What about Negotiation as a Specialty?

By Roger Fisher

MOST LEGAL problems are not settled through legislative or judicial action but by negotiation. All lawyers negotiate, but few of us have either a conceptual understanding of the process or particular skill in it. It is time to recognize negotiation as a field for specialization.

Litigation is time consuming and expensive. Cases often drag on because lawyers are not particularly good at settlement, because they have over-convinced themselves of the merits of their client's case, or because taking the initiative toward settlement seems to communicate a lack of confidence in victory.

If some lawyers chose to specialize in negotiation, it would improve both our understanding of the negotiation process and the skills of the best negotiators. Specialization also would permit an honest and effective use of a two-track approach—one lawyer, skilled in the process of making deals, would seek to develop a settlement that the client will prefer over the risks and costs of litigation, while a hard-hearted partner prepared singlemindedly for trial.

I make this proposal not because of doubts about the adversary process, but because of my belief in it. A judge, in order to maximize the chance of a wise decision, hears opposing points of view from different people. When a client has to decide between settlement and litigation, does he or she deserve any less?

One lawyer skilled in negotiation would seek settlement while a hard-nosed litigator prepared for trial. The client then would have a choice of which course to pursue.

What's wrong now?

Like warfare, litigation should be avoided. Let's candidly admit that from the client's point of view virtually every litigated case is a mistake. Unless one client or both had made a mistake, the case could have been settled and both would have been better off. They might have been able to craft an outcome reconciling their differing interests far better than a court could later. At the worst, they could have saved and divided between them the impressive legal fees that litigators earn.

Not only does every litigated case represent a waste of the money of one or more clients, litigation diverts their time and energies from more creative pursuits. Litigation is worse than a zero-sum game in which the winnings of one client added to the losses of the other equal zero. Litigation is a negative-sum game in which, because of lawyers' fees and other costs, no matter who wins the case, both clients—taken together—have lost.

Many law firms do not view mounting legal fees as anything evil, and in fact law firms value litigators because of the large billings they bring in. Today it is a widely held view that law firms will not be interested in any idea that reduces legal bills. But any firm that maintains this attitude is likely to price itself out of the market. Increasingly, law firms will be competing

Illustration by Guy Wolek

are becoming fed up with the high costs of litigation. They will shift their business to firms that demonstrate both a desire to settle cases quickly at low cost—and an ability to do so.

Expensive litigation also is a burden to society. As taxpayers we subsidize this wasteful process by providing judges, clerks and courthouses—even to litigious millionaires who should have settled. Each unsettled case delays every other case. If only clients had enough foresight and skill, they would promptly settle every dispute and split the savings between them. Why don't they? Why do clients make so many mistakes?

The diagnosis

Like us, clients are human beings. They react. They get angry. They see they do that of others, and they lose perspective. So they retain professional counsel. But how good is the advice we give? Perhaps, just perhaps, one reason there is so much litigation is that clients receive less than optimal advice from us lawyers. Like clients, we lawyers sometimes make mistakes by singlemindedly pursuing the litigation option. Let me suggest some reasons for this attitude.

Although lawyers negotiate every day — with spouse, landlord, colleagues, neighbors, salesmen and children—they often do so poorly. The more serious the disagreement, the less likely we are to engage in joint problem solving. We usually shoot from the hip. Clients would be better served by our persuading opposing counsel today than by our persuading a judge next year, but we usually prepare for a trial. Even in professional negotiations, we often attend meetings with no more purpose in mind than to "see what they say." Because we do not have to agree, we treat negotiation as a preliminary and not a final level of action.

In negotiations we are likely to come up with an answer before we fully understand the perceptions and concerns that create the problem. We vacillate between being hard and soft, not knowing which is better. We see no third alternative. We frequently reward the other side's stubbornness by making a concession, forgetting the lessons of Chamberlain and B.F. Skinner that we cannot buy good conduct by yielding to threats. If we respond to outrageous behavior with concessions, we will get more of the behavior we reward.

We often conduct negotiations in ways that are inefficient, exacerbate relations among the parties and produce unwise outcomes.

Another reason so many cases are litigated is that lawyers tend to overestimate the strength of a client's case. There is no doubt that the longer we work on a problem to advance one point of view, the more merit we see in that point of view. We may not be able to persuade a court that our client should prevail, but we always succeed in persuading ourselves. During the two years of arguing cases in the Supreme Court for the solicitor general, I was never on the wrong side—on the side that should have lost. A majority of the Court was sometimes on the wrong side, but not I.

An experiment

Howard Raiffa of the Harvard Business School conducts an experiment that demonstrates the effect of working on a problem as an advocate. Each student is given an identical set of facts about a business to be sold. Half the students are buyers; half are sellers. The facts encourage each side to make a deal. The only question is price. After studying the facts, each student is asked to write down, privately, his or her estimate of the fair price that would be determined by an impartial appraiser.

