

Worlds of Deals: Using Negotiation to Teach about Legal Process

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The title of this Workshop on Negotiation/Alternative Dispute Resolution strikes me as revealing something about the tacit picture of the legal world which permeates American legal education. It links negotiation with alternatives and implicitly juxtaposes them to something unspecified. Alternatives, we may ask, to what? To adjudication, to courts. Even while affirming that negotiation is important, the title reflects the view that negotiation (and mediation and so forth) occupy the outer edges of the legal realm—they are peripheral to the real thing, adjudication in courts; they are soft as opposed to the hard core of legal doctrine. Negotiation is something apart from the real law that occupies legal educators.

This picture is misleading in several ways. It implies that negotiation (and other so-called alternatives) are infrequent, new, unproven, marginal. But the gravitation to the mediative posture by judges and other decision makers armed with arbitral powers is surely one of the most typical patterns of disputing on the American scene—as an examination of our courts and administrative agencies will attest. The linking of negotiation to “alternatives” to litigation is misleading in another sense. On the contemporary American legal scene the negotiation of disputes is not an alternative to litigation. It is only a slight exaggeration to say that it *is* litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals that we might call *litigotiation*, that is, the strategic pursuit of a settlement through mobilizing the court process. Full-blown adjudication of the dispute—running the whole course—might be thought of as an infrequently-pursued alternative to the ordinary course of litigotiation. I do not minimize its importance: adjudication remains a compelling presence even when it does not occur.

The courts are central to the litigotiation game because of the “bargaining endowments” they bestow on the parties.¹ What might be done by (or in or

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1. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L.J.* 950-97 (1979); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 *J. of Legal Pluralism* 1-47 (1981).

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near) a court, that is, gives the parties bargaining chips or counters. Bargaining chips derive from the substantive entitlements conferred by legal rules and from the procedural rules that enable these entitlements to be vindicated. But rules are only part of the endowment conferred by the law—the delay, cost, and uncertainty of eliciting a favorable determination also confer bargaining counters on the disputants.² Everything that might affect outcome counts—all the outcome for the party, not just that encompassed by the rules. The ability to impose delay, costs, risk, embarrassment, publicity comes into play along with the rules. Rules are important but they interact with a host of other factors in ways that do not correspond to the neatly separated background and foreground of the law school classroom.

The settlement process is not some marginal, peripheral aspect of legal disputing in America; it is the central core. Something like 90 percent of civil cases are settled (and of course many more disputes are settled before reaching the stage of filing).³ Lawyers spend more time on settlement discussions than on research or on trials and appeals.⁴ Much of the other activity that lawyers engage in is articulated to the settlement process.⁵ Even in the case that departs from the standardized routines of settlement, negotiation and litigation are not separate processes, but are inseparably entwined.⁶ Negotiation, then, is not the law's soft penumbra, but the hard heart of the process. The so-called hard law turns out to be only one (often malleable) set of counters for playing the litigation game.

How is it then that negotiation is put on the "alternative" team? Litigation appears deviant or at least sub-optimal to both the custodians of our courts and to their critics. From the command posts of the courts one observes a tremendous flood of would-be adjudication decomposing into negotiated and mediated settlements. What appears from this vantage as failed adjudication appears to proponents of alternative dispute resolution as failed agreements. Captains of adjudication and champions of alternatives concur that these disputes should be separated from the courts. For if the distinctive work of courts is full-blown adjudication, these cases do not require it and should go to a forum where agreement is openly pursued.

2. Delay, cost, and uncertainty may themselves be the product of rules—a discretionary standard involving the balancing of many factors and requiring detailed proofs, for example, is more costly, time consuming and uncertain in application than a mechanical rule. But cost, delay, and uncertainty also result from such non-rule factors, as, for example, the number and organization of courts and lawyers. The meaning of the endowment bestowed by the law is not fixed and invariable, but depends on the characteristics of the disputants: their preferences, risk-aversiveness, ability to bear cost and delay. A different mix of disputant capabilities may cause a given endowment to take on very different significance.
3. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. Rev. 4, 27 (1983).
4. See David M. Trubek, Joel B. Grossman, William L.F. Felstiner, Herbert M. Kritzer & Austin Sarat, *Civil Litigation Research Project: Final Report, Vol. II, Civil Litigation as the Investment of Lawyer Time: A Preliminary Analysis* 14 (Madison, Wis., 1983).
5. See, for example, Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers about the System of Civil Discovery*, 2 Am. B. Found. Research J. 217-51 (1980).
6. See Gerald M. Stern, *The Buffalo Creek Disaster* (New York, 1977).

