

Designing the Negotiation module (LAW1025)

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Abstract

In the present article, I will be focusing on the design and development of the Law School's Negotiation module (LAW1025). Negotiation is a relatively new module which commenced in Term 2 of the 2012/13 academic year. First year Law students undertake Legal Foundations for the duration of Term 1, and are then able to choose one of three (formerly two) options: Advocacy, Learning from Work Experience and now Negotiation. The module aims to teach vital academic, professional and transferable skills; it also offers learning via simulation. One of the key successes of the module is the e-learning element, including an in-depth virtual simulation which provided the springboard for practical simulations and assessment. The article thus also provides an opportunity to reflect on the issues involved in virtual and practical simulation.

Keywords: *e-assessment; e-learning; negotiation, simulation*

Introduction

My ideas for the construction of the Negotiation module were based in practitioner and professional perspectives of how students could learn the art of negotiation. The Negotiation module was delivered via 11 lectures and 5 workshops, mirroring how the Advocacy module was taught. I used Advocacy as my starting point because it represents a skill that, like Negotiation, requires a great deal of practice. Elements of advocacy naturally materialised in my Negotiation module, as students are required to speak on behalf of their client: I focused in particular on persuasion, articulation, and structure of argument throughout the lectures and workshops. I had the benefit of being able to use the 'Persuasive Language' video developed by Professional Services last year for the Advocacy module. In fact, it is much harder to persuade an opponent in a dispute, who is obviously going to be set against you, than it is to persuade a judge, who is (at least in theory) a neutral decision maker. The Negotiation module was assessed via a reflective essay (25%) and a 20-minute practical negotiation assessment for which students prepared a negotiation plan (75%). Students were given the opportunity to submit a formative practical negotiation with a plan and also a portion of reflective writing, in order to obtain specific feedback and suggestions in relation to their methods of reflection.

In analysing the design of the Negotiation module, I will be discussing and reflecting upon the overall structure of the module as planned and implemented, along with giving due consideration to possible changes for the future. I also reflect upon the issue of teaching via simulation. One of the key successes of the module is the online resources: these were the springboard for practical

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simulations, as well as providing an online simulation created in conjunction with Professional Services that was made available to students on ELE. In brief, this provided an opportunity for students to gain instant feedback as they progressed through a virtual negotiation. The design, creation and workability of this tool are all thanks to Kate Tyler and her team, who worked very hard to get it ready for its launch.

Before discussing the module in detail, it may be useful to first set out what negotiation is and to identify some real and/or perceived challenges which I faced in introducing this module, both personal and those relating to legal education as a whole.

What is Negotiation?

Negotiation can be defined in many ways, depending on the context:

- Oxford English Dictionary: 'To communicate or confer (*with* another or others) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to some compromise or settlement.'
- Steve Gates (2012): 'Negotiation is a word, a process and an art.'
- Bar Manuals: 'Negotiation is a process by which people try to reach agreement or settlement where there are differences either real or perceived.'

Clearly the dictionary definition considers negotiation in its broadest form without putting it into a specific context, whereas the Bar Manual's definition is naturally legally focused (being a book for the aspiring legal professional) and considers negotiation strictly within a legal context. Somewhere in the middle of these two sources, Steve Gates, author of *The Negotiation Book*, writes from a skills-based perspective with no particular slant in terms of the type of negotiations he envisages his readers to be undertaking.

My focus in designing the Negotiation module was to concentrate on the legal professional as the negotiator (the students are, after all, studying law), and with the concept of the legal professional comes consideration of ethics, such as a duty to the client, which I saw as an opportunity to encourage students to think about the sort of practitioner they would like to become. Furthermore, as Negotiations followed on from the Legal Foundations module, many of the elements I decided to cover were built upon the practical implications of some of the issues raised in Legal Foundations, including Ethics. However, in recognising that many students will not be entering the legal profession (because this is not, after all, the only reason a student studies law), I was also keen to highlight the nature of negotiation as a useful and versatile transferable skill. For example, in one lecture I organised the students into teams and got them to play 'Bits and Pieces', a game which involves negotiating with other teams in order to piece together full playing cards.² In another lecture, Devon and Cornwall Police gave the students a two-hour workshop on negotiation skills and how they are used in crisis situations.

