

# ARTICLES

## A FRAMEWORK FOR ADVANCING NEGOTIATION THEORY: IMPLICATIONS FROM A STUDY OF HOW LAWYERS REACH AGREEMENT IN PRETRIAL LITIGATION

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## I. INTRODUCTION

The prevailing negotiation theory tries to fit lots of square pegs into just two round holes—adversarial or cooperative bargaining.<sup>1</sup> In the real world, negotiation comes in many different shapes, not just circles and squares. This Article demonstrates that the two “round holes” in current negotiation theory are poorly defined and do not reflect the reality of much pretrial negotiation. It argues that it is time to replace the system of theoretical models with a flexible framework that can accommodate virtually all legal negotiations, including those that do not fit into any pre-defined model.

This Article compares generally-accepted theories of legal negotiation with empirical accounts of lawyers’ negotiations to illustrate some misconceptions in the theories, including the definition of the two negotiation models. To provide a snapshot of contemporary legal negotiation theory,<sup>2</sup> this Article analyzes nine law school negotiation textbooks.<sup>3</sup>

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<sup>1</sup> Although current negotiation theory includes some variations of the two major models, those two models clearly dominate. See *infra* Part IV.

<sup>2</sup> Professor Thomas Kuhn argues that “textbooks expound the body of accepted theory,” which is reflected in generally-accepted paradigms similar to “accepted judicial decision[s] in common law.” See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10, 23 (4th ed. 2012). He defines “paradigms” (as used in this context) as “elements” in a “constellation of beliefs, values, techniques, and so on shared by the members of a given community” that are “models or examples [that] can replace explicit rules as a basis for the solution of the remaining puzzles of normal science.” *Id.* at 174. For discussion of legal negotiation, see *infra* note 4.

<sup>3</sup> CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (7th ed. 2012); JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW* (2d ed. 2011); DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND PRACTICE* (2d ed. 2007); RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* (3d ed. 2014); CARRIE J. MENKEL-MEADOW ET AL., *NEGOTIATION: PROCESSES FOR PROBLEM-SOLVING* (2d ed. 2014); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000); MELISSA L. NELKEN, *NEGOTIATION: THEORY AND PRACTICE* (2d ed. 2007); ALAN SCOTT RAU, ET AL., *NEGOTIATION* (3d ed. 2006); GERALD R. WILLIAMS & CHARLES B. CRAVER, *LEGAL NEGOTIATING* (2007). All of these texts were designed for use in law school courses except for *Beyond Winning*, which often is used as a law school text. They were selected because they focus exclusively on negotiation, unlike texts that cover other dispute resolution processes. The authors are highly-respected academics, many of whom have practice experience. The purpose of citing these texts is to critique negotiation theory, not the texts or authors.

The texts generally have a similar structure and cover the same general topics. Most include an introductory chapter, identify different negotiation models, note special issues related to lawyer-client relationships, describe basic negotiation techniques, discuss psychological and identity issues, analyze ethical and legal constraints, and sketch the use of mediation and other dispute resolution processes. There are some significant variations between the texts, but most of the differences are not relevant to this Article. Relevant differences are noted below.

This Article focuses on lawyers' negotiation processes in pretrial litigation.<sup>4</sup> Good legal negotiation theory should encompass the full range of lawyers' negotiation activities. A major problem with most legal negotiation theories is the narrow definition of negotiation that does not recognize that negotiation and litigation are "inseparably entwined."<sup>5</sup> Some negotiation texts refer to legal negotiation occurring in the context of litigation, but they generally include little, if any, material that specifically discusses the relation-

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Most of the texts include excerpts and/or citations of theoretical publications selected by the authors to reflect the most significant relevant theory. Moreover, most of the texts are updated editions, indicating that they contain the most current versions of the theoretical arguments. A survey of the texts does not provide a perfect portrait of contemporary theory because they do not attempt to provide a comprehensive analysis of the relevant theory. Nonetheless, such a survey does provide a good summary of generally-accepted negotiation theory. This Article notes points of greater and lesser agreement between the texts.

<sup>4</sup> Negotiation used by lawyers differs in significant respects from negotiation used by other professionals who regularly negotiate, such as merchants and diplomats. Negotiation is an integral part of lawyers' work as agents of their clients and, in pretrial litigation, it is organized and regulated as part of a distinctive set of elaborate institutional and social systems.

Parties and lawyers regularly negotiate in appellate litigation and some of the dynamics are similar, but there are some significant differences that may affect the negotiation dynamics in the two settings. In pretrial litigation, parties often spend a great deal of effort to learn and establish the facts whereas in appellate litigation, the facts have been determined by the courts and the disputed issues typically are legal issues (though the legal issues may relate to whether the trial court properly determined the facts). The population of parties and cases differs in pretrial and appellate litigation because of the departure from the population of appellate cases of cases that do not involve litigation after the pretrial or trial process. Moreover, in appellate litigation, the perspectives and relationships between the parties and lawyers are likely to be significantly affected by the history of the litigation, financial and other investments used to reach an adjudication, and the passage of time, among other things.

Many lawyers also regularly negotiate transactional matters, though such negotiations are not regulated by an extensive body of procedural law and the courts do not adjudicate disputes in these negotiations (other than disputes about the agreements reached in negotiation). Some insights in this Article could be adapted for negotiation in appellate litigation and transactions as well as negotiations that do not involve lawyers.

For simplicity, this Article focuses on cases where there are only two parties and each party is represented by a lawyer. When appropriate given the context, "party" may include the party's lawyer and vice versa. Similarly, "negotiator" and the "other side" may refer to a lawyer or party or both. This Article uses the term "counterpart (lawyer)" instead of "opposing counsel" because lawyers representing parties on opposite sides of a case often cooperate as well as oppose each other. See John Lande, *Getting Good Results for Clients by Building Good Working Relationships with "Opposing Counsel,"* 33 U. LA VERNE L. REV. 107, 107 n.1 (2011). See generally Jonathan R. Cohen, *Adversaries? Partners? How About Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution,* 20 CONFLICT RESOL. Q. 433 (2003) (discussing significance of terminology in referring to other party in negotiation). "Legal negotiation" refers to negotiation conducted by lawyers. Sometimes this Article uses the term "negotiation" instead of "legal negotiation" for simplicity. For discussion of the definition of "negotiation," see *infra* Part III.

<sup>5</sup> Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process,* 34 J. LEGAL EDUC. 268, 269 (1984).

ship between litigation and negotiation.<sup>6</sup> They give the impression that litigation is a discrete and independent process except for negotiators' analysis of possible trial outcomes (such as the best, worst, or most likely alternatives to a negotiated agreement).<sup>7</sup> Many of the texts imply that negotiation begins after the end of a largely irrelevant pretrial litigation process. All the texts refer to the process of obtaining necessary information, though this is usually presented as part of a discrete negotiation process without reference to the pretrial discovery process that lawyers typically use.<sup>8</sup>

Although pretrial litigation is ostensibly designed to prepare cases for trials (which do not actually occur in most cases),<sup>9</sup> the

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<sup>6</sup> See CRAVER, *supra* note 3, at 1–2 (negotiation can “streamline” litigation even if parties do not settle); FOLBERG & GOLANN, *supra* note 3, at 373–76 (judicial promotion of settlement); GIFFORD, *supra* note 3, at 1, 7 (“nothing is more important to your success as a negotiator than preparation—your understanding of the relevant facts and law and of your client’s interests” but discovery may not be feasible because of the time and expense and the negotiation process is the only way to learn the other side’s perspective); KOROBKIN, *supra* note 3, at 427–55 (rules encouraging settlement in litigation including fee shifting, offer of settlement, judicial settlement conferences, and inadmissibility of settlement negotiations); MENKEL-MEADOW ET AL., *supra* note 3, at 437–42, 463–64 (participation in judicial settlement conferences and judicial review of settlement); MNOOKIN ET AL., *supra* note 3, at 108–18 (litigation dynamics inhibiting settlement); *but see* NELKEN, *supra* note 3, at 2, 10–19, 46, 84–90 (the context of litigation and bargaining in the shadow of the law); RAU ET AL., *supra* note 3, at 1–85 (substantial introductory chapter discussing lawyers, litigation, and dispute resolution processes); WILLIAMS & CRAVER, *supra* note 3, at 89–92 (interplay between litigation and negotiation as well as effects of pretrial conferences on case settlements).

<sup>7</sup> See CRAVER, *supra* note 3, at 58–61; FOLBERG & GOLANN, *supra* note 3, at 77–80, 132–38; GIFFORD, *supra* note 3, at 52–57; KOROBKIN, *supra* note 3, at 29–30, 42–48; MENKEL-MEADOW ET AL., *supra* note 3, at 88–95; MNOOKIN ET AL., *supra* note 3, at 232–40; NELKEN, *supra* note 3, at 33–37; RAU ET AL., *supra* note 3, at 87–90, 107–16; WILLIAMS & CRAVER, *supra* note 3, at 79.

The texts generally focus on the best alternative to a negotiated agreement (BATNA) although, during negotiation, lawyers and parties probably focus at least as much on the worst—and especially the *most likely*—alternatives to a negotiated agreement. For example, for a defendant, the best alternative is to have a case dismissed immediately, paying little in legal fees. Nonetheless, many defendants routinely pay plaintiffs in settlement because they recognize that there is a significant risk of loss at trial and a certainty of paying additional legal fees. Parties and lawyers probably consider BATNAs when formulating initial positions but probably focus more on the most likely and worst alternatives as litigations proceed.

<sup>8</sup> See CRAVER, *supra* note 3, at 87–114; FOLBERG & GOLANN, *supra* note 3, at 90–98; GIFFORD, *supra* note 3, at 98–112; KOROBKIN, *supra* note 3, at 8–10; MENKEL-MEADOW ET AL., *supra* note 3, at 41–77, 233–38; MNOOKIN ET AL., *supra* note 3, at 28–37, 188–93; NELKEN, *supra* note 3, at 41–42, 93, 96–97, 337–41; RAU ET AL., *supra* note 3, at 107–16; *but see* WILLIAMS & CRAVER, *supra* note 3, at 78–79 (“The most important stage of most bargaining interactions takes place before the parties even begin their serious discussions. This is where the negotiators initially ascertain the relevant factual, legal, economic, medical, cultural, and other information.”).

<sup>9</sup> See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460–61, 507 (2004) (analyzing data showing that federal district court trial rates declined from 11.5% to 1.8% between 1962 and

predominant reality of litigators' work is captured in Professor Marc Galanter's term, "litigotiation," which he defines as "the strategic pursuit of a settlement through mobilizing the court process."<sup>10</sup> In an observation that is still as true today as it was three decades ago, he noted:

On the contemporary American legal scene the negotiation of disputes is not an alternative to litigation. It is only a slight exaggeration to say that it *is* litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals."<sup>11</sup>

In practice, negotiation is routinely infused in litigation from the outset of a case. Lawyers not only negotiate about the ultimate issues, such as how much a defendant will pay a plaintiff, but they also negotiate about substantive issues during litigation, such as temporary orders during divorce proceedings, as well as a myriad

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2002 and that the trial rate in 22 states declined from 36.1% to 15.8% between 1976 and 2002). Some cases are resolved through procedures other than settlement or trial such as cases terminated by motion or default judgment. Thus it is not accurate to assert, for example, that if only 2% of cases are tried then 98% are settled. A study of Hawaii cases found that at least 88% of tort cases and 54% of contract cases settled in 2007, though these figures do not include dismissals without prejudice or for inaction, which may reflect settlements in some cases. See John Barkai & Elizabeth Kent, *Let's Stop Spreading Rumors About Settlement and Litigation: A Comparative Study of Settlement and Litigation in Hawaii Courts*, 29 OHIO ST. J. ON DISP. RESOL. 85, 106–11 (2014). See also Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162–64 (1986) (finding that only 63% of cases in a random sample from selected state and federal and state courts terminated in 1978 were settled, 7% were tried, and the remaining 30% were terminated by default, referral to arbitration, dismissal, or other court decisions).

<sup>10</sup> Galanter, *supra* note 5, at 268. Professor Debra Emmelman's ethnographic study of criminal practice provides a similar analysis. She argues that:

[P]lea bargaining [is] part of the defense attorney's recursive consideration of whether a case should be settled immediately or proceed further. "Proceeding further" means that, until an attorney achieves an acceptable plea bargain, s/he proceeds to litigate a case throughout various court hearings that could ultimately lead to a jury trial and sentencing. Viewed in this manner, plea bargaining can be seen to encompass not only multiple episodes of negotiating behavior but also a wide range of formal litigation proceedings. As such, distinctions made between plea bargaining and taking a case to trial can actually be seen as relatively minor.

Debra S. Emmelman, *Trial by Plea Bargain: Case Settlement as a Product of Recursive Decision-making*, 30 LAW & SOC'Y REV. 335, 336 (1996). See also Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 73–88 (1985) (describing negotiation in context of litigation of criminal and personal injury cases).

Building on Galanter's concept of litigotiation, I described "liti-mediation" cultures, where "it has become taken for granted that mediation is the normal way of ending litigation." John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 846 (1997). Thus, in practice, often there is no clear line between litigation, negotiation, and other dispute resolution processes.

<sup>11</sup> Galanter, *supra* note 5, at 268 (emphasis in original).

of procedural issues. The process of reaching such agreements often is integrated into regular communications throughout the course of pretrial litigation rather than occurring in a single dramatic settlement event to resolve the ultimate issues in a case. Indeed, this study identified a number of cases clearly involving litigotiation.<sup>12</sup> To provide a realistic basis for analyzing negotiation theory, this Article considers negotiation as the process of lawyers seeking agreement regardless of the stage of litigation, nature of the issue, or the level of contentiousness.<sup>13</sup> In other words, this Article is about litigotiation, not merely final negotiations of ultimate issues untethered to the rest of the pretrial process.

A major problem in legal negotiation theory is the excessive focus on the adversarial and cooperative models of negotiation noted at the outset of this Article.<sup>14</sup> In the adversarial model, negotiators try to maximize their own interests through strategic exchanges of offers. In the cooperative model, negotiators identify both parties' interests and possible resolutions that would satisfy the parties' interests.<sup>15</sup> Because negotiation generally is portrayed as a discrete process for the final resolution of disputes, these models lend themselves to dramatic portrayals, which I described this way:

Romantic narratives of negotiation involve a single, dramatic settlement event to resolve the ultimate issues at stake. One version—a legalistic and positional narrative—involves an extended series of strategic offers and counter-offers, often involving hard bargaining to maximize negotiators' respective partisan advantages. Protagonists approach negotiation as a kind of high-stakes poker game in which they may win or lose great sums depending on how shrewdly they “play their cards.” The second version, an interest-based narrative, involves an explicit and systematic identification of parties' interests and options with the goal of identifying solutions that would maximize both parties' interests. The heroes of the interest-based stories use good communication and clever problem-solving tactics to save their clients from unnecessary impasse or suboptimal agree-

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<sup>12</sup> See *infra* text accompanying notes 66–67, 76–78, 127–34 (cases 1, 2, 4, 5, 13–14).

<sup>13</sup> For further discussion of the definition of negotiation, see *infra* Part III.

<sup>14</sup> People use various terms identifying these two basic models. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13–16 (1996) (collecting sources and noting various terms used distinguishing approaches to negotiation). This Article refers to them as positional and interest-based negotiation. For further discussion of negotiation models, see *infra* Part IV.

<sup>15</sup> For the classic versions of these stories, see ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 3–95 (2d ed. 1991).

ments, thus creating value, efficiency, and satisfaction for both parties.<sup>16</sup>

Although people generally recognize that many negotiations are less dramatic than these romantic stories, negotiation theory is limited to these two basic models (or some combination/variation of them).<sup>17</sup>

This Article proposes a broad framework for developing more complete theories of legal negotiation but, for two reasons, it does not try to provide a definitive portrait of how lawyers negotiate. First, it is not practically possible to produce such a portrait because the phenomena are too complex, with too many variables affecting the dynamics of the cases. These include variations in local legal culture, subject matter, amount at stake, power relationships, and psychological and interpersonal dynamics, among many others. Moreover, the litigation process often occurs over an extended period of time and the final negotiations are strongly colored by the earlier interactions. To develop something approaching an accurate portrait, scholars would need a much more extensive body of empirical research focusing on lawyers' actual behavior than has been conducted or is likely to be conducted in the foreseeable future.<sup>18</sup>

Second, this framework is based on a study involving a small sample of lawyers in one state who were not randomly selected.<sup>19</sup>

<sup>16</sup> John Lande, *Teaching Students to Negotiate like a Lawyer*, 39 WASH. U. J.L. & POL'Y 109, 113 (2012) (footnote omitted). Professor Russell Korobkin provides an intentionally caricatured version of the stories from the perspective of proponents of the cooperative approach. In this telling, proponents of cooperative (or "integrative") negotiation tout their superiority over the adversarial (or "distributive") negotiation:

[Integrative negotiators] display subtlety, creativity, intelligence, and sophistication. In contrast, negotiators who employ distributive tactics are surly Neanderthals who try to use brute force and other boorish, knuckle-dragging behavior to subjugate their opponents. Teaching negotiation is viewed by many as the task of civilizing the great unwashed horde of naive, instinctive negotiators and convincing them to renounce their backward, distributive ways.

Russell Korobkin, *Against Integrative Bargaining*, 58 CASE W. RES. L. REV. 1323, 1324 (2008). Some proponents of distributive negotiation undoubtedly have a similarly unflattering perspective of integrative negotiation as a naive notion reflecting a lack of understanding about the way the world really works.

<sup>17</sup> For discussion of negotiation models in negotiation theory and as used by lawyers in this study, see *infra* Part IV.

