The Problem-Solving Lawyer

By Michael Palmer

A Vermont dairy farmer died a few years back, survived by three sons. In his will, he left one-half of all his cattle to his eldest son, Jim. He left one third of the cattle to Joe, his middle son. And his will stated that John, his youngest, was to receive one ninth of all his cattle. As things turned out, when he died he had seventeen cows and no other property, not even a handkerchief.

The executor of the will quickly noticed that it was impossible to divide the cattle as prescribed by the will. Jim would be entitled to 8.5, Joe to 5.6667, and John to 1.8889 cows. But a fraction of a cow is a dead cow.

Not knowing what to do, the executor hired a lawyer. Each of the sons hired a lawyer. Now, it just so happened that each of the cows was worth $1,000. After the lawyers did their lawyerly thing, the estate expenses were $944.39. The probate judge ordered 3 of the cows to be sold for a total of $3,000. He directed that $944.39 be paid to the estate's lawyer. John received $888.90 plus one cow. Joe got five cows and $666.70. And Jim was given eight cows together with $500. The legal fees for each of the sons came to $800. When the dust settled, John had one cow and $88.90. Joe had to sell one of his five cows to pay his lawyer, as did Jim.

In the end, John had a cow and a few bucks, Joe had four cows and several hundred dollars, and Jim had seven cows and seven hundred dollars. The probate judge and the lawyers thought the outcome was fairly reasonable. Joe, John, and Jim weren't quite so sure. After all, their father's estate of 17 cows had now been reduced to 12 cows and a bit over $1,000. But neither they nor the lawyers saw any way the result could have been avoided.

It just so happened that a widow in another part of the state died a few weeks after the first farmer. She was survived by three daughters who had lived with her on the farm all their lives. Through her will she left all of her cows to Jill, Judy, and Jennifer in the same proportions as the first farmer: one half, one third, and one ninth, Here again the entire estate consisted of 17 cows.

The executrix, having the same quandary as the first, chanced to explain it to a neighbor farmer who happened to moonlight as a mediator, When the executrix told the neighbor that she saw no way to avoid expensive and divisive litigation, the neighbor, in a gesture of Vermont generosity, said, "Tell you what, You take one of my cows and add it to the seventeen and see if that doesn't help." The executrix thought for a moment, accepted the gift, and went on to probate court.

At court the executrix announced that she had 18 cows and proceeded to give Jill one half (9 cows), Judy one third (6 cows) and Jennifer one ninth (2 cows). On the way back home, the executrix returned the remaining cow to the neighboring farmer with the words that it had been helpful but was no longer needed.

To the person whose only tool is a hammer, all the world looks like a nail.

Positional Dispute Resolution

We lawyers have been trained to view our role in the adversary process as that of the defender or proponent of positions in disputes or transactions. The law schools train us to practice law as modem knights trying to slay the adversary. Our ethical codes enjoin us to pursue our clients' causes zealously, which we often interpret to mean by all means fair and foul short of breaking the law or disciplinary rules. [1]

Frequently, we devise a solution to a problem on our own and then insist that the Other Person accept our solution. We adopt a position before we begin negotiating and then hammer on the Other Person in an effort to obtain her consent, This positional bargaining leads to the all-too-familiar pattern of stating extreme positions and then gradually compromising to somewhere "in the middle." As we back off our extreme positions, we hope that some value will be left after the process has cut the case to shreds [2] it is not an effective way to devise a good solution to a problem. Such positional negotiating is not likely to achieve a good outcome.

This is not a matter of the lawyer's style or manner. "Aggressive" litigators and business lawyers as such are not the problem. Neither are "cooperative" negotiators the solution. Rather, the problem is our tendency to fall into the positional dispute resolution trap. Those with an aggressive style may chew up cooperatives for breakfast, but to the extent they remain fixated on their position, they may be satisfying their own egos while leaving a lot of value on the table that their clients would be glad to have. And by haggling on a straight line between two opposed positions, cooperatives forego the same extra value all while being sliced and diced by aggressives.

Positional dispute resolution is so entrenched in the legal culture that it seems to many the natural or only way we could regulate matters. I declare my position. You declare yours. We fight over the matter in an effort to show each other the error of our ways. Finally, if we cannot resolve the dispute with some sort of compromise between the two positions, we let a judge or a jury decide which of the two positions (or perhaps a third) will win. What other way could there possibly be?

The limitations of positional bargaining become apparent upon reflection. Positional negotiators often

(a) fail to listen to each other,
(b) don't understand one another,
(c) allow a conflict to escalate into harsh words or even violence as anger mounts,
(d) don't get what they want anyway,
(e) pass up creative ways to produce more value for each side, and
(f) feel in the end like they got taken.

No wonder so many of us try to avoid conflicts or just give in when they come our way.

As technical resources have improved (photocopiers, word processing, video recording of depositions, etc.), so too has this positional style of lawyering dramatically increased the pain and cost of resolving disputes. Adjudication frequently becomes a tug of war in which each side expends enormous energy at great cost to move a marker only slightly in one direction or the other. One is

reminded of the well-known picture of two farmers tugging on opposite ends of a cow being milked by the lawyer in the middle. Increasingly, clients and lawyers alike are seeking alternatives to this form of dispute resolution.

Alternative Dispute Resolution

Alternative Dispute Resolution ("ADR") has been to date only a qualified success. ADR firms such as Endispute, the Center for Dispute Resolution, Conflict Management, Inc., and the American Arbitration Association as well as individual mediators have been making a variety of ADR resources available for over 25 years. Some courts have instituted mandatory mediation and other court-annexed ADR procedures. Yet only a small fraction of the disputes that lawyers are are resolved through mediation, arbitration, or some other standard form of Alternative Dispute Resolution. One might well ask why this is so.

It may be that a large percentage of disputes are not suitable for ADR. Notwithstanding the benefits of mediation and arbitration, many people, including lawyers, are genuinely suspicious of the universal applicability of ADR as it is often understood and practiced. Some see in it a tool for the powerful to take advantage of the weak outside a forum that is traditionally supposed to balance the scales. Thus, the anthropologist Laura Nader sees ADR as a "movement to 'trade justice for harmony."'3 Others have voiced concerns about the power imbalance in the mediation of divorce issues and sexual harassment claims.[4] Recently, commentators have asked whether mediation is a fair way of resolving special education disputes and have pointed out problems with mediation in deciding terminal illness issues.[5] If nothing else, these voices of concern should warn us against all-too-readily accepting any process purporting to be mediation or another form of ADR as being necessarily appropriate dispute resolution regardless of how it is, in fact, practiced. There is such a thing as ADR malpractice, and one form of it does, indeed, trade justice for supposed or superficial harmony.

Perhaps more time is needed to inform lawyers and clients about these supposedly new methods. [6] Although some larger corporations have reduced their litigation costs significantly by using ADR options, [7] many smaller businesses have not yet made the cost/benefit comparison for themselves.

Valid as these arguments are, it may be that the legal profession has been slow to adopt mediation and other ADR procedures for more fundamental reasons, Like soldiers in boot camp who are taught to kill, we in law school were taught from the beginning that our role is to "win" for our client, not to help resolve disputes. [8] For most of us (as indeed for many professors) "winning" means defeating the other party. "Winning" means getting the largest share of a fixed pie for our client by any legal means possible. In short, "winning" means prevailing with "our position" over the position of the other side. Frequently, we view our job as that of bringing back a "win" regardless of the cost (in time, money, and emotional distress) even to our own client.

It would be wrong to suggest that the law schools are the cause of the positional, winning-is-the-only-thing approach to legal practice. More likely, they are merely an expression and a channel of something deeper. That something deeper is the tendency in our culture to see the Other Person as an opponent rather than a neighbor. [9] It has been said that we have a need for enemies. [10] Whether that is

true on a genetic level, it is indisputable that over hundreds of years our Anglo-American legal culture, having its roots in trial by combat,"[11] has developed positional dispute resolution to a fine art, if "art" is the right word.

Our legal education presupposes a winner-take-all mentality in the judicial system. Learning to "think like a lawyer" means becoming better than the next person at winning in that forum. The true interests of our clients become secondary. "This is the system we have," we say. "If the clients don't like it, that's just too bad. Don't look at us. We didn't invent it,"

David Luban has done much to show that this resignation is a cop out. [12] It is time that we lawyers take responsibility for the system we have. To borrow Hillel's words, if not us, who? If not now, when?