²<http://www.fradleycroft-events.co.uk/blog/team-building-games/bits-and-pieces/>

Challenges in Designing and Delivering Negotiation

These challenges derive from my own recent experience of going through the higher education system, in addition to the more specific challenges I have faced (or, perhaps, have perceived myself facing) in teaching. Detailing these challenges goes some way to beginning a critical reflection on both the experience of module design and of teaching via simulation by encouraging me to recognise, reconsider and question my own assumptions on a broad range of issues. As Brookfield (1988) outlines, the first step in critical reflection is assumption analysis, followed by contextual awareness, imaginative speculation and reflective scepticism.

Personal challenges

Having graduated from Exeter in 2011 with an LLB law degree, I undertook the Bar Professional Training Course (BPTC) to qualify as a barrister and was 'called to the Bar' in October 2012 by Lincoln's Inn. I also qualified as a mediator. In August 2012, I took up a post at the University of Exeter with a lot of ideas as to how I would approach Negotiation, a module which had not been taught before. It was my responsibility to design and develop the Negotiation module from scratch. One of my biggest perceived challenges here was my age, not only in terms of being academically and professionally credible to the students, but also in being credible to fellow colleagues, many of whom had taught me as a student. I felt I would need to prove myself to both students and staff in order to earn their respect; although I didn't mind this, it did give me a lot to think about in terms of how I would demonstrate what I could offer. However, as Brookfield (1995) acknowledges, 'length of experience does not automatically confer insight and wisdom'.

In regards to the students, I hoped that my own recent student experience would mean that I was in tune with their needs, considered approachable and responsive to feedback. I felt it imperative to seek feedback on their experiences, which would help to shape the module in future. Of course this is something that I would endeavour to do in any case, but I envisaged particular teething problems in the first year of the module. Another concern or assumption I perhaps made about myself was whether I was going to be 'academic' enough for the students. Given my practitioner background, I was keen to ensure that I developed and maintained sufficient academic rigour in the design of the Negotiation module whilst appreciating that negotiation is very much a learned skill requiring a lot of practice. One of my key aims was to give students as many opportunities to practice as possible. I quickly realised that theory and practice can go hand-in-hand quite nicely. Negotiation is a skills-based subject, thus making it academic by force could be seen as contrived. To avoid this danger, I gave the students the opportunity to read a mixture of both academic theory and practitioner advice in addition to content delivered during lectures. This enabled students to choose for their reflective essays the particular lens which appealed to them. Of course in their practical assessment they were expected to display negotiation skills, thus the emphasis was always explicitly and implicitly on them developing those skills. All the same, I have found that linking theory and practice ensures students understand why something is relevant and thus considered important to learn.

A final challenge, which I noticed in being part of other teaching teams, was to 'fall into line' in terms of the amount of feedback or the availability of the tutor for meeting students. Consistency is important, so I tried to ensure that I was not going further than other colleagues; however, it would

be impossible to measure this to an exact nicety. What I valued most about Negotiation was that I could do as much as I wanted in terms of formative assessment and feedback in order to find out what worked and what did not. In supporting the students, I thought it important to challenge them. I used the register I took in lectures to get students to answer questions in a supportive environment to encourage them and give them confidence. Moreover, I gave them a heavier workload than they were perhaps expecting in terms of preparing practical exercises as well as undertaking further reading and the expectation of reflection after a workshop. I hoped that by introducing consistency and clear expectations in my module that students would respond positively. I also wanted to enable them to become reflective practitioners, a concept which I flagged in their first lecture as well as in the 'Introduction to Reflective Writing' booklet produced for the module. What I discovered, unsurprisingly, was that it did generate a lot of extra work. However, as I have set out a lot of the groundwork, this workload should become more manageable in future years. In any case, 'there is nothing like biting off more than you can chew and chewing anyway'.³

