

# THE SYNTHESIS OF LEGAL COUNSELING AND NEGOTIATION MODELS: PRESERVING CLIENT-CENTERED ADVOCACY IN THE NEGOTIATION CONTEXT

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## INTRODUCTION

In early studies of the lawyering process, scholars generally considered each aspect of lawyering, such as negotiation or counseling, separately. Negotiation and counseling were treated in distinct texts,<sup>1</sup> or at least in different chapters,<sup>2</sup> with little cross-referencing and without consideration

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1. See generally D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1972) (interviewing and counseling processes); H. EDWARDS & J. WHITE, *PROBLEMS, READINGS AND MATERIALS ON THE LAWYER AS A NEGOTIATOR* (1977) (devoted exclusively to the study of legal negotiation); G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983) (legal negotiation). But see generally G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978) (combining elements of lawyer-client interviewing and counseling skills with the negotiation process).

2. G. BELLOW & B. MOULTON, *supra* note 1, at 430-606, 966-1104; H. FREEMAN & H. WEIHOFFEN, *CLINICAL LAW TRAINING: INTERVIEWING AND COUNSELING, TEXT AND CASES* 88-114, 116-40 (1972); M. MELTSNER & P. SCHRAG, *PUBLIC INTEREST ADVOCACY, MATERIALS FOR CLINICAL LEGAL EDUCATION* 145-58, 231-40 (1983). Chapter Five of Bellow and Moulton's text entitled *Negotiation: The Search for Compromise*, outlines the phases and skills of the negotiating process with no reference to counseling. G. BELLOW & B. MOULTON, *supra* note 1, at 430-606. Similarly, the authors describe counseling in Chapter Eight without referring to negotiation. *Id.* at 966-1104. Professors Freeman and Weihofen likewise treat these practicing skills in separate chapters, although they note in the introduction

of how one process affected the other.<sup>3</sup> This bifurcation of the study of legal counseling and legal negotiation has led to oversimplification, and misleading analysis, of both lawyering processes.

Section I of this Article outlines the currently accepted "models" <sup>4</sup> for legal counseling and legal negotiation, models that consider each lawyering process in isolation from other aspects of lawyering.<sup>5</sup> Part A describes the current model of client counseling. This model implicitly assumes that client counseling occurs fleetingly prior to negotiations and more extensively after negotiations, but does not con-

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to the negotiation chapter the similarity in the skills necessary for both negotiation and counseling. H. FREEMAN & H. WEIHOFEN, *supra*, at 116.

3. Scholars in many fields often divide interrelated parts of a complex process into discrete segments to simplify their analysis and explore the segments in greater detail. See J. BRUNER, *BEYOND THE INFORMATION GIVEN: STUDIES IN THE PSYCHOLOGY OF KNOWING* 397-479 (1973). Dr. Jerome Bruner, in his studies of the psychology of human cognition, hypothesizes that any child can be taught any subject at any age if the knowledge is broken down into appropriate components. *Id.* at 412-14. By this process of classification, all concepts can be reduced to concrete, fundamental units which are easily learned and understood. *Id.* at 417. This classification process, however, may obscure the interrelationships among the parts of the whole, thus distorting the analysis of both the comprehensive process and its component parts.

4. Professors Gary Bellow and Bea Moulton, founders of the modern study of lawyering processes, begin their discussion of negotiation by presenting "a model—a set of simplifying assumptions to help you better understand an area of lawyer work." G. BELLOW & B. MOULTON, *supra* note 1, at vi. Similarly, Professors David Binder and Susan Price expressly acknowledge that this "intention is to provide general models which can be used [by a student] as a foundation for learning to become an effective interviewer and counselor." D. BINDER & S. PRICE, *supra* note 1, at vi.

Other clinical educators also use models to describe effective interviewing and counseling techniques, see, e.g., D. BINDER & S. PRICE, *supra* note 1, and effective negotiation techniques, see, e.g., G. BELLOW & B. MOULTON, *supra* note 1, at 479-586; R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENTS WITHOUT GIVING IN* (1981).

Models can be either descriptive or prescriptive. Descriptive models illuminate how lawyering processes have been observed to take place. See, e.g., P. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE* at xvi (1979) ("general models" used to demonstrate "common patterns of behavior and interaction among negotiators") *Id.* at 81-207 ("Processual Model Of Negotiation"); R. WALTON & R. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM* 13-57 (1965) (distributive bargaining model); *id.* at 126-43 (integrative bargaining model); G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 70-85 (1983) (stages of the legal negotiation process). Prescriptive models suggest how lawyers *should* interview clients and counsel them, see D. BINDER & S. PRICE, *supra* note 1, or negotiate with other lawyers, see R. FISHER & W. URY, *supra*.

5. See *infra* notes 17-84 and accompanying text.

sider that counseling sessions frequently occur during the course of negotiations.<sup>6</sup> Part B describes the current negotiation models and shows how these models ignore, or at least inadequately account for, the fact that the lawyer represents a client during negotiations, and that such representation is ongoing, interactive, and continues throughout the negotiation process.<sup>7</sup>

Thus, the traditional models fail to recognize that the counseling and negotiation processes are interrelated in substance and interspersed in time and that this overlap substantially affects how each process unfolds when the lawyer represents the interests of her<sup>8</sup> client in negotiations. Section II identifies three consequences of this interdependence that have been largely ignored in the lawyering process literature.<sup>9</sup> First, the negotiation process usually consists of multiple encounters between the lawyers punctuated with repeated counseling sessions between the lawyers and their clients.<sup>10</sup> Second, when the lawyer negotiates on behalf of her client's interests instead of her own interests, she occupies a "boundary role position" between the client and the other negotiator that subjects her to the influences of both her client and the other negotiator.<sup>11</sup> Finally, the lawyer's active involvement in the negotiations, when contrasted with the more passive role typically played by the client, exacerbates the tendency of the lawyer to dominate the client counseling process.<sup>12</sup> These realities make it difficult for even the conscientious lawyer to conform her conduct fully to the existing models of good lawyering.<sup>13</sup>

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6. See *infra* notes 26-49 and accompanying text.

7. See *infra* notes 50-84 and accompanying text.

8. For convenience and clarity I will use "her" or "she" when referring to a lawyer and "his" or "he" when referring to the client throughout this Article.

9. See *infra* notes 85-87 and accompanying text.

10. See *infra* notes 90-102 and accompanying text; see also P. GULLIVER, *supra* note 4, at xv-xvi.

11. See *infra* notes 103-24 and accompanying text; see also D. PRUITT, NEGOTIATION BEHAVIOR 41-44 (1981); R. WALTON & R. MCKERSIE, *supra* note 4, at 282-302; Druckman, *Boundary Role Conflict: Negotiation as Dual Responsiveness*, 21 J. CONFLICT RESOLUTION 639, 639-40, 652-61 (1977).

12. See *infra* notes 125-36 and accompanying text.

13. It is particularly important that clinical educators and other scholars of the lawyering process have failed to refine the seminal client-counseling models and to consider the impact of the negotiation process on client counseling. Implementing the American Bar Association's Model Rule of Professional Conduct 1.2—which calls for clients and not lawyers to decide whether to accept a settle-

Section III considers how the client-centered counseling model of Binder and Price can operate more effectively in the context of negotiation counseling.<sup>14</sup> To preserve client-centered advocacy in the face of the previously described tensions inherent in negotiation counseling, the client must participate earlier and more actively in the negotiation process than the Binder and Price model explicitly provides. Section III suggests that the lawyer should consult the client in a meaningful manner both prior to the negotiations and between individual negotiation sessions.<sup>15</sup> During these counseling sessions, the lawyer and client should discuss not only the progress of the negotiations and the client's preferences regarding the available alternatives, but also how new insights gained during the negotiation affect those alternatives, and the tactics the lawyer should use during the subsequent phases of the negotiations. Section III concludes by stating that the effective negotiator can use continued client discussions between negotiation sessions to produce better negotiation results for her client.<sup>16</sup>

#### I. TRADITIONAL LAWYERING MODELS OF COUNSELING AND NEGOTIATION

Lawyers and law students have studied models of effective cross-examination and other trial techniques for many decades.<sup>17</sup> It was not until the 1960s and 1970s, however, that law professors began the systematic study of the counseling and negotiation processes.<sup>18</sup> Although other commentators have described the counseling process,<sup>19</sup> Binder

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ment offer or to pursue alternatives to settlement—is not realistic unless there is a counseling model available to lawyers that is both client-centered and realistic in the negotiation context. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983).