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Problem-Solving Negotiation

We can pursue a different path, one that is better for our clients and, coincidentally, one that will give most of us a much greater sense of fulfillment in our profession. We might call our current practice the path of Positional Dispute Resolution. An alternative approach is the use of Problem-Solving Negotiation. [13]

Social psychologists tell us that there are four basic strategies for dealing with conflict: [14]

1. Yielding
2. Avoiding
3. Contending
4. Problem Solving

While we may have an individual preference for one of these approaches to conflict, we probably have used them all over the years. There is no one right strategy for all conflicts all the time. It might be best to avoid a conflict with a mountain lion altogether. Giving in (yielding) may be best when I can do a great favor for the Other Person at little or no cost to me. There may be times when contending is an unavoidable prelude to problem solving or simply the only way to resolve the dispute (e.g., when bringing a lawsuit to effect a change in public policy). Yet, problem solving is surely the correct strategy in a wide variety of conflicts.

Problem-Solving Negotiation is an attitude, a theoretical framework for conflict management, and a collection of skills and tools with which to achieve a good outcome in disputes. What follows is only a brief overview of the subject. It is an effort to make more accessible the argument for integrating problem-solving strategies into the normal work of lawyers handling civil disputes [15] and transactions, Hopefully, the reader will become stimulated to learn more about how to improve his or her existing problem solving skills. [16]

The problem-solving approach is not synonymous with the term "Alternative Dispute Resolution." The latter term has come to be associated with a wide variety of

procedures, including mediation, arbitration, mini-trials, early neutral evaluation, rent-a-judge, and the like. The variations on these procedures (e.g., baseball arbitration, high-low arbitration, Michigan mediation) have been a tribute to the ingenuity of workers in this vineyard.

However, with the possible exception of transformative mediation, [17] all these forms of ADR are still dominated by the positional bargaining approach that the disputants and their attorneys typically bring to the process. Thus, many people, including former judges and others who hold themselves out as mediators, perceive mediation as a search for a compromise between opposing positions. Others shy away from arbitration as being merely a poorer quality (albeit cheaper) form of adjudication in which an arbitrator splits the baby down the middle. [18]

Although ADR so-conceived and so-practiced still has much to commend it over bull-headed litigation, as long as the participants conceive and practice it primarily in the positional mode, it will not give them or society in general the wealth of benefits that are otherwise possible. We need to get underneath the positions to the underlying interests so that we can generate interest-satisfying options for mutual gain in accordance with acknowledged standards of legitimacy.

Unfortunately, we are relatively unskilled in problem-solving negotiation. The dominant cultural model is that of contending. Because contending is (for most of us) an unpleasant experience, we frequently (a) try to avoid conflicts or (b) give in rather than go through the stress and pain of a fight. We don't see that we have another option. And we don't know how to do it well if we do see it. It is time that we learned more about the problem-solving option.

Problem-Solving Negotiation ("PSN") was developed by Roger Fisher and others at the Harvard Law School Project on Negotiation. Getting To Yes: Negotiating Agreement Without Giving In, the best-selling book by Fisher, William Ury, and Bruce Patton, contains the most succinct and most popular statement of the principles underlying PSN. [19] It has been used to great advantage by participants in the Camp David Agreement between Anwar Sadat and Menachem Begin, by the leaders who brought about the peaceful transition to majority rule in South Africa, and by countless lawyers, businesspeople, mediators, and others looking for nonviolent, non-coercive ways to resolve conflicts.

PSN views conflict as a shared problem, one that the parties involved can usually solve to their mutual advantage. It is a form of conflict management that leads to the constructive resolution of disputes. People who practice PSN tend not to keep score or to ask who's winning and who's losing. This is not to say that they lose sight of their own interests. Quite the contrary. Attention to interests is at the heart of the process.

PSN is not a patent medicine. It is not a secret recipe or special bag of tricks.

PSN cannot be reduced to a simple rule-like "Act toward others they way you want them to act toward you."[20] Rather, PSN is a general strategy for dealing with all kinds of conflicts in a way that leads to a good outcome for all. It is not enough to have good will. It is not enough to want to be fair and have positive relationships. It is not enough to desire peace. To solve conflicts on a regular basis, to live peace in a conflict-ridden world, requires the strategic use of specific problem-solving skills.

Problem-Solving Negotiation is one collection of skills and a strategic blueprint for employing them that has stood the test of application in a wide variety of conflicts. It is based on the recognition that the negotiating process consists of seven elements: [21]

* The Relationship between or among the parties
* Communication between or among the parties
* Each party's Best Alternative to a Negotiated Agreement (BATNA)
* The Interests of the Parties
* Options that might serve to satisfy some or all of the interests of the parties
* One or more standards of Legitimacy for assessing proposals and outcomes
* Commitment to one or more courses of action

Practitioners of PSN pay attention to these seven elements in special ways when working with others in trying to resolve conflicts. The Project on Negotiation at Harvard has developed various tools to help problem-solving negotiators use these seven elements synergistically and systematically. But the secret is an open one: Learn to attend to these seven elements and you will be much better at resolving conflict than otherwise.

Some general statements grow out of the basic insight into the structure of negotiation. The object of a healthy dispute resolution process is to satisfy interests, not to cling to concrete positions on how those interests might be fulfilled. An agreement should satisfy each party's interests better than each party can satisfy them alone. Agreements are likely to be better if the parties take into consideration the standards or criteria of judgment each uses. Agreements are better if no party subsequently feels taken. To achieve agreement, the parties will need to communicate as well as possible. The better the relationship, the easier it is to reach a good outcome. An agreement should help improve the existing relationship between the parties.

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Element One: RELATIONSHIP-I Control Me and Affirm You [22]

Is the relationship between the parties good or are they unable even to stay in the same room together? What can be done to improve the relationship? What effect on a good relationship will certain tactics have? Is that effect acceptable to my client? Is a long-term relationship important or unimportant to my client? What would be the benefits of an improved relationship? How might the relationship be improved through the dispute resolution strategy that 1 am considering? How might it be worsened? Does it matter? To whom does it matter?

All these questions and many more are important when trying to resolve a dispute or conduct a negotiation. In our culture, we like to think that we are self-sufficient, that

we do not need anyone else. Accordingly, we often proceed on the assumption that we can treat the other person poorly as long as we have the upper hand or believe we are in a stronger position or are unlikely to be dealing with him or her in the future, We have a lot to learn in this regard. Relationships, even supposedly transient ones, matter. Indeed, reality is relationship. The lawyer who attends to this element will frequently obtain a better outcome for his or her client than otherwise.

The Rule of Reciprocity

Most of us are inclined to live by a fundamental law of human interaction: We do unto others as they do unto us. This is the Rule of Reciprocity.

On the negative side, whenever someone hits us, we want to hit them back. Retaliation is so ingrained in our makeup that we might even think it has biological roots. Some cultures have refined the urge to strike back into the fine art of revenge. Or we might refer to it as "balancing the scales." Whatever we call it, this reciprocating impulse seems to take hold reflexively. When someone hurts us, we want them to feel at least as much pain as we do. On a societal level we view our criminal justice system as a vicarious means of paying back the wrongdoer who then must "pay his debt" to society.

It is interesting, though, that this urge to respond in kind, to reciprocate, is activated as well when someone does us a favor. Someone does us a kindness; we want to be kind towards them. It feels almost like an obligation. This is especially true when the good deed appears to have no ulterior motive or arrives with no strings attached. [23]

The skilled negotiator can work wonders by using the Rule of Reciprocity to build better relationships. There are two ways to do this. The first is to initiate positive acts toward the Other Person. These might be simple acts of politeness, of courtesy, of decency. Smile when you meet. If it is my office or home, I should make sure the Other Person is comfortable or has something to drink. If the Other Person is bursting to talk, it is best to let her talk first and to hear her out. An honest compliment can also help get us on the right track.

Such affirming acts must be genuine. It rings hollow to go through the motions of being polite, when your whole body is shouting how much want to strangle the Other Person. But if I can muster the strength to show true kindness toward the Other Person, the Other Person will start to repay that kindness toward me.

The second way of skillfully applying the Rule of Reciprocity is to break the rule. When someone is rude to me, I should resist the urge to respond in kind. Instead, it is better to find a way to do something good to them. Deliberately break the cycle. Intervene in the reciprocal behavior pattern. Refuse to toss back the verbal hand grenade Send a bouquet of flowers, instead.

What happens when I return good for evil? I break the cycle of destructive behavior and create circumstances in which the Other Person feels the need to respond to my positive behavior with positive behavior on her part. If the Other Person is extremely angry and hostile, it may take a while before my good deeds have the effect of generating good deeds in return. But it eventually will happen with most people.

Much of the time we let the Other Person's behavior determine what we do. We don't have to do that.