Challenges in delivering Legal Education

One of the 'hot topics' currently surrounding legal education is the question of when students should learn about ethics. Unless a student chooses to study jurisprudence (Legal philosophy) ethics often does not emerge at all until a much later stage. Ethics is, however, taught on the practitioner courses (Legal Practice Course, or LPC, for solicitors and Bar Professional Training Course, or BPTC, for barristers). An ethical breach on these courses would render a complete fail on a particular module. In future, ethics is likely to be introduced at a much earlier stage. In Negotiation, I have included an ethical requirement in the assessment criteria, represented as a separate section, but included in the marks awarded for skills. I have received feedback from local practitioners that including ethical criteria is impressive and (in their view) necessary so that students acquire an earlier understanding of the area.

A related issue, and one at the heart of legal education discussion, is the consideration of what a law degree should actually teach. It is often thought that a law degree is the time for the academic foundation to be instilled into budding lawyers before they progress to their practitioner programmes. Yet, the very existence of the Graduate Diploma in Law (GDL), a one-year course equivalent to the law degree for the purposes of progression to the next stage, somewhat undermines this need for a three-year and purely academic foundation.

A third challenge, also linked with the question of ethics and the law degree as a whole, is that entering the legal profession is becoming increasingly difficult. Competition for places for pupillage or training contracts is fierce. The reality is that students need to be displaying the skills of a lawyer at a much earlier stage. In a recent conversation with a partner at a national solicitor's firm, I was told (and this is often said by many others) that the competition is such that every applicant has a 2:1, has mooted and volunteered. It seems clear, therefore, that whatever the University can do to improve the standards of its graduates is vital – but, equally, that the students need to have the tools to ensure that they are able to stand out from the rest of the field on their own. This also means, of

³ The quote is from Mark Burnett, the British-American television producer perhaps best known for *Survivor* and the U.S. versions of *The Apprentice* and *The Voice*. Although a less than academic source, the sentiment does make some sense.

course, that there are large numbers of those studying law that do not ever enter into the legal profession.

How these challenges relate to designing the Negotiation module

I realised that I was not necessarily going to be training students in negotiation skills who were going to become a traditional solicitor or barrister. Therefore, whilst it was important to focus on the legal professional as negotiator, I ensured that many of the skills were identified as transferable.

A specific challenge in relation to getting students to negotiate in a legal context was the fact that they had not studied very much law by this point in their degree. I could have just centred problems on the parts of contract law that they had already covered, but I decided that it would be an interesting exposure to many different areas of law to cover a range of scenarios. I did not want workshops to become repetitive; more importantly, only negotiating around contract law would have provided a very narrow impression of when and why negotiation is important. The students had the choice as to whether they wanted to research the legal context as part of their preparation for workshops, as it was made clear to them that they had enough information from their brief to conduct a negotiation effectively. Negotiation is often considered 'bargaining in the shadow of the law'; it is clear that the law is only one element when it comes to considering whether or not someone is going to settle. Students came to realise that often it was other considerations (i.e. the practicalities of litigation, such as cost, time and effort) which came into play in addition to how strong their case was in terms of the law.

Therefore, out of the appreciation of these challenges, I decided that my broad aims for Negotiation should be:

- Developing the outlook of an ethical professional;
- Encouraging the development of professionalism, which was embodied in the Virtual Law Firms⁴;
- Enabling students to make links between theory and practice;
- Ensuring Negotiation was legally focused but also encouraging students to recognise it as a career inclusive skill;
- Providing students with opportunities to distinguish themselves from others and recognise them as individual learners to develop their own negotiation personality.

In relation to the final aim, one thing I noticed in workshops was that students wanted to know what the 'right way' was. Of course, each negotiation is different and different situations require different reactions, so I encouraged students from the outset to try out new techniques and to play to their own strengths. On the one hand, this is an approach which celebrated individuality; on the other hand, such an approach can also create uncertainty. However, this was supported and 'scaffolded' by encouraging the students to reflect on their learning after every workshop and to turn their focus from outwardly-looking for perfection to an inward look at themselves and the development of their own skills.

⁴ Initiative created by Dr Sue Prince and piloted in the 12/13 academic year with first year law students.