14. See *infra* notes 137–210 and accompanying text.

15. See *infra* notes 143–201, 205–10 and accompanying text.

16. See *infra* notes 194–98 and accompanying text.

17. For example, Francis L. Wellman's classic text on cross-examination was first published in 1903. F. WELLMAN, *THE ART OF CROSS-EXAMINATION* (4th ed. 1936).

18. The first law school texts that discussed lawyering processes and lawyering skills were not published until the mid-1970s. See G. BELLOW & B. MOULTON, *supra* note 1; D. BINDER & S. PRICE, *supra* note 1; H. EDWARDS & J. WHITE, *supra* note 1; H. FREEMAN & H. WEIHOFEN, *supra* note 2; M. MELTSNER & P. SCHRAG, *supra* note 2; A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* (1976).

19. See, e.g., G. BELLOW & B. MOULTON, *supra* note 1, at 156–239, 998–1080;

and Price present the most comprehensive model for client interviewing and counseling.<sup>20</sup> Their client-centered model may be used in almost any counseling situation and it provides the analytical foundation for most current teaching about the interviewing and counseling processes in the law school curriculum.<sup>21</sup>

Despite this widespread acceptance, the Binder and Price model for counseling fails to address adequately the significant effects of the negotiation process on client counseling.<sup>22</sup>

Unlike the near universal acceptance of the client-centered model for client counseling, there is little agreement among legal negotiation theorists regarding a preferred prescriptive model for the lawyer as negotiator. Most of the early law school texts for teaching negotiations focused on a *competitive* strategy.<sup>23</sup> More recently, the *problem-solving* approach has emerged in legal academe as the preferred model for legal negotiations<sup>24</sup>—a preference linked to the simultaneous emergence of the Alternative Dispute Resolution movement. Whatever the differences between the competitive and problem-solving negotiation models, they both view the process under consideration—in this case, negotiation—as an entity unto itself, and thus largely ignore and underestimate the influence of the client on the negotiation process.<sup>25</sup>

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H. FREEMAN & H. WEIHOFEN, *supra* note 2, at 108–09; T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING* (1976); A. WATSON, *supra* note 18.

20. See generally D. BINDER & S. PRICE, *supra* note 1.

21. A representative of the West Publishing Company, which publishes Professors Binder and Price's *Legal Interviewing and Counseling: a Client-Centered Approach*, stated that the text was used at 94 law schools in the United States during the 1985–86 academic year and that sales were "very high." Telephone interview with Darlene Christianson, Marketing Department, West Publishing Co. (Apr. 1, 1986).

22. See *infra* notes 26–48 and accompanying text. Binder and Price did not intend their counseling model to be used solely in the negotiation context, but it clearly applies in that context since many of their examples involve negotiation.

23. See, e.g., G. BELLOW & B. MOULTON, *supra* note 1, at 445–606; H. EDWARDS & J. WHITE, *supra* note 1, at 7–163; C. KARASS, *THE NEGOTIATING GAME* 12–26 (1970).

24. See R. FISHER & W. URY, *supra* note 4; Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984).

25. See *infra* notes 50–84 and accompanying text.

A. *Counseling: The Client-Centered Approach*

A prescriptive counseling model suggests how lawyers and clients should interact in deciding how to proceed with the client's case. Model Rule of Professional Conduct 1.2 is the logical starting point for any discussion of the allocation of decisionmaking authority in negotiation counseling between client and lawyer.<sup>26</sup> Most importantly, this rule provides: "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."<sup>27</sup> In addition, the lawyer is required to "abide by the client's decisions concerning the objectives of the representation" and to "consult with the clients as to the means by which they are to be pursued."<sup>28</sup> Case law<sup>29</sup> and commentators<sup>30</sup> frequently refer to the lawyer as "an agent" for the client in negotiations.

Contrary to the admonitions of Model Rule 1.2, many practicing attorneys have in the past *told* their clients whether to accept or reject settlement offers and probably continue to do so.<sup>31</sup> As Professor Thomas Shaffer states, the "fact persists, however, that many lawyers see themselves as telling their clients what to do."<sup>32</sup> In a practitioners' guide to settlement published in 1963, the authors argue that the lawyer's proper role is to dominate the counseling process and suggest tactics such as finding a judge who, with "the dignity of the black robe," will be able to "drive home to the

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26. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

27. *Id.*

28. *Id.*

29. See *Moving Picture Mach. Operators Union Local No. 162 v. Glasgow Theaters, Inc.*, 6 Cal. App. 3d 395, 86 Cal. Rptr. 33 (1970) (principles of agency applied when attorney is involved in labor dispute negotiations); *Dillon v. City of Davenport*, 366 N.W.2d 918 (Iowa 1985) (agency principles applied when attorney is negotiating a settlement of a workman's compensation claim); *Southwestern Bell Tel. Co. v. Roussin*, 534 S.W.2d 273 (Mo. Ct. App. 1976) (principles of agency applied when attorney is negotiating a settlement of an easement dispute); *Mattco, Inc. v. Mandan Radio Ass'n, Inc.*, 246 N.W.2d 222 (N.D. 1976) (principles of agency applied when attorney is renegotiating terms of an existing contract); *Johnson v. Tesky*, 57 Or. App. 133, 643 P.2d 1344 (Ct. App. 1982) (agency principles applied when attorney is negotiating a settlement in a negligence action).

30. See, e.g., L. RAY PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* 75-76 (2d ed. 1984).

31. See Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1050 (1984); Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721, 738 (1975); Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003.

32. Shaffer, *supra* note 31, at 803.

plaintiff that it is better to settle than to wage expensive, unnecessary legal warfare."<sup>33</sup> This approach, in which the lawyer presumes that he knows what the client wants and pursues those desires without regard for the client's *actual* desires, has been referred to as the "paternalist" approach.<sup>34</sup>

The Model Rules soundly reject this paternalistic approach to lawyering,<sup>35</sup> as they should. Several major political forces converged to provide the climate which generated the counseling model promulgated by Professors Binder and Price and allowed client-centered advocacy to be enshrined in the Model Rules. First, Professors Bellow and Moulton, and others who approached the study of lawyer-client interactions from backgrounds in clinical education and legal services, realized that lawyers who represented indigent clients frequently imposed their own values on their clients and dominated the clients during the counseling process.<sup>36</sup> For them, client-centered advocacy was, in part, a means of politically empowering disenfranchised individuals.<sup>37</sup> Simultaneously, the pioneers of lawyering skills education who first provided prescriptive counseling models were

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33. J. & D. SINDELL, LET'S TALK SETTLEMENT 308, 382, 384-85 (1963), *quoted in* G. BELLOW & B. MOULTON, *supra* note 1, at 1028-30.

34. *E.g.*, Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 461-62; Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 19 (1975).

35. In exceptional circumstances, the Model Rules sanction a more paternalistic model of lawyer-client relations. For example, Model Rule 1.14(b) provides that a lawyer should take "protective action with respect to a client" only when she "reasonably believes that the client cannot adequately act in the client's own interest." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(b) (1983).

36. *See, e.g.*, G. BELLOW & B. MOULTON, *supra* note 1, at 487; Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 BRIEFCASE 106, 108-09 (1977).