By understanding and applying the Rule of Reciprocity skillfully, I can turn it to our mutual advantage. Whenever the Other Person does something nice to me, let me return the favor. Whenever she loses her cool or flies off the handle or even maliciously and deliberately insults me, let me suppress the impulse to give as good as I got. We can rise above the petty fray and find a way to return good for evil.

Because this is a behavioral skill, it must be practiced. 1 am unlikely to control my animal impulses in a heated negotiation if I have not practiced this restraint in less demanding contexts. But if I develop the skill of eliciting good behavior by behaving well myself, then I will acquire a far greater negotiating power than ever possible through bullying, threatening, or abusive behavior.

Stop the Blame Game

Sometimes we physically point a finger at the Other Person. More often, we find less demonstrative ways to blame the Other Person for whatever we think is going wrong. But we all have a talent for talking about how the Other Person is at fault.

No good comes from the Blame Game. The Other Person is likely to go into a defensive mode, enumerating how we are wrong. Or worse the Other Person will turn the tables and rant about
how I am the one causing all the problems.

In short order we will have moved away from solving the real problem. We will be deep into personalizing the matter. It is crucial, as Roger Fisher says, to separate the people from the problem.

"But what," you say, "if the Other Person is the problem? Shouldn't we then call a spade a spade and get on with it?"

No doubt we often see the Other Person as the problem. (And guess what the Other Person thinks on this subject?) But I venture to state that the Other Person is never the problem-and neither are you. The problem is always more complex than that.

The conviction that the Other Person is the problem arises frequently in troubled marriages and divorces. He does X,, Y, and Z. She doesn't do L, M, and N. He's a ____. She's a _____. But just as a marriage is the creation of a new reality through joint effort, so too does the destruction of that union have causes that run deeper than the behavior of either party. It takes two to tangle as well as tango.

At any rate, even if I think the Other Person is the cause of present difficulties, it is never productive to say so. It never helps to point my finger figuratively or literally at the Other Person.

During the course of negotiations between Israel and the PLO over Palestinian autonomy in the West Bank, one of the Israeli negotiators said, "You must take concrete steps if our relations are to change. "First of all, you must make it clear that the Palestinian Police is the only body with military authority on the ground. Second,

you must confiscate all unlicensed weapons. And third, you must halt the incitement to violence." [24]

From the perspective of the Palestinian negotiating team, this speech probably sounded like the other negotiator was blaming the Palestinians collectively and the negotiators in particular. It was a form of finger pointing. Indeed, at the time the Palestinians responded in a predictably defensive way. [25]

The Israeli negotiator could have talked about Israel's needs as he saw them without ever implying any blame: "I think we need three things: First, we must jointly find a way to make it clear that the Palestinian Police is the only body with military authority on the ground. Second, we probably both want all unlicensed weapons to be confiscated. Third, we must find a way to stop incitement to violence." By phrasing the matter in a non-accusatory fashion, I present my need in a way more likely to become a joint problem that we both try to solve.

I should, therefore, point my finger at the problem, not at the Other Person. In so doing I stand a better chance of enlisting the Other Person as my ally in attacking that problem.

I Control Me

Anger is one of our strongest emotions. Given full vent, it can lead to destructive acts that we will long regret. Properly controlled, anger can be one of our most powerful resources-in negotiation and elsewhere.

At times anger is the force that moves a couch potato to take action. Call it righteous indignation. If we felt nothing, we would do nothing, We would be indifferent because nothing would engage us where we care.

"Controlling me" does not mean that I must always hide my anger or pretend that I am not angry. It is sometimes important to let the Other Person know that I am seething. It can make sense- and be tactically useful-for the Other Person to see that he or she has done or said something that touches a nerve.

But if anger can be a positive force, it can, when out of control, lead to tremendously destructive behavior. We yell. We throw things. We hit people. We say things we can't take back.

Some people cannot control what they do when they become angry. But most of us can. Some of the most explosive people put on their best behavior when they walk into a courtroom or a church, a synagogue, a mosque, or a temple.

What is the secret of this control? Perhaps it has many parts. One aspect might be the commitment to ban certain acts from our own behavior no matter what the circumstances. For example, we might tell ourselves that hitting another person is never acceptable as an expression of our anger. Verbal insults might be added to the list. Another part of self-control might be the cultivation of an attitude of respect for the Other Person, whoever he or she might be. Would we fly off the handle at someone we hold in high regard?

It is up to me to control the expression of my anger. Indeed, it is up to me to control all of my behavior. I do not need to erupt in violent acts or abusive language whenever I become angry.

It never serves any useful purpose to express my anger as an attack on you, whether physically or verbally. When I berate you, you are likely to become mad at me or to resent my attack or to withdraw to lick your wounds. Even if you know my anger is justified, you will not appreciate being treated in an offensive manner,

Call Time Out

0K, so it's not always easy to be nice or to control my temper or to resist the urge to point the finger. Sometimes I just will not be able to continue without blowing up. What should I do?

Call for a break. William Ury, co-author of Getting To Yes, calls it "going to the balcony."[26] Interrupt the process by getting away from the table. Go outside and give everyone involved, yourself included, a chance to cool off

If it's not possible physically to leave or to stop the session, take a mental break. Count to ten, Count to ten again. Count to ten again. Take deep breaths. Stop talking. Focus on controlling yourself

. . . . and Affirm You

The second half of the phrase-"and affirm you"-is the key to the first. To affirm another person is to accept him or her as of equal worth, entitled to the same respect and dignity that I want for myself Shakespeare gave this fundamental fact memorable expression:

I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as a Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? [27]

A key tenet of Hinduism, tat twain asi, has been translated as "yonder person, I am he." In the
Western tradition, John Donne tells us "no man is an island," [28] Martin Buber has given us
profound discussions of the dialogical nature of reality, most notably in his classic work, I and
Thou. [29] To affirm the Other Person is to act as if he or she is just as important as I.

Now, if I really believe that whatever I do to you, I do to me and if I sincerely try to affirm you and respect your dignity, am I likely to fly off the handle and treat you in an abusive fashion? I suspect not. I suspect that a deep conviction that affirms your value will also help me control my behavior, even when you do or say things I don't like.

At any rate, acting as if I thought you were the most important person in the world works wonders in the negotiating relationship. And as a side benefit, through the rule of reciprocity, it just may be that the Other Person will treat me with respect as well.

On April 11, 1993, the maximum security prison in Lucasville, Ohio was taken over by prisoners. During the first week of the takeover, the prisoners controlled half of the prison. Several prisoners and one guard hostage were killed. Despite the horrific circumstances, the Ohio authorities were determined not to have a repeat of the catastrophe that occurred when correction officials retook Attica Prison by force in New York 20 years earlier.

The prisoners demanded a lawyer and the Ohio Department of Corrections asked Niki Schwartz to serve in that role. After several days of negotiations, the hostages were released, the prisoners returned to their cells, and the prison authorities had entered into an agreement to address the prisoners' most serious grievances. In marked contrast to Attica, no hostage was physically harmed after the initial takeover.

As Niki Schwartz later told the story, he and other negotiators were effective in large part because they treated the prisoners with dignity and respect. They drank coffee together. They brought in food and medicine. They listened to what the prisoners had to say. In short, they did what they would have wanted done had the tables been turned.

And these hardened criminals, who were desperate enough to put their lives at risk in the rebellion, did the same for the negotiators. They acknowledged the mediators as people worthy of respect. They entered into a relationship of trust. And together they solved the problem.

The "hardened criminals" and the "outside do-gooders" ceased to be stereotypes and bogeymen. They became real people for each other. They had names, not numbers and masks. They saw that they all were "subject to the same diseases, were healed by the same medicine, were warmed and cooled by the same winter and summer." And the recognition of that fact in their behavior made all the difference.

Any serious problem-solving negotiation involves the creation of something new: two or more people come together to bring about a new or different relationship. They work together to mold their perspectives and desires into one result. From viewing each other as and I and an It, they come to see each other as I and Thou. Each more nearly recognizes the Other Person as a human being of equal worth. By treating each other with respect, we gain the respect of each other.

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Element Two: COMMUNICATION-To Be Heard, Listen. [30]

Short of obtaining a default judgment in court, the non-violent resolution of disputes requires communication. Yet, the hustle and bustle of a lawyer's workday almost guarantees that whatever communication we have with the Other Person will be abysmally poor. We put off getting in touch with each other until the last minute. We hurriedly try to resolve important matters on the fly over the telephone. We wait literally until we get to the courthouse to focus seriously on a possible settlement.

