White for the money that White contracted to pay. Other issues in the case include a payment by White that was never credited, some damage to the books while they were in White's custody, and alleged debt collection harassment. The company's records do not reflect harassment, but the company has a practice of not recording all of its collection calls, in order to avoid legal challenge.

The principal legal issues, then, are misrepresentation, unconscionability, and debt collection harassment. In particular states, additional legal issues may arise from local consumer protection laws.¹⁴ Since this exercise is primarily a negotiation experience and secondarily a counseling opportunity, the instructions flag the legal issues and students need not lose valuable time in a preliminary search for authority. How they apply the law to their facts, and indeed the degree to which they rely on *legal* arguments at all in their negotiating efforts, is left up to them.

Some of the complexities in the case derive from the situations of the clients and lawyers. White's near-poverty is a dominating fact of life. Students often try at first to ignore this factor; sometimes they even negotiate a tentative settlement (or, on occasion, a final settlement) without first talking with their client and seeing the world through White's eyes. But when lawyer and client connect, the lawyer is likely to learn that living on take-home pay of \$132 per week is extremely difficult, that it would not be possible for White to make the contracted-for payments on the encyclopedia, and that making *any* monthly payment for the books would also impose severe hardship on White's family.

¹⁴ State consumer protection laws often provide additional remedies beyond rescission or damages (e.g., injunctions and punitive damages) for misrepresentation in the sale of consumer goods and services. They may also ease the consumer's proof problems (e.g., by providing that the consumer need not prove that he or she was actually deceived by a materially false statement). For a state-by-state survey, see SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (1982 & Supp. 1983). The contract form itself is based on an actual form designed by a company for use in all the states; such national forms always risk violating disclosure requirements of particular states. For example, some jurisdictions require disclosures with respect to the three-day cooling-off period that differ, in form or substance, from those required by the Federal Trade Commission's applicable regulation, 16 C.F.R. § 429.1(b) (1985). See, e.g., D.C. CODE ANN § 28-3811(g)(2) (1981). Whether the federal regulation preempts state law, or whether a creditor may have to obey state law as well, depends on whether the two requirements are "directly inconsistent" with each other. 16 C.F.R. § 429.1, n.2 (1985). In addition, how the instructor fills out the contract form may deliberately or inadvertently generate further legal issues. One semester, for example, my colleague and I inadvertently neglected to enter a date next to the consumer's signature on the cooling-off notice, thereby injecting an additional legal issue into the exercise. Since both sides tell their lawyers that they would like to settle the lawsuit, and since important facts are in dispute in any event, the exercise is not terribly sensitive to the injection or removal of particular legal issues, although if the case gets too one-sided in either direction, the lawyers in whose favor it tilts may counsel the client to refuse to settle at all. The classroom evaluation is most interesting if some pairs of adversaries reach agreement and others do not, and this pattern has materialized on each of the six occasions on which the exercise has been used by us to date.

Pat Stone, vice-president of the encyclopedia company, also has grim realities to face. Stone works in a competitive bureaucracy in which executives' ratings depend on financial statistics and little else. Stone already has a reputation within the company as a soft-hearted person. There is a "sob story" and a threat of contested litigation in every collection case, yet promotion within the company, or even retention of Stone's current position, requires that these stories not be translated quickly into concessions by the creditor.

The parties are not equivalent in their level of sophistication. White is easily suggestible (which is how the contract was signed in the first place) and will accept whatever settlement the legal services lawyer recommends, even one that requires payments in excess of the funds available.¹⁵ Stone, on the other hand, imposes some limits from the outset on the discretion of the collection lawyer, and although these initial limits can be relaxed during further conversations with the collection lawyer, Stone is not infinitely malleable.¹⁶

The exercise leaves the attorneys plenty of room within which a financial settlement is possible. Furthermore, the negotiation is not simply a zero-sum game. On several side issues, the attorneys are able to develop creative solutions. For example, White is worried about a warning letter that White's employer has placed in the personnel files after several telephone calls (including at least one from the encyclopedia company) were received at work, contrary to the employer's policy. If asked, Stone can agree to write a letter to the employer to relieve White of responsibility for the firm's calls, and the text of the letter can be negotiated. Similarly, though the creditor will not buy White a Bible, it is willing, as part of a settlement, to provide White with numerous copies of its dictionary. And beyond the negotiated issues lie related occasions for client counseling. White's lawyer, for example, might advise White about how to avoid similar entanglements in the future, or how to adjust the available budget to make whatever payments are agreed to in the settlement. Stone's lawyer might explain the impropriety—and the contingent liability—of the company's policies of permitting sales personnel to sweeten the firm's encyclopedia offers with their own side deals (such as the Bible promise), or of encouraging collection personnel to log only a fraction of their telephone calls.

¹⁵ Such a settlement can result from a negotiation during which White's lawyer never contacts the client, or where the lawyer-client contact is so cursory that the client's budget is never revealed to the lawyer.

¹⁶ For example, the encyclopedia company authorizes the collection lawyer to make generous financial concessions, but it does not print Bibles and it will not commit itself to buying White an embossed Bible on the open market (*i.e.*, specific performance of the contract as White understood it). The company fears setting an operational precedent which, in the long run, will cause it substantial inconvenience and, consequently, unquantifiable losses.

¹⁷ Two to three hours seem necessary for reasonably thorough processing of the experience. If the instructor wants to focus on individual negotiating skills or performance (*e.g.*, by having the group critique videotape or audiotape of one or more negotiating sessions), additional sessions should be scheduled.

In the classroom analysis which ends the exercise,¹⁷ many of these issues are discussed. Instructors will give different degrees of emphasis to different aspects of the exercise, but most will at least want to touch on the nature and quality of planning for negotiation, the degree to which planning proved useful, the effect of client contact on negotiation outcome, the nature of lawyer-client relations during the negotiation process, the tactics that were used (and their ethical propriety), the reasons for differences in outcome (including failures to settle) as between different negotiating partners, the emotions generated by the process, and the opportunities for counseling and for creativity. Suggestions with respect to the classroom analysis are set forth in detail later in this article.

III. MODIFICATION OF THE MATERIALS

The instructor's first task (other than finding a colleague willing to play the second client role) is to make whatever modifications or additions to the printed materials are necessary. The printed materials are intended to be copied from this *Law Review*, modified as desired, and then recopied (as modified) for distribution to students. Before copying the materials the instructor will probably want to delete the title of the *Law Review* at the top of each page so as to prevent referral to this article. Some suggestions for modifications follow:

A. *The Instructions*

A small number of issues have been left open by the general instructions (*i.e.*, the assignment) which are given to all members of the class.

1. Reading Assignment

Instructors may wish to assign the first chapter of Fisher and Ury's *Getting to Yes*,¹⁸ some part of chapter five of Bellow and Moulton's *Lawyering Process*,¹⁹ or some other reading. If this exercise is the only treatment of negotiation in a course, some reading is probably necessary as an introduction to the subject, but the assignment is so time-consuming that the reading component cannot be extensive. If the exercise is administered as part of a larger unit or course on negotiation, it might be best to undertake it at least several weeks into the unit and to rely on prior readings rather than include any reading assignment as part of this activity.

¹⁸ R. FISHER & W. URY, *supra* note 2.

¹⁹ G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* (1978).

2. Deadlines²⁰

At the end of the general instructions, the instructor should fill in deadlines for completion of each phase of the exercise. It is unlikely that the exercise could be administered in less than a week, but it could certainly be expanded to a two-week time frame. If a one-week exercise is contemplated, deadlines for the reading and planning phases might be set at ten p.m. on the night after the materials are distributed; for the completion of negotiations at five p.m. on the day before the discussion class; and for the submission of papers at two hours before the class convenes.

3. Choice of Non-Negotiated Outcome

In evaluating a possible settlement, the negotiators need to have some knowledge of how the dispute would be resolved if they do not reach agreement. The instructions offer two choices, and those administering the exercise should decide between them, and perhaps check the indicated box, before duplicating the materials for distribution. Under the first option the instructor simply seals the "judgment of the court" in an envelope before seeing any of the settlements; if any pairs of negotiators do not settle, the envelope is opened and the result becomes their result. Under the second option, the instructor would prepare two or more envelopes with different judicial results;²¹ the envelopes would be shuffled in the classroom, and one result selected. This option dramatizes the uncertainties of going to court, and the instructor could use any number of envelopes and results to reflect her assessment of the probabilities of various outcomes.²²

²⁰ In my experience, students have appreciated two or three weeks' warning that a fairly time-consuming exercise, with a number of short, rigid deadlines, is planned. This warning also enables them to plan their schedules so that, to the extent possible, they do not arrange out-of-town trips for the weekend falling in the middle of the exercise. It should be noted, however, that absence from the law school vicinity over that weekend does not preclude participation, because it can be handled in role.

²¹ For example, one envelope might give the creditor nothing, reflecting the court's belief that the salesman did promise that White could cancel at any time. Another might give the creditor all or nearly all of what it is asking for, reflecting the judge's belief that White failed to carry the burden of proof on the various defenses. A third might reflect a compromise judgment of a type not unknown in small claims courts.

²² I think that the second, more sophisticated, option is preferable because it better stimulates the risks of litigation. But that gimmick of drawing could direct too much attention to the ultimate outcome, and it could therefore cause negotiators to feel like failures if they had agreed to settlements that were worse for their clients than the court-imposed outcome.

B. *Background Information for White's Attorney*²³

1. Names of Attorneys²⁴

After the instructor has decided which students should be paired with each other for purposes of the exercise, she should write the names of both attorneys on White's background sheet. Since the encyclopedia company's lawyer initiated suit, White's lawyer would be aware of his or her identity.

2. Pizza King Letter

Attached to the summary of the initial interview with Terry White is a copy of the letter from White's employer to the personnel file. This document should be completed by typing in some address for Pizza King (which should be the same address that is entered on White's credit application), the name and address of Terry White (the same address that is entered on White's contract), a salutation, and the date of the letter (about two and one-half months before the deadline for completion of negotiations).

3. Contract and Credit Application

Unlike the Pizza King letter and the Parker memorandum, this document is distributed to both attorneys. The following steps should be taken to complete the document before duplicating it for the students:

(1) print Terry White's name and address on the front (using a local address—the same one that appears on the Pizza King letter);

(2) print the word "SAME" in the "SHIP TO" block;

(3) with a different handwriting, sign the contract with Terry's signature and date the contract, using a date about a year before the date of the completion of negotiations (to be consistent with the demand in the complaint for a year's accrued finance charges);

(4) returning to the original handwriting,²⁵ on the left side of the contract,

²³ In principle, since the clients are available for further interviews, the information given in writing to the lawyers could be truncated or eliminated altogether and included instead in the information available to be elicited from the clients by the lawyers. This will turn the problem into an exercise in interviewing as well as negotiating and counseling. Unfortunately, providing so much information orally and individually to a dozen or more students might unduly burden an instructor's available time.

²⁴ The names of the attorneys are the only items which need to be entered on student materials individually, after the masters which follow this article have been copied, modified, and recopied for distribution.

