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THE LAWYER'S DILEMMA: TO BE OR NOT TO BE A PROBLEM- SOLVING NEGOTIATOR

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Clinical legal education has not paid sufficient attention to developments in the theoretical understanding of negotiation. A growing body of scholarship on legal negotiation endorses a problem-solving approach to negotiation, an approach based on the premise that negotiated solutions to problems create value for all the parties. Leading texts for clinical courses advise students to learn both the problem-solving approach and the adversarial approach. The adversarial approach is based on the premise that negotiation is a process of dividing limited resources in which one party gains and one party loses. Deciding which approach is consistent with the duties and values of the legal profession is a dilemma that lawyers must resolve. In this article, Professor Hurder reviews the origins of both the client-centered approach to lawyering and the problem-solving approach to legal negotiation and finds that the two approaches have much in common. He urges clinical legal education to prepare and encourage lawyers to be problem-solving negotiators.

INTRODUCTION

Lawyers must know how to negotiate.¹ Negotiation is a large

* Clinical Professor of Law, Vanderbilt Law School. I am grateful to Robert Belton, Frank Bloch, Susan L. Brooks, Chris Guthrie, Laurie Hauber, Susan L. Kay, and Yolanda Redero for their helpful comments on earlier drafts of this article.

¹ The 1992 report of the American Bar Association Task Force on Law Schools and the Profession lists negotiation as one of the fundamental skills of lawyering. American Bar Association, Section of Legal Education and Admissions to the Bar, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* 135 (1992) [hereinafter *THE MACCRATE REPORT*]. In many circumstances, lawyers are required to negotiate. See Judith Resnik, *Procedures Projects*, 23 *CIV. JUST. Q.* 273, 274 (2004) (“‘Bargaining in the shadow of the law’ is a phrase often invoked, but bargaining is increasingly a requirement of the law of conflict resolution, both civil and criminal.”) (footnote omitted). The Civil Justice Reform Act of 1990 has given federal courts the authority to order mandatory negotiations in federal court cases. See 28 U.S.C. § 473(a)(6)(a) (“In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, . . . shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction: . . . (6) authorization to refer appropriate cases to alternative dispute resolution programs that . . . (A) have been designated for use in a district court; or (B) the court may make available, including mediation, minitrial, and summary jury trial.”).

part of what lawyers do.² A competent lawyer should have a sufficient command of the negotiating process to be able to plan, organize and successfully conclude a negotiation. A competent lawyer should know how to create value and to claim value through negotiation. In short, a competent lawyer should know the basic principles of negotiation theory. Clinical legal education has not paid sufficient attention to negotiation theory or to the problem-solving approach to legal negotiation. The problem-solving approach is based on the principles of interdisciplinary negotiation theory. Clinical legal education has yet to reconcile the strategy of cooperation required by problem-solving negotiation with the traditions of adversarial behavior fostered by trial and pre-trial advocacy. The dilemma should be resolved in favor of the problem-solving approach. Clinical legal education can prepare law students to be more efficient and effective lawyers by teaching them to be problem-solving negotiators.

The lack of attention to advances in the theory of negotiation is leaving lawyers at a disadvantage. Without knowledge of negotiation theory, lawyers cannot represent clients adequately in legal disputes, and they cannot advise clients intelligently about the potential to resolve cases. The fact that lawyers are not optimally prepared to negotiate is undoubtedly one force behind the increase in multi-disciplinary practice. Litigants and entrepreneurs are turning to other professionals who are better negotiators.³

A growing body of scholarship on legal negotiation endorses an approach to negotiation called problem-solving.⁴ It is an approach

² Most lawsuits are settled out of court. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 768 (1984) [hereinafter Menkel-Meadow, *The Structure of Problem Solving*]; Carrie Menkel-Meadow, *When Winning Isn't Everything: The Lawyer As Problem Solver*, 28 HOFSTRA L. REV. 905, 907 n.5 (2000) [hereinafter Menkel-Meadow, *When Winning Isn't Everything*] ("Less than five percent of all cases filed, in any kind of court, federal, state, criminal, civil, etc., actually go to full adjudication."). Furthermore, many lawyers have exclusively transactional practices in which negotiating deals and contracts is a large part of the practice.

³ See Menkel-Meadow, *When Winning Isn't Everything*, *supra* note 2, at 921-22 ("To the extent that traditional lawyers speak only the adversarial language of litigation and winning, they will be used narrowly for only one function, trial work, when that function is increasingly wasteful and inefficient, as well as emotionally draining, on most, if not all, of the players."). See also Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 255-56 (2002) (describing tensions between lawyer and nonlawyer professionals in mediation practice).

⁴ See, e.g., ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* ix (2000) ("This book makes the case that a *problem-solving approach* to negotiation offers the most promising means of creating value."); Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 817 ("A problem-solving orientation to negotiation may lead not only to better solutions, but to a process which could be more creative and enjoyable than destruc-

based on an analytical model of negotiation developed by economists, mathematicians, psychologists, diplomats, social scientists, and scholars of business and law. The problem-solving approach has also been called "integrative," because it integrates the complementary interests of the negotiating parties in order to create new value. It has been called "principled," because it seeks solutions based on principle, rather than on positions staked out by the parties.

Surprisingly, clinical legal education has not fully embraced a theoretical approach to negotiation. Leading texts for clinical courses advise students to become proficient in both the problem-solving approach and the adversarial approach to negotiation.⁵ The adversarial approach springs from the concept that a dispute is a contest for a fixed award and negotiation is a zero-sum game in which anything won by one side is a loss by the other.⁶ Thus, the goal of negotiation is to win a larger slice of the pie. The adversarial approach appeals to lawyers because it appears to mirror the way that courts resolve disputes. Negotiation theory, however, rejects the basic premise that negotiation is a zero-sum game. Negotiation theory assumes that the possibility of creating value greater than the sum of the parts is the motivation for the parties to negotiate an agreement. In negotiation theory, if an agreement would leave either party worse off than the absence of an agreement, then a voluntary settlement is, by definition, not possible.⁷

The failure of clinical legal education to adopt a prescriptive approach to legal negotiation stems from its focus on the lawyer-client relationship as the significant feature of the lawyer's role in the legal

tive and antagonistic."); Leonard L. Riskin, *A Response to Professor Pipkin*, 50 FLA. L. REV. 757, 757 (1998) (discussing use of term "problem-solver" to describe, "the model of lawyering we are trying to promote).

⁵ See, e.g., ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 401-03 (1990); GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 440-45 (1978); DAVID F. CHAVKIN, *CLINICAL LEGAL EDUCATION, A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS* 137-141 (2002); DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* 22 (1989); STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 273-77 (2d ed. 2003). The influential MacCrate Report on the skills and values of the legal profession calls on lawyers to know the difference between cooperative and competitive bargaining, but does not recommend either approach. See THE MACCRATE REPORT, *supra* note 1, at 185-90 (describing skills needed to negotiate effectively).

⁶ See Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 764-65.

⁷ See Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 12 (2003) ("By definition, whenever there is a negotiated agreement in a two-party negotiation both parties must believe that a negotiated outcome leaves them at least as well off as they would have been if there were no agreement.").

system.⁸ Early in its history, clinical legal education embraced the client-centered approach to legal counseling. The origins and core principles of the client-centered approach place high value on loyalty to clients and give little attention to the value of building constructive relationships with adversaries.⁹ In contrast, the origins and principles of the problem-solving approach to negotiation emphasize the economic and social rewards that flow from building relationships between parties with different and complementary interests.

Clinical legal education has lagged behind the changes that have taken place in more advanced sectors of the legal profession. Traditional legal education faculty have assumed responsibility for teaching negotiation classes in many law schools. Their classroom courses often teach negotiation theory and advocate the problem-solving approach to legal negotiation.¹⁰ Clinical legal education, by and large, has failed to endorse a problem-solving approach to legal negotiation. Nevertheless, with its ability to learn from reflective practice, clinical legal education is uniquely situated to identify problems and to propose solutions to the issues that lawyers face when negotiating.¹¹ Clinical legal education, which introduced study of the lawyering process into the law school curriculum, should incorporate the insights of interdisciplinary negotiation theory into the clinical curriculum.¹²

Part I of this article begins with an example of two people negotiating and uses the example to illustrate the two dominant approaches to legal negotiation. It describes the adversarial approach to legal negotiation and contrasts it with the problem-solving approach, focusing on three significant differences. The adversarial approach is linear, case-centered, and discourages disclosure of information about a client. In contrast, the problem-solving approach is imaginative, party-

⁸ For a brief description of the client-centered approach to lawyering, see CHAVKIN, *supra* note 5, at 51-57.

⁹ See Kate Kruse, *Fortress in the Sand: The Plural Values of Client-centered Representation*, 12 CLIN. L. REV. 369 (2006) (discussing underlying principles of client-centered lawyering).

¹⁰ For example, the Executive Report of the Program on Negotiation at Harvard Law School reports that the Harvard Negotiation Research Project, directed by Professor Robert Mnookin, "engages in research and teaching to help prepare a new generation of lawyers to use a problem-solving approach in their negotiation and professional activities." PROGRAM ON NEGOTIATION AT HARVARD LAW SCHOOL, http://www.pon.harvard.edu/shared/docs/PON_2006_exec_rpt.pdf (2006) (last visited Jul. 6, 2007).

¹¹ For a discussion of the origins and principles of reflective practice, see Richard K. Neumann, Jr., *Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLIN. L. REV. 401, 405 (2000).

¹² See Frank S. Bloch, Susan L. Brooks, Alex J. Hurder & Susan L. Kay, *Filling in the 'Larger Puzzle': Clinical Scholarship in the Wake of The Lawyering Process*, 10 CLIN. L. REV. 221, 233-35 (2003) (describing how Gary Bellow and Bea Moulton's 1978 text introduced subject of lawyering into curriculum of legal education).

centered, and promotes disclosure of information about a client. Part II examines the fundamental dilemma faced by lawyers as they negotiate: navigating the tension between the tactics that create value and those that claim it in the context of an adversarial legal system. It compares the origins and principles of the problem-solving approach to negotiation with the origins and principles of the client-centered approach to lawyering, revealing the strong affinity between these traditions. Part III examines the lawyer's choice of an approach to negotiation in light of core values of the legal profession. It considers the impact of a lawyer's duty of loyalty to a client, a lawyer's duty to protect a client's confidences, and the problems caused by an imbalance of power between a client and an adversary. It concludes that the problem-solving approach should be the preferred approach to legal negotiation.

I. TWO APPROACHES TO LEGAL NEGOTIATION

Many of the leading textbooks used in clinical legal education introduce students to two very different approaches to legal negotiation, the problem-solving approach and the adversarial approach, and advise them to learn both.¹³ In part, the two approaches represent disagreement about what works and what does not. In part, they represent a tension between negotiators who are lawyers and those who are not. In part, they represent a tension between an old culture of negotiating and a new one. There is no agreement about what to call the different approaches to negotiation. Some contrast an "adversarial" approach with a "problem-solving" approach.¹⁴ Others contrast a "competitive" approach with a "cooperative" approach.¹⁵ Roger Fisher and William Ury refer to the two approaches as "posi-

¹³ See, e.g., BASTRESS & HARBAUGH, *supra* note 5, at 390-91 ("[T]he fundamental choices available to negotiators have been reduced to two. Those choices usually have been labeled as competitive (or adversarial) and cooperative (or problem-solving). As we shall see, our approach to legal negotiation will give lawyers the opportunity to select one of four basic models of bargaining."); CHAVKIN, *supra* note 5, at 139 ("It is no answer to say that you feel most comfortable negotiating in a problem-solving, cooperative strategy-style combination if that is not the combination best suited to achieving your client's goals."); GIFFORD, LEGAL NEGOTIATION, *supra* note 5, at 22 ("The same lawyer who uses *competitive* tactics in one bargaining session will find her client's interests better served by employing *problem-solving* methods on another occasion."); KRIEGER & NEUMANN, *supra* note 5, at 276-77 ("If you assume that one approach is always preferable to the other, you will be less effective at negotiation than another person who can function well using either approach.").

¹⁴ See BASTRESS & HARBAUGH, *supra* note 5, at 390-91; LEONARD L. RISKIN, JAMES E. WESTBROOK, CHRIS GUTHRIE, TIMOTHY J. HEINSZ, RICHARD C. REUBEN, JENNIFER K. ROBBENOLT, DISPUTE RESOLUTION AND LAWYERS 165 (3d ed. 2005); Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 757-58.

¹⁵ See, e.g., THE MACCRATE REPORT, *supra* note 1, at 190.

tional” and “principled” bargaining.¹⁶ None of the terms is entirely descriptive of the method of negotiation it represents. Nevertheless, the terms reflect practical and philosophical differences in how to negotiate. I will use the term “adversarial” to refer to the approach that has also been called “competitive” and “positional,” and I will use the term “problem-solving” to refer to the approach that has also been called “cooperative” and “principled.”

Robert Bastress and Joseph Harbaugh use the terms “problem-solving” and “adversarial” to describe contrasting negotiation *strategies*, and they use the terms “cooperative” and “competitive” to describe contrasting negotiation *styles*.¹⁷ A strategy is a master plan to achieve a client’s goals. Strategy can vary from case to case, provided that it addresses the fundamental goals of the negotiation process. Style is the interpersonal behavior of the negotiator.¹⁸ An approach is a conceptual framework that allows one to choose both strategy and style based on an analysis of the fundamental goals that must be achieved in order to succeed. I use the term “approach” to describe the dominant types of negotiating behavior, because the strategies and styles that are associated with each approach reflect the different conceptual frameworks for the negotiation process. Whereas strategy and style might change depending on the context of a case, the approach chosen should remain constant, because it is based on the negotiator’s understanding of what negotiation itself is about.

Scholarship about legal negotiation is concluding with increasing frequency that the problem-solving approach is the preferred approach.¹⁹ The conclusion is based on an analytical model of negotia-

¹⁶ See ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

¹⁷ See BASTRESS & HARBAUGH, *supra* note 5, at 390. David Chavkin also uses strategy-style combinations to describe lawyers’ negotiating behavior. See CHAVKIN, *supra* note 5, at 137-41. See also GERALD R. WILLIAMS & CHARLES B. CRAVER, *LEGAL NEGOTIATING* 52-67 (2007).

¹⁸ See BASTRESS & HARBAUGH, *supra* note 5, at 390.