We use the discovery process both as a battle-ax and as an ill-suited means of communication. In some extreme cases, we simply refuse to talk to each other.

It should go without saying that our usual methods of mis- and non-communication are not likely to bring about good outcomes for our clients. They do not help us build better relationships either. We have strong incentives to improve communication in the dispute resolution process.

Yes, but how do we do that?

Here's the rule: If I want to be heard, I must listen to the Other Person, We may be caught up in our own concern, what we want to accomplish. Perhaps we are even emotionally distraught about the problem at hand. The key to getting the Other Person to listen to me is to listen to him or her first. It's almost like magic. The single-most helpful hint on communicating well is the advice to seek first to understand, then to be understood. [31] Put differently: To be understood, first listen to the Other Person.

"Listening" means making a sincere effort to understand what the Other Person is trying to say. Thinking of what I want to say while the Other Person is talking is not listening.

Active listening is extremely difficult-especially for lawyers. But it is a skill well worth acquiring. Listening is a matter of giving the Other Person FACE:

> Focus patiently on what the Other Person is actually saying.
>
> Acknowledge the truth of what the Other Person says.
>
> Clarify points that you do not understand or that seem muddled, confused, or incomplete and confirm that you have properly understood.
>
> Empathize with the Other Person's emotional state.

Each of us wants to be understood. We need understanding almost as much as we need food and water. If I satisfy the Other Person's need to be heard, I build up credits with that person. I trigger the Rule of Reciprocity: Do a favor for someone and that person feels a need to return the favor.

Focus Patiently on What the Other Person is Actually Saying

Active listening is not easy. Say my client has a child with a learning disability who needs special education assistance. I want the Other Lawyer to listen to me about the impact this disability has on the child's education. It is not natural for me to suppress my need to talk. I should make an effort anyway.

To listen, I need to concentrate my mental energy on everything the special education administrator or the school's lawyer is telling me. For now, I don't argue with it-either out loud or in my own mind. Perhaps she hasn't yet grasped what the child's problem is. Nevertheless, I give my attention to what she is talking about. Who knows, I might even hear something I did not know or that will help me in my effort to get appropriate services for my client.

Acknowledge the Truth of What the Other Person is Saying

No law says I am right only if the Other Person is wrong. Even the most misguided person might hit on a correct point from time to time. It does not weaken my points to admit the truth of what the Other Person is saying. To the contrary, the Other Person often will be more open to my truth when I have acknowledged hers. By acknowledging what's right about what she says, I show that I am open to reason. The Other Person is more likely to listen to reason as well,

Each of us can look at the same sensory data and see something different. That I see a cow when you see a deer may mean any number of things-perhaps that neither of us has a corner on The Truth. But even if my perception turns out to be more accurate than the Other Person's, the Other Person's perception is still true for the Other Person. It's best not to assume bad faith. If I look at matters from the Other Person's angle, I may find that I see things differently too.

This is not to say that I must give up my view or that there is no need to advocate for my child's interests. We're in the listening phase. Part of the listening process is acknowledging the truth of what the Other Person is saying. When it's my turn to talk, I will get to tell my truth.

Clarify and Confirm What the Other Person Meant to Say

Speech is an imperfect means of communication. Why mince words? It's downright poor. We miss words, mishear others, and don't recognize some of the rest. Speakers sometimes say something like "go to town" when they mean to say "don't go to town." People have been known to use a word that generally means something different from what they think.

In addition, much of the communication process depends on nonverbal cues. Facial expression, the tone of the voice, points of stress, hand gestures, posture, speaking speed-all and more tip us off to meanings that the cold words alone do not say. If we can't see the Other Person or are distracted at important moments, we are likely to miss much of what was said-maybe even something important.

For these and other reasons, we need to clarify whether we heard what the Other Person intended to say. Expert negotiators do this by stating what they heard, not what the Other Person said: "I understood you to say _____." "I heard that _____. Is that what you meant?"

The Other Person has no cause to dispute my statements about what I heard, felt, or sensed.
These "I" statements do not threaten the Other Person. They do not give rise to a side conflict

about whether the Other Person really said X or not. Rather, they provide a neutral field for the
Other Person to correct my misperceptions (if such they be).

"I" statements tend to keep the emotional temperature low.

They also give the Other Person a face-saving avenue to change what she said. Maybe I heard her accurately, but, upon reflection, she wants to revise. She now has a friendly atmosphere within which to adjust or correct the earlier statement. Negotiations about the special needs of my client's child will be emotionally tense as it is. It's wise to avoid unnecessarily ratcheting up that tension.

Empathize With the Other Person 's Emotional State

"What's there to empathize with?" you might say. "May client is the one with the child who's getting battered or neglected by the system. She's the one on the emotional roller coaster of unfulfilled expectations, denial by school authorities, and anxiety about what will become of her child and her family. The 'Other Person' draws a cushy salary, pushes a few papers during the day, and leaves all this at the office when she goes home at night. She needs to empathize with my client, not the other way around."

Well, maybe. Remember the rule: If you want to be heard, listen to the Other Person. Nowhere is this more true than with the emotional side of listening. Our emotions reveal where we truly live. They are not just momentary flashes of feeling. They are the means by which we experience and display what is really meaningful to us, what is important, what connects with our sense of identity. Our emotions may look irrational to others. They seldom do to us.

No matter how bureaucratic, even technocratic, we may think the representatives of the Other Side are, they really are people. They have feelings too. They may experience pressures from all sides.

If I empathize with the Other Person, truly try to feel what she is going through, I will be well on the way to establishing the rapport that is the basis for successful negotiations. When the Other Person feels understood at the emotional level, she will be all the more ready to hear me at that level as well.

When that happens, I am ready to work together on solving the problem. My problem becomes a shared problem. Instead of fighting with each other, we are in a position to attack the problem and to find solutions that are acceptable to all.

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Element Three: ALTERNATIVES-Identify Each Party's BATNA [32]

My alternatives to a negotiated agreement are what I can achieve without the consent or cooperation of the Other Person. I may have several such self-help alternatives. One of them is likely to suit my interests best, Similarly, the Other Person will probably have one best alternative to an agreement with me. Thus, we each have a Best Alternative to a Negotiated Agreement or BATNA. It must be better

by at least a smidgen than my BATNA; otherwise, I should not agree to it. The same holds true for the Other Person.

I'm talking to a neighborhood teenager about mowing my lawn. Before I discuss price with him, I should find out what it will cost me to have someone else provide the same service. I might also want to decide whether I'm willing and able to cut the grass myself and what it will cost my if I do. These other ways of satisfying my interest (having a neat lawn) are my alternatives to a negotiated agreement with the neighborhood teenager. The alternative that fits all of my interests best (save money, least hassle, minimum investment, low demand on time, beautiful lawn) is my Best Alternative To a Negotiated Agreement. We call it BATNA for short. [33]

Any proposed agreement should satisfy my interests better than my BATNA or I shouldn't agree. If I can do better on my own or with someone else, then I should walk away from the table. This has nothing to do with belligerence, power plays, or even face saving. It's just common sense. If I can get exactly the same make and model car and just as good service from dealer A for $1,500 less than from dealer B, I won't buy from B unless he offers some offsetting advantages. I should explore all realistic alternatives to an agreement with the Other Person. I should not enter into negotiations without knowing my best alternative to an agreement, as well as that of the Other Person.

Thus, knowing our BATNA's helps us define the minimum contours of a negotiated agreement:

Work for Mutual Gain

Once I have identified my BATNA, I know the minimum requirement for a negotiated agreement. It must be better, at least a little bit better, than what I can do without the Other Person's agreement.

But the minimum is a poor place to stop. To do the best for my client, I should aim for an agreement that satisfies his or her interests significantly better than can be accomplished without agreement.

To reach the best possible agreement, I will need to work together with the Other Person, typically with that person's lawyer. There is no other way. It is not enough merely to tolerate each other. I will not make genuine progress if we are playing tug of war over contradictory positions. To get the best deal, I must, in fact, cooperate.

Now, why would the Other Person and her lawyer want to do more for me and my client than the bare minimum required by law? Why would they choose to cooperate with me at all? Pure self-interest. For the most part, they will help me do better if they also do better than otherwise.

The gains need to be mutual. Both parties need to improve on their BATNA's for negotiation to work well. The better we work with each other, the more we can accomplish for each other.

It is, therefore, valuable to me to know the Other Person's BATNA. I should know the consequences of No Agreement for the Other Person. Will they have to spend much

more time dealing with the issue? How much money in legal fees will it cost? What is the impact on the their business? Will they on balance save money? In what ways might they be better off saying no rather than yes to the choice they currently perceive I have given them?