²⁵ White being of limited literacy, Clark has filled out all but White's signature and date.

in the financial block, enter data as follows: (a) print so as to make the first line read "1 set/Encyclopedia/Grn/279.00"; (b) make the second line read "1/Dictionary/Brn/75.20"; (c) do not check off any "reading development program kits"; (d) enter a "subtotal product price" of 354.20; (e) enter a tax of 20.25;²⁶ (f) enter shipping and handling charges of 29.00; (g) enter a "total" of 403.45; (h) check the "other" box under "initial deposit" and enter 25.00; (i) enter a balance to pay of 378.45; and (j) enter a payment per month of 20.00, leaving blank the spaces below that entry;

(5) sign Steven Clark's name and print his signature;

(6) enter the date of the contract at the top of the notice of cancellation;

(7) in the space in the last line of the notice, enter a local address (perhaps in the largest city in your state) for National Encyclopedia's regional headquarters;

(8) at the end of the last sentence of the notice, enter a date that is at least four business days after the contract date;²⁷

(9) take care *not* to sign the notice of cancellation;

(10) on the next page, still in Steven's handwriting, print Terry's name, age (twenty-nine), years at this address (three), home occupancy status (rent), number of children (three), age of the eldest (eleven), age of the youngest (six), telephone status (yes), auto ownership (own auto);

(11) below the top line, on the left, enter Terry's title (cook), years on the job (six), employer (Pizza King), Pizza King's address (as on its letterhead),²⁸ and a social security number for Terry;

(12) to the right of that block, enter a unisex name, social security number, and address for Terry's spouse, leaving employer information blank;

(13) enter another local address as Terry's previous address, and some number of years of occupancy there;

(14) enter "Republic Savings" as the name of Terry's bank, and check the "savings" box;

(15) to the right, check option 1 (buyer's income only), and below that, check the \$6,000—\$9,999 box;

²⁶ This is a five percent tax. If the tax is higher or lower in your state, use of a five percent figure could, for some alert students, inject another legal issue into the problem, but the author's experience with this problem suggests that the impact would probably be very minor. Alternatively, an instructor could use the correct tax, but this will require changing the paragraph describing the complaint in both versions of the Attachment.

²⁷ Be sure to use a calendar from the year the contract was signed to determine which days were business days—or enter a date six or seven calendar days after the contract date.

²⁸ Leave blank the space for Pizza King's phone number.

- (16) in the space for "credit references" enter "GMAC" without further identifying information; and
- (17) leave blank the boxes for "educational level of buyer."

4. Terry White's Availability

The availability by telephone of the instructor who will be playing Terry White should be indicated by filling in the chart at the end of White's lawyer's version of the Attachment, with the instructor's office phone number given for that of Agnes. The instructor should probably not be available in the last hour or two before the negotiating deadline, in order to avoid giving any one lawyer an advantage of having exclusive access in a last-minute crunch. Experience with this exercise suggests that it is desirable for the clients to be available for at least a few hours on each of the possible negotiating days, and particularly on the last two days of the period. A special problem is created, of course, if the instructor's telephone is normally answered by another person—*e.g.*, a family member at home, or a receptionist at the office. Although others may not wish to go so far as involving others in the simulation, my colleagues and I have found that our relatives and co-workers were happy to play supporting roles; children, for example, answered the telephone during the relevant period and responded to calls for Terry White or Pat Stone by nonchalantly calling their parent to take the call. In one run-through, a man who lived with a female "Terry" asked her callers to identify themselves; when one of them said that he or she was Terry's lawyer, the man began to interrogate the lawyer about why Terry had a lawyer, and could then be overheard by the lawyer to threaten Terry because she was doing something without his knowledge or permission. Thus a lesson on lawyer-client confidentiality was built into the exercise and brought up in class.²⁹

C. Background Information for the Creditor's Attorney

1. Names of the Attorneys

A space is provided in which the instructor can enter on the creditor's lawyer's version of the Attachment the name of the student to whom the packet is directed. This entry is not strictly necessary, and the line could be taped over.³⁰ The name

²⁹ In 1984, this exercise was used at West Virginia University, where all incoming calls are taken by a receptionist who answers "College of Law." There was nothing to do but to acknowledge this unwelcome intrusion of reality into the role play. Terry's lawyers were instructed that Agnes had her own problems, and that they should persist by asking for Terry White; the creditor's lawyers were informed that Stone shared offices with a small law school. Perhaps others will have more creative solutions to problems presented by central switchboards.

³⁰ It is provided because having names on the packets may help the instructor to identify any student who does not pick up a set of materials when they are distributed; such an omission will ob-

of Stone's lawyer's adversary is not provided, because in a real case of this sort, a collection lawyer would not know whether a defendant would be represented, much less by whom, and the defendant's lawyer would have to make the first move toward contact. Waiting for an unknown adversary to make contact may cause some of Stone's lawyers some anxiety; if so, this aspect of law practice can be discussed along with other subjects during the analysis.

2. Parker Memo

The only change needed is to type or stamp in a date, approximately two months before the end of the negotiation period.

3. Contract and Credit Application

This is an exact duplicate of the document supplied to White's lawyers. Instructors must remember to make extra copies of the modified masters of this document so that the contract can be included in the packets going to Stone's lawyers as well as the packets for White's lawyers.

4. Pat Stone's Availability

See the description of Terry White's availability.

D. *Any Supplemental Instructions*

The general instructions provide that they are superseded by any supplemental instructions. An instructor may want to issue a supplement to attorneys for one or both parties. This supplement could, for example, identify additional legal issues, provide specific citations to relevant state laws, indicate that the client was available in person (rather than only by telephone),³¹ require some negotiators to use videotape or audiotape, modify the amount demanded in the complaint,³² specify precisely where settlements should be filed, and so forth.

E. *A List of Planning Partners and Telephone Numbers*

The instructor will also need to distribute to all participants a list of assigned partnerships to be used during the planning phase (Part II) of the exercise. Of course

viously create serious problems both for that student's planning partner and for his or her adversary. See also *supra* note 24.

³¹ See *supra* note 11.

³² For example, the instructor may decide to change the amount of sales tax, as described in note 26, and would prefer not to alter the printed text of the Attachment.

this list should be compiled after the instructor has decided which students will negotiate with which others, because a student should be paired for planning purposes only with another student who will be representing the same client. In schools in which accurate, complete student telephone directories are not readily available to all participants, this list should include telephone numbers so that participants can easily reach both their planning partners and their adversaries.

IV. PLAYING THE ROLES

When the materials have been distributed, those who will play the client roles can prepare to receive calls. The following suggestions, set forth in the second person to avoid gender linkage, may prove helpful. In addition, five suggestions apply equally to both actors. First, become very familiar with the materials in the version of the Attachment that your lawyers have, so that the information you give them is consistent with it. Second, when talking with your lawyers, remain strictly in role at all times. It may be helpful, both to you and to them, for you to assume a regional accent;³³ this will help the students to distinguish instructor from character, and to act toward you, on the telephone, differently than they do when talking to you as their teacher. Whatever personality you assume should also remain consistent throughout the negotiation period.

The third suggestion is to carry with you, at all times during the negotiation period, two items: (1) a copy of the pages of this article which describe your role and (2) one or two three-by-five index cards for each of your lawyers, on which you can make notes, during or after each conversation, of what you discussed and how you left the matter. It is extremely difficult without such notes to remember the details of eight or ten parallel conversations, each of which proceeds in a different order and covers slightly different subjects. Not only will these cards enable you to review the status of your interaction with each lawyer as soon as he or she gets on the phone with you, but they will also help you significantly as you prepare for classroom analysis.

The fourth suggestion is to make every effort to be consistent in your relationships with your various lawyers. This means adopting the same personality and at least the same initial stance with respect to each of them. In class, you will want to show that different outcomes and different qualities of lawyer-client relationships depended on *their* actions and choices, not on variations in how you behaved. (This is not as difficult as it might seem.)

Finally, even if you don't hear from some of your lawyers, don't call them. In the classroom comparison and analysis, they will learn the consequences of lawyers' choices about whether and when to talk to clients.

³³ In our experience with this exercise, Terry White has spoken softly, with a southern accent, and Pat Stone has been a high-pressure, fast-talking New Yorker.

A. *Terry White*

You are now thirty years old. You've worked for Pizza King for seven years. You have been married for thirteen years, but for the last five of those years, your spouse has been permanently disabled. Your children are Jerry (now age twelve), Amy (nine), and Selena (seven). Your take home pay of \$132 per week (down from \$139 after a pay cut about eleven months ago) is barely enough for you and your family to live on; you get no money from your disabled spouse. You are chronically worried about a lot of things that are going wrong in your life, such as not being able to make ends meet; Jerry's poor grades in school; the appearance of your house (including the mismatched books); what your sister Agnes thinks of you; etc. Your monthly budget is as follows:

Rent	\$250	In three months it will probably go up to \$275.
Food	\$135	
Utilities	\$46	On a year round plan to even out the bills.
Gasoline	\$30	And it would cost even more to get to work on the bus.
Spouse's medical bills	\$24	And sometimes higher.
Clothes	\$35	Nothing for yourself, but you won't have your kids going to school looking shabby.

From your take-home pay of \$528 per month, this leaves about eight dollars per month which has to be spread among school supplies, additions to your Christmas club account, an occasional treat for the kids, car repairs, and the medical bills for yourself and your children.

If your lawyer is bossy and demanding, you will let yourself be intimidated as you were by the book salesman. If your lawyer obtains your confidence, you will share these facts of your life and help the lawyer to see the world through your eyes. For example, if the lawyer urges you to make monthly payments in connection with a settlement of the claim, you could ask the lawyer what you could spend less money on. And you could come to the conclusion, eventually, that your family will give up eating meat to pay the encyclopedia company.

You don't do well with figures, which is part of how you got into this mess. The other part is that your pay was cut just a month after you agreed to buy the books. There was just no way to make those payments after your take-home pay was reduced by about twenty-eight dollars per month. The main reason why you stopped paying was that you couldn't afford the payments, although Jerry's disinterest in the books and the company's failure to deliver the Bible also contributed to your decision to cancel the contract. Here's what you want your lawyer to do for you:

- (1) Cancel the contract, and get the company off your back. You'd be happy for them to come and take back the books, as you've told them all along.
- (2) Get back the twenty-five dollars you paid at first, the twenty dollars you paid later, and the ten dollars you paid for the Bible.

(3) Get you the Bible, which you promised to Agnes.

(4) Get the company to explain to your boss that it was their fault, not yours, that you got called at work.

(5) If you have to keep the books, replace the mismatched volumes and the volume with the pages that Selena tore out.

(6) If you have to pay, reduce the monthly payments as low as possible, preferably to a negligible amount.

(7) You are less aware of the importance of reducing the balance owing than you are conscious of reducing the monthly payments, but if your lawyer explains the issue, you will, of course, want to lower the balance due as well.

(8) If you are asked whether you want the salesman, Steven Clark, fired or disciplined, or the firm's business practices changed in any way, you reply, as you so often do, "Good idea, whatever you think."

