BOXALL BATTLES
PHASE 5 – CORE CONCERNS IN A BOX

Teaching Note

These two vignettes draw from the plot line in BoxAll Battles, but they imagine a discovery dispute that doesn't flare up in the BoxAll Battles negotiation sequence. They could easily be used as stand-alone exercises[1] focused on the challenges of explaining unwelcome legal obligations in litigation that are likely to provoke clients' emotion and resistance.

Having said that, one could certainly use it in conjunction with the more elaborate BoxAll sequence. After the first lawyer-client interview meeting and the initial lawyer-to-lawyer communication, the instructor could simply say: these lawyers have been successful in explaining to their clients that relevant documents must be exchanged in litigation. That's not always so easy. Let's step out of sequence and work on strategies for a lawyer to discuss the expectations of the discovery process with his or her client. Or, after the second meetings, you could ask students to imagine that documents were not exchanged informally in pre-litigation communication, and litigation has commenced. Dianne Nelson and their mother have sued Keith Nelson for various types of malfeasance.
In whatever context used, the vignettes are designed to draw upon the "core concerns" model first introduced in R. Fisher and D. Shapiro, *Beyond Reason: Using Emotion As You Negotiate* (Penguin 2006), as applied to the lawyer-client context in chapter 4 of M. Aaron, *Client Science: Advice to Lawyers on Counseling Clients through Bad News and Other Legal Realities* (Oxford 2012).

As is often true, one can find any of these core concerns operating in the vignette if you try. Having said that, I think the most salient of the core concerns for the parties are "autonomy," "affiliation," and "status" in both of these. The autonomy trigger is clear: neither party wants to be *forced* [by some judge] to turn over documents for the benefit of the other. There's inevitably an affiliation core concern in play, given that these two are siblings: how could my sibling do this to me? I also see a status trigger in both vignettes, as both wish to have their status recognized and respected by the other, and by the legal system. Arguably, status rings stronger for Dianne in the second vignette as she has long resented her brother's higher professional status as CEO of BoxAll.

Generally, I put students into small groups to discuss the core concerns they view as most salient. I then facilitate a plenary discussion of which core concerns seem might have been triggered – in the interaction and in the litigation that preceded it. Then I ask students to pair up in two's or threes. If in two's, then one takes on the lawyer and the other the client role. If a group of three, then one is the observer, takes notes for reporting to the later discussion.

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[1] The text of this teaching note is also included in the comprehensive teaching note for all phases of BoxAll Battles. But because it could also be used as a stand-alone, it deserved a stand-alone teaching note.

I ask the clients to "ham it up," protest the other side's demands, say how outrageous it is, etc. The lawyer should be practicing "targeted active listening" as described in Chapter 4 of Client Science. In other words, their efforts at active listening should target the core concern they perceive as most salient based on the client's words or situation. That interaction goes for five or six minutes. They can debrief and give each other feedback in groups – five minutes or so - with a prompt about how the "targeted active listening" made the clients feel and what the impact was. For the lawyer, what was difficult? What was awkward? The observers can be helpful here, providing feedback on what they saw and heard.

When I call the group back for plenary discussion, I usually begin with a general question about what was difficult and what was easy – what did they struggle with?
Sometimes, I ask lawyers to self-report on an effort at targeted active listening that was terrible – completely missed the mark – the anti-active listen. That generates a laugh and often a good sport volunteer. I ask them to play it out – what was so bad and why?

Whether or not I've started with the "anti-active listen," I always ask the clients or observers to report on a lawyer who did a GREAT job on at least one "targeted active listen." I ask them to replay it – set up the client's words and lawyer's terrific targeted active listen. Often, they have indeed done a terrific job applying the "targeted active listening" advice in *Client Science* to the vignette. We applaud it! It's not unusual to notice that the effort was laudable but could also have been even more effective. We discuss ways to improve or build upon it. Often, the interesting discussion involves other directions it might have taken.

Inevitably, the question arises: what if I get it wrong? What if I think this was all (or mostly) about affiliation, and I pick up on that theme: "Gosh, how awful to feel your own brother would do this." What if the client says: "That's not the problem. I'm at peace with my relationship with my brother. But I can't stand that he gets to force me to show my therapy records!" The lawyer's targeted active listening might be: "It just seems like a power play…". The punch line is that it's fine. Unless your active listening is consistently far off the mark, the client will give you credit for trying, and will help you find the keys to their emotions. Fundamentally, listening to understand, and then expressing that understanding, are acts of respect.

It's important for you to emphasize and the students to understand that to actively listen is NOT to agree. It is to connect with how the client feels and let the client know that you "get what it feels like." After that, the lawyer still must explain what the rules of civil procedure require. Hopefully, the client's emotional reaction will have calmed down and he or she will be better able to listen.