¹⁹ See, e.g., Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 564 (1994) (“Our message is that the relationship between opposing lawyers and their capacity to establish credible reputations for cooperation have profound implications for dispute resolution: if the payoff structure establishes cooperation as the most desirable strategy and supportive institutional structures exist, lawyers may be able to damp conflict, reduce transaction costs, and facilitate dispute resolution.”); Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L. J. 1789, 1814 (2000) [hereinafter Korobkin, *A Positive Theory of Legal Negotiation*] (“Prescriptive literature on negotiation firmly counsels that negotiators should focus attention on their and their opponents’ underlying interests rather than on positions.”). Although Russell Korobkin does not name the approach he advocates, his analytical model of negotiation is consistent with the problem-solving approach described in this article. See RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY*, at 16-17 (2002) [hereinafter KOROBKIN, *NEGOTIATION THEORY*].

tion developed in the 1920s and 30s and refined by scholars in the years since then. There is no single definition of the problem-solving approach to negotiation or of the adversarial approach. This article draws on the descriptive and prescriptive writings of legal scholars who, in turn, have drawn on analytical works from many disciplines.²⁰ It does not attempt to reproduce the subtlety or complexity of their analyses of negotiation. Rather, it seeks to identify concepts that lawyers should recognize in order to make competent decisions in the course of legal negotiation.

In problem-solving legal negotiation, the remedial powers and precedents of courts do not limit goals and solutions. While legal negotiation has tended to confine itself to goals and solutions recognized by law, the interdisciplinary study of negotiation has embraced more creative solutions. In problem-solving negotiation, the only limits on the goals and solutions of the negotiators are the needs of the negotiating parties. This Part begins with an example of two friends negotiating without lawyers and then describes the adversarial approach to legal negotiation and contrasts it with the problem-solving approach.

A. *An Example*

The following example describes a negotiation between two parties who are friends. Although there are legal issues involved, the negotiation takes place without lawyers.

Two hikers, Anna and Betty, are walking the Appalachian Trail from Georgia to Maine when Anna sees a gold watch by the side of the path. They decide to interrupt their hike to take the watch to the Ranger Station. The Ranger tells them there is a \$1,000.00 reward for the watch and gives them a check made out to them both. When they return to the trail, Anna says the reward is hers because she found the watch. Betty says that half of the reward is hers, because it was her idea to take it to the Ranger. They continue to negotiate the division of the reward as they hike toward Maine.

The adversarial approach to negotiation would predict that the Anna is likely to take most of the reward, if the two reach an agreement at all. That is because the process of adversarial bargaining requires each party to make an opening offer and then to make a series of concessions and counter-offers until agreement is reached.²¹ The process in this case would result in a final agreement that, because of their opening proposals, gives Anna an amount that falls between half

²⁰ See generally KOROBKIN, *NEGOTIATION THEORY*, *supra* note 19; MNOOKIN ET AL., *supra* note 4; RISKIN ET AL., *supra* note 14; Korobkin, *A Positive Theory of Legal Negotiation*, *supra* note 19; Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2.

²¹ See Korobkin, *A Positive Theory of Legal Negotiation*, *supra* note 19, at 1821-22

and all of the reward, even if it would be fairer to split the reward evenly. The process of give and take would be likely to result in a split of \$750.00 for Anna and \$250.00 for Betty, unless one of the hikers were able to persuade the other to accept less. If the result of the give and take of bargaining results in a division that appears too unfair to either party, the negotiation might fail, and the two hikers might look to a third party to divide the reward. Problem-solving negotiators believe that this style of bargaining is less likely to meet the needs of the parties, and less likely to produce a settlement, than problem-solving negotiation. Without knowing it, the two hikers begin to follow the problem-solving approach.

Anna thinks to herself, "Even though I deserve the entire amount, I would accept \$500.00 to avoid fighting about this for the rest of the hike." Betty thinks to herself, "I am not going to go to court over this, but if I refuse to sign the check, Anna will have to go to court to get anything, and the judge will probably give me half. I don't need half the check, but I would not feel right if Anna keeps it all for herself. Therefore, I will refuse to sign the check unless she gives me at least \$100.00."²² Neither one tells the other what she is willing to settle for.

As they walk along, the hikers begin to discuss the reasons for their initial proposals. Anna makes a moral claim. She found the watch and there would be no reward if she had not. Betty agrees that it would be immoral to deprive the finder of any reward, but argues that fairness requires dividing the reward equally. She adds that she thinks a judge would divide the reward evenly because the check is made out to both of them. They are unable to agree on what is fair, and they begin to talk about why they need the money.

Betty reveals that she has to pay \$500.00 for rent as soon as she returns from the hike to avoid being evicted, and she does not have the money. The economic need is her priority. Anna says that she needs the money because she depends on her parents for financial support and having some money of her own would meet a psychological need for independence. Both hikers begin to realize that they also have a serious need for each other's friendship. It is a long walk from Georgia to Maine. Trust in each other is essential. They discuss alternative ways to meet the needs they have expressed.

Anna says that her roommate has moved out and she is looking for someone to split \$800.00 a month rent. Betty says that she still has time to avoid owing rent by giving notice to her landlord but she

²² Although Betty's initial demand was for \$500.00, an honest assessment of her own feelings and preferences leads her to decide privately that she would be willing to settle for \$100.00.

would still need \$400.00 to move in with Anna. They agree that Betty will take \$400.00 and use it to rent the space with Anna. Anna will receive the remaining \$600.00. Both hikers are happy with the deal.

Anna and Betty represented themselves in the negotiation. If they had had lawyers, would their lawyers have discovered – and disclosed – their other needs? Would their lawyers have appreciated the importance of preserving the relationship between Anna and Betty? Would their lawyers have killed the deal?²³ The answer might depend on whether the lawyers used an adversarial or a problem-solving approach to negotiation.

B. *The Adversarial Approach to Legal Negotiation*

Roger Fisher and William Ury coined the terms “positional” and “principled” in 1981 in their groundbreaking monograph, *Getting to Yes*, to represent the contrasting approaches to negotiation that can also be called “adversarial” and “problem-solving.”²⁴ Although Fisher and Ury recognize that positional negotiation has a long history and some features that make it appealing to negotiators, they call on negotiators to abandon the approach.²⁵ On the other hand, leading texts on lawyering, and even the prestigious MacCrate Report, advise lawyers to become competent in both problem-solving and adversarial negotiation.²⁶ The two approaches to negotiation are different in ways that are significant to lawyers. The adversarial approach to legal negotiation reflects the relationship between lawyers and clients that arose to meet the needs of litigation. When lawyers negotiate as representatives of clients, they are bound by ethical, legal and procedural rules that do not all apply to nonlawyer agents or to persons representing themselves. Rules of professional responsibility set standards of loyalty, candor, confidentiality, competence and zealous representation that lawyers must follow.²⁷ Lawyers negotiating the settlement

²³ See, e.g., DAVID A. BINDER, PAUL BERGMAN, SUSAN PRICE & PAUL R. TREMBLAY, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 209 (2d ed. 2004) (discussing reputation of lawyers as “deal-killers”).

²⁴ See FISHER ET AL., *supra* note 16, at 10. Mnookin and his colleagues contrast the problem-solving approach to negotiation with a “hard bargaining” approach that relies on deceptive offers, misrepresentation, and the exploitation of the other sides’ good will. MNOOKIN ET AL., *supra* note 4, at 24-25.

²⁵ See FISHER ET AL., *supra* note 16, at 4 (acknowledging that taking positions can serve “some useful purposes in a negotiation.”).

²⁶ See *supra* note 5 and accompanying text.

²⁷ See Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 *FORDHAM L. REV.* 2241, 2270 (1999) (arguing that ethical duties of confidentiality, candor, competence, and loyalty protect courts as well as clients); Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 *WAKE FOREST L. REV.* 295, 311-318 (1997) (reviewing lawyer’s role in terms of ethical obligations of competence, diligence and zealous representation).

of a lawsuit must negotiate within the framework of rules of civil procedure and rules of evidence.

Adversarial negotiation differs from problem-solving negotiation in its approach to finding solutions, to defining problems, and to disclosing information. The approach of adversarial negotiation to the search for solutions to a dispute or problem tends to be linear, rather than imaginative. Its approach to defining the problem to be solved tends to be case-centered, rather than party-centered. Its approach to disclosing information tends to be guarded, rather than open.

1. The Adversarial Approach Is Linear

The approach of adversarial negotiation to the search for solutions to a dispute or problem is based on the bargaining positions of the parties, and potential solutions tend to fall on a line between the initial positions. For this reason, Carrie Menkel-Meadow describes adversarial negotiation as linear.²⁸ The description of positional negotiation in *Getting to Yes* illustrates this characteristic. In positional negotiation, each side takes a position and then makes limited concessions to the other side until the positions of each side meet at some point along a line between the two original positions.²⁹ In the process, each side makes arguments to persuade the other side to make greater concessions and to come closer to the other's position. The approach relies on an expectation that each side will meet a concession with a concession.³⁰ Because the process is a series of reciprocal steps between two fixed points, the settlement is likely to occur at a point along the line between the initial positions.

The conceptual framework that underlies adversarial negotiation is the comparison of negotiation to a zero-sum game.³¹ In other words, the adversarial negotiator assumes that there is a finite resource to be divided between or among disputing parties. Anything

²⁸ See Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 767.

²⁹ See FISHER ET AL., *supra* note 16, at 6; Donald Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiations*, 47 OHIO ST. L. J. 41, 50-51 (1985).

³⁰ See FISHER ET AL., *supra* note 16, at 6. See also Korobkin, *A Positive Theory of Legal Negotiation*, *supra* note 19, at 1821-22 ("Perhaps the most common behavioral norm invoked in the negotiation process is reciprocity. When one person takes some action on behalf of another, it is assumed that the favor will be returned. The person who fails to reciprocate commits a social faux pas, which can lead to social ostracism and derision.") (footnote omitted). In legal contexts where negotiation is required by law, the failure to meet a concession with another concession can be evidence of refusal to bargain. See, e.g., *General Electric Co.*, 150 N.L.R.B. 192, (1964) (quoting Justice Frankfurter's statement in *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149, 154 (1956), that good faith bargaining "is inconsistent with a predetermined resolve not to budge from an initial position.").

³¹ See BASTRESS & HARBAUGH, *supra* note 5, at 393 ("An adversarial strategy is truly a zero-sum game, one in which the gains of one party equal the losses of the other party and the resulting balance sheet always equals zero.").

that one party receives will be lost by another party. Thus, a line divided by a point is an apt metaphor for the process of negotiating a division of resources. A pie that can be cut into pieces is also used to illustrate the concept of negotiation that gives rise to the adversarial approach. The pie can be cut into pieces of different sizes, but it cannot be expanded. The adversarial approach mirrors the dispute resolution process of courts, which ordinarily converts disputes into units of value, typically money, and rewards one party at the expense of another.

The process of adversarial negotiation tends to reward making a large initial claim and retreating by small steps.³² A large concession by one side can lead to a lopsided settlement.³³ Furthermore, the tactics necessary to protect one's interests are often not conducive to reaching a settlement.³⁴ The process of persuading an adversary to make greater concessions can involve convincing the opponent that one's case is better than it is, that one's bottom line is higher than it is, and that one's prospects in court are more favorable than they are.³⁵ To the extent that adversarial negotiation limits remedies to traditions and precedents created by courts, the remedies tend to be more formal and less imaginative than solutions the parties themselves might create.³⁶

Nevertheless, the approach has appeal to lawyers for a number of reasons.³⁷ The remedial powers of courts offer a natural boundary for negotiated solutions to legal problems. For this reason, negotiated solutions to litigated cases tend to fall on a line between the claims for relief in the pleadings of the opposing parties. Furthermore, loyalty to a client gives a lawyer incentive to be conservative in granting concessions. If a lawyer is negotiating as the agent of a client, small conservative concessions might seem to incur less risk for the client.

A lawyer's knowledge of the law provides an objective standard

³² For an explanation of how an opening offer can act as an "anchor" that influences the other side's decision to settle a dispute and the value of the settlement, see Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795, 805-06 (2004).

³³ See FISHER ET AL., *supra* note 16, at 8 ("In positional bargaining a hard game dominates a soft one.")

³⁴ See Gifford, *supra* note 29, at 52 ("The likelihood of impasse is much greater for negotiators who employ the competitive strategy than for those who use other approaches.")

³⁵ See, e.g., BASTRESS & HARBAUGH, *supra* note 5, at 379 (explaining that in adversarial process, argument is "designed to manipulate, intimidate, cajole, and persuade the opponent to accept a solution.")

³⁶ See Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 106 (2001).

³⁷ Scott R. Peppet, *Raising the Bar and Enlarging the Canon: ADR Ethics*, 54 J. LEGAL EDUC. 72, 75-76 (explaining that lawyers have reason to use adversarial strategy).

for a fair and just settlement, but it also gives the lawyer a more central role in the negotiations. The lawyer brings the skills of identifying potential legal solutions and assessing the probability that a third-party decision maker will choose any one solution. To the extent that the initial positions of both parties are framed in terms of potential legal remedies, the lawyers for each side have a unique ability to craft settlement offers and to evaluate settlement offers in terms of the probability that a court would reach the same result.³⁸ Similarly, lawyers who do transactional work have an incentive to define the subject of the representation in a way that limits the boundaries of a deal.³⁹ The expertise that the transactional lawyer brings to the negotiation tends to limit the range of possible solutions. In both settings, litigation and transactions, the skill and mindset that a lawyer employing an adversarial approach brings to the table tend to limit the settlement or deal to a band of solutions stretched between the initial positions of the parties.

2. *The Adversarial Approach is Case-Centered*

Adversarial negotiation is case-centered. If each side takes a position and slowly retreats from it, neither side has an incentive to go beyond the initial framing of the problem. Maintaining a focus on the initial case is practical for lawyers. Lawyers ordinarily begin their work by signing a contract with a client to resolve one dispute or to make one deal. Courts allow lawyers to define the disputes or transactions that they undertake.⁴⁰ The lawyer's contractual and ethical obligations to the client are heightened with regard to that one dispute or deal.⁴¹ The lawyer does not have a duty to solve all of a client's problems, and the client might not want to pay or commit to engaging the lawyer to help with all of her problems. The seriousness of a legal

³⁸ The pressure to reach settlements that approximate probable court decisions has the advantage of contributing to enforcement of the law and arguably enables parties who are less powerful than their adversaries to obtain just settlements.