Even though these are your desires (and they might get formulated gradually, with the help of a lawyer who draws them out of you), you are easily suggestible. *So although you will make known your problems, you frequently tell your lawyer that you'll do whatever he or she thinks best.* You ask frequently for the lawyer's advice about what you should do, and you will, in the end, agree to *any* settlement that your lawyer presses you to accept, including monthly payments that are even higher than the twenty dollars per month contract obligation that you weren't able to afford. You have too many other problems, and you want this one over with. Also, with the demands made on you by your job, Agnes' frequent need for a babysitter, your disabled spouse, and your children, you can't afford to take the time to go to court.

Consistent with your lawyers' printed interview summary, you should initially try to get them to cancel the deal. If they don't press you to accept a less beneficial settlement, don't offer to do so. If (as will usually be the case) they do urge you to settle, you can gradually be talked into accepting a wide range of settlements, including agreement to pay an ever-increasing fraction of the balance and, as noted above, ever-larger monthly payments, in excess of what you can afford. If you are asked to think about what you can afford, however, it quickly becomes plain that on your budget you will not be *able* to pay more than a few dollars per month, and that you will therefore not be able to adhere to any agreement requiring you to pay more than about fifteen dollars per month without making serious adjustments in your budget. (Indeed, even small payments are going to be a serious problem if your rent goes up.) You mention this problem of possible inability to pay as soon as you are pushed over about ten dollars per month, but you do not raise it again unless your lawyer brings up the subject.

When you are first pressed to make concessions, see whether you *feel* persuaded by your lawyer. You are, after all, easy to persuade. But if your lawyer is too

demanding, too soon, you can react against such tactics (e.g., by asking which side your lawyer is on).

A few miscellaneous matters are as follows:

(1) Your sister Agnes is a very religious Baptist. After you told her about the Bible, she told some other people in her church about your gift, and they were very impressed. She said that she would bring the Bible to church. It is very important to you that you not let your sister down. You will not let your attorney forget that receiving this Bible is very important to you. The only way that you can save face with your sister is to show her that you got some real value—and not just your ten dollars back—in return.³⁴

(2) Jerry hasn't looked at the books in months.

(3) If you do have to keep the books, the only thing they are good for is making the living room look nicer. But with four books having a different color binding, the effect is ruined.

(4) Selena tore a few pages out of Volume 9, but no one could tell without opening the book. If you return the books without saying anything about it, the company probably won't notice. You might suggest this to your lawyer.

(5) You can't meet with your lawyer in person because it's too much of a strain on your spouse.³⁵

It should be noted that some issues are likely to arise that are not covered by these guidelines, and that a certain amount of improvisation will be necessary. For example, as part of the settlement, the company might throw in a free dictionary or two, and you can give one to Agnes and invent other relatives who might want one.

B. *Pat Stone*

You are a very harried executive, and you have too many managerial responsibilities at National Encyclopedia Corporation for any one person. You are an

³⁴ In our experience, some of White's lawyers conduct a preliminary (or even final!) negotiation with their adversaries without first talking to their client, or after having talked to White without really hearing the client's concerns. Notwithstanding White's desires as stated in the memorandum reflecting the initial interview, some of these lawyers do not even try to get a Bible, and some of them get angry with their client for asking them to return to the bargaining table to raise the Bible issue. Behind this lawyer-client conflict lies the lawyers' imposition of their values on the client; they think White unreasonable in pursuing the Bible, and they tend to press what they think White should want rather than what the client actually wants. (As it happens, providing a Bible is one of the few things that the company adamantly will not do as part of the settlement, but that is not a valid justification for the lawyers' failure to try to prevail on this issue, or their resentment of their client's desires).

³⁵ Unless you modify this exercise to permit or encourage such meetings. See *supra* note 11.

Assistant Vice President in charge of sales, personnel, finance, and debt collection for a region which includes seven states. You always feel rushed and you have no time to waste. You know that you are considered abrasive but there's no other way to get the work done. If you give someone more than four or five minutes of your time in any one telephone call, you will fall hopelessly behind in your work. Because you have so many interruptions, it is not unusual for you to put people on hold during calls.

Your collection work is the most annoying, least attractive part of what you do, but it is very important to the company because if the firm falls off in collections, it not only loses money right away, but word gets around to customers who are paying without any problem, and a chain reaction of defaults occurs. Or that's how it seems, at any rate—there are months in which collections start to fall off and then everything goes to pot. The head office of the firm, in New York, keeps close tabs on the collections in the regions and rewards middle-level executives accordingly. This is a real problem for you, because somehow you have quite unjustly picked up a reputation within the firm as a “soft-hearted” collector compared with your peers in other regions. You are quite worried about not being promoted to Associate Vice President and are determined to change your image. You can readily share with your lawyers this information about the pressures on you—particularly when they start pressing you to make concessions.

When one of your lawyers calls you “to talk about Terry White,” you might signal how distant you are from individual cases by asking who Terry White is and then putting the lawyer on hold while you find the relevant file. In fact, you might be somewhat surprised that the lawyer is calling you at all, since about eighty-five percent of your collection cases are default judgments, and your lawyer resolves most of the rest without having to talk to you.³⁶

Your examination of the records in the White file will not turn up any information beyond the facts that your lawyer already has. You do know, however, that the company has had some prior trouble with Steven Clark, the salesman. Like the rest of the company's sales force, Clark is an independent contractor, working on commission, and is not a company employee. He is a very productive

³⁶ Although it would be odd for White's lawyers to settle the case without talking with their client, it would not be strange for the corporation's lawyers to settle without talking to Stone; they have standing instructions permitting routine processing. On the facts of this case, however, it is very difficult for the company's lawyers to settle the case within those standing instructions; most of them will want to forgive part of the debt to settle it, which requires Stone's approval. In class, if a lawyer for the company has settled *within* the standing instructions without conferring, he or she might not be criticized, but a lawyer who has naively violated the client's instructions might be made aware of this in forceful terms. Even if a lawyer does not violate an explicit limit, a client might be distressed by a settlement, made without consultation, which exceeded what the client was in fact willing to do. For example, the standing orders do not say explicitly that the company will not provide a Bible, but Stone will make that clear if asked. This aspect reinforces the low (but not negligible) probability that all of Stone's settlement conditions can be met by a lawyer who never talks to Stone.

salesman. It is not company policy to offer Bibles or other premiums as incentives to customers, but neither has the company prohibited salespeople from selling two products while in a house, and it would be hard to attract a sales force without raising the commission rate if the company did bar multiple selling. If Clark has been selling Bibles, that's a separate transaction not mentioned in the contract, and it is of no concern to National.

Other than Mrs. Parker's detailed memorandum regarding White's version of the transaction, there is no record of what either the credit department personnel or White said in their calls. It is possible that the credit personnel called White frequently at home and at work; they know that the company doesn't want to be accused of harrassment, so they don't necessarily record all of their collection calls. You have tacitly approved this practice because it keeps the company out of trouble.

The company's records indicate no payments other than the down payment. If White's lawyer makes a big fuss about a claim of having made one payment, ask what your lawyer thinks you should do about it. If your lawyer recommends that you give White the benefit of the doubt, you will do so fairly quickly.

As for the rest of the debt, on which no payment has been made, you have a lot of discretion. You will *not* accept a return of the books; the administrative cost of arranging for return of the merchandise exceeds the value to the company of a set of books that are no longer in mint condition.³⁷ But you nevertheless have authority from National to write off as much of a debt as you see fit—though if you write off too much, too often, your superiors will raise eyebrows, and, as noted above, your write-offs are already out of line with those of your colleagues in other regions. Your typical pattern is to be pretty willing to write off relatively small amounts on the advice of counsel, but to be increasingly resistant as the numbers get larger, especially beyond about \$100 to \$150. You have rarely if ever written off more than half of a debt.

In making your decision about how much to write off, you are influenced by the following six factors: (1) the persuasiveness of your lawyer; (2) your sense of how hard your lawyer has tried to get a better settlement on your behalf; (3) your lawyer's judgment of how the customer and the customer's lawyer are likely to behave if you hold the line; (4) how long your lawyer keeps you on the phone and away from other business; (5) how much time and inconvenience the firm will be put to if the case goes to trial, as communicated by your lawyer; and (6) the degree to which you end up agreeing to other items of any settlement (*e.g.*, dealing

³⁷ Or, as I put it abrasively to my lawyers, "What? You want dat we should take back da books? What use is da books to us? Once da customah's opened d'box, d'books might as well be junk. Dis is a respectable company. We don't sell no used books. What are we gonna do wid 'em? We'd just have to t'row em in d'gahbage. Cheapa t'forget about 'em, den we don' have to worry 'bout gettin' rid a d'gahbage." And so forth.

with Clark or with Pizza King) that will take time or cost money and therefore consume company resources.

Stretching out payments (as opposed to writing off debt) is entirely within your lawyer's judgment, and you might refuse to guide him or her in this regard. But you can point out that the faster the money comes in, the sooner the company can use it—and the more likely that the customer won't leave town and vanish before completing payment.

In dealing with your lawyer on money issues, particularly the issue of how much debt to write off, it is better to react to your lawyer's suggestions than to tell your lawyer what to do. In real life, of course, lawyers will encounter all kinds of clients, including those who will dictate rather than merely authorize the terms of settlements. The simulation would therefore not be rendered false to reality if the client initiated settlement suggestions. But students will learn much more about the opportunity to be creative in the settlement process if their client in this exercise happens to be one who asks, "how much more do you think we have to give up to get this over with?" or "what are you recommending that I write off?" rather than saying, "offer White another seventy dollars off and see whether that does the job." In addition, leaving it to your lawyers to initiate suggestions for how to settle the case will probably generate a much wider spread of settlements than if you direct the lawyers with respect to their offers. Finally, students will feel much less manipulated by the administrators of the exercise if they take the lead on constructing settlements, with the clients introducing constraints rather than telling them what to do.

Although all of your lawyers will probably discuss writing off part of the debt and stretching out the rest, there will probably be considerable variation with respect to which other issues enter the settlement. If your lawyer brings up the question of supplying a Bible, you should dismiss it out of hand, forcefully;³⁸ it would cost the company too much to disrupt its routines to find such an item, and it would set a bad precedent. The company would rather go to trial than commit itself to finding merchandise on the market. On the other hand, the firm could easily concede some small sum of money (*e.g.*, the ten dollars Terry White paid for the Bible) to dispose of this part of the claim. Furthermore, it could throw in an extra book or two (*e.g.*, the dictionaries published by the company since they are high-volume items that cost a lot to sell but very little to manufacture). You don't think of this by yourself, though.

