

GOOD PRETRIAL LAWYERING: PLANNING TO GET TO YES SOONER, CHEAPER, AND BETTER

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I. INTRODUCTION

Parties¹ settle most lawsuits.² If getting to yes³ is good,⁴ then getting to yes sooner generally should be cheaper and better. This

¹ When appropriate given the context, “party” may include the party’s lawyer and vice versa. “Negotiator” and the “other side” may refer to a party or lawyer 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).

² 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 2002 and that the state court trial rate in twenty-two states declined from 36.1% to 15.8% between 1976 and 2002). Parties resolve some cases through procedures other than settlement or trial (such as by motion or default judgment), so although it is inaccurate to suggest that parties settle 98% of federal cases, the evidence indicates that they settle most 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) (study of Hawaii cases finding 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); Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162–64 (1986) (finding that 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).

³ “Getting to Yes” is the title of a bestselling guide on negotiation. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

⁴ In general, litigants benefit from settling cases because they have some control over whether to settle and the terms of settlement, which are not limited to the remedies that courts could order. Barring factors like duress, litigants presumably believe that their settlements reflect their best options under the circumstances. Moreover, a recent study found that in more than 85% of cases that went to trial, at least one party would have gotten a better result by accepting the other side’s last offer than by going to trial. 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, 566–67 (2008) (replicating results of prior studies). In only 14.5% of cases, the trial award was less than the plaintiff’s last demand and also greater than the defendant’s last offer. Plaintiffs received trial awards less than the defendants’ 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. *Id.* Even in the 14.5% of cases in which both parties were nominally better off by going to trial, this does not take into account the extra out-of-pocket expenses of legal fees and litigation costs following the last exchange of offers or the indirect costs such as extra diversion of time from more productive activities, damaged relationships and reputations, and increased risk and worry. Although some parties’ decisions to go to trial are vindicated by getting better results at trial than their counterparts’ last offer, this study shows that parties and their lawyers often miscalculated their chances of winning and incurred substantial extra losses when

logic is not always true but often it is.⁵ This Article suggests that generally it *is* better to get to yes and to do so sooner than later (though it also describes circumstances when this is not the case).⁶ Reaching agreement in pretrial litigation⁷ sooner generally produces the benefit of reduced litigation costs as well as reduced time that parties invest in litigation, which obviously is beneficial in itself. Based on interviews with respected lawyers, this Article suggests how lawyers can help produce these and other benefits through negotiation at the earliest appropriate time.

The predominant reality of litigators' work is captured in Professor Marc Galanter's term, "litogotiation," which he defines as "the strategic pursuit of a settlement through mobilizing the court process."⁸ In an observation that is still true as today as it was three decades ago, Galanter 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

they lost. For example, although defendants did worse at trial in only 24.3% of cases, in these cases, the awards were an average of \$1.14 million more than the plaintiffs' last demand. *Id.*

Critics like Professor Owen Fiss argue that "settlement as a generic practice" is a "highly problematic technique for streamlining dockets" and, as a result, "justice may not be done." Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). Dean Michael Moffitt responds that, rather than being for or against litigation or settlement per se, one should oppose processes that do not "(1) deal appropriately with power imbalances, (2) minimize agency costs, and (3) ensure meaningful access to courts." Michael Moffitt, *Three Things to Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203, 1205 (2009). I agree with Dean Moffitt that it is hard to make sweeping generalizations about the merits of settlement as a social policy. *Id.* at 1204–05. Policy arguments about the value of settlement and trial, which I have discussed elsewhere, are beyond the scope of this article. See John Lande, *How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213, 225–28. Here I will simply assert my belief that settlement usually benefits individuals and society, recognizing that this is not always the case.

⁵ In some cases, parties might get better results if they settle later than sooner. These instances may include cases in which parties rush into agreements without doing appropriate investigations or make decisions based on emotional impulses without taking sufficient time for reflection.

⁶ See *infra* Part IV *passim*.

⁷ This article is based on interviews with lawyers describing their perspectives about negotiation in pretrial litigation. Although the conclusions are most relevant to negotiation in this context, some principles proposed in this article could be adapted for lawyers' negotiation in pre-suit negotiation, appellate litigation, negotiation of transactions, and negotiations that do not involve lawyers.

⁸ Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals.⁹

In practice, negotiation is routinely infused in litigation from the outset of a case. Despite the fact that the ostensible purpose for pretrial litigation is to prepare for trial, such preparation is inextricably intertwined with negotiation because the expected trial outcome is a major factor affecting negotiation in many, if not most, cases. Indeed, many lawyers continuously consider how litigation activities may affect negotiation. For example, one lawyer in this study¹⁰ said 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.”¹¹ Another lawyer said that he “always has an eye toward settling,” taking care of matters as fast and cheaply as possible and minimizing clients’ risk.¹² A third 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.”¹³ 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.”¹⁴

This Article summarizes the views of respected lawyers about how they negotiate, which were collected as described in Part II. Part III recommends that lawyers develop a strategic approach to negotiation, including general negotiation goals and plans to negotiate at the earliest appropriate time. Part IV outlines recommendations for lawyers to take charge of their cases from the outset, including getting a clear understanding of clients’ interests, devel-

⁹ *Id.* at 268 (emphasis in original).

¹⁰ For a description of the data from the study and citation of interviews, see *infra* Part II.

¹¹ Interview, BC 05.

¹² Interview, KC 02.

¹³ Interview, KC 06.

¹⁴ *Id.* Lawyers’ comments in this paragraph reflect the fact that lawyers negotiate many interim and procedural issues as well the ultimate resolution of disputes. It is so common for lawyers to reach agreement on issues other than the ultimate issues that many lawyers do not recognize that they negotiate throughout litigation. Although interim and procedural negotiation is essential for lawyers to manage their cases, this article focuses solely on negotiation of the ultimate issues (or “final negotiations”). For further discussion of the nature and context of lawyers’ negotiation, see John Lande, *A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation*, 16 *CARDOZO J. CONFLICT RESOL.* 1 (2014).

oping good relationships with counterpart lawyers, carefully investigating the cases, making strategic decisions about timing, and enlisting mediators and courts when needed. Part V provides two general suggestions for improving the quality of agreements, including developing good relationships with counterparts and looking for opportunities to create value by trading on differences between the parties. Part VI is the conclusion, arguing that clients and society would benefit if lawyers improve the quality of their negotiations. The conclusion recommends that law schools, law firms, bar associations, courts, publications for lawyers, continuing education programs, and clients encourage lawyers to provide efficient, cooperative, and reasonable litigation services.

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.¹⁵ They were selected using a snowball sampling process in which potential subjects were identified by their peers as having good reputations as lawyers. Chairs of county bar association committees were invited to be interviewed and/or to nominate other lawyers to be interviewed. Part of the interviews focused on negotiations involving only two parties, so I excluded bar association committees dealing with subjects where more than two parties typically are involved such as bankruptcy, construction, and environmental law. At the end of each interview, I asked subjects to suggest other lawyers who they consider to be good lawyers and I interviewed some of the suggested lawyers.¹⁶ Toward the end of the data collection period, I interviewed three Collaborative lawyers specifically to describe some interest-based negotiations.¹⁷ I issued twenty-six invi-

¹⁵ 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.

¹⁶ I told the interview subjects that I was interested in lawyers who were good lawyers regardless of their approach to negotiation. Nonetheless, given the subject of the interview, some subjects may have suggested lawyers who they thought have positive attitudes about negotiation. That said, virtually all the lawyers seemed comfortable litigating vigorously when needed.

¹⁷ 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

tations that did not result in interviews, usually due to non-response to invitation emails, though sometimes because the lawyers did not do litigation.

The interviews were conducted by telephone and generally lasted sixty to ninety minutes.¹⁸ Much of the time in the interviews was devoted to giving detailed accounts of the most recent case that the subjects settled. Some of the later questions focused on the timing of negotiation.

The lawyers in the sample had been in practice for three to forty-six years, with a median of 20.5 years.¹⁹ They were in firms with 1 to 630 lawyers, with a median of 7.5 lawyers. There were twenty-three men and nine women in the sample. Lawyers in the sample handle a wide range of cases including divorce, criminal, commercial, employment discrimination, family trust, foreclosure, labor, landlord-tenant, intellectual property, personal injury, product liability, real estate, and workers compensation. 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, e.g., BC 01, KC 02.

III. DEVELOP A GENERAL PHILOSOPHY OF NEGOTIATION

Considering that parties settle most lawsuits, lawyers can benefit a great deal by developing a general philosophy of negotiation. Doing so would help lawyers identify their goals, guide clients in deciding on their goals, and manage interactions with the other side.

In fact, most lawyers presumably do develop negotiation philosophies because negotiation is such a regular part of their work. Some lawyers probably do so without much reflection and develop unconscious routines. Lawyers can be more effective by developing self-conscious philosophies that can help them accomplish their

the case is litigated. See John Lande, *An Empirical Analysis of Collaborative Practice*, 49 *FAM. CT. REV.* 257, 257 (2011). For discussion of interest-based negotiation, see *infra* Part III.A.

¹⁸ 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. In some situations, I am fairly confident that the reported language accurately reflects the subjects' words, which are shown in quotation marks.

¹⁹ The number of years in practice was calculated based on the number of years since graduation from law school.

goals more strategically.²⁰ Part III.A identifies typical goals in negotiation and Part III.B outlines how lawyers can plan to negotiate at the earliest appropriate time.