³⁹ Menkel-Meadow, *supra* note 36, at 106 ("Dispute negotiation too often looks for its solutions among the legal precedents or outcomes thought likely in the 'shadow of the courthouse' (these days most often compromise of some monetary values), and deal negotiations too often seek solutions in the boilerplate language of form contracts for transactions.") (footnote omitted).

⁴⁰ See McNeal, *supra* note 27, at 315 ("Because the attorney-client relationship is primarily contractual in nature, the relationship is created by an express contract, an implied contract, or the client's detrimental reliance on the lawyer.")

⁴¹ See Menkel-Meadow, *supra* note 36, at 103 ("Legal negotiators, must, however, also be concerned with the role of law in solving problems, the difficulties of multi-party negotiations when one serves as an agent to another, the need for precedent and publicly announced rules, the differentiated incentives of different fee arrangements, and the specialized and rule-based ethical system in which lawyer negotiators must operate.") (footnotes omitted).

dispute or of a desired transaction causes the client to seek out a lawyer, and both the lawyer and the client have an incentive to restrict the subject matter of the representation to areas within the lawyer's expertise.

3. *The Adversarial Approach Discourages Disclosure of Information*

Adversarial negotiation protects the privacy of the parties. In adversarial negotiation each side generally seeks to protect its position by limiting the information available to the other side.⁴² This often takes the form of lawyers negotiating outside of the presence of their clients. Excluding clients from negotiations prevents the other side from observing the clients' reactions, discerning the clients' interests and values, and asking clients questions. Lawyers are conditioned to reveal only what needs to be revealed. Rules of ethics and rules of evidence enforce the idea that a client's confidences should not be revealed except by the consent of a client or the order of a court.⁴³ The adversarial approach conforms to the practice of guarding information carefully. Using the example of Anna and Betty, a lawyer following the adversarial approach would be unlikely to reveal that Betty is unable to pay her rent and is facing eviction. The information exposes Betty's weakness and vulnerability and might be exploited by Anna to press for a greater share of the award.

Some advocates of adversarial negotiation advise lawyers to disguise the true interests of their clients and to project feigned interests as a strategy for winning concessions from the other side.⁴⁴ In the past, negotiation strategies that relied on concealing facts and interests, delaying the release of information, or misleading opponents might have been considered to be consistent with zealous preparation for a trial. However, courts have not looked with favor on litigation strategies that conceal relevant information, and some court rules require early disclosure of relevant facts, even in the absence of a request by the adversary.⁴⁵

⁴² See, e.g., Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 780 ("The one strategic exhortation that seems to dominate most descriptions of adversarial negotiation is the admonition that the negotiator should never reveal what is really desired.")

⁴³ See Hurder, *supra* note 27, at 2270.

⁴⁴ See, e.g., GIFFORD, *supra* note 5, at 133-34 (describing approaches to concealing information used in adversarial negotiation); Michael Meltsner & Philip G. Schrag, *Negotiating Tactics for Legal Services Lawyers*, 7 CLEARINGHOUSE REV. 259 (1973) (advocating use of hard-bargaining tactics in legal negotiation).

⁴⁵ For example, the Federal Rules of Civil Procedure require disclosure of the following information soon after a case is filed without awaiting a discovery request, except in certain types of cases:

C. *The Problem-Solving Approach to Legal Negotiation*

The problem-solving approach to legal negotiation differs from the adversarial approach in three fundamental ways. First, the problem-solving approach is imaginative, rather than linear. It requires an imaginative search for solutions guided by a process based on negotiation theory. Second, the problem-solving approach is party-centered, rather than case-centered. It bases the search for solutions on the needs, interests, and values of the client and other parties to the negotiation, and thus the scope of the negotiation might expand beyond the initial scope of the case. Third, the problem-solving approach encourages disclosure of information and interests, rather than discouraging such disclosure.⁴⁶ The problem-solving approach risks disclosure of private information in order to take advantage of the benefits that can result from cooperation, while the adversarial approach is guarded with the release of information in order to protect each side from exploitation by the other and to avoid weakening each side's bargaining position.

1. *The Problem-Solving Approach Is Imaginative*

The problem-solving approach to legal negotiation is imaginative. It allows imagination to drive the search for solutions to disputes and problems. Problem-solving negotiation relies on the process described by negotiation theory, and it takes advantage of the creativity

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(E) . . . A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

FED. R. CIV. P. 26(a)(1).

⁴⁶ See RISKIN ET AL., *supra* note 14, at 165.

made possible by imagination and cooperation. *The fundamental insight of negotiation theory is that voluntary cooperation to meet complementary needs can create greater value than the cooperating individuals could create acting alone.*⁴⁷ Thus, individuals have incentive to cooperate, even with their adversaries in disputes. The search for complementary needs and lawful ways to meet them is limited only by the imagination.

Negotiation theory is a product of interdisciplinary analysis of the negotiating process. It combines the insights of many disciplines, including economics, mathematics, psychology, business management, law, and diplomacy, to generate a theory of how parties create and distribute value through negotiation. A brief overview of negotiation theory shows how a process that makes room for imagination can lead to mutual gains for negotiating parties.

a. Creating Value

Negotiation theory divides the negotiating process into two different types of activity: creating value and distributing value.⁴⁸ The first activity, creating value, is aimed at finding complementary interests and exploring agreements that can meet each other's needs. Creating value through negotiation is an economic activity.⁴⁹ Finding something that has less value to the person who has it than it does to the person who needs it can create value.⁵⁰ This is possible because people can have complementary interests, i.e., interests that are not mutually exclusive, interests that can be met without harming the other. In the case of an orange, a person who needs the juice and a person who needs the peel have complementary interests. Instead of fighting for possession of an orange they can share the orange, if they are able to discover each other's interests and agree to divide the or-

⁴⁷ In negotiation theory, value is created when the outcome of an agreement makes one or both of the parties better off than they would have been without the agreement. See MNOOKIN ET AL., *supra* note 4, at 12. For further discussion of the economic concept of value, see *infra* notes 48-52 and accompanying text.

⁴⁸ See, e.g., MNOOKIN ET AL., *supra* note 4, at 42-43 (explaining that value-creating opportunities and value-distributing opportunities are present in almost every negotiation)

⁴⁹ See Korobkin, *A Positive Theory of Legal Negotiation*, *supra* note 19, at 1792 (explaining that process of defining bargaining zone in order to create value is economic activity). See also DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 32 (1986) ("The economist's analogy is simple: creativity has expanded the size of the pie under negotiation. Value creators see the essence of negotiating as expanding the pie, as pursuing joint gains.").

⁵⁰ See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD, SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 54 (1992) ("The basic principle is simple: through negotiation one aims to discover and match what one side finds to be relatively cheap with what the other finds or expects to be more valuable.").

ange.⁵¹ Problem-solving negotiators learn about the other side's needs, interests and values by investigating, listening, asking questions, and making proposals.⁵² Negotiation theory makes the search for differences in needs, interests and values a strategic goal of negotiations.

Negotiation theory assumes that settlements and agreements are consensual. Each party to a negotiation is free to walk away from the bargaining table without a deal. Each party is assumed to have alternatives that can be pursued without the agreement of the other negotiator. Roger Fisher and William Ury coined the acronym BATNA, the "Best Alternative to a Negotiated Agreement," to describe the best option available to a party who walks away from a negotiation.⁵³ A party can discover a BATNA by examining the needs, interests, and values that led to the negotiation and by imagining all the ways the party can satisfy those needs without relying on the other party.⁵⁴ The process can require significant self-examination and creative planning.⁵⁵ In litigation contexts, the BATNA is often the possibility of a favorable decision by a third-party decision maker.

Furthermore, the needs and interests of a party are not just economic. Carrie Menkel-Meadow identified categories of needs that people seek to meet when they negotiate.⁵⁶ Needs can be economic, legal, social, psychological, ethical and moral.⁵⁷ Needs are idiosyncratic. One person might need to please a family member. Another person might feel a moral obligation to make reparations for causing an injury. Needs also change over time.⁵⁸ A person with few economic needs today might have major economic needs in the future. The legal system itself creates needs by creating obligations and im-

⁵¹ The orange case is a legendary example. See, e.g., MNOOKIN ET AL., *supra* note 4, at 17 n. 3 (attributing the example to Mary Parker Follett). For a discussion of Follett's trailblazing role in the field of negotiation theory, see *infra* notes 114-21 and accompanying text.

⁵² See MNOOKIN ET AL., *supra* note 4, at 35 (suggesting that negotiators ask the other side questions, such as, "What is important to you? Why? Why not? What else?"); Korobkin, *A Positive Theory of Legal Negotiation*, *supra* note 19, at 1804.

⁵³ See FISHER ET AL., *supra* note 16, at 100. See also HOWARD RAIFA, *THE ART AND SCIENCE OF NEGOTIATION* 45 (1982) (crediting Roger Fisher and William Ury with the first use of the term BATNA).

⁵⁴ In litigation contexts, a party's BATNA is often the anticipated resolution of the dispute by a court or agency, with adjustments for such factors as the costs of the litigation and the risk aversion of the party. However, a party who has initiated a legal proceeding might find that her best alternative to a negotiated agreement is to dismiss the proceeding and to pursue another activity altogether.

⁵⁵ See FISHER ET AL., *supra* note 16, at 103-04 (describing the process of developing a BATNA).

⁵⁶ See Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 795.

⁵⁷ See *id.*, at 803.

⁵⁸ See *id.*

posing remedies.

The negotiating process requires an individual to put a value on the BATNA in order to determine the point at which the individual would just as soon walk away from the negotiation as make an agreement.⁵⁹ Mnookin, Peppet, and Tulumello call this point the "reservation value."⁶⁰ The reservation value can be expressed in money or in anything else that has value to the party.⁶¹ It could be expressed in crates of fruit, days of visitation with a child, or hours of instruction by a special education teacher.⁶² Both parties must determine a reservation value in order to decide whether to make an agreement.

A central problem of negotiation is that neither party can know precisely the reservation value of the other party. A negotiator can only estimate the reservation value of the other negotiator.⁶³ Nevertheless, estimating the reservation value of the other side is essential to effective negotiation. Estimating another person's reservation value in a negotiation requires learning about the other person's needs, interests and values. For that reason, every negotiator must develop an approach to learning about the other side.⁶⁴

Mnookin and his colleagues call the range of values between the reservation values of two parties the zone of possible agreement (ZOPA).⁶⁵ If either party requires more to meet her reservation value than the other party is willing to give, then no agreement is possible. However, if each party has a reservation value that could potentially satisfy the other party, then they can reach agreement if they can find a point between the two reservation values that satisfies them both.

⁵⁹ See MNOOKIN ET AL., *supra* note 4, at 19.

⁶⁰ See *id.* See also RAIFA, *supra* note 53, at 45 (calling it "reservation price"). Korobkin also calls it a "reservation point." See Korobkin, *A Positive Theory of Legal Negotiation*, *supra* note 19, at 1792 ("In any negotiation, the maximum amount that a buyer will pay for a good, service, or other legal entitlement is called his 'reservation point' or, if the deal being negotiated is a monetary transaction, his 'reservation price.'").

⁶¹ See KOROBKIN, *NEGOTIATION THEORY*, *supra* note 19, at 41 ("If a negotiator is offering or demanding time, praise, labor, or any other commodity besides money, the party's reservation price, or reservation point, is the most he will give or the least he will accept of whatever the relevant commodity is.").

⁶² See, e.g., Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 800 ("The exploitation of complementary interests occurs frequently in the legal context. For example, in a child custody case the lawyers may learn that both parties desire to have the children some of the time and neither of the parties wishes to have the children all of the time. It will be easy, therefore, to arrange for a joint custody agreement that satisfies the needs of both parties.").

⁶³ See KOROBKIN, *NEGOTIATION THEORY*, *supra* note 19, at 156.

⁶⁴ See Korobkin, *A Positive Theory of Legal Negotiation*, *supra* note 19, at 1804 ("Good negotiators do as much or more 'asking' as they do 'telling.'").

⁶⁵ See MNOOKIN ET AL., *supra* note 4, at 19-21. Korobkin refers to the zone of possible agreement as the bargaining zone. KOROBKIN, *NEGOTIATION THEORY*, *supra* note 19, at 111-13.

The value created by the difference between the two reservation values is a critical concept of negotiation theory. It becomes the surplus when the parties make an agreement.⁶⁶ If the difference between the reservation values of the two parties is large, then there will be a relatively large amount of potential surplus to be divided between the parties. The parties lose this potential value if either side walks away. Parties to a negotiation can increase surplus by discovering complementary needs. Each party identifies a subject for trade that has less value to the party who has it than it does to the party who needs it and offers it in trade for something that the other party can provide.⁶⁷ For instance, a noncustodial parent who wants visitation with a child on holidays might discover that the custodial parent needs someone to keep the child while she is on business trips. If the noncustodial parent places a higher value on having the child during holidays than on not having to keep the child while the other parent is on business trips, and the custodial parent places a higher value on having a trusted caretaker for the child while she is traveling than on having the child on holidays, then an agreement is possible. The zone of possible agreement could be small, as in a potential exchange of one day of holiday visitation for one business trip, or it could be larger, as in offering visitation with the child on all holidays in exchange for taking care of the child any time the custodial parent has to leave on business. The parents explore their respective needs and interests through the negotiating process. Each side might have to offer more or less depending on the value of each offer to the other side. For instance, if the noncustodial parent has to forego work opportunities to care for the child, then the custodial parent might increase the value of her offer by adding weeks of visitation during summer vacation. Korobkin refers to this process of discovering possible subjects for trade as zone definition.⁶⁸ In general, problem-solving negotiators try to define the zone of possible agreement in a manner that creates as much potential surplus as possible.⁶⁹ The parties either combine or divide possible subjects of trade so that the difference between the reservation values of the parties becomes as large as possible. In other words, the negotiators define and redefine the subject of negotiation in order to maximize the zone of possible agreement.⁷⁰

In the example of Anna and Betty, the initial zone of possible

⁶⁶ See MNOOKIN ET AL., *supra* note 4, at 19-21.

⁶⁷ See *id.* at 31.

⁶⁸ See Korobkin, *A Positive Theory of Legal Negotiation*, *supra* note 19, at 1794.

⁶⁹ See *id.* at 1814 (“Concentrating on interests allows negotiators to redefine the negotiation’s subject matter when doing so produces a larger bargaining zone.”).