If White's lawyer asks you to help with respect to the threat from her employer resulting in part from the company's collection calls, you can oblige. You can,

³⁸ On this one issue, White's initial demands and the company's ultimate unwillingness to concede are directly in conflict, forcing the lawyers to seek compromise in other areas. The clients in this exercise may be more flexible in what they will ultimately accept than most clients that lawyers actually encounter, but the company, at least, is not infinitely flexible.

for example, agree that the company will write to Pizza King to inform it that some calls to White at work were not made at her request. But the company will not admit in such a letter that it did anything wrong. You leave the drafting of such a letter to your lawyer.³⁹

If your attorney raises the issue of replacing certain volumes alleged to be of a different color, you can very quickly agree to this, for two reasons. First, the company did make a mistake; the dye lot was mixed incorrectly for the bindings on the last four volumes on several hundred sets of books, and it has long been company policy to replace them on request. Second, this policy costs the company very little, since few requests have been received and each volume only costs the company about two dollars for the paper and printing.

You would rather not deal with the situation of Steven Clark and his continuing sale of Bibles, but you can recognize, if the issue is forced on you, that if large numbers of disgruntled customers get together over this issue, there could be bad publicity or other troubles. You don't actively seek any advice from your lawyer about future selling practices, but if it is offered, you are open to discussing such matters, either as part of the White settlement or as a matter of unilateral company action in your sales territory. For example, your lawyer could persuade you to make a commitment to give better training to the sales personnel, or to give every customer a pre-stamped consumer satisfaction questionnaire. You might even decide that you would agree (if you were persuaded that it would not reduce profit in your region) to a future commitment prohibiting the sales personnel from selling other products during an initial visit to a National customer.⁴⁰ You are not willing, however, to refuse to deal with Steven Clark in the future; he is too good a salesman.⁴¹

V. PREPARING FOR CLASSROOM ANALYSIS

Preparing to help the class analyze this exercise is relatively time-consuming because the instructor will want to digest a great deal of material and perhaps display

³⁹ This element introduces another opportunity for creativity by the lawyers, and also for decisionmaking about another element of the lawyer-client relationship. Some lawyers will read a draft letter to you on the phone, some will ask whether you want to hear a draft, and others will commit the company to a text without finding out whether you want to approve it.

⁴⁰ With respect to issues of this sort, an instructor can be creative but should settle on her outer limits in advance and be consistent in her conversations with several attorneys. On this particular issue, for example, she might decide that she is willing to agree to a one-year trial prohibition to measure the effect of this changed practice on profits in the region. Or she might only agree to survey the sales force to determine how much more the company would have to pay to avoid losing its productive sales personnel.

⁴¹ Pedagogically, the reason for this instruction is that eliminating Clark from the sales force is too easy a solution to the problem of future practices; eliminating the possibility of this provision requires White's lawyers to think more creatively about how to reform the company.

some of it for the students in a form through which they can quickly absorb it. Mercifully, however, the time period during which this intensive preparation must take place is necessarily limited, because if only a week is available for the exercise, the instructor will have only one evening and perhaps a morning after receiving the settlements in which preparation can be accomplished.

My colleagues and I have found it useful to prepare for the students two large charts, one of which (derived from the submitted settlements) displays all of the terms of the various agreements and the other of which (derived from the notes taken by White and Stone) reveals the details of lawyer-client communications.⁴² Each chart contains a long horizontal row for each pair of negotiators; the vertical columns reveal the nature of the settlements and lawyer-client contacts.

The settlement chart is the simpler of the two. On this chart there is a horizontal row with the names of each attorney pair,⁴³ and two more rows showing the least favorable settlement to which each client would have been required to agree by the binding instructions.⁴⁴

In addition, if there are any pairs which did not settle, the instructor might want to leave a blank row in which the judgment can be summarized after the judge's envelope is opened in class.⁴⁵ The headings on the vertical columns usually call for data on the total amount that White will have to pay, the schedule of payment (e.g., any payments "up front" and the rate of monthly payment), whether or not a Bible was promised, what if anything was done about the letter in the personnel file, whether anything was done about the discolored or damaged books, what if any company practices are to be changed, and the form of the settlement, which could be either an agreement and dismissal of the case, or a consent judgment.⁴⁶ We have left a final column for "comments" such as notations of any settlements that violated a client's instructions.

The lawyer-client chart also has a row for each pair of negotiators, and we have used a large number of columns to reflect their client contacts.⁴⁷ The first column is used to indicate whether or not the pair settled the case (that is, whether

⁴² The lawyer-client chart was an innovation suggested by Lisa Lerman in 1984; its use has significantly deepened students' appreciation for the counseling aspects of a negotiation.

⁴³ We have considered the possibility of displaying the various settlements without names to reduce the likelihood that those who did not do so well for their client, comparatively speaking, would feel that they were being subjected to public criticism or embarrassment. But this decision would make it impossible for students to direct questions about particular settlements to each other, and it would also make it impossible to correlate the settlements with data from the lawyer-client chart.

⁴⁴ As described at pp. 743-44 and 746-48 *supra*, or in any modification prepared by the instructor.

⁴⁵ Pairs that did not settle could be represented by their names followed by the words "no settlement" instead of data, or they could be omitted from this chart. If a instructor wishes to reduce the impact of the judge's order, this row could be omitted. *See supra* note 22.

⁴⁶ An "agreement" would not be as harmful to White's credit bureau record, and it would also not result in an execution against her assets in the event she did not pay as promised.

⁴⁷ The large number of columns has required us to develop a two-page spread for this chart.

the reader should refer to the settlements chart to check the outcome). The next two indicate the number of contracts with White and with Stone respectively. The next two summarize the last set of terms discussed with each client by that client's lawyer. If the pair did not settle, these columns reflect the lawyers' positions at the time of breakdown; if a settlement was reached, these columns (read together with the other chart) reveal any disparities between the actual settlement and what the clients were told was being agreed to in their names. Then four columns are devoted to whether the most prominent non-money issues (Bible, bindings, personnel file, and torn pages) were discussed with White, Stone, or both. Two columns are used to summarize White's defenses as stated respectively to White and to Stone; these columns tend to show whether the parties were being told about the same or different risks of litigation. Two more columns are devoted to any counseling (other than about the immediate case) that either lawyer engaged in; these columns reflect, for example, any advice to White about future credit purchases or to Stone about the salesman's future behavior. Finally, we have used the last two columns to give the lawyers some feedback from their clients about their reactions to the process or the outcome.⁴⁸

The other thing that an instructor can do to prepare for a class on this exercise is to read the students' papers in which they have described their negotiation planning and the factors that influenced the outcome. Time may not permit an instructor to correlate all of the papers with the information summarized on the two charts, but reading the papers before class will at least enable her to identify common themes such as efforts (whether or not successful) to avoid positional bargaining, the influence of friendships among participants, or the degree to which differing perceptions of the strength of the creditor's case affected the outcome.

VI. CLASSROOM ANALYSIS

At least two hours seem necessary for a review of this exercise in class. We have always found it useful to begin the discussion by distributing the charts to the students and letting them spend a few minutes studying them, so that they can absorb, in a relatively efficient and orderly way, a broader picture of what the entire group had done. Beginning in this way conveys to the group the range of variations in outcome and in lawyer-client relationships, and making the charts available alleviates the necessity for a student to describe his or her outcome before commenting about the negotiating process as he or she experienced it. On the other hand, distributing the charts could cause students to feel "ranked," and that could

⁴⁸ Some examples of these observations may be helpful. White's observations: "He didn't explain too much but I felt that he was on my side," or "He was just like a collection agency. He kept threatening me. He said I better not miss a payment or they would sue me again." Stone's observations: "He told me that he could get me \$363. Then he suddenly yanked it back and we only got \$240," or "She called me again and again, but she was always pleasant so I didn't mind."

dampen their enthusiasm. Some instructors might therefore prefer to distribute the charts without students' names, or to summarize the charts orally rather than distributing them.

Over a period of several semesters, we have used several different ways of organizing the discussion after the charts have been digested.⁴⁹ On some occasions, we have divided the experience into temporal slices, looking first at factors that influenced the negotiations before the two sides made any contact, and then at the dynamics of the ongoing negotiation. On other occasions, we have added a third layer, the lawyer-client interactions, in order to ensure that this aspect of negotiation received sufficient attention. In one semester, at least, we began by asking the students to make a blackboard list of the principal factors that influenced their negotiations (a distillation of their papers) and then worked from that list. In another semester, we subdivided the discussion of interaction between lawyers into categories of real-world influences (time, friendships), tactics, and aspects of style or personality.⁵⁰

Whatever formal structure is used, students have always appeared ready to dive in, eager to try to relate their own experiences to the experience of the group. They are usually amazed by the wide variation among the settlements⁵¹ and the ways that various lawyers responded to the same clients.

Although the issues that the students most want to discuss will vary from semester to semester, an instructor might want to watch for certain ones that seem to provide particularly strong reactions. Six of these issues seem to recur with sufficient frequency to warrant brief descriptions below.

A. *The Two-Front Character of the Process*

Most students begin the exercise without distinguishing between the everyday

⁴⁹ We have also considered imposing no organizational construct because the level of energy in this class is usually so high that students will keep a good discussion going with very little intervention from the instructor. On one occasion, we permitted the students to decide whether they preferred an ordered or a free-form discussion, and they voted for structure. Transcript, class at Georgetown University's Center for Applied Legal Studies, Sept. 14, 1983, p. 21 (hereinafter cited as Transcript). On the pedagogical desirability of letting students make some of the decisions on teaching methodology in their classes, see Aiken, Koplow, Lerman, Ogilvy & Schrag, *supra* note 9.

⁵⁰ In principle, an instructor might want to survey *all* of the influences on the negotiations, using as a guide a very broad list of candidates, such as the one in the General Instructions for the exercise. In practice, using such an extensive outline is probably not practical in a class of two or three hours, so some way of distilling the most important issues seems necessary.

⁵¹ In a typical semester (Spring, 1983) in which eight pairs negotiated, the amounts that the creditor would eventually collect ranged from \$233 to \$487, a variation of over 100%. The payment schedules have ranged from under \$5 per month to \$25 per month, sometimes with large initial payments. There have been any number of combinations involving replacement of books, extra books, letters to Pizza King, future sales practices, and forms of agreement. In a few cases, Bibles were promised by the company (in violation of Stone's instructions to the company's lawyers).

negotiations with which they are familiar from their personal lives and the more complex process of negotiating on behalf of a client.

