

“Civil Rights Settlement”
(*Neruda v. Heritage Homes, et al.*)

**Instructor Notes
& Background**

Skills Addressed

Drafting and revising, negotiating, and managing clients

Target Audience

2Ls and 3Ls who have completed Contracts and have had some basic drafting and negotiating coursework

Overview

This is an intermediate-level dispute resolution scenario focused on negotiating and drafting a settlement agreement. Students play the roles of the lawyers for each side. Instructors and adjunct faculty have typically played the clients (although with support students could play those roles, too). The scenario is designed for use over three or more class sessions (total of 4-5 hours of in-class time and approximately 2-3 hours of out-of-class time):

1. Preparation / reading the materials (1 hour)
2. Meeting with the client (1/2 hour)

3. Meeting with the other side with clients available but not at the table (parties will not (and should not) reach agreement at this point, even if that means clients taking irreconcilable positions) (1-2 hours)
4. Defendant counsel drafts settlement agreement¹ (between class periods - 1 hour)
5. Plaintiff counsel submits revisions (tracking changes) (between class periods -1 hour)
6. Counsel meet again with client to update and explore options and alternatives (1/2 hour)
7. Meetings between counsel for both parties to continue discussions, exchange additional drafts and finalize agreement or prepare last offers with clients available but not at the table (1 hour)

Scenario Background

More than three years ago, Salvador Neruda, a self-employed roofer, sued a large remodeling retail company (Heritage Homes) and two private citizens (both are retirement age). The lawsuit claims that Heritage Homes denied Neruda roofing jobs because of her national origin. Customers, including the two other individual defendants, allegedly had requested “no foreigners” as roofers and Heritage had honored those requests.

Trial will begin soon and the judge has ordered one last attempt at settlement. All but one claim of Neruda’ lawsuit has been thrown out by the court. The remaining claim is under the Ku Klux Klan Act (conspiracy to deny civil rights).

Previous attempts at settlement have been unsuccessful, as discussions have focused almost entirely on issues of liability and monetary damages. The last exchange of settlement offers ranged from \$500K from the plaintiff to \$10K from the defense.

The main lawyers in the case seem to have made it a personal battle between the two of them, as evidenced by their multiple exchanges of terse letters (included in the student packets). New counsel (i.e. the students) are being brought in to try to find a possible resolution. The exercise picks up with the students playing the role of the new counsel.

Each student gets a packet of documents, including pleadings, deposition transcripts, correspondence, and two sample Settlement Agreements. The sample agreements are ostensibly from previous legal disputes and have a number of suboptimal provisions and language use.

¹ The parties could negotiate who drafts the first draft. They could also split the drafting. Traditionally, the non-drafting party has been required to draft at least something – usually a carve-out business provision or two, just so all students have responsibility for drafting (rather than only revising).

Learning Outcomes

- ✓ Build on drafting, revising, negotiating, and client management skills (this is not an introductory exercise and should be used mid-course or later)
- ✓ Work with a relatively large file of documents to sort out the main negotiation issues and understand a complex fact scenario
- ✓ Use drafting and revising as an integrated process with face-to-face negotiations
- ✓ Practice and improve techniques for resolving challenging conflict and dealing with difficult negotiators and their tactics
- ✓ Work with a client on understanding client interests, developing strategies for resolution or no deal, and managing client expectations
- ✓ Use sample forms and previous agreements effectively in crafting a new deal

Teaching Notes:

1. Set-up and assignments for the students.
 - a. Introduction. Students should understand the complexity and breadth of this exercise. They will review a complex and lengthy fact pattern, work with a client, draft and revise proposals and possible agreements, and negotiate the terms of a settlement agreement.
 - b. Schedule of assignments. It is useful to break up the exercise into various parts and have the students generate work product at each major stage, after they have read and reviewed their packet:
 - i. Interview plan or checklist for the initial discussion with the client
 - ii. Negotiation plan for the initial meeting with the lawyer for the other side
 - iii. First draft of / initial revisions to the Settlement Agreement (the attorney for defendants does the first draft²)
 - iv. Final version of the Settlement Agreement or last proposals (if no deal was reached)
 - c. Expectation of challenging discussions with clients and counterparts. The facts are set up so that a deal will be hard to reach, if at all. The lengthy and contentious litigation has left both parties focused on the legal claims. Both clients have unrealistic expectations at the start and are slow to back away from

² See previous note.

their initially firm positions. There are multiple issues to negotiate, and many are set up with opposing interests with difficult solutions.

2. Coaching opportunities for instructors during the exercise.
 - a. Drafting and revising. As drafts are exchanged, instructors can review and work with students on both the technical and substantive elements of the proposals and counterproposals. In this exercise, the potential deal contains more than just the usual components to a settlement agreement. There are potential business issues that could help the parties resolve the dispute (e.g., Neruda could go back to work for Heritage with certain quality control measures spelled out). Students will need to work carefully on describing the provisions they include and also on revisions to the work of their counterpart until they have either reached a final agreement or time has expired. Instructors can work with students individually on each step.
 - b. Working with the client. Students will have multiple interactions with the client during this exercise, including an initial meeting and shorter, check-in meetings during the negotiations as needed (the client should be available for all negotiation sessions in the hallway or in a breakout room).
3. Debriefing points for discussion.
 - a. Managing difficult clients. Most students are reluctant to push back with clients (this is why for this exercise we encourage using practitioners or adjunct faculty for the roles of clients, not other students unless they are supported with significant instructor coaching throughout), and this is particularly the case here where both clients are designed as sophisticated and experienced negotiators in their own right. Students should understand the value of clarifying interests with clients, including the varying degrees of importance of certain interests to clients, so that trade-offs and other creative solutions can be explored. They also must understand how to manage client expectations and weighing consequences to no deal against available settlement proposals.
 - b. Dealing with positional tactics and hard bargaining. Because of the client instructions and the fact pattern, many students will be tempted to engage in adversarial negotiation approaches. Students should understand how to work through these challenges without getting emotionally involved or needlessly sidetracked into lengthy arguments. They should begin to see how enforcing a productive process built around interests and generating possible solutions can help keep difficult counterparts in line. They should also begin to understand how and when to say no and how to share potential consequences of no agreement.
 - c. Using the drafting and revising process effectively. Students should begin to understand how and when drafting and revising can be used as part of the negotiation. Not every detail needs to be worked out between the parties before

drafting begins. In fact, sometimes turning to the drafting process (even in an abbreviated fashion) can be a good “change of pace” when there is an impasse. Regardless, students should understand how drafting and revising are an integral part to the overall negotiation.

- d. The role of “justice” or other factors arguably unique to these types of disputes. Civil rights cases or other policy-oriented litigation may raise special issues with respect to settlement. How can a plaintiff find “justice” through compromise? What if the case has deeper ramifications for future possible plaintiffs? Working through a full set of client interests, including issues of justice and policy, may be particularly important when working with clients in these types of cases. Structuring settlement agreements to address policy implications (and perhaps face-saving and reputation-protecting for the defense) can raise interesting issues to resolving litigation through settlement.

Handouts (attached)

1. Packet for the plaintiff’s lawyers
2. Packet for the defendants’ lawyers
3. Additional information for plaintiff (client Salvador Neruda)
4. Additional information for defendants (client Terry Burns, COO, Heritage)