37. The concept of client-centered advocacy as a political force is based on the belief that legal assistance can be a "powerful system of social control, capable of defining and legitimizing particular grievances . . . and ignoring others." Bellow, *supra* note 36, at 122. This ideology focuses on teaching clients that social and economic institutions create their legal difficulties. *Id.* Bellow states that the traditional approach, conversely, teaches clients that their situations are "natural, inevitable, or their own fault." *Id.*

Cloward and Piven, writing specifically about social work but generally about traditional professional-client models, advocate a client-centered focus in counseling combined with "socioeconomic" interpretations, thereby providing political strength without client domination. The traditional model, with the client in a passive role, was oppressive. By providing socioeconomic interpretations for clients, professionals can illustrate to them how their lives are "distorted by realities of class structure." *Id.*

heavily influenced by psychologist Carl Rogers and his nondirective counseling model.<sup>38</sup> Finally, the client-centered predispositions of those who first suggested counseling models were substantiated by Douglas Rosenthal's book, *Lawyer and Client: Who's In Charge?*,<sup>39</sup> which argued from a

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38. See C. ROGERS, *CLIENT-CENTERED THERAPY* 1-130 (1951). Clinical psychologist Carl Rogers advocated a counseling model premised upon the belief that a client is capable of making all decisions himself and therefore should take an active role in his counseling. *Id.* at 19-30. This nondirective or client-centered theory transfers responsibility for decisionmaking from the professional to the client. *Id.* The counselor's role in this model is to allow a client his "separateness" and to encourage the client not to become, or remain, dependent on his counselor. *Id.* at 71. As Rogers understood the traditional model, the counselor directs the client to take certain actions and to follow the counselor's advice. *Id.* at 93-96. This traditional approach where the client is completely passive is the antithesis of the Rogerian model of the counselor providing only gentle guidance within the parameters established by the client. *Id.*

Rogers' model plays a central role in the counseling models for lawyers presented in many leading texts. See, e.g., G. BELLOW & B. MOULTON, *supra* note 1, at 977; D. BINDER & S. PRICE, *supra* note 1, at 15; T. SHAFFER, *supra* note 19, at 14-31, 108, 124-25, 168-69. Bellow and Moulton suggest that counselors should use Rogers' list of self-evaluative questions as a guide to increasing the effectiveness of their counseling skills. G. BELLOW & B. MOULTON, *supra* note 1, at 977. These questions illustrate Rogers' belief that a counselor can create a psychological climate characterized by 1) acceptance of a client as a worthwhile person, 2) the counselor's effort to understand a client's communications without alteration by the counselor, and 3) an attempt to convey this empathy to the client. C. ROGERS, *ON BECOMING A PERSON* 4 (1961). Bellow and Moulton believe these issues to be central for lawyers as counselors. G. BELLOW & B. MOULTON, *supra* note 1, at 977. Binder and Price also describe how communication between lawyers and clients can be heightened by using empathy effectively. D. BINDER & S. PRICE, *supra* note 1, at 15. Their model of client-centered lawyering focuses on "non-judgmental understanding" by the attorney. *Id.* By listening actively and responding empathetically, the attorney can increase a client's motivation to communicate fully with his counselor. *Id.*

Shaffer's succinct guide to legal counseling skills is replete with references to Rogers' model and work. T. SHAFFER, *supra* note 19, at 14-31, 108, 124-25, 168-69. Specifically, Shaffer uses Rogers' nondirective model, as well as three other prominent theories of counseling, to explore the ways in which a lawyer can more effectively counsel her clients. *Id.* at 14-18. Shaffer believes active listening, expressive empathy toward the client, and acceptance heighten the effectiveness of communications between the lawyer and client. *Id.* at 108, 124-25. In addition, these counseling skills can lessen the tendency for a client to depend on his attorney and the concomitant dominance of the client by the attorney. *Id.* at 169. Shaffer illustrates that good lawyering results when a client learns to trust his attorney and his own judgment. See *id.* at 31. In addition to heightening a lawyer's effectiveness, the greater rapport between lawyer and client averts crises in the attorney-client relationship because of the honest, nonmanipulative discussions, thereby leading to more efficient use of time and energy and reducing stress for both parties. *Id.* at 31.

39. D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974); see also D. BINDER & S. PRICE, *supra* note 1, at 148-51.



utilitarian standpoint that clients were financially better off when they made the decisions regarding settlement.

These political and intellectual trends<sup>40</sup> conditioned legal educators to be receptive to the Binder and Price client-centered counseling model.<sup>41</sup> The client-centered model is designed to effectuate, to the greatest possible extent, the client's autonomy. Binder and Price stress that the lawyer cannot know before the counseling session which available alternative will provide maximum client benefit, because the lawyer does not yet understand the client's unique value system.<sup>42</sup> Some clients, for example, might want to avoid the anxiety accompanying trial at all costs, and

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40. In addition to political and intellectual trends, the current understanding of the proper roles of the lawyer and the client has influenced the counseling model.

The most widely accepted contemporary justification for the lawyer-client relationship is Professor Charles Fried's analogy to the lawyer as a special-purpose friend. See Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060, 1066-67, 1074, 1077 (1976). Professor Fried believes the special allowances granted in the lawyer-client relationship are warranted because the lawyer's basic purpose is to preserve her client's autonomy. *Id.* at 1074. Lawyer-client relationships, according to Fried, cannot merely have an instrumental value which enhances the operation of the legal system or society as a whole, but are "good in themselves." *Id.* at 1075. The influence of Fried's theory of the lawyer-client relationship is evident in the adoption of the Model Rules of Professional Conduct. MODEL RULES OF PROFESSIONAL CONDUCT (1983). The text of Model Rule 1.2, and the comment to the rule, indicate that the client has significant authority in the lawyer-client relationship, limited only by the law and the lawyer's professional obligations. *Id.* Rule 1.2 is thus consistent with Fried's view of the lawyer-client relationship.

Although conceptions of the lawyer's role have changed throughout the last century, from paternalistic mentor, see Maute, *supra* note 31, at 1053-54, to "hired gun," see Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30, four fundamental principles have remained as foundations for a generally accepted "ideology of advocacy." *Id.* at 36.

Two of these principles are most important and are relevant here. The first principle, "neutrality," requires that the lawyer represent her client regardless of her personal beliefs about his goals, remain detached from the client's ends, and not consider herself responsible for his purposes. *Id.* at 36. The second principle, "partisanship," demands that the lawyer do everything possible within the bounds of the law to advance the client's interests, even including actions that she would not do to advance her own personal interests. *Id.* The client-centered counseling model can be seen as an implementation of the principles of "neutrality" and "partisanship" which underpin the "ideology of advocacy." In addition, because of its emphasis on client autonomy, client-centered advocacy embodies the aspirations of Fried's "friendship" analogy.

41. See generally D. BINDER & S. PRICE, *supra* note 1, at 135-210.

42. See *id.* at 148-51.

some clients may be less risk-averse than others.<sup>43</sup> This dilemma could be solved if the client communicated his interests and preferences to his lawyer, thereby allowing the lawyer to make a decision using the full knowledge of the client's preferences. Binder and Price suggest, however, that this is not feasible because clients frequently would find it difficult or impossible to quantify and articulate their preferences.<sup>44</sup>

The prototypical counseling problem presented by Binder and Price involves whether a client should accept a proposed settlement or proceed to trial. In essence, the model provides that the lawyer and client should work together to identify all possible alternative solutions to the client's problem, which usually include accepting a proposed settlement offer or proceeding to trial. The lawyer and client then proceed to consider all of the consequences of each alternative. According to Binder and Price, the lawyer has primary responsibility for predicting the "legal" consequences of each proposed course of action, such as the likely trial outcome. Conversely, the client takes the lead, in response to the lawyer's questions, in identifying the economic, social, and psychological consequences of each alternative. Binder and Price suggest that the lawyer then convert these identified consequences into "advantages" and "disadvantages" so that the client can better compare and contrast the available alternatives. Finally, the lawyer asks the client to evaluate the advantages and disadvantages of each alternative and reach a decision. In order to aid the client in the decisionmaking, the lawyer summarizes the alternatives and their consequences; this summary sometimes can be accomplished most effectively, according to Binder and Price, by providing a written list of advantages and disadvantages for each alternative.