In particular they are not aware that they are likely to have to engage in a negotiation with their client as well as with their adversary. The exercise drives home, in a powerful way, this special quality of professional negotiation. "I found that I had to negotiate at least as much with Mr. Stone as I did with the other attorney," one student reflected.⁵² Many students find the negotiation with their clients to be much the more difficult of the two, and this may be the case regardless of which side they represent. "I was so happy for three days in between," a student reported. "Then I spoke to Terry about it and she said, 'that's fine, go ahead with it, whatever you advise', and then I felt terrible. I was waiting for her to say 'no, no way.' Then I could come back to my other counsel and say, 'Oh, she won't agree.' I wanted to be Miss Nice. [But] all of a sudden I had to become hard."⁵³ A few minutes later, a lawyer who had represented the encyclopedia company said, "We had a beautiful settlement . . . that was nice for both sides. It was terrific and we said 'oh, great. Nice working with you. Terrific. Terrific.' Only we had to talk to our clients. I was completely chewed out by Stone. Our relationship went right down the tube. It was the most horrible experience. He accused me of giving away the store. [The] thing I came away [from this exercise] with was to know my client better before I start giving things away. From then on we couldn't settle."⁵⁴

Students have also discovered that they sometimes develop bonds with their adversaries based on the ease of working together, as professionals, to solve a problem, and that one of these bonds might even materialize because of mutual dislike of the clients. "After the first few times we spoke to our clients, there was nowhere to go," a student told the class. "But we [lawyers] became closer. And that's when . . . instead of trying to beat each other any more, we were now striving for a common goal, which basically was to get our clients off our backs."⁵⁵ Another student, who had had a great deal of trouble getting Stone to agree to concessions that would make agreement possible, concurred: "By the end it was like, well, what can I advise him, or maybe [I'll] tell him how important this Bible is even though we're not going to agree to it and then maybe he'll give up some on the amount and all that. It was like we were helping each other out. What we should do is [sic] this strategy to convince these two people."⁵⁶ The existence of professional bonding is, of course, only a beginning for analysis. Instructors may want to explore with the class, in this or some subsequent session, the ethical problems raised in an adversary system when attorneys so easily identify with each other.

⁵² Transcript, Sept. 15, 1982 at 18.

⁵³ Transcript, Feb. 1, 1984 at 12-13.

⁵⁴ *Id.* at 17.

⁵⁵ Transcript, Sept. 15, 1982 at 27.

⁵⁶ *Id.* at 58.

B. *Lying*

The issue of lying by attorneys during the course of negotiation has been a surprisingly prominent theme during discussions of the Terry White negotiation. In almost every semester, at least some lawyers have lied. Some have misrepresented facts (e.g., that Terry White's employer had recently informed Terry of another impending pay cut, reducing the salary below the amount that could lawfully be subject to garnishment). Others have misrepresented their own knowledge (e.g., that White had a car), their client's "bottom line", or the scope of their negotiating authority. When these false statements are revealed in class, the attorneys to whom they were made are often furious, and the lawyers who made them are surprised by the feelings of betrayal that are expressed. The discussion often reveals some confusion about what is expected of attorney behavior. The lawyers who lie say that everyone makes false statements in a negotiation, particularly statements about what clients are willing to accept and what they have already authorized their lawyers to explore. The attorneys to whom the lies are directed cite the absolute bar, in the Code of Professional Responsibility, to false statements of fact.⁵⁷ An instructor who wants to emphasize what the exercise can teach students about the pressures to lie and the feelings and consequences of lying and being lied to might encourage relatively more emphasis on the actual experiences in the exercise; one who prefers a more analytic stance might give relatively greater emphasis to the meaning of the Code or its relationship to personal morality with respect to the issue of lying.

C. *Client Expectations*

Another common experience involves the lawyer's generation of client expectations. Some of the students lead their client during early conversations to expect an essentially favorable outcome. Sometimes this message is communicated after the student has had an initial negotiation session with the other lawyer, but before that lawyer has spoken to the other client. The client may later be more disappointed by the defeat of his or her expectations (as generated by the lawyer) than by the failure to obtain a better settlement.⁵⁸

D. *The Counseling Role of the Lawyer*

In our experience, most of the students do not counsel their clients (other than

⁵⁷ MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(5) (1979), applicable to all "representation of a client." Curiously, the relevant section of the new Model Rules only bars false statements of fact "to a tribunal." MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.3(a)(1) (1983). Could the change represent a codification of widespread negotiating practice? Curiously, the Comment following the new Rule says that it is "substantially identical" to the old one.

⁵⁸ Stone has been known to become furious with lawyers who say that a very good settlement for the company is in the works, but who call at the last minute to say that, notwithstanding their earlier optimism, the firm will have to make major concessions to settle the case. Of course Stone gets even angrier with lawyers who settle on changed terms without ever making the second call.

about the settlement terms) in the course of the negotiations,⁵⁹ but they learn a great deal when they discover that a few students in the group have done so. The exercise presents numerous counseling opportunities for both lawyers.

With respect both to advice about the settlement itself and to counseling more generally, one special pattern to watch for is the relationship between how students approach White and how they treat Stone. White is a poor individual who is getting free legal help; Stone is a business executive who is directing business to a lawyer. In our use of the exercise, we have accented these differences by making White female and Stone male. And at least in some semesters, students have been far more deferential to Stone than to White. They have, for example, contacted Stone at a much earlier stage in the process, often waiting to speak to White until after an agreement has been fully worked out. They have often freely told White not to buy on credit in the future, but have been much more restrained in offering Stone advice about the affairs of the company. In our experience, in fact, no student has ever told Stone that the credit department should be keeping records of every collection call that it makes to customers. In class, Stone's attorneys often reply that they feared that any advice they offered would be met by criticism from the client; White's lawyers were apparently not worried. The money, class, and perhaps gender differences underlying these differences in approach might fruitfully be explored in discussion.⁶⁰

E. Creativity

Because parties are not bound by precedent, the negotiation process offers numerous opportunities for the exercise of creativity. Even this settlement of a small claim offers some possibilities, such as how the lawyers will deal with White's need for an explanation to her employer of the phone calls that she received at work. One student, discovered, for example, that by applying some creative energy to this apparently minor issue she was better able to unlock a satisfactory settlement to the whole case. White "was very upset because we had jeopardized her job," the student told the class. "[But I suggested to Stone that] we would send a letter [to] apologize for that and say it wouldn't happen again, that it wasn't her fault

⁵⁹ Many students are reluctant to counsel their clients, even with respect to accepting, rejecting or revising proposed terms of settlement. The following comment from a student may help explain this reluctance: "[B]efore I came to law school I assumed . . . I was going to learn . . . what the law was and then I'd be able to advise clients. . . .When I seek black letter law and am absolutely confident then I don't really have any problem with saying to a person, 'Well, here is what in my judgment your rights . . . and your responsibilities are.' However when the law is mushy, then I guess I want to be mushy, too. . . .I don't want to make some kind of a commitment to a client. . . ." Transcript of a class reviewing the Terry White exercise at West Virginia University, Oct. 23, 1984.

⁶⁰ For an extensive discussion of some of the interpersonal relationships that affect a lawyer's work, see Himmelstein, *Reassessing Law Schooling: An Inquiry Into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. REV. 514 (1978).

[though we didn't do] anything wrong. . . .It didn't cost us a cent. . . .[I] even typed and drafted the letter so all my client had to do was sign it. . . .It meant a lot to Terry and after that . . . making out the payment schedule was really amicable."⁶¹ The opportunity for creativity is also illustrated by the student who reversed the more common (and poorly received) suggestion that Stone tell the firm's salespersons to stop selling Bibles; this student urged that the firm publish a line of embossed Bibles that it would sell or give away along with encyclopedias, increasing profits while bringing this sales practice under firmer company control.

F. *Exceeding a Client's Authority*

Each semester, one or two students have exceeded the authority delegated to them by their clients, for example, by forgiving part of the debt without first talking with Stone, or by agreeing with White on a payment plan that would be barely acceptable and then agreeing to a more rapid schedule without a further conversation. This conduct is not very surprising, since many students will have had no prior experience with working within limited authority. But it does seem important to call students' attention to the problems engendered by exceeding delegated authority and to help them recognize when they are on the verge of doing so.

These six issues represent some of the common themes that have intrigued students who have participated in the Terry White exercise, but by no means are they the only subjects of discussion. As intimated by the suggestions for structuring the discussion, the most common subjects of the class are the influences on the negotiating process and outcome; the cross-cutting themes tend to emerge at some point during consideration of why different negotiators reached different outcomes. Nor should the suggestions in this article limit an instructor's imagination with respect to how the exercise is used⁶² or discussed. The Terry White exercise is rich with possibilities, and more extensive use of it by law teachers will undoubtedly uncover new ones.

⁶¹ Transcript, Feb. 1, 1984 at 15.

⁶² At George Washington University, David Medine has experimented with an entirely different use of the exercise. He has law students do the negotiating during one hour of a class period rather than between classes, making actors available as clients in other rooms. He reports that students enjoy and learn from the exercise but say that they need more time for negotiation. He also observes that students involved in this streamlined version of the exercise tend to focus much less on lawyer-client relations than they do in the week-long version. Interview with David Medine, May 6, 1985.

APPENDIX

The following materials may be copied to make masters of handouts for the Terry White negotiation exercise. The masters should then be modified as indicated in the preceding article. After modification, the masters may be duplicated for distribution to students participating in the exercise. Once the masters have been duplicated, the only modification needed is insertion of individual students' names to create the negotiating pairs.

TERRY WHITE: AN EDUCATIONAL SIMULATION*

GENERAL INSTRUCTIONS TO ALL PARTICIPANTS

This exercise will involve you directly in a simulated negotiation. It will help you to understand more about the substance, style, tactics, and dynamics of the negotiation process.

The exercise has four parts: (1) a short reading assignment, (2) a planning event, (3) the negotiation itself, and (4) a very brief writing assignment. Please note that the various phases of this exercise have very strict time limits which are set forth at the end of these General Instructions.

NOTE: All participants are receiving identical versions of these General Instructions. There are, however, two versions of the Attachment: one for each side's lawyers.

PART I—READING

At the outset the instructor may require completion of a preliminary reading assignment.

PART II—PLANNING

You will be working on the case of *National Encyclopedia Company vs. Terry White*, as counsel for either White or the book company, as indicated on your version of the Attachment. Between the time you receive this assignment and the deadline for Part II, you should work with an assigned partner to develop a plan for negotiating a settlement in the case. (Your partner for this phase of the exercise has received a set of instructions with the same version of the Attachment that you have; obviously, this will *not* be the person with whom you will negotiate in Part III.) The plan should outline your objectives, your general approach, any tactics you expect to use, how you intend to approach any special issues that are likely to arise, and anything else you think relevant. The list in Part IV, *infra*, may stimulate your thinking about elements in your plan. Since you'll be negotiating individually in Part III, the two of you may disagree, but any significant disagreements should be noted explicitly so that you can later determine whether they were important in affecting the outcome.

Each partnership should commit its plan to paper. The team's plan will be handed in shortly before the class at which this exercise is analyzed (as described in Part IV, *infra*).

* © 1986 by Philip G. Schrag, Professor of Law and Director of the Center for Applied Legal Studies, Georgetown University Law Center. This exercise was developed at the Center for Applied Legal Studies with the assistance of Jane Aiken, Alice Dueker, David Koplou, Lisa G. Lerman, Joyce McConnell, and J.P. Ogilvy. Instructors administering the exercise may copy it for use by their students without further permission. They may obtain a copy of the instructor's manual from the author.

PART III—NEGOTIATING

After the deadline for Part II, you will work as an individual, not as a member of a pair. You will try to negotiate a satisfactory settlement with someone representing the opposing party. You should begin, at least, by trying to implement the plan that you and your partner developed. You may, of course, modify the plan as the negotiation progresses. (This splitting up of the pair will both enable you to have more individual negotiating experience and give you a chance to see how two people who started with the same plan followed the plan or modified it to react to circumstances as they developed.)

