Most transactional lawyers negotiate, yet few law students who plan to become transactional lawyers actually learn negotiation skills in law school. Most of these future lawyers do not take a course in Negotiation; it just isn’t one of the law school courses seen as a requirement for transactional lawyers. These students are advised to take Business Organizations, Sales & Leases, Secured Transactions, Accounting for Lawyers, and Taxation, but not Negotiations. And most law school Negotiations courses are centered on the litigation context. While some law schools do offer courses on transactional lawyering or transactional clinics that include a component on negotiation, negotiation training for future transactional lawyers is most often ignored in law school. Thus, it often becomes the responsibility of law firms and employers to train new transactional lawyers how to effectively negotiate on behalf of their clients.

That is why I decided to include an introduction to negotiation skills in my contract drafting course several years ago. To me, it seemed a natural fit because you cannot really divorce the skill of drafting contracts from the skill of negotiating contracts. Of course, it would not be feasible for me to teach students everything they are going to need to know about negotiation in my contract drafting course; there just isn’t enough time to accomplish that.

So when I decided to incorporate the teaching of negotiation skills, I chose to focus on introducing my students to three basic concepts: (1) the role of transactional lawyers in negotiations; (2) the benefits of interest-based negotiation and effective communication; and (3) the ethical obligations of legal negotiators. These objectives are aimed at providing my students with a practical introduction to the negotiation skills that they will likely need when they enter the workforce.

Since negotiation training for future transactional lawyers is so limited during law school, it is advantageous for law firms and employers to incorporate negotiation skills in their training. The concepts discussed below could be used to formulate a valuable introduction to the methods of effective and ethical negotiation for new lawyers, or even as a useful reminder for more experienced transactional lawyers.

The Role of the Transactional Lawyer

First, it is important for new lawyers to understand the role of the transactional lawyer in negotiations. When litigators speak about negotiations, they are generally referring to an adversarial process. In most instances, negotiations occur in an effort to settle a legal dispute between two parties on opposing sides of a lawsuit. The same is also true for other types of lawyers; for example, family lawyers often negotiate when their clients are embroiled in bitter divorce or custody proceedings. In these adversarial settings, not only do both sides often have completely divergent views, but success is often measured not only in terms of what one party wins, but also in terms of what the other party loses.

However, for transactional lawyers, negotiations often occur in a very different setting. Most transactional lawyers negotiate deals and contract terms in situations where both parties to the negotiations seek the same final outcome—the commencement or continuation of a contractual relationship. While I am not suggesting that these negotiations cannot be confrontational or get “ugly,” the parties are likely more similarly situated than a plaintiff and a defendant engaged in a civil lawsuit, or two parents dealing with custody of their children. Thus, transactional lawyers play a different role than other types of lawyers when they engage in negotiations.

It is this role that all future transactional lawyers must be exposed to. A mock negotiation exercise that I use in my class reinforces the fact that law students are primarily trained to view every legal interaction as adversarial. For this exercise, my students are matched up as lawyers representing each side to a basic sales agreement and told the general parameters that the parties have agreed to, before I send them off to negotiate the specific terms of the agreement.

Every year, with every group of students, many do not actually reach a compromise. The result is often that the
two student lawyers cannot agree on the terms of the contract, so they decide to walk away. In most instances, this is because one or both of the students do not want to give anything away to the other party. They stick to their guns to such a degree that not only does the other party not receive any concessions, but neither party gets a contract—the contract that they both desired. This exercise thus leads to a prime teaching opportunity—one in which we can discuss the role of the transactional lawyer in negotiations. More specifically, we discuss how for transactional lawyers, negotiations are not generally adversarial. Of course, the transactional lawyer must zealously represent his or her client in negotiations, trying to get the best possible outcome for the client. But since both parties’ goals are usually to enter into a mutually beneficial contractual relationship, transactional lawyers do not generally view the goal of contract negotiations as being to win everything while the other party loses everything. When most law students enter practice, they do not understand this role that transactional lawyers engage in while negotiating a contract on behalf of their clients. Thus, any introduction to negotiations in practice should begin with this basic, yet fundamental, concept.

Interest-Based Bargaining

Second, new transactional lawyers must be exposed to the benefits of interest-based negotiation and effective communication. In my class, I emphasize the benefits of moving away from a purely adversarial approach to negotiation, which often results in a win-lose result, and to moving toward an approach that is aimed at finding a creative win-win solution to the negotiations.

To illustrate this concept, I use the well-known example of two sisters arguing over an orange. In this scenario, both sisters want the orange for undisclosed reasons. Thus, their conflict appears to be distributional; in other words, the resource over which they are negotiating is fixed and limited. As long as they continue to argue about who gets the orange, the result will be that one sister gets the whole orange and the other sister gets nothing. One of the sisters will win the proverbial “whole pie” and the other sister will lose everything, not even getting a slice of the pie.