<sup>18</sup> In 1991, Professor Herbert Kritzer wrote, "With the exception of the divorce area, most discussions' analyses of negotiation and settlement of civil cases have been theoretical and prescriptive, with few attempts to assess the theories against large numbers of actual cases." HERBERT M. KRITZER, *LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION* 131 (1991). This is still true today.

<sup>19</sup> For description of the data in this study, see *infra* Part II.

The subjects provided their own perspectives about cases that they negotiated but they could not provide accurate perspectives of other negotiators in those cases. Although they provided fairly detailed accounts of the cases, many details were omitted due to time limitations.

Thus, this Article does not attempt to represent the way that a specific population of lawyers actually negotiates or the frequency of particular negotiation phenomena. Instead, it uses lawyers' accounts of negotiations to identify problems in current theoretical conceptions, sketch elements of a more helpful framework, and suggest future theoretical, research, practice, and teaching initiatives. Despite the limitations of the research methodology, this analysis of lawyers' actual negotiation behavior can help theorists transcend some limitations of purely theoretical or prescriptive analyses and empirical research based on hypothetical scenarios.<sup>20</sup>

Part II of this Article describes the empirical data in this study. Part III discusses common understandings of negotiation, noting that some people do not consider an interaction to be negotiation unless it is an attempt to resolve an actual dispute. Because lawyers routinely reach agreements in pretrial litigation about undisputed issues, this Article argues that it is more helpful to focus on the *process of seeking agreement* than focusing merely on the process of resolving disputes. Since that phrase is cumbersome, this Article uses the word "negotiation" as having this broader meaning.

Part IV relies on the interview subjects' detailed accounts of cases to analyze the two traditional negotiation models as well as a third model that I have called "ordinary legal negotiation" (OLN). In OLN, lawyers try to reach a reasonable agreement based on shared norms, which usually are the expected outcomes in court or typical agreements in similar cases. Parts IV.A and IV.B review textbook definitions of the two traditional models and finds that

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<sup>20</sup> Much empirical research on negotiation involves laboratory settings or responses to hypothetical cases using students or other non-lawyer subjects. While such research can produce valuable insights, there are considerable limitations on the applicability of the findings to the real-life behavior of lawyers in actual negotiations. See Robert J. Condlin, *Legal Bargaining Theory's New "Prospecting" Agenda: It May Be Social Science, But Is it News?*, 10 PEPP. DISP. RESOL. L.J. 215, 232–43, 269–71 (2010) (critiquing "research on legal bargaining . . . based on questionnaires asking lawyers how they bargain, or hypothetical decision scenarios asking college students (and others) to resolve bargaining judgment problems") (footnote omitted); Richard K. Neumann, Jr. & Stefan H. Krieger, *Empirical Inquiry Twenty-Five Years after the Lawyering Process*, 10 CLINICAL L. REV. 349, 375–76 (2003) (arguing that experimental studies about negotiation that use student subjects and/or ask subjects to perform simplified tasks seem "sterile and unpersuasive").

there is a lack of consensus about these models and that many of the elements ascribed to them do not necessarily occur in real-life cases. Part IV.C documents lawyers' use of OLN, both as an approach to resolving ultimate issues in a case and as an omnipresent process in which lawyers generally manage their cases in litigation.

Part V presents a framework for analyzing negotiations that addresses the problems identified in Part IV. Part V.A sets out the framework and Part V.B uses cases in this study to illustrate the framework. The framework builds on current theory to make it more useful. It does not provide a new model of negotiation but rather, is a tool for analysis of negotiation that can be continuously refined. Instead of focusing only on bundles of characteristics for each model that are assumed to be highly correlated with each other, the framework unbundles the variables, permitting scholars, practitioners, and students to describe negotiations more accurately. The unbundled variables in the framework are: (1) the degree of concern, if any, negotiators have for the other side, (2) the communication process used in trying to reach agreement, (3) the extent that negotiators create value in the negotiation, (4) the negotiators' tone, (5) the use of power in negotiation, and (6) the source of norms that negotiators use.

Part VI.A summarizes the problems and omissions of current theory identified in this study and suggests approaches for future scholarship and empirical research. It argues that the system of the theoretical models is too confusing and should be replaced with a flexible framework that is readily understandable and that better fits actual pretrial negotiation. Part VI.B describes how lawyers can use the framework to improve their work. Part VI.C encourages faculty teaching courses dealing with pretrial litigation and negotiation to incorporate insights about litigation and to use multi-stage simulations. It shows how faculty can use the framework to help students avoid the confusion caused by the current theory and better understand negotiation dynamics. Part VII is the conclusion.

## II. EMPIRICAL DATA

This study is based on thirty-two semi-structured interviews of lawyers conducted between March and May 2013. The subjects are

based in Kansas City, Saint Louis, and Boone County, Missouri.<sup>21</sup> Chairs of county bar association committees were invited to be interviewed and/or to nominate other lawyers to be interviewed.<sup>22</sup> I used a snowball sampling process, which consists of asking subjects to suggest other lawyers who they considered to be good lawyers<sup>23</sup> and I interviewed some of the suggested lawyers. Toward the end of the data collection period, I interviewed three Collaborative lawyers specifically to describe interest-based negotiations.<sup>24</sup> I issued twenty-six invitations that did not result in interviews, which was usually due to non-response to invitation emails, though in some cases it was because the lawyers did not litigate.

The lawyers in the sample had been in practice for three to forty-six years, with a median of 20.5 years.<sup>25</sup> They were in firms or offices with 1 to 630 lawyers, with a median of 7.5 lawyers. There were twenty-three men and nine women in the sample. Eleven lawyers were in Boone County, nine in Kansas City, and twelve in Saint Louis. The lawyers were promised confidentiality and are identified with codes based on their location.<sup>26</sup>

The interviews were conducted by telephone and generally lasted sixty to ninety minutes.<sup>27</sup> After asking general background questions, I explained that the interview would focus on negotiation of two-sided cases in which both sides were represented by

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<sup>21</sup> Boone County is located in the center of Missouri. Columbia is the county seat and had a population of 113,225 of the 168,535 people in the county in 2012. U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/29/2915670.html>. It is a university town in the middle of a rural area.

<sup>22</sup> Because the interviews focused on negotiations involving only two parties, I excluded bar association committees dealing with subjects where there were typically more than two parties involved in litigation such as bankruptcy, construction, and environmental law.

<sup>23</sup> I sought to interview good lawyers to increase the probability of getting descriptions of cases that were handled well by thoughtful lawyers.

<sup>24</sup> In Collaborative Law, the parties and lawyers use a “participation agreement” providing that they will use interest-based negotiation. The agreement includes a “disqualification” clause providing that both Collaborative lawyers would be disqualified from representing their clients if the case is litigated. See John Lande, *An Empirical Analysis of Collaborative Practice*, 49 FAM. CT. REV. 257, 257 (2011).

<sup>25</sup> The number of years in practice was calculated based on the number of years since graduation from law school.

<sup>26</sup> E.g., Interview BC 01, KC 02.

<sup>27</sup> The research involved an ambitious interview protocol and I did not ask all the questions of each subject because of time constraints. After conducting about half of the interviews, I deleted some questions that did not seem to produce worthwhile data and I added some questions to elaborate on issues discussed in the original protocol. I did not take complete verbatim notes of the interviews and most of the data reported in this Article summarizes or paraphrases the subjects’ statements. Some language is shown in quotation marks, which I am fairly confident accurately reflects the subjects’ words.

counsel and there was not a mediation.<sup>28</sup> Much of the time in the interviews was devoted to discussing the most recent such case that they settled.<sup>29</sup> Subjects told the stories of the cases from their first contact with the case until settlement. In addition to developing an overall narrative of the cases, I asked the subjects: (1) when the negotiation began; (2) who initiated the negotiation; (3) why the negotiation was initiated at that time; (4) the time period between the first communication until final agreement; (5) whether the subject previously knew the lawyer for the other party; (6) how well the lawyers got along; (7) if the lawyers' relationship affected the negotiation process or outcome; (8) if the parties directly participated in the negotiation; (9) what the lawyers communicated about the negotiation with the client; (10) how the subjects prepared for the negotiation; (11) how much of the negotiation was conducted by phone, email, letter, or in person; (12) if both sides identified their interests or goals early in the negotiation; (13) what the subjects thought were the main goals of each side; (14) if there was any negotiation about the litigation process itself (such as discovery, timing, information sharing, or motions); (15) if there was a series of offers and counter-offers, and if so, how many times the parties exchanged offers; (16) what was the first offer or demand from each side; (17) what was the final agreement; (18) why the parties accepted the agreement that they did (as opposed to some other possible agreement); (19) the extent, if any, that the resolution was based on expectations about the likely result in court or typical settlements in similar cases; (20) whether the subjects thought that the settlement was appropriate; (21) how satisfied they felt about the negotiation process; and (22) how typical this negotiation was compared to their other recent two-sided negotiations of this type of case. Of course, the subjects provided only their perspectives (including some perceptions of others' perspectives in the negotiation). The cases are intended to illustrate common dynamics rather

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<sup>28</sup> I explained the parameters of the study to the subjects as follows:

All my questions will focus on *negotiation of disputes* though these may be disputes that are settled without a lawsuit. This interview will NOT ask about *negotiations of transactions*. All the questions will be about cases where there were *only two sides*, *both sides were represented by lawyers*, and there was *not a mediation*. Note that there may be *more than one party on the same side*, such as a couple in a suit against another party.

Mediated cases were generally excluded because the negotiation dynamic is very different in a specific settlement event.

<sup>29</sup> Asking subjects to describe the most recent settled case reduces the risk of selection bias, though that is not a major concern in this study because the data is not used to generate population estimates.

than to determine the precise reality of particular cases or to establish frequency estimates.

Half of the cases were either divorce (ten cases) or criminal cases (six cases). There were a range of other cases including commercial, employment discrimination, family trust, foreclosure, labor, landlord-tenant, intellectual property, personal injury, product liability, real estate, and workers compensation.<sup>30</sup>

### III. DEFINITION OF NEGOTIATION

Legal negotiation texts vary in their definitions of negotiation. Some definitions are quite broad and others include a variety of conditions that unnecessarily narrow the scope of interactions fitting in the definition. One text makes the following broad statement, “Anytime you deal with someone else, seeking to reach agreement on some matter, you are involved in a negotiation,”<sup>31</sup> which provides a helpful way to analyze lawyers’ behavior. Using the phrase “process of seeking agreement” instead of “negotiation” would avoid some of the confusion based on theoretical and commonplace notions of negotiation, as described below. Unfortunately, this phrase is cumbersome. So, for simplicity, this Article uses the two terms interchangeably.

If one includes routine interactions leading to agreement, negotiation is a process that includes “getting to okay” conversations as well as more dramatic “getting to YES” settlement events.<sup>32</sup> This broad notion of negotiation provides a better account of lawyers’ actual behavior in pretrial litigation than the narrower, conditional conceptions of negotiation in some texts, as described below.

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<sup>30</sup> The distribution of subject areas of the cases was partially by design but mostly was not. I was interested in divorce cases because they lend themselves to a wide variety of approaches to negotiation. I specifically included several Collaborative Law cases (which were necessarily divorce cases) because I wanted to document some cases where the lawyers self-consciously used an interest-based negotiation approach. I included several criminal cases to document cases using an ordinary legal negotiation approach, which often is used in criminal cases. On the other hand, some of the lawyers I interviewed handle a variety of types of cases, so the cases they discussed reflected the last cases they happened to settle. All but one of the criminal cases were from Boone County. Otherwise, there was a broader distribution of case types from the different locations.

<sup>31</sup> NELKEN, *supra* note 3, at 1. It is not clear whether this statement was intended as a definition but it can serve that function.

<sup>32</sup> See FISHER & URY, *supra* note 15 (emphasis in original); *supra* note 16 and accompanying text (describing stories of dramatic settlement events in both interest-based and positional negotiation).

Despite the fact that pretrial litigation is supposed to prepare for trial, such preparation often is designed to prepare for negotiation because the expected trial outcome is a major factor affecting negotiation in many, if not most, cases. Indeed, some lawyers continuously consider how the litigation process may affect negotiation. For example, one lawyer said, “It is all negotiation from the time suit is filed. You are constantly negotiating or setting up the negotiation. It doesn’t just happen. You are negotiating from the outset, setting up where you want to go. You are judging [the other side] and they are judging you.”<sup>33</sup> He elaborated, “Negotiations don’t occur in a week or a month. They occur in the entire time of the lawsuit. If anyone tells you they aren’t negotiating, they really are. Every step in the process is a negotiation. You don’t call it negotiation, but in effect, that’s what it is.”<sup>34</sup> Another lawyer expressed the same view, saying that he “prepares for settlement from day one of the lawsuit” and that there is a “constant process of evaluating the claim” throughout the litigation.<sup>35</sup> A third lawyer said that he “always has an eye toward settling,” taking care of matters as fast and cheaply as possible and minimizing clients’ risk.<sup>36</sup> This study documents numerous cases illustrating this litogitation approach.<sup>37</sup>

During pretrial litigation, lawyers regularly reach numerous agreements with many different people on the path toward resolving their cases. Most obviously, lawyers negotiate with each other about matters such as “acceptance of service of process, extension of filing deadlines, scheduling of depositions, resolution of discovery disputes, and numerous other procedural matters.”<sup>38</sup> Lawyers agree with clients about the tasks that they each will perform and

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<sup>33</sup> Interview, KC 06.

<sup>34</sup> *Id.*

<sup>35</sup> Interview, BC 05.

<sup>36</sup> Interview, KC 02.

<sup>37</sup> For definition of litogitation, *see supra* note 10 and accompanying text. For description of cases in this study illustrating litogitation, *see infra* text accompanying notes 66–67, 76–78, 127–34 (cases 1, 2, 4, 5, 13–14). *See also* CRAVER, *supra* note 3, at 3–4 (arguing that negotiation begins with the first contact between negotiators); HAZEL GENN, *HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS* 19 (1987) (study of negotiation in England where “[e]very letter written and telephone call made constitutes an integral part of the ‘litogitation’ process in which positions are taken, adjusted, and redrawn”); *cf.* JONATHAN M. HYMAN ET AL., *CIVIL SETTLEMENT: STYLES OF NEGOTIATION IN DISPUTE RESOLUTION* 164 (1995) (study of legal negotiation in civil cases finding that lawyers differed about whether their negotiation and overall litigation strategies were integrated or whether they treated negotiation as a separate activity at the end of the litigation process).

<sup>38</sup> Lande, *supra* note 16, at 123. *See* CRAVER, *supra* note 3, at 1–2 (noting that lawyers negotiate about procedural matters in pretrial litigation).

how the lawyer will respond to the other side at various points during the litigation. Lawyers reach agreements with people such as co-workers in their firms, process servers, investigators, court reporters, technical experts, financial professionals, and mediators.<sup>39</sup> Lawyers regularly reach agreements with judges about case management issues such as discovery plans and schedules, referral to ADR procedures, and ultimate issues during judicial settlement conferences.<sup>40</sup>

Although the process of resolving difficult disputes with counterparts about the ultimate issues merits serious attention, focusing *exclusively* on those interactions overlooks the vast number of lawyers' interactions in which they try to reach agreement. Indeed, the instances of lawyers seeking agreement without difficult disputes are so plentiful and obvious that it is as if they are hiding in plain sight.<sup>41</sup>

Various definitions of negotiation include elements that are not necessary or helpful including, but not limited to, the existence of a dispute. For example, some texts include only interactions in which the other person has some control over the subject matter.<sup>42</sup> Although this element makes sense descriptively, it does not significantly restrict the class of phenomena involved because it is hard to imagine many negotiations where a party has no control over the subject.

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<sup>39</sup> See CRAVER, *supra* note 3, at 2 (noting that lawyers negotiate with clients and law firm personnel as well as counterpart lawyers).

<sup>40</sup> For further discussion of how lawyers seek agreement during pretrial litigation, see Lande, *supra* note 16, at 121–23. In Kritzer's study of negotiation in ordinary litigation, 80% of lawyers reported spending no more than 20% of their time in the cases on settlement discussions, but "many other activities (e.g., conferring with the client, discovery, other factual investigation), which together typically take almost half the lawyers' time . . . are often closely related to settlement discussions." KRITZER, *supra* note 18, at 32. Moreover, that analysis focused only on the resolution of the ultimate issues in a case but not on various procedural negotiations.

Although much pretrial work is oriented toward seeking agreements, some activities do not fit in this concept, such as arguing summary judgment motions or doing final trial preparation in cases that will be tried. One could explore the boundaries of what should be considered the process of seeking an agreement, but establishing the precise boundaries of this concept is not necessary for the current analysis. For the purpose of this Article, suffice it to say that in pretrial litigation, lawyers spend a significant proportion of their time seeking numerous agreements with many different people.

<sup>41</sup> For further discussion, see *infra* Part III.

<sup>42</sup> See FOLBERG & GOLANN, *supra* note 3, at 1 ("the process of communication used to get something we want when another person has control over whether or how we can get it."); MENKEL-MEADOW ET AL., *supra* note 3, at 3 ("People negotiate whenever they need someone else to help them accomplish their goals.").