Between the deadline for Part II and the deadline for Part III, you are free to negotiate as often as you wish, and for as long as you wish. You may also contact your client, as indicated on the Attachment to these instructions.

Any settlement must be:

- (1) *signed by each lawyer* and
- (2) filed with the court (by submitting a signed copy to your instructor) before the deadline for Part III. *No extensions will be granted.*

If you do not reach a settlement before the deadline, the outcome for your client will be determined by the court. The judgment of the court in this case has been sealed in an envelope. If any pair of negotiators does not settle by the deadline, the envelope will be opened during the class analysis of the exercise.

— Variant: if your instructor has checked this space, two or more different judgments of the court have been sealed in envelopes. One of these envelopes will be drawn and opened during the class.

PART IV—ANALYSIS

When you finish negotiating, you should submit a short written description of the three major factors that caused your outcome to be as it was. If you negotiated without reaching a settlement, the paper should focus on the factors causing the negotiations to be unsuccessful. If you settled, your paper should describe major factors responsible for the outcome.

The format for the body of the paper is very simple: just describe, in one paragraph per factor, each of the three factors (from the list below or from your own experience) that most strongly influenced the outcome of your negotiation. This paper need not be polished; it is intended to focus your thoughts. You may write more if you wish, but not more than one page per factor. Bring a copy to use as a reference during the class. (You might also want to swap copies, after the class, with your planning partner and the person against whom you negotiated.)

The goal of the class will be to understand better the influence of various factors on the outcome of negotiations. Because we will have data on a number of

separate negotiations, all of which begin with the same statement of facts (though perceptions of those facts will surely vary) and applicable law (though knowledge of it will also vary), we might be able to learn something about the relevance of factors other than those. Here is a long but partial list of factors that might influence negotiations. It is intended to give you a start in thinking about the factors that influenced your negotiations.

PARTIAL LIST OF POSSIBLE FACTORS THAT MAY INFLUENCE NEGOTIATIONS

- (1) Any prior personal or professional relationship you had with the lawyer on the other side.
- (2) Your feelings about your decision to negotiate.
- (3) The process by which you reached a decision on how to negotiate.
- (4) How the first contact was made: who made it, whether on the phone or in person, and when it was made.
- (5) Each side's first impression of the other lawyer and of the other side's issue.
- (6) How much each side cared.
- (7) The running of the clock.
- (8) Your competing time commitments during the period of negotiation, those of the lawyer on the other side, and the relative pressure on the two of you.
- (9) The degree of any client contact.
- (10) How carefully you prepared a plan.
- (11) Your flexibility in modifying your plan as the negotiation developed.
- (12) Concepts of justice.
- (13) The personalities of the negotiators.
- (14) Each side's assessment of the substantive law and its application to the case.
- (15) Each side's perception of the facts.
- (16) The dynamics of changing perceptions of the facts and law.
- (17) Any overall philosophy of negotiating (such as that of Fisher and Ury) adopted by either side.
- (18) Similarities or differences in the genders, races, ages, or experiences of the negotiators.
- (19) Creativity and imagination.
- (20) Whether the negotiators concentrated on the feelings of the other, as opposed to the substance of the problem.

- (21) The degree to which the negotiators understood each other's perceptions of the situation.
- (22) The number of issues or sub-issues on the table.
- (23) Whether feelings were discussed explicitly by the negotiators.
- (24) Any sudden or dramatic moves.
- (25) The degree to which a party gaining an upper hand permitted the other to save face.
- (26) Symbolic gestures.
- (27) Communication problems.
- (28) Fear of criticism (by clients, colleagues, etc.).
- (29) Desire to build a continuing relationship with the negotiator for the other party.
- (30) The degree to which either or both negotiators sought or found unexpressed needs of their own or the other side.
- (31) The amount of time spent.
- (32) Repetition of positions.
- (33) "Hardness" or "softness."
- (34) Any use of neutrals or third parties.
- (35) The locale of the negotiations (e.g., whose turf, business or social setting, the degree of privacy, the use of the telephone, etc).
- (36) Any multiplication of options as negotiations progressed.
- (37) The use of any temporary agreements for the duration of the negotiations themselves.
- (38) Precedent.
- (39) Which side drafted the settlement documents, and whether the drafting role procured or was perceived to procure interstitial advantage.
- (40) Which side made the first proposal.
- (41) The use of objective standards.
- (42) The use of chance (e.g., coin-flipping).
- (43) Threats and other forms of pressure.
- (44) The use of silence.
- (45) The use of humor.

- (46) The asking of questions.
- (47) Refusals to negotiate.
- (48) The degree of the negotiator's authority to negotiate.
- (49) Deception.
- (50) Whether either side opened with an extreme position.
- (51) The tactic of raising demands as agreement nears.

(52) The degree to which the process of negotiating could undercut either client's position in the event the negotiations broke down.

(53) Which side made the first concession.

(54) The number of contacts between the negotiators.

A copy of your paper should be submitted to your instructor by the deadline for Part IV. At this time, you should also turn in a copy of the planning document that you and your partner developed in preparing for the negotiation (Part II). These submissions will help your instructor to prepare for the class.

IMPORTANT NOTES

(1) Except for planning with your planning partner (as described in Part II above) and negotiating with your adversary before the deadline for Part III, please do not compare notes with other participants either during the exercise or between the deadline for Part III and the following class. At that time you will be able to compare the results you obtained for your client with those reached by the other pairs. The purpose of this request is so that the class is not a rehash of what you've already talked through beforehand.

(2) In the negotiating phase of this exercise, you should do your best to stay in your role as lawyer throughout all your contacts. It may be difficult to remain rigorously in role, but if you force yourself to do so, you'll get much more out of the experience.

(3) If you anticipate being out of town or otherwise unavailable for a portion of the negotiating period of the exercise, you should attempt to deal with that problem in role—that is, by constraining the negotiation schedule to fit your availability, as a lawyer would.

(4) Much of the class will be devoted to analyzing what happened in the various negotiations and why. If any pairs of negotiators do not reach agreement, part of the class will also be devoted to an exploration of why that happened.

(5) Your instructor may supplement these instructions with his or her own handout. In the event of any inconsistency, your instructor's handout governs.

Deadlines

	<u>Date</u>	<u>Time</u>
Parts I and II	_____	_____
Part III	_____	_____
Part IV	_____	_____

ATTACHMENT

(This version for Terry White's counsel)

TO: _____

You are a legal services lawyer representing Terry White, whom you interviewed last week. When you start to negotiate, the creditor's attorney will be _____ . He or she does not now know who is representing White, and should therefore not be expected to contact you first. The two of you know each other from law school and (if it is true) may be personally friendly, but you have had no prior professional contact.

Summary of Interview

Terry White seems rather timid, and speaks quietly, sometimes almost inaudibly. White currently works as a fast food cook at a local Pizza King. White's take-home pay (after a recent pay cut) is \$132 per week.

White lives with a very ill, permanently disabled spouse and three children: Jerry, 12; Amy, 9; and Selena, 7. One evening more than a year ago, during a week in which White's spouse was hospitalized, White had just put Selena to bed when a man rang the doorbell. The man turned out to be a salesman, and he sold White a 20 volume set of National Encyclopedias, and the National Encyclopedia Dictionary.

White doesn't remember all the details of the conversation with the salesman very well. He introduced himself as Steven; if he gave a last name, White doesn't remember it. He was about 30, energetic and very convincing. He said he lived a few blocks from White. He started the conversation by saying that one of White's neighbors (he may not have said which one) had told him that White had children in school. He'd come to commiserate about the poor quality of the local elementary school; he had a child in the school system himself, and he knew how things were. But he'd also come because he'd discovered a marvelous way to improve his own daughter's education and to help her get ahead in school. He'd bought a National Encyclopedia for her, about a year ago, and her grades had improved a lot.

White had been increasingly worried about Jerry, who was doing very poorly in school and had just received several D's and an F on his report card. Steven seemed very concerned about Jerry. They continued to talk in White's living room, and White made Steven some coffee.

Steven showed White a volume of the Encyclopedia, and it did look very attractive, full of engaging color pictures. He also had a number of advertising folders describing the full set of volumes. (White no longer has these and doesn't remember whether Steven left them). At one point in the conversation, which lasted about

two hours, Jerry came into the room and looked at the book, too, and he made some remark about the nice pictures. Steven showed White and Jerry a wallet photo of his daughter. In the photo, his daughter was reading a National Encyclopedia. For most of the two hours, White and Steven talked about their children.

Steven said that he was so impressed with the National Encyclopedia and how it had helped his daughter that he was going around the neighborhood telling other people about it. White could get a set for Jerry and his sisters to use, with only \$25 down. Steven was certain that Jerry's grades would improve. The payments would be only \$20 a month.

Your client at first remembered clearly—because it was a factor in convincing White to sign up—that Steven said that one could change one's mind and cancel the contract. In the interview, you pressed for details on exactly what Steven said about cancellation, but White's responses seemed increasingly confused. White could not really remember Steven's words, but said that "I definitely got the impression that I could cancel at any time."

Another thing White remembers—it was the final thing that clinched the sale—was that Steven said that if White signed the contract and gave him, in addition to the \$25 down, an extra \$10 in cash (which White did), he'd provide White with a Bible on which any name of White's choice would be embossed in gold leaf. He showed White an attractive sample.

Eventually, your client had agreed to buy, telling Steven to emboss the Bible with the name of Agnes Baker, White's sister. Steven asked White some questions about employment and income, and he wrote down the answers. He also wrote out a contract which White signed. He gave White a copy of the contract, which was brought to the interview (and is attached). About two weeks later, he came back with a big carton, containing the full set of books. This time he was in a rush, and they didn't talk or have coffee. He said that he was sorry, but the Bible company had stopped sending him embossed Bibles, and he'd have to refund the ten dollars. White told him that the Bible was one of the main reasons for White's agreement to buy the books. "I pleaded with Steven," your client said, "I'd already told Agnes that I had bought her a Bible with her name embossed on it in gold. I refused to take the ten dollars back." Steven said he'd see what he could do, but White has never seen nor talked to him since, and doesn't know where to reach him.

For a few days, Jerry looked at the books occasionally. White urged him to read them, but he said he couldn't understand them and preferred to watch television. After a month had gone by, it was clear that Jerry wasn't going to read the books, and he'd even stopped looking at the pictures. By this time, Selena had torn a few pages out of Volume 9. Then White put the books on a shelf where Selena couldn't reach them. They're not even very attractive on the shelf, White says, because the binding on the last four volumes is a noticeably different shade of green from that on the other volumes.

Another thing happened around this time. White's employer told all the employees that because times were so rough, everyone's wages were being cut by 5%. And if business continued to be bad, the restaurant might have to close altogether. With Jerry not reading the books and the family so squeezed financially, White decided to cancel. So White didn't make any payments, though bills came in the mail.