⁷⁰ See, e.g., MNOOKIN ET AL., *supra* note 4, at 13 (giving example of conversation between two negotiators seeking to expand zone of possible agreement).

agreement was the difference between Anna's reservation value of \$500.00 and Betty's reservation value of \$100.00. Thus, there was a surplus of \$400.00 that could be distributed between the parties. Anna received \$600.00, of which \$500.00 was her reservation value and \$100.00 was surplus. Betty received \$400.00, of which \$100.00 was her reservation value and \$300.00 was surplus. Because they expanded the zone of possible agreement by redefining the subject matter of the negotiation, Anna also gained a tenant and a source of income. Betty acquired a roommate and a place to live. Both Anna and Betty were better off than they would have been without the deal.⁷¹

Korobkin describes the process of defining the zone of possible agreement as an economic activity.⁷² It is aimed at creating value. If both parties can obtain something of greater value to themselves through trade than they can obtain through other alternatives, then it is economically rational to reach an agreement. The final act of making the agreement creates actual economic value for both sides.⁷³

b. *Distributing Value*

Korobkin distinguishes the economic activity of *creating* value through negotiation from the social activity of *distributing* the value created by the negotiation.⁷⁴ He refers to the social activity of distributing the value created as "surplus allocation."⁷⁵ Surplus allocation,

⁷¹ Anna and Betty also had reservation values for the additional subject matter of the deal. If Anna had a reservation value of \$300.00 a month for a year's rent and Betty had a reservation value of \$500.00 a month for the year, the additional surplus to be divided would have been \$2,400.00 for the year. By agreeing on \$400.00 a month, they divided the additional surplus equally.

⁷² See Korobkin, *A Positive Theory of Legal Negotiation*, *supra* note 19, at 1792 ("Because transactions are economically rational – in the sense that reaching agreement is better than not reaching agreement for both parties – only at points within the bargaining zone, zone definition can be understood as an inherently economic activity.").

⁷³ The leading negotiation theorists rely on concepts developed by economist Vilfredo Pareto to describe how trade creates value beyond that which the parties bring to the table and how trade distributes the created value to the trading parties when an agreement is made. See MNOOKIN ET AL., *supra* note 4, at 12 n.1.

⁷⁴ See Korobkin, *A Positive Theory of Legal Negotiation*, *supra* note 19, at 1792 (describing surplus allocation as an "inherently social activity."). Economic theory has developed a standard of efficiency to evaluate the integrative potential of trading agreements. The standard, known as the "Pareto optimal frontier," allows economists to judge the potential of an agreement to create value. See MNOOKIN ET AL., *supra* note 4, at 12 n.1. However, economic theory does not provide a widely accepted normative standard for the distribution of value created by trade. Negotiating parties must turn to social conventions, such as fairness, custom or morality, to decide how to distribute value. For a discussion of the distinction between positive and normative economics, see PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 7-8 (18th ed. 2005).

⁷⁵ See Korobkin, *A Positive Theory of Legal Negotiation*, at 1792 ("Surplus allocation effectively divides the cooperative surplus that the parties create by reaching an

according to Korobkin, “usually requires that negotiators appeal to community norms of either procedural or substantive fairness.”⁷⁶ Korobkin identifies three substantive norms that are frequently invoked in deciding how to make a just distribution of value.⁷⁷ The first is the principle of equality, by which benefits are divided equally.⁷⁸ The second is the principle of equity, by which benefits are distributed according to the contribution or merit of the parties.⁷⁹ The third is the principle of need, by which benefits are distributed according to the individual need of the parties.⁸⁰

Returning to the example, in their attempts to persuade each other, Anna appealed to the principle of equity, arguing that she made the primary contribution to obtaining the reward. Betty appealed to the principle of equality. However, the settlement that satisfied both parties relied heavily on the principle of need.

Fisher and Ury also identify norms that come into play in the distribution of surplus.⁸¹ They urge negotiators to refer to standards such as market value, legal precedent, and moral values to justify a desired distribution.⁸² Reference to such neutral principles is key to their vision of “principled negotiation.”

The two activities of negotiation, creating value and distributing value, both involve elements of cooperation and competition. Rather than being alternative styles of negotiation, cooperation and competition coexist in all negotiation. The parties cooperate by revealing information about their own needs, interests, and values and by brainstorming about possible solutions that would generate value for both sides. They compete by giving out information that supports their goals, withholding information that might put them at a disadvantage, and attempting to persuade the other party that a deal is more advantageous than the probable alternatives.

Both sides compete by attempting to persuade each other to allocate the new value created by the negotiation in a manner most favorable to themselves. Lawyers often focus on the probable outcome of litigation as the standard for distributing value, but the parties to a negotiation are free to turn to other standards, which might

agreement.”).

⁷⁶ *Id.*

⁷⁷ See KOROBKIN, *NEGOTIATION THEORY*, *supra* note 19, at 209-10. See also FISHER ET AL., *supra* note 16, at 85 (suggesting standards of fairness, such as market value, precedent, or moral standards).

⁷⁸ See KOROBKIN, *NEGOTIATION THEORY*, *supra* note 19, at 210.

⁷⁹ *Id.* at 210-11.

⁸⁰ *Id.* at 210.

⁸¹ FISHER ET AL., *supra* note 16, at 85-87.

⁸² *Id.* at 85.

include ethical, moral, religious, political or economic values.

2. *The Problem-Solving Approach Is Party-Centered*

Problem-solving negotiation is party-centered. Its goal is to create solutions that satisfy needs of the parties. For a lawyer, this means that the starting point of negotiation is to explore the needs of a client – and clients have many different kinds of needs. Carrie Menkel-Meadow identified economic, social, psychological, ethical, and moral needs, as well as legal needs.⁸³ There are undoubtedly others.⁸⁴ Thus, the foundation of problem-solving negotiation is investigation of a client's needs and interests rather than analysis of legal rights, duties and potential remedies.⁸⁵ Investigation of a client's needs begins with lawyer-client communication, but it also requires a lawyer to rely on other sources of knowledge about a client and the culture and community in which a client lives.⁸⁶ Advocates of problem-solving negotiation have recognized the close connection between the lawyer's duty to explore a client's needs and the client-centered approach to legal interviewing and counseling.⁸⁷

The term problem-solving reflects the focus on the client's needs as the starting point of problem-solving negotiation. Ordinarily, lawyers view the subject matter of their work for a client as a case. The reference to a problem rather than a case suggests a broader view of the lawyer's role than the lawyer's traditional conception of a case implies.⁸⁸ One difference between the problem-solving approach and

⁸³ See Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 803.

⁸⁴ Menkel-Meadow later added religious and political needs. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2677 (1995).

⁸⁵ The needs and interests created by legal rights and duties are among the factors that must be investigated to prepare for problem-solving negotiation.

⁸⁶ See, e.g., Menkel-Meadow, *supra* note 36, at 109 n.52 ("My use of needs rather than interests alone has been quite deliberate and reflects several important jurisprudential challenges to conventional conceptions of negotiation in the legal system. First, lawyers should have an obligation to explore client's needs that may be beneath the articulated surface, both for individuals who may not be able to express those needs readily and for organizational or entity clients who may need to be reminded of long-term needs of the organization, rather than short-term goals of the person representing the entity. Second, my problem solving negotiation is heavily influenced by work in feminist theory that suggests that clients have needs that may not be fully recognized by the formal legal system.").

⁸⁷ See, e.g., MNOOKIN ET AL., *supra* note 4, at 178 ("Behind the table, a lawyer's goal is to establish a client-centered, collaborative relationship that supports problem-solving negotiation.").

⁸⁸ See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994) (describing lawyer's traditional conception of case and arguing for broader conception). See also Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 826 ("Parties can agree to settle on principles such as community norms or values that are broader than those the court can consider."); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLIN. L. REV. 427, 491-92 (2000) (observing that

the traditional adversarial approach is the problem-solving negotiator's belief that legal negotiation requires a search for remedies that go beyond the "limited remedial imagination of courts."⁸⁹ Carrie Menkel-Meadow argues that problem-solving negotiation allows the parties to redefine problems and create new remedies in cases where the law might be unfair in the specific circumstances of a dispute or too uncertain to guide the parties.⁹⁰

Problem-solving negotiation encourages creativity in setting substantive goals. It requires preparation that fits its potential for creativity. Because problem-solving negotiation does not rely exclusively on legal analysis and legal precedent for its solutions, an effective lawyer must have enough knowledge of a client's needs, interests and personal values to imagine a variety of ways to meet the client's substantive goals. The lawyer must also engage in a dialogue with the client to develop proposals that rely on the economic, social, and cultural expertise of the client.⁹¹ Furthermore, a lawyer must work with a client to frame a story that incorporates the facts and values of the client in a way that will be persuasive to the other side.⁹²

Because problem-solving negotiation is party-centered rather than case-centered, a lawyer must be capable of exploring the differences between the sides in order to find opportunities to create value. Learning about differences begins with recognition of the unique

lawyers narrow disputes by determining scope, substantive and procedural norms, rules of relevance, cast of characters, and available remedies).

⁸⁹ See Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 791 ("The limited remedial imagination of courts, when extended to negotiation, narrows not only what items might be distributed but also how those items might be apportioned."). See also Menkel-Meadow, *supra* note 84, at 2674-75 ("[U]ntil litigation is permitted to recognize the ambiguities and contradictions in modern life by developing a broader 'remedial imagination,' settlement offers the opportunity to craft solutions that do not compromise, but offer greater expression of the variety of remedial possibilities in a postmodern world.") (footnotes omitted).

⁹⁰ See Menkel-Meadow, *supra* note 84, at 2676-77. Menkel-Meadow recognizes that legal precedent is an ever-present factor in legal negotiations. See *id.* at 2677-78. See also Robert H. Mnookin & L. Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

⁹¹ See, e.g., Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFFALO L. REV. 71 (1996) (recommending counseling process that permits dialogue between lawyer and client).

⁹² A story is a means of expressing the experience of the client, but it is also a means of appealing to the values of an audience. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984). See also Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLIN. L. REV. 9 (1994) (discussing how lawyers use storytelling to convey moral values and to persuade listeners); Alex J. Hurder, *The Pursuit of Justice: New Directions in Scholarship About the Practice of Law*, 52 J. OF LEGAL EDUC. 167, 182-86 (2002) (discussing lawyer's responsibility to clients, legal system, and public when framing story of case).

identity and culture of the client.⁹³ Learning the needs, interests and personal values of a client requires sensitivity to the client's history and experience.⁹⁴ Learning the needs, interests and personal values of the other side requires what Mnookin and his colleagues call "perspective-taking."⁹⁵ The lawyer and client try to imagine what it is like to walk in the other party's shoes. The process of building a relationship between a lawyer and client, which includes recognition of inevitable differences of identity, culture and perspective, prepares the lawyer-client team for the task of appreciating the identity, culture and perspective of the other side.⁹⁶ In problem-solving negotiation such differences can be the source of solutions that create value.

The problem-solving approach also recognizes the need for lawyers to collaborate with other professionals, such as social workers, psychologists, economists, or financial planners, in the search for solutions to a dispute.⁹⁷ The emphasis on finding imaginative solutions to problems and disputes encourages an interdisciplinary approach to problem-solving.⁹⁸ A social worker might be able to devise imaginative solutions to a family problem. A psychologist might be able to propose innovative solutions to a sentencing dispute in a criminal case. An accountant might have knowledge needed to formulate proposals for a business transaction. Focusing on the client frees the negotiating lawyer from the limits of legal categories and remedies in the search for solutions in a dispute or transaction.

3. *The Problem-Solving Approach Promotes Disclosure of Information*

A key difference between problem-solving negotiation and adversarial negotiation is the approach to disclosure of information about the negotiating parties.⁹⁹ Adversarial negotiation is guarded with information. Problem-solving negotiation asks that lawyers ap-

⁹³ This is true even if the client is an organization. See, e.g., THE MACCRATE REPORT, *supra* note 1, at 94 ("It is maintained by some corporate law departments that the cost per hour for in-house counsel is half that for outside counsel, making the further point that in-house counsel are familiar with the corporate culture and with personnel.").

⁹⁴ See Hurder, *supra* note 92, at 172-74 (describing ways of learning about clients and the communities with which they identify).

⁹⁵ See MNOOKIN ET AL., *supra* note 4, at 47.

⁹⁶ See *id.*, at 180-82.

⁹⁷ See, e.g., Menkel-Meadow, *When Winning Isn't Everything*, *supra* note 2, at 910 ("To solve human problems and climb the mountain or get out of the forest, a good problem solver wants diversity in thinking, human beings to do that thinking, and some people who can effectively coordinate the action.").

⁹⁸ See Kruse, *supra* note 9, at 393-94 (describing trend toward collaboration between lawyers and other professionals).

⁹⁹ See GIFFORD, LEGAL NEGOTIATION, *supra* note 5, at 120-22.

ply a different standard: to disclose any helpful information that does not need to be concealed. Problem-solving negotiation relies on the disclosure of needs, interests and values. Sometimes information can be gathered from third parties, but knowledge of needs, interests and values belongs primarily to the person who has them. The system works best with honest disclosure.¹⁰⁰

Problem-solving negotiation makes demands on the lawyer-client relationship. It requires a lawyer to have a rather comprehensive idea of the needs, interests and personal values of a client in order to negotiate the solution to a problem. It requires spending more time with a client, and it requires more disclosure by a client to the lawyer. The lawyer who customarily refrains from asking questions that do not relate to a particular dispute or transaction must learn to seek information about the client as a person.

Problem-solving negotiation does not rely on misleading an adversary to reach an agreement.¹⁰¹ Although the problem-solving approach does not require total disclosure of a party's secrets and confidences, it requires that parties take the risk of exposing themselves to some degree. Because problem-solving negotiation relies on disclosure rather than secrecy, preparation for negotiation requires evaluation of information to determine what should be disclosed. Problem-solving negotiation permits protection of secrets that would be injurious to a party if they were disclosed. Thus, effective negotiation requires a lawyer and client to evaluate information before discussions with the other side begin. Sharing information that can be released at manageable cost to the client makes the possibility of a settlement that creates value more likely.¹⁰² It must be recognized that disclosure of some information has the potential to subject one side to exploitation by the other. In such cases, a lawyer and client must weigh the risk of disclosing confidential information against the potential of a value-creating settlement.¹⁰³

¹⁰⁰ See MNOOKIN ET AL., *supra* note 4, at 25 (explaining that negotiators "can create value by reducing the risk of deception and overcoming information asymmetries"); Korobkin, *A Positive Theory of Legal Negotiation*, *supra* note 19, at 1815-16 ("[T]he value that can be created by integrative bargaining requires a truthful exchange of information."); Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 822 ("The problem solver recognizes that he is more likely to develop solutions which meet the parties' needs by revealing his own needs or objectives, while at the same time trying to learn about the other party's.").