Some definitions indicate that negotiation occurs in the context of actual or potential conflict.<sup>43</sup> Since people could have a potential conflict about any issue, having only a *potential* conflict also does not seem to exclude interactions that might be considered negotiations. For example, one lawyer said that she and her counterpart were fighting over “everything” in a case.<sup>44</sup> While this obviously was a figure of speech and presumably the lawyers did not actually fight over every possible aspect of the case, they could have fought—and negotiated—over virtually anything. Indeed, the first issue that lawyers need to consider is whether they will agree to communicate with each other at all. Although one might take this for granted, practitioners do not always do so. For example, one lawyer said that when he gets a letter from his counterpart, his “natural course” is to respond and negotiate, but he makes a conscious decision whether to do so or to ignore the letter.<sup>45</sup> Thus, even a decision not to negotiate can be the source of conflict and the subject of negotiation. For example, one lawyer lamented that sometimes she has to press her counterparts to negotiate and make a counter-offer.<sup>46</sup>

As suggested by some of the texts, many people think of negotiation as being limited to matters about which the parties *actually are* in conflict, though this conception ignores many important negotiations. Lawyers regularly suggest options that the other side accepts without attempted modification. In criminal cases, a substantial number of defendants accept the prosecutors’ plea offer

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<sup>43</sup> See GIFFORD, *supra* note 3, at 3 (“a process in which two or more participants attempt to reach a joint decision on matters of common concern in situations where they are in actual or potential disagreement or conflict”); KOROBKIN, *supra* note 3, at 1 (“an interactive communication process by which two or more parties who lack identical interests attempt to coordinate their behavior or allocate scarce resources in a way that will make them both better off than they could be if they were to act alone.”); RAU ET AL., *supra* note 3, at 86 n.1 (citing several definitions including a “process of potentially opportunistic interaction in which two or more parties, with some apparent conflict, seek to do better through jointly decided action than they could do otherwise” and a process where “parties can mutually benefit from reaching agreement on an outcome from a set of possible outcomes . . . but have conflicting interests over the set of outcomes”) (citations omitted).

<sup>44</sup> Interview, SL 03.

<sup>45</sup> Interview, KC 03.

<sup>46</sup> Interview, BC 09. In a study of lawyers who work on a contingency fee, Professor Herbert Kritzer found that the rate of defendants’ offers responding to initial demands varied widely by type of case, from a low of 33% in product liability and non-personal injury tort cases to 97% in automobile accident cases. HERBERT M. KRITZER, *RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES* 155 (2004).

without making a counteroffer.<sup>47</sup> Similarly, lawyers regularly make procedural agreements when one lawyer agrees to a request unconditionally or after suggesting an alternative that is accepted without difficulty.<sup>48</sup>

Conventional conceptions of negotiation often involve various elements that do not necessarily occur in the process of reaching agreement. For example, some people think of negotiation as involving (1) an exchange of offers occurring close in time to each other, (2) multiple options for handling an issue, (3) an explicit *quid pro quo*, and/or (4) something different from normal conversation or professional courtesy. Although sometimes it may be helpful to focus on processes that involve explicit disagreements or such other factors, ignoring interactions without such factors leads people to overlook much of lawyers' everyday work of producing agreements.

#### IV. MODELS OF NEGOTIATION

Current negotiation theory is based on two general models of negotiation, though people use many different terms to describe them.<sup>49</sup> The negotiation texts refer to one model as “distribu-

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<sup>47</sup> For example, a prosecutor who handles felony drug cases said that almost half defendants accept her initial plea offer without making a counter-offer. Interview, BC 08. This is similar to a study finding that 60% of 5600 defendants in nine counties entering guilty pleas accepted the prosecutors' initial plea offer. See JAMES EISENSTEIN ET AL., *THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS* 245 (1999) (describing “consensus” process of agreeing on guilty pleas).

<sup>48</sup> Most of the lawyers in this study said that they did not negotiate about procedural matters in the cases they described in the interviews. While some of these cases may not have involved any procedural agreements, many cases almost certainly did involve such agreements but the lawyers presumably did not think of the process of reaching the agreements as “negotiation.”

<sup>49</sup> Indeed, the “models” may be referred to as approaches or styles, CRAVER, *supra* note 3, at 11–12; FOLBERG & GOLANN, *supra* note 3, at 31–49, or as strategies, GIFFORD, *supra* note 3, at 26–27; RAU ET AL., *supra* note 3, at 116–66; WILLIAMS & CRAVER, *supra* note 3, at 59–65. I should note that I refer to the two approaches in my book as well. See JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY* 58–71 (2011).

Professor Donald Gifford distinguishes between negotiation strategies and styles, stating that strategies refer to specific negotiating behaviors whereas styles refer to personal characteristics reflected in such things as non-verbal communication and tone of voice. GIFFORD, *supra* note 3, at 18. Some texts do not refer to distinct models and, instead, identify “tensions” or “activities” presumably in every negotiation. Professor Robert Mnookin and his colleagues refer to a general tension between creating and distributing value and include a list of “hard-bargaining tactics” for distributing value associated with the traditional model. See MNOOKIN ET AL., *supra* note 3, at 17–25. Similarly, Professor Russell Korobkin refers to a “bargaining zone /

tive,”<sup>50</sup> “competitive” and/or “adversarial,”<sup>51</sup> or “positional negotiation”<sup>52</sup> (or “softer” variations of this model).<sup>53</sup> I refer to this model as “positional negotiation” (PN) because the only common element in the cases in this study was that parties took substantially adverse positions.<sup>54</sup> The texts refer to the other model as “integrative,”<sup>55</sup> “problem-solving,”<sup>56</sup> or “cooperative problem-solving.”<sup>57</sup> I use the term “interest-based negotiation” (IBN) reflecting a key element of explicitly identifying parties’ interests.<sup>58</sup> I have theorized a third model of negotiation, which I called “ordinary legal negotiation” (OLN), based on prior empirical research.<sup>59</sup>

This part discusses these three models and the extent to which the cases in this study fit into them. In real life, some cases do not perfectly exhibit all the characteristics of a given model. For example, negotiators may use different models to address different issues or they may use one model at one point and use another model at a later time in the process. Even so, this study shows that it is hard both to identify essential features of the different models and to categorize some cases, which demonstrates the major limitations of traditional negotiation theory.

surplus allocation” framework in which negotiators identify a zone of possible agreement and then decide on a deal point within that zone. See KOROBKIN, *supra* note 3, at 17–20.

<sup>50</sup> MENKEL-MEADOW ET AL., *supra* note 3, at 161–79; NELKEN, *supra* note 3, at 33–90.

<sup>51</sup> CRAVER, *supra* note 3, at 11–12 (“competitive/adversarial”); FOLBERG & GOLANN, *supra* note 3, at 31–42 (“competitive/adversarial”); GIFFORD, *supra* note 3, at 14, 16 (“competitive”); WILLIAMS & CRAVER, *supra* note 3, at 60–64 (“competitive/adversarial”).

<sup>52</sup> RAU ET AL., *supra* note 3, at 116–33.

<sup>53</sup> Several texts identify variations that can be considered as “soft positional” negotiation. See FISHER & URY, *supra* note 16, at 8–9 (identifying “soft positional” negotiation as a more “friendly” approach that “emphasizes the importance of building and maintaining relationships”). Along these lines, Professor Donald Gifford identifies a “cooperative” strategy, Carrie Menkel-Meadow and her co-authors identify an “accommodating” strategy, and Professor Alan Rau and his colleagues use the term “soft positional” negotiation. See GIFFORD, *supra* note 3, at 16–19 (negotiators using a cooperative strategy seek an “accommodative” relationship with the other negotiator but use distributive bargaining tactics, starting with moderate, rather than extreme, bids); MENKEL-MEADOW ET AL., *supra* note 3, at 179–83 (negotiators highly value the relationship with the counterpart and use a distributional approach); RAU ET AL., *supra* note 3, at 125–26 (soft positional bargaining is a softer version of positional negotiation except that negotiators are “more conciliatory” than in a more traditional positional strategy).

<sup>54</sup> See *infra* Part IV.A.

<sup>55</sup> KOROBKIN, *supra* note 3, at 101–35; MENKEL-MEADOW ET AL., *supra* note 3, at 117–60; NELKEN, *supra* note 3, at 91–158.

<sup>56</sup> GIFFORD, *supra* note 3, at 14–15; RAU ET AL., *supra* note 3, at 133–47.

<sup>57</sup> CRAVER, *supra* note 3, at 11–12; FOLBERG & GOLANN, *supra* note 3, at 42–49; MNOOKIN ET AL., *supra* note 3, at 173–271; WILLIAMS & CRAVER, *supra* note 3, at 59–60.

<sup>58</sup> See *infra* Part IV.B.

<sup>59</sup> See *infra* Part IV.C.

A. *Positional Negotiation*

Various negotiation texts describe different characteristics of positional negotiation including goals, assumptions, relationships, process structure, and tactics.<sup>60</sup> Most texts identify the goal of maximizing negotiators' results, such as the statement that the purpose of negotiators using a competitive approach is to "obtain the best possible economic result for your client, usually at the expense of the other side."<sup>61</sup> Several texts refer to negotiators as having a zero-sum assumption, such as in the following statement: "A competitive bargainer is likely to think that negotiation involves a limited resource or fund that must be distributed between competing parties—in effect, a fixed economic 'pie.'"<sup>62</sup> Some texts indicate that competitive negotiators treat the other side as "opponents."<sup>63</sup> One text focuses on the structure of the process, defining positional negotiation as a process in which "each side takes a position, argues for it, and makes concessions to reach a compromise."<sup>64</sup> Sev-

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<sup>60</sup> As the following material illustrates, some texts refer to these characteristics as common features of this negotiation model rather than as essential elements.

<sup>61</sup> FOLBERG & GOLANN, *supra* note 3, at 32. *See also* CRAVER, *supra* note 3, at 11 (negotiators with a competitive/adversarial style try to maximize their own results); GIFFORD, *supra* note 3, at 16 (a competitive strategy is designed to "induce the other negotiator to enter into an agreement with terms less advantageous to his client than those he would have accepted prior to the negotiation"); KOROBKIN, *supra* note 3, at 14 (an adversarial model focuses on "maximizing victory"); MENKEL-MEADOW ET AL., *supra* note 3, at 161 (in distributive bargaining, negotiators are primarily concerned with "winning" by maximizing their gains in dividing limited resources); NELKEN, *supra* note 3, at 33 (distributive bargainers try to maximize their own gains).

<sup>62</sup> FOLBERG & GOLANN, *supra* note 3, at 32 (stating an assumption of competitive negotiators that the parties' relationships or other intangible factors are not of primary importance). *See also* KOROBKIN, *supra* note 3, at 14 (an adversarial model is based on the assumption that the parties want to get as much as possible in a "zero-sum" negotiation); MNOOKIN ET AL., *supra* note 3, at 18 (distributive bargainers assume that there is a fixed amount of value to distribute); NELKEN, *supra* note 3, at 33 (distributive negotiators assume that if one side receives more, the other side receives less).

In a zero-sum negotiation, the amount of one party's gain in an agreement is equal to the other party's loss. In a positive-sum agreement, one party may achieve a gain that would "cost" the other side less than the value of the first party's gain, thus "creating value" when considering the total value for both parties. Thus the essence of creating value is trading things that one party values more than the other party. *See* Korobkin, *supra* note 16, at 1331.

<sup>63</sup> GIFFORD, *supra* note 3, at 16. *See also* CRAVER, *supra* note 3, at 12 (negotiators with a competitive/adversarial style seek to maximize their clients' interests but not the opponents' interests); MENKEL-MEADOW ET AL., *supra* note 3, at 161 (competitive negotiators are "less likely to be interested in the other side's point of view"); NELKEN, *supra* note 3, at 33 (distributive negotiators deal with each other at arm's length).

<sup>64</sup> RAU ET AL., *supra* note 3, at 117 (quoting FISHER & URY, *supra* note 16, at 3). In a study of negotiation of civil cases in New Jersey, lawyers reported exaggerating initial demands and understating initial offers as part of the PN "settlement ritual" involving a series of concessions

eral texts also refer to various tactics that negotiators use. For example, one text states that in distributive bargaining, negotiators are “more likely to engage in deceptive, manipulative, or ‘power’ tactics”<sup>65</sup> and another text states that distributive negotiation may involve various “hard-bargaining” tactics such as extreme demands, small and slow concessions, personal insults, threats, puffing, and belittling the counterparts’ alternatives.<sup>66</sup>

The seventeen cases in this study that have significant positional characteristics illustrate some but not all of these features. The only feature appearing in all of the cases was taking substantially adverse positions and, in virtually all cases, the parties exchanged offers. In many, but not all, of the cases, each side apparently assumed that there were only zero-sum options and sought to maximize its partisan advantage. In only a handful of these cases, the lawyers seemed to have adversarial attitudes toward the other side that went beyond the normal interactions of counterpart lawyers. In some PN cases, the parties had intense antagonisms toward each other but most of the accounts did not suggest that the parties had unusually difficult relationships for parties in legal disputes. Lawyers reportedly used power tactics in only two of the cases and, indeed, the lawyers generally described working together quite professionally in most of the PN cases. While the texts’ descriptions of the negotiators’ goals, assumptions, relationships, and tactics occurred to varying degrees in the PN cases in this study, there were significant exceptions to all these variables, except that the parties took substantially adverse positions in all of these cases.

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by both sides. Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: “You Can’t Always Get What You Want,”* 12 OHIO ST. J. ON DISP. RESOL. 253, 262–65 (1997).

<sup>65</sup> MENKEL-MEADOW ET AL., *supra* note 3, at 161.

<sup>66</sup> MNOOKIN ET AL., *supra* note 3, at 24–25 (distributive tactics involve managing “information asymmetries” to persuade counterparts that they cannot receive as much as they would like). See also CRAVER, *supra* note 3, at 11–12 (negotiators with competitive/adversarial styles are adversarial and disingenuous, attempt to manipulate opponents, minimize disclosure of information, start with unrealistic positions, make minimal concessions, and frequently use threats); GIFFORD, *supra* note 3, at 16 (competitive bargainers manipulate the perception of the strength of the respective positions, and use tactics including extreme initial positions, hiding of information, threats, and slow concessions); RAU ET AL., *supra* note 3, at 117–25 (describing various “hard” positional tactics such as taking extreme initial positions, providing limited information, making small and slow concessions, threatening opponents, and using commitment tactics); WILLIAMS & CRAVER, *supra* note 3, at 61 (describing a “competitive/adversarial” strategy as involving “tough” negotiation where people move psychologically against opponents, as reflected by high aspirations, extreme demands, and few and small concessions).

The negotiation in Case 1, involving alleged copyright infringement, manifested all the foregoing elements of PN theory. The owner of a marketing company that distributed materials through a franchise network sued the franchisor for illegally copying and distributing the materials. At first, the parties communicated directly to try to resolve the issues and then their lawyers negotiated, to no avail. The defendant ignored the “cease and desist letters” from the plaintiff’s lawyer. The plaintiff then filed suit and the defendant filed numerous motions to dismiss the suit, which were denied. The plaintiff’s lawyer initiated extensive discovery requests and the defendant made “half-hearted attempts” to respond. The plaintiff’s lawyer filed motions to compel responses and, after waiting about eighteen months for the court to rule on motions to compel responses, he initiated depositions because the discovery deadlines were approaching. The plaintiff’s lawyer deposed the defendant and the lawyer said that the defense counsel apparently coached his client during breaks to change his testimony. The defense counsel later deposed the plaintiff, intimidating him by making threats and saying “horrible things” about him. The plaintiff’s lawyer thought that the defense counsel also tried to intimidate a witness. He said that the defense counsel was the “most unethical attorney [he] had ever encountered.”<sup>67</sup>

As a result of these experiences, the plaintiff’s lawyer told his client that he would not be able to withstand the questioning if they went to trial. He advised his client to settle, telling him that he would spend a lot of money but would not get a better result if he went to trial. The defendant’s intimidation worked. The process was so unpleasant that the plaintiff said, “Just get me out. I’ll take zero.” Plaintiff’s counsel wanted to get more than that for his client, however. They were asking for statutory damages of \$30,000 for each violation. He had evidence that the defendant had illegally distributed at least ten copies (each of which would constitute a violation) and he thought that many more copies were distributed. The parties settled for \$75,000 and an order requiring the defendant to return or destroy the materials at issue. The plaintiff’s lawyer thought that the resolution was based only on what the parties were willing to pay or accept and not on the legal merits of the case. The defense counsel implicitly acknowledged that he had behaved improperly by trying to get the plaintiff’s lawyer to agree not to file an ethical grievance against him.<sup>68</sup>

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<sup>67</sup> Interview, KC 05.

