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# DISCOVERING AGREEMENT: SETTING PROCEDURAL GOALS IN LEGAL NEGOTIATION

Alex J. Hurder\*

## I. INTRODUCTION

There are no rules of procedure for legal negotiation. Negotiators have to make them up. The procedures for legal negotiation have to fit the context of each unique case. Moreover, they have to be acceptable to the other side. Every negotiation addresses the procedural goals of the negotiators as well as the substance.<sup>1</sup> But how do negotiators decide which procedures to propose? This article examines the tasks that contribute to effective negotiation and how lawyers and their clients can devise procedures to accomplish them.

The interdisciplinary study of negotiation has created negotiation theory, an attempt to analyze and explain what happens when people negotiate. Negotiation theory draws on economics, mathematics, psychology, business, and law to understand the process of negotiation.<sup>2</sup> The problem solving approach to legal negotiation applies principles of negotiation theory to the work of lawyers.<sup>3</sup> The theory, however, must be translated into the con-

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1. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 9 (Bruce Patton ed., 2d ed. 1991) (“The game of negotiation takes place at two levels. At one level, negotiation addresses the substance; at another, it focuses—usually implicitly—on the procedure for dealing with the substance.”).

2. For a brief history of negotiation theory, see Alex J. Hurder, *The Lawyer's Dilemma: To Be or Not To Be a Problem-Solving Negotiator*, 14 *CLINICAL L. REV.* 253, 278-83 (2007).

3. Carrie Menkel-Meadow used the term “problem-solving” to describe an approach to legal negotiation based on negotiation theory. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754, 757-58 (1984). For a description of the problem-solving approach, see generally Hurder, *supra* note 2.

text of specific cases and unique personalities in order to be useful.

The problem-solving approach to legal negotiation makes three broad assumptions. The first assumption is that the economic analysis of bargaining developed by economists over the last three centuries explains the dynamics of legal negotiation. A second assumption is that cooperation and competition always coexist in negotiation. A third assumption is that storytelling is an essential mode of communicating the multifaceted desires of all sides in negotiation. Part I of this Article examines these three assumptions. Part II applies the economic analysis of bargaining to legal negotiation and discusses ways that lawyers and their clients can discover and claim value in negotiation. Part III asks nine questions that a negotiator should ask before setting procedural goals for a negotiation. It discusses possible answers and their implications for designing a process to fit each situation.

## II. THREE ASSUMPTIONS OF A PROBLEM-SOLVING NEGOTIATOR

The problem-solving approach to legal negotiation relies on three broad assumptions. The first assumption is that the economic analysis of bargaining developed by economists explains the dynamics of legal negotiation. The economists discovered that voluntary exchanges create value. The problem-solving approach relies on the assumption that voluntary deals and settlements negotiated with the help of lawyers are like all other bargains. People agree to them because they hold out the promise of making them better off. A second assumption is that cooperation and competition always coexist in negotiation. This assumption stems from the recognition that all trade is both cooperative and competitive. Thus, the negotiation process must not exclude the possibility of cooperation or competition. A third assumption is that narrative is an essential mode of communicating in negotiation.

### A. VOLUNTARY DEALS AND SETTLEMENTS CREATE VALUE

Deals and settlements are agreements to trade one valuable bundle of things for another. If the trade is voluntary, neither side will be worse off and, more than likely, both sides will consider themselves better off than they were before the trade. It is this chance to be better off that motivates a person to make the exchange. This reasoning assumes that a person would not voluntarily choose to make an exchange that leaves him or her worse off. It also assumes that the person has not been coerced or deceived into making the trade. Voluntary exchanges that make at least one of the parties

better off without making someone else worse off create economic value.<sup>4</sup>

The science of economics is the study of the characteristics of such exchanges, both individually (microeconomics) and in the aggregate (macroeconomics).<sup>5</sup> Economics identifies voluntary exchanges, from the smallest to the largest, as the source of value creation in society.<sup>6</sup> Negotiation theory has relied on principles from the discipline of economics to explain why people engage in voluntary trade and how people's voluntary agreements to exchange things create new value.<sup>7</sup>

Negotiation theory arose from the efforts of scholars in the fields of business, law, diplomacy, economics, mathematics, and psychology to describe what effective negotiators do and to recommend effective negotiating practices.<sup>8</sup> Negotiation theory applies principles of economics to bargaining behavior to explain how parties to a negotiation integrate the differing needs and interests of the parties to make bargains that leave both sides better off.<sup>9</sup> In law, the problem-solving approach to legal negotiation embraces the ideas of negotiation theory.<sup>10</sup> Some understanding of economic principles used in negotiation theory can help a lawyer find a proper role in negotiations and represent clients more effectively.

Beginning most prominently with Adam Smith, economists have recognized that a thing can have two kinds of value.<sup>11</sup> One is the value to a person based on its utility to that person—with utility encompassing all the reasons a person might want to keep it or acquire it, including needs, de-

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4. See *infra* notes 6-24 and accompanying text.

5. For a brief discussion of the difference between microeconomics and macroeconomics, see PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 5 (18th ed. 2004).

6. A major interest of economists from Adam Smith to the present has been the concept of value. Joseph A. Schumpeter reviews the history of the science of economics, with frequent reference to how the concept of value has developed, in JOSEPH A. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* (1954).

7. See Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 *GEO. L.J.* 1789, 1790-92 (2000).

8. For a review of the origins of negotiation theory, see Hurder, *supra* note 2, at 267-73, 277-81.

9. *Id.* at 279-80.

10. See *id.* at 278-83.

11. Adam Smith called the two kinds of value the natural price and the market price. See SCHUMPETER, *supra* note 6, at 189.

Market price, defined in terms of short-run demand and supply, is treated as fluctuating around a 'natural' price . . . which is the price that is sufficient and not more than sufficient to cover 'the whole value of the rent, wages, and profit, which must be paid in order to bring' to market that quantity of every commodity 'which will supply the effectual demand,' that is, the demand effective at that price.

*Id.*

sires, fads, and fashions.<sup>12</sup> The other is the value it will bring in exchange.<sup>13</sup>

The difference between the value to the person who has something and the value to the person who needs and wants it makes it possible to create new value by bargaining. There are many reasons that a subject of trade<sup>14</sup> might be valued more highly by someone else than by its owner. The owner might have more than enough of them.<sup>15</sup> Someone else might have a use for something that its owner does not have. If each party has something that has less value to the party who has it than to the party who needs it, they can both be better off by making a trade. When an agreement is reached, the things that each bargainer was prepared to give up for the exchange, but did not have to, become available to trade for something else. Economists call this amount that was freed up the surplus.<sup>16</sup> The surplus is the new value that is created by a voluntary exchange.

To assign a value to a subject of trade, an individual takes into account all of the considerations that affect her prediction of the satisfaction she is likely to receive from it.<sup>17</sup> The individual's calculation will include: the an-

12. See SCHUMPETER, *supra* note 6, at 301.

Utility is not usefulness as understood by the observer—'useful' in the economist's sense is everything that produces pleasure (*piacere*) or procures welfare (*felicita*). Fashion, prestige value, and altruistic components are all trotted out in due course. And scarcity is the relation between the existing quantity of a thing and the uses one has for it and explains why a golden calf is valued more highly than a natural calf.

*Id.*

13. This value is an objective fact once an exchange is made. See Hurder, *supra* note 2, at 279-80.

14. A subject of trade could be a thing, a service, a promise, or a bundle of things, services, and promises.

15. See SCHUMPETER, *supra* note 6, at 910 ("[A]s we go on acquiring successive increments of each good, the intensity of our desire for one additional 'unit' declines monotonically until it reaches—and then conceivably falls below—zero.").