A. *Identify Your Goals*

Legal practice is designed to achieve objectives that satisfy clients' interests. Thus setting goals in their clients' cases should be an important part of lawyers' work. Of course, the goals in particular cases will vary based on considerations such as the particular clients' interests, the counterparts' approach, the legal and factual issues, power dynamics (related to the expected alternatives to a negotiated agreement and other factors), and expectations about whether the parties will have a relationship in the future. While recognizing such variations, most lawyers probably have general philosophies about what they try to accomplish in their work. They may not have a single approach for all of their cases but may have general goals for particular categories of cases or clients.

In traditional negotiation theory, there are two main goals reflected by two distinct negotiation models.²¹ In an adversarial model (sometimes called "positional negotiation" or "PN"), negotiators seek to get as much possible benefit for themselves with little or no concern for their counterparts' interests.²² In PN, the negotiators take positions and exchange a series of offers trying to reach an agreement in the middle.²³ In a cooperative model (sometimes called "interest-based negotiation" or "IBN"),²⁴ negotiators try to reach an agreement that satisfies important interests

²⁰ Negotiation is much harder than it might seem, so most lawyers would benefit from studying, practicing, and reflecting on their experience to develop intentional philosophies. See JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY* 129–35 (2011) (suggesting methods for improving negotiation practice).

²¹ See Lande, *supra* note 14, at 16–17. In a companion article based on this study, I argue that the traditional negotiation models are poorly defined and do not fit some real-life negotiations, and thus they should be replaced by a more flexible theoretical framework. See Lande, *supra* note 14. For convenience, this article refers to the generally recognized models.

²² There are numerous names for this model such as "distributive," "competitive," "adversarial," "positional," "zero-sum" negotiation or "hard bargaining." For further discussion, see Lande, *supra* note 14, at 16–17.

²³ For further discussion, see Lande, *supra* note 14, at 18–26.

²⁴ There are also numerous names for this model including "integrative," "problem-solving," "cooperative problem-solving," "collaborative negotiation," and "interest-based negotiation." For further discussion, see Lande, *supra* note 14, at 27–36.

of both parties. In the classic form of IBN, negotiators explicitly identify their main interests, list possible options for satisfying the interests, and choose an option satisfying both parties' interests. A third model is what I have called "ordinary legal negotiation" (OLN) in which negotiators try to reach reasonable agreements based on shared norms, which typically are the expected outcomes in court or typical agreements in similar cases. The process resembles everyday conversation in which lawyers exchange information to figure out an appropriate result given the norms in their legal practice community rather than primarily exchanging offers or analyzing how to satisfy the parties' interests.²⁵

Negotiators typically use a PN approach trying to maximize their advantage and as a defensive measure to protect themselves from counterparts who may try to take as much advantage as they can. In many types of practice, it is the normal or default approach. Although the IBN model sounds ideal, negotiators may not use it because they are less familiar with it or they are afraid that their counterparts would take advantage of them if they candidly disclose their clients' interests. There has been little analysis of the OLN model, though it may be quite common, especially when some or all of the following conditions exist: (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 law and/or set of legal 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 negotiation, and (7) using this process is considered a legitimate negotiation method in the norms of the applicable legal culture.²⁶

This brief summary of negotiation theory identifies three general categories of lawyers' goals: (1) maximizing the clients' interests (with little regard for the counterparts' interests), (2) satisfying the interests of both sides, or (3) making agreements considered appropriate based on recognized norms. Lawyers can consider these goals in developing their general philosophies for handling their cases.

Of course, negotiation philosophies need not be limited to these three goals. Some lawyers have articulated other goals such

²⁵ Although an OLN process generally focuses on figuring out an appropriate result based on applicable norms, lawyers may make adjustments using some exchange of offers or recognition of parties' particular interests. For further discussion, *see* Lande, *supra* note 14, at 36–46.

²⁶ For further discussion, *see* Lande, *supra* note 14, at 45–46.

as always acting with integrity and grace, educating and collaborating with clients in decision making, fighting only about things worth fighting about, and being a peacemaker.²⁷ Thus lawyers have a wide range of options for developing their philosophies, possibly varying by categories of cases or clients.

B. *Plan to Negotiate at the Earliest Appropriate Time*

Parties may begin to negotiate at many different stages of the pretrial process, including before a party files a lawsuit. In general, lawyers in this study seem to make strategic decisions about the timing of their negotiations. In the interviews, I asked lawyers to estimate the proportion of their cases in which serious negotiations began at each of the following four stages: (1) before suit was filed, (2) after suit was filed but before most discovery had been completed, (3) after most but not all discovery had been completed, and (4) after virtually all discovery had been completed.²⁸

Very few of the lawyers indicated that they often start serious negotiation before suit is filed. The figures generally ranged between 0% and 15% and several lawyers gave responses in the range of 20% to 30%. Two lawyers—one representing owners in landlord-tenant cases and another lawyer representing plaintiffs in personal injury cases—said that they start serious negotiation before suits are filed in 90% of their cases.

Lawyers gave a very wide range of estimates of the proportion of cases in which they began to negotiate in the other three timeframes listed in the question. Very few lawyers said that they began serious negotiation in most cases after completing virtually all discovery. This suggests that many lawyers often initiate negotiation in the middle of the pretrial process, before they complete all discovery, and that most lawyers in the study make conscious decisions about when to start negotiation.

I asked the lawyers why they think that serious negotiation in their cases started (1) before suit or soon after suit was filed and (2) after most or all discovery had been completed. I then asked

²⁷ LANDE, *supra* note 20, at 31–32 (describing several lawyers' negotiation philosophies).

²⁸ The responses to this question can provide only a fuzzy sketch about the timing of negotiation for several reasons. This study involves a small, non-random sample of lawyers discussing many different types of cases. In addition, this question asks lawyers to give estimated proportions of their cases dealing with a wide range of subjects, which necessarily produces very crude data. Even so, the responses are suggestive.

what factors make it appropriate to start negotiation early and what advice they would give lawyers to help them to start negotiating early in appropriate cases.

Some lawyers in this study believe that it is always appropriate to negotiate early in virtually every case. For example, one lawyer said that an early stage of litigation is “a great time to settle” because cases generally get worse over time and clients want to settle their cases with minimal inconvenience.²⁹ Another lawyer said that he cannot think of an instance when early negotiation is not appropriate.³⁰ He believes that plaintiffs should be required to make an early demand and should be sanctioned if they do not do so. Even if clients say that they have tried to negotiate with their counterparts or they are being unreasonable, he believes that lawyers still have a responsibility to try to negotiate.³¹ Another lawyer said that it is always appropriate to start to negotiate early in domestic cases.³² One lawyer said that lawyers should consider negotiation as early as possible in every case because early resolution provides obvious benefits, though he believes that it may not work in some cases depending on the parties’ mindsets.³³

Other lawyers in this study expressed a similar philosophy of trying to initiate negotiation early in a case.³⁴ For example, one lawyer who handles general civil matters said that he normally tries to initiate negotiation at an early stage.³⁵ A plaintiff’s personal injury lawyer said that he likes settling cases without going to court and his clients do too. He “makes” clients proceed this way, which they presumably accept as normal and/or desirable.³⁶ A general practitioner said that his approach is to start by suggesting proposals to his counterparts, asking them, “Tell me what’s wrong with this?”³⁷ A family lawyer said that she “works” at starting negotiation early.³⁸ She tells her clients that they can make their case “into a trial and a bloodbath” but if they do, their children will

²⁹ Interview, BC 04.

³⁰ Interview, KC 07.

³¹ *Id.*

³² Interview, KC 09.

³³ Interview, KC 05.

³⁴ These findings are consistent with those in a survey of New Jersey lawyers, in which 79% said that lawsuits should settle sooner than they do. See 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, 254 (1997).

³⁵ Interview, BC 03.

³⁶ Interview, BC 04.

³⁷ Interview, KC 09.

³⁸ Interview, SL 01.

“never get over it” because the clients are “never going to get over it.”³⁹ Another lawyer said that she is not a “dilly-dally prosecutor” and moves her cases forward as soon as possible.⁴⁰

On the other hand, some lawyers may not want to start negotiating early because they are not open to early negotiation, either generally or in particular cases.⁴¹ None of the lawyers in this study said that this was their approach,⁴² and several suggested that other lawyers do not consider negotiation early in a case due to habit, procrastination, “inattention” to their cases, or heavy case loads.⁴³

Some lawyers may start negotiation relatively late in the process because they “may not have enough to do” and they view continued litigation as a way to keep busy and earn more fees.⁴⁴ This reflects a pattern of lawyers’ financial self-interest that several lawyers described. One lawyer noted that insurance defense counsel are paid by the hour and have an interest in drawing out the process.⁴⁵ Some lawyers demand discovery that is not really necessary for the litigation and presumably is requested to advance the lawyers’ financial self-interest.⁴⁶ One lawyer described a pattern that he sees “pretty often” in which lawyers use up their initial retainer

³⁹ *Id.*

⁴⁰ Interview, BC 11.

⁴¹ See Interviews, BC 01, KC 05, KC 07.

⁴² The fact that no lawyers in this study generally rejected the value of early negotiation may be due to social desirability bias to some extent. Although I tried to pose my questions to be open to different perspectives, subjects may have felt that advocating early negotiation was the expected response. I suspect that this was a relatively small factor, however, considering that many lawyers qualified their recommendations for early negotiation. Since subjects were selected because of their reputations as good lawyers, the views they expressed may reflect those of more thoughtful and effective practitioners.