I should conduct this analysis for my own benefit. I need to know in what ways the Other Person will be believer or worse off as a result of the proposal on the table than if she simply says No.

However, I should be careful not to use information about the Other Person's BATNA to try to coerce an agreement. It is terribly counterproductive, even stupid, to get into a power struggle with the Other Person. She will likely have a fairly good idea about her alternatives to a negotiated agreement. Like every other human being, she will not take kindly to efforts to force her to do my bidding. The trick is to persuade her to work with me in solving our joint problem. Working with her for her benefit as well as mine is a reliable path to that goal.

The Engine of Greater Value

The increased value we achieve through problem-solving negotiation results from the interplay of three elements:

Interests (mine and those of the Other Person);

Creative Options (which I and the Other Person generate together); and

Legitimacy.

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Element Four: INTERESTS (34)

By identifying my client's interests, I am able to gain perspective. I cease to be a prisoner of a position that I have staked out, perhaps unthinkingly. My stated position (demand or announced course of action) may satisfy my interests more or less well. But until I have explored my interests and determined what they really are, it will be difficult for me to know the extent to which that position achieves what I really want. Moreover, unless and until I understand something of the Other Person's interests, my ability to persuade her to go along with what I want will be severely restricted. I will be, in effect, reduced to saying that what I propose is a little bit better than her BATNA or what I can possibly get a judge to force her to take.

My client may think, for example, that what she wants is to get her school district to pay for private school tuition so her child can get special training to help her learn how to compensate for a reading disability. She believes that this special school will do the trick.

What she really wants, though, is for her child to learn as much as she possibly can despite her disability. If someone could eliminate her child's dyslexia by waiving a magic wand, would she not like that just as well-perhaps better-than the private school she has in mind?

Her demand of a private school is a position. She may have determined for good reasons that it will satisfy her child's needs. But her position (the private school) may be only one of several ways to satisfy those interests. It may not even be the best. Or it may not be attainable for any number of reasons.

She seeks to have her interests satisfied. She wants her child to overcome her dyslexia if possible, but, in any event, she wants her child to learn as much as she can as well as she can. Her "really want" (her interest) is what is important, not her momentary notion of how to obtain it (my position). When she gets what she really wants, when her interest is satisfied, she will have achieved what she is after. How she gets there is important only insofar as it impinges on other interests (available resources, time, convenience, desire to be physically close to her child, etc.).

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Element Five: Creative OPTIONS [35]

Once I have clarified my interests and those of the Other Person as well as I can, I and the Other Person need to generate options for solving the dispute. A creative option is a potential agreement (or partial agreement) that solves the problem in a way that is usually not obvious at first sight. It proves the old maxim that two heads are better than one. It is the product of real work by as many people involved as possible.

One means by which negotiating parties improve on their respective BATNA's is by generating options that might solve the problem at hand, To do this part well, everyone involved needs to get their creative juices flowing, Brainstorming sessions help as long as everyone complies with two simple rules:

> No evaluation during the brainstorming process and
>
> No one is committed to any option regardless of who came up with the idea.

When you and I get into the problem solving mode, there is no way to tell in advance what we might come up with, Each of us sparks thoughts in the other that probably would not occur if we weren't working together.

By cooperating, we attack the problem, not each other. We change the process from one in which each is trying to get a larger share of the pie to one in which we both are creating or discovering a much larger pie.

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Element Six: LEGITIMACY-Using Shared Standards of Judgment [36]

The resolution of a dispute, whether by agreement or by a judge, should be based on standards or criteria that both parties acknowledge as valid, If both parties consent to the deal, then each needs to feel that it is legitimate. Neither should think that he or she was taken. This point may seem obvious. Nevertheless, we lawyers seem to

think that the adversarial system gives us carte blanche to do anything, short of violating the law or a disciplinary rule, to advance our client's cause. "All's fair in love and war," we say, "and this is war."

The practices that this attitude engenders are instrumental in creating the public opinion of lawyers as lowlifes. This is also the point at which we lose credibility with judges. We stake out positions having questionable legitimacy in the hopes that we can get away with them. [37] We fail to realize that there is tremendous persuasive power-both in court and in extra-judicial negotiations-in committing oneself to what is fair and reasonable, whatever the result might be. We may not always agree on what constitutes a fair and reasonable standard; but if we truly appeal to criteria that both parties acknowledge as legitimate, the likelihood of a reasonable settlement or a proper adjudication increases.

As the parent of a child who appears to need special education assistance, my client has certain legal rights. But those rights are not an end in themselves. The laws were passed because it is the right thing. It is legitimate that each child be educated to his or her greatest potential regardless of any particular disability. And it is also legitimate that all of us in a nation, state, and local community share the added cost of such education.

My client does not have a right to abuse that process by trying to finagle a benefit for her or her child that is in fact unrelated to her needs. It is illegitimate for her to use a supposed disability as a pretext for siphoning off extra money from the system. Problem-Solving Negotiation is not a matter of doing the Other Person in before he does you.

By the same token, the Other Person would violate the principle of legitimacy by trying to buy off my client with some low-cost warehousing plan that does not address the child's needs. Officials who feel the pressure to contain costs might seek to do so at the expense of my client's child. That's not right.

When the legitimacy factor is raised, most people would be embarrassed to admit they are trying to get something to which they have no right. It is, therefore, helpful to bring legitimacy out in the open. State the reasons why you think the outcome you seek is legitimate, is well ground in the law and what is right. Invite the Other Person to do the same.

By making the legitimacy question explicit, I can accomplish at least two things: First, we can quickly find out whether our disagreement is over facts (does my child have a disability and, if so, what is it) or rules (what am I entitled to and what must the school provide if there is a disability). Second, if our dispute is about the rules only, then we might be able to agree on a process for resolving that conflict.

If I adhere to the principle of legitimacy, I am less likely to engage in manipulation, deceit, trickery, and other ploys designed to get something for nothing. By stepping out of this bog of sleaze, I might also help shift the entire negotiation to a plane in which the best outcome is also the right outcome.

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Element Seven: COMMITMENT [38]

An agreement involves commitment. But the commitment element comes into play in many ways before one reaches the signature page of the settlement document. We use commitment unwisely in positional dispute resolution when we commit to a position and then try our best to hold on to that position as if it were a strategically located hill or town in a war.

As we move from our opening position to our "final offer" to our "last and final offer" on to our "absolutely last and final offer" then to our "take-it-or-leave-it-absolutely-last-and-final offer," we erode our credibility, such that it was. Like Richard Daley's machine, which advised Chicago Democrats to vote early and often, positional bargaining requires the lawyer to commit early and to change that commitment frequently. The process is a game of attrition in which the players unwittingly try to assure that neither walks away with very much.

Commitment in Problem Solving occurs typically at the end of the process. After all the other work is done, the parties articulate as precisely as possible what each has committed to do. Of course, there are many other commitments that occur along the way: A commitment to provide certain information by a given date. A commitment to meet at a certain time and place. But the commitments that resolve the dispute should come after all the other work has been done.

The Seven Elements Work Together

Those who become proficient in Problem-Solving Negotiation develop an ability to work with each of the seven elements of negotiation in a way that brings about results that are better than either party could accomplish on his/her own. Such competent negotiators:

1. Respect and improve relationships;
2. Communicate well;
3. Identify each party's interests;
4. Understand each party's best alternative to a negotiated agreement;
5. Create options for mutual gain;
6. Attend to the legitimacy of potential agreements; and
7. Make and keep commitments carefully.

Those who use these seven elements appropriately and in concert tend to be effective problem-solving negotiators.

On reflection, we can see that each of these elements is present directly or indirectly, explicitly or implicitly in the judicial (coercive) as well as extra-judicial (or voluntary) dispute resolution
work that we do. The problem is that by choosing a positional dispute resolution strategy, we severely limit our ability to make effective use of these elements.

Positional dispute resolution entails more than simply asserting a position as distinct from exploring interests, options, and legitimacy. With the positional stance comes almost inevitably the view that I'm right and you're wrong. Partisan perceptions

prevail, in which case a closing of the channels of communications results. The heart hardens. We see the Other Person not just as the opponent but also as the enemy. We project our worst thoughts on to the Other Person. We attribute bad motives to the Other Person. The relationship, such that it might have been, deteriorates or never gets a chance to develop.

We come to think that in order to prevail we must "fight fire with fire." As a consequence of positional thinking, we say we must learn to think like the Other Person, talk like the Other Person, act like the Other Person-until in the end we become the Other Person.