¹⁰¹ See FISHER ET AL., *supra* note 16, at 13.

¹⁰² See MNOOKIN ET AL., *supra* note 4, at 35 ("At the table, the joint task for Stephanie and Bradford is to identify each other's interests, resources, and capabilities – the prerequisites for value-creating trades.).

¹⁰³ Mnookin and his colleagues identify an inherent tension in every negotiation between the potential to create value by sharing information and the risk that the other side will exploit the information without making reciprocal disclosures. See *id.* at 17.

To summarize, problem-solving negotiation depends on an approach to legal interviewing and counseling that educates the lawyer about the needs, interests and personal values of the client. It also requires an approach that involves the client in a collaborative effort to learn the needs, interests, and values of the other side. In short, problem-solving negotiation requires the kind of lawyer-client communication that client-centered interviewing and counseling facilitates.

II. THE LAWYER'S DILEMMA

David A. Lax and James K. Sebenius coined the term "negotiator's dilemma" to describe the difficult choice that negotiators must make between tactics aimed at *creating* value and tactics aimed at *claiming* value in negotiation.¹⁰⁴ The dilemma results from the fact that the cooperative behavior and information sharing necessary to reach a value-creating agreement expose one side to possible exploitation by the other side.¹⁰⁵ On the other hand, concealing information and misleading the other side can deprive both sides of potential value.¹⁰⁶ Lax and Sebenius concluded that the dilemma exists in all negotiations, because the activities of creating value and claiming value are present in every negotiation.¹⁰⁷

Lawyers also face a dilemma. If they choose to negotiate, they must not only resolve the negotiator's dilemma, but they must resolve it in the context of an adversarial legal system that is commonly considered to place limits on cooperation with an adversary. Lawyers can attempt to escape the negotiator's dilemma by disregarding the value-creating potential of negotiation. However, to the extent that lawyers ignore the principles of negotiation theory, they overlook opportuni-

¹⁰⁴ LAX & SEBENIUS, *supra* note 49, at 29-45 (describing "Negotiator's Dilemma"). For a discussion of the contribution of the Lax and Sebenius text to negotiation theory, see Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 OHIO ST. J. ON DISP. RESOL. 669, 699-700 (2003) ("The book's core contribution to the field of negotiation theory and practice was its articulation of the concept of the 'Negotiator's Dilemma.'"). The phrase "Negotiator's Dilemma" is derived from a problem used by mathematicians in game theory, known as the "Prisoner's Dilemma." In the prisoner's dilemma, two prisoners have the option of cooperating with each other or betraying each other in negotiating their plea bargains. Mathematicians explore the probability of the consequences for each prisoner of cooperating with the other prisoner versus turning against the other prisoner. For a brief description of the game, see KOROBKIN, *NEGOTIATION THEORY*, *supra* note 19, at 224-25.

¹⁰⁵ See LAX & SEBENIUS, *supra* note 49, at 34 (describing risks involved in revealing information) and preferences).

¹⁰⁶ See, e.g., *id.* at 39 ("Individually rational decisions to emphasize claiming tactics by being cagey and misleading lead to a mutually undesirable outcome.").

¹⁰⁷ See *id.* at 33 ("An essential tension in negotiation exists between cooperative moves to create value and competitive moves to claim it.").

ties to generate economic, social and psychological benefits for their clients. Negotiation theory teaches that differences of interests are the source of value in negotiation, and differences of interests are likely to be pronounced in legal disputes. The decision not to use a problem-solving approach reduces the options available to clients. The better choice for lawyers is to embrace the principles of negotiation theory and to become partners with their clients in the search for value-creating solutions.

Clinical legal education has focused on client-centeredness as an overall approach to lawyering,¹⁰⁸ but the client-centered approach has not fully incorporated or embraced the principles of problem-solving negotiation theory. Consequently, client-centered lawyering theory has not had the impact on approaches to negotiation and advocacy that it has had on legal counseling. Ironically, leading advocates of problem-solving negotiation have endorsed a client-centered approach to legal interviewing and counseling as effective preparation for negotiation.¹⁰⁹ The unwillingness of client-centered theory to adopt a prescriptive embrace of problem-solving negotiation limits its utility as a theory of lawyering. Advocates of the client-centered approach give little guidance concerning how the principles and values that gave rise to client-centered counseling should be put into practice when lawyers interact with adverse counsel and their clients.

The problem-solving approach to negotiation and the client-centered approach to counseling emerged from distinct historical and philosophical trends. Their different histories have led them to take parallel paths without embracing each other. A brief examination of the historical and philosophical roots of the two approaches to lawyering will demonstrate that the two approaches share many values, concerns, and techniques. Indeed, their overlapping and complementary interests warrant a mutual embrace.

A. *Origins of the Problem-Solving Approach to Negotiation*

The problem-solving approach to negotiation is a product of political movements that converged in the 1970's, especially the movement for collective bargaining in labor-management relations and the movement for court reform. The movement for collective bargaining in labor-management relations, which resulted in the National Labor Relations Act of 1935, gave rise to a continuum of approved dispute-resolution processes, including negotiation, mediation, and arbitra-

¹⁰⁸ See, e.g., CHAVKIN, *supra* note 5, at 51-57.

¹⁰⁹ See, e.g., MNOOKIN ET AL., *supra* note 4, at 178 (recommending collaborative, client-centered lawyer-client relationship); RISKIN ET AL., *supra* note 14, at 103-107 (describing own model of collaborative, client-centered interviewing).

tion.¹¹⁰ For many years, dispute-resolution professionals from the field of labor-management relations reached out to their counterparts in other fields in search of a common agenda.¹¹¹ They found allies in the movement for court reform. The court reform movement that emerged in the 1970's adopted Alternative Dispute Resolution (ADR) as a solution to problems in the administration of justice.¹¹² The subsequent development of ADR as an academic field led to an interdisciplinary exploration of negotiation theory.¹¹³

The philosophical basis of the problem-solving approach to negotiation has rested on a commitment to social organization and human relationships. Mary Parker Follett introduced the idea of integrative bargaining in the 1920's as a justification for promoting collective bargaining between management and labor.¹¹⁴ She worked out many of the principles of negotiation theory in collaboration with Northwestern University economist, Frederick S. Deibler.¹¹⁵ She demonstrated that negotiation between people with different needs and values had the potential to create value.¹¹⁶ Thus, managers who needed labor and workers who needed income could trade their resources and create benefits for both sides. The resulting agreements had the additional advantages of securing industrial peace, reducing conflict, and increasing the wealth of society.

Follett used the word "integration" to describe the process of negotiation through which two or more parties create greater value acting together than the combined value of that which they could create acting separately.¹¹⁷ She drew on the discipline of economics to make the case that each person's subjective evaluation of a resource to be

¹¹⁰ See Sanchez, *supra* note 104, at 681-82.

¹¹¹ See *id.*, at 679.

¹¹² See *id.* (citing three central concerns: overloaded court dockets, needs for specialized private fora, and ideals of "access to justice for all").

¹¹³ See *id.* at 677-700.

¹¹⁴ See *id.* at 684; Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 7 (2000) (identifying Follett as one of "mothers of invention in ADR"). See also MARY PARKER FOLLETT, *CREATIVE EXPERIENCE* 156-78 (1924) (describing creative potential available through integration of diverse interests).

¹¹⁵ See Sanchez, *supra* note 104, at 773 n.217.

¹¹⁶ See FOLLETT, *supra* note 114, at 163-65. See also FREDERICK S. DEIBLER, *PRINCIPLES OF ECONOMICS* (1929). Carrie Menkel-Meadow summarizes Follett's approach to generating integrative solutions from differing interests in Menkel-Meadow, *supra* note 114, at 7-10.

¹¹⁷ See Jane Mansbridge, *Foreword: Mary Parker Follett: Feminist and Negotiator* (1998), in MARY PARKER FOLLETT, *THE NEW STATE: GROUP ORGANIZATION THE SOLUTION OF POPULAR GOVERNMENT* xxiii (1918) ("Follett's alternative to the three evils of aggregation, compromise, and concession, along with her later word 'integration' for her alternative, have now become accepted wisdom in negotiation theory.") See also FOLLETT, *supra* note 114, at 156-65 (1924) (discussing concept of "integration").

traded translates into objective value when a trade is made.¹¹⁸ The difference between the subjective evaluations that make each side willing to trade with a willing partner, described today as the surplus, becomes actual economic value when the sides reach an agreement. The agreement divides what they have created.

Follett's ideas were translated into legislation in the National Labor Relations Act of 1935 (NLRA), which required bargaining in "good faith" in labor relations and imposed penalties for refusal to bargain.¹¹⁹ In 1947, Congress added provisions to the NLRA supporting voluntary mediation and conciliation of labor disputes and establishing the Federal Mediation and Conciliation Service.¹²⁰ The collective bargaining system of management and labor remained the primary standard bearer for integrative bargaining and alternative dispute resolution until the 1960s and 1970s when negotiation theory gained adherents in business schools and law schools.¹²¹

Richard Walton and Robert McKersie paved the way in academia for a theoretical analysis of negotiation.¹²² In 1965, Walton and McKersie described the negotiation process in labor-management relations as a mix of integrative and distributive behaviors.¹²³ In their theory,

¹¹⁸ See Sanchez, *supra* note 104, at 772-73. See also DEIBLER, *supra* note 116, at 176 ("[V]alue is a market phenomenon which arises only when goods are being exchanged. In this sense, then, value must be regarded as an objective fact. However, value should be distinguished from the process of evaluation which is a subjective act.").

¹¹⁹ See 29 U.S.C. § 158(a)(5) (making it unlawful for employer to refuse to bargain collectively with representatives of its employees); 29 U.S.C. § 158(b)(3) (making it unlawful for labor organization to refuse to bargain collectively with employer); 29 U.S.C. § 158(d) ("[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."). See also Sanchez, *supra* note 104, at 678 n.17 (giving brief history of federal legislation promoting alternative dispute resolution).

¹²⁰ See 29 U.S.C. § 172 (establishing Federal Mediation and Conciliation Service). See also 29 U.S.C. § 173(a) ("It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation."). The NLRA inaugurated a system of alternative dispute resolution by setting up a continuum of publicly sponsored processes to resolve private disputes. The continuum included mandatory bargaining enforced by the NLRB and federal courts, voluntary mediation and conciliation, and provisions for submission of disputes to third party binding arbitration. See Sanchez, *supra* note 104, at 681-82.

¹²¹ See *id.* at 679.

¹²² See RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR RELATIONS, AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM* (2d ed. 1991) (1965). See also Sanchez, *supra* note 104, at 687 n.35 (describing academic impact of text by Walton and McKersie).

¹²³ See WALTON & MCKERSIE, *supra* note 122, at 161-62; Sanchez, *supra* note 104, at

integrative behaviors aim at creating value and distributive behaviors aim at dividing limited resources between the parties.¹²⁴ Influenced by Follett, they called negotiating behavior aimed at mutual gain "integrative" because it had the potential to create value by integrating the complementary needs and interests of the parties.¹²⁵ In their view, both integrative and distributive behaviors are joint decision-making processes and thus involve elements of cooperation and competition.¹²⁶ As a result, the problem-solving approach embraces both cooperative and competitive behaviors. Walton and McKersie recognized that joint gain was possible only because of the relationship between the negotiating parties.¹²⁷

The movement for court reform in the 1970s, spearheaded in part by Chief Justice Warren E. Burger and Harvard University President Derek Bok, turned to negotiation theory and alternative dispute resolution as a means of dealing with overcrowded court dockets and perceived popular dissatisfaction with the administration of justice.¹²⁸ Advocates of court reform sought to apply the vision of early Twentieth Century reformers such as Mary Parker Follett and Roscoe Pound, Dean of Harvard Law School, to the problems caused by the rapidly growing dockets of American trial courts. Roscoe Pound had corresponded with Follett during her crusade for peaceful relationships between management and labor.¹²⁹ Pound had championed an approach to law known as sociological jurisprudence.¹³⁰ He saw law as a means of ordering and improving human relations.¹³¹ Leaders of the movement for court reform invoked Pound's legacy by naming the national conference on court reform held at Harvard University in 1976 the Pound Conference in his honor.¹³²

In a speech to the Pound Conference, Chief Justice Burger pro-

687-88.

¹²⁴ See WALTON & MCKERSIE, *supra* note 122, at 4-5.

¹²⁵ See *id.* at 7.

¹²⁶ See *id.* at 5 ("Integrative bargaining and distributive bargaining are both joint decision-making processes.").

¹²⁷ See *id.* at 23-24 ("The joint gain grows out of the relationship and is something that is not available to either side elsewhere.").

¹²⁸ See Sanchez, *supra* note 104, at 679 & 680 n.23.

¹²⁹ See *id.* at 684.

¹³⁰ See *id.* at 674. See also Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

¹³¹ See Sanchez, *supra* note 104, at 674 n.9.

¹³² See Sanchez, *supra* note 104, at 679. See also Judith Resnik, *Many Doors? Closing Doors?: Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 216 (1995). The proceedings of the Pound Conference are published in *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79-246 (1976).

posed institutionalization of ADR within the court system.¹³³ Frank E. A. Sander called for a “multi-door courthouse” that would embrace a variety of methods of dispute resolution.¹³⁴ The Pound Conference sparked wide academic interest in ADR and negotiation theory.¹³⁵ The ensuing Harvard Program on Negotiation brought together scholars from law, business, government, economics, mathematics and other disciplines.¹³⁶ Program participants Roger Fisher and William Ury published their text, *Getting to Yes*,¹³⁷ in 1981, endorsing a cooperative approach to negotiation.¹³⁸ Participant Howard Raiffa from the Harvard Business School published *The Art and Science of Negotiation* a year later in which he recommended integrative negotiation as the preferred approach to negotiation.¹³⁹ Both Raiffa and the team of Fisher and Ury drew heavily on personal experience in international peace negotiations.