16. See Herbert Hovenkamp, *Bargaining in Coasian Markets: Servitudes and Alternative Land Use Controls*, 27 J. CORP. L. 519, 523 (2002).

Market transactions create a 'surplus' because the buyer values the article purchased more than the seller does; otherwise the transaction would not occur. For example, if I value a banana at fifty cents and A&P values it at fifteen cents, which is its cost, we will complete a transaction at some price between fifteen and fifty cents.

*Id.*

17. See Herbert Hovenkamp, *The Marginalist Revolution in Legal Thought*, 46 VAND. L. REV. 305, 310-11 (1993) [hereinafter *The Marginalist Revolution*].

Under marginalism the economic theory of value became entirely subjective, based on the individual utility function rather than on any criterion that could be determined from the desired good itself or the environment in which a choice was made. As a result, marginalism forced a shift in economics methodology from the measure of *goods* or the environment in which they were contained to the measure of human behavior. To state it differently, economics' basis of measurement moved from an essentially natural science model to a model based on presumed rationality or observed individual behavior. One no longer measured value by looking at the amount of a good that was available or the historical cost of producing it; one needed to measure individual willingness to pay for the good. The great marginal-

anticipated satisfaction from having it; how useful it is likely to be; alternative ways of meeting the need; the transaction costs of the deal, such as expenses for lawyers and other advisers; all the risks involved in making the trade; and all the costs of gathering information about the subject of the trade.<sup>18</sup>

In buying a box of cereal it might suffice to read a label on the box and to rely on one's satisfaction with the last box purchased. If one is buying a trainload of grain, each of the determinations—such as future uses of the product, risks of damage to the product in delivery, and the risk of having incomplete information about the product—would all have to be carefully researched and considered as a part of the deal. Each bargainer has to make all of these calculations before deciding the point at which she would be indifferent between making a trade and walking away.<sup>19</sup>

Thus, whether the subject of a trade is to be used as a tool or used for pleasure, the individuals who bargain over it are the ultimate arbiters of its value in exchange.<sup>20</sup> However, things that are traded in a competitive market tend to have similar exchange values.<sup>21</sup> If a person is trading tomatoes for potatoes, peaches, or pork, stable values will emerge based on the supply and demand for each.<sup>22</sup> One tomato might trade for two peaches or half a pound of pork. In the aggregate, all of these voluntary exchanges are

ist Alfred Marshall knew that the whole notion of subjective preference meant nothing at all unless it could be measured behaviorally. Thus, one could speak meaningfully of consumer demand only “as represented by the schedule of the prices at which [one] is willing to buy different amounts of something.” In his highly influential eighth edition, Marshall wrote:

If then we wish to compare . . . physical gratifications, we must do it not directly, but indirectly by the incentives which they afford to action. If the desire to secure either of two pleasures will induce people in similar circumstances each to do just an hour's extra work, or induce men in the same rank of life and with the same means each to pay a shilling for it; we then can say that those pleasures are equal for our purposes, because the desires for them are equally strong incentives to action for persons under similar conditions.

*Id.* (footnotes omitted).

18. See SCHUMPETER, *supra* note 6, at 919 n.3 (describing how both subjective and objective factors influence the individual's assessment of the value of something).

19. See Korobkin, *supra* note 7, at 1791 (explaining that “the distance between the reservation points (or ‘walkaway’ points) of the two parties” is the “bargaining zone”).

20. See *The Marginalist Revolution*, *supra* note 17, at 324.

Finally, and most technically, marginalism had a powerful impact on legal theories of value, an area that had always vexed the classical economists. The marginalist answer, as described above, was simple and elegant. It was also scientific in the sense that it attempted to separate concepts of value from natural law. Finally, it was behaviorist in the sense that it divorced value from previous investment, which had no impact on current behavior. Value was a function of marginal willingness to pay, nothing more. The result of this transformation, however, was that the concept of value became forward-rather than backward-looking and became more concerned with potential for growth than previous commitment.

*Id.*

21. See SAMUELSON & NORDHAUS, *supra* note 5, at 159-61.

22. *Id.* at 158-59.

the mechanisms that move the subjects of trade to their most efficient use.<sup>23</sup>

Economists recognize that the utility of a subject of trade to a bargainer might increase unit by unit until the optimum satisfaction is reached and then decrease unit by unit.<sup>24</sup> Thus, if a farmer has 10,000 tomatoes, and the average person obtains the maximum satisfaction from two tomatoes, repeated bargaining will produce a stable exchange value that results in the most efficient use of the tomatoes, namely, five thousand people will have, on average, two tomatoes each. The farmer with 10,000 tomatoes has great incentive to trade them, and the person who needs two tomatoes also has an incentive to trade. Their needs complement each other, and both will be better off as a result of the trade. At the point at which everyone has roughly two tomatoes, people will have little or no incentive to trade because the most efficient distribution has been reached. The point at which the tomatoes have reached their most efficient use is the condition that economists call "Pareto optimal," after the economist Vilfredo Pareto.<sup>25</sup> Once Pareto optimal is achieved, there is no trade that can make someone better off without making someone else worse off.<sup>26</sup>

Like a farmer with 10,000 tomatoes, a client with a large liability might have a great incentive to trade.<sup>27</sup> Lawyers have a tendency to see a defendant's liability and a plaintiff's claim as a "zero-sum" bargaining

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23. SAMUELSON & NORDHAUS, *supra* note 5, at 158-61.

24. See *The Marginalist Revolution*, *supra* note 17, at 312.

Even the person whose favorite experience is eating peach ice cream experiences declining marginal utility for it. The value of each additional quart of peach ice cream declines as he accumulates more. He will buy peach ice cream until the utility derived from the next unit of peach ice cream has fallen to a level equal to his marginal utility from some other good, such as broccoli.

*Id.*

25. See Hovenkamp, *supra* note 16, at 536 n.8.

A state of affairs is Pareto optimal if no alternative state can make someone better off without making at least one person worse off. A move is said to be Pareto superior if it makes at least one person better off without making anyone worse off. This implies, of course, that the preceding state was not Pareto optimal.

*Id.*

26. See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 n.4 (2d ed. 1989).

A situation is said to be Pareto efficient or Pareto optimal if there is no change from that situation that can make someone better off without making someone else worse off. Equivalently, if a situation is *not* efficient in this sense, then, by definition, someone *can* be made better off without making anyone else worse off.

*Id.*

27. The economic analysis also applies to bargaining for the voluntary exchange of things for which there is no competitive market, normally the case when parties are negotiating the settlement of a lawsuit. For a discussion of value creation in situations of bilateral monopoly, in other words, when each side is forced to deal only with the other side, see Hovenkamp, *supra* note 16, at 521.



situation, one in which any settlement that leaves one party better off must leave the other party equally worse off.<sup>28</sup> However, that would imply that both sides evaluate the other side's rights, duties, and possible subjects of trade in exactly the same way. The economic analysis of bargaining suggests that it is very unlikely that two parties to a legal dispute place equal value on the rights and actions of the other. In other words, it is unlikely that they are in a Pareto optimal state. If each one has something that would be valued more highly by the other, they have the possibility of discovering a bargaining zone, that is, a range of options for an exchange that can create value.<sup>29</sup> A voluntary agreement could make them both better off.