The positional approach ties our hands. We threaten, cajole, wheedle, deceive, manipulate, bluster, dissemble, bluff, and resort to all manners of tricks and chicanery in order to outfox, outmaneuver, outdo, outspend, and just plain outlast the Other Person. [39] To what end? As Benjamin Franklin observed, "Those disputing, contradicting, and confuting people are generally unfortunate in their affairs. They get victory, sometimes, but they never get good will, which would be of more use to them. [40]

Disputes and client problems come in a wide variety of sizes and shapes including conflicting claims of legal rights, conflicts of wills, disagreements over matters of value or principle (when does life begin?) or matters of fact, and unsettled relationships (e.g., marital problems). Yet our reflex response to them is to approach them all in the positional mode. As the saying goes, to the person whose only tool is a hammer, all the world looks like a nail.

Problem Solving, on the other hand, integrates consideration of the seven elements in the strategic work of every assignment we take on, not just the "negotiation" aspects of our work. One does not start thinking about interests and options only when it is time to try to "work out" a deal. There is no need to practice schizophrenically, on the one hand in a "litigation" mode and in a settlement" mode on the other. [42] If litigation is necessary, it need not be conducted in the manner of Sherman marching through Georgia. Indeed, as a lawyer thinks through the seven elements, the discovery and pre-trial motion practice may become more sensible.

The strategical work of a lawyer should, from the very first client interview, be governed by an integration of the seven elements, It should become second nature from our first exposure to the client's contact with us (whether on a transactional matter such as the formation of a limited liability company or a dispute with another party) to begin looking for the underlying interests of the client, to begin the process of creating options to satisfy those interests, to identify alternatives to any agreement with another person, to maintain and improve communication, to examine and where possible to improve the relationship with other people, to identify the appropriate standards of legitimacy, and to make and keep commitments only when the parties have properly prepared for them.

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Problem Solving is More Than Just Cutting a Deal

Many lawyers might say that they do problem solving all the time. No doubt we all do, more or less well. We need to be careful, however, not to confuse Problem

Solving as the term is used here with merely cutting a deal. Just because we generally reach some sort of agreement without going all the way through a verdict and appeal does not mean that we have helped our clients solve their problems. More importantly, reaching a settlement even months before the case comes up for trial or throwing the transaction together in boilerplate fashion may leave a lot of value for both parties on the table-unrealized for either.

Steven Covey has abbreviated this aspect with the phrase "win-win or no deal." "Winning" in this context means doing better than your BATNA, achieving a result by working together that is better than what either of us could do on our own. "Win-win" is an unfortunate phrase to the extent that it suggests a game to be won in the positional bargaining sense. On the other hand, the expression has a certain felicity in that it shocks the positional thinker into the realization that both parties, counter-intuitively, can "win" in a real, meaningful sense.

Another expression for what we are talking about here is "mutual gain." We mutually achieve a gain over what we could accomplish separately. Of course, that is the essence of standard business deals. There is nothing earth shaking about that. What is new, perhaps, is the notion that two parties in conflict can find a way to resolve the conflict such that each is better off if they cooperate than if they do not.

How much better than our BATNA's should we aim for in working for mutual gain? People at the Harvard Program on Negotiation like to discuss this question in terms of Pareto Optimality, named after the l9th Century Italian economist and philosopher Vilfredo Pareto. In any conflict there is a finite, but nonetheless fairly large number of potential agreements in which both parties have a result that is better than their respective BATNA's. Among those agreements there is a much smaller subset of agreements (at least one) in which each party receives as much benefit as possible without a disproportionate cost to the other party. There is also a subset of agreements in which the increased benefits to one side come at the expense of the other. The trick is to find that small group of agreements in which each side gets maximum benefit with least cost to the other. Such a result is a Pareto Optimal agreement.

Working toward Pareto Optimality or maximum mutual benefit can be thought of as a two-step process. First the parties work out a solution in which each is better off than either is without an agreement. That is then the baseline or bird in the hand. They then work with each other to improve upon that agreement if they can. I want to buy an ice cream cone from you. We agree on a price, flavor, and amount. I then suggest that you might put some colored sprinkles on top. That costs you something but not much. Is there a way that you can get a counter benefit? Well, it turns out that the price you quoted was for a sugar cone. I prefer a cake cone, which is cheaper for you. In fact, you will be better off if I take a cake cone even if you add the sprinkles. By continuing to explore our interests and options, we end up with a better deal for each.

There is, of course, a point at which the transactional costs of pursuing Pareto Optimality exceed the incremental benefits. You will do better moving on to the next customer instead of exploring with me the various permutations and costs of an ice cream cone, And my ice cream cone could melt to a puddle while we debate the different topping combinations. At that point one should probably stop the search for

maximum mutual benefit. The trick is to know when one has reached that point of diminishing returns. Most of us never get that far.

Covey relates a story about a businessman who complained to him: "1 tried that win-win stuff, and we got taken to the cleaners." Covey responded by asking what the businessman meant, to which he replied, "We lost and they won." Covey points out through some additional questions that the businessman is describing the "Jose-win" scenario. We did worse than our BATNA, and the Other Person did better than hers. In other words, the businessman did not do "win-win or no deal;" he did "lose-win," which is not the objective.

It is important to keep in mind, therefore, that working for mutual gain should never be confused with soft-headedness on the substance. As Roger Fisher never tires of observing: "We can be soft on the people while being hard on the issues." Moreover, the more competent and prepared we are, the gentler we can be on the people. Working toward a Pareto Optimal Solution or maximum mutual benefit through Problem Solving is real, hard work. It is not for the lazy or faint of heart. But then, in the clients' eyes, it's what lawyers are paid to do.

Yes, but . . .

Some will likely object that it is the nature of litigation to argue for a position. For a judge to decide between two positions, there must be a clear statement of what those positions are. It does not help to have the litigants say, "We could do X, Then again, Judge, Y might be appropriate or even Z is possible." Rather, we have to tell the court clearly what we believe the facts and law are and what conclusion follows from that position.

That certainly is the way we have been taught to present and argue cases. Either Hadley should pay for the lost income caused by his delay in repairing the rod or Baxendale must absorb the cost because he did not tell Hadley about the urgency and the damage was not otherwise foreseeable. Tertium non datur: There is no third way-at least for judicial decisions.

That may well be true. The judicial decision part of the disputing process may, in fact, boil down to a choice between two mutually exclusive positions. But that is precisely what makes it such an impoverished technique. By concentrating solely or even mainly on the litigated position, lawyers expend most of their energy on an alternative to a negotiated agreement-and it may not even be their client's best alternative.

We cannot neglect the ultima ratio, the judicial decision, but we need not treat it as the exclusive task for which we are responsible. When a conflict arises, we should view ourselves as dispute resolution professionals, not just litigators or trial lawyers. For our client's sakes we should learn to be problem solvers, not problem makers. To be problem solvers we need to attend to Ml seven elements of the problem-solving negotiation process.

If we do that, then the question ceases to be solely one of what do I think I can persuade the judge to give my client. it becomes one of exploring and satisfying the parties' respective interests through creative options that result in mutual gain within

a framework of acknowledged standards of legitimacy. If that work is done well, then many matters need never be presented to the judge.

That does not mean that all disputes should be decided without the benefit of the judiciary. To the contrary, we must have a judicial system and judicial decisions. Among other things, they help establish standards of legitimacy and draw lines by which to determine alternatives to negotiated agreements.

Rather, this essay advances an argument for equipping lawyers and judges with the tools for achieving better outcomes in the judicial arena. It has no doubt been true throughout this century that most lawsuits are resolved without a trial. If that is so, why not have the best results human ingenuity can create? If we are going to spend our time and our client's money working on the resolution of a dispute, why not get the most possible for both? Why settle for whatever comes from bludgeoning each other to near death? "You can no more win a war than you can win an earthquake." [43] The corollary is equally true: In most fully litigated debuts, only the lawyers prevail.

Another concern frequently raised asks what happens if the "'other side" does not know how or refuses to play the Problem Solving game. The short answer is that even one party that focuses on the seven elements of negotiation and dispute resolution can help bring about a better outcome for both. It is unwise to act naively or to fail properly to prepare for an eventual trial, if such is necessary. But it has always been of questionable effectiveness to stoop to playing the same "hard ball" or "dirty tricks" game that others might choose in the litigation world, especially if that is not your normal style.

At any rate, as is the case when a problem-solving negotiator meets a positional bargainer, so too when someone committed to Problem Solving meets a positional, hard ball litigator: A problem-solving negotiator will not be outfoxed or out-positioned by a positional bargainer. The seven elements approach is simply a much more powerful way of getting the job done.