⁴³ See Interviews, BC 02, BC 08, SL 04. Although such delay may be understandable in some cases, lawyers have an ethical duty to handle their cases in a timely way. Rule 3.1 of the Model Rules of Professional Conduct states, “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.” MODEL RULES OF PROF’L CONDUCT R. 3.1 (2011). Rule 1.3 states, “A lawyer shall act with reasonable diligence and promptness in representing a client.” MODEL RULES OF PROF’L CONDUCT R. 1.3 (2011). Comment 3 to Rule 1.3 elaborates:

Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client’s interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness.

Id. at cmt. 3.

⁴⁴ Interview, KC 09.

⁴⁵ Interview, SL 02. Of course, lawyers handling other kinds of cases are also paid on an hourly basis and have similar incentives.

⁴⁶ Interview, SL 04.

and send clients a bill on the eve of trial. The lawyer needs more money from the client before going to trial, which leads to settlements that “could have been done a lot earlier” in the case.⁴⁷

This study indicates that good lawyers believe that planning for negotiation at the earliest appropriate time generally is in their clients’ interests. The appropriate timing of negotiation in particular cases varies and the lawyers in this study identified factors prompting them to start sooner or later, as described below.⁴⁸

IV. TAKE CONTROL OF YOUR CASE

The lawyers in this study generally recommended being assertive in managing cases from the very outset. Consistent with the views of many lawyers in this study, one lawyer recommended the following mindset:

Sooner or later, you will need to negotiate. You need to get out in front, get the facts, get the client on board. Try to prepare a settlement letter This drives the case in the right direction. If you wait, you just get sucked into a pile of mud. If the other lawyer sends the letter, then you have to catch up.⁴⁹

The lawyers in this study suggested many specific techniques for taking control of one’s cases, as described in the following parts.

A. *Understand Your Clients and Their Interests*

1. In General

One lawyer counseled the importance of understanding where clients are “coming from.”⁵⁰ He said that it is important to understand the facts of the case but it is even more important to learn the clients’ interests about the particular situation as well as their attitudes about settlement and trial.⁵¹ Thus, lawyers should learn the clients’ goals and what they are—and are not—willing to give up.⁵² After learning the clients’ goals, lawyers should develop a

⁴⁷ Interview, BC 02.

⁴⁸ See *infra* Part IV *passim*.

⁴⁹ Interview, BC 01.

⁵⁰ Interview, SL 06.

⁵¹ *Id.*

⁵² Interview, BC 09.

strategy to achieve the goals and a theory of the case consistent with the goals.⁵³

One lawyer said that lawyers should discuss negotiation with clients at the beginning of a case, discussing factors indicating whether it might be helpful or not.⁵⁴ In that conversation, lawyers should explain that negotiation might be an effective and efficient process for achieving the clients' goals and is not a sign of weakness or giving in.⁵⁵ Lawyers should tell clients about the potential saving of litigation fees and costs if they can resolve the case early and get the same result as if they went to trial.⁵⁶ They should also explain different approaches to negotiation and, if clients are interested in trying negotiation, lawyers should ask their preferences about how they want to pursue it.⁵⁷ If clients seem interested in negotiation, one subject said that lawyers should be "absolutely sure" that the clients are "100% on board" to negotiate early in the matter, the lawyers believe it would be in the clients' interest, and they have the authority to do so.⁵⁸

One lawyer described developing a "sixth sense" about discussing these issues with clients.⁵⁹ He said that lawyers obviously have to follow the clients' instructions about whether to pursue negotiation but lawyers are "not just hogcarriers."⁶⁰ Lawyers should give their candid advice and if they think that clients "are going to ruin" by proceeding in litigation, lawyers are obligated to tell them so.⁶¹ He said that lawyers can tell clients, "I know how you are feeling now. Here's what you are going to feel in six months, one year, and when it's all over."⁶² Similarly, another lawyer counseled "manag[ing] client expectations early and often."⁶³ Of course, lawyers ultimately need to follow their clients' directions, but that does not mean that lawyers must immediately do so without discussing the legal and practical risks. This may involve negotiation but if

⁵³ See Interview, SL 05.

⁵⁴ Interview, SL 04.

⁵⁵ Interview, KC 04.

⁵⁶ Interview, SL 03.

⁵⁷ See Interview, KC 04.

⁵⁸ Interview, BC 10.

⁵⁹ Interview, SL 09.

⁶⁰ *Id.*

⁶¹ *Id.* Lawyers have an ethical duty to provide candid advice to clients. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2011) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.").

⁶² Interview, SL 09.

⁶³ Interview, BC 02.

the other side is not open to negotiation, parties “have to let the process run its course.”⁶⁴

To provide good advice, lawyers need to assess the parties’ mindsets and motivations. Whether negotiation is appropriate may depend on the parties’ level of sophistication and whether their “egos” are too involved⁶⁵ and whether they are mature enough to “keep their emotions in check.”⁶⁶ Negotiation may be appropriate if the parties are relatively mature, not acting “crazy,” and want to avoid trial.⁶⁷ If both sides are reasonable about valuing the case and recognizing risk, they may want to negotiate early to avoid extended litigation.⁶⁸ Early negotiation is especially appropriate if the parties are able to communicate well and want to maintain a good relationship.⁶⁹ Some people want to settle early because they cannot withstand lengthy litigation⁷⁰ and prefer to “move on with their lives.”⁷¹ This may happen if parties previously used mediation and/or are committed to finding common ground fairly quickly.⁷²

On the other hand, some parties may not be interested in early resolution.⁷³ One lawyer described a pattern of “inertia” in some clients.⁷⁴ Another lawyer attributed later starts in some cases to the “stubbornness” of parties who do not want to negotiate “until the reality of trial is facing them.”⁷⁵ One lawyer noted that “it takes some time for people to come to grips” with this.⁷⁶ Or, as one lawyer put it, some clients are not ready until they “figure out that angst is cost.”⁷⁷ When the parties hate each other, it may be hard to negotiate at all or they may be able to resolve the matter only in mediation.⁷⁸ Even when parties do not actually hate each other, they may have a lot of intense emotions interfering with their ability to focus on negotiation. The “emotional drag” of liti-

⁶⁴ Interview, SL 09.

⁶⁵ Interview, KC 05.

⁶⁶ Interview, BC 01.

⁶⁷ *Id.*

⁶⁸ Interview, KC 02.

⁶⁹ Interviews, SL 04, SL 05.

⁷⁰ Interview, KC 01.

⁷¹ Interview, KC 04.

⁷² Interview, BC 02.

⁷³ Interview, KC 07.

⁷⁴ Interview, BC 02.

⁷⁵ Interview, BC 08.

⁷⁶ Interview, BC 09.

⁷⁷ Interview, KC 09.

⁷⁸ Interview, SL 08.

gation can “wear them down” to the point when they are ready to negotiate, but it can take some time before they “get there.”⁷⁹

2. Financial and Offsetting Interests

Clients virtually always have significant financial issues in litigation and it is important for lawyers to discuss them with clients early in the case. The outcome of litigation often involves potential payments. Contrary to some lawyers’ assumptions, parties do not always want to receive the largest possible recovery or make the smallest possible payment. For example, some plaintiffs are willing to accept smaller recoveries if they can receive them sooner⁸⁰ or avoid the “ugliness” of feeling harassed in litigation.⁸¹ Conversely, defendants often settle for more than they think they are liable for because they want to settle the case as “quickly and economically as possible” to cut off their exposure⁸² or reduce adverse publicity.⁸³ Some parties are satisfied by getting what they consider to be fair outcomes, even if this does not maximize their financial result.⁸⁴ Some parties value maintaining good relationships (or not increasing the damage to relationships), which they consider more important than getting the most favorable financial outcome.⁸⁵ If defendants give sincere apologies, plaintiffs may be willing to receive smaller amounts than they otherwise would.⁸⁶ A plaintiff in a commercial dispute may be willing to accept a smaller settlement if the defendant would increase the amount of future business.⁸⁷ Moreover, parties’ perspectives may change during litigation, so it is important to periodically re-assess them throughout a case.

If parties are paying for their legal services and litigation costs, this often is a major factor in their approach to litigation and negotiation. Legal costs obviously reduce the net value of the outcomes and in extreme cases, the costs of protracted litigation exceed the recovery. Sometimes clients want to settle early because they cannot afford to pay for extended litigation and are willing to “take

⁷⁹ Interview, SL 09.

⁸⁰ See Interviews, BC 04, SL 03.

⁸¹ See Interviews, KC 01, KC 05, SL 09.

⁸² See Interview, BC 05.

⁸³ See Interview, KC 01.

⁸⁴ See Interviews, BC 03, SL 02.

⁸⁵ See Interview, SL 10.

⁸⁶ See, e.g., Ben J. Cunningham, *The Other Sarah*, in *STORIES MEDIATORS TELL* 33, 33–47 (Eric R. Galton & Lela P. Love eds., 2012) (describing a case in which the driver who caused the death of the plaintiff’s daughter gave a remorseful apology, which led the plaintiff to use the settlement to create a college fund for the driver’s daughter.).