When you asked in the interview whether White had called the company to inform it of the cancellation, White said, "No, I didn't. I assumed they'd know that from the fact that I wasn't paying. Anyway, the company knew pretty soon, because within a few weeks, a Mr. Lake from the company's collection department asked when I was going to make payments. I told him that I'd decided to cancel and that he could come get the books. He said that I couldn't do that and that I'd signed a contract and would have to pay."

Mr. Lake called White at home three or four more times over the next few months. He was always polite and respectful, but his calls did not stop despite White's requests to be left alone because the contract had been cancelled. Once, Mr. Lake called White at work. This frightened White, because Pizza King forbids personal telephone calls at work, and White's boss answered the phone. During that call, White told Mr. Lake about Pizza King's prohibition on such calls, but the boss was nevertheless furious. In fact, he wrote White a letter (attached) threatening dismissal if the calls continued. White was afraid, and therefore sent the company a money order for one \$20 payment a few days later.

That stopped the calls for a while, but about four weeks later, White was called again at work. This time the caller wasn't Mr. Lake, but a Mrs. Parker, who said that White was now several months behind, and that if no payment was made in a few days, they were going to refer the matter to their lawyer. White explained the whole situation to Mrs. Parker, about not getting Agnes' Bible, how Jerry wasn't reading the books, about how everyone's pay had been cut at Pizza King, and about wanting to cancel, but Mrs. Parker said that White would still have to pay. Mrs. Parker said that she would put a memorandum about their conversation in her files. White didn't have any money to spare, and couldn't keep making payments, so no more payments were sent.

When you pressed the point, your client said that most of the phone calls at work that had made the boss mad were from friends, but that the one that the boss had answered himself had been from Mr. Lake. The boss wasn't there when Mrs. Parker called.

Recently, White was sued by National Encyclopedia. The amount demanded in the suit is \$520.35—the full \$378.45 amount of the contract (the one payment seems not to have been credited), plus (at 1-1/2% per month compounded) an accumulated finance charge of \$74.03, plus a 15% counsel fee amounting to \$67.87. The plaintiff also seeks court costs and statutory interest of 8% on the outstanding total balance between the date of judgment and the date of payment.

When you gave White your office's standard retainer form to sign, you noticed that your client spent a long time looking it over before signing it, but that White's eyes did not seem to move across the paper. After the retainer was signed, you asked your client how far White had gone in school. White had finished the eighth grade and claimed to be able to read, but you suspect, based on what you saw when you proffered the retainer, that White reads poorly if at all. This is White's first personal experience with credit sales; in the past, before becoming ill, White's spouse handled all the contracts.

At the end of the interview, you asked White about the next steps. White continues to want to cancel the contract, and continues to be willing to give back the books. White also wants the embossed Bible that was paid for and promised to Agnes; White doesn't want Agnes to think White's been "taken" by a salesman. White would like to get the past payments (\$25 down plus \$20) back too, if possible. And White is very worried about the letter that the Pizza King Manager wrote to White's personnel file.

Summary of Your Investigation

Since you first interviewed White a week ago, your investigation has revealed the following additional information:

1. The case has been assigned to Judge Marion Taylor, a 63-year old white male who was formerly an insurance salesman. He is a conservative Republican who is usually pro-business and has never been thought particularly receptive to public interest claims. (You should assume that recent case law will preclude obtaining a jury trial on National's claim). You have heard that he is a good friend of National's lawyer.

2. You've discovered (by researching the Court's records of plaintiffs and defendants) that the National Encyclopedia Corporation has been a very frequent litigant recently. By calling many of the people who have been sued by National, you've located two other consumers with stories similar to White's. One of them had been promised a Bible by Steven Clark but had never received it. The other one had dealt with a different salesman, who had promised but never delivered a set of six stem glasses. Both of these defendants are angry and one has asked you for advice or representation (which you have so far declined). You also reached four defendants who had no complaints about the selling practices of the company or about the merchandise, but who defaulted on their payments because of their inability to keep up with the payments; these customers, too, have asked for your professional assistance. As a result of cutbacks in funding, however, the docket of your office is too full to accept representation of any additional consumers.

3. If White goes to trial and loses completely, the judge *could* order that the entire sum of money be paid immediately, plus 8% per annum on the amount of the judgment until it is paid. This would subject White's wages to garnishment to the extent that the law allows, and it would also render subject to attachment White's small Christmas Club savings account (\$135) at the Union Savings Bank,

and car (1981 Pontiac)—if the creditor learns about these assets. More likely, the judge would suspend the judgment conditionally upon White's making regular payments according to a schedule set by the court, and would provide that upon missing even one scheduled payment, White would immediately be liable for the entire judgment. When you explained this to White on the telephone, your client asked you to try to settle the case along the lines that you discussed previously, adding that if White has to pay anything in connection with a settlement, the monthly payments should be as low as possible, preferably no more than a few dollars a month.

Summary of Law

Your preliminary research has revealed several lines of argument that might be pursued if this case goes to court. None of them seems open and shut. You may do more research if you want to.

1. White might be able to argue common-law misrepresentation, based on Steven's alleged statement about being able to cancel at any time, which is much stronger than the right that appears in the contract. But White's testimony on this point seems especially weak. Some of Steven's other statements may lend themselves to claims of misrepresentation; again, there are proof problems, and perhaps materiality problems as well.

2. Some of the same claims might be asserted as statutory claims under state law, perhaps with different remedies and somewhat different elements.

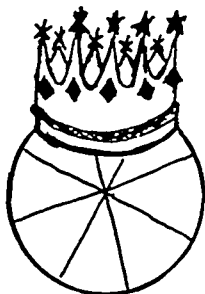
3. Perhaps you could argue unconscionability (UCC 2-302 or common law), stressing your client's reading ability, the fact that the sale took place at home, and the things Steven said. But the alleged facts are not all that different from many run-of-the-mill door to door sales, which have never been declared unconscionable.

4. The company's calls to White might arguably have violated state law regulating debt collection. But the company will probably argue that no violations occurred.

5. Maybe there are other lines of legal argument as well: every lawyer who looks at consumer cases seems to find new possible theories.

Contact with Terry White

During the interview, you asked whether your client would be available to talk with you over the next few days. Your client will be available—sometimes at home and sometimes babysitting at Agnes' home while on a day off from Pizza King. Here is a list of when White can be reached:



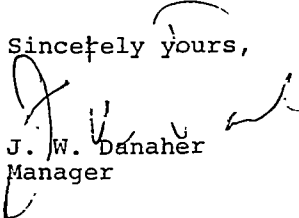
Pizza King

It has come to my attention that in recent weeks you have received a number of personal calls on the Pizza King telephone. As you have been told in the past, the receipt of personal calls by Pizza King employees disrupts the production of food, increases the time that customers are kept waiting, prevents us from receiving telephone orders, and is strictly forbidden by company policy.

This is your final warning. If you continue to receive telephone calls at work, you will be subject to company sanctions, including dismissal from employment.

A copy of this letter is being placed in your file in the personnel office.

Sincerely yours,



J. W. Danaher
Manager

OPEN END CREDIT AGREEMENT

(The terms of this agreement are contained on both sides of this page)

Qty	Product	Rating	Price
	Encyclopedia DICTIONARY		
	READING DEVELOPMENT PROGRAM KITS <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> 4		
SUB TOTAL-PRODUCT PRICE(S)			
TAX			
SHIPPING & HANDLING			
TOTAL			
INITIAL DEPOSIT—Check One Check <input type="checkbox"/> Visa/Master Card <input type="checkbox"/> Other <input type="checkbox"/>			
BALANCE TO PAY ON THIS ORDER (plus monthly finance charge on unpaid balance as specified in attached Credit Disclosure Statement)			
FIRST MONTHLY PAYMENT DUE 40 DAYS FROM DATE OF ORDER	<input checked="" type="radio"/> S	PAY PER MONTH	
Add to Present Account No	Buyer Phone Area Code		

OFFICE USE ONLY

A

SHIP TO BUYER	TITLE (Optional)	NAME	ADDRESS	CITY	STATE	ZIP
	TITLE (Optional)	NAME	ADDRESS	CITY	STATE	ZIP
	TITLE (Optional)	NAME	ADDRESS	CITY	STATE	ZIP
	TITLE (Optional)	NAME	ADDRESS	CITY	STATE	ZIP

The undersigned buyer hereby agrees for an open end credit account with **National Encyclopedia Corp.** Buyer orders and agrees to accept and pay for the product(s) as specified herein. Buyer may, from time to time, charge additional purchases to the account, provided it is current. Any additional purchase that would increase the account balance by more than \$200.00 above the current balance to pay on this order shall be subject to seller's approval. This agreement is subject to acceptance by seller.

NOTICE TO BUYER: Do not sign this agreement before you read it or if it contains blank spaces. You are entitled to an exact copy of the agreement you sign. Buyer hereby acknowledges receipt of a completed copy of this OPEN END CREDIT AGREEMENT (including attached Credit Disclosure Statement) and oral advice from seller of buyer's right to cancel.

Buyer's Signature: X Date Signed: _____, 19__

You, the buyer, may cancel this transaction at any time prior to midnight of the fourth business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

This contract sets forth the entire agreement with the buyer and the buyer's signature is genuine.
Representative's Signature: _____

Sign Name Here _____ Print Name Here _____

NOTICE OF CANCELLATION Date Order Signed _____, 19__

You may cancel this transaction, without any penalty or obligation, within four business days from the above date. If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within 10 business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled. If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk. If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract. To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram, to National Encyclopedia, _____ not later than midnight of _____, 19__

*(Rep. Fill in above date line—4 business days from the date order signed.) (See reverse side for additional term.)

I hereby cancel this transaction. Date: _____, 19__

Buyer's Signature _____ Buyer's Name (Please Print): _____

CREDIT APPLICATION

Buyer Age		Yes This Address	1 <input type="checkbox"/> Own 2 <input type="checkbox"/> Rent 3 <input type="checkbox"/> Other	No Children	Age of eldest	Age of youngest	Do You Have Phone? <input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Home <input type="checkbox"/> Office
Buyer's Employer		Educator Cert. date No.		Spouse Employer		Spouse Social Security No.		How Long
Address		Phone No.		City State		Phone No.		Job Title
Buyer's Previous Address		How Long		Indicate the principal source of income on which buyer intends to rely for payment of this account. One box MUST be checked.				
City State		Phone No.		<input type="checkbox"/> Buyer's Income Only <input type="checkbox"/> Spouse's Income Only <input type="checkbox"/> Spouse's Income will be over to credit history of new co-applicant's credit <input type="checkbox"/> Buyer and Spouse's Combined Income Complete all information on both buyer and spouse Consideration will be given to credit history of both individuals				
Annual Income		Annual Income		<input type="checkbox"/> Under \$5,000 <input type="checkbox"/> 5,000-10,000 <input type="checkbox"/> 10,000-15,000 <input type="checkbox"/> 15,000-20,000 <input type="checkbox"/> 20,000-25,000 <input type="checkbox"/> 25,000-30,000 <input type="checkbox"/> 30,000-35,000 <input type="checkbox"/> 35,000 and over				
Type of Account		Company Name		Acct No.		Educational Level of Buyer		
<input type="checkbox"/> Savings <input type="checkbox"/> Checking <input type="checkbox"/> Loan Acct.						<input type="checkbox"/> High School <input type="checkbox"/> College <input type="checkbox"/> Attended <input type="checkbox"/> Attended <input type="checkbox"/> Graduated <input type="checkbox"/> Graduated		

CONTINUATION OF OPEN END CREDIT AGREEMENT

If litigation against the buyer is instituted after a default by the buyer, the buyer agrees to be liable for a reasonable attorney's fee payable to the seller's attorney, in an amount not to exceed 15% of the unpaid balance.