<sup>68</sup> *Id.*

Case 2 also illustrates all the elements of PN described in the negotiation texts. In a divorce case, the wife was in her early fifties and the husband was significantly older. The husband had used numerous prostitutes, which had an “extraordinary emotional impact” on the wife. The key issues were the property division, whether the wife would receive maintenance, and if so, how much. At the beginning of the case, the wife authorized her lawyer to make a settlement offer. The wife was in counseling and wanted to “close the wound.” She asked for a fifty-fifty property division and substantial maintenance for a limited time. The husband gave no response to this offer or to a revised offer. The wife’s lawyer had previously dealt with her counterpart and found him to be “difficult” to work with. After getting no responses to her settlement offers, she told him that it was “difficult to negotiate with a lamp.” This may have prompted him to send an offer, though she considered it “ridiculous.”<sup>69</sup>

The parties engaged in extensive discovery, which the wife’s lawyer described as, “like a PI case for a while.” She tried to get information from the husband’s “rehab center” and he resisted, arguing that it was privileged. Conversely, the husband wanted medical information about his wife’s psychological condition. There were many delays due to discovery battles and negotiations about discovery. Somehow, the wife obtained damning evidence of a detailed handwritten confession that the husband wrote when he was in rehab.<sup>70</sup>

The lawyers took depositions of both parties on the same day. The wife’s deposition was first and the husband’s lawyer implied that the wife was responsible for her husband’s misconduct, which greatly upset her. The attorneys stepped out of the room and the wife’s lawyer complained that this questioning was obnoxious. During the wife’s deposition, her lawyer noticed that the husband was also getting upset. The wife’s lawyer said that the trial would be horrible for both parties. After the wife’s deposition, the husband said that he was willing to talk about a marital offset in the property division but not about maintenance. The wife’s lawyer thought that the husband’s lawyer was advising him not to settle the case so that the lawyer could continue earning fees, drawing from the couple’s sizeable estate.<sup>71</sup>

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<sup>69</sup> Interview, BC 06.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

In the husband's deposition, the wife's lawyer asked some very unpleasant questions to quantify the economic harm he caused. The deposition produced disclosures of many things that wife had not known and the husband was in tears as he testified. The wife's lawyer said that the process was difficult for both parties and that the wife would prefer to settle, but the husband's lawyer apparently scuttled the overture on the day of the depositions. As the trial date approached, the parties had some discussions on their own and then exchanged offers that the wife's lawyer thought were more reasonable. But shortly before the trial date, the parties had a nasty argument, which brought the negotiation to a "complete halt."<sup>72</sup>

On the day of trial, the husband shook with anxiety, apparently coming to grips with the reality of the exposure of his "dirty secrets." The wife was emotionally ready to go to trial, which may have "spooked" the husband. His lawyer also seemed agitated and the lawyers negotiated with the "back and forth of horse trading" based on what they thought that the judge would decide. The wife had demanded an offset for the husband's misconduct so that she would get about sixty percent of the estate and they ultimately agreed that she would get about fifty-five percent. The wife agreed to waive maintenance in exchange for an adjustment in the property settlement. Having arrived in court at about 8:30 am, they settled by noon. The wife was satisfied with the result but was disappointed that she did not have the catharsis of a trial.<sup>73</sup>

Some PN cases did not involve the personal antagonism or hard-bargaining tactics illustrated in Cases 1 and 2. In some cases without these features, the parties nonetheless had the goal of maximizing outcomes based on zero-sum assumptions. For example, Case 3 was an example of "soft positional" negotiation, in which the negotiators exchanged a series of offers to maximize their partisan advantage but they maintained a cooperative approach in handling the case.<sup>74</sup> This was an employment discrimination case that the defense counsel described as being "like a mediation without the mediator." The defense counsel investigated the case within the employer's organization and, following his normal practice, he called his counterpart lawyer to get to know him. In response to his invitation for his counterpart to make a demand, the plaintiff asked for \$50,000. The defense counsel responded with a

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See *supra* note 52 and accompanying text for discussion of "soft positional" negotiation.

\$5,000 offer and the parties exchanged several offers by mail. When this did not result in a settlement, they decided to have a meeting with the parties. After an exchange of offers at the meeting, they settled for \$16,000 and an agreement that the employee would not be rehired as well as a confidentiality agreement specifically prohibiting disclosures on social media. Although each side sought to maximize its financial outcome and the defendant's representative was upset at times because he felt that the company should not have to pay much or anything to the plaintiff, the overall negotiation process was generally cooperative.<sup>75</sup>

Several cases involved a PN process but did not entail a purely zero-sum assumption and partisans' exclusive goal of maximization of their interests. This may have been, at least in part, because the disputed issues were not monetary and the parties had other interests, especially about their relationships. For example, in Case 4, the mother in a post-divorce parenting dispute wanted the father to go to counseling because he had outbursts of anger about the mother in front of their daughters, but the father refused to go to counseling. The judge ordered the Domestic Relations Unit to do an investigation and, in a settlement conference with the lawyers, suggested that the report was favorable to the mother. As a result, the father agreed to go to counseling. Apparently, there was not much give-and-take exchange of offers after that as the father simply accepted the mother's demand.<sup>76</sup> Counseling generally is not a zero-sum issue, because granting the mother's demand for more counseling for the father is not necessarily bad for the father.<sup>77</sup>

A labor grievance, in Case 5, illustrates a hard-fought negotiation involving an exchange of offers but that also involved some analysis of the negotiators' interests to reach a positive-sum result. Because of an employee's arrest, he did not have a commercial driver's license, which was required for his job, so the company fired him. The union demanded that the employee be rehired and receive \$30,000 in back pay. The company offered reinstatement but no back pay. In trying to resolve the dispute, the lawyers had

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<sup>75</sup> Interview, KC 02.

<sup>76</sup> Interview, SL 01.

<sup>77</sup> This is an example of "noncompetitive similarities," where parties share non-zero-sum interests. See MNOOKIN ET AL., *supra* note 3, at 16. There could be some zero-sum negotiation about the amount of counseling, where the parties exchange offers to meet in the middle, though this arguably might be considered to have non-zero-sum outcomes. For further discussion of the non-zero-sum nature of some aspects of divorce bargaining, see Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 542 (1994).

“unproductive” discussions, as they were “fighting over everything.” The case was set for arbitration but when they arrived for the hearing, it was clear that the hearing would take more than the one day scheduled for the hearing, so the lawyers decided to negotiate instead of starting the hearing.<sup>78</sup>

According to the company’s lawyer, the other side initially “dug in its heels” and took a hard position. The employee was in a tough financial condition and was “desperate” to get money soon, feeling that it would take too long to wait for an arbitration award. The union was getting “a lot of bad PR on their website and Facebook” and the union leaders had a strong interest in demonstrating to their membership that they were “working hard” for them, being “tough” in negotiation, and achieving “a result that no one thought was possible.” The company also had multiple interests. Although the company’s lawyer believed that he had a strong case and did not need to compromise very much, the company was anticipating an upcoming negotiation of a collective bargaining agreement and it wanted to improve its relationship with the union by settling this grievance. The company representatives also felt that it was important that a settlement of this grievance should not set a precedent. After an exchange of three to five offers by each side, the parties agreed to the following conditions: the employee would have a suspension (which was stayed); could return to work if he satisfied certain conditions; would receive \$10,000 in back pay, and would have his seniority reinstated. They also agreed that the settlement would not set a precedent for future cases. While all the negotiators presumably analyzed the interests of each party, apparently they did not explicitly discuss them with each other.<sup>79</sup>

Because the company was concerned about its relationship with the union and the effect of the outcome of the grievance on the upcoming contract negotiations, it was not in the company’s interest to maximize a partisan goal of giving the employee as little back pay as possible. Presumably, the company executives believed that they could get more benefit from a good contract negotiation than from paying less than \$10,000 and antagonizing the union. Similarly, the executives presumably believed that the provision making the settlement non-precedent-setting was worth possibly paying a premium in settling this dispute. The union leadership probably also benefitted in its relationship with their members by negotiating a favorable settlement.

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<sup>78</sup> Interview, SL 03.

<sup>79</sup> *Id.*

Even in some cases that are supposedly “only about the money,” other interests may temper the parties’ goal of maximizing their results. For example, in Case 6, the parties had an adversarial dispute in which both parties wanted to maximize the amount of property they received (or retained) but they settled because it gave them relief from the bitter litigation. The trustor (the parties’ father) had transferred to the defendant some property from the trust prior to the father’s death, and the plaintiff claimed that the transfer was improper. The defendant’s lawyer located an impressive witness who could completely discredit the plaintiff’s factual claims and the lawyer argued that some of the plaintiff’s causes of action were barred by the statute of limitations. After extensive litigation, the parties settled for about \$15,000, which was much less than the plaintiff’s original seven-figure demand. They ultimately compromised because the litigation was too burdensome on them. One brother was “losing sleep” because he worried so much about the litigation and the legal costs. The other brother had to deal with an ailing wife and did not want to endure the rigors of continued litigation. Clearly, each party valued the emotional relief from ending the litigation more than the potential financial advantage from continuing it.<sup>80</sup>

In the PN process in Case 7, at least one party had some concern about the other party’s interests. The husband in a divorce cared about the welfare of his wife and children and did not merely attempt to maximize his own financial situation in resolving issues of maintenance and allocation of debts. He initiated the divorce and his wife wanted to remain married. Although he wanted to protect his financial interests, he also wanted to maintain good re-

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<sup>80</sup> Interview, 09. By definition, any time that parties reach agreement, they consider it to be better than the no-agreement alternative. Professor Russell Korobkin argues that as a theoretical matter, this is trivial because by using this perspective, virtually every agreement would be considered to be creating value. See KOROBKIN, *supra* note 3, at 114. As a practical matter, reaching agreement has real significance considering evidence that in the vast majority of cases in which litigants go to trial, one of the parties would have been better off to accept the counterpart’s last offer. See Randall L. Kiser et al., *Let’s Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUD. 551, 566 (2008) (finding that plaintiffs received an award less than or equal to the defendant’s last offer in 61.2% of the cases and defendants were ordered to pay more than the plaintiff’s last demand in 24.3% of the cases). Merely saving the out-of-pocket cost of continued litigation can constitute a major “created value” in negotiation. Moreover, this calculation does not include the value of time diverted from more productive activities, damaged relationships and reputations, increased risks, and loss of peace of mind. This value created in this case can be demonstrated by comparing it with Case 3, the employment case settled through an exchange of offers without the intense emotional costs present in Case 6. See *supra* text accompanying notes 73–74.

relationships and he felt responsible for taking care of his family financially during the divorce. Even so, the parties felt a lot of distrust toward each other, filed motions, and conducted most of the negotiation in writing. Before reaching an agreement, the parties exchanged three to five offers dealing with varying combinations of the amount and length of maintenance and responsibility for the debts. Presumably the husband would have tried to get (and might have gotten) a more favorable deal if he hadn't been somewhat concerned about the wife.<sup>81</sup>

Case 8 was a contract dispute that was initially framed as a zero-sum dispute about money but was converted into a positive-sum dispute by adding an agreement for the buyer to increase the amount of its purchases. The buyer and seller had a long-term supply contract that provided for an adjustment of the price based on certain contingencies. The seller claimed that it was entitled to a price increase under the contract but the buyer disagreed. The parties and lawyers had a series of phone calls and meetings to resolve the dispute. In the final meeting, where they settled the dispute, both sides exchanged about three offers before reaching an agreement under which the price was increased about half as much as the seller initially demanded and the buyer agreed to increase the amount of its purchases.<sup>82</sup>

This part demonstrates that negotiators may use a PN process of taking positions (and usually exchanging offers) even when they do not act in a hostile manner, use hard-bargaining tactics, define the situation as having a zero-sum, or seek only to maximize their own outcomes. Although antagonistic relationships and hard-bargaining tactics do occur in PN negotiations (as in Cases 1, 2, and 5), some negotiators are quite cooperative when using a PN process (as in Case 3). And while many cases may appear to have zero-sum structures, this is not inherent in the disputes. Instead, it is a function of how the negotiators define the disputes,<sup>83</sup> as illustrated in Cases 4 through 8.<sup>84</sup>

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<sup>81</sup> Interview, SL 04.

<sup>82</sup> Interview, SL 05.

<sup>83</sup> See GIFFORD, *supra* note 3, at 15 ("Whether a bargaining situation is an entirely distributive one or includes integrative possibilities is determined as much by how the negotiator approaches the situation as it is by the inherent nature of the bargaining context.").

<sup>84</sup> For additional examples of lawyers creating value in positional negotiations, see Heumann & Hyman, *supra* note 62, at 280–81, 302.

## B. *Interest-Based Negotiation*

In defining interest-based negotiation (IBN) or an analogous term,<sup>85</sup> the negotiation texts generally refer to efforts to satisfy both parties' interests and create positive-sum outcomes amicably and efficiently, though all the texts do not include all these characteristics. Focusing on the parties' interests, one text states that this approach "involves parties in an effort to jointly meet each others' needs and satisfy [their] interests."<sup>86</sup> As a distinct but closely-related element in some definitions, some texts refer to a process of "creating value" by developing positive-sum agreements. For example, one text states that this approach "take[s] advantage" of situations where parties "structure a deal that will benefit the parties more than merely dividing a single asset" because the parties value aspects of the situation differently.<sup>87</sup> Some texts also refer to managing negotiation efficiently and/or amicably.<sup>88</sup> The texts sum-

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<sup>85</sup> For various terms used to identify this model, see *supra* notes 54–56 and accompanying text. Although none of the texts use the term "interest-based," it is commonly used. A search of the Westlaw "Journals and Law Reviews" database for similar terms found 576 documents referring to interest-based negotiation or bargaining. This Article uses the term "interest-based negotiation" because explicitly identifying parties' interests is a key element of this model, as described in this Part.

<sup>86</sup> FOLBERG & GOLANN, *supra* note 3, at 42. See also CRAVER, *supra* note 3, at 11–12 (in a cooperative/problem-solving style, negotiators seek to get reasonable results and satisfy opponents' interests); GIFFORD, *supra* note 3, at 14–15 ("Instead of dividing a fixed quantity of resources between them, an integrative bargaining context allows the parties to 'problem-solve,' i.e., devise mutually satisfying solutions."); MENKEL-MEADOW ET AL., *supra* note 3, at 117 (integrative negotiation takes "account of the real needs and interests of all parties"); RAU ET AL., *supra* note 3, at 133 ("a problem-solving strategy centers more on the parties' underlying interests [than the parties' positions, offers and counteroffers]"). Professor Charles Craver describes a "competitive/problem-solving" strategy in which lawyers use IBN techniques to advance their clients interests by treating opponents respectfully and maximizing the opponents' satisfaction as long as they get favorable results for their clients. See CRAVER, *supra* note 3, at 15–18; see also WILLIAMS & CRAVER, *supra* note 3, at 59, 64–65.

<sup>87</sup> KOROBKIN, *supra* note 3, at 101. See also CRAVER, *supra* note 3, at 11 (in a cooperative/problem-solving style, negotiators try to maximize joint returns); MNOOKIN ET AL., *supra* note 3, at 174 ("The overarching aim [of problem-solving] is to manage the distributive aspects of bargaining efficiently and create value whenever possible."); NELKEN, *supra* note 3, at 91 (The "basic premise [of an integrative approach] is that a negotiator can often do better by working together with the other parties rather than assuming that the parties' interests are necessarily antagonistic."); RAU ET AL., *supra* note 3, at 133 (The goal of a problem-solving strategy is "to search for trades and creative arrangements that can create value and to deal with distributive issues as amicably and efficiently as possible. This strategy does not *depend* upon there being integrative possibilities to create value, but it certainly is well-suited to such negotiations.") (emphasis in original).

<sup>88</sup> CRAVER, *supra* note 3, at 11–12 (in a cooperative/problem-solving style, negotiators use reason and are courteous, sincere, open, and trusting); MNOOKIN ET AL., *supra* note 3, at 174

marize the techniques suggested in *Getting to Yes*, the modern “bible” of IBN, or list many other techniques with very little overlap between the lists of techniques,<sup>89</sup> suggesting that there is no consensus that any particular techniques are essential to an IBN process. Analyzing the cases in this study demonstrates that it is very hard to identify essential features of IBN, as described below.

In the early stages of data collection, my subjects had not described cases that clearly fit the IBN model. So I interviewed several Collaborative lawyers to get accounts of cases to provide good illustrations of IBN. In addition to the Collaborative cases, six non-Collaborative cases in this study displayed some elements of IBN. These cases dealt with property boundary, landlord-tenant, foreclosure, divorce, business, and trust disputes. In the non-Collaborative cases, the lawyers did not seem to purposely use an IBN approach. Rather, they presumably did what they thought would be most effective in representing their clients. Although all these cases included monetary issues, they also involved significant non-monetary issues requiring some behavioral coordination, which may explain why the lawyers used some IBN procedures. Resolution of these cases was more complex than simply making monetary payments and thus PN or court adjudication presumably would not have been as well suited to crafting careful solutions to the parties’ problems. For example, in the landlord-tenant and foreclosure cases, the parties worked out arrangements for the tenant and borrower, respectively, to stay in the properties for a period of time and work out payment plans, which are better suited to IBN than simply arranging evictions.<sup>90</sup>

Cases 9 and 10 provide good examples of a classic IBN process. Case 9 was a Collaborative divorce in which the wife had serious alcohol problems that she initially denied. Her behavior jeopardized the children’s safety, particularly when she was driving them in her car. Following the norms of Collaborative practice, the lawyers and parties met to negotiate in “four-way meetings.” At the first meeting, the lawyers “set the stage” by describing how the

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(“The overarching aim [of problem-solving] is to manage the distributive aspects of bargaining efficiently . . . .”); RAU ET AL., *supra* note 3, at 133 (The goal a problem-solving strategy is “to search for trades and creative arrangements that can create value and to deal with distributive issues as amicably and efficiently as possible.”).

<sup>89</sup> See CRAVER, *supra* note 3, at 11–12; FOLBERG & GOLANN, *supra* note 3, at 42–43; GIFFORD, *supra* note 3, at 89–97; KOROBKIN, *supra* note 3, at 116–27; MENKEL-MEADOW ET AL., *supra* note 3, at 130–60; MNOOKIN ET AL., *supra* note 3, at 224–48; NELKEN, *supra* note 3, at 97–102; RAU ET AL., *supra* note 3, at 133–47; WILLIAMS & CRAVER, *supra* note 3, at 59–60.