⁸⁷ See Interview, SL 05.

what they can get.”⁸⁸ If clients cannot “afford to go the entire distance,” it obviously creates an incentive to start negotiation. One lawyer said, “It’s not right to go on for years like Bleak House.”⁸⁹ During periods of economic downturns, parties may be especially interested in settling early to reduce legal costs.⁹⁰ The relative ability of the parties to afford litigation can affect parties’ motivation to negotiate early or not. One lawyer said that while clients generally do not want to spend money on litigation, smaller companies are more willing to negotiate early than big companies, which figure that litigation is “just a cost of doing business.”⁹¹

Sometimes, parties do not anticipate the costs of litigation and settle late in the process because they cannot afford to continue.⁹² Monthly legal bills can be much more than they imagined and can “eat up their savings.”⁹³ Some parties may have to get several large legal bills to seriously consider negotiation.⁹⁴ Some parties will negotiate only after they have spent enough (or too much) money on attorneys’ fees and say, “Let’s make this case go away.”⁹⁵ On the other hand, some insurance companies and other defendants may have an interest in dragging out the litigation process to reduce their eventual payouts.⁹⁶

Considering the significance of legal costs in parties’ decisions about litigation and negotiation, it is important for lawyers to provide realistic estimates, which is very difficult. One lawyer said, “Every time you estimate the cost, you are going to underestimate” so he recommends that lawyers double their estimates of the costs.⁹⁷

3. Specific Interests

Obviously, lawyers should understand their clients’ particular interests in each case.⁹⁸ Some parties have strong interests about resolving issues promptly. For example, a lawyer representing de-

⁸⁸ Interview, KC 04.

⁸⁹ Interview, SL 09. See CHARLES DICKENS, *BLEAK HOUSE* (1853) (classic novel describing lengthy litigation in the English courts).

⁹⁰ Interview, SL 05.

⁹¹ Interview, KC 05. Of course, companies of every size typically want to minimize their litigation costs.

⁹² Interview, BC 02.

⁹³ Interview, SL 09.

⁹⁴ Interview, BC 03.

⁹⁵ Interview, KC 05.

⁹⁶ Interview, SL 02.

⁹⁷ Interview, BC 03.

⁹⁸ See Interviews, KC 01, SL 03.

endants in civil cases said that some clients want to “get rid of cases” before they develop into serious problems. A defense lawyer said that some plaintiffs’ lawyers have sent him information about potential lawsuits and he has been successful in settling cases without a suit.⁹⁹ In some cases, there are external pressures creating need for immediate resolutions, such as in some landlord-tenant and foreclosure matters involving possession of the property where time is of the essence.¹⁰⁰ In some cases, parties have an interest in satisfying other people’s interests about timing. For example, in family cases, husbands may feel pressure from their girlfriends to settle so that they do not have to continue dealing with their wives.¹⁰¹

Some interests are distinctive to particular types of cases. For example, in employment disputes, parties may have concerns about whether employees can continue working for the employer or not.¹⁰² Employers want to avoid retaliation claims because they can aggravate the conflict and increase their liability.¹⁰³

In divorce cases, both parties typically have major interests in maintaining financial security after the divorce.¹⁰⁴ In cases where there are minor children, the parents generally have strong concerns about their welfare.¹⁰⁵ A family lawyer said that he talks with clients about the risks in potentially volatile emotional situations which can affect their financial security, physical safety, and emotional well-being as well as the children’s interests. In some cases, by resolving issues sooner, he can reduce the risks for his clients.¹⁰⁶

Lawyers in criminal cases have significantly different interests than in civil litigation. Prosecutors generally are concerned about the protection of society, justice, accountability, closure for victims, and rehabilitation of criminals.¹⁰⁷ Not surprisingly, defense counsel usually want their clients to get little or no jail time,¹⁰⁸ fairness in sentencing in comparison to similar cases,¹⁰⁹ and prevention of col-

⁹⁹ Interview, KC 06.

¹⁰⁰ See Interviews, KC 07, KC 08.

¹⁰¹ See Interview, KC 04.

¹⁰² See Interviews, KC 01, KC 02.

¹⁰³ See Interview, KC 03.

¹⁰⁴ See, e.g., Interview, SL 10.

¹⁰⁵ See Interviews, KC 04, SL 01, SL 04, SL 11, SL 12.

¹⁰⁶ Interview, KC 04.

¹⁰⁷ Interview, BC 07, BC 08, BC 09, BC 11, SL 07.

¹⁰⁸ Interview, BC 07, BC 08.

¹⁰⁹ Interview, BC 10.

lateral consequences such as having a felony conviction or having to register as a sex offender.¹¹⁰

B. *Follow the Norms in Your Legal Practice Community*

Lawyers are likely to get better results if they recognize and follow the norms of the particular legal communities they work in. Practice communities have “local legal cultures,” which are “shared, local perceptions and expectations in the operation of a legal system” that are “embedded local culture[s] in which judges, lawyers, and other repeat actors influence the application of law in that locality.”¹¹¹ The geographical scope of lawyers’ practices vary so that some lawyers work primarily or exclusively with lawyers in their local area while others regularly work with lawyers in certain regions, metropolitan areas, or nations. Lawyers who specialize in particular types of cases regularly deal with other specialists in their subject areas, which may have distinct practice cultures. However the legal practice community is defined, there are likely to be norms about what is considered the proper way to handle cases and (usually informal) sanctions for violations of those norms.

In this study, the practice communities of most of the lawyers interviewed seemed to have been in their local areas, though some of the specialists in Kansas City and Saint Louis regularly seemed to have cases in cities in other states. In my interviews, I asked about differences in approaches to negotiation between lawyers from cities and those from smaller communities. Thus, rather than concentrating particularly on legal culture in and around courtrooms, I asked lawyers to describe what might be called “local *negotiation* culture” (or “local *litigotiation* culture”). The following perspectives may not be empirically accurate generalizations, but whether they are accurate is irrelevant for this purpose because lawyers orient their behavior based on their perceptions and beliefs, however accurate they may be. Indeed, the lesson for lawyers seeking to reach good, efficient agreements is to learn about the local practice culture of their counterparts and “when in Rome, do as the Romans do”—unless there is a good reason not to do so. If

¹¹⁰ Interview, SL 07.

¹¹¹ See Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL’Y 801, 803–04 (1994).

the local culture generally is adversarial, lawyers may take the initiative to develop cooperative relationships with their counterparts, recognizing that this may be difficult or impossible because of the local norms.

Most of the lawyers in the study said that they noticed differences between lawyers from cities and smaller communities in their approach to negotiation.¹¹² Several lawyers suggested that they found lawyers in smaller towns to be more informal and lawyers in bigger cities to be more formal and possibly more difficult to deal with. For example, a Kansas City lawyer said that in the larger communities, there is more posturing and lawyers have their “guard up,” almost having an “inherent distrust” of each other. By contrast, he said that lawyers in smaller communities tended to be “more laid back” and use first names more often. He described a case in a smaller community where the tone was “like a cliché and they said, ‘Come on down. Let’s work it out.’” He went to his counterpart’s office and the secretary “acted like they were best friends.” He wore a suit and the other lawyer wore a sweater. They were constantly offering him drinks in what “turned into a war story hour.” He contrasted that case with one in Kansas City, where, despite the fact that he had had a dozen cases with the same attorney, the interactions were very formal and they both wore suits.¹¹³

A Boone County lawyer gave a similar account. He said that lawyers in big cities generally are more confrontational and less collegial, making more extreme demands. He said that big-city lawyers generally will not engage in casual conversation and there is “less transparency” about what they want as they are afraid to talk about where they “want to end up.” He said that lawyers in smaller communities tend to be far less competitive. Unlike big cities, where lawyers may not encounter the same lawyer on the opposite side of the case again, in smaller communities, “you live and die by your reputation.”¹¹⁴ A Saint Louis lawyer said that big-city lawyers are like “automatons,” who “generat[e] lots of papers”

¹¹² The findings in this study are quite consistent with Professor Donald Landon’s study of lawyers in small towns. *See generally* DONALD D. LANDON, *COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE* 119–46 (1990). *See also* LYNN MATHER, CRAIG A. MCEWEN & RICHARD J. MAIMAN, *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 57–61 (2001) (study finding geographical differences in divorce litigotiation practice and culture between New Hampshire and Maine and between rural and urban areas).

¹¹³ Interview, KC 04.

¹¹⁴ Interview, BC 02.

as opposed to focusing on developing good relationships.¹¹⁵ Another lawyer said that attorneys in smaller communities tend to know more about their clients than big-city lawyers.¹¹⁶

By contrast, big-city lawyers may see small-town lawyers as less knowledgeable about complex legal issues and less flexible.¹¹⁷ A Saint Louis lawyer described a case with a small-town lawyer who felt bound by local norms and was reluctant to consider alternatives. She suggested a creative idea that her counterpart agreed was good for both their clients but he responded, “We have never done that in this county.” Since he agreed that the result would be good for his client, she asked what was the problem and he said that he did not have language for an agreement on that issue.¹¹⁸

Lawyers should be aware of a possible “home-town advantage.” Several lawyers said that local lawyers are likely to have an advantage over out-of-towners. For example, a Boone County prosecutor said that experienced local defense counsel are more likely to know what the prosecutors will offer and how the judges will sentence in particular cases.¹¹⁹ A general practitioner agreed, saying that local lawyers know more about judges’ “proclivities,” so out-of-town counsel may be at a disadvantage.¹²⁰ Knowledge of local norms can easily create advantages in negotiation because it leads to more accurate assessments of the likely outcomes if the parties do not settle. Out-of-town lawyers often recognize these risks and sometimes retain local counsel to reduce the risks.¹²¹

In addition, lawyers should consider perceptions of particular geographic areas. For example, one Boone County lawyer has a dim view of Saint Louis lawyers, wondering how they “keep from killing each other.” He said that they “treat us like we are dumber than stones” and that he is more likely to resolve things with Kansas City lawyers.¹²² A Saint Louis family lawyer does not think highly of the lawyers in neighboring Jefferson County, which she compares to the “Jerry Springer Show.” She says that in Jefferson County, they get “sidetracked by the drugs or carousing or soap opera of the cases” and the lawyers become part of the drama.¹²³

¹¹⁵ Interview, SL 09.