The end result: a focus on Experiential Learning

*'Learning occurs when one experience opens the learner to other new experiences.'*⁵

In order to give Negotiation a real thread on which to hang all of the different skills and theories that come into play, I used the *process* of a negotiation as a means of highlighting different skills at different points in negotiation. Commonly, the stages of a negotiation are: preparation, opening, information exchange, bargaining phase and closing. These stages were the specific focus for each of the five workshops, and by progressing through a negotiation process we consistently built upon the previous lectures and workshops.

I had the advantage of all small group sessions taking place within one week so the material covered was well planned, minimising potential confusion around which group had covered what. Dewey's (1933) progressive educational theory encompasses the idea of 'experiential continuity' whereby each experience is influenced by prior experiences. I have received feedback from students which suggests that structuring negotiations in this way, and adding further complexity in each workshop, meant that students realised and valued that they were building on their previous experiences. I also thought it was important to establish from the outset a sense of continuity in workshop layout, so students knew what to expect. Each workshop consisted of a discussion section, whereby students had the opportunity to discuss theoretical ideas and approaches to negotiation; this was then followed by the practical exercise and concluded with a period of reflection within the workshop, or debrief. Students were given a pack at the start of the module containing introductory materials, one of which aimed to introduce them to the concept of experiential learning, and this was backed up by teaching via simulation, which is clearly a form of experiential learning.

Basing the design of negotiation around learning activities meant that much of my efforts were centred on devising a variety of methods of teaching negotiation for lectures and workshops. Teaching via simulation was my predominant approach in negotiation, as I now go on to discuss.

Teaching via Simulation and Technology Enhancing Learning

Lewicki (cited in Susskind and Corburn 1999) suggests that negotiation skills are 'a complex collection of elements that entail aspects of strategizing, advocacy, communication, persuasion, and cognitive packaging and repackaging of information'. In discussing Lewicki's view, Susskind and Corburn add that 'skills such as understanding, questioning, defining, framing and re-framing do not necessarily fit neatly into a recognizable discipline or pedagogy'. My biggest issue in designing the module was deciding what to include and what to perhaps leave out. I am in agreement that negotiation does not fit easily into a particular discipline: it includes elements of psychology, for example, alongside legal skills. Susskind and Corburn conclude that teaching via simulations is one of the best ways to teach negotiation. I agree with the effectiveness of simulations in enabling students to practice negotiation skills together, but they are also artificial. It would be fantastic if actors could attend workshops to play the part of the client they are representing in a dispute, but of course this would be very expensive.

⁵Dewey, cited in Susskind and Corburn (1999).

Our own solution was to make use of technology enhanced learning. In conjunction with key staff in Professional Services, a series of online resources was created for Negotiation, centring on a family farm in the fictional village of North Lawton. In North Lawton, there are a number of characters who get into disputes with each other throughout the module. The family farm idea is of particular relevance not just because of the University's immediate rural environment in Devon, but also in regards to the increasing recognition by farmers of the importance of negotiation skills.⁶

By developing characters and giving them more depth than that which is usual in a problem question scenario, I hoped students would recognise that in practice they would be dealing with real people with real problems, often several problems. In developing these materials it occurred to me that just telling students they are representing 'X' does not encourage the concept of duty to their clients. The workshops played out the stories from the farm and village. In each workshop students would represent one of two clients depending on whether they were assigned odd or even numbers in the first workshop. They would have access to the Common Information (the background and context to the dispute) and also be privately emailed the Confidential Brief corresponding to the particular client for whom they were acting.

The resources and the additional reading about the characters meant that students had a wider understanding of their client and were able to voice valuable detail about their client's position. The challenge I found was getting students to improvise. However, I noticed in the early workshops that students were often too nice and would not justify their client's position to each other, whereas in later workshops they were fighting for their client and putting that duty first. They had clearly picked up much of the history between individual characters and used that to their advantage in later negotiations. Susskind and Corburn draw upon other academics and their comments in relation to how they use the simulations to then have a debriefing session, where learning is most important. Robert Mnookin, for example, argues that he uses 'the student's own experience in the simulation to both develop conceptual frameworks and get them thinking' (cited in Susskind and Corburn). The reality is that you cannot tell students how to deal with a difficult opponent, in order to learn 'they need to do it' (Fisher, cited in Susskind and Corburn). By treating students as individual learners and by building on their experiences in simulations, the learning potential was high, providing that debriefings were structured in order to create an environment of effective learning and reflection.