Carrie Menkel-Meadow turned to personal experience in clinical legal education to apply Fisher and Ury’s interest-based approach to the resolution of legal disputes.¹⁴⁰ In her influential 1984 article, she adopted the term “problem-solving” to describe an approach to legal negotiation that emphasizes a search for creative solutions based on the needs of the client.¹⁴¹ Both the term “problem-solving” and Menkel-Meadow’s identification of needs have been widely accepted

¹³³ See Warren E. Burger, *Agenda for 2000 A.D. – A Need for Systematic Anticipation*, 70 F.R.D. 83, 93-96 (1976).

¹³⁴ See Frank E. A. Sander, *Varieties of Dispute Resolution*, 70 F.R.D. 111 (1976). The phrase “multi-door courthouse” was not used in Sander’s speech, but was widely used later to describe Sander’s proposal. See Resnik, *supra* note 132, at 216 n.19.

¹³⁵ See Sanchez, *supra* note 104, at 692 (“After the Pound Conference of 1976, a notable synergy developed across interdisciplinary lines that paved the way for the institutionalization of ADR in legal academia and a move to augment descriptive theory with prescriptive, in keeping with the aims of the ‘new’ field of ADR pedagogy.”).

¹³⁶ See *id.*, at 693 (“In the post-Pound Conference era, Harvard University became the situs for concentrated interdisciplinary collaborations germane to the theory and practice of ADR. In 1982, the Harvard Program on Negotiation, working with faculty members from Harvard Law School, Harvard Business School, and Harvard’s Kennedy School of Government, as well as from the Sloan School of Management at MIT, and other universities in Boston and its suburbs, founded the ‘Negotiation Roundtable’ as a forum for sharing ideas about negotiation and dispute resolution.”).

¹³⁷ FISHER ET AL., *supra* note 16.

¹³⁸ See Sanchez, *supra* note 104, at 693.

¹³⁹ See RAIFFA, *supra* note 53. See also Sanchez, *supra* note 104, at 693 (describing impact of Raiffa’s text).

¹⁴⁰ See Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 762 (1984) (The impetus for this Article came from many years of watching teachers and students in clinical programs struggle to understand negotiation, primarily through strategic and tactical considerations. What we lack are sufficiently clear overarching theories or frameworks which would enable us to understand better the complexity of legal negotiations.”).

¹⁴¹ See *id.*, at 757-58.

by scholars of negotiation theory.¹⁴² Menkel-Meadow's analysis of the actual needs of negotiating parties helped transform the theory of integrative bargaining, developed in the context of union collective bargaining, into an approach to negotiation of legal disputes.¹⁴³

The problem-solving approach to negotiation incorporated the principles of integrative bargaining and applied them to a model of negotiation for lawyers. Lawyers who follow the problem-solving approach must focus not only on the needs and values of their clients, but also on the needs and values of their clients' counterparts in order to serve their clients well.¹⁴⁴ The process of problem solving requires an attempt to understand the actual needs and preferences of both sides in a dispute.¹⁴⁵ The problem-solving model proposed by Menkel-Meadow recognized that parties to disputes and transactions often place a high value on non-monetary concerns, such as meeting a legal obligation, satisfying a relative, relieving anxiety, or being fair.¹⁴⁶ These non-economic needs are often tied closely to relationships with others. Economic needs can also be dependent on relationships, such as when payments are due over time or depend on the performance of another. Menkel-Meadow's analysis of the kinds of needs that are factors in creative problem-solving (economic, social, psychological, ethical, and moral, as well as legal needs) contributed significantly to acceptance of the problem-solving approach as a strategy for legal negotiation.¹⁴⁷

By premising the successful outcome of negotiation on a comprehensive assessment of a client's needs and interests and a comparable estimate of the complementary needs and interests of the other side, the problem-solving approach broadens the role of the lawyer from interpreter of legal rules and remedies to a builder of relationships and value.

¹⁴² See, e.g., BASTRESS & HARBAUGH, *supra* note 5, at 374; MNOOKIN ET AL., *supra* note 4, at ix (This book makes the case that a *problem-solving approach* to negotiation offers the most promising means of creating value."); Riskin, *supra* note 4, at 757.

¹⁴³ See Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 810 ("To the extent that principles of wealth creation and resource expansion from transactional negotiation can be assimilated to dispute negotiation, the parties to a negotiation have the opportunity to help each other by looking for ways to expand what is available to them.") (footnote omitted).

¹⁴⁴ See *id.* at 795.

¹⁴⁵ See *id.*

¹⁴⁶ See Menkel-Meadow, *supra* note 84, at 2677; Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 801-803.

¹⁴⁷ For instance, Eleanor E. Maccoby and Robert H. Mnookin demonstrated the value of Menkel-Meadow's inventory of actual needs as a tool for negotiations in divorce cases. See MACCOBY & MNOOKIN, *supra* note 50.

B. *Origins of the Client-Centered Approach to Lawyering*

The hesitation of clinical teachers and scholars to endorse wholeheartedly the problem-solving approach to negotiation illustrates the importance of theoretical inquiry into the principles that underlie methods of practice. The principles that gave rise to the movement for client-centered lawyering, especially the value placed on the autonomy of the client do not at first appear to be consistent with core values of the problem-solving approach to negotiation, such as cooperation, social organization and value creation.¹⁴⁸ Nevertheless, the arguments put forward by advocates of the client-centered approach and advocates of the problem-solving approach have much in common. As the theoretical underpinnings of both approaches develop, the two movements are moving closer to each other. In fact, they need each other.

The widespread influence of the client-centered approach to lawyering in U.S. law schools is due in part to publication of the text, *Legal Interviewing and Counseling: A Client-Centered Approach*, by David A. Binder and Susan C. Price in 1977, when clinical legal education was new and few texts were available.¹⁴⁹ The text explains the theory of client-centered lawyering and prescribes in detail a process for interviewing and counseling clients. It became the standard for defining the client-centered approach.¹⁵⁰ However, the client-centered approach to lawyering was not the product of a single textbook. Robert Dinerstein traces the history of the client-centered movement and examines the arguments for and against it in an influential 1990 article.¹⁵¹ Dinerstein defines client-centered counseling as “a legal counseling process designed to foster client-decisionmaking.”¹⁵²

The process of client-centered counseling promoted by Binder and Price, updated by Binder, Bergman, Price and Tremblay in *Law-*

¹⁴⁸ For a discussion of the meaning of autonomy as it relates to the client-centered approach, see Kruse, *supra* note 9.

¹⁴⁹ DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977). See Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 504 (1990); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 21 (2002) (“Thus, for example, almost all U.S. law schools now offer courses on client interviewing and counseling that are ‘client-centered’ or collaborative”) (footnotes omitted). The original text by Binder and Price has been revised and reissued in a second edition. See BINDER ET AL., *supra* note 23, at 3.

¹⁵⁰ See Dinerstein, *supra* note 149, at 504; BINDER ET AL., *supra* note 23, at 3 (“Since the original precursor of this edition was first published over 25 years ago, client-centered counseling has become among the most broadly shared conceptions of lawyering in the country.”).

¹⁵¹ See Dinerstein, *supra* note 149.

¹⁵² See *id.* at 507.

yers As Counselors: A Client-Centered Approach, prescribes an organized structure for gathering information from clients, giving advice to clients, and soliciting decisions from clients.¹⁵³ It relies on techniques borrowed from psychotherapy to facilitate the gathering of information from clients. Binder and his colleagues recommend that lawyers communicate empathy and nonjudgmental acceptance to their clients as a means of encouraging clients to disclose fully their interests, values, and the facts that they know.¹⁵⁴ They identify psychological factors that might inhibit a client from sharing information with a lawyer and suggest ways of overcoming the client's inhibitions.¹⁵⁵ They urge lawyers to maintain neutrality toward the goals of the client.¹⁵⁶ They teach listening skills, particularly what they call "active listening," to prepare lawyers to learn from clients – about both legal and non-legal concerns – and to confirm their understanding of substantive information and emotional content by summarizing what they have heard and encouraging clients to confirm, reject, or correct those summaries.¹⁵⁷ They recommend questioning a client about the facts of a case in stages which progress from broad open-ended questions to narrow questions designed to verify the legal theories generated by the lawyer.¹⁵⁸ They suggest that lawyers give advice based on the beliefs and values of the client, not those of the lawyer, and only when the client asks for advice.¹⁵⁹ The entire process is designed to enable the client "to make his own choices in his own way."¹⁶⁰

By proposing explicit rules for interviewing and counseling clients, Binder and his colleagues gave meaning to the principles that they considered to be the core values of the lawyer-client relationship.¹⁶¹ Critics of the client-centered model have seldom challenged the centrality of individual autonomy as the core value of the lawyer-client relationship.¹⁶² Rather, they question the impact of client-cen-

¹⁵³ See generally BINDER ET AL., *supra* note 23.

¹⁵⁴ See *id.* at 62 n.27. See also Dinerstein, *supra* note 149, at 571-72 & n.195 (criticizing practice of "feigning empathy" to induce client to reveal information).

¹⁵⁵ See BINDER ET AL., *supra* note 23, at 16-40.

¹⁵⁶ See *id.* at 292. See also Dinerstein, *supra* note 149, at 580.

¹⁵⁷ See BINDER ET AL., *supra* note 23, at 48-57. See also MNOOKIN ET AL., *supra* note 4, at 63 (recommending use of similar practice called "looping" to demonstrate understanding of other side in negotiation).

¹⁵⁸ See BINDER ET AL., *supra* note 23, at 86-193.

¹⁵⁹ See *id.* at 289-92.

¹⁶⁰ See Dinerstein, *supra* note 149, at 600.

¹⁶¹ See, e.g., BINDER ET AL., *supra* note 23, at 4 ("Thus, the starting point of client-centeredness is that respect for clients' autonomy means that decisions about solutions to clients' legal problems are for clients to make."). Dinerstein provides the most thorough history and review of the arguments that led to the acceptance of client-centered counseling in legal education. See Dinerstein, *supra* note 149, at 511-583.

¹⁶² See, e.g., Dinerstein, *supra* note 149, at 504. For instance, Stephen Ellmann criticizes

tered lawyering methods on the autonomy of the other actors in the legal system. They question the impact of client-centered lawyering on the autonomy of the lawyer who yields to the client on a question of principle.¹⁶³ They question its impact on the autonomy of a third party whose freedom is limited by the action of a lawyer's client.¹⁶⁴

The political argument in favor of client-centered counseling was in large part a result of the influence of lawyers for the poor on the early development of clinical legal education.¹⁶⁵ Law schools drew heavily on lawyers with experience in Legal Aid offices to staff new clinical programs.¹⁶⁶ In addition, law school legal clinics frequently require that clients meet poverty guidelines in order to comply with the student licensing requirements of courts. As a result, law school clinics have typically focused on issues of poverty law. Early clinical faculty were acutely aware that clients who had faced discrimination because of poverty, race, gender, nationality, or disability had a hard time making their voices heard in a law office.¹⁶⁷ The structured interviewing and counseling of client-centered lawyers was an affirmative attempt to establish more equal relationships between lawyers and clients in spite of their differences.¹⁶⁸

From its inception, however, the client-centered approach was more than a method in interviewing and counseling clients. It was an

the use of feigned empathy as an interviewing technique, but he does not question the underlying value of promoting client autonomy. See Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L. J. 991, 1001-02 (1992) (stating that lawyer enhances client's autonomy, rather than undermining it, when lawyer gives advice about relevant moral considerations, provided the lawyer "is careful not to prevent her client from making his own choice."). Defenders of the client-centered model also cite enhancement of client autonomy as its core value. See Kruse, *supra* note 9, at 399 ("To the extent that the client-centered approach has been theoretically defended, it has been on the ground that taking a client-centered approach enhances or promotes client autonomy.").

¹⁶³ See, e.g., Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 761-64 (1987).

¹⁶⁴ See, e.g., Dinerstein, *supra* note 149, at 514-15. See also William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 558-59 (1980) (criticizing conception of lawyer-client relationship in which "loyalty to clients requires the betrayal or coercion of others").

¹⁶⁵ See Dinerstein, *supra* note 149, at 518-21.

¹⁶⁶ See *id.* at 519 n.82. Legal Aid programs were law offices funded by the national Legal Services Corporation to provide free civil legal services to low-income persons. For a brief history of the Legal Services Corporation, see THE MACCRATE REPORT, *supra* note 1, at 50-54.

¹⁶⁷ See Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEF CASE 106 (1977); Dinerstein, *supra* note 149, at 518 n.81.

¹⁶⁸ See Kruse, *supra* note 9, at 384 ("[T]he client-centered approach expressed a set of values about the lawyer-client relationship that resonated with many early clinical professors. For clinical professors, lawyering skills were only part of their teaching agenda, inseparable from instilling values of professional commitment to confronting the problems of poverty and social injustice in which clinic clients were enmeshed.") (citations omitted).

alternate view of lawyering that transferred the lawyer's attention from the task of applying legal rules to the task of helping clients find solutions, both legal and non-legal, to problems. Centering the lawyer's focus on a client rather than on a case required a problem-solving approach to representation.¹⁶⁹ Katherine Kruse argues that the client-centered approach to interviewing and counseling introduced significant changes in the lawyer's role:

From this conceptualization of lawyering as problem-solving, the client-centered approach can be said to lay four important cornerstones as the foundation for its interviewing and counseling techniques: (1) it draws attention to the critical importance of non-legal aspects of a client's situation; (2) it cabins the lawyer's role in the representation within limitations set by a sharply circumscribed view of the lawyer's professional expertise; (3) it insists on the primacy of client decision-making; and (4) it places a high value on lawyers' understanding their clients perspectives, emotions and values.¹⁷⁰

Kruse observes that there are significant tensions between the counseling techniques associated with the client-centered approach and its vision of legal representation as problem-solving, and these tensions have given rise to a variety of interpretations of the client-centered approach and proposals for alternative counseling techniques.¹⁷¹ She concludes that the principle of client autonomy can sustain a variety of interpretations and is flexible enough to coexist with other values that are necessary guideposts in the context of representation.¹⁷² The client-centered approach is a big tent that can accommodate multiple approaches that "put the client at the center of the representation instead of something else."¹⁷³

The attention of client-centered lawyering theory has largely been devoted to the lawyer-client relationship.¹⁷⁴ The process of advocacy requires an approach to other relationships as well.¹⁷⁵ What duty do lawyers and clients owe to courts, to their counterparts in

¹⁶⁹ See *id.* at 376 ("Although presented under the rubric of interviewing and counseling, the client-centered approach offered something much more momentous: an alternative vision of lawyering that conceptualized legal representation primarily in problem-solving terms and redefined the boundaries of decision-making authority in the lawyer-client relationship.").

