
TO LEAVE OR NOT TO LEAVE DESIGN DISPLAY COUNSELING

Teaching Note

I originally developed this exercise for my client interviewing and counseling course, eventually known as the Client Science course, after the 2012 publication of my book with that title (followed by an unconscionably long subtitle).

The exercise is designed to demonstrate that lawyers should broadly and deeply explore the client's deeper interests, preferences, values, and concerns and these will likely determine which decision is wise for this client. The lawyer's legal analysis and assessment of available choices are not enough to yield a wise decision for a particular client without that exploration and collaborative discussion. Of course, the Dale Doran plotline could also be useful for teaching in other contexts. It has both emotional pull and logical legal risks and constraints. It invokes litigation and transactional awareness.

I confess that the way I set it up and used it in the course, detailed in this teaching note (with three Dale Dorans, a mid-class session switch, and a "consequences chart") is not uncomplicated.¹ However, there's no reason it couldn't be used more simply, using the General Information, the attorney's role, and one (or even all) of the client instructions. I'm pleased to say we created a video of an experienced lawyer interviewing and counseling an actor Dale Doran (one Dale Doran, not all three), available on the Clientsciencecourse.com website (password educator), and at adrvideos.org (password: adrteacher123).

As you'll see in this folder, the exercise consists of five components: *General Information; Instructions for Dale Dorans (1, (2), and (3) and Instructions for the Attorney*. If you are running it with all three Dorans, each student should receive the General Information; half of the students should receive the attorney role. Of the remaining half, one third should get Dale Doran (1), one third Dale Doran (2), and one third Dale Doran (3).

For reasons that should be clear from the guide to teaching with this case below, it's best NOT to highlight that there are three different Dale Dorans (until after it its completion).

Really a client communication and decision-making exercise, this requires participants to:

- Explain different decision options and their practical, legal, business, professional and personal consequences, including the impact on other people or entities significant to the client.
- Convey complex information as to each option, including relevant legal structures, constraints, and conventions.
- Update information as to client's narrative and context.

¹ This teaching note is largely drawn from *The Client Science Course Instructor's Guide*, 2d Edition (2017) available to educators at Clientsciencecourse.com (password "educator").

- Elicit and understand client feelings as to those impacted.
- Elicit client predictions, constraints, and attitudes toward and tolerance for risk.
- If the “Consequences Chart” is used, demonstrate potential value of formal, structured decision review and evaluation process.

The premise of the exercise is that, ultimately, clients must decide among a set of options, which have been shaped by their lawyer’s legal analysis and familiarity with available legal structures and conventions. Option(s) that would work best for one client will not serve another, even if s/he presents the identical legal claims. Which option the lawyer would choose is entirely unimportant: it should not be imposed or “strongly suggested,” nor should the lawyer attempt to shape (manipulate) the client’s decision by emphasizing positive aspects of what would be the lawyer’s choice and downplaying other possibilities.

Pre-reading assignment

If you are using the *Client Science* book, the pre-class reading assignment would be Client Science, Chapter Two, “Meaning Truths,” and Chapter Three, Translating the Terrain, as well as “Client Science: Advice for Lawyers on Initial Client Interviews,” published on the course website and available with this cache of materials.

Précis of *To Ditch or Not To Ditch Design Display* Facts and Analysis

Dale Doran has been employed as a commissioned salesperson for some time at a company called “Design Display.” (He brought some of his current customers with him from a previous employer.) When he took the Design Display job, Dale’s contract gave him a minority share in the company and included non-compete obligation. Under the terms of the contract, if Dale is terminated, the non-compete does not operate. But, if Dale leaves voluntarily, he is bound by the non-compete. There is no provision for mandatory divestment or repurchase of his minority shares upon leaving the company.

In recent years, Dale has disputed his boss’ unilateral changes in the commission formula applied to his sales, and also the way those commissions were calculated under the various formulas. His relationship with his boss (the company owner) has deteriorated, and the company itself has lost revenues in the recession.