This experiment has been done many times with hundreds of students. The average price that buyers think fair is always substantially lower than the aver-

Ideas on Improving Negotiation

Many people consider negotiating like putting on their clothes: no need for theory, just do it. But in negotiation, theory does help. Distinctions can make it easier to understand what is going on. Rules of thumb can provide guidance for most cases. Here are some examples:

1. Distinguish between:

people issues	**substantive issues**
perception, emotion, understanding, trust	specifications, terms, price

Rules of thumb: Deal with both sets of issues concurrently, but separately. Do not try to improve a relationship by making concessions or try to obtain concessions by threatening a relationship.

2. Distinguish between:

positions	**interests**
what the parties state they will or won't do	their real concerns

Rules of thumb: Arguing about positions tends to lock people in. Ignore positions except as evidence of underlying interests. Talk about interests.

3. Distinguish between:

inventing options	**making decisions**

Rule of thumb: First generate many possible ways of reconciling interests; decide later.

4. Distinguish between:

talking about what the parties ought to do	**talking about what the parties will do**

Rules of thumb: Insist on talking about what the parties ought to do. Seek agreement on appropriate principles for resolving that question.

5. Distinguish between:

developing the best alternative to a negotiated agreement—then negotiating	**negotiating first—then exploring other options only if necessary**

Rule of thumb: Before sitting down to negotiate, know realistically the best thing you can do if you decide to walk away.

(For development of these and other ideas see Fisher and Ury, *Getting to Yes: Negotiating Agreement without Giving In* (1983).)

judgment. With both lawyers unduly optimistic, the clients are doomed to litigate far more than they should.

A third factor contributing to the high cost of litigation is the fear by counsel that the first side to propose settlement weakens its negotiating position. Appearing eager to settle is taken as demonstrating a lack of confidence in one's case. Instead, if only to strengthen their hand for future negotiations, both sides concentrate on discovery, preparing for trial and looking tough. Meanwhile, legal fees continue to mount.

The prescription: specialization

My suggested answer to all three difficulties is for some lawyers to specialize in negotiation and dispute settlement. The existence of these specialists should improve the quality of the settlement skills offered by the bar and avoid the problems of overoptimism and postponing talks for fear of looking weak.

John Dunlop, a former secretary of labor and renowned negotiator, once suggested that lawyers never would take negotiation seriously until it became a recognized specialty. He seems to be right.

A generation or more ago every lawyer felt competent to draw wills, give tax advice and try a few cases. Today clients can get better service in each of those areas because specialists are available. By concentrating his or her professional services in one field, a lawyer also concentrates on learning. It is far easier to become good at something than to become good at everything.

The time has come for lawyers to recognize that negotiation is a special field in which it is possible to acquire special competence. Of course, as in litigation, a lot depends on personality and other factors that are impossible to teach. But study, theory and concentrated experience can make a big difference. Lawyers can learn to produce wiser outcomes, and to do so more efficiently and amicably.

Most lawyers have given comparatively little thought to the negotiation process. Suppose, for example, that a husband and wife, with children, property and conflicting interests have decided on a divorce. Suppose they wish to

How many lawyers would feel confident giving such advice? Suppose only the wife were to ask how best to negotiate with her husband, who seemed angry, tough and interested only in "winning"? As a professional negotiator, what would be your professional advice?

Working with colleagues at Harvard and elsewhere, a few of us have developed some hypotheses about how best to answer these questions. Recognizing that particular circumstances need to be taken into account, some generalizations appear possible. The handful of distinctions and corresponding rules of thumb that appear in the box on page 1222 illustrate the possibility of developing useful advice. They also suggest how much

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work remains to be done in improving the theory and practice of negotiation.

Some lawyers love the excitement of litigation, the parry and thrust of cross-examination. But others find challenges elsewhere: putting themselves in the shoes of those with whom we differ; understanding their concerns; converting an adversary into a joint problem solver; developing ingenious solutions that dovetail differing interests; persuading people where their true interests lie; and saving clients the costs and anguish of protracted battle.

The two-track answer

Specialization also provides an answer to the twin problems of overestimating the merits of a client's case and of postponing settlement talks for fear of looking weak. Pursue a two-track approach.

tion.

As believers in the adversary process, lawyers recognize the potential bias in all of us. There is no way in which one lawyer, try as he may, can be counted on to give a judge a properly balanced assessment of the pros and cons. To maximize the chance of a wise decision, the judge needs to hear the case for A from one lawyer and the case for B from another.

For a client, the decision whether to settle or to litigate is of comparable importance. Shouldn't the client also be entitled to the benefits of the adversary process? Isn't a client likely to make a wiser decision if one lawyer presents the case for settlement and a different lawyer the case for litigation?

In any major case a wise client should ask one lawyer to explore the possibilities of settlement and a different lawyer to pursue the litigation option. An expert in negotiation, with full authority to negotiate, subject to client approval, would seek to develop a settlement that could be recommended to the client. With that proposed settlement in hand, the client then could weigh the negotiator's arguments for settlement against his trial counsel's arguments for pursuing litigation. The chance of making a mistaken decision to litigate would be reduced greatly.