### B. THE NEGOTIATION PROCESS CANNOT EXCLUDE EITHER COOPERATION OR COMPETITION

Voluntary trade requires cooperation.<sup>30</sup> To bring about a mutually beneficial trade, the parties must identify possible exchanges that will leave them no worse off and hopefully better off than before.<sup>31</sup> Then each side must make a personal and essentially secret assessment of the status quo, personal needs and preferences, and the likelihood that the subject of the trade will satisfy those personal needs and preferences.<sup>32</sup> If the bargainers identify a possible subject of trade that has higher value to the one who wants it than to the one who has it to trade, there will be a range of options for an exchange that can create value.<sup>33</sup> None of this can be accomplished without cooperation between the trading parties.

The science of economics demonstrates how the possibility of creating new value, a surplus, gives people incentive to make voluntary exchanges. A voluntary exchange requires people to work together.<sup>34</sup> To be voluntary,

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28. See Menkel-Meadow, *supra* note 3, at 755-56.

29. See Carrie Menkel-Meadow, *Getting to "Let's Talk": Comments on Collaborative Environmental Dispute Resolution Processes*, 8 NEV. L.J. 835, 839 (2008) [hereinafter *Getting to "Let's Talk"*] ("Unlike dispute resolution populists who coined the phrase 'win-win,' more serious scholars of negotiated processes generally don't use that term, which in a sense, over promises what dispute resolution proponents suggest is a Pareto superior process.").

30. See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 33 (1986) ("An essential tension in negotiation exists between cooperative moves to create value and competitive moves to claim it.").

31. See Korobkin, *supra* note 7, 1792-93 (describing the process of discovering a "bargaining zone" that can lead to a mutually beneficial trade).

32. *Id.* at 1804 (discussing negotiators' motivation to reveal or conceal information about how they value the subject of a deal).

33. See Hurder, *supra* note 2, at 267.

34. See RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR RELATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM* 5 (2d ed. 1991) ("Integrative bargaining and distributive bargaining are both joint decision-making processes").

any party must be free to walk away.<sup>35</sup> In the economic analysis, the process of creating value requires a series of joint activities—including exchange of information, sharing of proposals, and making and keeping commitments to each other—before a deal is even reached. The individuals involved pursue mutual benefit through cooperation.

Competition, however, is an unavoidable part of the process. The surplus produced by joint action must be distributed by mutual agreement.<sup>36</sup> The possibility of creating value means that things of value must be divided and distributed. Whether the bargainers begin negotiation as friends or as opponents, they inevitably compete for a fair share of the value created. Thus, cooperation and competition coexist throughout the bargaining process.<sup>37</sup>

The coexistence of cooperation and competition should not come as a surprise. Markets exist all over the world where people meet in peace and order to seek personal advantage by trading one thing for another.<sup>38</sup> Roommates, even spouses, share living space but compete for control of the thermostat and the television. Basketball players compete within the framework of rules that everyone agrees to follow. Processes that allow both cooperation and competition are familiar to everyone. Devising procedures for legal negotiation that allow simultaneous cooperation and competition should be possible for lawyers.

It is necessary to recognize, nevertheless, that there is an inevitable tension between cooperation and competition.<sup>39</sup> The feelings of adversaries in a dispute might make cooperation more difficult to attain. A friendship among business partners might make competition something they prefer to postpone or avoid. In each case, the negotiating parties must decide if the potential advantages of a settlement or deal justify overcoming feelings of enmity or friendship to create something of value and claim a share of it.

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35. See ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 19 (2000).

36. See Korobkin, *supra* note 7, at 1816-17.

37. See *supra* note 30 and accompanying text.

38. A market might be a place where people gather together to trade, such as a flea market, a farmers market, or the New York Stock Exchange, or it might be a mechanism such as the Internet that allows buyers to exchange goods and services. See SAMUELSON & NORDHAUS, *supra* note 5, at 26.

39. Robert H. Mnookin, Scott R. Peppet, and Andrew S. Tulumello identify three tensions that are inherent in legal negotiation: tension between creating value and distributing value, tension between empathy and assertiveness, and tension between principal and agent. See ROBERT H. MNOOKIN ET AL., *supra* note 35, at 9-10. In their view, managing the three tensions is the central challenge of problem-solving negotiation. *Id.* All three of these tensions are generated, in part, by the need to balance cooperative activities and competitive activities. *Id.*

An effective negotiator must be able to manage this tension.<sup>40</sup> A lawyer can contribute to a bargaining situation by helping the parties steer a course between cooperative actions and competitive behaviors.

Both the activities needed to create value through exchanges and the activities needed to distribute value have cooperative and competitive aspects.<sup>41</sup> Finding exchanges that create value and distributing the value created requires that parties cooperate in setting rules and procedures for negotiating.<sup>42</sup> They must also share enough information for each side to know and to evaluate the subject of the agreement.<sup>43</sup> Parties compete in the creation of value as they attempt to influence how the other evaluates the subject of a trade in order to maximize the value created.<sup>44</sup> They compete in the distribution of value as they attempt to claim a share of the surplus for themselves. Procedures that make room for both cooperation and competition are essential.

In recognition of the importance of bargaining to the economy as a whole, law limits or prohibits some behaviors that would undermine the voluntary nature of trade. In particular, law defines and prohibits coercion and fraud in the exchange of goods and services.<sup>45</sup> Contract law allows contracts to be set aside if coercion or fraud was a factor in their formation.<sup>46</sup> Criminal law sets punishments for theft, extortion, and other coercive means of acquiring property. Government regulations define and limit fraudulent activities in complex economic transactions.<sup>47</sup>

A deal arrived at through coercion or fraud does not create value in the economic sense. For example, an offer of “Your money or your life,” does not have the potential to create value. The source of value in a trade is the voluntary decision of each participant that the trade will make him or her as

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40. ROBERT H. MNOOKIN ET AL., *supra* note 35, at 27. Mnookin, Peppet, and Tulumello emphasize that managing the tension between creating value and distributing value is essential for effective negotiation. *Id.* (“The challenge of problem-solving negotiation is to acknowledge and manage this tension. Keep in mind that this tension *cannot be resolved*.”).

41. *See* Hurder, *supra* note 2, at 272.

42. *See* FISHER & URY, *supra* note 1, at 9.

43. *See, e.g.*, LAX & SEBENIUS, *supra* note 30, at 35 (explaining that if both sides in a negotiation “choose to claim value, by being dishonest or less than forthcoming about preferences, beliefs, or minimum requirements, they may miss mutually beneficial terms for agreement”).

44. *See* Korobkin, *supra* note 7, at 1799 (“Perhaps the most common activity negotiators engage in at the bargaining table is attempting to persuade their opponent of the value of the negotiation’s subject matter or of other alternatives.”).

45. *See* Russel Korobkin et al., *The Law of Bargaining*, 87 MARQ. L. REV. 839, 839 (2004) [hereinafter *The Law of Bargaining*].

46. *Id.* at 840-42.

47. *See, e.g.*, 17 C.F.R. § 240.10b-5 (2010) (regulation of the U.S. Securities and Exchange Commission prohibiting fraud and deceit in the sale of securities).

well off or better off than before. A threat of violence violates the logic of the system. However, the line between coercion and permissible bargaining is not always clear, and courts have a role in determining which statements are coercive and which are permissible.<sup>48</sup> For instance, a threat to break a person's car window would be coercive, whereas a plumber's threat to deny services to a person who needs them is not.

Fraudulent representations also undermine value creation. Although each person evaluates the subject of a trade, a person's evaluation should be based on an honest appraisal, not on misrepresentations by the other party. As with coercion, courts have had a long and active role in drawing the line between unlawful fraud and lawful exaggeration.<sup>49</sup> As the economy becomes more complex the line between fraud and aggressive bargaining must be constantly adjusted.