In their description of client-centered counseling, Binder and Price frequently caution the lawyer to be a neu-

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43. *Id.*

44. Binder and Price recognize that the attorney may not be able to ascertain the degree of importance the client places on each particular consequence, or to what degree the client is a risk avoider. They conclude that the client usually reaches a decision by "lumping together" the pros and cons of various consequences without attempting to rank them. *Id.* at 153. The degree of risk a client is willing to accept is somehow included in this "lumping together" of consequences. *Id.*

tral provider of information regarding available options and their consequences and not a joint actor in the decision-making process. Binder and Price expressly warn lawyers to communicate “neutrally” to the client when describing the available alternatives. They address the issue of the lawyer’s demeanor at great length to prevent the lawyer from communicating a preference among alternatives by “tone of voice, facial expressions, language, and timing in switching from one set of consequences to another.” Even when the client asks for the lawyer’s opinion or recommendation, Binder and Price conclude “lawyers should refrain from stating what they would do,” since the client may be unduly influenced by the lawyer’s opinion in her role as an authority figure. Binder and Price argue that the lawyer should convince the client to make his own decision.<sup>45</sup>

The Binder and Price model is extremely useful as a starting point for the lawyer seeking to facilitate his client’s interaction as an autonomous individual in the legal system and to comply with both the letter and the spirit of Model Rule 1.2. Binder and Price, however, intentionally simplify the counseling process for teaching purposes and their basic model thus ignores the ongoing nature of the counseling process and the interspersing of counseling sessions between negotiation encounters with the other party’s attorney. The model focuses only on the simplest possible decisionmaking situation: when the client need only consider a single settlement offer and weigh it against the litigation alternative. It is much more difficult when the client and lawyer must consider additional options, such as making an additional counterproposal in the negotiations. Neither lawyer nor client can predict fully all the consequences of

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45. In their textbook, Binder and Price give several examples of situations involving the basic decision of whether to settle or continue litigation. One such situation involves a client who was arrested because a traffic court clerk failed to record that the client had paid a traffic citation. *Id.* at 150–51. The client brought suit against the city alleging false arrest and imprisonment, and the city offered to settle for \$1000. At this point, the client already had incurred court costs and attorney fees totaling \$750. To analyze the situation, the lawyer and client have drawn up a chart listing the positive and negative consequences of litigation and settlement. The chart classifies the positive and negative consequences of each alternative as economic, social, and psychological. Binder and Price identify the difficulties in reaching a decision using this chart and conclude that the lawyer cannot determine which alternative would provide the client with the most satisfaction. *Id.* at 186, 197–200.

the available options, prior to or during the negotiations, because there are literally scores of possible "next moves" for the client in the negotiations. Each of these options has varying consequences, many of which depend upon the response of the other party that cannot always be predicted accurately. Binder and Price acknowledge in passing that this situation is "much more complex"<sup>46</sup> because "to decide what offer or demand should be tendered, there first must be an analysis of what settlement options are open, and what are the likely consequences of adopting each of the options."<sup>47</sup>

As currently designed, the client-centered counseling model is unrealistic in a second regard. The model, if slavishly followed, is too highly structured and "linear" and does not facilitate the kind of conversational "give and take" between lawyer and client which ideally occurs in the counseling context. For example, the attorney is "allowed" to give the client the benefit of her opinion only in two narrowly defined situations: first, when the client virtually "begs" for an opinion after repeated attempts by the lawyer to explain to the client why he should make his own decision;<sup>48</sup> and second, in a few cases in which the lawyer thinks that the client is likely to suffer substantial economic, social, or psychological harm if he pursues his tentative decision.<sup>49</sup> Except under these two circumstances, the client is denied the benefit of knowing how the lawyer would weigh the options confronting the client. The client also does not profit from those aspects of the lawyer's judgment that are intuitive or cannot be articulated, but upon which the lawyer relies in making decisions affecting her life.

#### B. *Negotiation Without the Client*

The first legal negotiation models displayed a much greater naivete than that of the client-centered counseling model about the interrelationships between counseling and negotiation. If the negotiation model were sophisticated enough to acknowledge the existence of a client in the negotiation process, it portrayed client representation through

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46. *Id.* at 163.

47. *Id.*

48. *Id.* at 197-200.

49. *Id.* at 203-04.

negotiation as a sequence of discrete and wholly isolated processes: a lawyer obtained authorization from the client to seek a negotiated settlement and then negotiated with the other attorney, presumably in a single encounter.

This simplified, sequential, one-dimensional view of the negotiation and counseling processes appears, at least implicitly, in most of the early theoretical work regarding legal negotiation.<sup>50</sup> Professors Bellow and Moulton, for example, suggest that prior to the beginning of the negotiations, the negotiator determine her "own outer limit"<sup>51</sup> or "minimum disposition point"<sup>52</sup>—the negotiated solution least favorable to her client's interests that she would be prepared to accept. Bellow and Moulton then define the "bargaining range" as the continuum of possible agreements that would be within both parties' "outer limit[s]."<sup>53</sup> Settlement is only possible when there is a negotiated resolution which both parties believe to be more satisfactory than their minimum disposition points.

For example, in a simple personal injury action, assume the injured claimant is willing to accept any settlement offer in excess of \$65,000; thus, the figure of \$65,000 is the claimant's minimum disposition point. The defendant's insurance carrier is willing to pay \$79,000 to avoid the risks of litigation; \$79,000 is therefore the defendant's minimum disposition point. If the negotiating attorneys behave rationally and in a manner consistent with their clients' best interests, the parties will reach a settlement somewhere between \$65,000 and \$79,000. They both would prefer a settlement in this range to litigation. This segment of the continuum of settlement possibilities constitutes the bargaining range.

The model presented by Bellow and Moulton, and also the one outlined by Professors Edwards and White,<sup>54</sup> suggests that parties can and should define their minimum disposition points clearly prior to negotiation. These early negotiation models imply that a negotiator may be commit-

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50. See, e.g., G. BELLOW & B. MOULTON, *supra* note 1, at 479-92; H. EDWARDS & J. WHITE, *supra* note 1, at 62; C. KARASS, *supra* note 23, at 12-26 (1970).

51. G. BELLOW & B. MOULTON, *supra* note 1, at 484.

52. *Id.* at 487.

53. *Id.*

54. See H. EDWARDS & J. WHITE, *supra* note 1, at 112-13, 185-88.

ting a negotiation *faux pas* when she changes her case evaluation or minimum disposition point as the negotiations proceed. Bellow and Moulton discuss extensively the techniques to be used to induce the other negotiator to change his minimum disposition point,<sup>55</sup> and the techniques to be used to conceal one's own minimum disposition point from the other negotiator.<sup>56</sup> Nowhere does their classic text on the lawyering process consider how, or under what circumstances, the lawyer may change her own target or aspiration level,<sup>57</sup> or even her minimum disposition point, as she learns more facts during the negotiation process and becomes aware of how the other side values the case. To be fair to Bellow and Moulton, their negotiation analysis recognizes explicitly that the "boundaries" of the bargaining range "are not static."<sup>58</sup> They allow that "[w]hile each party enters (or should enter) a particular negotiation with some initial as-

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55. See G. BELLOW & B. MOULTON, *supra* note 1, at 555-75. Bellow and Moulton illustrate how a negotiator can force concessions from her opponent by using threats and arguments. *Id.* at 559. If credible and effectively used, threats can communicate a negotiator's firmness and an implied willingness to deadlock rather than concede. *Id.* By communicating this intransigence, a negotiator can convince her opponent that her minimum disposition point has been reached. *Id.* at 555. Arguments can also be used to encourage the other negotiator to change his minimum disposition point by implying a willingness to deadlock. *Id.* at 574. By pointing out various factors indicating the strength of the negotiator's case and the costs to the opponent of not settling, the negotiator seeks to induce her opponent to concede. *Id.* at 560. See also Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 51 (1985) (competitive negotiator's use of threats, arguments, and other offensive tactics).

56. See G. BELLOW & B. MOULTON, *supra* note 1, at 519-22. Bellow and Moulton describe the techniques negotiators can employ to conceal information from their opponents. *Id.* "Low activity" is a technique designed both to maximize information gathering and minimize information disclosure. *Id.* at 519. The negotiator's taciturnity creates "information space" which most people will fill by talking, thereby disclosing information. *Id.* at 519-20. The opposite approach to information concealment is used by the negotiator who confuses her opponent by reacting quickly, acting unpredictably, and talking a great deal, thereby obscuring the information she possesses. *Id.* at 520. A third set of techniques suggested by Bellow and Moulton include fending off the other negotiator's questions without really answering them (by leaving the other negotiator with the assumption that her question has been answered), answering incompletely, answering inaccurately, or leaving her without the desire to pursue the questioning process further. *Id.* at 522.

57. See generally C. KARASS, *supra* note 23, at 41-54. Karass uses the term "aspiration level" to describe the negotiator's expectations about the outcome of the negotiations. In a study of 120 professional negotiators from the aerospace industry, Karass found that negotiators with higher aspiration levels achieved higher outcomes. *Id.* at 17.