While the three Dale Dorans differ somewhat regarding precise feelings toward the boss and his co-workers, none of them are happy at Design Display. Dale Doran (all three) has received an offer to work at a competitive organization, Upscale Display. However, each Dale is loyal to his customers and appreciates the income that keeping his customers will guarantee if he takes them to Upscale. The non-compete language would also bar Dale from soliciting new customers within a 100-mile radius of Design Display. If that were enforced, Dale would have to travel more than 100 miles to work in industry sales. One possible (and common) compromise would be for Dale to refrain from selling to Design Display customers but be permitted to seek new customers within the territory for a defined period. Another possible term for agreement would be for Dale to “keep”



customers he brought to Design Display in the first place, but not to sell from Upscale to customers first acquired at Design Display.

The attorney's information suggests the possibility of a suit on a theory of breach of contract, relating to Design Display's unilateral change of commission formula and failure to pay some of Dale's commissions due. Even if Dale Doran quits – which would trigger the non-compete--Design Display's breach of contract might void the non-compete. On the other hand, if Dale Doran quits and begins at Upscale, it's entirely predictable that Design Display will file a preliminary injunction motion. The breach of contract claim could be raised as a defense. However, if the injunction were granted, Dale may not be able to assume his new position at Upscale, or even if the position remains, he would be unable to sell within a 100-mile radius for approximately two years. (The duration of the non-compete term is not extreme, but a judge could theoretically reduce it).

Since Dale's last meeting with the attorney, there have been a few developments and Dale has been thinking about his professional and family circumstances. Of course, the lawyer has investigated and analyzed the client's legal position and decision options. All lawyers have the same information and should have prepared to present the same options and analysis to the clients.

The three Dale Dorans' interests, preferences, and capabilities vary, as do their versions of events at Design Display since they last met with the lawyer. Their family circumstances and employment opportunities also differ, as do their predictions and confidence about their abilities to sell within the industry. These are summarized on the chart on the next page.



Three Dale Dorans – Interests, Predictions, Constraints, Risk Tolerance

	DD 1	DD2	DD3
Current circumstances at work	Deteriorating, bad decisions create long term risk, day-to-day unpleasant	Deteriorated, revenues flat despite economic uptick, commission reduced 25%, \$ put into marketing, Boss intends to pay back. Dale bears more of his expenses.	Deteriorated dramatically Revenues up modestly overall, but Dale now bears more of his expenses. Three customer accounts recently “stolen” and given to boss’ daughter.
Views re: boss, recent actions	Sees boss as paranoid, bitter, increasingly abusive, threatening to reduce income	Boss’ increased anxiety makes him irritable & insulting to all staff; has targeted vitriol somewhat toward Dale.	Boss more difficult, and directly insulting and abusive to Dale. May be due to daughter’s jealousy and Dale’s ownership share.
Views toward co-workers	No love lost; all are jealous	Other salespeople are friends, concerned about them if the company goes under.	Others have been cold and unfriendly, may be viewing him as a “traitor in our midst.”
Prediction, confidence re: building new customer base,	Confident of getting new customers, \$50K commission 1 st yr.; est. 3 yrs. to current \$; est. min \$100K commis. in 2d Upscale yr., higher if keep some customers.	Uncertain re: getting new customers & reasonable commissions, estimate 3-4+ years. Much travel required, many potential new customers far away.	Would not feel right going to Upscale Design, abandoning old customers. Doubts Upscale would maintain job offer without customer base.
Willingness to travel	Not mentioned, presumably ok.	Hates travel; it interferes with coaching soccer/ homework; spouse travels a lot.	Spouse’s job requires travel.
Family finances: ability to pay legal fees without client income	Could pay attorneys’ fees	Could only pay attorneys’ fees if NEITHER his nor spouse’s income decline significantly.	Spouse’s salary doubled. Can afford attorney’s fees for litigation.
Non-industry options?	None mentioned, but does feel some customer loyalty	No idea re: other options, other industries; concerned re: long days, travel.	Wouldn’t mind leaving industry, at least for a while; enticing job offer with college friend’s new business.
Other	Believes judge/jury on his side. Boss won’t release, fears competition. Leverage required.		Worthwhile to fight non-compete, to go to Upscale with customers; values showing boss and daughter they can’t treat people this way.

Obviously, while their cases are the same, the optimal decisions for Dale Doran 1, 2, and 3 are quite different.