¹¹⁶ Interview, SL 06.

¹¹⁷ Interview, SL 04.

¹¹⁸ Interview, SL 10.

¹¹⁹ Interview, BC 08.

¹²⁰ Interview, BC 01.

¹²¹ See Interviews, BC 01, BC 03.

¹²² Interview, BC 03.

¹²³ Interview, SL 01.

A Kansas City lawyer has found that lawyers from the East Coast and California have been harder to work with than Midwest lawyers.¹²⁴

It seems likely that there are also distinct practice cultures based on the practice areas such as criminal, family, personal injury, workers compensation, among many others. Although I did not specifically ask lawyers about negotiation norms particular to their practice areas, in recounting cases that they settled, they described procedures that they viewed as normal. For example, criminal cases have a regular flow of interactions based on litigation procedures and local practice norms.¹²⁵ In addition to normal processes that may lead to agreement in particular subject areas, there may be different local “going rates” for resolution of cases with similar fact patterns.

It also seems likely that there are distinct negotiation cultures varying in negotiation approaches such as positional and interest-based negotiation.¹²⁶ This would be consistent with Professors Heumann and Hyman’s theory that lawyers often use an approach out of “habitual social practices.”¹²⁷ This may vary by geographic area and type of case, so that there may be a norm of generally exchanging offers in personal injury cases, focusing on parties’ (and their children’s) interests in some family cases, and applying the normal “going rates” in criminal cases, all of which may vary in particular geographical areas.

Lawyers should also be sensitive to their counterparts’ preferred modes of communication. In the “old days,” lawyers may have communicated primarily in person, by letter, and/or by phone. For example, one lawyer referred to her counterpart in a case as “old school” because he preferred to negotiate in person.¹²⁸ Meetings to negotiate may be scheduled or lawyers may call to see

¹²⁴ Interview, KC 05.

¹²⁵ Interview, BC 11.

¹²⁶ For descriptions of these negotiation models, see *supra* Part III.A.

¹²⁷ See Heumann & Hyman, *supra* note 34, at 295–305, 309 (1997). For example, Professor Pamela Utz found that criminal practice in San Diego was generally adversarial whereas lawyers in Alameda County, California embraced cooperative negotiation. See PAMELA J. UTZ, SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT 41–126 (1978).

¹²⁸ Interview, BC 11. Several lawyers expressed this preference. See Interview, BC 10 (a “big believer in personal contact”); Interview, SL 05 (prefers to handle negotiations face to face if possible because he gets a “much better read how the other side reacts”); Interview, SL 07 (when lawyers meet in person, it is “easier to understand where people are at”). Some negotiation occurs in court, as described by one lawyer who said that she often negotiates in the hallways while waiting for a judicial settlement conference. Interview, SL 01. When asked whether parties participate directly in negotiation sessions, virtually all the lawyers who responded, ex-

if their counterparts are ready to meet right away. For example, one lawyer said that he texts or calls his counterparts to see if they are willing to talk and, if so, he says that “he’ll be right over.”¹²⁹ Many lawyers in this study said that they frequently negotiate by email. One lawyer said that he prefers email because it is quick, protects confidentiality, looks good to clients, and is easy to track.¹³⁰ Another lawyer likes email because it avoids the problem of lawyers missing each other on the phone and it gives him time to think about how he wants to respond.¹³¹ He has noticed that more experienced lawyers often prefer to communicate by phone calls and younger ones prefer letters and emails.¹³² It seems likely that communication preferences will change along with technological developments. For example, it may become common for some lawyers to use video tele-conference technologies or new internet applications. Familiar communication media such as email are constantly changing, and with them, their users’ communication habits and negotiation patterns.¹³³ As new communication technologies emerge, different age cohorts may develop general preferences based on what technologies were popular at particular stages of their lives.

Many lawyers said that they used several communication modes in their cases, which makes sense considering the fact that the litigotiation process often takes months or years. The choice of communication mode at any point in a case is likely to be affected by a combination of factors such as the lawyers’ general preferences about communication modes, the level of trust and cooperation between the lawyers, litigotiation culture of the relevant legal community, point in the history of the case, content of the commu-

cept for lawyers in Collaborative cases, said that they usually meet without the parties, as some noted that this reduces lawyers’ adversarial posturing.

¹²⁹ Interview, BC 10. *See also* Interview, BC 03 (describing a case in which he texted his counterpart and said he would come down to his office to talk).

¹³⁰ Interview, BC 01. *See also* Interview, BC 02 (does an “awful lot” of negotiating by email); Interview, KC 07 (“pretty much all” his negotiation is by email). For an excellent analysis of issues about negotiating by email, *see* Noam Ebner et al., *You’ve Got Agreement: Negotiating via Email*, in *RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE* 89 (Christopher Honeyman et al. eds., 2009).

¹³¹ Interview, BC 07. Some lawyers write letters, which they send by email. One lawyer said that he prefers letters because he can “lay out everything [he] want[s] to say” and is not forced to say something he did not plan to say, which can happen by phone. Interview, KC 02.

¹³² Interview, KC 02. One lawyer said that almost all of his negotiation is by phone. Interview, KC 08.

¹³³ Noam Ebner, *Negotiating via (the New) Email*, in *NEGOTIATION EXCELLENCE: SUCCESSFUL DEAL MAKING* (Michael Benoliel ed., 2d ed. 2014).

nication,¹³⁴ and norms of communication modes for the lawyers' cohorts. For example, one lawyer described a case in which the lawyers met to work out an agreement in principle and then used emails and phone calls to "work out the glitches."¹³⁵ Conversely, another lawyer described a case in which the negotiation started with a letter and concluded with a meeting.¹³⁶ A third lawyer said that she "made a point of documenting everything" in the negotiation of a case because she had not previously worked with her counterpart.¹³⁷

These observations suggest that the process of seeking agreement in pretrial litigation is likely to be affected by numerous aspects of litigation culture. Presumably lawyers who follow norms of the relevant practice community have an easier time in the negotiation process, settle more often, and obtain more moderate settlements (as opposed to settlements with big winners and losers) than lawyers who generally do not do so. This study did not focus on these hypotheses, but they are plausible working assumptions for lawyers who want to negotiate effectively.

C. *Develop Good Relationships with Counterpart Lawyers*

One of the most effective things that lawyers can do to promote their clients' interests is to develop a good relationship with their counterpart lawyers.¹³⁸ Some lawyers take the initiative to develop a good relationship with their counterparts at the start of a case, ideally in a face-to-face conversation.¹³⁹ One lawyer said that he generally calls the other lawyers to get to know them at the outset of a case, even if he is not thinking about negotiation.¹⁴⁰ Another lawyer said that he usually tries to build a relationship with his counterparts, often just by "pick[ing] up the phone" and calling them.¹⁴¹ Going out to lunch can be a good way for lawyers

¹³⁴ Negotiation communications may include facts, law, interests, positions, offers, threats, key issues, details, or confirmation of agreements, among other things.

¹³⁵ Interview, BC 03.

¹³⁶ Interview, KC 04.

¹³⁷ Interview, SL 01.

¹³⁸ See LANDE, *supra* note 20, at 48 ("If you have a good relationship, you are more likely to be able to exchange information informally, readily agree on procedural matters, take reasonable negotiation positions that recognize both parties' legitimate expectations, resolve matters efficiently, satisfy your clients, and enjoy your work.").

¹³⁹ See Interviews, BC 05, 08.

¹⁴⁰ Interview, KC 02.

¹⁴¹ Interview, SL 09.

to learn about each other's backgrounds, practices, and shared interests, among other things.¹⁴²

Lawyers in this study repeatedly emphasized that if counterpart lawyers have a good relationship, the lawyers are more likely to take actions leading to better results for clients. For example, one lawyer said that having a good relationship enables lawyers to give honest assessments, trust the others' statements, and take more risks.¹⁴³ Several lawyers emphasized the importance of discussing one's perspective¹⁴⁴ and asking about the counterparts' motivations and expectations.¹⁴⁵ If counterparts have a good relationship, they are more likely to call each other, know where each is "coming from," want to work out the case, and understand what is and is not possible.¹⁴⁶ One lawyer said that lawyers are more effective in negotiation if they have good rapport with their counterparts and that without such rapport, the litigation cost "goes up tenfold."¹⁴⁷

One lawyer said that sometimes it is "tricky" to decide what to reveal to the counterpart.¹⁴⁸ With a good relationship, it is easier to trust that the counterpart will not take advantage.¹⁴⁹ Similarly, another lawyer said that it is easy to fall into an adversarial mindset but if she has a good relationship with her counterpart, she can speak frankly without worrying that it will "come back to bite" her.¹⁵⁰ She said that when she has a good relationship with her counterpart, she can say, "I don't have authority for this, but do you think if we did X, would your client accept it?"¹⁵¹ Similarly, another lawyer described a case in which he trusted his counterparts and they agreed that they "needed to get clients to point A," which would achieve a "bigger goal: peace."¹⁵² Because he trusted his counterparts, he offered, "If you get your clients to do this, I

¹⁴² See LANDE, *supra* note 20, at 50–51; Chris Guthrie, *Principles of Influence in Negotiation*, 87 MARQ. L. REV. 829, 831 (2004) (summarizing research finding that people are inclined to accommodate people who they know and with whom they share something in common, and that "lawyers who litigated against each other frequently were more likely than others to settle their cases and to do so more quickly").