There is an acknowledged lack of a shared framework for evaluation in the pedagogy. Susskind and Corburn suggest that simulation, and specifically face-to-face negotiation, is the best form of teaching negotiation skills, as opposed to role play or online simulations; they remain sceptical of virtual learning, stating that this cannot replace the real-life dynamic. In my experience, face-to-face simulations are very effective, but having also developed an online simulation I felt like that this gave me an opportunity to give a wider range of feedback via electronic means. This ensured that ideas and concepts that did not come up in the students' particular negotiations were still addressed. The risk would be that those issues could have come up in their exam for the first time, therefore there needs to be some consistency of approach. This risk is not often acknowledged by commentators, but this might be attributable to the focus on teaching negotiation to mid-career professionals or graduates rather than undergraduates, who are likely to be more inexperienced. The feedback from

⁶ Workshops provided by the National Farmers Union illustrate that farmers recognise the need for negotiation skills especially when negotiating with big commercial enterprises like supermarkets:
http://www.eadt.co.uk/business/farming/negotiation_skills_under_spotlight_1_1789641

the students regarding the online simulation for the Negotiation module was overwhelmingly positive, with 100% of the respondents claiming it had enhanced their learning. Clearly there is a place for this sort of learning experience.

This was also the case with the module's ELE site. Here, I provided students with general feedback from workshops, template plans and offered opportunities to raise issues on the discussion forum. I found that putting effort into structuring the ELE page to make it aesthetically pleasing ensured the Negotiation module came across as structured and clear, so that the only confusion students could possibly suffer was in understanding the concepts, which could be remedied. It is clear that these types of activities do work best when 'part of an overall teaching strategy, grounded in experiential learning, not simply as isolated exercises' (Susskind and Corburn). The Negotiation module developed from a concept of the family farm, which has ensured that the e-learning elements are part of an overall strategy, steeped in experiential learning.

In terms of developing these ideas, I have engaged with peer dialogue and intend to continue to do so substantially with fellow colleagues and, indeed, anyone who will listen. In particular, Kellie Cox from Education Quality and Enhancement, who before her role change observed one of my teaching sessions and looked over my early materials for Negotiation, provided me with insightful feedback. I have received valuable support from Dr Sue Prince, Craig Newberry-Jones (on matters of IT), Imogen Moore (on matters of assessment), Dr Onyeka Osuji, Adrienne Cox (practising mediator and lecturer in Family Law) and Dr Phil Robinson from English. The various critical conversations with these colleagues have enabled me to test out new ideas, to reflect upon and to consider ways of making improvements in the future to the Negotiation module. I have also shared and discussed my approach and ideas with a number of practitioners, such as barristers, solicitors, mediators and other legal professionals in order to get their input. I thought, not only as graduate recruiters of students, but as negotiators themselves, it was vitally important to elicit feedback from these sources. I place a great emphasis on student feedback and, given that Negotiation was a new module with 70 students undertaking it, I created several opportunities for student feedback and ensured that, wherever possible, I acted on that feedback. From the very start of the module and throughout, I sought student feedback informally in addition to formal feedback to find out whether the module was really working. From the feedback received they seem to have enjoyed the story of North Lawton as it unfolded; it will be interesting to see how the story of the module itself develops in coming years.

Extracts from student feedback on the online simulation:

'I liked the fact that it allowed you explore different options and then assess which ones were the best.'

'I found that I was able to follow where the negotiation was going and understood why certain reactions from the opposite solicitor were made.'

'I think I got better as I went along. The step-by-step feedback really helped me focus on the priorities at hand.'

'Very useful and would definitely use again.'

'It was quite a fun and private way to get introduced to negotiation.'

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