When people do not have access to information or the skill to evaluate it, legislation and regulation often step in to assure that people have basic information necessary to evaluate trading opportunities.<sup>50</sup> For example, a deal to trade a nearly-new car for a nearly-new truck does not create value if one party has rolled back the odometer by 100,000 miles. The difficulty of discovering this type of fraudulent behavior led Congress to require disclosures of odometer readings and to impose criminal penalties for tampering with odometers.<sup>51</sup>

Legal negotiation often involves deals and settlements in which there is limited access to the information known by the other side. It is often necessary to rely on assertions by a counterparty about the nature of the things to be exchanged. One role of lawyers is to help clients draw the line between honesty and misrepresentation. As lawyers play an increasingly larger part in negotiations, it is important for ethical rules to evolve and give guidance. The economic analysis of the value-creating potential of negotiation illustrates what lies at stake.

### C. NARRATIVE IS ESSENTIAL

Negotiation requires that negotiators try to discover a bargaining zone and search for an agreement that leaves all sides better off, or at least as well off, as they were before the agreement. Negotiation is fact-specific. It

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48. See *The Law of Bargaining*, *supra* note 45, at 841-42.

49. See *id.* at 839-40.

50. See, e.g., *id.* at 842-43.

51. See 49 U.S.C. §§ 32705(a)(1), 32709(b) (2006). In other areas, regulatory agencies set standards for honesty in dealing, such as when the Federal Reserve Board requires disclosure of the terms of certain consumer credit transactions under its Regulation Z implementing the federal Truth in Lending Act. See, e.g., 12 C.F.R. §§ 226.1-226.9 (2010).

is concerned with particular people and their unique needs, specific incidents, and specific actions. It is about present conditions and future expectations. The way that people integrate and express their experiences, beliefs, and needs is through stories.

Stories allow integration of facts and values.<sup>52</sup> Stories organize people and events into meaningful relationships and sequences. Stories can evoke empathy and sympathy by dramatizing the similarity of one person's experience to another's.<sup>53</sup> They can connect present experience to the traditions of a culture. People express their needs and values by telling stories about themselves or about others in similar situations.

It is also possible to think about and discuss a problem analytically. Rules and principles can be expressed in abstract terms. But connecting a rule to specific facts requires a story. Needless to say, creating and telling a story is a skill and an art. Stories are the substance of daily conversation and of great literature. Because they are needed in negotiation, lawyers must know how to frame and tell stories. Beyond that, lawyers must know how to collaborate with clients in doing it.<sup>54</sup> Lawyers also need to be open to the possibility that their clients are better storytellers than they are.

When Professor Lucie White was a legal aid lawyer in rural North Carolina, she encountered a case in which the client's narrative overwhelmed the legal rules.<sup>55</sup> Her description of the case in *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, has fascinated lawyers and law teachers ever since.

Mrs. G had received a welfare overpayment through no fault of her own.<sup>56</sup> Faced with dire poverty and overwhelming needs, Mrs. G decided to spend the money on Sunday shoes for her five daughters.<sup>57</sup> When the welfare department realized that it had made a mistake, it demanded the

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52. See ANTHONY AMSTERDAM & JEROME BRUNER, MINDING THE LAW 111-13 (2000) (describing the connection between narrative and law).

53. See, e.g., Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLINICAL L. REV. 9, 17-18 (1994) (describing how Thurgood Marshall's oral argument in *Brown v. Board of Education* told a story with "children, who learn and think and live and feel and hurt and play and grow" as central characters).

54. See Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71 (1996) [hereinafter *Negotiating the Lawyer-Client Relationship*] (arguing for a collaborative relationship between lawyers and clients in every aspect of representation).

55. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 21-31 (1990).

56. See *id.* at 22-25.

57. *Id.* at 31.

money back, and Mrs. G appealed.<sup>58</sup> An administrative law judge held a hearing and ordered Mrs. G to reimburse the welfare department.<sup>59</sup> If Mrs. G had spent the money on “necessities,” she might have been eligible for waiver of the overpayment but she had bought new shoes for her daughters to wear to church.<sup>60</sup> After her lawyer had made the best case she could, Mrs. G told the judge about the Sunday shoes.<sup>61</sup>

Soon after the decision came out, the director of the welfare office notified Mrs. G that he was dropping the claim for reimbursement.<sup>62</sup> Lucie White gives Mrs. G credit for being a better strategist than her lawyer.<sup>63</sup> Mrs. G’s case is also a story about negotiation. Mrs. G was possibly a better negotiator than her young lawyer. Even when a lawyer and client are telling the story of a case to the judge, other audiences with power to resolve the dispute can be listening.<sup>64</sup> One of those audiences in this case was the other party to the dispute.<sup>65</sup>

Mrs. G had told a story in tune with the values of her community. In her story, a mother faced with overwhelming material needs chose to spend unexpected money on Sunday shoes for her five daughters, demonstrating her love of God, love of her children, and love and respect for her community. The judge—as always—was bound by technical rules and legal reasoning, but the welfare director had the authority to dismiss the claim. In response to Mrs. G’s moving story, he did just that.<sup>66</sup> How did Mrs. G do it?

Perhaps she recognized that it was not too late to negotiate. Although it is impossible to know how Mrs. G decided on her course of action, it is feasible to consider why it worked. People are free to negotiate a voluntary agreement at any time. Their legal entitlements and liabilities might shift due to the status of a court case, but other interests remain. The hearing gave Mrs. G a chance to meet face to face with her opponent, the director of the welfare office. It also gave her a chance to tell her story. Her intention

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58. White, *supra* note 55, at 26.

59. *Id.* at 32.

60. *Id.* at 27.

61. *Id.* at 31.

62. *Id.* at 32.

63. *Id.* at 47.

64. See Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1630 (1989) (explaining that audiences other than courts can have the power to resolve disputes).

65. White, *supra* note 55, at 32.

66. Lucie E. White speculates about the message conveyed by Mrs. G’s story and what caused the welfare director to reverse his position. She concludes, “We do not know.” See White, *supra* note 55, at 51-52.

might have been to convince the judge, but her lawyer had already advised her that the legal rules were not favorable.<sup>67</sup> It is quite possible that she wanted the people with whom she had a long-term relationship, the director and staff of the welfare office, to hear her story. She might have wanted them to know that her actions were selfless and laudable. Her story also re-defined the subject of the controversy and made it possible to see how both sides could benefit from settling the case. She identified a bargaining zone. Her story transformed the case from a dispute about who should have to pay for a caseworker's mistake to a question about the mission of the welfare office. Was its mission to help families raise healthy children who shared the community's values, or was its mission to operate with bureaucratic efficiency? In Mrs. G's story, the welfare director could advance the interests of his agency by agreeing to dismiss the case.

Professor Anthony Amsterdam and the noted psychologist Jerome Bruner attempt to define narrative in their book *Minding the Law*.<sup>68</sup> A narrative is a story with a "cast of human-like characters."<sup>69</sup> It has a beginning, middle, and end.<sup>70</sup> The beginning is a steady state.<sup>71</sup> The middle describes how the original state has been disrupted by trouble.<sup>72</sup> The end tells how a steady state is restored.<sup>73</sup> The story reaches a moral conclusion that might be expressed or simply implied.<sup>74</sup> Amsterdam and Bruner observe, "[t]o the extent that law is fact-contingent, it is inescapably rooted in narrative."<sup>75</sup> Bruner calls narrative a mode of thinking that exists side by side with analytical thinking.<sup>76</sup> The recently completed *Carnegie Report* faults legal

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67. White, *supra* note 55, at 29.

68. See AMSTERDAM & BRUNER, *supra* note 52, at 5.

69. *Id.* at 113.

70. *Id.*

71. *Id.* at 114.