<sup>90</sup> Interviews, KC 07, 08.

process works, eliciting the parties' intentions, setting a "roadmap" for the process, and signing a "participation agreement" committing to the process. The Collaborative process requires full disclosure of relevant information and so the parties and lawyers made arrangements to share financial information. The husband's lawyer said that the husband's "heart was in the right place" about the wife as he wanted her to maintain a good relationship with the children and for the children to be safe. The lawyer said that if they were in litigation, she would have "tried to prove how bad [the wife] was instead of trying to support her."<sup>91</sup>

The husband's lawyer was not privy to conversations between the wife and her lawyer, but she believes that they had extensive conversations to get her to acknowledge her alcohol problems. In four-way meetings, they also talked about the mental health resources she might use and ways to arrange for help that she would find acceptable. A major challenge was to arrange for an alcohol assessment that the wife would not feel was too risky or judgmental. They agreed that the mental health professionals would be in a Collaborative "container," i.e., protected by an agreement that the professionals could not be called to testify in court. With this agreement, the wife participated in a formal alcohol assessment showing that she had alcohol problems. The parties and lawyers jointly considered what treatment would be appropriate and she underwent this treatment as agreed.<sup>92</sup>

The lawyers were concerned about how the children were dealing with their mother's issues and so the parties hired a child specialist. The child specialist met with the children to understand their views and then "[fed] them back" to the mother in a constructive way. The specialist told the mother about the children's problems caused by her drinking and also educated the children about safety.<sup>93</sup>

The mother wanted to spend equal time with the children but her alcohol use made it difficult for them to be with her at first. The parties and lawyers considered various options to deal with the problem. They agreed that the children would initially spend short supervised periods of time with the mother but not "overnights" at her house. They set up a process for visitation supervision, including monitoring and reporting on the visitation. They set conditions for removing supervision and created a "safety net" to reinstate the

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<sup>91</sup> Interview, SL 12.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

supervision if needed. They also arranged for the mother's therapist and the child specialist to talk with each other periodically. The parties resolved all the issues in the divorce and the husband's lawyer (and presumably her counterpart and the parties) believed that the agreements were appropriate.<sup>94</sup>

Case 10 is another illustration of a classic IBN process. It involved a Collaborative divorce in which spousal support was a central issue. The husband had a high-income job and the wife did not earn very much because she was just starting to develop a business. In the initial consultation with the wife, her lawyer asked her what was most important to her. The wife wanted to have enough spousal support to transition back into the work world. She had some credentials in a certain field but had not worked in that field for quite some time. So she needed time to get stabilized in the workplace. She thought that her husband would be willing to provide support if he knew that he did not have to pay it "forever." She also knew that he was concerned about his job stability. He was high in the hierarchy of his company and believed that it is easier to "get knocked off from the top."<sup>95</sup>

The wife's lawyer called the husband's lawyer and set up a four-way meeting where the lawyers described how the Collaborative process works. They asked the parties to say why they chose Collaborative Law and what goals and challenges they anticipated in the process. They listed information that would be needed and decided who would gather it. In a series of meetings, they discussed the issues, which the wife's lawyer compared to "peeling an onion, layer by layer." She said that the assets were easy to divide and they agreed on a fifty-fifty split. They also agreed easily about paying for the children's college costs by using a certain asset.<sup>96</sup>

Spousal support was the most challenging issue. The parties and lawyers discussed what work the wife would do. Would she start in a new direction? Did she need retraining? Did she need a vocational expert? How much would she earn? They also discussed the stability of the husband's company and the prospect of his staying employed. What if he lost a job through no fault of his own? How might it affect support? They had an open discussion of these questions, "looking at the situation from as many angles as they could come up with."<sup>97</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> Interview, SL 10.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

The wife also discussed the situation with her lawyer privately. The wife knew that the husband was “terrified of being pinned down” and suggested the idea of setting support as a percentage of the husband’s income. She and her lawyer discussed all the pitfalls of such an approach, such as the risks of her husband losing his job. The wife said that her husband is a good employee who is a “workaholic” and “rises to the top.” She thought that the only way that he would lose his job would be a downturn in the company. If the “bottom did fall out,” she said that there would be enough assets so that she would be okay. The parties ultimately decided that the husband would pay a percentage of his income, including bonuses, for a period of five to ten years. They also made an arrangement to take care of the wife financially if the husband became disabled. As a result of this negotiation, the provision in the divorce agreement regarding support was unusually detailed. The wife’s lawyer said that the lawyers always focused on the parties’ needs and goals, which “made such a difference” in helping them deal with their fears during the process.<sup>98</sup>

In Cases 9 and 10, the parties discussed their goals, arranged for an exchange of information, considered a range of options for deciding difficult issues, and reached agreements that satisfied their interests. Although the wife in Case 9 probably struggled through the process and would have preferred to avoid some of the interim agreements for supervised visitation of her children, she probably also came to appreciate that these agreements ultimately did satisfy her interest in maintaining healthy relationships with her children. The parties in both cases created value as compared with a traditional divorce process. In Case 9, the process strengthened the parties’ relationships instead of engaging in an adversarial conflict that presumably would have damaged the relationships. The wife traded her denial of alcoholic problems for an improved relationship with her children. The husband traded the instability of dealing with his wife for greater confidence in her parenting. The combined value for the parties was obviously much greater than if they had engaged in litigation, fighting over the wife’s access to the children. In Case 10, the parties traded the certainty of a definite amount of maintenance for having an agreement that provided what they felt was a fair sharing of risks and benefits, which the parties valued more.

Case 11 illustrates a non-Collaborative case using an IBN process. It involved a dispute between two adjacent property owners

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<sup>98</sup> *Id.*

about alleged acquisition of property by adverse possession. After the defendant's lawyer did a basic investigation into the facts and the law, he determined the likely outcome at trial. He said that his goal in every negotiation is to reach an agreement that both sides can live with even though they "may not love or even particularly like it," which is better than expensive litigation. He talked with his client, explaining possible ways to resolve the dispute to see what would be acceptable.<sup>99</sup>

Then he called the plaintiff's lawyer and arranged to meet with him. He explained why he thought that plaintiff's counsel had an erroneous understanding about the law and unrealistic expectations about the outcome if they went to trial. They talked about their clients' general goals and that it was in both their interests to settle the matter rather than incur more litigation costs. They talked about the clients' expectations, how things might go in the negotiation, and what the clients might accept. The defense counsel explained that his client had to have legal title to the property. Although the plaintiff originally indicated that he needed legal title, it turned out that the plaintiff's top priority was having access to the property and his interests could be accommodated without getting legal title. The parties also had important interests in defining the boundaries; resolving issues about curbs, a decorative wall, a driveway, and landscaping; and settling on a reasonable amount of damages. Both lawyers worked hard to convince their clients that pursuing litigation was not in their best interest. The lawyers reached a general understanding in principle, which was not based on an exchange of offers. After the parties approved the agreement in principle, they exchanged offers by refining each other's offers. This led to an agreement about the amount of money that the defendant would pay, what would be done about various aspects of the property, and who would carry out certain tasks.<sup>100</sup>

In this case, the negotiation process generally fit the characteristics of an IBN even though the lawyers presumably were not self-consciously using the process as Collaborative lawyers do. Here, the lawyers explicitly discussed their clients' overlapping and conflicting interests, developed an agreement in principle that addressed these interests, and then worked out the details through an exchange of counter-offers to refine the final agreement. Presuma-

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<sup>99</sup> Interview, BC 03.

<sup>100</sup> *Id.*

bly, the agreement satisfied the parties' interests more than the options they considered but did not agree to.<sup>101</sup>

Prosecutors interviewed in this study who handle cases in drug court and mental health courts—sometimes called “problem-solving courts”<sup>102</sup>—said that they often use an IBN process in those cases.<sup>103</sup> A prosecutor who handles drug court cases said that she and the defense counsel often have in-depth discussions reflecting their shared interest in helping the defendants and keeping them out of the criminal justice system.<sup>104</sup> Another prosecutor said that in mental health court, she meets with the defendants along with a team of professionals and later with the judge. The goal in these cases is to improve people's lives so that they can “graduate” and avoid future offenses rather than to put them in jail. In these negotiations, they discuss how the defendants are doing, whether they are complying with treatment regimes, and whether they need sanctions. If there are problems (such as an arrest, positive drug test, or non-compliance with court orders), they discuss what is the best thing to do for the defendants.<sup>105</sup>

Although the negotiations in Cases 9 through 11 and in the problem-solving courts fit the general IBN model, it was hard to categorize some of the other cases. To some extent, what is considered essential to be an IBN case may be a matter of one's theoretical preference. In my view, the only essential feature of this type of negotiation is a significant effort to satisfy explicitly-identified interests of both parties. Thus this Article uses the term “interest-based negotiation.”<sup>106</sup>

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<sup>101</sup> Although a process centered on the exchange of offers generally does not fit in an IBN model, exchanging offers is not necessarily inconsistent with it. According to *Getting to Yes*, exchanging offers is not inconsistent with an IBN process if it follows identification of interests, generation of options for mutual gain, and discussion of fairness. FISHER & URY, *supra* note 15, at 153.

<sup>102</sup> For a general description of problem-solving courts, see Paul Holland, *Lawyering and Learning in Problem-Solving Courts*, 34 WASH. U. J.L. & POL'Y 185 (2010).

<sup>103</sup> These lawyers described these cases generally but did not provide detailed accounts like the cases in this study.

<sup>104</sup> Interview, BC 08.

<sup>105</sup> Interview, BC 09.

<sup>106</sup> Explicitly focusing on the parties' interests generally is related to an effort to create value by taking advantage of differences in the parties' interests about the issues. As a practical matter, however, it is easier to observe whether negotiators explicitly discuss their interests than whether their negotiations create value. Creating value depends on negotiators' relative assessments of various options, which are subjective, are not necessarily consciously considered and often are not candidly disclosed. For example, a criminal defense lawyer said that he sometimes reaches agreements with prosecutors without much discussion because they know each others' interests in the case. See Interview, SL 07. Even if both negotiators in such cases accurately

Although IBN processes can be efficient and amicable, this is not necessarily the case and these are not essential characteristics of this type of negotiation. For example, the parties in Cases 9 and 10 apparently spent substantial resources and they presumably would have spent a lot more time and money if the parties did not settle after extensive negotiations. Although the lawyers in Cases 9 and 11 worked together cooperatively, the parties in those cases did not experience the negotiations as completely amicable. Thus, while many academics and practitioners in everyday conversation think of IBN as being a friendly process (and often assume that a PN process is unfriendly), this does not seem to be a necessary or distinguishing feature of IBN.

Some cases in this study display some but not all of the theoretical elements of IBN. Consider Case 7, described above.<sup>107</sup> In that case, a husband in a divorce was concerned about the welfare of his wife and children and not merely maximizing his own financial situation. The lawyers discussed the parties' interests, which presumably helped them negotiate. Although the lawyers started on a "good footing" with each other, the parties were very anxious about the financial arrangements and filed motions for temporary court orders to govern the situation while the case was pending. Both lawyers tried to focus their clients on negotiation, and they reached an agreement on temporary issues without a hearing. Before reaching an agreement, the parties exchanged three to five offers dealing with varying combinations of the amount and length of maintenance and responsibility for the debts.<sup>108</sup>

Is this an example of an IBN process? On one hand, the lawyers discussed the parties' interests and the husband was concerned about the wife's welfare to some extent. On the other hand, the parties apparently had a tense relationship during the process and reached agreement only after a considerable exchange of offers. What would make the process clearly positional or interest-based? Would it matter if satisfying both parties' interests was the primary consideration in the negotiation? What difference does it make that the lawyers apparently were focused on satisfying both parties' interests but the parties themselves may have had much less concern for each other? Would it make a difference if only one party was concerned about the other's interest? Is a critical factor what

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assess the options and choose one that satisfies the interests of both sides, this does not fit the common conceptions of an IBN approach.

<sup>107</sup> See *supra* note 80 and accompanying text.

<sup>108</sup> *Id.*

the negotiators thought or said when they exchanged offers? For example, would it matter if the negotiators crafted their offers to maximize their side's gain (hoping that their offers would be the bare minimum needed to get the other side to accept) or to accommodate the other side's real interests?<sup>109</sup> Although it might be easy to distinguish these two motivations in some negotiations, in many cases, it would be hard to separate them. Does it matter how much of the negotiation involved an exchange of offers? For example, in Case 11, it appears that the exchange of offers may have been a relatively small part of the negotiation, working out details of an agreement in principle. In Case 7, perhaps the parties gave lip service to addressing each others' interests but most of the process involved exchanges of partisan offers. Would it have made a difference if the negotiators considered a range of options instead of exchanging offers? Would it have made a difference if the agreement "created value" for the parties?

In Case 5, involving a labor grievance, apparently there was little or no direct discussion of the parties' interests between the opposing parties although the agreement was obviously tailored to satisfy the interests of the negotiators.<sup>110</sup> Should this be considered as an IBN case? The relationships between the opposing sides were extremely adversarial as the lawyers "[fought] over everything." At the beginning of the final negotiation, the company lawyer said that the union initially "dug in its heels" and took a hard position. After a difficult negotiation involving an exchange of three to five offers by each side, the parties reached an agreement that was tailored to the interests of the employee, union, and company.<sup>111</sup> Again, it is hard to determine whether this was an IBN case or, if not, what changes in the process would make it fit into the IBN model. Although there was apparently little direct discussion of the negotiators' interests, the negotiators presumably developed theories about the other side's interests, which probably were pretty accurate. Would it have made a difference if there was an explicit discussion of the parties' interests? Would it be enough if the negotiators had a certain level of concern for the other side's interests in crafting offers even if they did not discuss the interests explicitly? Would it have made a difference if the negotiators considered a range of options, such as in a brainstorming process?

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<sup>109</sup> This approach would be an example of what Professor Charles Craver calls a "competitive / problem-solving style." See *supra* note 86.

<sup>110</sup> See *supra* notes 77–78 and accompanying text.

<sup>111</sup> *Id.*

Would it make a difference if the tone of the negotiation was more friendly?

These questions illustrate a fundamental conceptual confusion about the meaning of IBN, a cornerstone of contemporary negotiation theory. This is reflected in loose talk by some academics and practitioners who seem to consider a process as IBN if the negotiators are friendly or make even cursory reference to parties' interests.<sup>112</sup> Professors Milton Heumann and Jonathan Hyman observed similar confusion in their study of New Jersey lawyers. Although lawyers in that study reported that, on average, they used IBN in up to 33% of their civil cases, the researchers "seldom" heard "stories about the interests of the parties" when observing actual settlement negotiations.<sup>113</sup> Moreover, in interviews about the cases, the lawyers described "little about the underlying real-world interests of their clients and the opposing parties."<sup>114</sup> The researchers found that "[e]ven the word 'need' was turned to positional, not problem-solving, use," typically referring to "what dollar amount would be sufficient to settle the case."<sup>115</sup>

Part of the confusion about IBN may be due to the lack of a concept for a generally-recognized alternative to an IBN or PN process. The following part describes what I have called "ordinary legal negotiation," which may provide a better fit for some cases that people might consider as IBN.

### C. Ordinary Legal Negotiation

An initial purpose of this study was to find real-life examples of a negotiation model I theorized as "ordinary legal negotiation" (OLN).<sup>116</sup> In this model, lawyers try to reach a reasonable agreement based on shared norms, which typically are the expected out-

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<sup>112</sup> Some people probably consider, without much reflection, that "soft positional negotiation"—a friendly version of PN—is interest-based negotiation. See *supra* note 52 and accompanying text for description of this approach.

<sup>113</sup> Heumann & Hyman, *supra* note 63, at 255, 306. The average response of lawyers was that they used problem-solving negotiation (a term used synonymously with IBN) entirely or almost entirely in 16% of cases, and a combination of PN and IBN methods was used in 17% of cases. *Id.* at 255.

<sup>114</sup> *Id.* at 306.

<sup>115</sup> *Id.*

<sup>116</sup> Lande, *supra* note 16, at 112–21; John Lande, *Lessons from Teaching Students to Negotiate Like a Lawyer*, 15 CARDOZO J. CONFLICT RESOL. 1, 9–10 (2013). The term "ordinary" follows Kritzer's term "ordinary litigation," referring to relatively routine, "everyday" cases. See KRITZER, *supra* note 17, at 5–13. Lawyers probably use OLN quite commonly, though this study

comes in court or normal agreements in similar cases.<sup>117</sup> The process resembles everyday conversation more than it does a dialogue focusing on an exchange of offers or an analysis of how to satisfy the parties' interests, as in the PN and IBN models.<sup>118</sup> This model is based on the empirical research of Herbert Kritzer and Lynn Mather and her colleagues:

Social scientist Herbert Kritzer studied ordinary civil litigation and found a very common pattern where "the discussions concerning damages may be less a series of offers and counteroffers and more a process of exchange of information intended to place the instant cases in the context of presumed going rates." Consistent with Kritzer's description of this approach, Professor Lynn Mather and her colleagues' research found that many divorce lawyers in Maine and New Hampshire followed a "norm of reasonableness" in negotiation. Under this norm, lawyers realistically analyze the typical legal outcomes in their cases and advise clients to accept "settlement close to the typical result." Thus lawyers said that they do not start with "extreme" or "ridiculous" positions that are "inconsistent with what 'everyone knows' about divorce."<sup>119</sup>

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cannot compare the frequency of its use with other models. The term is not intended to suggest any normative implication that OLN is normal or preferable to other models.

<sup>117</sup> Lande, *supra* note 16, at 118–20; Lande, *supra* note 115, at 9–10. There are analogs to OLN in dispute resolution theory. Fisher and Ury recommend using objective criteria as a possible element of their concept of principled negotiation, a form of interest-based negotiation. See FISHER & URY, *supra* note 15, at 81–94. They identify numerous forms of objective criteria, including court outcomes along with market values, professional standards, and tradition, among others. *Id.* at 85. Similarly, Professor Donald Gifford describes a cooperative negotiation strategy as usually relying on norms or objective standards. GIFFORD, *supra* note 3, at 16. Professor Ellen Waldman distinguishes between what she calls "norm-educating" and "norm-generating" mediation models. In a "norm-educating" mediation, mediators provide information about relevant legal or other norms to help parties make decisions, in contrast to "norm-generating" mediations, where the mediators and parties refer to the parties' interests or other factors that they consider relevant. See Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 718, 730–32 (1997).

<sup>118</sup> In Kritzer's study of negotiation in ordinary litigation, only 15% of lawyers reported exchanging three or more offers, in contrast with the image of PN, where lawyers start with extreme offers and exchange multiple offers before reaching agreement. See KRITZER, *supra* note 18, at 37.