A third objection asks whether this method can work when the conflict is between good and evil? To the extent that the dispute can be subjected to a process other than direct violence, Problem Solving is a much more powerful means of protecting and advancing the interests of the party with truth and justice on its side than any other means. Indeed, in this world fraught with ethical ambiguity. [44] Problem Solving is much better able than positional dispute resolution to ferret out just where truth and justice lie.

Should we not demand more from ourselves and our profession? Perhaps once we do, we will cease thinking of two kinds of dispute resolution-judicial and alternative-and concentrate on only one: Appropriate Dispute Resolution.

Using Problem Solving strategies consistently throughout the representation of a client is not easy. Clients frequently want us to be their surrogate avengers through whom they vicariously inflict pain on the Other Party. Our own behavior is by far the more difficult challenge, however. We reflexively fall into the adversarial, beat-up-the-other-side groove. Our own tempers flare and we think up a slew of discovery requests to "show them a thing or two." We fear showing weakness by not hewing to a tough stance. Yet, paradoxically, the moment we switch to the positional mode, we

lose the power that a Problem Solving strategy gives our client.

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Build the Other Person a Bridge To Yes

It sometimes seems that we have to do all the work in a negotiation. All the suggestions above involve something that I must do to advance what should be a joint effort. Doesn't the Other Person have to do anything in this process? Does it all rest on me? And what if the Other Person won't cooperate in this problem-solving negotiation process?

The outcome will almost always be better if the Other Person and I work together in trying to create a solution to a joint problem. And the better I practice the rules of problem-solving negotiation, the more, as a result of the rule of reciprocity, the Other Person is likely to do that. But it is not essential.

All the Other Person really has to do for the negotiation to be at least a moderate success from my vantage point is to say Yes. If I do all the work developing the ideas that satisfy my client's interests and the Other Person contributes little or nothing, it matters little as long as the word is Yes.

Sometimes the Other Person's hostility or negative attitude or antagonistic position seems to be a stone wall to our best efforts. That's when we should build the Other Person a bridge to yes.

Look at the matter from the Other Person's perspective. Get into her shoes. Think about how she is perceiving what we are talking about. Then organize the proposal so that the Other Person can see how it benefits her. Go the extra mile. Address her needs and interests. Try to make sure she is comfortable with the proposal. In short reach out with a bridge that allows her to walk over the crocodile-infested mote to an agreement that benefits both parties.

The small town in which I practice law and mediation achieved a certain notoriety a few years ago when the national press descended on us to cover the Baby Peter case. In this struggle between the adoptive parents and the child's natural father, no one was eager to have the local probate judge decide who would receive permanent custody, least of all the judge himself. As the parties shored up their mutually exclusive positions in briefs and arguments before the court, one of the junior lawyers in the case hit upon a truly Solomon-like option that eventually became the basis for a voluntary settlement. Later that week, I congratulated the young lawyer's senior partner on the brilliant outcome and stated, "Now, that is an example of the effective use of ADR." To which the elder statesman replied, "No, it wasn't. It was just good lawyering." And so it was.

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Endnotes

1. David Luban has written a thorough analysis of this aspect of the adversary system in Lawyers and Justice: An Ethical Study (Princeton: Princeton Univ. Press, 1988). See also Barry Sullivan, "Professions of Law" in 4 Geo. J. of Legal Ethics 1235-1300 (1996). Luban sees no better alternative to the adversary system, but argues persuasively for a view that lawyers can be held to an ethical standard that includes responsibility for the integrity of the system as well as responsibility for the zealous representation of the client. As salutary as this proposal is, however, it does not deal with the root problem of a positional as opposed to a principled approach to dispute resolution. In Problem Solving the lawyer is still an advocate, still required to represent the client zealously; now, however, the lawyer does this with tools designed to achieve a just and cost-effective resolution that satisfies the interests of the client well and maximizes the benefits for all parties. That style of dispute resolution almost automatically accomplishes the improvement in ethical behavior for which Luban argues.

Sullivan provides an in-depth review of three views of the legal profession, each of which attempts to find the baser for the larger community's dissatisfaction with the legal profession in something outside the adversary or legal system itself. In the present article I do not address the "problem with lawyers" as such nor do I presume to have a solution for what Sullivan calls "the malaise that currently affects the [legal] profession in this country." I do believe, however, that increasing the sense of moral responsibility that we lawyers bring to the form and content of our work cannot hurt. This article attempts to show how one can, indeed, do good by doing the job well.

2. In Lawyering 184-213 (New York: Law Journal Seminars Press, 1979), James C. Freund illustrates typical positional bargaining in a section entitled "The Friendly Adversary." Among other things, Freund unabashedly) advises the neophyte lawyer to draft proposed agreements not only to his client's advantage but also to the disadvantage of the other client with the hope that the other lawyer may not be paying attention and will let it pass Id. at 190. It is not just that the other client's interests are his lawyer's look out. Rather, Freund espouses the view that we should claim as much value as possible at the outset in the hope that we will get lucky and end up with bonus advantage.

That the other lawyer's client may one day realize that he got taken by Freund's aggressive drafting and that at important relationship may suffer because he comes to resent both Freund's client and Freund appears not to have occurred to Freund and might not bother him if it did. Freund also does not appear to have any qualms about the legitimacy of trying to take advantage of a poorly represented party. In Freund's view, what he advises is what lawyers do-indeed, what they should do.

3. L. Nader, "Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology," 9 Ohio State 3. On Disp. Res, 1 (1993). See also Laura Nader, Harmony ideology: Justice and Control in a Zapotec Mountain Village (Stanford: Stanford Univ. Press, 1990).

4. "See, e.g., M. Irvine, "Mediation: Is It Appropriate for Sexual Harassment Grievances?" 9 Ohio State .1. on Disp. Res. 27-53 (1993).

5. See P.3. Kuriloff & S.S. Goldberg, "Is Mediation A Fair Way To Resolve Special Education Disputes? First Empirical Findings," 2 Harv, Neg. L. Rev. 35 (1997); D.E, Hoffmann, "Mediating Life and Death Decisions," 36 Ariz. L. Rev. 821 (1994).

6. Actually, they are not so new at all. As Susan Donegan shows in "ADR in Colonial America: A Covenant for Survival," 1993 Arbitration Journal 14-22, mediation and arbitration were widely used as early as the 17th century.

7. See, e.g., E.D. Green, "Corporate Alternative Dispute Resolution," 13. on Disp. Res. 203-297 (1986); W.G. von Glahn, "Why Did Management at The Williams Companies Come Over to ADR?" 1992 Arbitration Journal 26-30.

8. "The seeds of change in the law schools may have been planted. Probably every law school now has at least on course on mediation or negotiation, and a few such as Georgetown and Harvard have extensive ADR programs However, no law school has expressly adopted as its mission the training of law students to be problem solving instead of adversarial champions. A change in this self-understanding would constitute a paradigm shift in legal education.

9. In a perceptive analysis of the enemy phenomenon, James Aho sees the enemy at least in part as "our very own creation.... [T]he enemy is a joint production. It is rarely a phenomenon achieved by any one person alone, but is something done socially, by all of us together." I. Aho, This Thing of Darkness 5-6 (Seattle: 1994). See also S. Keen, Faces of the Enemy: Reflections of the Hostile Imagination (San Francisco: Harper and Row, 1986); R.W. Rieber (ed.), The Psychology of War and Peace: The image of the Enemy (New York: Plenum, 1991).

10. See, e.g., David P. Barash, Beloved Enemies: Our Need for Opponents (Amherst, NY: Prometheus Books, 1994)

11. Although trial by combat was widespread in the laws of the German tribes, it was unknown in Anglo-Saxon procedure. However, an ordinance of William the Conqueror enabled Englishmen to use trial by battle in lawsuits with Normans. I Frederick Pollock and Frederick W. Maitland, The History of English Law 39 (2d ed., Cambridge: Cambridge Univ. Press, 1898). See Sir Walter Scoff, Ivanhoe for a detailed portrayal of this ancient form of dispute resolution.