The accompanying Credit Disclosure Statement is hereby incorporated by reference as part of this agreement

CREDIT DISCLOSURE STATEMENT

A finance charge at the rate of 18% per annum on the outstanding balance, as computed below, will be added to the buyer's account on the Billing Date at the end of each monthly billing period.

Average Daily Balance Method For buyers residing in places other than Nebraska when the account is opened, Finance Charge will be computed on the Average Daily Balance for each monthly billing period. Average Daily Balance is the sum of the daily unpaid balances—after applying charges, payments and credits posted to the account for the billing period and excluding any unshipped purchases and unpaid Finance Charge—divided by the number of days in the billing period. Finance Charge will be computed by multiplying the Average Daily Balance by the applicable periodic rate(s) specified in the Finance Charge Table below.

Adjusted Balance Method For buyers residing in Nebraska when account is opened, Finance Charge will be computed on the Adjusted Balance as of the billing date at the end of each monthly billing period. The Adjusted Balance is determined by adding to the Previous Balance any charges posted to the account for the billing period and deducting payments, credits, unshipped purchases and unpaid Finance Charge posted to the account for the billing period. Finance Charge will be computed by multiplying the Adjusted Balance by the applicable periodic rate(s) specified in the Finance Charge Table below.

If the initial purchase is paid in full within 60 days of the "first payment due date", any Finance Charge levied thereon will be cancelled. If the New Balance shown as of the end of any monthly statement is paid in full within 25 days from the Billing Date of such statement, no Finance Charge will be applied on such New Balance.

Buyer may pay any amount in advance at any time. Monthly payments may be suspended 30 days at a time up to 4 times in any period of 12 consecutive months provided the account is not past due and buyer requests each suspension separately and in writing. A \$7.00 charge will be added to buyer's account as a processing fee if any check submitted as a payment is dishonored for any reason by the bank upon which it is drawn.

Installment payments will be applied to the account in the following order: to any finance charge due, to any products purchased by mail, and then to all other products purchased in order of purchase. Entire balance may be declared due and payable if any payment due remains unpaid for 3 months.

ATTACHMENT

(Encyclopedia company's lawyer's version)

TO: _____

You represent the National Encyclopedia Corporation. The company is a steady client, part of your substantial collection practice. It sends you about 200 defaulted contracts a year for collection through courts in your area. The officer you deal with is Pat Stone, Assistant Vice President in the Regional Office. You have authority on your own to settle claims by stretching out payments or by replacing any defective encyclopedias or dictionaries, but you have no authority to settle for less than the full amount, or to agree to other conditions, without Stone's approval.

National Encyclopedia sells all of its books by direct solicitation; that is, by door to door sales. The company works with a large number of salespersons, all of whom are independent contractors working on commission. They identify their customers either by canvassing neighborhoods or by obtaining references from previous buyers. They visit prospects in their homes (usually without prior appointments), strike up friendly conversations with them, show them advertising brochures and a sample volume of the encyclopedia, and offer easy credit terms—\$25 down and payments as low as \$20 per month. In compliance with the law, they also give customers a written notice of their right to cancel their contracts within a few days after signing them. A recent batch of contracts included one pertaining to Terry White. White has apparently made no payments, and you have filed suit for the entire purchase price, plus accrued finance charges, court costs, and an attorney's fee. The file indicates nothing unusual about the sale. The credit application shows that White earns between \$6,000 and \$10,000 a year as a cook in a fast food restaurant. White has three children.

The collection record indicates that the company's collection department sent White the standard sequence of six collection notices including, eventually, a warning of possible suit; that it telephoned White twice at home and once at work; and that White claimed a desire to cancel the sale. (You know, however, from past experience, that the company's records often do not indicate all the calls made to debtors. The firm's collection personnel are alert to harassment claims and the officers wink at their failure to keep full records.) There is no indication that White tried to cancel within the four days allowed by the contract. The file also contains a memorandum from Mrs. Parker, one of the company's telephone collectors, reporting some song and dance from White about a child not reading the books, an allegedly promised Bible, and cancelling at any time. This is the kind of story you've heard from deadbeats, and also from honest people pressed by hard times, again and again.

The Bible story, though, could be true. Sometimes the company's salespersons, who are independent contractors, piggy-back their own side-deals onto a sale for the firm. The company's position is that since such arrangements don't appear

in a written contract, they are separate transactions involving other parties and are of no concern to the company. It tries to discourage its sales personnel from engaging in side deals, but it stops short of refusing to deal with sales people who are productive. This is not the first time that you've heard complaints about Steven Clark, in particular. At least four people whom you've sued for National in the past two months have had stories concerning renege promises involving Bibles or other items. You asked Stone about this a month ago, but you were put off and you haven't pursued it.

The complaint that you filed asks for damages of \$520.35. Of this amount, \$378.45 is the unpaid balance, \$74.03 is the accrued finance charge, and \$67.87 is your counsel fee. It also asks the court to award costs and statutory post-judgment interest. You would like to get everything demanded by the complaint immediately (especially the 15% counsel fee which is an important part of your firm's compensation for doing this work), but you know that you can't squeeze out what isn't there. You would be satisfied to get White to agree to a schedule very much like the original payment schedule contemplated by the contract, extended for additional months to cover the additional attorney and court fees and the accrued finance charges, and, if possible, you'd like to get the 8% per annum that the law allows on the outstanding balance between the date of a judgment and the date it is paid. Any longer extensions would mean that the company has to wait longer to get the use of its money, and that represents a cash loss because the company normally gets 18% on its money, rather than the smaller percentage that is allowed on unpaid judgments, and because debtors tend eventually to default on very long extensions of credit, even if backed up by court judgments. The more stretch-out losses the company suffers, the more likely that it will someday turn to a different lawyer, and these days there are plenty of people who would love to get 200 collection contracts a year from a major enterprise. If you have to extend the payments for a longer period, it would be helpful to get a big initial payment to make up for the loss and to produce something at the beginning.

If debtors or their representatives call you to talk, you will be eager to try to settle for two reasons. First, although you can always get a judgment from the court, people tend to pay much more reliably on a judgment they've agreed to than one the court has imposed. And if they don't pay after judgment, you have to go through a lot of paperwork to garnish wages and locate other assets (for example, by getting a court order for examination of the judgment debtor as to his or her assets). These procedures are more time consuming than they are worth, but you have to go through them so your firm doesn't get a reputation in the community as one whose judgments can be ignored. The second reason that you'd like to settle if possible is that a court hearing could require you to spend all day in the court house waiting for this small case to be heard—a terrible waste of time that you tolerate once in a while, but which always messes up your busy schedule. An officer of the company would have to wait with you on the court benches so that he or she could place the contract into evidence and authenticate it, and the officer would undoubtedly be none too pleased.

In addition to settling the case, one of your prime objectives if you do talk to Terry White or a legal representative will be to try to find out, during the course of the conversation, the nature and location of any other assets that White has. This will make your life much easier if it turns out later than you have to collect the money by legal process—after either a court-ordered or a consent judgment that is not strictly adhered to by White.

You do not, at the outset, know who is representing Terry White, but he or she has your name. The judge next week will be Marion Taylor, a 63-year old white male. You know him fairly well, and you handled a few cases with him before he ascended to the bench, but despite your friendship with him, he has always acted impartially in your cases. He is a conservative Republican. He is pro-business and rarely receptive to public interest claims. As a result of recent case law, you can count on Taylor rather than a jury to rule on National’s claim.

Stone can be reached, but only by telephone. Here are the times at which Stone can be contacted;

At the office: Telephone number _____

At home: Telephone number _____

<u>day</u>	<u>hours</u>	<u>home or office</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

If Stone is not available during the hours listed, it may be possible to leave a message with a secretary or spouse. Stone is very busy and is not a very chatty type. It should also be noted that Stone will not be available for a period immediately before any settlements must be filed.

Summary of Law

Most of the time, consumers sued by National Encyclopedia have defaulted simply because they no longer had enough income to keep up their payments; under these circumstances, they do not consult lawyers or even call you when you sue them—they just fail to show in court, and a default judgment is entered against them. Once in a while, though, a defendant contacts you, sometimes through a

lawyer or law student, and asserts a legal defense to your client's demands. Your research has led you to the conclusion that these alleged defenses are often frivolous, and they tend to fall into certain recurring patterns, as follows:

1. *Misrepresentation.* The consumers' representatives sometimes argue, citing common law or state consumer protection statutes, that their clients were misled by the company's sales personnel. They almost never have anything to prove their assertions, however, other than the consumers' own self-serving testimony. Also, the alleged misrepresentations are often flatly contradicted by writing in the contract, and they are rarely material to the bargain.

2. *Harassment.* The consumers' representatives sometimes claim harassment by the company's debt collection department. Fortunately, many states don't even have statutes regulating debt collection. And of those that do, many provisions only apply to debt collection efforts with *intent* to annoy or abuse, and the courts tend to accept a creditor's testimony as to his or her own intent. The federal debt collection laws 15 U.S.C. § 1692-1692o, don't apply to National because it does its own debt collection. *Id.* at § 1692(a)(6).

3. *Unconscionability.* As a last resort, consumer lawyers often argue the vaguest of all theories: that the contract was somehow unconscionable, either as a matter of common law or in violation of § 2-302 of the Uniform Commercial Code. This is unlikely to succeed because National's door-to-door selling practices are fairly typical of this industry.

NATIONAL ENCYCLOPEDIA COMPANY

M E M O R A N D U M

TO: The file
FROM: Patricia Parker, Collections Clerk
RE: Terry White
DATE:

I spoke today with Terry White, who has still made no payments on a year-old encyclopedia contract. I warned that if we didn't receive a payment in a few days, we would refer this matter to counsel.

White complained of a recent salary cut, and claimed inability, as a result, to pay for the books. White also said that the child for whom the books were intended wasn't reading them, and that our salesman had said that a customer could cancel at any time. I said that these were not valid reasons for refusing to pay on a contract that had been agreed upon, and that we would not agree to retrieve the books and cancel the sale. I pointed out the provision in the contract which specifies a strictly limited cancellation period. White expressed no dissatisfaction with the quality of the merchandise.

The customer did add (apparently as an afterthought when I said that a reduced salary did not justify nonpayment) that our salesman had promised a Bible as an inducement to sign, and that the Bible had not been delivered. I noted that the contract did not mention a Bible and that we therefore had no obligation to deliver one.