72. *Id.*

73. *Id.*

74. AMSTERDAM & BRUNER, *supra* note 52, at 114.

75. *Id.* at 111.

76. See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 96 (2007) [hereinafter THE CARNEGIE REPORT].

In *Actual Minds, Possible Worlds*, psychologist Jerome Bruner, one of the leaders of cognitive science, argues that schools, like modern societies as a whole, depend on the yoking of two broadly different modes of thinking that do not fit easily together.

One mode of thinking is based on narrative; that is, things and events acquire significance by being placed within a story, an ongoing context of meaningful interaction. This mode of thinking integrates experience through metaphor and analogy. It is employed in the arts and in all practical situations, including professional work. Critically, this mode of thought is the source of meaning and value, even in contemporary society. Bruner sees narrative understanding as rooted in embodied skills. Mostly tacit, these forms of bodily perception are most noticeable when absent or widely different, as in encounters between persons formed by different cultures. Then the divergence of basic understanding at the tacit level can render more formal communication ineffective, even counterproductive, as efforts to

education for neglecting the narrative mode.<sup>77</sup> The prestigious study of modern legal education observes that both meaning and value have their origins in the stories that people tell.<sup>78</sup>

The analytical mode of reasoning allows lawyers to derive rules from reasoning about prior cases.<sup>79</sup> However, it is less useful when venturing into unexamined territory. When lawyers, clients or judges need to decide on a course of action, narrative reasoning allows them to focus on relevant facts and to imagine the consequences of a decision.<sup>80</sup>

Mrs. G's story expressed a cultural norm. Her lawyer had reasoned analytically and reached a dead end.<sup>81</sup> The carefully constructed rules of the welfare system laid the burden of the mistake on Mrs. G.<sup>82</sup> The rules of the welfare system no doubt originated in other stories, such as: fairness resides in consistent application of the rules; or, receiving undeserved income creates moral hazard. However, Mrs. G, the welfare director, and the case workers probably knew that these stories would not afford justice to Mrs. G.

Mrs. G's story allowed her opponents to see their self-interest in taking another course of action. Her story laid the groundwork for a negotiated agreement. The exchange of stories in negotiation makes it possible to

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transport institutions and ways of doing things between different parts of the globe attest.

*Id.*

77. *See id.* at 83-84.

On the other hand, law functions as a normative lattice in American society. Law provides a web of categories and rules that interpret and channel individual aspirations while regulating conflict. Its reliance on narrative, even if highly formalized, reveals this involvement in human contexts structured by cultural meaning and moral norms. Students cannot proceed very far in even their technical mastery of the law without encountering issues concerning matters of policy or the equities implied in particular rulings or general rules. Legal thinking naturally opens out onto the concerns of political philosophy, ethics, and religion, though as we noted earlier, the case dialogue's emphasis on formal and procedural issues tends to convey the view that a lawyer need not take matters of policy or "the equities" very seriously. Yet law regulates the world of human activity. . . . From the point of view of professional identity, the missing complements to legal analysis imply the need for a serious effort to re-integrate the severed components of the educational experience.

*Id.*

78. THE CARNEGIE REPORT, *supra* note 76, at 83 ("The narrative is a mode of thinking that integrates experience through metaphor and analogy. It is employed in the arts and also in practical situations, including professional work. Meaning and value have their origins here.").

79. *Id.* at 96 ("Bruner calls the other mode of thinking, by contrast, 'analytic' or 'paradigmatic.' Analytical thinking detaches things and events from the situations of everyday life and represents them in more abstract and systematic ways.").

80. *Id.* at 97 ("Actual legal practice is heavily dependent on expertise in narrative modes of reasoning. . . . Hence both judicial decisions and law teaching must invoke cases in order to give intelligibility to abstract legal principles.").

81. *See White, supra* note 55, at 47.

82. *Id.* at 27-29.



identify sources of value and to discover complementary needs. Narrative is always present in the exchange of offers and counter-offers. Offers and counter-offers contain the elements of status quo, disruption, and restoration that make up a story.<sup>83</sup> However, negotiators who limit themselves to the most formalistic styles of communication will limit their potential to create value. Stories make it possible to apply the unlimited creativity of individuals and cultures to the search for mutually beneficial agreements.

## II. WAYS TO DISCOVER AND CLAIM VALUE IN NEGOTIATION

### A. LEARN THE CLIENT'S NEEDS AND INTERESTS

Negotiation with the help of a lawyer is legal negotiation. The lawyer's role should be decided jointly by the lawyer and client. Negotiation requires a series of tasks; a lawyer and client together can divide the tasks to make the best use of the skill and experience of each. Transactional lawyers typically engage in negotiation with the aim of making a deal. Litigation lawyers negotiate with the aim of settling or avoiding litigation. In either case, the structure of the negotiating process is the same. The goal of negotiation in both cases is to produce a voluntary agreement that leaves all sides better off, or at least as well off, as they would be without the agreement.

The problem-solving approach to legal negotiation prescribes a role for the lawyer based on the economic analysis of bargaining as an activity in which value is created and divided.<sup>84</sup> The lawyer helps a client discover a bargaining zone and claim a portion of the value that is created by an agreement. The steps described by negotiation theory would be the same, with or without the help of a lawyer. However, a lawyer can be of service by making sure that each step is addressed and by counseling the client as she sets goals, makes decisions, and chooses strategies.

As a first step, the lawyer must begin to gain an understanding of the client's needs, interests, and values.<sup>85</sup> The lawyer hopes to understand the spectrum of interests that influence a client's preferences.<sup>86</sup> The client's needs and interests might be legal, financial, social, psychological, cultural, moral, political, or religious.<sup>87</sup> The list is not a comprehensive inventory of human motivations, but rather it reflects how we think about ourselves.

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83. See AMSTERDAM & BRUNER, *supra* note 52, at 113-14.

84. See Hurder, *supra* note 2, at 267-73 (describing the processes of creating and distributing value).

85. See Menkel-Meadow, *supra* note 3, at 801.

86. *Id.* at 802-03.

87. *Id.* at 803 (identifying economic, legal, social, psychological, ethical, and moral needs).

The categories overlap and their boundaries are porous; however, it is important to have a framework to guide the dialogue between the lawyer and client so that important needs and interests are not overlooked. Finding needs and interests might be a process of discovery for the client as well as for the lawyer. No one is likely to have complete self-awareness or totally consistent preferences. In fact, telling stories is a means of creating a sense of self.<sup>88</sup>

The client has probably retained the lawyer, in part, to learn about her legal rights and liabilities. The discussion of needs and interests often starts with a lawyer's explanation of the client's exposure to liability or right to relief. However, this part of the investigation merely clarifies the status quo.<sup>89</sup> It does not answer the forward-looking questions. Taking an inventory of possible interests helps a client formulate goals and preferences.

Financial interests are important, but often not decisive, for a client. The tendency to evaluate a lawsuit solely in financial terms causes lawyers and clients to pass over numerous other sources of value.<sup>90</sup> The question of social needs forces a client to evaluate the importance of future relationships with other parties or the impact of potential litigation on relationships with family and friends.<sup>91</sup> Psychological needs emanate from a person's personality. They would include a need for approval or a desire for conflict.<sup>92</sup> A psychological need important to negotiation is a person's attitude toward risk.<sup>93</sup> A risk-averse person might prefer settlement. A risk-seeking person might favor having a third party decision maker.

Cultural interests can also be a powerful motivation for decision making, but the nature of culture is that its influence is often invisible to the person it influences.<sup>94</sup> Discussion of a client's cultural background, national origin, or primary language can begin the process of learning about cultural influences. The stories a client tells might express cultural values. A serious attempt to understand a client's culture can also require making a connection with the communities that have helped shape the client.<sup>95</sup> A

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88. See JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 85-86 (2002) ("I have argued that it is through narrative that we create and re-create selfhood, that self is a product of our telling and not some essence to be delved for in the recesses of subjectivity.").