12. See Lawyers and Justice, supra n.l at 105-127 ("The Problem of Role Morality").

13 The term "problem-solving negotiation" has been used by Roger Fisher, the founder and now professor emeritus of the Harvard Project on Negotiation, as well as by others. The most famous and readily available statement of problem-solving negotiation is contained in Roger Fisher, William Ury, and Bruce Patton, Getting To YES: Negotiating Agreement Without Giving in (2d ed., New York: Penguin Books, 1991). For other works in the field, see Sung Hee Kim, Conflict, Negotiation, and Dispute Resolution: An Annotated Bibliography (Cambridge: Program on Negotiation, 1991). What follows in this article is heavily dependent on Fisher's work and that of his colleagues in the Project On Negotiation and Conflict Management, Inc. ("CMI"). CMI provides training and negotiation services to a wide range of public and private clients throughout the world and was instrumental, for example, in helping to bring about the bloodless revolution to majority rule in South Africa. CMI has also developed video tapes, books, and interactive CD ROM products with which groups

and individuals can begin the process of learning principled negotiation. Further information is available through CMI-Negotiation Strategy Group, P.O. Box 620369, Newton Lower Falls, MA 02462-0369.

14. See Jeffrey Z. Rubin, Dean G. Pruitt, and Sung Hee Kim, Social Conflict: Escalation, Stalemate, and Settlement (New York: McGraw-Hill, 1994, 2d ed.).

15. Problem-Solving Negotiation is likely to be useful in criminal cases as well. David Luban makes the case that the representation of a criminal defendant should be governed by different ethical rules than those appropriate for civil disputes. In Luban's eyes, the fact that the full power and resources of the state are arrayed against the defendant in an effort to deprive him or her of life or liberty makes all the difference. Lawyers and Justice, supra n.l at 60-61. If Luban is right, there may be impediments inherent in the structure of the criminal law process to fully exploiting the benefits of Problem-Solving Negotiation.

16. Notwithstanding the strong cultural bias toward positional bargaining, each of us uses problem-solving negotiation skills more or less frequently and more or less well. Like Moliere's Monsieur Jourdain, who discovered to his great satisfaction and relief that he had been speaking prose all his life, we may find that Problem-Solving Negotiation is not altogether new. The awareness of the process and the conscious attempt to apply it instead of positional bargaining may, however, be something heretofore unknown.

17. See Robert A. Baruch Bush and Joseph P. Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (San Francisco: Jossey-Bass, 1994).

18. Neither mediation nor arbitration should be practiced this way, of course. Well-trained mediators engage in one or another variant of problem-solving negotiation with the parties. Good arbitrators will pass judgment if asked by the parties to do so; but they frequently also engage the parties in problem-solving in an effort to avoid the law's meat cleaver approach.

19. Fisher/Ury/Patton generally refer to PSN as "principled negotiation" but also use the phrase "problem-solving negotiation."

20 Although PSN is fully compatible with the Golden Rule and many other ethical precepts, including those set forth in the Sermon on the Mount, it is not per se an ethical program. Anyone can apply the principles of Problem Solving Negotiation, regardless of specific moral or religious convictions.

21 The "seven elements" were first isolated and explained by Roger Fisher and his colleagues at Harvard and CMI. The seminal presentation of them, albeit not identified as such, is contained in Getting To YES, which is far and away the best single compendium of advice on negotiation available. Yet, like those other perennials, The Elements of Style by Strunk and White and The Bible, no doubt many more people own than actually read it. And the ratio of people who read to those who put it into practice may be even greater. Such should not be the case with lawyers. The subject of Getting To YES is the heart of what we do day in and day out. As a combat soldier is issued a helmet upon enlisting, so should a budding

lawyer receive a copy of Getting To YES and then at least some basic training or putting its precepts into practice.

22 Getting To YES 17-39. The best book on the relationship element is Roger Fisher and Scott Brown, Getting Together: Building Relationships as We Negotiate (New York: Viking Penguin, 1988).

23 See Robert B. Cialdini, Influence: The Psychology of Persuasion (New York: Quill 1984).

24 Uri Savir, The Process: 1,100 Days That Changed the Middle East 166 (New York: Random House, 1998).

25 Id.

26. William Ury, Getting Past NO (1991).

27 The Merchant of Venice, Act Ill, Scene 1.

28 "No man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of they friends or of thine own were; any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee." J Donne, Devotions upon Emergent Occasions, No. 17.

29. See Martin Buber, I and Thou (New York: Simon & Schuster, I 970)(translation by Walter Kaufman). Buber's dialogical writings, including Ich und Du, are collected in Martin Buber, Das dialogische Prinzip (Gerlingen: Verlag Lambert Schneider GmbH, 1962).

30. Getting To YES 32-36. See also Christer Joensson, Communication in International Bargaining (Leiden: Pinter, 1990), which contains an excellent compendium of communications research.

31. Steven Covey, The 7 Habits of Highly Effective People 235-260 (New York: Simon & Schuster, 1989).

32. Getting To YES 97-106.

33. The term "BATNA" was developed by Roger Fisher, the founding director of the Harvard Project on Negotiation at the Harvard Law School.

34. Getting To YES 40-55. On occasion, someone will erroneously refer to Problem-Solving Negotiation as "interest based negotiation." This understanding mistakenly views the interest element as the only or most important element. While interests are highly important, the genius of Problem-Solving Negotiation is the conscious understanding and use of all seven elements in concert.

35. Getting To YES 56-80. It is helpful if the Other Person will share her interests with me. However, frequently the Other Person is too suspicious or caught up in a

manipulative style of negotiating to reveal them to a perceived adversary. The Harvard Project On Negotiation and CMI have developed some excellent tools for discovering the interests of the Other Person in such situations. Roger Fisher, Elizabeth Kopelman, and Andrea Kupfer Schneider have made some of them available in Beyond Machiavelli: Tools for Coping With Conflict: Cambridge: Harvard Univ. Press, 1994).

36. Getting To YES 81-94.

37. Some see what one might argue in court as limited only by the so-called straight-face test: Whatever you can say with a straight face is allowed. Of course, some lawyers have a better poker face than others. This is, in fact, not a witty approach at all. It is lazy lawyering. The practitioner who relies on it does not do the hard work of thinking through the problem, of determining whether his client's cause should prevail, and of then articulating in clear English (to the client or to the court) the reasons that support the conclusion. Instead, we sometimes take our conclusions as pre-determined by the client's willingness to pay us money to "advocate" his or her position, and then we grasp at whatever straws seem most readily available.

38. Getting To YES 171-175. Other information on commitment is interspersed throughout the book.

39. Much of what passes for advice on negotiation skills consists largely of quick-fix nostrums reminiscent of the old medicine shows. "Never make the first offer." "Conduct the negotiations on your turf." "Always flinch when they state the price." "Soften them up with a 'good guy/bad guy' routine." "Appeal to a 'higher authority' as a variant of good buy/bad guy." These and other "patent medicines" do not constitute a solid strategy for problem solving. Rather, they are manipulative devices useful only in the positional dispute resolution model. Like all positional tactics, they carry disadvantages: They do not help maximize value or mutual gains. They tend to skirt the edge of what is legitimate. They can lead to an erosion of the relationship once the victim realizes what has happened. They can be the source of miscommunication. In short, like many aggressive or hostile tactics, they may help you win the war but lose the peace.

40. Benjamin Franklin, Autobiography, ch 9 (written 1779). Franklin also wrote that "[p]ersons of good sense... seldom fall into [disputatious behavior], except lawyers, university men, and, generally, men of all sorts who have been bred at Edinburgh." Id. ch. 1.

41 Edwin H. Greenebauin, "Lawyers' Agenda or Understanding Alternative Dispute Resolution," 68 md. L.J. 771, 778-779 (1 993)(footnotes omitted).

42 A few years back some law firms thought that it would not be possible for the litigators to work on a settlement because their litigation tactics had such a corrosive effect on relationships. They therefore posited that on big cases it would be good to have a separate team that focused solely on the settlement side, a team that would not be tainted with the "bad" acts of the litigators.

43. Jeanette Rankin, quoted in Hannah Josephson, Jeanette Rankin: First Lady in Congress, ch, 8 (Indianapolis: Bobbs-Merrill, 1974). Of course, Rankin's epigram is not universally true. There are wars, such as that with Nazi Germany, that are a

matter of life and death, There are likewise lawsuits involving major social struggles that must be litigated. Brown v. Board of Education and its progeny come to mind. But even in such disputes, once the legal principle has been established as the law of the land, Problem Solving is probably better for both sides than all-out litigation. In retrospect, it may be that all parties, especially school children, might have been better served during the implementation of Brown v, Board had they not left the fashioning of solutions solely to judges. Unless one is dealing with a mentally deranged person, which is seldom the case no matter how much we might think otherwise, Problem Solving can improve the quality of the ultimate result considerably.

44. See, e.g., 3 Paul Tillich, Systematic Theology 11-110 (Chicago: Chicago Univ. Press, 1963)("Life, Its Ambiguities, and the Quest for Unambiguous Life.").

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