Since they do not need to enter the adjudication arena, they do not need a ticket of admission! But from the point of view of the customers, things appear different: it is the coercive, menacing character of the court process that is valued—it is the anvil against which the hammer of negotiation strikes; it is the second hand clapping.

If negotiation is the (largely unexamined) heart of the legal process, a course in negotiation is first of all a place to examine it, and thus to challenge students to reorganize the cognitive map of the legal world implanted by an education centered on the reading of appellate cases. The course should provide an opportunity for students to reconsider the picture of law conveyed by the law school curriculum—challenging the tacit notions of background versus foreground, periphery versus core, hard versus soft, which help to organize that picture. Students sense that the picture of hierarchies of courts developing and applying doctrine in cases adjudicated through appellate courts is a very partial and unrepresentative picture of the legal world. But law school tends to present the other components of the system in fragments and asides; it does not supply the analytical tools (or mnemonic categories) to hold these other aspects in mind and incorporate them into a coherent picture.

A negotiation course provides an occasion for incorporating into our view of the legal world the other factors that interact with doctrine—uncertainty delay, and cost, (and the institutional features that produce them); the structure and culture of law practice; and the goals, capabilities, vulnerabilities, and disparities of parties. The aim is to reorganize what we know in a way that is both more useful for understanding the world of lawyering and more satisfying intellectually.

How does one do this in a negotiations course? My course is confined largely to the negotiation of disputes. I leave out the negotiation of deals per se and stick to negotiation of the kinds of disputes which make up the grist of legal practice. (This is a matter of priority and inclination rather than principle.) I do not confine the course to pure two-party bargaining, since much of the most important legal negotiation involves the participation of third parties (mediators of various sorts, including judges), and I am interested in bringing out the effect of their participation on the process. My course is self-consciously eclectic. I try to expose the students to the world of litigation by various means: simulations, films and videotapes, reports of researchers; accounts by visitors (lawyers, mediators, judges) as well as by analysis of readings (both theoretical and how to do it accounts, including a generous dose of newspaper clippings).

We move through units organized around particular kinds of disputes—personal injury, criminal, family. We begin with automobile accident claims. This is for several reasons. A wonderful book, Ross's *Settled out of Court*,⁷ combines a rich account of the world of settling automobile accident claims with a very clear introduction to negotiation theory. We not only get the theory, but we see how it is embodied and institutionalized in the auto

7. H. Laurence Ross, *Settled out of Court: The Social Process of Insurance Claims Adjustment* (Chicago, 1970).

accident settlement arena. We then move on to look at big-time personal injury litigation—the world of large claims, specialist lawyers, extensive expert testimony, pioneering theories of recovery—found in some medical malpractice, products liability, or disaster cases. Here again I am grateful for a wonderful book, *The Buffalo Creek Disaster* by Gerald Stern.⁸ It tells the story of the preparation and settlement of a complicated tort case on behalf of 600 victims of a flood caused by collapse of a faulty mine dam. This is the plaintiffs lawyer's account of an intense, and ultimately profitable, pro bono effort by a major Washington law firm, involving a massive deployment of legal resources, the development of innovative theories of recovery, strenuous and elegant maneuver—and ultimately a substantial settlement. In the course of a gripping account of the case, it dramatizes the inseparable fusion of preparation for trial and maneuver for settlement. We then move on to units on the negotiation of criminal charges and family disputes. I cover these by readings, videotapes, and presentations by visitors.

I find Bellow and Moulton's *Negotiation*⁹ is very helpful in presenting negotiation theory in a way that is sensitive to the contexts of lawyers' dispute negotiations. It highlights not only the relevance of negotiating theory but the open, indeterminate character of its application. Williams' *Legal Negotiation and Settlement*¹⁰ (and the companion videotapes) supplement this by emphasizing the dimension of negotiating style and provide an opportunity to enhance our observational skills. The Williams' book has the additional and rare attraction that its practical observations are grounded in empirical research findings, establishing a needed linkage between negotiation choices and the real world of litigation in which they take place.