¹⁷⁰ *Id.* at 377.

¹⁷¹ See *id.* at 376.

¹⁷² *Id.* at 419.

¹⁷³ *Id.*

¹⁷⁴ See Piomelli, *supra* note 88, at 437.

¹⁷⁵ See Kruse, *supra* note 9, at 439 ("[T]he choice to make a lawyer's duties to clients central to a lawyer's professional role rests on assumed or implicit political and jurisprudential commitments, which when articulated may be theoretically unsatisfactory or indefensible.").

deals and disputes, to the public?¹⁷⁶ Advocates of the client-centered approach cannot avoid responsibility for determining what it means to keep the client at the center of the representation in all of the contexts of a lawyer's work, including negotiation.

A view of the client-centered approach that takes into account the duties that lawyers owe to the legal system and society, as well as to clients, is fully compatible with the problem-solving approach to legal negotiation. Likewise, a view of problem-solving legal negotiation that takes into account the duties that lawyers owe to their clients, as well as to courts and society, is fully compatible with the client-centered approach to legal counseling. The two approaches reinforce each other.

III. RESOLVING THE LAWYER'S DILEMMA

Lawyers must examine their approach to legal negotiation in the light of core values of the legal profession. They must resolve dilemmas with regard to their duty of loyalty to clients, their duty to protect the secrets and confidences of clients, and their duty to handle clients' affairs competently and zealously. They must respect the duty of candor to courts and opponents. They must address realistically problems caused by imbalances of power between clients and their adversaries. For the problem-solving approach to work in legal negotiation it must be consistent with the responsibilities that lawyers owe to their clients and to the public, and it is.

A. *The Problem of Loyalty*

Lawyers owe a duty of loyalty to clients, and clients want their lawyers to effectively pursue their interests. Our legal system is adversarial by design.¹⁷⁷ The essence of a legal case is a contest of parties with conflicting interests. In such a system, many clients expect their lawyers to be adversarial. Why then should a lawyer tell a client to pursue a strategy of cooperation with a confrontational adversary? Why should a lawyer advise a client to pursue a strategy of disclosure in the face of potential exploitation? The following example of a hypothetical negotiation illustrates the possibilities of a problem-solving approach – even in a situation where there is no continuing relationship between the parties.

¹⁷⁶ See Hurder, *supra* note 92, at 182-86 (discussing a lawyer's responsibilities to courts, opposing counsel, witnesses, and the public).

¹⁷⁷ See Hurder, *supra* note 27, at 2260-62.

1. An Example

Ms. Sincere has rented an apartment from Mr. Adverse for three years while she has been in law school. She gives proper notice to Mr. Adverse and moves out. She soon receives a letter from Mr. Adverse's lawyer that says she must pay \$2,000.00 for damage to the apartment within 10 days to avoid a lawsuit. Ms. Sincere goes to her lawyer and tells her that she did not damage the apartment; she is moving to a new state to study for the bar exam; she does not think it is fair for her to pay for something she did not do; she has the money to pay but she would have to give up things she wants to do in her new home if she pays Mr. Adverse. Furthermore, she is worried about the effect on her application for the bar if she is party to a lawsuit. She asks her lawyer to try to negotiate a settlement with Mr. Adverse.

Ms. Sincere's lawyer is committed to problem-solving negotiation. She calls the landlord's lawyer to get more information about the case. Mr. Adverse's lawyer, a self-proclaimed adversarial negotiator, says the apartment looks like an animal lived in it; his client has ignored much of the damage; his client needs \$2,000.00 to paint the stained walls, to clean the stove, and to repair a hole in the door; and the court costs and attorney fees allowed under the lease will be another \$1,000.00 if Mr. Adverse has to go to court. He adds that he appears in Judge Fairhand's court every week and the judge does not tolerate students who think they can destroy property and leave town.

Ms. Sincere is skeptical when her lawyer tells her that they should look for ways that can make both parties better off. Ms. Sincere wants to go to court to prove that she is not the kind of person who would destroy an apartment. She believes she can win the case. Her lawyer says the outcome of a trial is never certain, and she proposes a process to see if a settlement is possible. She suggests that first they explore alternatives to a negotiated agreement, and that later Ms. Sincere should decide what Mr. Adverse would have to agree to before she would be willing to make a deal.

At first, Ms. Sincere's alternatives seem to be limited. She can go to court and fight the case, but that would have to occur after she moves and begins studying for the bar. She would also have to pay her own attorney. She is not afraid to take the risk of going to trial, but the cost to her of going to trial might be more than \$2,000.00. However, it is not entirely a financial calculation. She has to weigh the satisfaction of proving that she did not damage the apartment against her desire to study for the bar without interruption. Her lawyer tells her that she can continue exploring other alternatives, but she asks her to decide whether there is a point at which she would make a deal. Ms. Sincere says that she would pay \$1,000.00 if that would set-

tle the case.

The lawyer says the next step is to estimate what Mr. Adverse might be willing to accept as a deal. Ms. Sincere has never met Mr. Adverse, and she knows nothing about him. Her lawyer suggests that Ms. Sincere do some research to learn whether Mr. Adverse has other property in his name. Her lawyer also suggests that they try to arrange a meeting of both lawyers and both clients at the apartment, in part to review the damage, but also so that they can try to learn what Mr. Adverse's interests are. The research reveals that Mr. Adverse owns two other apartment buildings. When they meet at the apartment, Ms. Sincere learns that Mr. Adverse is a retired plant worker, and he appears to live on the income from his apartments. Ms. Sincere offers to pay \$400.00, but Mr. Adverse's lawyer says he will only accept \$2,000.00.

On the way back to the office, Ms. Sincere and her lawyer discuss ways to divide or add to the subject of the bargaining so that both parties can gain. They suspect that Mr. Adverse needs money to prepare the apartment for the next tenant. Ms. Sincere says she has a friend who is a painter and would paint the apartment for \$200.00. She also has a friend who saw the apartment when she moved in and would testify that the hole in the door was already there. Finally, she has found out that it would cost \$200.00 to pay a professional to clean the stove. They arrange to meet Mr. Adverse's lawyer at his own office, and this time they bring the witness who is prepared to testify that the hole was already in the door. They offer to paint the apartment and to pay \$500.00 to Mr. Adverse. The landlord's lawyer calls them an hour later and says Mr. Adverse will accept \$600.00 if they will paint the apartment. They make a deal. Ms. Sincere realizes that she was prepared to pay \$1,000.00, but she settled the case by paying \$600.00 to Mr. Adverse and \$200.00 to her friend the painter. She saved \$200.00 over what she was willing to pay.

2. The Problem-Solving Approach Is Consistent with Loyalty

In the example, Ms. Sincere's lawyer was able to follow a problem-solving process even though the opposing lawyer chose to use adversarial methods. The problem-solving approach determined the tasks that needed to be accomplished and Ms. Sincere's lawyer devised a creative strategy to accomplish them. Ms. Sincere and her lawyer needed to search for complementary interests that might be a source of value. They needed to find ways to redefine the subject of negotiation. Then, they needed to claim a share of the value created by an agreement. Because the other lawyer was uncooperative, Ms. Sincere and her lawyer found ways to learn about Mr. Adverse's

needs and interests without relying on the other lawyer's cooperation. They used public records to learn about his needs. They used the opportunity to inspect the apartment as a chance to meet Mr. Adverse in person. Ms. Sincere and her lawyer brainstormed to imagine possible deals that might make both sides better off.

The problem-solving approach gave Ms. Sincere and her lawyer a framework to plan a strategy to settle the case on terms more favorable than Ms. Sincere was likely to obtain from a court. Russell Korobkin identifies four basic goals that must be the focus of a successful negotiating strategy.¹⁷⁸ The first two goals are integrative. The first goal is to discover whether there are possible negotiated solutions that would benefit both sides.¹⁷⁹ The second goal is to redefine the boundaries of the negotiation, if necessary, so that agreement becomes possible and the potential for mutual benefit grows larger.¹⁸⁰ The next two goals are distributive: The third goal is to exercise negotiating power, based on one's alternatives to a negotiated agreement, by communicating in some way that one has alternatives to a negotiated agreement and that one is unwilling to reach an unsatisfactory settlement.¹⁸¹ The fourth goal is to persuade the other side that "procedural or substantive social norms" require a favorable division of the benefits of the transaction.¹⁸²

The strategy adopted by Ms. Sincere and her lawyer met the first two goals by allowing them to learn about Mr. Adverse's needs and interests and to search for solutions that would integrate the needs and interests of both parties. The strategy also met the second two goals. Ms. Sincere exercised power by communicating that she had a witness who could improve her chance of obtaining a favorable decision if she chose to go to court. By arranging to meet Mr. Adverse in person, Ms. Sincere was not only able to learn more about him, but she was also able to engage in persuasion by communicating to him that she was a hard-working law student who deserved consideration and respect. The fact that Mr. Adverse's lawyer took an adversarial approach did not make a problem-solving approach impossible, but it did influence the strategy that Ms. Sincere and her lawyer adopted.

The strategy devised by Ms. Sincere and her lawyer relies on the assumption that negotiation can create value, an assumption central to the problem-solving approach. To the extent that the adversarial approach interprets negotiation, especially in the context of litigation, as

¹⁷⁸ KOROBKIN, NEGOTIATION THEORY, *supra* note 19, at 33-34.

¹⁷⁹ *Id.* at 33.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 34.

a zero-sum game in which someone wins and someone loses, lawyers who follow the adversarial approach must try to persuade the other party to voluntarily give up benefits without receiving something of equal or greater value in return.¹⁸³ The image of dividing a pie resonates with trial lawyers who understandably view many disputes as contests to obtain money for one party that must be paid by another party. Furthermore, the economics of private law practice often force lawyers to focus on monetary settlements, because such settlements are the only realistic source of legal fees. However, the concept that negotiation is nothing but a contest for the biggest possible portion of a fixed resource leads to strategies that rely on intimidation and manipulation of adversaries.¹⁸⁴ Even if there is a range of lawful intimidation and manipulation that does not amount to unethical coercion and deception, such conduct should not be embraced by the legal profession as a manifestation of loyalty, competence or zealous representation. The insights of negotiation theory explain why the problem-solving approach is a more appropriate model for the negotiation process and why intimidation and manipulation are not necessary for success.

The strategic goals of the problem-solving approach require both cooperative and competitive behaviors. Competitive tactics are a part of the problem-solving approach to legal negotiation, provided they do not prevent cooperation that is necessary to achieve integrative goals. Threats, misrepresentations, and feigned interests inhibit and delay the cooperation that is necessary to create value. Competitive tactics that include thorough preparation, research, and persuasion are essential to effective negotiation. The problem-solving approach, likewise, permits lawyers to adopt a range of interpersonal styles, provided they do not defeat either the integrative goals or the distributive goals that are present in every negotiation.

For good reasons, lawyers often adjust their styles of lawyering to the expectations and demands of clients. Some clients demand flamboyant lawyers. Other clients want lawyers who will act out their anger or rage. In trial practice, lawyers often develop a style that balances the client's demand for a visible display of partisanship with the requirements of civility and cooperation needed to try a case. A dialogue between the lawyer and client can often resolve differences of opinion about the style of advocacy in court appearances.¹⁸⁵ An

¹⁸³ See BASTRESS & HARBAUGH, *supra* note 5, at 377-78.

¹⁸⁴ See, e.g., *id.* at 378-79 (explaining that adversarial bargainers "engage in a form of argumentative debate designed to manipulate, intimidate, cajole, and persuade the opponent to accept a solution in which their side maximizes gain.").

¹⁸⁵ See Hurder, *supra* note 91, at 83.

explanation of the lawyer's strategy can often convince a client that the lawyer is acting aggressively on the client's behalf even though the lawyer is not acting with belligerence toward the opponent. Advocacy in negotiation requires a similar dialogue between lawyer and client. The range of permissible conduct is greater in negotiation than in courtroom advocacy, but a lawyer with a theoretical understanding of negotiation strategy and technique can and should engage a client in a dialogue about styles of negotiation.

The style a lawyer chooses should support the goals the lawyer is trying to achieve. If the goal is to discover complementary needs and interests, an abrasive demeanor is likely to be counterproductive. However, if the goal is to gain the largest possible share of the surplus that an agreement will produce, confidence and assertiveness might be most useful. Since problem-solving negotiation is both integrative and distributive, styles of behavior that allow both cooperation and competition are called for. Because there is always a tension between cooperative and competitive behaviors, Robert Mnookin and his colleagues argue that managing this inevitable tension is the primary challenge for a negotiator.¹⁸⁶

Problem-solving negotiation is an activity that can transform a costly dispute into a valuable deal. Litigants might choose not to take advantage of the ability to turn damaging disputes into mutually beneficial agreements, but their lawyers should be able to advise them of the possibility. Because voluntary settlements are not losses to be avoided, but gains with more value to a client than all other alternatives, loyalty to a client requires that a lawyer understand the potential power of negotiation and how to take advantage of it.¹⁸⁷ Since problem-solving negotiation is, in fact, about maximizing value for one's client, it is thoroughly consistent with the duty of loyalty.

B. The Problem of Disclosure

A fundamental process of problem-solving negotiation – defining and redefining the subject matter of the negotiation in order to integrate complementary needs of the parties – benefits from the honest disclosure of needs and interests by all sides.¹⁸⁸ Leading advocates of problem-solving negotiation encourage honest disclosure of each

¹⁸⁶ See MNOOKIN ET AL., *supra* note 4, at 9-10.

¹⁸⁷ See KOROBKIN, *NEGOTIATION THEORY*, *supra* note 19, at 133-34 (describing “fixed-sum error”).

¹⁸⁸ See Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 795 (“The principle underlying such an approach is that unearthing a greater number of the actual needs of the parties will create more possible solutions because not all needs will be mutually exclusive.”).

side's interests.¹⁸⁹ However, lawyers who represent clients in case settlement negotiations face a dilemma. Honest disclosure of information poses risks for clients in litigation.