¹⁴³ Interview, SL 11.

¹⁴⁴ Interview, BC 08.

¹⁴⁵ Interviews, KC 01, 04.

¹⁴⁶ Interview, BC 09.

¹⁴⁷ Interview, KC 05. Obviously, this statement is a hyperbole, but it makes the point.

¹⁴⁸ Interview, BC 07.

¹⁴⁹ *Id.*

¹⁵⁰ Interview, SL 12.

¹⁵¹ *Id.*

¹⁵² Interview, SL 08.

will try to get my clients to do this.”¹⁵³ Another lawyer described a similar experience of working with her counterpart to focus on the parties’ goals and needs, which “made such a difference” in helping them feel safe and secure as they dealt with difficult issues.¹⁵⁴ One lawyer (X) described a case where his counterpart (Y) had a difficult client. Y explained the situation at the outset and, later in the case, suggested that X limit a discovery request as a sign of good faith to prompt Y’s client to be more cooperative in return.¹⁵⁵ In addition, having a good relationship can help lawyers deal with problems more effectively. One lawyer emphasized the importance of having candid conversations with counterparts when things go badly to get things back on track.¹⁵⁶

Being honest and taking reasonable positions makes it possible to have a good relationship.¹⁵⁷ Just because lawyers work in an adversarial system, they do not have to be adversarial with each other.¹⁵⁸ A criminal defense lawyer said that the prosecutors in his area know that he does not exaggerate or say things he can not “back up” and so they are more likely to agree to his requests.¹⁵⁹ Another lawyer said that it helps to initiate conversations where lawyers are not yelling or accusing the other side of wrongdoing.¹⁶⁰ Lawyers are advised to let the facts speak for themselves and avoid exaggeration, finger pointing, or emotionalism. One can discuss liability without accusing the other party of being a “horrible” person.¹⁶¹

Having a bad relationship can cause problems for lawyers and the parties, possibly making the case one’s “own private hell.”¹⁶² One lawyer described a case where he previously had a confrontational relationship with his counterpart, which carried over into the latest case in which they had unproductive discussions and fought

¹⁵³ *Id.*

¹⁵⁴ Interview, SL 10.

¹⁵⁵ Interview, KC 07.

¹⁵⁶ *See* Interview, SL 11.

¹⁵⁷ *See* Interview, BC 08.

¹⁵⁸ *Id.*

¹⁵⁹ Interview, BC 10.

¹⁶⁰ Interview, SL 09.

¹⁶¹ Interview, BC 04.

¹⁶² Relying on interviews with lawyers, I wrote:

[I]f you have a bad relationship with opposing counsel, a case can become your own private hell. Your counterpart may decline to grant routine professional courtesies (such as extensions of deadlines to file court papers), bombard you with excessive and unjustified discovery requests, file frivolous motions, make outrageous negotiation demands, yell and scream at you, and generally behave badly.

LANDE, *supra* note 20, at 48.

“over everything.”¹⁶³ When lawyers do not have a good relationship, they have to be more guarded¹⁶⁴ and may communicate only in writing and document every conversation.¹⁶⁵ This obviously increases the cost and reduces opportunities for open communication that could lead to agreements. A family lawyer is very conscious of the effect of the lawyers’ relationship on the parties. She said that if lawyers engage in a “warlike negotiation,” they may get some short-run gains but also may cause a lot of damage that can last a long time.¹⁶⁶ She said that the parties may forget the details they were fighting over but they will remember the wounds, how bitter they felt, and how long it lasted.¹⁶⁷

Lawyers can take the initiative to improve relationships. A prosecutor said that when one public defender started working in her area, they “didn’t have the best relationship” but they now have a very good working relationship.¹⁶⁸ She suggested that he talk with other defense counsel who had worked with her and, as a result, the prosecutor’s working relationship with the public defender has been much better ever since then.¹⁶⁹

Of course, it is not always possible to develop good relationships and trust counterparts. “Some lawyers or clients are completely selfish, have no concern for others, are not open to evidence or reason, and may actually enjoy conflict and inflicting suffering on others.”¹⁷⁰ Lawyers may worry that their counterparts have such motivations, though these situations probably are less common than many people think. It is usually worth trying to develop good relationships and if the counterparts rebuff the effort, this is an important signal that can prompt lawyers to be appropriately vigilant.¹⁷¹

¹⁶³ Interview, SL 03.

¹⁶⁴ Interview, SL 11.

¹⁶⁵ Interview, SL 01, SL 12.

¹⁶⁶ Interview, SL 10.

¹⁶⁷ *Id.*

¹⁶⁸ Interview, BC 08.

¹⁶⁹ *Id.*

¹⁷⁰ Lande, *supra* note 1, at 118.

¹⁷¹ *Id.* at 119.

D. *Identify Key Issues, Investigate the Facts, and Exchange Information Efficiently*

To negotiate effectively, lawyers should identify the key issues and get the information necessary to evaluate the case.¹⁷² Lawyers need to figure out where the suit is going, know the facts, understand the procedure and the law, and estimate how long the suit will take.¹⁷³ Half of the lawyers in this study explicitly gave similar advice¹⁷⁴ and presumably all of the others would agree. The fact that so many lawyers independently offered this advice highlights how important it is.

Lawyers should consider the likelihood of settlement or trial in all of their cases. One lawyer said that if cases are going to settle eventually, it is generally better to settle them sooner than later.¹⁷⁵ Of course, lawyers' perceptions of both sides' ability to be persuasive at trial are likely to affect the relative bargaining power and favorability of the ultimate settlements.¹⁷⁶ So it is important for lawyers to be ready to try cases if needed. The appropriate amount of preparation depends on several factors such as the amount at stake, the likelihood of actually going to trial, what is necessary to convince the other side that one has a good chance of winning, and how the other side perceives its procedural and substantive interests.¹⁷⁷ In cases that are likely to settle, lawyers should find the right balance between under-preparation and over-preparation.

To prepare, lawyers need to figure out the strengths and weaknesses of their cases, what issues are disputed, as well as the tasks and costs involved in pursuing litigation.¹⁷⁸ Lawyers need to do less investigation if the facts or law are clear or undisputed, especially in cases involving relatively simple issues.¹⁷⁹ For example, evaluating cases is easier in simpler cases, such as divorces where there are no children, the spouses can support themselves, and the marital estates do not include complex assets.¹⁸⁰ It may be particularly appropriate to negotiate early in tort or civil rights cases if

¹⁷² See Interviews, BC 10, BC 11.

¹⁷³ Interview, SL 08.

¹⁷⁴ Interviews, BC 01, BC 02, BC 03, BC 05, BC 08, BC 10, KC 04, KC 08, KC 09, SL 01, SL 02, SL 05, SL 06, SL 07, SL 08, SL 12.

¹⁷⁵ Interview, KC 02.

¹⁷⁶ See Interview, SL 09.

¹⁷⁷ See Interview, BC 07.

¹⁷⁸ See Interviews, BC 03, KC 08, KC 09.

¹⁷⁹ See Interviews, BC 10, KC 01, SL 03, SL 06.

¹⁸⁰ Interview, BC 02.

there is little doubt about liability and the parties will negotiate only about damages.¹⁸¹ Parties may also be ready to negotiate early if they have collected and exchanged information necessary to evaluate the cases and make settlement decisions. For example, in cases involving medical conditions, if the parties have gathered the essential medical information fairly quickly, they may be ready to negotiate early.¹⁸² If lawyers have an “overwhelming piece of evidence,” they may tell the other side, “Lookee what I’ve got! I’ve got four aces. I’m going to show them to you. We can do discovery all year around, but you’re not going to get around that.”¹⁸³

Doing careful investigation is especially important when the cases are “not black and white,” with evidence supporting both sides.¹⁸⁴ In such cases, it can “take a while to figure where the scale begins to tip.”¹⁸⁵ Some issues require substantial investigation before lawyers can make confident judgments. For example, in cases where the value of a business is an issue, lawyers should get valuations before being willing to negotiate.¹⁸⁶ Similarly, a trust lawyer said that it may be necessary to take a number of depositions when a person’s capacity is at issue.¹⁸⁷

While learning the legally-relevant facts, lawyers should also remember to learn the parties’ perspectives and reasons for their decision-making.¹⁸⁸ Although parties normally consider the possible legal outcomes, they often have other interests than merely winning in court or maximizing their individual outcomes, as described above.¹⁸⁹ One lawyer notes that “everyone comes in with [his or her own] truth” and she advises lawyers to see their cases through their clients’ eyes.¹⁹⁰ Since parties can settle only if both parties agree, it is important for lawyers to understand the world through the *other side’s eyes* as well their clients’.¹⁹¹

One’s counterparts normally will not negotiate seriously until they can reasonably evaluate their cases.¹⁹² As one lawyer put it,

¹⁸¹ Interview, KC 01.