I intersperse several simulations in which students take turns negotiating (and mediating) and observing. These simulations are not exclusively or even primarily intended to inculcate skills, but rather to cultivate understanding—to bring into the foreground otherwise neglected aspects of the legal process. They provide the occasion for internalizing some basic elements of negotiation theory, including such helpful analytical tools as notions of resistance point, settlement range, commitments, and rationalizations, distributive and integrative bargaining. These exercises do not presume to make students expert negotiators any more than the torts course aims to make them personal injury specialists; they are there to provide a sense of the elements, the parameters, the possibilities.

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

8. Stern, *supra* note 6. In addition to the Stern book, we examine the settlement agreement and read excerpts from several other accounts of this litigation.

9. Gary Bellow & Bea Moulton, *The Lawyering Process: Negotiation* (Mineola, N.Y., 1981).

10. Gerald Williams, *Legal Negotiation and Settlement* (St. Paul, Minn., 1983).

negotiators, given identical cases, are asked to record beforehand their estimates, goals, and strategies; student observers record the course of events in each of the (six to twelve) duplicate negotiations. Comparison of the divergences and convergences in the interactions between negotiators with different goals, different expectations and different styles, conveys an immediate sense of variability of the process and the power of various contingencies in shaping the result. It provides an opportunity, unavailable in "real life" settings, to get a comparative and contextual reading of one's own inclinations and responses as a negotiator.

The process is, I believe, more like learning linguistics than learning French. I try to dispel the illusion that the students are learning some universal language. It is important not to give a false idea that negotiation is a set of techniques that, once mastered, can be transported to any setting. Obviously many general notions and specific techniques are helpful in many settings. But the negotiation of criminal charges in Madison, for example, is a very different game than the negotiation of divorce settlements or personal injury cases. It is as important to recognize the differences as to know the uniformities. Negotiation in this view is not a single set of skills, a bag of tricks that you can learn once and for all, but a family of processes that resemble one another but also differ significantly. This family of games is not unfamiliar to us: we have been speaking this language all along. What the course tries to do is to make students reflective about their negotiating, to give them useful markers and mnemonics and analytic tools. It aims to enable them to fit this general negotiation core to the context of a particular bargaining arena.

The movement through a series of subjects reflects this view of the world of negotiation as made up of different bargaining arenas.¹¹ By this I mean some more or less bounded constellation of lawyers (and in some cases other actors such as insurance adjusters or detectives or judges) who interact with one another in connection with the settlement (and occasional adjudication) of particular kinds of cases in a particular locality. They share (more or less) expectations and understandings about procedures, applicable norms, outcomes. In a particular locality there may be a personal injury bargaining arena, a medical malpractice bargaining arena, a family law arena, an

11. The bargaining arena notion draws on and complements several very striking sets of findings in recent studies of the legal process. These include the highly segmented bar portrayed in Heinz and Laumann's study of the Chicago bar; John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (New York and Chicago, 1982). The distinctness of the careers of different types of disputes (and the influence of dispute type on those careers) are displayed in Miller's and Sarat's analysis of disputing in American households (Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 *Law & Soc'y Rev.* 525 [1980-1981]), as is the existence of distinct worlds of discovery in different kinds of law suits (Brazil, *supra* note 5). The bargaining arena notion also comports with observations of patterned variation of "local legal cultures"—the set of norms, understandings, concerns, and priorities shared by communities of legal actors (and their audiences); see Herbert Jacob, *Debtors in Court: The Consumption of Government Services* (Chicago, 1969); James Q. Wilson, *Varieties of Police Behavior: The Management of Law and Order in Eight Communities* (Cambridge, Mass., 1968); James Eisenstein & Herbert Jacob, *Felony Justice: An Organizational Analysis of Criminal Courts* (Boston, 1977); Martin A. Levin, *Urban Politics and the Criminal Courts* (Chicago, 1977).

antitrust arena and so forth. Individual lawyers may participate in one or several; lawyers may be comfortably familiar with a certain arena or find it strange and intimidating. Such arenas may be more or less differentiated and more or less bounded. A lawyer may spend his whole working life in a single arena in which everybody knows everybody, one's reputation in the arena is a prime concern, and everybody knows what every case is worth. (I gather that criminal law in some middle-sized cities approximates this.) Or an arena may be diffuse—one may constantly encounter antagonists who are strangers, with little concern about reputation and little shared knowledge about standards and benchmarks. An arena may deal with cases that are exhaustively researched and investigated, or with cases that are too small to support much investment in generating information.