58. G. BELLOW & B. MOULTON, *supra* note 1, at 489.

assessment of the bargaining range, those assessments are subject to change in the course of the negotiation itself.”<sup>59</sup> This express recognition of the issue is far less significant, however, than their failure to include the possible modification of one’s own minimum disposition point or aspiration level as a legitimate aspect of the negotiation process.

If a party has accurately, objectively, and with full information determined her “best alternative to a negotiated agreement” (“BATNA”)<sup>60</sup> prior to the negotiation, and established her BATNA as her minimum disposition point, then this point should not change during the negotiations. During many negotiations, however, the lawyer will be confronted with new information about the BATNA, such as the probability of success in litigation which may warrant modifying her BATNA.<sup>61</sup> Even if the client’s minimum disposition point may not be affected by information gleaned during negotiations, the party’s aspiration level or negotiation “target”<sup>62</sup> almost inevitably will change as her lawyer determines how much the other negotiator is willing to yield.

More recent negotiation texts fail to go even as far as Bellow and Moulton in recognizing that a client’s preferences and minimum disposition points legitimately can change during the course of the negotiations. For example, Professor Roger Haydock presents case evaluation as some-

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59. *Id.*

60. R. FISHER & W. URY, *supra* note 4, at 104–08 (1981).

61. See G. BELLOW & B. MOULTON, *supra* note 1, at 508–16. Bargaining for information is a basic aspect of negotiation, and the negotiation process can and should be used to gather information. *Id.* at 512. Bellow and Moulton describe five basic techniques negotiators use to elicit information. *Id.* at 513–16. Direct questioning can be “surprisingly effective” according to the authors, since most lawyers have difficulty not answering a direct question or not revealing relevant information. *Id.* at 513. The use of multiple questions which vary slightly can assist a negotiator in ferreting out consistency or inconsistency in an opponent’s responses. *Id.* at 514. “Baiting,” or a personal challenge, also is used by some negotiators to ascertain underlying credibility, although Bellow and Moulton suggest that this technique is of questionable validity. *Id.* at 515. A negotiator can suggest third party participation in the negotiation process by requesting, for example, inspection of files or documents by third parties or submission of the dispute to arbitration or mediation. *Id.* at 515. The other negotiator’s response to such a proposal illustrates both the accuracy of her stated positions and her willingness to settle. Finally, Bellow and Moulton discuss a cluster of timing strategies, including offering quick settlements or “pushing” the bargaining toward deadlock in order to gauge an opponent’s reaction. *Id.* at 515.

62. See *supra* note 57.

thing that should be done prior to negotiations, with the information that the attorney has available at that time.<sup>63</sup> Haydock not only believes the client's minimum disposition point should be established prior to the beginning of the actual negotiations, but also his attorney's negotiation notebook should actually include a preplanned "concession pattern describing sequential offers, demands, or positions with supporting reasons."<sup>64</sup> Further, Haydock recommends that the negotiator actually "rehearse and practice the negotiation."<sup>65</sup> He ignores the possibility that both the client's preferences as well as the negotiator's strategy can change during the negotiations.

Some current negotiation theorists appear to recognize that client representation adds additional complexities to the negotiation process, but this understanding fails to affect their negotiation models and their recommended negotiating techniques. Professor Gerald Williams agrees that "clients come with their own sets of expectations about what the case outcome should be,"<sup>66</sup> and "for whatever reason, the expectations of clients are commonly some distance from those of the attorney, and it is in this context that the relationship of the client to the negotiation process becomes obvious and determinative."<sup>67</sup> According to Williams, the lawyer's "task includes helping the client to form realistic expectations of how and on what terms his case should be resolved."<sup>68</sup> Williams' analysis is a sophisticated one when it suggests that arriving at judgments regarding the value and probable outcome of a case is "a process that can only occur over time,"<sup>69</sup> and "the lawyer's own evaluation substantially changes during the process as the full dimensions of both

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63. See R. HAYDOCK, *NEGOTIATION PRACTICE* 23-25 (1984).

64. *Id.* at 49-50. Haydock suggests that the efficient negotiator, prior to negotiation, will prepare her overall negotiation approach, including a list of strategies and techniques appropriate to the particular situation and an initial offer of demand with the reasons supporting the position. *Id.* at 49. Although Haydock notes overpreparedness may lead to rigidity or overcomplexity in negotiations, he stresses that advance determinations can provide a negotiator with significant advantages. *Id.* at 50.

65. *Id.* at 53.

66. G. WILLIAMS, *supra* note 1, at 82.

67. *Id.* at 83.

68. *Id.*

69. *Id.*



sides of the case become revealed.”<sup>70</sup> Williams’ advice to the negotiating lawyer, “to create realistic expectations in [her] client at the outset, and keep him abreast of the lawyer’s own evolving evaluation of the case,”<sup>71</sup> is also an excellent recommendation. Williams’ description of the phases of the negotiating process neither suggests any interaction with the client during negotiation nor acknowledges that such counseling sessions affect the negotiation process.<sup>72</sup> Despite his more sophisticated understanding of the negotiating process, Williams thus falls into the conceptual trap of treating negotiations as a lawyering process isolated from the client.

Legal negotiation theorists advocating the use of the problem-solving negotiation strategy address the interrelationships between negotiation and counseling more adequately than other writers.<sup>73</sup> Problem-solving bargaining is best defined by comparing it with competitive or cooperative bargaining strategies.<sup>74</sup> Both the competitive and cooperative strategies focus on the opposing positions of the negotiators: the negotiator attempts to force as many concessions as possible from the opposing party, at the other’s expense. Conversely, the problem-solving bargaining approach emphasizes the negotiators’ joint goals in reaching a solution which provides high benefits to both parties. Problem-solving bargaining is typically used when the parties’ interests are not directly opposed, when the parties may reach a mutually satisfying solution.

Professor Menkel-Meadow, a proponent of problem-solving bargaining, most clearly recognizes the important role played by interactions with the client in problem-solving bargaining.<sup>75</sup> She recommends that lawyers begin, dur-

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70. *Id.*

71. *Id.*

72. *See id.* at 70–72.

73. *See, e.g.,* R. FISHER & W. URY, *supra* note 4; Menkel-Meadow, *supra* note 24, at 801, 804, 808, 818.

74. *See* R. FISHER & W. URY, *supra* note 4, at 10–11; D. PRUITT, *supra* note 11, at 137–200. *See also* Gifford, *supra* note 55, at 54–57.

75. *See* Menkel-Meadow, *supra* note 24, at 754. Menkel-Meadow’s problem-solving approach to negotiation views “legal negotiation as an opportunity to solve both the individual needs and problems of . . . clients, and the broader social needs and problems of the legal system . . . .” *Id.* at 842. By attempting to avoid the destructive conflict of litigation and by involving clients in the decisionmaking process, an attorney can “transform an intimidating, mystifying process into one which will better serve the needs of those who require it.” *Id.*

ing their initial client interviews, to identify the underlying needs of their client and to seek solutions satisfying both the client's interests and those of the other party.<sup>76</sup> Professors Fisher and Ury's seminal text on problem-solving negotiation, *Getting to Yes: Negotiating Agreement Without Giving In*,<sup>77</sup> also prescribes a more fluid, less linear model for interaction between the negotiating lawyers and their clients. They explicitly warn against the kind of "premature judgment"—establishing negotiating limits prior to the negotiations themselves<sup>78</sup>—endemic to many of the negotiation models previously discussed.<sup>79</sup> Their attack on the assumption of the "fixed pie"<sup>80</sup> implicitly assumes that it is possible during the negotiation process itself to learn of new information from the other negotiator and to consider new proposals not previously identified. Presumably, the lawyer and the client then consider the new information and proposals during additional counseling sessions.

One goal of the problem-solving approach to negotiations is to involve the client in the process through planning and "brainstorming,"<sup>81</sup> a specific technique designed to devise new options to solve the problem at issue in the negotiations. Fisher and Ury recommend that the negotiator brainstorm first with his own client and then even with the

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76. *Id.* at 804-14.

77. R. FISHER & W. URY, *supra* note 4.

78. *Id.* at 59-60.

79. *See supra* notes 50-59 and accompanying text.