A complicated but (I hope) worthy teaching process guide

I admit, the way I've used this exercise is complicated! It is designed to make sure all students have some time in the lawyer's and the client's role for the exercise, and to provide some time for separate focus on the option to create a "consequences chart" with the client. I suggest explaining the process-agenda to the students before you start, putting up a power-point with instructions and timing and leaving it up as they participate in the exercise. I also make sure to call the timing and the steps clearly as we go along.

I firmly believe that using the consequences chart has value, even if most lawyers don't use the device in practice. The more I work with it, and with clients in mediation, the more I can see that a formal way of mapping consequences may rightly be called a best practice in some circumstances. It also links nicely to teaching Decision Analysis in the future.

Here is the class flow:

- 5 minutes – Attorneys and clients pair up.
It's important to pre-assign the lawyer and client roles because the lawyers have quite a bit to absorb and prepare. It wouldn't work well to have them read it in class for the first time- and it would send the wrong message about the importance of preparation. If the lawyers and their clients were not pre-paired, I ask all students assigned to lawyer roles to stand up, and then ask students to pick a lawyer, with the caveat that they should not work with roommate, fiancés, best friends, or a student they've been paired with previously in the course. Have student lawyers and clients pair up and sit together. Do explain that this exercise is complicated and it's important that they pay attention to your explanation of the process.
- 20-25 minutes – Counseling session – first phase assessing.
Attorneys take stock of the client's circumstances; explain legal options; Ask and learn about the client's interests, goals, priorities, and concerns, etc.

This is stated on my class agenda as 20 minutes, but I will extend the time as needed if students aren't finished. The conversation should feel close to real time. Explain that the goal is for the client to choose and authorize a planned course of action. The attorneys are advised to take stock of the client's circumstances. They should understand the client's interests and goals. And the attorneys should explain the legal options.

Emphasize that the lawyer and client pairs should NOT be reaching any decisions during this time. If it is done in real time, it takes quite a while for the lawyers to explain all of the options, learn about the client's interests, answer questions, etc.

- 3-5 minutes – Students Feedback in Pairs
Suggest that the clients address the questions: Was the lawyer clear? Does the client have confidence in the lawyer? How was unwelcome news delivered? In recent years, I have

given clients the option to call 'time out' during the initial 20 minutes or so, to give constructive feedback at a time the student lawyer could incorporate it into the exercise. So, if a student client feels the lawyer has been unclear, or that the lawyer's assumption regarding his preferences might be perceived as offensive, s/he can stop action let him know. They should go immediately back into role, continuing the exercise. This has been worthwhile with a class that takes the feedback task seriously.

- 10-15 minutes – Lawyer and client decide on criteria for evaluating options. Narrow to 3 options and select 1 option. (If you took extra time in the first phase of the counseling session, you can easily cut this back to 10 minutes.)

Do allow 2 minutes or so within this time for additional client feedback. Acknowledge that this will feel a bit artificial but do ask the lawyers and clients to explicitly decide on criteria for evaluating among the available options. What's most important in judging what would be the best decision? Name and discuss criteria! Then they should narrow their options to three and choose one. **STUDENTS SHOULD WRITE DOWN WHICH THREE OPTIONS they decided to consider (before picking one).**

- 5 minutes – Lawyers and clients switch roles within the exercise. This step is tricky! The student clients and lawyers are asked to physically give each other the printed copy of confidential role information they would have read in preparation for the class. (My syllabus instructed them to print this out and bring it to class. Still, the professor is wise to have to extras on hand.)

By now they should each know the other's information pretty well. The lawyer should know the client's circumstances and the client should understand the options. Still, give them a few minutes to read the sheets. If you thrive on chaos, one way to handle the next stage is to switch the lawyer and client pairs too! In other words, have the lawyers stand up again, and have clients select a different lawyer, preferably someone located nearby. (Time issues generally determine whether I switch the pairings at this point, as the extra chaos also takes extra time.)

- 25-30 Minutes – Working with the "Consequences Chart." Once the groups are set, or as they are forming, hand out copies of the Consequences Chart. (A generic version is included in this simulation folder and is also available on the clientsciencecourse.com website.) Each pair needs three copies of the sheet (or two double-sided copies). Lawyer and client discuss 3 options selected previously and work through the consequences chart. The client should decide on the option s/he will choose. This may but absolutely need not be the same option as that chosen in the first round.