So, preparing to negotiate involves not only acquiring generalized skills, but learning to read the landscape, to dope out the features of the bargaining arena. It is crucial to know whether you are dealing with people who are concerned to deal with you again, whether deals are standardized here or custom made, and what expectations are shared about the process and outcome.

The program of using negotiation as a platform for intellectual reorganization of the law school experience may appear unattractive or threatening. Negotiation may be readily admitted to the periphery, as a realm of application in which real law encounters various frictions. But to treat it as central strikes some as threatening to de-moralize the law: are we to depict the legal world as an arena of strategic maneuver, in which the norms and values of the law are reduced to rationalizations or at best bargaining counters—and plunge students into a bath of cynicism?

This bleak vision identifies the core of real law (i.e., adjudication in courts) as the locus of whatever realization of value the law admits of; the world of bargains, deals, private ordering, and informal regulation is portrayed as a jungle of expediency and manipulation. But there is reason to believe that this dichotomous image is seriously wrong. That we should not acquiesce in the identification of adjudication with the realization of the values embodied in the law is forcefully demonstrated by Noonan's reconstructions of familiar cases.¹² He shows how our most esteemed courts and judges failed to be responsive to personal needs or social interests when they allow "masks" (i.e., formal classificatory concepts) to conceal the complex human and social realities in the cases before them. Analyzing some well-known contracts cases, Danzig traces the implications of the inevitable shortages of resources, limitations of skill and knowledge, and infirmities in capturing the facts, which attend adjudication even at its best.¹³ He depicts even craftsmanlike and thoughtful judges making decisions that fall far short of either the satisfactory resolution of the controversy at hand or the establishment of viable controls over the area of social life in which it arose.

12. John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (New York, 1976).

13. Richard Danzig, *The Capability Problem in Contract Law: Further Readings on Well-Known Cases* (Mineola, N.Y., 1978).

(The imperfect joinder between adjudication and social setting afflicts not only the hidebound or the unimaginative judge, but also the heirs—even the patron saints—of a more expansive style of judging.)

Furthermore, bargaining may sometimes produce “better” resolutions to disputes than can professionals constrained to apply general rules on the basis of limited knowledge of the dispute.¹⁴ The variability of preferences and of situations, compared to the small number of factors that can be taken into account by formal rules¹⁵ and the loss of meaning in transforming the dispute into professional categories, suggests limits on the desirability of conforming outcomes to the formal legal rules.¹⁶

In a curious reversal of classical legalist view, a benign and cheerful view of bargaining has become the received view of important segments of the legal establishment. This a draft of the proposed Model Rules of Professional Conduct simply observed that “a fairly negotiated settlement generally yields a better conclusion” than litigation.¹⁷ Similar sentiments are frequently expressed by respected judges: “One of the fundamental principles of judicial administration is that in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement.”¹⁸ Others have been more impressed by infirmities of the negotiation process as it is institutionalized in American litigation. Thus Earl Warren worried about the injustice and suffering caused by “inadequate settlements which individuals are frequently forced to accept on account of [delay].”¹⁹

This double vision of the process is nicely articulated by Mnookin and Kornhauser, who conclude their account of “bargaining in the shadow of the law” by portraying “two alternative models” of the bargaining process:

(1) a *Strategic Model* which would characterize the process as ‘a relatively norm-free process centered on the transmutation of underlying bargaining strength into agreement by the exercise of power, horse-trading, threat, and bluff’ and (2) a *Norm-Centered Model* which

14. Cf. Melvin A. Eisenberg, *Private Ordering through Negotiation: Dispute-Settlement and Rulemaking*, 89 Harv. L. Rev. (1976); Mnookin & Kornhauser, *supra* note 1, at 956 ff.; Arnold Enker, *Perspectives on Plea Bargaining*, Task Force Reports: The Courts (Washington, D.C., 1969); John Dunlop, *The Limits of Legal Compulsion*, John Herlings’s Labor Letter, vol. 25, nos. 48-49.
15. Cf. Duncan Kennedy, *Legal Formality*, 2 J. of Legal Stud. 351-98 (1973).
16. The ideal of perfect penetration of official norms is subject to the even more fundamental objection that is a mirage, a chimera. For it attributes to rules propounded in the lofty setting of the legislature or the appellate court a single determinate meaning when “applied” in a host of particular settings. But most authoritative norms are ambiguous; variant readings are possible in any complex system of general rules (Malcolm M. Feeley, *The Concept of Laws in Social Science: A Critique and Notes on an Expanded View*, 10 Law & Soc’y Rev. 500 [1976]). Compare Damaska’s observation that “there is a point beyond which increased complexity of law, especially in loosely ordered normative systems, objectively increases rather than decreases the decisionmaker’s freedom. Contradictory views can plausibly be held, and support found for almost any position.” (Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 Yale L.J. 500 [1975]).
17. A.B.A. Commission on Evaluation of Professional Standards, *Model Rules of Professional Conduct*, Discussion Draft 86 (January 20, 1980).
18. Hubert L. Will, Robert R. Merhige, Jr. & Alvin B. Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1977).
19. Earl R. Warren, *Delay and Congestion in the Federal Courts*, 42 J. Am. Jud. Soc’y 9 (1958).