80. R. FISHER & W. URY, *supra* note 4, at 61. "Fixed pie" refers to a negotiation in which the parties seek to divide a finite amount of resources and the gain of one party necessarily comes at the expense of the other party. *See Gifford, supra* note 55, at 69. Examples of fixed pie (distributive) negotiations include the bargaining between the buyer and the seller about the cash price of a used car, and the negotiations between the prosecutor and a defense attorney about the length of a recommended sentence. *Id.* Various negotiation theorists have used different terms when referring to this bargaining situation. *See, e.g.,* C. KARASS, *supra* note 23, at 12-26, 128 ("share bargaining"); E. MCGINNES, *SOCIAL BEHAVIOUR: A FUNCTIONAL ANALYSIS* 414 (1970) ("zero-sum game"); R. WALTON & R. MCKERSIE, *supra* note 4, at 4 (1965) ("distributive bargaining").

81. R. FISHER & W. URY, *supra* note 4, at 62-65. Fisher and Ury describe brainstorming as a technique in which a group of participants is encouraged to invent ideas without considering their validity, while a facilitator stimulates discussion by asking questions and recording the ideas. This process is designed to produce as many ideas as possible to solve the problem at hand, while postponing all criticism and evaluation of the ideas. Fisher and Ury suggest that the brainstorming process facilitates creative problem-solving by separating the creative stages of planning from the necessarily more rigid judgment stages.

negotiator representing the other party.<sup>82</sup> Brainstorming thus actively involves the client in the negotiations in a way most negotiating techniques do not. The use of brainstorming as a method of including the client in the negotiation process is an important one and will be discussed later in this Article.<sup>83</sup> However, this technique only begins to answer the question of how the negotiator should deal with the conflicting demands of client-centered advocacy and the real-world pressures to "push" clients toward settlement. It fails entirely to assist the lawyer who is negotiating in a context where problem-solving solutions are not available.<sup>84</sup>

## II. THE SYMBIOTIC RELATIONSHIP BETWEEN NEGOTIATION AND COUNSELING

Because traditional models of the lawyering process portray the negotiation and counseling processes separately, they fail to recognize how the overlap between these two lawyering activities substantially affects the dispute resolution process. Negotiation on behalf of clients inevitably involves counseling, and the interrelationships between the two processes must be accounted for if lawyering models are to describe realistically client representation or provide useful guides for lawyering behavior.

Part A of this Section discusses the interspersing of negotiation sessions and counseling conferences and how this interspersing affects both aspects of lawyering in ways not suggested by the traditional models described in the previous Section. These lawyering models also ignore the representative role of the lawyer. In most legal negotiations, the lawyer represents a client's interests and not her own. This representative function places the lawyer in a situation that social scientists refer to as a "boundary role position"<sup>85</sup> in

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82. *Id.* at 64-65.

83. *See infra* notes 169-71 and accompanying text.

84. *See* Gifford, *supra* note 55, at 69-70. Negotiations involving only *distributive* bargaining issues offer no opportunity for problem-solving, but they are rare. Although purely distributive issues are rare, *predominantly* distributive issues are more common. The paraplegic plaintiff's personal injury attorney and the insurance company attorney may be somewhat concerned with problem-solving solutions such as structured settlements or avoiding the costs of litigation, but neither believes that her primary interest is anything other than the dollar amount to be paid on the claim.

85. *See, e.g.,* Druckman, *supra* note 11, at 639-40, 652-60.

which she is subject to the influences of both the other negotiator and her own client. This aspect of the lawyer's role as negotiator is discussed in Part B.<sup>86</sup> Finally, the negotiation process exacerbates the lawyer's frequent tendencies to dominate the client-counseling conference. The lawyer participates personally and directly in negotiations with the other side, while the client usually does not. As such, only she knows the details of the dispute or transaction being negotiated. Unfortunately, this greater knowledge of the legal matter often translates into dominance of the counseling process, unless the client is informed constantly about the negotiations. The general problem of lawyer dominance in counseling, and how the realities of negotiation contribute to it, are discussed in Part C.<sup>87</sup>

#### A. *Counseling and Negotiation as Cyclical Processes*

The Binder and Price counseling model addresses the content and structure of client counseling following negotiations,<sup>88</sup> but little is said about counseling sessions that occur prior to negotiations or between negotiation sessions. Further, Binder and Price provide a detailed model for explaining the uncertainties of litigation to the client,<sup>89</sup> but they largely ignore counseling that focuses directly on the negotiation process.

Uncertainty characterizes the initial counseling encounter between the lawyer and the client prior to the first negotiation session.<sup>90</sup> At this early stage, it usually is not possible to identify all the alternative courses of action available to the client and to assess the costs and benefits of each.<sup>91</sup> With the information at hand, the lawyer frequently cannot predict accurately what course the litigation alternative will

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86. See *infra* notes 103-24 and accompanying text.

87. See *infra* notes 125-36 and accompanying text.

88. See generally D. BINDER & S. PRICE, *supra* note 1, at 150-53, 159-64.

89. See *id.* at 159-62.

90. See McGrath, *A Social Psychological Approach to the Study of Negotiation*, in STUDIES ON BEHAVIOUR IN ORGANIZATIONS 101 (R. Bowers ed. 1966); Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN. L. REV. 98, 106 (1969). For a further discussion of the role of uncertainty in medical counseling, see Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 270 (1985).

91. See D. BINDER & S. PRICE, *supra* note 1, at 157-83; see also *supra* notes 45-46 and accompanying text.

follow. More importantly, in a transactional context not involving litigation, or when considering the settlement alternative to litigation, the lawyer can offer at best only an educated guess regarding the other party's response to negotiation proposals or the prospects for a negotiated agreement. The lawyer's understanding of the dispute or transaction increases significantly during the course of the negotiation as his own investigation and the discovery process continues. Further, even when extensive discovery is available, the lawyer learns much about the matter from the other lawyer. Along with increased information about the problem being negotiated, the lawyer also learns what options may be available to her client as a result of the negotiated settlement and how the other party views the subject matter of the negotiations.

Prior to negotiations, the client also is often unable to articulate fully his own goals and preferences. Typically, the client "wants it all" and unrealistically assesses the likely outcomes of both the negotiation and litigation alternatives. The client has not decided how much risk he is willing to assume and which of his multiple objectives is his primary goal in the negotiations. The client is unable to decide these issues until he learns more about the problem from his lawyer's reports of the negotiation sessions.

The subsequent negotiation process usually involves multiple encounters between the negotiating attorneys, either personally or through correspondence, and the attorneys often confer with their respective clients in the intervals between these meetings. Gulliver, a social anthropologist, presents a descriptive model of negotiations as they actually occur<sup>92</sup> that is more accurate than traditional legal negotiation models. Gulliver studied dispute resolution in two indigenous African cultures and subsequently compared bargaining in these cultures with negotiations in Western society. In each of these contexts, Gulliver identified two separate processes which occur simultaneously during negotiation.<sup>93</sup> In the *cyclical process*, according to Gulliver, the parties repeatedly exchange and assess information. Based on the new information, they adjust their expectations

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92. See P. GULLIVER, *supra* note 4, at xv-xvi.

93. *Id.* at 82.

and preferences.<sup>94</sup> The *developmental process*, on the other hand, is the progression of the negotiation process through various stages from the initiation of the dispute to implementation of an agreement.<sup>95</sup>

The cyclical process is of greatest interest in understanding the differences between negotiations in which lawyers represent their clients' interests and current negotiation models.<sup>96</sup> Most legal negotiations, like the indigenous dispute studies by Gulliver,<sup>97</sup> are not resolved during a single discrete encounter between the attorneys. Instead, legal ne-

94. *Id.*

95. *Id.* Gulliver identifies the following eight "overlapping sequences or phases" in the developmental process:

1. the search for an arena of negotiation;
2. the formulation of an agenda and of working definitions of issues in dispute;
3. preliminary statements of demands and offers and the exploration of the dimensions and limits of the issues, with an emphasis on the differences between the parties;
4. the narrowing of differences, agreement on some issues, and the identification of the more obdurate ones;
5. preliminaries to final bargaining;
6. final bargaining;
7. ritual confirmation of the final outcome; and, in many cases,
8. implementation of the outcome or arrangements for their implementation.

*Id.* at 82.

96. *See supra* notes 50-65 and accompanying text. Gulliver, in commenting on the utility of negotiating models typically generated by social scientists, states:

One must remain unconvinced . . . that negotiators think, assess, make choices, and act in the ways prescribed by utility theory and by models built upon it . . . . Who ever heard of negotiators seeking to maximize the product of their utilities as prescribed by Nash's theory . . . , or seeking an agreement that is Pareto optimal?