¹⁸² Interview, SL 02.

¹⁸³ Interview, SL 09.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Interviews, BC 01, KC 04.

¹⁸⁷ Interview, SL 08.

¹⁸⁸ *See* Interviews, SL 01, 07.

¹⁸⁹ *See supra* Part IV.A.

¹⁹⁰ Interview, SL 01.

¹⁹¹ *See* Interview, KC 01.

¹⁹² *See* Interview, KC 06.

“people can’t negotiate until the cards are on the table.”¹⁹³ Therefore lawyers should efficiently share information so that both sides are prepared to negotiate. A plaintiff’s lawyer suggested providing a thorough brief along with the initial demand letter because defense counsel often are particularly concerned about the law and procedural issues like venue.¹⁹⁴ On the other hand, if lawyers have a good working relationship, they are more likely to be able to exchange information efficiently, offering insights that would help both sides understand each other and what settlements are possible.¹⁹⁵ This probably explains why many lawyers begin serious negotiation before they have completed all the discovery that would be needed for trial.¹⁹⁶

Experienced lawyers know that their perspectives about their cases may change during the litigation for various reasons. This may be due to such things as the development of a new issue, the outcome of a motion, the inability to find a witness, or witnesses who have changed their story.¹⁹⁷ One lawyer advised negotiating early in a case unless something unexpected happens or is foreseeable, such as a change in the plaintiff’s medical conditions.¹⁹⁸

E. *Make Strategic Decisions About Timing of Negotiation*

Lawyers generally have control over whether and when they negotiate cases in pretrial litigation.¹⁹⁹ Lawyers in this study believe that it is often wise to negotiate relatively early in their cases, as noted above.²⁰⁰ This part illustrates some factors that might prompt lawyers to initiate negotiation sooner or later in particular cases.

Parties with strong bargaining positions may want to press their advantage in early negotiations. For example, a trust lawyer said that if he has a strong case against trustees, he may threaten to

¹⁹³ Interview, SL 12.

¹⁹⁴ Interview, KC 01.

¹⁹⁵ See *supra* Part IV.C.

¹⁹⁶ See *supra* Part III.B.

¹⁹⁷ Interviews, BC 08, SL 05.

¹⁹⁸ Interview, SL 02.

¹⁹⁹ This is not always true as some courts require or strongly encourage parties to negotiate early in a case. See, e.g., U.S. District Court for the Western District of Missouri, Mediation and Assessment Program, available at <http://www.mow.uscourts.gov/district/map.html> (requiring mediation within seventy-five days after the Rule 26 meeting).

²⁰⁰ See *supra* Part III.B.

petition the court to make the trustees pay their own legal expenses instead of having the trust pay them. He said, “If they think they can spend lots of other people’s money, nuke ‘em.”²⁰¹ This maneuver might cause the trustees to engage in serious negotiations and make substantial concessions sooner than they otherwise would. Some parties with weak positions may also believe that it is in their interest to negotiate early. If lawyers have information that would damage their cases that their counterparts do not yet know, early negotiation may prevent the counterparts from learning the information.²⁰² More generally, one defense counsel said that early negotiation is appropriate in “clear slam-dunk cases,” even mass cases involving high trauma and liability in the “six figures.”²⁰³ He said that it is important to “get everyone on the same page” early, including the defendant.²⁰⁴ In cases like this, he would say to the plaintiff’s counsel, “I know that these injuries are severe. When can we start negotiating?”²⁰⁵ Of course, lawyers should not seem desperate to settle (for example, by calling to ask for a response to an offer) because this could reduce their bargaining power.²⁰⁶

Insurance defense lawyers should consider potential liability for bad faith refusal to pay legitimate claims. To avoid bad-faith liability, it is important to evaluate cases promptly and, if there is clear liability, take appropriate action.²⁰⁷

Sometimes criminal defendants negotiate early to get the best possible deal, arguing that prosecutors can save resources by resolving the cases before investing much time in them.²⁰⁸ Indeed, prosecutors often are sensitive to resource constraints, particularly their limited amount of time, and do not want to use unnecessary procedures or waste people’s time.²⁰⁹ To save prosecutorial and judicial resources, prosecutors may make a favorable early offer with a relatively short deadline.²¹⁰ If defendants have information

²⁰¹ Interview, SL 09.

²⁰² Interviews, BC 04, SL 07.

²⁰³ Interview, SL 06.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Interview, SL 05.

²⁰⁷ Interview, BC 05.

²⁰⁸ Interview, BC 08.

²⁰⁹ Interview, BC 09.

²¹⁰ Interview, BC 08.

that prosecutors want to help them prosecute other cases, there may be a mutual interest in negotiating early.²¹¹

Some criminal defense counsel may try to negotiate before their clients are charged in the hope of influencing what the prosecutors will decide to charge or even to persuade them not to prosecute at all.²¹² Sometimes when defendants are in jail and they cannot post bond, they may want to negotiate earlier to get out of jail sooner.²¹³ On the other hand, some defendants know that they are going to prison and want to start serving their sentences so that they can get out earlier.²¹⁴ If there are parole matters pending against defendants, they may want to resolve new charges at the same time in hopes of getting a better deal by negotiating all the matters at once.²¹⁵

Criminal defense lawyers should also consider if there are actions that they or their clients should take early in a case to improve the settlement prospects. If there are co-defendants, the lawyers' clients may benefit if they are the first to turn against the other defendants.²¹⁶ If defendants are charged with driving while impaired, their lawyers should promptly discuss with the clients the possibility of starting a treatment program, which is likely to improve the prosecutors' attitudes in negotiation.²¹⁷

Lawyers in this study noted that it may not be advantageous to negotiate early in some cases. For example, if one has a strong case but the counterparts do not recognize the problems with their cases, it may take some time for this to "sink in."²¹⁸ Of course, lawyers could emphasize the problems in negotiation but this may not be as effective as waiting for the counterparts to recognize their problems on their own. Some parties, such as some government agencies, may have a general practice of not negotiating early and thus lawyers may decide that it is "not worth the paper" to initiate negotiation and make an offer.²¹⁹ In bad check cases, defendants may want to delay negotiation while they are trying to pay off the checks in the hopes of getting a better deal with the prosecutor.²²⁰

²¹¹ Interview, SL 07.

²¹² Interviews, BC 09, BC 10.

²¹³ Interview, BC 09.

²¹⁴ Interview, SL 07.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Interview, BC 07.

²¹⁸ Interview, BC 04.

²¹⁹ *Id.*

²²⁰ Interview, BC 09.

More generally, delaying negotiation can give some criminal defendants “time to get their lives on track,” which may provide a strategic advantage in the case or simply provide more time for the defendants to enjoy life (assuming that they are not incarcerated pending trial).²²¹

Some lawyers do not want to negotiate before completion of discovery because they fear that it would make them appear weak and result in a less favorable agreement.²²² One lawyer deals with claims that his invitation to negotiate is a sign of weakness by indicating that he is quite willing to fight in court if needed. He said, “It is pretty well known that I can take this the whole way. If there is an angle, I will use it. I don’t want you to think I am soft here. I know the rules and where the court is. If nothing comes of [negotiation], I am prepared to fight in court.”²²³ Along the same line, retired Judge Robert Alsdorf says, “Being willing to negotiate doesn’t make you look weak. Being *afraid* to negotiate makes you look weak.”²²⁴ Thus, despite the common fear of suggesting early negotiation, lawyers can negotiate successfully if they take control of their cases as described in this article.

F. *Enlist Mediators’ and Courts’ Help When Appropriate*

Several lawyers said that mediators and settlement judges can be very helpful in addressing particular problems in negotiation. They may be especially helpful when the parties take extreme positions and need help to close a large “gap” between their positions. For example, a defense counsel in civil cases is quite willing to mediate most cases and he finds mediation especially useful when plaintiffs need a third party to tell them that they have unrealistic expectations. He said that within a half a day, lawyers generally can tell if the process is working.²²⁵ On the plaintiff’s side, a lawyer who specializes in employment discrimination uses mediation in virtually all of her cases. She said that her biggest strategic decision is who will be the mediator. Her favorite mediator is sensitive to both employees’ and employers interests’ but he is very much in

²²¹ Interview, BC 07.

²²² Interview, KC 01.

²²³ Interview, SL 09.

²²⁴ E-mail from Robert H. Alsdorf, retired Washington state superior court judge, to author (May 7, 2012) (on file with author).

²²⁵ Interview, BC 05.

demand and charges higher rates than other mediators who charge less but “just want to exchange numbers.”²²⁶ A family lawyer sometimes recommends mediation if the parties need a “cathartic event.”²²⁷

Several lawyers said that judicial settlement conferences were helpful in breaking stalemates in negotiation. One lawyer said that settlement conferences prompt lawyers to organize their thoughts, which can prepare them to negotiate seriously.²²⁸ A lawyer described a bitter divorce case in which the settlement conference judge said that a father should get counseling and he agreed as a result of the judge’s recommendation.²²⁹ Similarly, in a workers’ compensation case, the judge gave a recommendation that seemed to affect the negotiation, where the parties’ positions were initially quite far apart and the parties eventually settled on an amount close to the judge’s recommendation.²³⁰ In a divorce case involving a dispute over whether royalty income from the husband’s work would be considered as marital property, a settlement conference judge gave his recommendation and, after relatively little discussion, the parties agreed to a figure close to the recommendation.²³¹

V. NEGOTIATE BETTER AGREEMENTS

Everyone wants to get the best possible agreement. But what is a good—or better—agreement? This depends on the negotiators’ goals, which vary as described above.²³² If lawyers clearly understand their clients’ goals (and the lawyers’ own goals, which may differ from the clients’ goals to some extent), they are in a better position to develop and implement an effective strategy to achieve those goals. Negotiators use a wide range of techniques and it is beyond the scope of this article to review a long list of techniques.²³³ Instead, this article highlights two related strategies that can be used regardless of any general approach that negotia-

²²⁶ Interview, KC 01.