would characterize the process by elements normally associated with adjudication—parties and then representatives would invoke rules, cite precedents, and engage in reasoned elaboration. Anecdotal observation suggest that each model captures part of the flavor of the process. The parties and their representatives do make appeals to legal and social norms in negotiation; but they frequently threaten and bluff as well.²⁰

I am comfortable with a “mixed” view that justice does not reside entirely in the realm of formal legal processes nor is it entirely absent from the world of bargaining. The question—both for research and practice—is how to locate it and augment it. How much and under what circumstances and at what cost are the values embodied in the law (or elsewhere) implemented in the litigotiation process? One way to pursue these values is through better negotiating. Lurking in many discussions of negotiating style is a sort of negotiation utopia, a method of transcending the “strategic” world of intractably opposed interests to produce an optimal (and, I take it, norm-infused) outcome. Thus Fisher and Ury commend a program of “principled” as opposed to “positional” bargaining;²¹ Nierenberg describes a kind of bargaining that transcends the distinction between aggressive pursuit of self-interest and the cooperative search for the common good.²²

If negotiation can sometimes produce such values, the key question—for both practice and research—is when? Under what conditions does this kind of constructive, problem-solving negotiation take place? This question has two levels. First, in what ways (and how much) does this “good” negotiation depend upon the qualities of the individual negotiators—their skills, preferences, temperament? Second, how much does it depend on the way in which the institutions of negotiation are constructed?

We should not be so captivated by the dispute perspective that we see the world of negotiation as a series of discrete cases. A negotiation course offers an opportunity to step back and examine our negotiation institutions. Law students will not only serve as players in these bargaining arenas, they will also (as legislators, judges, interest-group advocates, and members of bar committees) have a hand in designing and reforming them. Therefore in the final sessions, I take up the systemic problems that attend the litigotiation game—problems of disparities of skill/experience/bargaining power, problems of expense, delay and uncertainty, problems of failure to achieve optimal results. We take up some current proposals for reform of litigation in the light of their potential impact on negotiating in different kinds of cases. For example, we examine the Mahan-Nejelsky structured settlement proposal²³ and the proposal by Rosenberg et al. for a three-stage expedited procedure (quasi-judicial hearing, exchange of formal offers of judgment,

20. Mnookin & Kornhauser, *supra* note 1, at 973. Cf. Eisenberg, *supra* note 14, who has a dualistic vision of dispute negotiation as more norm-infused than adjudication, but of rule negotiation as entirely strategic.

21. Roger Fisher & William Ury, *Getting to YES: Negotiating Agreement without Giving In* (Boston, 1981).

22. Gerald I. Nierenberg, *Fundamentals of Negotiation* 185 ff. (New York, 1973).

23. Ellen Mahan & Paul Nejelski, *Structured Settlement: How to Encourage Early, Good Faith Negotiation among Parties*, A.B.A., Action Commission to Reduce Court Costs and Delay (September 1979 Draft).

trial on the documents).²⁴ We consider the various control devices that might be used to address these problems: the development and enforcement of ethical standards, the elaboration of judicial supervision, certification, malpractice, peer review (audits), and so forth.

Although I am skeptical about many features of these proposals, and about the negotiation utopia, the questions they raise for both action and research are the right questions, questions about the big world of litigation rather than the small world of formal adjudication. These are questions that should be of vital concern in our law schools. And the negotiation course should be the curricular foundation of that concern.

24. Maurice Rosenberg, Peter F. Rient & Thomas D. Rowe, Jr., Expenses: The Roadblock to Justice, 20 *The Judges J.* 16-19, 46-47 (Summer 1981).