<sup>119</sup> Lande, *supra* note 115, at 9 (citing KRITZER, *supra* note 18, at 121; LYNN MATHER ET AL., *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 48–56, 127–28 (2001) (footnotes omitted)). See also GENN, *supra* note 36, at 164–65 (describing "reasonable" or "cooperative" negotiation approach in personal injury cases where both lawyers "know what the claim is worth" and try to reach a "realistic" settlement); LYNN M. MATHER, *PLEA BARGAINING OR TRIAL?* 139–42 (1979) (finding that criminal defense attorneys and prosecutors classified cases based on the strength of the prosecutors' case (being "dead bang" or having "reasonable doubt") and the seriousness of the case (being either "light" or "serious") and negotiated accordingly); PAMELA J. UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL*

In an OLN process, the lawyers would advocate their respective clients' interests by trying to get a deal that is at least as favorable to them as the typical settlement or likely court result and is acceptable to both sides. The norms generally used in OLN—such as the “going rates” and “typical results” described by Kritzer and Mather—are different from the parties' interests.<sup>120</sup> For example, in Case 10, a divorcing couple's agreement to calculate spousal support as a percentage of the husband's income was based on how they could satisfy both spouses' interests in financial security, not expectations about what a court would decide if they tried the case.<sup>121</sup> Moreover, OLN is distinct from “soft positional” negotiation, as in Case 3, where the negotiators had a cooperative relationship but exchanged a series of offers to close the gap between their sharply different initial positions rather than focusing on a shared assessment of the case.<sup>122</sup>

[Thus, OLN] contrasts with IBN, which focuses primarily on what the parties actually need, rather than making adjustments to the relevant norms. Indeed, in both IBN and PN, the negotiators focus on the parties' *interests* although these two models differ about whether the negotiators seek to satisfy *both parties' interests* (i.e., IBN) or only *each party's own partisan interests* (i.e., PN). In IBN, negotiators discuss the parties' interests and options for satisfying the interests whereas PN negotiators exchange a series of offers where each side tries to pressure the other side to accept an agreement maximizing its own interests. If negotiators are primarily oriented to making decisions by reference to applicable norms, then making adjustments to the norms based on some exchange of offers and/or reference to

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COURT 106–08 (1978) (finding that prosecutors and defense counsel in Alameda County, California, jointly try to “settle the facts” to reach fair agreements based on generally-accepted “case-worth norms” considering the likely result at trial as well as other factors such as “the offender's age, record, character, motivations, and likelihood of recidivism”); James B. Atleson, *The Legal Community and the Transformation of Disputes: The Settlement of Injunction Actions*, 23 LAW & SOC'Y REV. 41, 61–63 (1989) (finding that, in cases involving injunctions against picketing, labor and management lawyers in Buffalo, New York, generally followed norms against seeking “too much” in court and unreasonably refusing to settle); Nancy Schultz, *Law and Negotiation: Necessary Partners or Strange Bedfellows?*, 15 CARDOZO J. CONFLICT RESOL. 105, 126 (2013) (survey finding that 41.3% of lawyers said that the law plays a “primary role in determining the outcomes of [their] negotiations”).

<sup>120</sup> For further discussion of norms used in OLN, see *infra* notes 138–41 and accompanying text.

<sup>121</sup> See *supra* notes 94–97 and accompanying text.

<sup>122</sup> See *supra* notes 73–74 and accompanying text.

parties’ interests does not make the process PN or IBN, nor is OLN simply a combination of these two familiar models.<sup>123</sup>

Table 1 summarizes the theoretical distinctions between the three models.

**Table 1. Goals, Assumptions, Process, and Use of Legal Norms in Positional, Ordinary Legal, and Interest-Based Negotiation by Lawyers**<sup>124</sup>

|                           | <b>Positional Negotiation</b>  | <b>Ordinary Legal Negotiation</b>   | <b>Interest-Based Negotiation</b>  |
|---------------------------|--|---|--|
| <b>Lawyers’ Goals</b>     | maximum partisan advantage for their clients   | good result for their clients   | good result for both parties   |
| <b>Key Assumptions</b>    | negotiation is zero-sum and clients must take tough positions to achieve their goals and avoid being disadvantaged   | most cases can be settled based on legal norms, which can produce good results and help preserve lawyers’ and parties’ relationships        | lawyers can achieve optimal, positive-sum results by jointly analyzing clients’ interests and a range of options   |
| <b>Process</b>            | lawyers exchange offers, starting with extreme positions, and make small and slow concessions  | lawyers exchange information to figure out an appropriate result given the norms in their legal practice community                          | lawyers and parties explicitly identify parties’ interests and numerous options to select the option best satisfying the parties’ interests  |
| <b>Use of Legal Norms</b> | lawyers use legal norms in tactical arguments to achieve the most favorable partisan result, ideally far exceeding legal norms rather than accepting legal norms as their goal | lawyers use legal norms as the initial and principal standard in negotiation, which may be adjusted due to parties’ needs and other factors | lawyers use legal norms to calculate their “best alternative to a negotiated agreement” to serve as an outer limit on acceptable agreements (adjusted by factors such as transaction costs, risk preferences, and concerns about privacy, reputation, and relationships) |

<sup>123</sup> Lande, *supra* note 115, at 10 (emphasis in original). When lawyers use norms in OLN cases, they try to persuade each other how the legal norms should be applied in their case. This contrasts with a PN process, where lawyers use legal arguments to gain advantage by undermining their counterparts’ confidence in the favorability of the likely court outcome.

<sup>124</sup> Lande, *supra* note 16, at 120.

In this study, eleven cases involved an OLN approach to a significant degree in resolving the ultimate issues. In some of these cases, it appeared that negotiators predominately used OLN and in other cases, negotiators used a combination of approaches. In all six of the criminal cases in this study, the lawyers used OLN; two of these cases appeared to involve other approaches in addition to OLN. Three divorce cases included OLN, all in combination with other approaches. The other two cases involved landlord-tenant and foreclosure disputes, which also involved other approaches.

Case 12, in which the defendant was arrested for attempting to sell marijuana, is an illustration of an OLN process. The defendant was on probation at the time and his probation was revoked due to his arrest, so he was in prison while this case was pending. The prosecutor followed her normal procedure by analyzing case to make a “baseline decision what the case is worth.” Her goals were to have the defendant take responsibility for his actions and arrange for an appropriate disposition. In analyzing this case, she considered the facts, whether the evidence was strong enough to prove guilt beyond a reasonable doubt, the defendant’s criminal history, whether he was an addict, the level of charges, and the fact that he was in prison. This case involved a confidential informant and the prosecutor was reluctant to “burn” the informant by disclosing his identity, which would have been necessary if they went to trial.<sup>125</sup>

The prosecutor routinely includes a plea offer along with the discovery she sends to defense counsel. She said that she has been handling cases like this long enough to know what the judges are likely to do and she often makes offers for less than what she thinks the judge would sentence. In this case, she thought that if the defendant would have been convicted at trial, he would have gotten a sentence of ten to twelve years in prison. She knew that he was going to prison anyway because of the parole violation and she recommended a three-year sentence to be served concurrently with a sentence for his probation violation. The public defender responded that the defendant did not want to accept the plea offer. She assumed that the defense counsel probably told him that if he was convicted at trial, he had a big risk of sentence enhancement because he had two prior drug convictions. On the morning of trial, the defense counsel called to say that the defendant would

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<sup>125</sup> Interview, BC 08.

accept the prosecutor's original plea offer without making a counter-offer, which she said was not unusual.<sup>126</sup>

This case involved two experienced lawyers who had a good relationship with each other and a good understanding of what to expect if the case went to trial. Although the defendant apparently was motivated to maximize his result (by minimizing his sentence), the prosecutor focused on well-accepted norms, including but not limited to the likely court decision. Although the defense counsel presumably wanted to get the best possible deal for his client, he probably also considered local norms for cases like this. Some people might not consider this case as one that would involve negotiation because the defendant did not make a counter-offer, though it obviously resulted in an agreement about the ultimate issues in the case.<sup>127</sup>

Case 13 involved an OLN process with a lot more effort devoted to negotiation than Case 12. In this case, a sixteen year-old defendant who, along with two co-defendants, was charged with armed robbery for committing three robberies in two days. The evidence against the defendants was overwhelming as they were found with the clothing, masks, guns, and money from the robberies and there was compelling video and audiotape evidence. The defense counsel had a good relationship with the prosecutor and, soon after he took the case, he called her to let her know that he was representing the defendant. Within ten days of taking the case, he started to negotiate and he continued to try to negotiate throughout the case. He thought that he and the prosecutor both were trying to achieve a fair result, though they presumably had different perspectives about what was fair in this case. He assumed that she would describe her goals as protecting society from dangerous individuals and deterring potential robbers. Presumably, the defense counsel wanted to minimize his client's sentence and believed that would be fair.<sup>128</sup>

The case was challenging because a co-defendant had already entered a guilty plea and accepted a fifteen-year sentence. That deal became the standard for the prosecutor as she would have to justify in her own mind why she should give a better deal to the defendant in this case when the facts seemed to be the same. She initially made the same offer of a fifteen-year sentence to this defendant, but he let the offer expire. The defense counsel tried to

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<sup>126</sup> *Id.*

<sup>127</sup> For discussion of the definition of negotiation, *see supra* Part III.

<sup>128</sup> Interview, BC 10.

think of distinctions that would persuade the prosecutor to accept a shorter sentence. For example, he noted that his client was a year younger than the defendant who pled guilty. Only one of the defendants held the gun, but since they were masked, it was hard to tell who had the gun. The lawyer tried to undermine the prosecutor's confidence that his client was the gunman by asking for DNA and fingerprint testing. He also arranged for his client to give evidence to the prosecutor about another crime. Although the prosecutor already knew the information that the defendant provided, meeting with him showed that he was a "charming young man" trying to help the authorities, distinguishing him from the other two defendants.<sup>129</sup>

The defense counsel engaged in some "brinksmanship," letting the case proceed until the eve of trial. In the final negotiation, he cited other cases with outcomes more in line with the ten-year sentence he asked for. The prosecutor offered eleven years, which was only slightly more than the minimum ten-year sentence but was significantly less than the fifteen years that the other defendant agreed to and much less than his client might have gotten if he was convicted at trial and got consecutive sentences for each robbery. The defense counsel thought that his good relationship with the prosecutor influenced her decision to meet with the defendant and contributed to her decision on the deal she finally offered. The defendant accepted the prosecutor's offer of the eleven-year sentence.<sup>130</sup>

In Cases 12 and 13, the lawyers had a lot of experience and good relationships with their counterparts. They knew the norms for their cases and their perspectives were framed around those norms. In Case 13, unlike in Case 12, the lawyers had extensive communications throughout the case and much of the interaction was directly related to negotiation. In the final negotiation, there was only one offer and one counter-offer, which was accepted.

Case 14 illustrates a case in which the parties used OLN based on norms in setting child support. This divorce case involved a husband who recently lost a professional-level job and a wife who had mostly worked at home taking care of their children but had recently started working part-time cleaning houses. Although the wife wanted the divorce, she still valued her relationship with her husband and his role as the father of her children, and she did not want to hurt him. The husband wanted to maintain a good rela-

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

tionship with his wife and he also wanted to minimize his financial cost.<sup>131</sup>

The wife's lawyer said that he had worked with the husband's lawyer many times and they had a good relationship of mutual respect. He said that the husband's lawyer is fair, easy to work with, and responsive. They do not "play hide the ball" or put on "dog and pony shows" for their clients. They advocate their clients' interests and also look for solutions that both sides would consider to be reasonable.<sup>132</sup>

The parties readily reached an agreement on the parenting issues but were "worlds apart" on the financial issues. The husband's loss of his job "threw a wrench" into the negotiation about child support. The husband had applied for many jobs, some of which he was overqualified for. He was offered several jobs but turned them down because they did not pay enough or were too speculative. He had been making about \$65,000 in his prior job and received a \$38,000 offer, which apparently was the highest offer he had gotten by the time they resolved the case.<sup>133</sup>

After the lawyers exchanged thorough responses to each other's discovery requests, the wife's lawyer sent a settlement proposal to the other side but they were still far apart. They decided to have a settlement conference with the lawyers and the parties. The lawyers agreed that "there was only so much money to go around" and the case was not going to trial, so they needed to resolve the issues through negotiation. Several days before this meeting, the wife's lawyer met with her to discuss what she would or would not accept. The wife agreed to drop a claim for maintenance in exchange for receiving certain assets, so they expected that the only difficult issue would be child support.<sup>134</sup>

At the meeting, the parties considered whether one would buy the other out of the house and, after some discussion, the couple decided to sell the house. They worked out arrangements for repairs needed to make it marketable. In the negotiation of child support, the wife's calculations imputed the husband's income as \$65,000 and the husband's calculations assumed his income to be \$40,000. They ended up with an agreement that was close to splitting the difference between the two figures. The discussion was

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<sup>131</sup> Interview, KC 04.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

generally very civil and there were only a few moments where people were frustrated.<sup>135</sup>

Negotiators in Case 14 used different negotiation approaches for different issues. Initially, the parties used a PN approach in dealing with financial issues when they exchanged offers that were far apart. The negotiation about the house was an IBN approach, where they considered several options and agreed on one that worked best for both of them. The agreement on parenting issues was the result of an OLN process, with little or no dispute.<sup>136</sup> The negotiators also used an OLN process to deal with child support, which did involve a dispute. They relied on legal norms based on legal child support tables and rules about imputing income. They also followed a time-honored legal norm of “splitting the difference” to reach an agreement. Although there was some tension, especially early in the case, the parties and lawyers generally acted respectfully and negotiated using normal conversation.

In the preceding OLN cases, the lawyers relied on their own understandings about legal norms. In several cases in this study, lawyers used the norms provided in judicial settlement conferences where judges identified likely court outcomes, which prompted the lawyers to focus the negotiations around the judges’ predictions or recommendations. For example, in Case 4, the judge in a bitter divorce case indicated in a settlement conference that a father should get counseling and he agreed as a result of the judge’s recommendation.<sup>137</sup> In a case involving a dispute over whether royalty income from the husband’s work would be considered marital property, a settlement conference judge gave his recommendation and then, with relatively little discussion, the parties agreed to a figure close to the recommendation.<sup>138</sup>

In all the OLN cases in this study (or portions of cases where negotiators used an OLN approach), the negotiations focused on norms as the central standard for negotiation. In virtually all of these cases, the norms were legal norms based on expectations about the likely result if the cases had been tried.<sup>139</sup> In some cases,

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<sup>135</sup> *Id.*

<sup>136</sup> Although the spouses apparently reached the agreement about parenting issues on their own, the lawyers presumably needed to agree and would have raised objections if they saw problems.

<sup>137</sup> See *supra* note 75 and accompanying text.

<sup>138</sup> Interview, BC 02.

<sup>139</sup> Although counterpart lawyers regularly profess differing expectations about the likely court outcomes, some counterparts explicitly agree. For example, in Heumann and Hyman’s study, in 21 of 131 cases described by the lawyer-interviewees, the counterparts had a similar

the norms in the OLN portion of the negotiation were based on typical business practices.<sup>140</sup> For example, in Case 8, which involved a dispute over the pricing provision of a long-term sales contract, negotiators referred to the typical prices in the applicable market.<sup>141</sup> In several criminal cases, the lawyers also considered various factors that were considered relevant in the local legal culture such as the defendants' ages, life circumstances, attitude, and degree of cooperation. The lawyers' goals were to reach what they considered to be a reasonable result under the circumstances and given the applicable norms.<sup>142</sup> The OLN parts of the negotiation involved everyday conversation rather than exchanges of offers or analysis of interests.

Lawyers are more likely to use an OLN approach to resolve the ultimate issues in a case when (1) the lawyers know each other, (2) they believe that their counterparts are experienced and competent, (3) they want to maintain reputations for reasonableness, (4) there is a relatively clear body of applicable legal or other norms, (5) the facts of a case can be readily likened to arguably comparable cases, (6) there is not enough at stake to justify an all-out adversarial battle, and (7) using an OLN process is considered a legitimate negotiation method in the particular legal culture. Of course, not all of these conditions would be necessary for lawyers to use an OLN approach.<sup>143</sup>

In addition to cases where lawyers used an OLN approach to resolve some or all of the ultimate issues, in *virtually every case*, the lawyers used an OLN approach to reach agreement on the countless things they needed to coordinate. To start, consider the seemingly trivial matter of returning phone calls or emails. Whether one's counterparts do so makes a big difference to lawyers in the study, who really appreciate it when their counterparts do so and

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view of the likely outcome. See Heumann & Hyman, *supra* note 63, at 289. Presumably, in a substantial additional proportion of cases, the difference in the counterparts' assessments was fairly small and easily negotiable.

<sup>140</sup> Negotiators may use non-legal norms such as "typical rates or provisions in particular types of agreements, such as sales, leases, or licensing agreements in specified markets." Lande, *supra* note 115, at 9 n.32.

<sup>141</sup> See *supra* note 81 and accompanying text.

<sup>142</sup> See *supra* notes 124–29 (Cases 12 and 13) and accompanying text.