89. See Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795, 807 (2004) (describing the significance of establishing a realistic "reference point of the current state of affairs").

90. See, e.g., Menkel-Meadow, *supra* note 3, at 803-04.

91. *Id.*

92. *Id.* at 802.

93. *Id.* at 802-03 (describing possible psychological needs).

94. See AMSTERDAM & BRUNER, *supra* note 52, at 232.

95. See, e.g., Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indige-*

lawyer can learn about a client's culture by visiting her home, attending meetings, or being present at holidays and ceremonies.<sup>96</sup> In like manner, a client's preferences might arise from moral, religious, or political interests.<sup>97</sup> A dialogue that gives a client an opportunity to identify moral concerns, religious convictions, or political interests can alert a lawyer to needs and interests that might otherwise be unspoken.

The discussion of needs, interests, and values in preparation for negotiation must be two-sided. A lawyer should strive to be aware of her own corresponding interests. To build a collaborative relationship a lawyer might need to reveal interests that impact the role that the lawyer takes in the negotiation. The lawyer might have an interest in preserving a long-term relationship with the other side, even when the client does not. Disclosure of the lawyer's hidden interests might make it possible to plan more effective negotiating strategies. A lawyer should also try to be aware of her own culture-based habits and assumptions.<sup>98</sup> Unfounded assumptions can prevent a lawyer from recognizing significant interests of a client.<sup>99</sup> The depth of the relationship that needs to be built between a lawyer and client can depend on the nature of the negotiation, but, in any event, problem-solving negotiation requires a lawyer-client relationship that facilitates communication and collaboration.<sup>100</sup>

## B. HELP DEVELOP THE CLIENT'S BATNA

After a preliminary discussion of a client's needs, interests and values, a lawyer can help a client identify options to meet the client's needs without resorting to a negotiated agreement with the other party. Creativity in searching for alternatives that do not depend on agreement with the other party can strengthen a person's position in a negotiation.<sup>101</sup> Roger Fisher, William Ury, and Bruce Patton advise negotiators at this step to discover the *best* alternative to a negotiated agreement, an option they refer to by its

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*nous Communities*, 5 CLINICAL L. REV. 557, 574 (1999) ("While an individual's relationship to her community may be a close and integral one or a complicated and distant one, an attorney must consider its nature in order to understand the client decisions.").

96. See Alex J. Hurder, *The Pursuit of Justice: New Directions in Scholarship About the Practice of Law*, 52 J. LEGAL EDUC. 167, 173-74 (2002).

97. See Hurder, *supra* note 2, at 283.

98. See Marwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 381 (2005) (urging lawyers to understand how a lawyer's own culture creates expectations and affects interactions with others).

99. *Id.* at 381.

100. See MNOOKIN ET AL., *supra* note 35, at 178 (recommending a "client-centered, collaborative relationship that supports problem solving negotiation").

101. See FISHER & URY, *supra* note 1, at 183-84.

initials as the "BATNA."<sup>102</sup>

Finding alternatives and choosing the best alternative requires a synthesis of all the information produced by the dialogue between lawyer and client. Needs must be specified, and conflicting preferences must be reconciled. The lawyer's skill and experience can help generate realistic alternatives, particularly if the probable outcome of legal action is one of the factors. Problems that concern children, business plans, or government programs might require consultation with psychologists, accountants or other experts at this stage. The search for a BATNA allows the client to formulate preferences and to make tentative decisions in the intimacy of the lawyer-client relationship. It prepares a client to evaluate offers and counteroffers at later stages of the negotiation.

### C. HELP THE CLIENT DECIDE HIS RESERVATION VALUE

Finding a BATNA prepares a client to set a value on the things that the client is prepared to give up in trade.<sup>103</sup> Whether the client's offer is to dismiss a lawsuit, admit a crime, or sell a house, the client sets a value on the subject of exchange by deciding exactly what the other side can give that would lead the client to the point of indifference between making an agreement and walking away with no agreement. In negotiation theory the value set by the client is called a reservation value.<sup>104</sup> If the client can obtain more than the reservation value through a negotiated agreement, the client will be better off. If the other party offers less, a voluntary agreement is not possible. Furthermore, a person's reservation value can change as circumstances evolve.

### D. LEARN ABOUT THE OTHER SIDE'S NEEDS AND INTERESTS

The other side in a negotiation also goes through the steps outlined above. Discovering a bargaining zone and claiming a portion of the value created depends on learning or, at least, estimating how the other side has identified its needs and preferences, discovered its BATNA, and set a reservation value. If the other side's reservation value is greater than the client's, there will be a bargaining zone.<sup>105</sup>

Collaboration between lawyer and client is important for the task of learning about the other side. If the parties have had a long-term relationship, a client is likely to have more information about the other party's

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102. See FISHER & URY, *supra* note 1, at 100.

103. See Korobkin, *supra* note 7, at 1794-95.

104. See Hurder, *supra* note 2, at 269.

105. Mnookin, Peppet, and Tulumello refer to the bargaining zone as the "Zone of Possible Agreement" (ZOPA). See MNOOKIN ET AL., *supra* note 35, at 19.

needs, interests, and values than the lawyer. For example, in a divorce, a wife will be able to provide insights about her husband that cannot be learned in any other way. However, a lawyer can also take on the task of learning about the other party through research and investigation. Another crucial source of information about the other party is the contact that occurs during the negotiation itself. The stories told by the other side and the offers made are a rich source of information.

It is important to consider the same spectrum of needs, interests, and values of the other party that the lawyer explored with the client. Legal, financial, social, psychological, cultural, moral, political, or religious needs and interests also motivate the other side. Differences between the parties can create complementary needs and lay a foundation for a mutually beneficial agreement. Failure to consider interests, such as the political impact of a settlement or the unfairness of a deal, can undermine an agreement and leave one side wondering why the other walked away.

A process that promotes the exchange of information expands the possibilities for value-creating agreements. Rules of confidentiality limit the disclosures a lawyer can make to the other side in negotiations, but the necessity of exchanging information in negotiations makes it important for lawyers to counsel clients about what to disclose and what to withhold.<sup>106</sup> Framing a story to tell the other side provides a structure to decide what to reveal and a context that explains the client's goals.

#### **E. TELL THE CLIENT'S STORY AND LISTEN TO THE OTHER PARTY'S STORY**

When I was a legal aid lawyer, I often received telephone calls from other lawyers to tell me that they had filed suit to evict my clients. The other lawyer would often begin with a statement such as: "Your clients have destroyed the apartment. There are holes in the walls, and it looks like a pig-sty. When are they going to move out?"

That was the other side's story. When I talked to my client I would learn a totally different story. Dishes were piled in the sink because the landlord had shut off the gas and water to force the tenants out despite the fact that they had a valid lease. Even in these tense situations, it was possible to discover complementary needs and to negotiate settlements that left both sides better off. However, it was necessary for both sides to reframe their stories. The landlord's story, describing the tenant as an animal who recklessly destroys property, neither encourages cooperation nor reveals the landlord's actual needs. The tenant's story should explain why the apart-

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106. See Hurder, *supra* note 2, at 295-96.

ment is in the shape it is in and what the tenant can do in the future to preserve the landlord's property. Facts that personalize the parties and foster empathy can remove resistance to a mutually beneficial agreement.