²²⁷ Interview, BC 02.

²²⁸ *Id.*

²²⁹ Interview, SL 01.

²³⁰ Interview, SL 02.

²³¹ Interview, BC 02.

²³² See *supra* Part III.A.

²³³ For a catalogue of adversarial techniques, see CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 131–45 (7th ed. 2012). For a guide on interest-based techniques, see FISHER & URY, *supra* note 1, at 40–94.

tors use: (1) lawyers should try to develop good relationships with their counterparts, and (2) lawyers should try to “create” value in negotiation.

Although many lawyers do not think about developing good relationships with counterparts as a valuable approach to litigation or negotiation, the lawyers in this study identified numerous benefits. As noted above, they repeatedly emphasized that if counterpart lawyers have a good relationship, they are more open to discussion, communicate more easily, trust each other more, are more candid, and take more reasonable positions, which obviously can make it easier to reach agreement and to save clients’ time and money.²³⁴

Developing or taking advantage of good relationships seems obviously appropriate when the negotiators focus on shared interests or sincere analysis of legal norms. Developing good relationships with counterparts may seem paradoxical, however, in cases where the parties start by taking extreme positions because people often associate this with harsh adversarial tactics such as deception, manipulation, threats, and insults.²³⁵ Although lawyers in this study described some such cases, more often, they described cases in which the lawyers maintained good professional relationships while exchanging a series of offers to close a large initial gap.²³⁶ Using a hostile approach is risky as it is likely to provoke resistance and escalation of conflict. Sometimes lawyers can get good results by using hostile adversarial tactics, but this may damage the lawyers’ reputations and prompt other lawyers to take hostile countermeasures in future cases. Professor Charles Craver describes what he calls a “competitive/problem-solving” approach in which he argues that negotiators get favorable results for themselves in a process in which they act in a congenial manner.²³⁷

Professor Craver’s observation has two implications about the effect of good relationships on negotiation. First, it suggests that negotiators can promote their self-interest by acting friendly rather than using hostile adversarial tactics. Second, lawyers may be able to defend against this approach by developing good relationships with their counterparts. Lawyers who know their counterparts are

²³⁴ See *supra* Part IV.C.

²³⁵ See Lande, *supra* note 14.

²³⁶ See *id.*

²³⁷ See CRAVER, *supra* note 233, at 15–18 (negotiators treat their counterparts fairly and respectfully as part of a strategy to gain favorable results for themselves, though not so extreme as to provoke a backlash from their counterparts).

more likely to accurately “read” the counterparts’ actions accurately and may be less likely to be deceived by their counterparts’ friendly manner.²³⁸ If the lawyers have a good relationship, it may be easier to raise questions about the intent or effect of the counterparts’ suggestions. Moreover, lawyers who have good relationships with their counterparts may be less likely to use deceptive tactics because they value their relationships and may worry about their reputations.

Having good relationships can help lawyers “create” value in negotiation. Considering that many litigants go to trial when they would have been better off by accepting their counterpart’s last offer,²³⁹ just reaching an agreement typically creates value for the parties considering the saved litigation costs as well as reduced risks, increased time to attend to other matters, and increased peace of mind. Having a good relationship may enable lawyers to settle some cases that they would not be able to settle with a typical arms-length relationship. This may be particularly valuable in cases where the parties’ positions are far apart and they are struggling in negotiation.

Without a good relationship, the opposing sides are likely to exchange recriminations of “bad faith” leading to an escalation of the conflict, slamming briefcases, and stormy exits from negotiation (assuming that they attempt to negotiate at all). With a good relationship, the lawyers are more likely to listen respectfully to each other and work together to resolve the differences.²⁴⁰

More generally, negotiators create value when they exchange things that one party values more than the other.²⁴¹ For example, a lawyer described a contract dispute over pricing in a long-term supply contract which the parties settled by agreeing to a price increase less than the seller wanted and an increased volume of sales in the future. The seller valued the commitment to increased sales more than the buyer did and the buyer valued the price reduction

²³⁸ Professor Art Hinshaw and his colleagues recommend that, as a technique to counter lying in negotiation, lawyers develop relationships with their counterparts and look for signs of deception. Art Hinshaw, Peter Reilly & Andrea Kupfer Schneider, *Attorneys and Negotiation Ethics: A Material Misunderstanding?*, 29 *NEG. J.* 265, 281 (2013) (citing research finding that people often cannot detect lying in negotiation but a reliable indication of lying is a change of behavior).

²³⁹ See *supra* note 2.

²⁴⁰ Lande, *supra* note 1, at 119.

²⁴¹ See Lande, *supra* note 14. There are limits to the amount of value that can be created and at some point, negotiators normally have to “distribute” value between them, which they will presumably do based on their goals in the negotiation process.

more than the seller did.²⁴² So both sides were better off than if they agreed on a payment without the commitment for increased sales. Although the parties negotiated by exchanging a series of zero-sum pricing offers, they were also able to create value by adding the provision increasing the purchase commitment.

The big challenge in creating value is that parties normally do not disclose their interests to their counterparts because they fear the counterparts would take advantage of the information. Consider a plaintiff in a personal injury case who wants to receive a recovery soon because she plans to move to another area and begin a new career.²⁴³ Because of the immediacy of her needs, she is willing to accept a smaller settlement than she presumably would get if she waited longer. If she discloses her interest to her counterpart, he may substantially reduce the amount he might otherwise offer to extract the maximum advantage of this disclosure. Negotiators generally are willing to make such candid disclosures only if they trust that the other side will not take unfair advantage.

Thus having a good relationship between lawyers may encourage them to exchange sensitive information enabling them to create value with less fear of exploitation. Regardless of how much value they create, however, it still needs to be divided between the parties. Having a good relationship can also ease that process by promoting more reasonable discussion with less fear of exploitation.

VI. CONCLUSION

Lawyers should expedite better and more economical agreements by developing litigotiation strategies, recognizing that litigation and negotiation generally “are inseparably entwined.”²⁴⁴ Just as lawyers create value by developing expertise in litigation, they should do the same with *litigotiation*. This involves developing conscious plans about goals and timing of the process, taking control from the outset, managing the process effectively, generally trying to develop good relationships with counterparts, and looking for opportunities to create value in negotiation.

²⁴² Interview, SL 05. For additional examples of negotiators creating value in cases involving exchanges of zero-sum offers, see Lande, *supra* note 14.

²⁴³ See Interview, BC 04.

²⁴⁴ Galanter, *supra* note 8, at 269. For definition and discussion of litigotiation, see *supra* Part I.

Litigation requires coordination with and, ideally, cooperation from counterparts. Clients and the public benefit when the legal culture supports efficiency and cooperation and discourages lawyers from being dilatory and unreasonable. Law firms, bar associations, courts, legal publications, continuing education programs, and clients should reinforce these messages so that lawyers are more likely to encounter counterparts who want to get to yes sooner, cheaper, and better.

Law schools should make an important contribution to this effort. Courses dealing with pretrial litigation should teach students that the focus of pretrial strategy normally should be to produce the most favorable possible settlement (however that is defined). Faculty should emphasize that when lawyers interview clients, pursue discovery, and contest motions, they should do so with an eye to how these actions might help them in the eventual negotiations. Of course, lawyers normally do prepare for the possibility of trial, though often that is just a feint to gain bargaining power in the litigation process. Thus, when discussing procedural issues, faculty teaching about pretrial practice should devote a significant amount of time considering how litigation tactics might affect the negotiation posture as well as the potential impact at trial.

Law schools should consider supplementing traditional courses focusing on pretrial litigation by focusing particularly on strategic case evaluation and management. Schools might offer this as a new elective course and/or incorporate material to supplement existing courses. A stand-alone course might cover topics such as: (1) conducting initial client interviews, (2) developing and refining a legal theory of the case, (3) developing an investigative strategy including a discovery plan, (4) developing a good working relationship with counterpart lawyers, (5) using experts as consultants and/or witnesses, (6) evaluating likely court outcomes, (7) developing a goal and strategy for possible negotiation, and (8) using mediators, arbitrators, or courts to advance clients' strategic goals.

Negotiation courses should also instruct students that negotiation and litigation are closely intertwined. Faculty should emphasize that the key dynamics of negotiation for lawyers in pretrial cases normally begin at the outset of a case, not right before the final negotiation. Just as courses focusing on pretrial litigation should instruct students that litigation strategy is often designed to prepare for negotiation, negotiation courses should teach students

to consider how the pretrial litigation dynamics affect the final negotiation.²⁴⁵

The lawyers interviewed for this article generally have a good understanding of these dynamics. This is not surprising considering they were selected because of their good reputations. If more lawyers develop their skills and perspectives in litigation, it would raise the level of practice for the benefit of clients and society.

²⁴⁵ For similar curricular suggestions about teaching law school civil procedure and ADR courses, see Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 *NOTRE DAME L. REV.* 681, 700–22 (2005).