<sup>143</sup> For example, Case 13 involved a high-stakes case with a minimum ten-year sentence, but the lawyers presumably chose to use this approach because the other factors in the list were present. See *supra* notes 127–29 and accompanying text. Even when lawyers have not worked with each other prior to a given case, many act cooperatively and are likely to use an OLN approach when other factors are present.

resent it when they do not.<sup>144</sup> Lawyers also routinely coordinate their actions in exchanging information, both through informal exchanges as well as arrangements for formal discovery procedures. Similarly, lawyers coordinate in giving time extensions, exchanging papers, scheduling depositions, making arrangements related to legal motions, engaging in required consultations, and jointly preparing documents required by court rules. Although many lawyers routinely follow norms in their practice communities without much thought, some do so more consciously than others. For example, one lawyer said that he “hates formal discovery” and usually exchanges information informally if possible. He often talks with his counterpart about the timing of court appearances and if he thinks that his client needs a cathartic event, he might say, “I think my client needs to be heard on this issue” in court or mediation.<sup>145</sup>

This study demonstrates that lawyers use an OLN approach with some regularity to resolve the ultimate issues in a case as well as numerous other issues along the way. Though one can identify some cases that clearly fit the theoretical description of OLN, it is a complex concept like PN and IBN and readers of early drafts have struggled to determine whether processes in particular cases fit in an OLN model or not.

## V. FRAMEWORK FOR ANALYZING NEGOTIATION

### A. *General Characteristics of the Framework*

Although some cases in this study fit neatly into the two major models in current legal negotiation theory, Part IV demonstrates that many do not fit very well because the various definitions of PN and IBN models include numerous elements that are not present in some real-life cases.<sup>146</sup> Current theory involves only two basic models<sup>147</sup> consisting of correlated bundles of elements, so people are confused when negotiations do not clearly fit into one of the traditional models. Theorists have dealt with this problem by say-

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<sup>144</sup> See *supra* notes 44–45 and accompanying text.

<sup>145</sup> Interview, BC 02.

<sup>146</sup> Professor Andrea Kupfer Schneider makes related critiques of the traditional system of negotiation models, which she refers to as “labels.” See Andrea Kupfer Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH. U. J.L. & POL’Y 13, 19–24 (2012).

<sup>147</sup> Although OLN is a distinct model, it is new and not recognized in current theory. See *supra* Part IV.C.

ing that some cases involve a combination of the models.<sup>148</sup> In my view, it would be more helpful to provide a more flexible framework that better reflects people’s experiences about how negotiations actually vary.

The following is such a framework, which is inspired by Professor Leonard Riskin’s revised grid system for analyzing mediation processes.<sup>149</sup> An early formulation of this framework consisted of a series of two-by-two tables like Riskin’s “new new” grids illustrating the relationship between different pairs of variables.<sup>150</sup> Using multiple grids is cumbersome and makes it hard to relate numerous variables to each other. So this framework combines all variables into a single table, in Table 2.

**Table 2. Framework for Analyzing Negotiation**

| <b>Continua of Negotiation Process Characteristics</b> |                                |  |
|--|--------------------------------|--|
| No concern for other party’s interests                 |                                | Great concern for other party’s interests    |
| Exclusive use of exchange of demands and offers        | includes everyday conversation | Exclusive use of interest-and-option process |
| Creation of no value                                   |                                | Creation of maximum possible value           |
| Hostile tone   |                                | Friendly tone                                |
| Extreme use of power                                   |                                | No use of power                              |
| Exclusive focus on extrinsic norms                     |                                | Exclusive focus on intrinsic norms           |

<sup>148</sup> Several texts refer to a “soft positional” model (using various labels) which is a combination of the two traditional models. See *supra* note 52. Some texts describe other combinations. See FOLBERG & GOLANN, *supra* note 3, at 34 (“cooperative and competitive approaches may be mixed or sequenced” and “adversarial” and “problem-solving” styles are “more intense” versions of these approaches); MNOOKIN ET AL., *supra* note 3, at 224–48 (recommendations for negotiating at both a “net-expected-outcome table,” similar to PN and OLN, and an “interest-based table”); NELKEN, *supra* note 3, at 159 (describing “tensions” between the two models and negotiators may use both models at different times in a negotiation).

<sup>149</sup> See Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 34–51 (2003).

<sup>150</sup> *Id.* at 38–46.

Table 2 displays the basic variables in the PN and IBN models. The values in the left end of the continua reflect the *traditional PN theory* and the values in the right end of the continua reflect the *traditional IBN theory*.<sup>151</sup> The framework can be used to analyze cases fitting patterns other than the two traditional models such as the various soft positional negotiation models,<sup>152</sup> which would rely primarily on an exchange of offers and the negotiators would display friendly tone. In general, an OLN model would be in the center of each row, though in a classic OLN process, negotiators would be on the friendly end of the tone dimension and the extrinsic end of the source-of-norms dimension.<sup>153</sup>

The most significant aspect of this framework is that it disaggregates variables that theorists have aggregated into distinct models. As the analysis in Part IV demonstrates, real-life negotiations often do not fit into the traditional theoretical models very well. As a result, people have been stuck trying to fit the “square pegs” of their negotiation experiences into the “round holes” of the theoretical models.<sup>154</sup> Separating the variables should help people fit their experiences into meaningful theoretical categories. Conversely, because of the confusion about what really are necessary elements of the existing theoretical models, negotiators who want to use these models may have a hard time doing so.

A related feature of this framework is that the variables generally are continuous, not dichotomous variables.<sup>155</sup> For example, current negotiation models often refer to whether the negotiators seek to advance only their own interests or also to advance the interests of the other party. In real life, this is not an either-or decision. Rather, such motivations may vary widely and most negotiations probably are somewhere in the middle of the various

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<sup>151</sup> Several readers of an earlier draft of this Article thought that it suggested that all cases in the two traditional models necessarily reflect extreme values for each of the variables in Table 2. A major purpose of this Article is to highlight the fact that some PN and IBN cases do *not* manifest all the extreme values from the traditional theory.

As noted above, some elements of the traditional theories are included in some but not all of the law school texts surveyed. See *supra* Parts IV.A, IV.B.

<sup>152</sup> See *supra* note 52.

<sup>153</sup> See *supra* Part IV.C.

<sup>154</sup> See *supra* notes 111–14 and accompanying text for an illustration of practitioners’ confusion about the meaning of the negotiation models.

<sup>155</sup> The row for communication process differs from the others as it is a categorical rather than a continuous variable. Although there is no strict order between the three values indicated for this variable (i.e., use of offers, everyday conversation, and interest-and-option analysis), everyday conversation seems somewhat intermediate between the other two.

dimensions. The middle column in Table 2 represents the range of possible values for each variable.

Each of the variables may vary over time, so instead of providing a single static snapshot for the entire negotiation, the framework enables people to analyze negotiation as a dynamic process with different characteristics at different times in a case. This is helpful for the relatively short period of a final negotiation and it is especially important considering the entire period of a litigotiation.<sup>156</sup>

In addition, the variables may differ for various negotiators, including differences between counterparts as well as between parties and their lawyers. Thus one could apply the framework differently for various negotiators in a case. For example, in some cases, the interactions between lawyers were friendly but the interactions between the parties were hostile.<sup>157</sup>

The particular variables in Table 2 build on existing theory and seem plausible but are not essential to this framework. Unlike approaches that rely on combining many specific variables, this framework is flexible and can easily accommodate different characterizations of these variables as well as the addition of other variables.<sup>158</sup>

### B. *Illustration of the Framework*

This part illustrates how the framework can be used by applying it to the data in this study. The first row of Table 2, regarding the extent of concern for the other party's interests, assumes that each negotiator has a significant self-interest in virtually every case but that negotiators differ in the extent to which they are concerned about the other side's interests.<sup>159</sup> Negotiators whose behavior is completely selfish would be on the left end of the continuum and those whose behavior reflects great concern for the other party's interests (as well as their own interests) would be on

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<sup>156</sup> For definition of litigotiation, *see supra* note 10 and accompanying text.

<sup>157</sup> *See supra* notes 79, 90–93, 98–100 (Cases 6, 9, and 11) and accompanying text.

<sup>158</sup> For example, Professor Andrea Kupfer Schneider offers a framework for teaching negotiation using variables of assertiveness, empathy, flexibility, social intuition, and ethicality. *See Schneider, supra* note 145, at 27–36. Some or all of these variables could be added to the framework.

<sup>159</sup> The degree of parties' self-interest could vary in significant ways and could be added to the framework if appropriate. It seems likely that the degree of concern for the other party is likely to vary much more and have a greater influence on negotiation dynamics.

the right end of the continuum.<sup>160</sup> Cases 1 and 2 illustrate a traditional PN approach, where the parties seemed to have little concern for their counterparties' interests and Cases 9 and 10 illustrate a traditional IBN approach, where the parties generally had great concern for each other.<sup>161</sup> Cases 12 and 13 illustrate an OLN process where the prosecutors and defense counsel were concerned about seeming reasonable to each other, taking each others' interests into account but not trying to promote their counterparts' interests, so these cases would be in the middle of this continuum.<sup>162</sup>

The framework may be especially helpful to analyze cases that do not fit neatly into the traditional models. For example, in Case 7, which was closest to the PN model, the husband in a divorce was concerned about the welfare of his wife and children as well as his own interests.<sup>163</sup> So the husband would fit somewhere in the middle of the first variable. On the other hand, in Case 9, which generally fits the IBN model, the wife, who had alcohol problems, presumably was not very concerned about her husband or children at the outset of the case, and would also fit in the middle of the continuum at that stage of the process.<sup>164</sup>

The second row of Table 2 focuses on the communication process to develop agreement. In the traditional PN model, negotiators develop agreements exclusively through the exchange of offers and counter-offers and related communications. Conversely, in the traditional IBN model, negotiators explicitly identify the parties' interests, discuss options for satisfying the parties' respective interests, and then select an optimal option. In an OLN model, negotiators reach agreements primarily through discussion in an everyday conversation. As with the prior variable, the same cases fit the respective models quite well. Negotiators in Cases 1 and 2 reached agreement almost exclusively through exchange of offers, negotiators in Cases 9 and 10 carefully analyzed the parties' interests and considered options that best satisfied the parties' interests, and in

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<sup>160</sup> This is essentially what Professor Robert Mnookin and his colleagues refer to as the tension between assertiveness and empathy. See MNOOKIN ET AL., *supra* note 3, at 44–68.

<sup>161</sup> See *supra* notes 66–72, 90–97 and accompanying text.

<sup>162</sup> See *supra* notes 124–29 and accompanying text. Both Cases 13 and 14 are criminal cases in which the defendants had somewhat different perspectives than their lawyers. For example, the lawyers had a strong interest in seeming reasonable to the prosecutors by accommodating their interests, but the defendants may have had different views about this.

<sup>163</sup> See *supra* note 81 and accompanying text.

<sup>164</sup> See *supra* notes 90–93 and accompanying text. As the case progressed, the wife's concern for her husband and children may have increased as she got treatment and her relationships became more normal.

Cases 13 and 14, the negotiators reached agreement through everyday conversation.<sup>165</sup> In Case 13, there was only one offer, which was accepted and in Case 14, the agreement was based on a single counter-offer, and the lawyers apparently engaged in no interest-and-option analysis.<sup>166</sup>

Again, the framework can help analyze cases that do not fit neatly into the models, such as Case 11, the property boundary case in which the lawyers focused primarily on satisfying the parties' interests but finished the negotiation through an exchange of offers.<sup>167</sup> So this case would include at least two of the communications processes—and it probably included some everyday conversation as well.

The third row reflects the degree to which the parties create value in a negotiation. This relates to the extent that the negotiation is considered a zero-sum negotiation (on the left end of the continuum) or a positive-sum negotiation on the right end of the continuum).<sup>168</sup> Traditional negotiation theory suggests that PN involves negotiators who view the negotiation as a zero-sum exercise and create no value. Conversely, negotiation theory assumes that negotiators using an IBN process seek to create value. Although some cases in this study fit these assumptions, some did not. In particular, negotiators in Cases 5 through 8 generally used a PN process but seemed to create some value.<sup>169</sup> In the property boundary dispute in Case 11, the negotiators presumably created significant value, but the grudging tone of parts of the negotiation suggested that the negotiators may have “left some value on the table.”<sup>170</sup> Thus some of these cases would fit in the middle of this continuum rather than at the ends.

Negotiators using an OLN process are likely to try to create some value by satisfying each others' interests. In Cases 13 and 14, the lawyers relied on norms of law and local practice and presumably created some value as compared with a possible PN negotiation, though presumably not as much as if they used an IBN

<sup>165</sup> See *supra* notes 66–72, 90–97, 127–34 and accompanying text.

<sup>166</sup> See *supra* notes 127–34 and accompanying text.

<sup>167</sup> See *supra* notes 98–100 and accompanying text.

<sup>168</sup> Although this discussion refers to the outcome of the negotiation, it could be reframed to focus on the negotiators' efforts, if any, to try to create value.

<sup>169</sup> See *supra* notes 77–82 and accompanying text.

<sup>170</sup> See Ernest M. Thiessen & Joseph P. McMahon, Jr., *Beyond Win-Win in Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 643, 645 (2000).

process. Thus, these cases would probably fit in the middle of this continuum.<sup>171</sup>

The fourth row involves the level of friendliness or hostility in the negotiation. A traditional PN story portrays negotiators as bitter enemies.<sup>172</sup> Conversely, IBN often is portrayed as “amicable.”<sup>173</sup> These stories would place the two models in the familiar left and right ends of the continuum in this row. Although some of the cases in this study fit the models, many cases did not. Cases 1, 2 and 5 fit the traditional PN model of hostile negotiation,<sup>174</sup> but most of the other PN cases seemed to involve professional and even cordial interactions between the lawyers and even some of the parties, which would be located somewhere in the middle of row four. On the other hand, Case 11 was the IBN case involving the property dispute in which there was some tension between the lawyers, especially at the beginning of the case, so it would also be in the middle of the continuum at that stage.<sup>175</sup> Theoretically, OLN cases should generally be on the friendly end of the continuum, though there were moments of tension in OLN cases in this study.<sup>176</sup>

There often were stark differences in the relationships between the lawyers and the parties and thus the framework could be used to distinguish the level of friendliness or hostility between various negotiators. In cases like the dispute between the brothers over their father’s trust (Case 6), the lawyers cooperated quite well even though their clients were bitterly opposed to each other.<sup>177</sup>

The fifth row deals with the degree to which the negotiators tried to exercise power over each other.<sup>178</sup> In the classic PN cases,

<sup>171</sup> See *supra* notes 127–34 and accompanying text.

<sup>172</sup> See FISHER & URY, *supra* note 15, at 9–14, 132–42.

<sup>173</sup> See *supra* note 87 and accompanying text.

<sup>174</sup> See *supra* notes 66–72, 77–78 and accompanying text.

<sup>175</sup> See *supra* notes 98–100 and accompanying text.

<sup>176</sup> See *supra* notes 127–34 and accompanying text.

<sup>177</sup> See *supra* notes 77–78 and accompanying text.

<sup>178</sup> Power is a very complex subject considering that there are many sources of power and ways of exercising it. See Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 8–29 (2000) (describing nature and sources of power). Litigation virtually always involves some degree of pressure, at least through implicit threats to go to trial if the other side refuses to accept one’s demand or offer. Sometimes, parties make explicit threats to go to trial, which generally are considered to be legitimate if there is a reasonable legal basis for the legal positions. Parties can exercise power by using a wide range of other negotiation tactics, which may be considered as more or less legitimate. See CRAVER, *supra* note 3, at 170–203 (listing numerous negotiation tactics that exercise power in varying degrees). For the purpose of this Article, we need not precisely analyze the magnitude and legitimacy of various uses of power. The framework merely

one or both sides tried to pressure the other to make concessions through various tactics and thus would be located on the left end of the continuum. For example, in Case 1, the plaintiff's lawyer allegedly coached his client to change his testimony and intimidated a witness to strengthen his legal position and exercise bargaining power.<sup>179</sup> In Case 2, in which the husband in a divorce frequently used prostitutes, lawyers asked humiliating questions during depositions of both parties that were presumably intended to pressure them into reducing their demands in negotiation.<sup>180</sup> Case 10 illustrates a classic IBN negotiation in which the parties apparently resolved the issues about alimony purely through reason and not at all through pressure, so it would fit on the right end of the continuum.<sup>181</sup> Case 13 illustrates an OLN case that might be placed in the middle of the continuum. In that case, the criminal defense lawyer representing a youth charged with armed robbery worked hard over an extended period to reason with the prosecutor. This strategy may have been based, in part, on the fact that the defense counsel had little power to exercise, though he did engage in some "brinkmanship" by letting the case proceed to the eve of trial, trying to pressure the prosecutor to accept his offer for a shorter sentence than she had been offering.<sup>182</sup>

This variable focuses on the use of power, recognizing that some parties have power that they do not try to use. For example, in Case 9, involving the mother with alcohol problems, the father presumably had the potential to exert great pressure on the mother but decided not to do so.<sup>183</sup> Although parties exercising power often do so in an unfriendly way, this is not always the case. In Case 6, the lawyers had a very cooperative relationship, which did not prevent the defense counsel from pressing advantages resulting from a compelling witness and favorable legal rules.<sup>184</sup>

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identifies a continuum of greater or lesser exercise of power and users of the framework can provide their own such analyses. Although the magnitude and legitimacy of use of power are related, they are distinct and thus users of the framework may wish to treat them separately.

<sup>179</sup> See *supra* notes 67–68 and accompanying text.

<sup>180</sup> See *supra* notes 69–73 and accompanying text.

<sup>181</sup> See *supra* notes 95–99 and accompanying text.

<sup>182</sup> See *supra* notes 128–30 and accompanying text.

<sup>183</sup> See *supra* notes 91–94 and accompanying text.

<sup>184</sup> See *supra* note 80 and accompanying text. This case illustrates the fact that if one considers developing favorable evidence and making strong legal arguments as forms of power, the use of power can be entirely legitimate.