Storytelling in negotiation is unavoidable. Each person begins negotiating with a status quo and a desire to make it better. The most austere proposal to a potential trading partner is already a story because it describes a condition that has been disrupted and suggests a change. The need to add details that inform, persuade, and define the trade invites the parties and their lawyers to master the art and skill of storytelling.

#### F. BRAINSTORM SOLUTIONS AND EXCHANGE PROPOSALS

The problem-solving approach relies on brainstorming to generate potential agreements.<sup>107</sup> Mnookin, Peppet, and Tulumello describe brainstorming as an exercise in which people throw out ideas without evaluating or prioritizing them at the time.<sup>108</sup> Brainstorming allows an exchange of tentative proposals and gives each side a chance to react favorably or unfavorably. It is a means of testing the other side's needs and interests, recognizing the reality that each side has only imperfect information about the other. The greater the level of trust and cooperation that exists between the negotiating parties, the more useful brainstorming can be as a joint search for solutions. However, at some point ideas must be turned into proposals and communicated to the other side. This exchange of offers and counter-offers is the classic activity of negotiations.<sup>109</sup>

#### IV. NINE QUESTIONS TO ASK BEFORE SETTING PROCEDURAL GOALS

Every negotiation is different. A negotiation can be a brief telephone conversation between lawyers or it can be lawyers and clients conferring for weeks across a conference table. It can take place in an airport or in the hallway of a courthouse. The absence of rules does not imply that negotiators should be indifferent to the procedures that they follow. Where it happens, who is present, and when it happens can all be important to the outcome. The procedures to be followed are as much a subject for negotiation as the substance of an offer is.<sup>110</sup> However, neither side can dictate the procedures.<sup>111</sup>

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107. See MNOOKIN ET AL., *supra* note 35, at 37-39.

108. See MNOOKIN ET AL., *supra* note 35, at 37-39.

109. See FISHER & URY, *supra* note 1, at 3-4.

110. *Id.* at 9-10.

111. *Id.*

Parties have to work together to reach an agreement, but how they work together can make a difference. A lawyer should be able to design a process that makes it possible to accomplish the essential tasks of negotiating a value-creating agreement. The process should give the negotiators the best platform to inform, to learn, to persuade, and to compete. Procedural goals must be tailored to each specific situation. They will depend on the substantive goals of a client and on the personalities of the parties and their lawyers. The other side does not have to go along, however. The best that one side can do is to set procedural goals and advocate their adoption.<sup>112</sup>

Lawyers and clients should ask at least the following nine questions before setting procedural goals for a negotiation:

- (1) What is the client's best story to tell?
- (2) Who is the best audience for the story?
- (3) What are the best disclosures for the client to make?
- (4) What is the best means of discovering the other side's needs and interests?
- (5) Who is the best person to tell the client's story and to be the client's advocate?
- (6) What is the best way to treat the other side?
- (7) Where is the best place to meet?
- (8) When is the best time to meet?
- (9) What is the best agenda for the meeting?

### **(1) WHAT IS THE CLIENT'S BEST STORY?**

Negotiation gives a client great freedom to tell a story that expresses the client's truth and values. Because of the immense power of stories, trial courts limit their content to facts that are considered relevant and to events witnessed firsthand by the speaker.<sup>113</sup> In negotiation the storyteller is able to decide what is relevant and what is true.

A negotiator tells a story to secure the cooperation of the other side. Therefore, the story must be believable to the other side. It must rely to some extent on values shared by the other side. It should show how the other side can derive some benefit from the suggested outcome. Parents

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112. See MNOOKIN ET AL., *supra* note 35, at 207 ("The rules of play are up for grabs.").

113. Federal rules of evidence allow parties to exclude evidence that is not considered relevant by the court, and hearsay rules prohibit second-hand testimony in most instances. See, e.g., FED. R. EVID. 402, 802.

and school authorities negotiate frequently over the individualized educational plans of children with disabilities.<sup>114</sup> An angry parent might tell a story in which a child with great potential has been permanently harmed by the neglect of the school system and all of its representatives, giving rise to a right to compensatory services. On the other hand, the same parent can frame a story in which all of the actors have tried in good faith to find the key to developing the child's potential, and now a new approach has been found that can prepare the child to succeed in high school and college. The second story invokes values shared by the parents and the school. It focuses attention on the future rather than on fault and blame in the past.

The choice of story will give rise to procedural needs in the negotiation. A long story needs a quiet place and a time without disruption to tell it. A story that depends on the truth of its facts should not be told until the facts have been verified. Thus, scheduling the negotiation should accommodate the need to gather information. If a story is told best by the client, then the client needs to be present at the negotiation. If the story has been framed to appeal to an opposing party, then that party needs to be present to hear it. Such factors should be considered in planning a proposed process.

## (2) WHO IS THE BEST AUDIENCE?

Legal negotiation often evokes the image of two lawyers with briefcases full of documents wheeling and dealing. There are other possibilities. Another lawyer might not be the best audience for a client's story. What happens to the story when it is retold to the other client? Does it keep its dramatic urgency? Is it stripped of the details added to reinforce its credibility and moral force? Did the other lawyer hear what the opposing client would have heard in the story?

Professor Gerald Lopez recommends that lawyers look for different audiences with remedial cultures in order to find the best solution to a client's problem.<sup>115</sup> A remedial culture has a tradition of stories and customary practices for resolving problems.<sup>116</sup> For instance, a religious institution might rely on examples from stories in sacred texts to resolve a dispute. An educational institution might see its role as teaching proper behavior and thus evaluate solutions according to their pedagogical value. A lawyer has

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114. The federal Individuals with Disabilities Education Act requires public school personnel to meet at least annually with parents of eligible children with disabilities to negotiate an Individualized Education Program. See 20 U.S.C. § 1414(d) (2006).

115. See Lopez, *supra* note 64, at 1630 ("Failing to appreciate that a court is not the only audience with a defined remedial culture (constituted in large part by an 'approved' repertoire of stories and arguments and storytelling and argument-making practices), lawyers often blow a chance to help a client by overlooking or crudely responding to the practices of an available audience.").

116. *Id.*



been socialized into the remedial culture of courts and will be drawn toward precedent to find solutions.

Lopez's insight applies even within a single negotiation. A lawyer and client are likely to draw on different remedial cultures. If a client's story relies on the remedial culture of law, the other lawyer might be the best audience. For instance, if the best story of a defendant in a criminal case is that evidence was unlawfully seized and should be suppressed, a lawyer who knows how the exclusionary rule works might be the best audience. However, if a client's story is grounded in the culture of business, public education, or labor relations, the party who knows that culture might be the best audience.

In many negotiations it is not clear who has the power to make a decision. Will it be the parent or the adult child? Will it be the school principal or the special education director? Will it be the CEO or the chair of the board of directors? In such cases, it might be best to tell the story to everyone who will share in the decision. The procedural goal should be to tell the client's story to the audience that will recognize the opportunity to benefit from a voluntary agreement. One must also recognize that procedural agreements can be binding on both sides, and there might be reasons to prevent the other side from telling its story to a client, or the client's relatives, or the client's business associates. The choice of a procedural goal depends on the totality of the circumstance.

### **(3) WHAT ARE THE BEST DISCLOSURES FOR THE CLIENT TO MAKE?**

Disclosing a client's confidences in negotiation requires a lawyer-client dialogue. Information known only to the client might supply the impetus to reach an agreement. It might also leave the client vulnerable to exploitation. If a settlement fails, the other party might use the information it gained in litigation.<sup>117</sup> For example, a client negotiating a plea in a criminal case might want to tell a story that would be reinforced by adding that the client was present and witnessed the crime. However, the danger of admitting that the client was at the scene normally would outweigh any advantage that can be gained. Similarly, in a business transaction, if a deal falls through, the other party might use information gained to compete for business. A lawyer and client need to explore jointly possible consequences of releasing information before making a decision about what to disclose.