You will get many questions about the consequences chart, and some resistance. Explain that it is surely not perfect, but it's intended to help the client assess and visually organize the impact of various options along several dimensions. Some students assume that because it's a chart, they have to use numbers and then do calculations (maybe because they know decision trees are coming later). Explain that they are free to use the chart in the way it feels most helpful. There is no single meaning to the words in the boxes.

‘Financial circumstances’ or ‘family and friends’ mean what they mean to the client in this case. They are prompts for thought and discussion, for considering long and short-term impacts, concerns, predictions, and priorities.

- 20 minutes – Discuss top three options and decide.

The lawyer and the client should look to what were the three last options the CURRENT CLIENT considered earlier (in the pair in which he was the lawyer – yes this is confusing). Now, this lawyer and this client have to work through and discuss the boxes in the consequences chart for each of the three options. (Each option gets a separate chart). The client should then pick the option s/he thinks best.

- 20 -25 minutes – Debriefing.

First, about those Dales

The early debriefing aims for an ‘aha’ moment when students recognize how easy it is for an attorney to unintentionally steer a client toward his (the attorney’s) pre-existing preferences and priorities – even if these don’t match the client’s. First, I direct the following question to students in the lawyer’s role in the first stage of the exercise: ‘How many of you, preparing for the attorney’s role, reading your part last night, identified the option you would choose if you were the client?’ Some hands will raise, somewhat tentatively. (They know you’re up to something). I will encourage them to acknowledge this (if it’s true), by noting that would be normal behavior. More hands will raise, higher and straighter. Then ask: “for how many of the lawyers with raised hands, did your client also end up choosing the option you had chosen initially, when you were preparing the night before?” Typically, at least half of the hands remain up, often a majority....Hmm.

That’s interesting, unless somehow so many of you were miraculously paired with the Dale Doran whose preferences matched yours.’ It’s time to pull back the curtain on the three Dale Dorans. Turn to the Dale Doran 1’s, ask how they felt about their boss, about the other employees, what their financial circumstances were, how much they like travel, how they think they would fare if they had to get all new customers, and what their career prospects are. The Dale Doran 2s and 3s will hear that the Dale Doran 1 responses are different than theirs. Of course, next get the Dale Doran 2s’ and 3s’ circumstances out. These are reflected in the chart on the next page. The lawyer’s legal analysis is the same for all three Dales, but would it make sense to follow the same plan of action for all three? Turning back to those lawyers whose initial choice was also, coincidentally, chosen by the client: why does this happen? When the lawyers were preparing to meet with their clients, were they aware of the client’s feelings, predictions, financial circumstances, willingness to travel, ability to tolerate risk, etc.? Don’t these determine the best decision for (each) Dale?

For this initial portion of debriefing, the punch line is clear: neither analysis of the legal case nor an attorney’s inclination determines the client’s best option. The three Dale Dorans differ greatly on the following dimensions: feelings about the boss and co-



workers, financial constraints, and time horizons (relating to family, other job offer or not, Upscale's willingness to employ, wife's job, etc.), predictions about the future (how soon this Dale predicts he could build up his business without the current clients), confidence levels (about future business and clients), and ability to tolerate risk. Without understanding these, a lawyer and client can't collaboratively discuss what may be most important. They cannot assess the impact of a decision on the client and his context – family, professional, business relationships, now or in the foreseeable future.

Now for the consequences (chart)

It's helpful to announce the deliberate shift to focusing on the consequences chart. I often prefer to get the complaints on the table first and so often start with the question: "How many people found it awkward to use the consequences chart? Why? Did it seem artificial?" Some significant number of students will have found it awkward and artificial. They observe that it was not tailored to the case and the meaning of the categories was unclear. Just acknowledge it; observe that in a real case with a real client you would tailor the categories to the client and the case, then steer the discussion to the value of the exercise.

As a segue to discussing consequences chart, I ask: "How many students ended up with a different decision when you used the consequences chart, different from the first time, without it?" There won't be many, but likely a few. Follow up with those students: ask what about the exercise led them to a different conclusion. They may raise the "consequences to others" piece or the fact that attorneys' fees were written down.