The sixth row focuses on the extent to which the negotiators rely on extrinsic or intrinsic norms.<sup>185</sup> In pretrial cases, the expected court result is the most prominent external norm, but other norms include, for example, industry standards. Intrinsic norms are based on the negotiators' own values rather than external norms. Presumably, PN negotiations would focus primarily on external norms as negotiators use the threat of litigation to gain bargaining advantage. Indeed, in virtually all the PN cases in this study, the expected court outcome weighed heavily in the negotiations. In Case 2, where the divorcing couple settled on the morning of trial, the shadow of the law loomed large and undoubtedly had a major effect on the negotiation.<sup>186</sup> In some PN cases, intrinsic norms played a significant role. For example, in Case 5, the contentious labor grievance, the union's and company's norms about negotiating grievances and collective bargaining agreements seemed to predominate over the likely outcome of the arbitration hearing as factors affecting the decision.<sup>187</sup> Thus, this case would be located in middle (or perhaps close to the "intrinsic" end) of this continuum.

It is less clear that the traditional IBN model would be located in the right end of the continuum in row six. Although *Getting to Yes* counsels reliance on anticipated court results (such as the best alternative to a negotiated agreement) or objective standards,<sup>188</sup> some proponents of IBN believe that this unduly shifts the focus away from the parties' interests.<sup>189</sup> Case 10 illustrates a major reliance on internal norms, as the divorcing spouses developed an agreement for spousal support using a variable formula based on a percentage of the husband's income rather than a typical agreement for a fixed amount.<sup>190</sup> On the other hand, Case 11, the dispute over property boundaries primarily involved an IBN process, but the lawyers had a substantial discussion of the likely court outcomes as well as the parties' interests, so this case would fit in several places on the continuum at different times in the case.<sup>191</sup>

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<sup>185</sup> This distinction is similar to Professor Ellen Waldman's distinction between "norm-educating" and "norm-generating" mediation models. See *supra* note 116.

<sup>186</sup> See *supra* text accompanying notes 68–72. For discussion of the "shadow of the law," see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 968–72 (1979).

<sup>187</sup> See *supra* notes 77–78 and accompanying text.

<sup>188</sup> See FISHER & URY, *supra* note 15, at 81–94.

<sup>189</sup> See Interview, SL 10.

<sup>190</sup> See *supra* notes 94–97 and accompanying text.

<sup>191</sup> See *supra* notes 98–100 and accompanying text.

In theory, OLN cases should be in the left end of the continuum as reliance on external norms is an essential characteristic of this model. Indeed, all the OLN cases in this study generally were located on the left end of the continuum, though presumably negotiators do consider some intrinsic norms at times.

## VI. IMPLICATIONS

### A. *Implications for Negotiation Theory and Research*

Accounts of cases in this Article demonstrate that, in the pre-trial context, understanding negotiation requires scholars to focus on litigotiation, “the strategic pursuit of a settlement through mobilizing the court process.”<sup>192</sup> In practice, lawyers know that most cases will not be tried. Although lawyers may prepare and posture as if a case will be tried, most realize that pretrial maneuvering is designed primarily for leverage to get the best possible settlement. Good lawyers “prepare[ ] for settlement from day one of the lawsuit.”<sup>193</sup> Thus negotiation theorists should not give short shrift to the pretrial process by focusing only on the final stages as if lawyers parachute into a negotiation just before the end of a case. The ultimate negotiation process unfolds out of the preceding events. Moreover, scholars would provide a more realistic portrait of legal negotiation if they contemplate all efforts to reach agreement, not merely efforts to resolve disputes.

There is significant confusion in negotiation theory about the traditional models of negotiation. Although there is a general consensus about the *existence* of two traditional models, there is no consensus about the *defining features* of these models, which probably is why there is a profusion of different terms for them.<sup>194</sup> It is fairly easy to recognize extreme examples of the models, which display most or all of the characteristics attributed to them, but there are significant deviations from these models in real life.<sup>195</sup> This study also documents the use of an ordinary legal negotiation approach, which does not exist in traditional negotiation theory,

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<sup>192</sup> See *supra* note 10 and accompanying text.

<sup>193</sup> See *supra* notes 32–35 and accompanying text.

<sup>194</sup> See *supra* Part IV.

<sup>195</sup> *Id.*

though it presumably suffers from similar problems of conceptual confusion.<sup>196</sup>

The traditional models have provided the foundation of legal negotiation theory for several decades and it would be nice if they could be rehabilitated. They certainly reflect the reality of some negotiation and they have captured the imaginations of many academics, students, and practitioners. It is precisely because these concepts have captured people's thinking so much that it is hard to change the concepts—and people's minds. Part of the problem is the confused thinking about the models in which people often consider PN as being tough and taking extreme positions and conceive of IBN as being nice and taking reasonable positions. The conceptual problems became particularly obvious to me through an experience with my negotiation class. We discussed a draft of this Article to analyze students' experiences in a simulation. All the groups had a hard time categorizing the interactions in terms of the models, saying that they used a mixture of them. We talked about how the framework would be more helpful. Yet, when they wrote papers about the simulation, most students used the theoretical models and got tripped up by the same confusions I hear from colleagues and that are demonstrated in this Article.

When first writing this Article, I imagined that the framework could be used to develop some consensus about the meaning of the models and that the models would co-exist with the framework. I thought that the framework might help develop some consensus in the field about which variables are and are not essential to the various models. But precisely because the conceptual models are so deeply entrenched in people's minds, it seems unlikely that this could happen. Although the fascination with the traditional models will make it hard for alternatives to gain general acceptance, developing better alternatives seems more likely to be useful and ultimately succeed than developing clear common understandings of the traditional models.<sup>197</sup> Indeed, reactions to earlier drafts of this Article reflecting dissatisfaction with the traditional theory and

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<sup>196</sup> See *supra* Part IV.C.

<sup>197</sup> The recommendation to replace the traditional models reflects a change in my thinking. In a recent co-authored article, I wrote, "We believe that there is substantial value in maintaining a general canon of negotiation while incorporating instruction of a wide range of additional perspectives, topics, and teaching methods." See John Lande et al., *Principles for Designing Negotiation Instruction*, 33 *HAMLIN J. PUB. L. & POL'Y* 299, 325 (2012). I now believe that the traditional models are so mesmerizing that it is hard to resist their spell. So I think it would be better to focus on other concepts and discuss the traditional models in footnotes.

critiques like Professor Schneider's<sup>198</sup> suggest some readiness to let go of the old theoretical approach and embrace a new one.

This Article demonstrates the value of a framework that un-bundles variables in the traditional models (as well as the OLN model), which can free scholars to consider how the variables relate to each other instead of simply assuming that all the variables are highly correlated or that deviations from the models merely are minor exceptions.<sup>199</sup> This tool can enable scholars to consider a much wider range of propositions by taking advantage of capabilities to consider changes in the process over the course of a case, and differences in perspectives of negotiators “behind” and “across” the negotiating table.<sup>200</sup> It can be readily improved by refining the variables included in the framework.

This framework can be particularly helpful in providing a structure for conducting empirical research. Negotiation theory relies largely on the analysis of hypothetical cases and it would be valuable to describe legal negotiation patterns in real life. Rather than assuming that characteristics of negotiations are all grouped together at the far ends of each continuum for each dimension in Table 2, it seems likely that most legal negotiations actually congregate in the middle of the dimensions. It also seems likely that there are different configurations based on the subject of the dispute. For example, Professors Richard Miller and Austin Sarat found different patterns of disputing in tort, employment discrimination, and divorce cases.<sup>201</sup> This framework might enable researchers to identify different patterns for different types of cases and explain the underlying dynamics causing these patterns.

This framework also can be helpful in identifying changes over time within a given case. For example, Professor Dwight Golann published a helpful study of simulated mediations that tracked patterns of shifts on the Riskin grid during the course of a mediation.<sup>202</sup> In the unmediated negotiation context, even the final negotiations unfold over time and if one focuses on the full litigation of a case, the process can last months or years. Some IBN theory describes how negotiators can shift from a PN to an IBN

<sup>198</sup> See *supra* note 145 and accompanying text.

<sup>199</sup> See *supra* Part V.

<sup>200</sup> See MNOOKIN ET AL., *supra* note 3, at 178–223.

<sup>201</sup> Richard Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 *LAW & SOC'Y REV.* 525, 544 (1980–81).

<sup>202</sup> See Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in The Course of a Case*, 2000 *J. DISP. RESOL.* 41.

process.<sup>203</sup> The framework in this Article can provide more precision in specifying desired shifts and developing hypotheses for empirical testing about what prompts changes in the framework variables. Moreover, the factors in this framework are likely to be used as causal factors affecting particular negotiation dynamics<sup>204</sup> or goals.<sup>205</sup> For example, many dispute resolution scholars want to promote negotiations that increase efficiency and/or satisfy parties' interests. A framework of unbundled variables is likely to be more helpful in this effort than relying on confusing models that require many assumptions about negotiation behavior.

Although this study focuses on negotiation in pretrial litigation, there presumably are some analogs in lawyers' negotiation of transactions and appellate cases. For example, it almost certainly makes sense to analyze transactional negotiations from the earliest interactions about the possible transaction rather than focus solely on the final stages of the negotiation. There also probably is an analog of OLN where lawyers rely on industry standards and norms rather than expected court outcomes as the central focus of their negotiation. In addition, it would probably be worthwhile to analyze transactional and appellate and even non-legal negotiations by disaggregating variables along the lines of the framework.

### B. *Implications for Negotiation Practice*

Evidence in this study illustrating litigotiation phenomenon can provide a reminder for lawyers that negotiation is not limited only to resolution of substantive issues after they complete pretrial activities. Savvy lawyers know that litigation entails a continual process of seeking agreements about a wide range of procedural and substantive issues, often starting from the very beginning of a case. Moreover, lawyers seek agreements with many people in addition to their counterpart lawyers, including their clients. Thus

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<sup>203</sup> See, e.g., MNOOKIN ET AL., *supra* note 3, at 230–40.

<sup>204</sup> For example, some variables in Table 2 might affect other variables in the table. As an illustration, researchers might hypothesize that demonstrating concern for a counterpart is likely to increase the likelihood that the counterpart would use friendly negotiation tactics in response. Although such a hypothesis may be difficult to test empirically because of uncertainties about “causal order” in an extended interaction (e.g., whether the demonstration of concern caused the counterpart to use friendly tactics or the use of friendly tactics caused a demonstration of concern), this is a general problem of empirical research about such issues.

<sup>205</sup> For a catalog of possible benefits of settlement, see Marc Galanter, *The Quality of Settlements*, 1988 J. DISP. RESOL. 55, 62–82 (1998).

lawyers should focus consciously on opportunities to reach agreements throughout a case and on a wide variety of matters that would advance their clients' interests.<sup>206</sup>

The framework in this Article can help practitioners better understand negotiation contexts and act effectively. Although the two traditional negotiation models can help negotiators plan moves in cases that clearly fit these models, many cases—perhaps most—do not fit neatly. These two models are both too rigid and too vague to help lawyers in many situations. The models are too rigid in implying that negotiation situations involve a set of highly inter-correlated variables that all have values on the extreme end of process continua. But they are also too vague because there is confusion about what characteristics are essential to the models. In practice, many lawyers probably find the models irrelevant to their experience and unhelpful in managing their cases. Although the addition of a third model, “ordinary legal negotiation,” fills a major void in the constellation of models, there probably are many situations that do not neatly fit any model. By breaking the models into variables that practitioners can readily recognize, they can better manage their negotiation strategies and tactics.

### C. *Implications for Legal Education*

The fact that negotiation is typically integrated in a litigation process should help inform law school faculty about how to train future lawyers. It is relevant to courses involving pretrial litigation, especially civil procedure, criminal procedure, pretrial practice, and interviewing and counseling.<sup>207</sup> Since more cases are resolved by negotiation than in trial, faculty in these courses should teach that the focus of their pretrial strategy normally should be to produce the most favorable possible settlement (however that is defined).

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<sup>206</sup> Another article based on this study offers specific suggestions for lawyers. It recommends that lawyers to take charge of their cases from the outset, including getting a clear understanding of clients and their interests, developing good relationships with counterpart lawyers, carefully investigating the cases, making strategic decisions about timing, and enlisting mediators and courts when needed. See John Lande, *Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better*, 16 *CARDOZO J. CONFLICT RESOL.* 63 (2014).

<sup>207</sup> For an excellent article making this point at some length, see Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 *NOTRE DAME L. REV.* 681, 690–712 (2005).

Just as the “hidden curriculum” of most law school courses teaches students that appellate litigation is “what really matters,”<sup>208</sup> the hidden curriculum in most negotiation courses is that the final negotiation is “where the action is,” with little attention to the activities leading up to it. Part of the problem with the hidden curriculum is that the messages are repeated and implicit.<sup>209</sup> The hidden curriculum of negotiation courses is reflected in the structure of simulations, a central pedagogical feature of most negotiation courses. Most simulations are one-stage simulations focusing solely on the final negotiation (or possibly including preparation for this negotiation).<sup>210</sup> Negotiation faculty can incorporate multiple stages in negotiation simulations so that students can experience more of the reality of litigation.<sup>211</sup>

The framework described in Part V can be a useful pedagogical tool for negotiation faculty to help students understand key variables in negotiation and avoid confusion when the traditional models do not fit their simulation experiences. This framework can be adapted into a helpful teaching tool by adding a column for students to assess the variables, as illustrated in Table 3.

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<sup>208</sup> David M. Moss, *The Hidden Curriculum of Legal Education: Toward a Holistic Model for Reform*, 2013 J. DISP. RESOL. 19, 20–21.

<sup>209</sup> As Professor Jean Sternlight and I wrote:

These messages [of a hidden curriculum] are mostly implicit in the structure of law school courses, erroneously suggesting that the bulk of what lawyers do is to analyze and argue appellate law, and that other functions are less common or important. The implicit nature of these messages, which are repeatedly reinforced in multiple courses, conveys a powerful subliminal lesson. Because many law students are not consciously aware of the message about lawyers’ roles, it is particularly hard to correct.

John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 256 (2010).

<sup>210</sup> Professor Marc Galanter noted the limitations of the one-stage simulations in his negotiation courses:

These simulations—at least my primitive ones—have severe limits in preparing for “real life” litigation games. There are no ongoing relations between bargainers; no reputations as bargainers to play on, to use for commitment, or to accumulate as gains; not enough time for things to develop; time is not available as sanction or reward; there are no nonverbal moves (delay, filing, discovery, lining up experts, and so forth).

Galanter, *supra* note 5, at 271. Of course, there are severe limits in the capacity of any instructor to cover all these things in a negotiation course as well as many other important topics. See generally Lande et al., *supra* note 197 (describing overwhelming range of possible topics and approaches in teaching negotiation). Nonetheless, instructors can do more. See, e.g. Sternlight, *supra* note 207.

<sup>211</sup> See Lande, *supra* note 115, at 17–23; Ctr. for the Study of Disp. Resol., Univ. of Missouri, Multi-Stage Simulations, available at [http://law.missouri.edu/drle/teaching\\_materials.html#multi-stage](http://law.missouri.edu/drle/teaching_materials.html#multi-stage) (collecting materials describing multi-stage simulations).

**Table 3. Framework for Analyzing Negotiation for Use in Teaching**

| Continua of Negotiation Process Characteristics |                                |  | Rating and/or Comments |
|---|--------------------------------|--|------------------------|
| No concern for other party's interests          |                                | Great concern for other party's interests    |                        |
| Exclusive use of exchange of offers             | includes everyday conversation | Exclusive use of interest-and-option process |                        |
| Creation of no value                            |                                | Creation of maximum possible value           |                        |
| Hostile tone                                    |                                | Friendly tone                                |                        |
| Extreme use of power                            |                                | No use of power                              |                        |
| Exclusive focus on extrinsic norms              |                                | Exclusive focus on intrinsic norms           |                        |

Students can be required to rate dimensions of a simulation (such as with a scale from 0 to 10) and/or verbally describe the relevant interactions. This framework allows students to describe their experiences more precisely, identify changes in the process (such as a shift from using offers to ordinary conversation or from hostile to friendly tone), and reflect on what caused the changes.

## VII. CONCLUSION

Applying concepts from Thomas Kuhn's theory of the development of knowledge, the dispute resolution community is analogous to a scientific community and has developed a dominant paradigm of negotiation based on the positional and interest-based models.<sup>212</sup> This Article identifies some "anomalies" in this para-

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<sup>212</sup> Cf. KUHN, *supra* note 2, at 176 ("A scientific community consists . . . of the practitioners of a scientific specialty. To an extent unparalleled in most other fields, they have undergone similar educations and professional initiations; in the process they have absorbed the same technical literature and drawn many of the same lessons from it."). For Kuhn's definition of paradigms, see *supra* note 1.

digm, reflecting aspects of the paradigm that do not fit real-life experience very well.<sup>213</sup> Conceivably, legal negotiation theorists could try to use the proposed framework to fix these anomalies. Considering the great conceptual confusion and the wide acceptance of the traditional theory, however, it probably is impossible to fix the prevailing paradigm. Although there is wide acceptance of this paradigm, there is also dissatisfaction with it. Hopefully, the time is ripe for a revolutionary new paradigm.<sup>214</sup> This Article proposes a new framework that would be more useful to academics, practitioners, and students. If people find value in it (and, hopefully, feel inspired to critique and improve it), the framework will lead to better understanding of the realities of legal negotiation.

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<sup>213</sup> *Id.* at 5–6 (anomalies are problems in normal science that resist solution by “known rules and procedures”).

<sup>214</sup> *Id.* at 92 (defining a scientific revolution as the replacement of one paradigm by an “incompatible new one”). Although the framework proposed in this Article is not inherently incompatible with the traditional theoretical models, it may be incompatible as a practical social matter since academics, practitioners, and students are unlikely to use both theoretical systems.