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117. See Hurder, *supra* note 2, at 294.

#### (4) WHAT IS THE BEST MEANS OF DISCOVERY?

Negotiators have to discover a bargaining zone and claim a portion of the benefits of an agreement. Both sides reveal the information they want to reveal and leave much unstated. A negotiator needs a plan to learn more about the other side. The lawyer or client might already have some knowledge about the other side. The client might know the events leading up to a dispute or the circumstances that inspired the parties to consider a joint transaction. However, a lawyer and client seldom have all the information needed about the history, interests, and values of the other side.

Sometimes it is possible to learn about the other person by doing independent research. Public records, newspapers, and other people might tell about the other party's public activities, community involvement, or cultural identity. Knowledge of the other client's community can bring out other possible sources of financial or social needs. If a lawsuit has been filed, court documents can provide significant information. But negotiation demands specific information. The other side is often the primary source.

Meeting the other party personally makes it possible to observe and possibly question the other decision maker. It can reveal attitudes, temperament, lifestyle, identity, and many other characteristics. If it is possible to involve the other party in negotiation discussions, the person's reactions and comments can reveal needs and preferences. If the other lawyer plans to negotiate alone, it is still possible to find opportunities to meet the other party within some other context.<sup>118</sup> In settlement discussions, if the other side is resistant to making disclosures and information is unavailable, it might be necessary to delay negotiations in order to use the court's discovery mechanisms to gather essential information.

#### (5) WHO IS THE BEST SPOKESPERSON AND ADVOCATE?

An effective plan for negotiation should use the strengths and talents of both the lawyer and client. There is no required format, provided that the other side consents. At one end of the continuum, a lawyer can be the sole spokesperson and the only person present at meetings with the other side. On the other end, the client could be the sole spokesperson and use the lawyer for consultation and planning strategy. In many cases, the lawyer and client divide tasks.

The procedures of negotiation have much in common with trial procedures, except that the parties alone are the decision makers. In a trial, each side has to tell a story and listen to the other side. Each side proposes solu-

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118. For an example, see Hurder *supra* note 2, at 289-90.

tions and argues for them. It is often effective to assume similar roles for negotiation. A lawyer can make an opening statement that sets the stage for the client to tell her story. If necessary the lawyer can help the client by asking questions as if she were a witness in court. After the client tells her story, the lawyer might summarize the client's proposal and make additional arguments if needed.

At times a client will ask to have a strong role in negotiations. At other times a lawyer might want to convince a reluctant client to become involved personally. The client's knowledge, passion, and presence can be a powerful influence on the other side. Although tradition has created role expectations for lawyers and clients in negotiation, proposing a process in which the participants have roles appropriate to the unique circumstances of each case should be a lawyer's responsibility in a negotiation.

#### **(6) WHAT IS THE BEST WAY TO TREAT THE OTHER SIDE?**

The necessary coexistence of cooperation and competition in negotiation is the guide to optimum behavior among negotiators. Civility ensures that the parties will continue to cooperate. Assertiveness is necessary to make one's position known and to protect one's interests.<sup>119</sup> There is also room for drama, emotion, and aggression in negotiation. It is ultimately a human activity.

The relationship between the negotiating parties includes questions of trust and reliance. In some cases parties will write up every agreement in detail. Writing up agreements, even unenforceable procedural matters, can minimize disputes by ensuring clarity. However, too much formality might also undermine trust between the parties. Lawyers should also consider whether to set a goal of writing up a final agreement or contract between the parties. The relationship between the parties is one part of the answer. If the parties have a relationship of trust, the decision can be based on convenience and efficiency.

#### **(7) WHERE IS THE BEST PLACE TO NEGOTIATE?**

I have a friend who hired a lawyer when her father died to represent her in probate court. The estate was very large, but the only contested claim was a relatively small bill for legal services that my friend did not think her father owed. She did not want the claimant to take advantage of her. My friend and her lawyer were discussing the case heatedly with the plaintiff's lawyer in the courthouse hallway when they passed the men's room. The

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119. See MNOOKIN ET AL., *supra* note 35, at 44-68 (describing the tension between empathy and assertiveness in negotiation).

two lawyers went in. They emerged soon afterward announcing that they had agreed on a settlement of the claim. The woman fired her lawyer and, after a search, replaced him with one who was willing to make joint decisions about issues great and small.

One lesson of the story is that the best place to negotiate is a place that is accessible to everyone who needs to be present. If women need to attend as lawyers or clients, the men's restroom is not a good place to negotiate. If persons with disabilities need to attend, negotiation should be in a place that is accessible and comfortable.

If it is critical to have access to records and documents, negotiation should be scheduled in a city and place where the records are convenient. If it is desirable to invite experts to the negotiation, it can be held where it is convenient for them. In sum, the location should be chosen to facilitate cooperation and creativity.

#### **(8) WHEN IS THE BEST TIME TO NEGOTIATE?**

There are tasks to be accomplished before parties meet to negotiate. If the other party makes a proposal before a lawyer has finished interviewing the client, before the lawyer and client have framed their own story, or before they have examined the available facts, it would be wise to try to negotiate a process that includes: time to prepare, opportunity for each side to tell its story and listen to the other's; and the possibility to brainstorm for solutions. Delay for better preparation can lead to improved agreements. On the other hand, negotiating before time and money has been spent in litigation places additional value-creating opportunities on the table. Of course, meetings should be scheduled at a time when necessary participants can come, and the length of meetings should be set realistically so that necessary tasks can be done.

#### **(9) WHAT IS THE BEST AGENDA FOR THE MEETING?**

When parties meet, the agenda is important. It is also negotiable. It is not uncommon for one side to arrive with the agenda planned, particularly when one side is a large institution or a repeat player. It is not necessary to accept it.

Although each negotiation is unique, it is not unusual for the first one or two items on the agenda to consume most of the parties' time together. The last items might never be reached. If it is important to the resolution of a dispute or deal, an item should be moved to the top of the agenda. If the agenda is going to be long or complex, it can be negotiated as a preliminary matter. Discussions of the time and place of a meeting can include discussion of the agenda. A commitment to a joint problem-solving approach to

negotiation includes implementing steps necessary to coordinate the presence of necessary participants with the timing of related discussions. A joint agreement requires joint consideration of the needs of both sides.

## V. CONCLUSION

There is no single way to negotiate. Answering the nine questions above makes it possible to plan a process tailored to the substantive goals of a client. The questions can help a negotiator assemble information needed to make a plan. However, the plan also has to take the habits and expectations of the other side into account in order to be the basis for voluntary joint activity. The actual process will be a joint creation of participants from two or more sides; participants who might be suspicious, reluctant, and hesitant about the whole endeavor.

Negotiation theory has made it possible to recognize the distinct tasks that all sides need to accomplish in order to bring about a voluntary agreement. The theory draws on many disciplines and has benefited from the perspectives of economists, mathematicians, psychologists, business people, lawyers, and diplomats. Negotiation is an almost universal activity, and attempts to describe it will always fall short. However, an activity that is so significant demands a conscious approach. The problem-solving approach to legal negotiation applies a uniform framework to the negotiation of business deals and settlements of legal disputes. Both deals and settlements create value for the participants, even when the participants are adversaries.

The ability to engage in joint activities for mutual benefit stands as a constant alternative to destructive disputes. The human capacity for agreeing to compete opens the door to achieving individual goals through cooperative action. Finally, the subtlety and nuance of storytelling make it possible to find common ground where few suspect it to exist. Both lawyers and clients have an important role in this process.

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