*Id.* at 92. Similarly, Professor Klimoski suggests the reason there is so "little experimental research on representative bargaining" may be "because of the complexity of forces that operate and make research difficult." *See* Klimoski, *The Effects of Intragroup Forces on Intergroup Conflict Resolution*, 8 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 363 (1972).

97. One of the principal negotiations observed by Gulliver involved a land dispute between two neighbors of the Arusha tribe of northern Tanzania. *See* P. GULLIVER, *supra* note 4, at 237-52. One of the disputants first made the disagreement public at a meeting organized for other purposes. *Id.* at 237. Both parties then conferred with their designated elders or "counselors" who subsequently arranged a "patrilineal moot" or meeting of designated elders representing each party which was designed to be a forum for negotiations of the dispute. At the moot, Gulliver observed seven distinct negotiations phases. *Id.* at 237-52. As an example of a dispute in Western culture, Gulliver recounts a union-management negotiation which lasted four months, involved weekly and often daily meetings and was punctuated by frequent deadlocks. *Id.* at 254-58.

gotiations occur over an extended period of time, consist of several exchanges between the attorneys, and are intermixed with meetings between the attorneys and their clients.<sup>98</sup> Many negotiation contacts are unscheduled, such as an unexpected encounter between lawyers, or an encounter in connection with a different case or transaction, in which a spontaneous, or at least a seemingly unplanned, reference to the negotiation is made.

Negotiations frequently include not only face-to-face encounters, but also written correspondence and telephone conversations.<sup>99</sup> The proposals exchanged through the writ-

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98. Significant data directly showing the duration of the typical negotiation process is unavailable, but data does exist which suggests that most negotiations are not resolved quickly. The median length of a civil case in all United States district courts is eight months, and most of these cases are settled. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR A-30. Cases resolved without any court action had a median length of five months. Cases resolved with court action but before pretrial had a median length of eight months and those resolved during or after pretrial a median length of seventeen months. *Id.*

A recent empirical study provides some indication of the amount of time a lawyer spends negotiating a "typical" civil case. Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983). The authors selected 1,649 cases, about half state and half federal, and interviewed 1,812 lawyers from these cases. *Id.* at 81. To determine how lawyers spend their time on various activities connected with a case, the authors used a sub-sample of 704 cases based on those lawyers who were compensated by an hourly, flat, or contingent fee method and who provided the necessary information. *Id.* at 90. The following table appears in their article:

<u>Average Percentage of Lawyer Time Devoted to Activities</u>	
<u>Activity</u>	<u>% of Time Spent</u>
Conferring with Client	16.0
Discovery	16.7
Factual Investigation	12.8
Settlement Discussions	15.1
Pleadings	14.3
Legal Research	10.1
Trials and Hearings	8.6
Appeals and Enforcement	.9
Other	5.5
	<u>100.0</u>

*Id.* at 91. The median case took 30.4 hours of the lawyer's time while the mean total time was 72.9 hours. *Id.* at 90. Extrapolating from these data, the median length of settlement discussions was approximately 4 hours and 35 minutes (15.1% of 30.4 hours) and the mean length was approximately 11 hours (15.1% of 72.9 hours).

99. See X. FRASCOGNA & H. HETHERINGTON, *NEGOTIATION STRATEGY FOR LAWYERS* 129-30 (1984); Morley & Stephenson, *Formality in Experimental Negotiations: A*

ten and telephonic media are discrete proposals and responses to earlier proposals by the other party. Because transaction costs are lower when the lawyer writes a letter or telephones than when she schedules and attends face-to-face negotiations, these alternate forms of communication likely increase the number of individual exchanges between negotiating attorneys.<sup>100</sup> In many instances, the lawyer consults with her client before writing letters or calling the other lawyer. These alternatives to face-to-face meetings between the attorneys therefore typically increase the effect of client counseling sessions on the negotiation process itself.

The multiple contacts between attorneys in most negotiations mirror Gulliver's representation of the cyclical process, and thus suggest the accuracy and applicability of his analysis to legal negotiations. Gulliver found that a party's evaluations and preferences are often quite vague and imprecise at the beginning of the negotiations.<sup>101</sup> The party's expectations for the negotiations and the emphasis placed on one particular issue, as compared with other issues, are not fixed and static, but continuously changing during the negotiations.<sup>102</sup> There are, of course, exceptions; the client's minimum disposition point and his goals for the negotiations sometimes are established in advance of the negotiations and will not be affected by new information gleaned from the negotiations. An airline negotiating with a pilots' union may have a rigid "bottom line" because any less advantageous settlement would force bankruptcy; a father may be committed to seeking the custody of his children during divorce negotiations; or a criminal defendant may refuse to consider any plea bargain including a jail sentence. It is the exception and not the rule, however, when the client's attitudes toward *all* of the issues being negotiated are unaffected by the negotiations. Gulliver's model, therefore, more accurately analogizes the interplay of counseling and negotiation in the legal arena than do traditional lawyering models.

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*Validation Study*, 61 BRIT. J. PSYCHOLOGY 383-85 (1970); Short, *Effects of Medium of Communication on Experimental Negotiation*, 27 HUM. REL. 225-31 (1974).

100. Written correspondence may also be used to slow the pace of negotiation. X. FRASCOGNA & H. HETHERINGTON, *supra* note 99, at 129.

101. P. GULLIVER, *supra* note 4, at 88-89.

102. *Id.* at 90.



### B. *The Boundary-Role Position of Lawyer as Negotiator*

As the client's representative in the adversary system, the lawyer represents the client's interests and owes her undivided loyalty to him.<sup>103</sup> In the courtroom context, the focus of the lawyer's obligations is relatively clearly defined except in extreme situations, such as when the client intends to present perjured testimony.<sup>104</sup> When negotiating on behalf of the client, however, the lawyer is drawn in conflicting directions. On one hand, she is obligated professionally to obtain the most favorable settlement possible during the negotiations and not to make binding concessions without the client's authority.<sup>105</sup> On the other hand, as Williams's survey of the negotiating traits of lawyers suggests, he must respond to pressures from his negotiating counterparts in negotiations and pursue settlements that are fair and just to both parties.<sup>106</sup> The pressure on the lawyer to accommodate

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103. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983) (unimpaired and undivided loyalty to a client is an essential element of the lawyer-client relationship). Interestingly, the Model Rules presuppose the lawyer's loyalty to her client and focus primarily on tempering the overzealousness which may result from that loyalty. *Id.* Formerly, the Model Code of Professional Responsibility Canon explicitly directed the lawyer to represent her client "zealously within the bounds of the law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1982). Zealous representation is incorporated implicitly in the newer Model Rules. See G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 20 (1985).

104. Under these circumstances, when a client's interests collide with the requirements of the law, the model of zealous advocate becomes less clear. See, e.g., *Nix v. Whiteside*, 54 U.S.L.W. 4194 (Feb. 25, 1986). In this recent Supreme Court opinion, a criminal defendant indicated he would give testimony which his attorney believed to be false. *Id.* at 4195. His attorney dissuaded the defendant from perjuring himself by threatening to advise the court of the perjury, impeach his client, and possibly withdraw from the case. *Id.* at 4195-96. The Court held the attorney's conduct did not constitute ineffective assistance of counsel so as to deprive him of a fair trial. *Id.* at 4196. The Court recognized counsel's "overarching duty" to advocate his client's cause, but limited that duty to "legitimate, lawful conduct." *Id.* at 4197. *Nix* is the latest volley in the long-standing debate on when, if ever, the attorney must draw the line between loyalty to one's client and the obligations to the court. See, e.g., Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

105. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983).

