

“Foggy Tops”
Employment Dispute

**Instructor Notes
& Background**

Title

Foggy Tops (Employment Dispute)

Skills Addressed

Negotiating, resolving conflict

Target Audience

2Ls and 3Ls

Overview

This is a basic dispute resolution scenario focused on negotiating the early resolution of an employment dispute. A high-priced employee (Wells Menz) has been fired by his employer (Foggy Tops), and the lawyers (played by students) must attempt to negotiate a resolution. One side has been given instructions to be more adversarial; the other side has been directed to remain interest-based. The scenario is designed for use in one class period (less than two hours):

1. Preparation / reading the materials (5 minutes)

2. Meeting with partners¹ to prepare strategy (or preparation time for students working alone) (1/2 hour)
3. Meeting with the other side to negotiate a resolution (1 hour) with clients available but not at the table (parties should not reach agreement, even if that means clients taking firm positions) (1 hour)
4. Collection of deals (or last proposals, if no agreement) and discussion

Scenario Background

Foggy Tops Consulting is a large and powerful consulting firm that provides economic analyses to various international organizations, including the World Bank, International Monetary Fund and the UN. The organizations use the recommendations and analysis of Foggy Tops to decide on whether to endorse or even sponsor various investment projects throughout the world. Foggy Tops has a number of high-placed relationships throughout the world in media, academics and publishing.

Wells Menz was hired two years ago by Foggy Tops. Before being recruited by Foggy Tops, Menz was formerly a professor of econometrics at Harvard and had published a number of prominent journal articles examining the economies of a number of developing countries, particularly in Sub-Saharan Africa (a particular attraction to Foggy Tops, who have no experts for that region on staff). Menz reluctantly left the academic world upon receiving the invitation to join Foggy Tops (and the tripling of his salary). He also enjoyed the increase in accoutrements (the car, four-star travel accommodations, profit-sharing, bonuses, and extravagant retirement and health care packages) as well as other opportunities for promoting himself (speaking tours and meeting the many friends of Foggy Tops in the publishing business).

For the last few weeks, Menz has been on a speaking tour funded by one of Foggy Tops' largest corporate clients, where he has been forcefully denouncing (sometimes on national news outlets) alleged corruption in the UN's ineffective response in the Congo and embarrassing the UN, one of the largest clients of Foggy Tops. In fact, contracts with the UN alone account for nearly 20% of all Foggy Tops revenue.

A day after a conference call between the UN and Foggy Tops management about a potential new consulting opportunity for Foggy Tops in Tanzania, the CEO of Foggy Tops called Menz into her office and fired him on the spot. Menz has threatened legal action, and counsel for Foggy Tops and Menz are meeting to discuss the possibility of early resolution.

¹ Traditionally, students have worked on their own, but the scenario can be adapted so that students work in pairs.

Each student receives background information and instructions from the client. Attorneys for Menz are instructed to focus on the money and approach the negotiations in a more adversarial way. Attorneys for Foggy Tops are instructed to remain interest-based.

Learning Objectives

- ✓ Introduce basic negotiation concepts using a easy-to-understand employment dispute
- ✓ Compare and contrast the virtues and drawbacks of the two principle approaches to negotiation (adversarial and interest-based)
- ✓ Understand the complexity of and learn to apply interest analysis in a simulated, straightforward negotiation

Possible Debriefing Points:

1. Comparing and contrasting adversarial and interest-based techniques. Students representing Menz were told to be more adversarial, and students representing Foggy Tops were told to be interest-based. How did the students approach their negotiations? Which techniques are more adversarial? Which are more interest-based? What virtues and drawbacks to each approach did you observe or would you expect in a real negotiation? How do most lawyers do it? How would you do it (absent instruction)? Is there anything about this scenario (i.e. an employment dispute) that would influence your decision on which approach to use?
2. Dealing with positional tactics and hard bargaining. Because of the explicit instructions to the Menz attorneys, students will likely focus on the money issue only and engage in adversarial negotiation approaches. Students representing Foggy Tops should understand how to work through (or how they could have worked through) these challenges using an interest-based approach. 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.
3. How to handle negotiators who focus exclusively on the money issue. Many students think all negotiations are meant to focus exclusively on money. After all, it is easy to quantify and everyone certainly cares about money. When the other side focuses on money, helping to expand the topics of discussion can be difficult. Managing the process and agenda can help. Explaining that the first order of business in the negotiations is to identify the major issues (plural emphasized) can open up the discussion to other possible issues. Confirming how the other side has other concerns (such as timing, reputation, future work, autonomy, etc.) can also broaden the discussion, even if you have to make certain presumptions about what those other issues might be (not as hard as it might sound, particularly where a client may have information about the other side to help fill in any gaps) .

4. The architecture of a negotiation and the importance of stages. This scenario is traditionally used early in a negotiation course, where topics like agenda-setting and information-gathering have yet to be put into practice. Too many times, students without training will launch into proposals immediately after discussions begin. The scenario provides enough breadth to explore how critical it is to understand how the negotiation will take place (agenda) and what information is required in order to craft optimal proposals (and evaluate them).
5. Sometimes no agreement is better than a bad deal. The scenario is designed so that an agreement that satisfies the client's needs better than no agreement is not difficult to reach, but because of the instructions for Menz's attorneys, it is possible that discussions will end in impasse. Students sometimes feel pressure to reach an agreement as time expires and will neglect an analysis of what is best for the client under the rush of finishing the deal. It is important for students to recognize that no does not necessarily mean no deal, but merely that an agreement is not possible at this moment (not yet).

Handouts

1. Role information for the attorneys for Well Menz (potential plaintiff)
2. Role information for the attorneys for Foggy Tops (potential defendant)