Incorporating the concepts of underlying interest and effective communication can bring a new dimension to the negotiation about the orange. If the sisters were to disclose their underlying interests for desiring the orange, it is more likely that they will be able to find a creative win-win solution to their conflict. In fact, one of the sisters wants the orange so that she can use the juice for drinking, while the other sister wants the orange so that she can use the rind for baking. If these underlying interests are considered in the negotiation, a compromise can be reached where both sisters win. One sister gets the whole outside of the orange to use for baking and the other sister gets the whole inside of the orange to use for juice. Using underlying interests as the basis for bargaining and finding a creative solution to improve the negotiation is sometimes referred to as “expanding the pie” or “creating value” in the negotiation. Thus, any introduction to negotiation, especially for future transactional lawyers, should emphasize seeking creative solutions in order to reach value-maximizing results through interest-based bargaining.

Professionalism and Ethics

Finally, it is imperative that new lawyers gain a basic understanding of professionalism and the ethical obligations of legal negotiators, particularly in transactional settings. Most law students learn about ethics in the context of a Professional Responsibility course—one that is too often primarily focused on the Model Rules of Professional Conduct, is designed to help students prepare for the MPRE, and is grounded in the litigation context. In practice, what young transactional lawyers need to understand is how to recognize potential ethical dilemmas and how to handle them in a manner that is beneficial to their clients and to their own professional reputations.

The answers to ethical dilemmas in these situations are far from clear. The preamble to the Model Rules describes the role of the lawyer as negotiator: “As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.” Thus, while the lawyer must advocate on behalf of his or her client to achieve a favorable result to the negotiations, he or she may be constrained by ethical considerations. In the transactional setting, since negotiations generally take place when the parties are working toward entering into a mutual contractual relationship, the costs of engaging in unethical or deceptive practices include the very real risk that the parties will not reach the desired result.

In an effort to avoid teaching professionalism and ethics in a vacuum, I present my students with hypothetical situations that may actually arise during contract negotiations. For example, one scenario relates to whether a lawyer for the seller during negotiations for the sale of a small business may present a “highball” offer that represents a sales price the lawyer believes is unreasonably high. Rule 4.1(a) states that “a lawyer shall not knowingly make a false statement of material fact or law to a third party.” Comment 2 acknowledges that in negotiations, there is some leeway because of the difficulty in determining what is truthful and what is false in the unique context of negotiations. In negotiations, certain types of statements by lawyers are not seen as “statements of material fact” and thus are permissible. Almost all lawyers in negotiations expect the other lawyer to engage in “puffing” and some embellishment of the facts. My law students know this—but the real questions are what types of deceptive tactics may ethically be employed to enhance bargaining interests and what tactics should be employed.

Comment 2 to Rule 4.1(a) specifically states that “estimates of price or value placed on the subject of a transaction” do not constitute material facts under the Rule. Thus, a lawyer is likely not violating ethical obligations if he or she begins the negotiations with a “highball” offer. The same is not likely true if he or she instead advised the buyer’s lawyer that there are
other interested buyers in an effort to make the offer more appealing, when in fact there are none. But the point of this discussion is also to focus on whether these types of tactics are necessarily wise decisions, even if not unethical ones. We talk about how lawyers may want to counsel their clients about relevant considerations that are non-monetary, such as the very real risk that the potential buyer will walk away from the negotiating table based on the impression that the seller is behaving unreasonably.

New lawyers also need to be introduced to the concept of professional reputation and how acts of dishonesty or unprofessionalism may negatively impact their reputations. The potential injury to the reputation of dishonest lawyers could be monumental. As other lawyers learn that a particular lawyer is not trustworthy, future interactions may become more difficult for that lawyer and his or her clients. If nothing else moves a lawyer to behave in an ethical and professional manner, the hope for a successful career should induce that lawyer to avoid conduct that may undermine his or her future effectiveness.

Conclusion
By incorporating an introduction to negotiations skills in my course, I strive to make my students’ understanding of contract drafting more complete and more practical. But all that I really do is plant the seeds for their future learning about effective and ethical negotiating in a transactional setting. Law schools need to do more to sow those seeds—they need to encourage future transactional lawyers to learn about negotiations and they need to offer more opportunities for them to do so before they enter the practice of law. But regardless of whether law schools rise to this challenge, law firms and employers will need to train new lawyers about how transactional lawyers effectively and ethically represent their clients in negotiations. The three concepts discussed above would be a valuable starting point.

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