This two-track approach also could eliminate that widespread working assumption that the lawyer who is talking settlement must have a weak case. When settlement is being handled by a specialist who never litigates, a proposal to talk settlement is no sign of weakness. On the contrary, a specialist in settling cases has an easy opening: "This case just came into the office. My partner is dying to litigate it and says he is confident of a spectacular victory. My job is to see if I can produce a fair settlement, one that I can persuade our client is better—all things considered—than litigation. Let's see what we can do."

Better for everyone

Having different lawyers work on settlement and litigation is better for the negotiator, better for the litigator, and better for the client. The hand of the negotiator is strengthened by the activities of the litigator. The hand of the

litigator also is strengthened.

Freed from any duty to explore settlement, the litigating lawyer can concentrate singlemindedly on preparing and pursuing the strongest possible case in court. The threat of litigation has not been weakened by exploring settlement.

And the client is in good hands, knowing that each option — settlement and litigation—is being pursued by counsel with a special skill in that area.

With this basic concept in mind, there are a number of variations. Specialists in negotiation might seek to settle a case before it is turned over to other counsel for litigation. Lawyer reference plans might list separately attorneys who specialize in settlement, who might undertake to try to settle a case promptly to the client's satisfaction and, if unable to do so within a given time, to turn the case over to other counsel for litigation.

Some small law firms might choose to specialize in negotiation. They could offer to try to settle cases before litigation counsel had been retained or to seek settlement concurrently with the pursuit of litigation by another firm.

Major firms with a litigation department might establish a negotiation department alongside it. They also might establish the policy that in every case one lawyer would have responsibility for litigation and a different lawyer would be responsible for trying to negotiate a settlement. Information could be shared but the roles separated.

For corporations that frequently are engaged in litigation there are similar options: outside specialists could be retained to seek to settle cases for which inside counsel routinely would pursue litigation. Or outside firms could be retained to pursue both options, through different lawyers. Alternatively, a deputy general counsel or other house attorney could become specially trained and experienced in settlement. Outside counsel might then be retained exclusively for litigation and for providing that best alternative to a negotiated agreement should none appear sufficiently attractive.

Some litigators will assume that they are not ready to talk settlement until full discovery has been completed, the admissibility of evidence has been considered and the availability of witnesses has been determined. But as those who negotiate business deals know, uncertainty often promotes agreement. Different predictions about the future, particularly when combined with risk aversion, often increase the pressure for a quick settlement. It is my belief that the modest increased cost to the client of having a specialist in negotiation explore settlement at the early stages of a case would time after time save the client the enormous costs of full discovery and trial.

Professor Raiffa has suggested that experts in negotiation also could offer a special service: "postsettlement settlement." In any dispute involving multiple issues, a settlement on which the parties agree or that may be ordered by a court is likely to be less than optimal—that is, the parties would have preferred a different settlement, but they were unable to find one. An expert negotiator-mediator might offer to talk with each side privately, to clarify their interests and to see if a settlement could be devised, which each side would prefer over the one they have. The case having been settled, the parties might be more willing to let a mediator, perhaps for a contingent fee, learn about their true interests and see if he could generate a package both sides would rather have than the one they worked out. If the mediator can, fine. If not, the parties still have the settlement they reached.

A task for experts

Everyone should know something about putting out fires, and presumably everyone does, but there is a compelling need for professional firefighters. Similarly, all lawyers should know something about negotiation. Most of us should know more than we do. It is high time that we lawyers, whose calling is to serve justice at minimum cost to our clients and to society, should have some members who specialize in the amicable settlement of differences. **Journal**

(Roger Fisher is Williston Professor of Law at Harvard University and director of the Harvard Negotiation Project. This article is adapted from an address at last fall's annual meeting of the Litigation Section of the American Bar Association in Chicago.)

Slow to catch on

SOMETIMES a great notion takes a while to catch on.

Last December the Chicago law firm of Jenner & Block broke new ground when it established the country's first negotiation-dispute resolution department to give clients a chance to have their matters reviewed by attorneys who are not out to try their cases.

Chairman of the department is Joan Hall, who proposed it last November after hearing Roger Fisher speak about his Harvard Negotiation Project at a meeting of the American Bar Association's Section of Litigation, which Hall also chaired at the time.

Fisher believes that some cases should be settled to reduce client costs and make case management more effective. The new department will counsel the client on whether the case should be settled and, if so, the best way to go about it.

"Once lawyers have looked at a case from the client's point of view, they sometimes have difficulty seeing it objectively; they tend to think about the worst possible thing the other side has done," Hall said. "Someone outside the case can take a more objective view."

A check with Jenner & Block in early spring found that some clients aren't ready for the dispute resolution method. The department had yet to handle its first case.

Jerold Solovy, a Jenner partner, said, "We're a little slow in starting, but it takes time to convince the business community that we have this new concept. We formed the department in December and we're organized, but I can't say that we're fully geared up."

Solovy takes the apparent reluctance in stride. "No one probably used the electric light or the telephone or the automobile when they were first introduced. Unless you're Karl Marx, revolution doesn't come in a day." —VICKI QUADE