Negotiation theory arose in the context of business transactions and international relations. Lawyers are justified in asking whether practices designed to produce business deals and international treaties can be transplanted to the formal processes of litigation. The approach to information sharing developed through years of legal tradition and case law cannot be lightly disregarded. The legal tradition has been to guard closely the secrets and confidences of clients.¹⁹⁰

Parties to litigation are vulnerable to the exploitation of information. If a case goes to trial, either side can use its knowledge of the needs and motives of the other side to persuade the decision maker to accept its version of truth or justice. Court rules often require disclosure of relevant information, but they also protect the privacy of litigants when disclosure is not necessary. Rules of evidence exclude information that is not relevant to the facts in dispute.¹⁹¹ Rules of civil procedure compel disclosure only of facts relevant to the subject matter of a case.¹⁹² Furthermore, the subject matter of a case is often limited to matters raised in the pleadings.¹⁹³ Understandably, many lawyers approach settlement negotiations with an intent to reveal only the information that rules of court can force a party to reveal.

The lawyer's ability to protect a client's secrets is also considered essential to the maintenance of a viable lawyer-client relationship.¹⁹⁴ The protection of secrets and confidences allows a client to tell a lawyer about interests, values, needs and facts without risking their disclosure to adversaries. It makes it possible for a lawyer to represent the true interests of a client in litigation. Lawyers need to be able to assure clients that their secrets and confidences will be safe in their lawyers' hands.

Against this backdrop, advocates of problem-solving negotiation tell lawyers to expand the subject matter of their clients' disputes and to lay their clients' needs, interests and personal values on the table for their adversaries to see. The answer to this dilemma is that prob-

¹⁸⁹ See, e.g., MACCOBY & MNOOKIN, *supra* note 50, at 54.

¹⁹⁰ See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399, 406-08 (1998).

¹⁹¹ See, e.g., FED. R. EVID. 402.

¹⁹² See, e.g., FED. R. CIV. P. 26.

¹⁹³ See Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L. J. 727, 729-37 (2005). Furthermore, the Due Process Clauses of the 5th and 14th Amendments prevent courts from deciding issues without proper notice to the parties. See *id.*, at 733.

¹⁹⁴ See *Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998) ("Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel.").

lem-solving negotiation calls for a different kind of relationship between a lawyer and client and a different level of information about the other party. Problem-solving negotiation requires the kind of lawyer-client relationship built by collaborative, client-centered interviewing and counseling.¹⁹⁵

Many advocates of problem-solving negotiation recommend client-centered interviewing and counseling as effective preparation for negotiations.¹⁹⁶ Client-centered counseling prepares lawyers and clients to make the decisions and take the actions necessary for problem-solving negotiation. Problem-solving negotiation does not require lawyers to violate the privacy interests of their clients.¹⁹⁷ However, it does require lawyers to learn more about their clients than the facts constituting the legal elements of a case. It requires joint decisions with clients about what to disclose and what to protect.¹⁹⁸ It requires a dialogue between lawyer and client about both the danger of disclosing information and the value of using information in the search for imaginative solutions to a problem. It requires thoroughly counseling clients to explore voluntary settlement options as well as litigation strategies.

The client-centered approach to legal counseling seeks the full participation of clients in all decisions that affect them, whether in litigation or in planning transactions.¹⁹⁹ Literature on client-centered counseling describes methods of involving clients in framing the subject and story of a case, setting substantive and procedural goals, and telling the story of a case to audiences with the power to grant relief.²⁰⁰ The dialogue between lawyer and client fostered by client-cen-

¹⁹⁵ A number of advocates of client-centered counseling have called for collaboration between lawyers and clients in all aspects of representation. See, e.g., Gerald P. Lopez, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 52-53 (1992) (explaining that in collaborative relationship both lawyer and client always teach and always learn); Piomelli, *supra* note 88; Lucie White, *To Learn and Teach: Lessons of Driefontein on Lawyering and Power*, 1988 WISC. L.REV. 699.

¹⁹⁶ See *supra* note 87 and accompanying text.

¹⁹⁷ See MNOOKIN ET AL., *supra* note 4, at 286-88 (discussing ways to avoid revealing information that might hurt client's case).

¹⁹⁸ See Hurder, *supra* note 91, at 88-96 (describing counseling process that allows lawyers and clients to make joint decisions).

¹⁹⁹ See BINDER ET AL., *supra* note 23. Mnookin, Peppet and Tulumello are critical of certain aspects of the *Lawyers As Counselors* model of client-centered interviewing and counseling. Their criticisms parallel the proposals that have come from clinical scholarship about interviewing and counseling. They recommend a more collaborative relationship between lawyers and clients than the *Lawyers As Counselors* model envisions. They see an active role for the client in planning and participating in negotiations. They see an assertive role for the lawyer in the process of redefining problems and suggesting solutions. MNOOKIN ET AL., *supra* note 4, at 178-203.

²⁰⁰ For a review of scholarship on the client-centered approach, see Hurder, *supra* note 92.

tered counseling equips a lawyer to protect a client's interests in negotiations while seeking creative solutions to problems. Disclosure of information in the course of litigation does entail risks, but a client-centered approach to counseling enables a client to evaluate the risks and the potential benefits and to make joint decisions about what to disclose.

The problem-solving approach to legal negotiation does not require a lawyer to violate the duty to protect a client's confidences. However, it requires a lawyer to engage a client in planning negotiation strategy so that decisions to reveal confidential information can be made with the client's informed consent. The resolution of the lawyer's dilemma requires a collaborative, client-centered approach to legal counseling.

C. *The Problem of Unequal Power*

The problem-solving approach requires a party to cooperate with the other side in a negotiation. It assumes that the risks of revealing information will likely be rewarded by benefits produced when an agreement is reached. A lawyer for a party in a dispute is justified in asking whether cooperation and disclosure are likely to yield benefits when an adversary is richer and more powerful than a client. Critics of the movement for alternative dispute resolution argue that negotiation is more likely than judicial decisionmaking to reproduce the power imbalances of society.²⁰¹

The dilemma for a lawyer is to decide whether pursuing a solution through problem-solving negotiation will help or harm a client when the adversary has more wealth and power. When individuals with few resources and little power confront rich and powerful adversaries, is it reasonable to assume that the weaker party might gain more through problem-solving negotiation than through the judgment of a court? Fisher and Ury respond to the power question by arguing that the BATNA is the measure of each party's power in negotiations, and each party can improve its BATNA through creative efforts that

²⁰¹ See, e.g. Richard Delgado, Chris Dunn, Pamela Brown & Helena Lee, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359, 1391-99; Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1088 (1984) ("The problems of settlement are not tied to the subject matter of the suit but instead stem from factors that are harder to identify, such as the wealth of the parties, the likely post-judgment history of the suit, or the need for an authoritative interpretation of the law."); Resnik, *supra* note 1, at 275 ("[T]he current legal landscape tolerates an erratic distribution of rights of access to formal process, permits both adjudication and bargaining to occur under conditions of dramatic inequalities of power, and condones administrative solutions based on questionable empirical bases producing instances of demonstrably unfair outcomes in sentences and in compensation schemes.").

do not depend on cooperation by the other side.²⁰²

Negotiation theory assumes that a party will not enter an agreement willingly unless it is preferable to the alternatives. Problem-solving negotiation provides a process for exploring and evaluating the alternatives available to a party. The probability of achieving a client's goals through successful court action is one of the alternatives that must be explored. A creative search for alternatives requires knowledge of the strength of a client's substantive claims and the potential to use procedural tools, such as discovery and class actions, as well as knowledge of all possible remedies available from a court or agency. A creative search for alternatives to a negotiated agreement requires awareness of potential political and social solutions to a problem, in addition to potential legal solutions.²⁰³ Political solutions might rely on action by public officials or legislatures. Social solutions might require intervention by family members or charitable and religious organizations. Once alternatives have been explored, problem-solving negotiation provides a means of translating a party's multiple needs, interests, and values into preferences that allow a person to decide whether she would be better off with a settlement or without. Negotiation theory teaches that differences, including differences in wealth and power, are the source of created value in negotiations. The laboratory of early students of negotiation theory was the conflict between labor and management. Mary Parker Follett saw in negotiation theory a way to create wealth and peace by integrating the complementary needs of workers and capitalists into labor-management contracts. It is hard to imagine more stark differences of wealth and power than existed between workers and capitalists in the United States in the 1920's and 30's. And yet Follett's system of "integrative bargaining" undeniably resulted in great benefits for both sides. Problem-solving negotiation represents the possibility of turning differences of needs and interests that are often associated with differences of class, race, gender, ethnicity and other identifying characteristics into sources of created value instead of sources of exploitation.

When combined with the ability to develop a BATNA and to search for creative solutions to problems, differences between people

²⁰² See FISHER ET AL., *supra* note 16, at 102-04. See also KOROBKIN, NEGOTIATION THEORY, *supra* note 19, at 153 ("The basic insight that power results from a strong BATNA, while quite intuitive, has also been demonstrated empirically through negotiation experiments.").

²⁰³ See Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L. J. 1603, 1630 (urging lawyers to search for audiences with remedial cultures other than courts in order to find alternative sources of solutions to client's problem).

can become a source of value.²⁰⁴ Mnookin identifies five types of difference that can be sources of created value in negotiation. People can have differences in: the resources they have; how they value things, actions, and relationships; how they forecast future events; risk preferences; and when they prefer events to take place.²⁰⁵ To prepare for negotiation, a lawyer should explore all of these factors with a client and should begin the process of working with the client to discover the respective characteristics of the other side.²⁰⁶ The process of exploring these five types of difference with a client compels both lawyer and client to search for and learn the same kind of information about a seeming adversary. Discovering any type of difference can lay the basis for framing an agreement that benefits both sides.

Negotiation theory is relatively silent about how personal identifying characteristics, such as race, class, and gender, affect the negotiation process and how negotiators should deal with them.²⁰⁷ The lack of an explicit approach is ironic because much of negotiation theory arose from actual experience in negotiations between parties with significant identity differences. Mary Parker Follett, as well as Walton and McKersie, based their theories on an analysis of labor-management negotiations in which class differences and class interests were a dominant factor. Fisher and Ury, as well as Howard Raiffa, drew insights from international treaty negotiations in which issues of nationality, race and culture were often prominent features. Carrie Menkel-Meadow bases her analysis of negotiation on her experience as a Legal Aid lawyer and clinical legal educator, settings in which differences of gender, race, class, and disability were often prominent factors in representation of clients.²⁰⁸ Nevertheless, negotiation theory often identifies the kinds of information a negotiator should have without acknowledging that differences of identity between lawyers and clients (and between one lawyer-client team and their counterparts on the other side) might require different approaches to gathering information, imagining solutions, and making persuasive arguments. Scholarship about legal interviewing and counseling has begun to explore how lawyers and clients can transcend differences of

²⁰⁴ See, e.g., MNOOKIN ET AL., *supra* note 4, at 14 (“Differences set the stage for possible gains from trade, and it is through trades that value is most commonly created.”).

²⁰⁵ See *id.* at 14-15.

²⁰⁶ See *id.* at 188-93.

²⁰⁷ The five differences enumerated by Mnookin and his colleagues are clearly effected by personal identity characteristics, but the authors do not explore this subject. See *id.* at 14-15 (discussing differences). Fisher and his colleagues discuss the effect of cultural differences on negotiation styles, but not how they affect the search for integrative agreements. See FISHER ET AL., *supra* note 16, at 166.

²⁰⁸ See Menkel-Meadow, *The Structure of Problem Solving*, *supra* note 2, at 754; Menkel-Meadow, *When Winning Isn't Everything*, *supra* note 2, at 905.

identity.²⁰⁹ Proponents of the client-centered approach to lawyering can make a contribution to negotiation theory by addressing the question of how lawyers should deal with identity issues in preparing to represent a client in negotiations.

In summary, problem-solving negotiation is designed to maximize a party's power in negotiation. It is an effective way to craft potential solutions that have value to a client, as well as to an adversary. The process allows a client to evaluate potential solutions and alternatives and to reject settlements that do not produce more value for a client than the best alternatives. The process requires a lawyer and client to balance cooperative and competitive behaviors so that risks are justified by the possibility of gain. The answer to the dilemma of whether the problem-solving approach to negotiation is more likely to help or harm a client involved in a dispute with a more powerful adversary is that the approach helps a client find better solutions to problems, affords protection from harm, and prepares a client to make informed decisions about whether to agree to a settlement or deal.

CONCLUSION

The problem-solving approach to negotiation affords a way for lawyers to make settlements and deals that satisfy the needs of their clients as well as those of other parties. The theory of problem-solving negotiation has established a standard of competence for negotiators. A competent lawyer should have sufficient knowledge of the principles of negotiation theory to be able to create value and to claim value for clients through negotiation. To be sure, the problem-solving approach to negotiation exposes clients to some risks that an adversarial approach seeks to avoid. Lawyers who use the problem-solving approach must be conscious of the risks involved and must make decisions about the goals and procedures of negotiation jointly with their clients. The client-centered approach to legal interviewing and counseling provides a process for making joint decisions about the goals and procedures of negotiation.²¹⁰

Clinical legal education and clinical scholarship have much to contribute to the study of legal negotiation. To date, however, clinical scholarship has largely avoided taking a prescriptive stance on how lawyers should negotiate. Clinical scholarship has paid far greater attention to issues in the relationship between lawyers and clients than

²⁰⁹ See, e.g., Pat K. Chew, *The Pervasiveness of Culture in Conflict*, 54 J. OF LEGAL EDUC. 60 (2004); Hurder, *supra* note 92; Ascanio Piomelli, *Cross-Cultural Lawyering by the Book*, 4 HASTINGS RACE & POVERTY L.J. 231 (2006) (reviewing leading clinical textbooks' discussion of difference).

²¹⁰ See, e.g., Hurder, *supra* note 91.

to the questions concerning the duties of lawyers and clients to their adversaries and the rest of the community. Literature on problem-solving legal negotiation has borrowed from models of legal interviewing and counseling developed by clinical legal education, but clinical legal education has resisted fully endorsing the models of problem-solving negotiation that have emerged from the interdisciplinary study of negotiation theory.

Clinical legal education must become a player in the effort to develop descriptive and prescriptive models of legal negotiation. Clinical legal education has generated a method of teaching and a style of scholarship that are effective in addressing questions of lawyering theory and practice. Clinical scholarship is able to draw on insights gained from supervision and observation of law students representing actual clients. However, to be a player in the development of a new approach to legal negotiation, clinical legal education will need to expand the scope of its theoretical inquiry to include all of the contexts in which lawyers practice. Negotiation is as essential to the role of a lawyer as are counseling and litigation. The problem-solving approach to legal negotiation is consistent with the values underlying client-centered lawyering, the duties and values of the legal profession, and the best interests of clients and society. Consequently, clinical legal education should prepare and unequivocally encourage lawyers to become problem-solving negotiators.