Of the majority who will have reached the same decision, ask what difference the chart made. Did it affect the interaction? Did it affect how they felt about the decision? Some students will say they felt better knowing they had been thorough and had thought about ramifications of their decision.

Students will report that it took more time to work through the chart for each option. While comments and responses to the chart are quite variable year to year, you can generally count on several student pairs' acknowledging that using the chart made them discuss important concerns that were glossed over or not raised without it. Sometimes, student will observe that the chart leads to a greater power balance between lawyer and client: the conversation is more clearly and naturally collaborative. The lawyer recognizes that they can't evaluate an option through the chart's categories for the client. And the client recognizes that they need the lawyer's input regarding law, legal process, and negotiation and the way they typically unfold. Their collaboration is real. That really is the point.

While I've never kept the statistics, informal polling results as to perceived value of the consequences chart have varied greatly from class to class. Sometimes, there's strong consensus that the chart has great value, other classes not so much. I emphasize the importance of intangibles and raise the importance of the lawyer's helping the client to imagine the realities before they unfold. What will their Thanksgiving conversations be

like during litigation? How will their business function during discovery – through documents and depositions? How well will they tolerate some financial uncertainty?

Slowing down the conversation to think through the reality of what will or might occur has value, either for decision making or just to prepare for what will be. Psychology research confirms “measurability bias”²: people tend to overweight the value of what can be measured (often \$) and underweight or undervalue that which is difficult to measure – even if the latter is terribly important.

Some students will have used the chart to create a numerical scoring and/or ranking system. They will observe that it helped them to compare “apples to oranges” by translating to numbers. Note that this links to the decision analysis module (coming up soon in the course), which uses a formal method to depict a visual and numerical map of the case. That too slows down the conversation between lawyer and clients, forcing the lawyer to articulate the case’s twists, turns and uncertainties in a way that makes them less abstract. It also highlights the timeline and uncertainties over time and for distinct issues. Within decision analysis, it’s also useful to find a way to “count” and enter intangibles into a decision tree. The students’ efforts to weight and rank intangible consequences could theoretically be used in decision analysis (an advanced version).

Punch lines for the consequences chart segment are:

- Intangible, non-monetary interests are IMPORTANT.
- That which cannot be measured and counted is too often ignored.
- Charting fewer tangible consequences makes them appropriately important.
- Charting the more tangible but distant consequences makes them more real.

Punchlines for the overall exercise are:

- A client is not a legal issue or a set of legal options: each client brings to the table a set of individual preferences, relationships, emotions, predictions (or prediction proclivities – optimism or pessimism), risk attitude, and tolerance. The lawyer must seek to understand these. Only then can the lawyer work collaboratively with the client toward an optimal decision.
- Ultimately, the client must decide among a set of options, which have been shaped by the lawyer’s legal analysis and familiarity with available legal structures and conventions.
- The option(s) that would work best for one client will not serve another, even if s/he presents the identical legal claims.
- Which option the lawyer would choose is entirely unimportant: it should not be imposed or “strongly suggested,” nor should the lawyer attempt to shape

² Brian J. Hall and P. Trent Staats, “Do the Numbers Get in Your Way?” *Negotiation*, Vol. 7, No. 11(Nov. 2004).

(manipulate) the client's decision by emphasizing positive aspects of what would be the lawyer's choice and downplaying other possibilities.

More details on the video: Professor Dwight Golann and I produced and edited this video (with fine technical work by UC College of Law's Michael Mimms). It shows a lawyer interviewing and counseling (actor) client Dale Doran in a single session. The attorney, Lisa Loring, an employment lawyer in Cincinnati, reports that this is the way an initial consultation would occur in her practice. It is long: just over an hour. Rather than edit down further and eliminate too many terrific 'lawyer-client moments' (for teaching), we opted to divide the video into many, many chapters – enabling instructors to jump to the moments they'd prefer to highlight. Depending on timing, you could assign student to watch the whole video over night, and then review and discuss specific chapters of interest in class the next day. As stated above, it is available on the clientsciencecourse.com website (password “educator”) and on Dwight Golann's Suffolk/ABA website: adrvideos.org (password “adrteacher123”).