106. G. WILLIAMS, *supra* note 1, at 18-22, 27. As a result of her expertise, the lawyer as a representative negotiator is usually in a much better position than the client to assess realistically the outcome of the negotiation. See Hosticka, *We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599, 607 (1979); Reed, *The Lawyer-Client: A Managed Relationship?* ACAD. MGMT. 67, 69, 76 (1969); Scheff, *Negotiating Reality: Notes on Power in the Assessment of Responsibility*, 16 SOC. PROBS. 3, 4 (1968); see also

these tensions, according to Williams, results in part from the expectation of future contact with the other lawyers<sup>107</sup> and in part from the traditions of courtesy and fair play among lawyers.<sup>108</sup>

The responsiveness of the negotiator to both her client and to the other negotiator, and her position as an intermediary between these competing influences, are examples of what social scientists refer to as boundary-role conflict.<sup>109</sup> In their seminal study of labor negotiations, Professors Walton and McKersie describe the "intra-organizational bargaining" process between the negotiator and her constituency which proceeds at the same time as "intergroup negotiations" with the opposing negotiator.<sup>110</sup> They characterize the negotiator as "the [wo]man in the middle,"<sup>111</sup> who must negotiate not only with the other group but also with [her] own constituency. Most often, the negotiator acts as a subduing influence, moderating the views of her own organization,<sup>112</sup> because the negotiator is subject not only to the role expectations of her constituency, but also to those of the other negotiator.<sup>113</sup> These expectations develop naturally as a result of the interactions between the negotiators and their joint responsibility for implementing any agreement reached.<sup>114</sup>

The lawyer's role as a moderating influence does not

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Sorenson, *Biomedical Innovation, Uncertainty, and Doctor-Patient Interaction*, 15 J. HEALTH & SOC. BEHAV. 366, 366-68 (1974) (doctor-patient). Professor Gary Bahr makes a provocative analogy when he compares the lawyer's task of delivering negative communications to the client with the process of counseling the grieving following a death. See Bahr, *Client Counseling for the Frustration of Expectations: We Can Learn From the Dying*, 49 TENN. L. REV. 511, 533-34 (1982).

107. G. WILLIAMS, *supra* note 1, at 18-22; see also Gruder, *Relationships with Opponent and Partner in Mixed-Motive Bargaining*, 15 CONFLICT RES. 403, 413-15 (1971); Roering, Slusher & Schooler, *Commitment to Future Interaction in Marketing Transactions*, 60 J. APPLIED PSYCHOLOGY 386, 386-87 (1975).

108. G. WILLIAMS, *supra* note 1, at 22; see also T. SHAFFER, *supra* note 19, at 300.

109. See R. WALTON & R. MCKERSIE, *supra* note 4, at 282-302; see also D. PRUITT, *supra* note 11, at 41-44; Druckman, *supra* note 11, at 639-40, 652-60; Frey & Adams, *The Negotiator's Dilemma: Simultaneous In-Group and Out-Group Conflict*, 8 J. EXPERIMENTAL SOC. PSYCHOLOGY 331-46 (1972); Klimoski, *supra* note 96, at 363.

110. R. WALTON & R. MCKERSIE, *supra* note 4, at 286; see also D. PRUITT, *supra* note 11, at 41-42; Druckman, *supra* note 11, at 640.

111. See R. WALTON & R. MCKERSIE, *supra* note 4, at 286.

112. *Id.* at 286-89.

113. Walton and McKersie define "a role" as "a set of complementary expectations." *Id.* at 283.

114. See *id.* at 284.

necessarily mean that she is "selling-out" the interests of her client. Professor Eisenberg views the lawyer as an "affiliate" who seeks to reconcile the conflicting interests of the opposing parties in ways that they could not accomplish themselves.<sup>115</sup> According to Eisenberg, by using affiliates in negotiations, an adjudicative element is introduced into the negotiation; negotiators inherently must decide what is a fair and just resolution. Eisenberg also argues that representative negotiation alleviates the anxiety that the disputing parties often experience when they negotiate for themselves. It avoids the embarrassment that would result if either party were required to admit fault personally in order to resolve the conflict. Pruitt, a social psychologist, identifies additional valid reasons why representative negotiators tend to be more compromising than their clients.<sup>116</sup> Professional affiliates understand their role as trying to achieve an agreement, and they also value their continuing relationships with each other. Further, representatives often know more about the other party's negotiating limits, and they therefore have fewer unrealistic illusions about their ability to extract substantial concessions from the other side.<sup>117</sup>

The available experimental data supports the conclusion that negotiators tend to be more compromising than their clients.<sup>118</sup> Negotiators who were observed, monitored,

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115. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 660 (1976).

116. See D. PRUITT, *supra* note 11, at 41; T. SHAFFER, *supra* note 19, at 300. Professor Thomas Shaffer has described how lawyers fulfill their representative roles:

An example of the conditions which make a trusting choice possible—and therefore make it possible to confine competition to the inevitable in negotiation—is the lawyer tradition of courtesy and fair play. Much of the profession's effectiveness rests on the tradition which makes it possible for one lawyer to take the oral word of another (on, for instance, what is at issue), and on a sense of fair play between the two lawyers. To put that another way, on most matters, the two lawyers implicitly agree to cooperate. . . . They are both, usually, committed to the survival of the republic and the maintenance of liberty under law. . . . In a more subtle dimension, each probably is committed to the idea that what he seeks is a fair settlement of the matter at issue, and each attempts to decide exactly where the sense of fairness will lead, in himself and in the other lawyer.

*Id.*

117. See D. PRUITT, *supra* note 11, at 42.

118. See, e.g., Benton & Druckman, *Constituent's Bargaining Orientation and Inter-*

and directed by their clients bargained more competitively and made fewer concessions than negotiators acting independently.<sup>119</sup> Alternatively, representatives who either had no information regarding their clients' bargaining orientation, or were informed that their clients had a cooperative orientation,<sup>120</sup> bargained less competitively. When these results are combined, they confirm that representative negotiators face pressures from both the other negotiator and the client and that when the client exerts no pressure or urges cooperation, the negotiator probably will yield to the other negotiator's influence and bargain cooperatively.

By synthesizing the idea that the attorney as negotiator occupies a boundary-role<sup>121</sup> position with Gulliver's recognition of negotiation as a continuing, on-going *cyclical* process,<sup>122</sup> a more sophisticated and realistic portrayal of legal negotiations emerges than under the traditional models of legal negotiation and counseling.<sup>123</sup> The attorney as negotiator typically begins a negotiation with somewhat vague goals and frequently with unrealistic expectations. The negotiator does not ignore the arguments made by the other party's attorney during the negotiation; indeed, effective negotiators consciously use the negotiation session as an opportunity to gain information about the matter being negotiated and about the other side's preferences.<sup>124</sup> The lawyer apprises the client of what she has learned, and these new

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group Negotiations, 4 J. APPLIED SOC. PSYCHOLOGY 141 (1974); Kogan, Lamm & Trommsdorff, *Negotiation Constraints in the Risk-Taking Domain: Effects of Being Observed by Partners of Higher or Lower Status*, 23 J. PERSONALITY & SOC. PSYCHOLOGY 143 (1972); Slusher, *Counterpart Strategy, Prior Relations, and Constituent Pressure in a Bargaining Simulation*, 23 BEHAVIOURAL SCI. 470 (1978); Wall, *The Effects of Constituent Trust and Representative Bargaining Visibility on Intergroup Bargaining*, 14 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 244 (1975) [hereinafter *Visibility*]; Wall, *A Negotiator's Bargaining: The Effects of Representation and the Opponent's Sex*, in BARGAINING BEHAVIOUR (H. Sauermann ed. 1978) [hereinafter *Representation*].

119. See *Representation*, *supra* note 118, at 279-80.

120. See Benton & Druckman, *supra* note 118, at 148.

121. See *supra* notes 103-20 and accompanying text.

122. See *supra* notes 92-102 and accompanying text.

123. Professor Wall reaches a similar conclusion and suggests that "intergroup bargaining is a process in which: (a) the constituent-representative relationship and its outcomes affect the representative-outsider relationship and (b) the resultant representative-outsider relationship and its outcomes in turn alter the subsequent constituent-representative relationship." *Visibility*, *supra* note 118, at 245.

124. See G. BELLOW & B. MOULTON, *supra* note 1, at 512-28 (distributive bargaining); Gifford, *supra* note 55, at 56 (integrative bargaining); see also *supra* note 61.

disclosures often lead the client to change his expectations concerning the negotiation or his preferences as to concessions. The client's reactions to this new information become an important ingredient in the next round of negotiations with the other party. This sequence often will be repeated several times before a negotiation is completed.

### C. *Lawyer Dominance of Negotiation Counseling*

When discussing the interfacing of the negotiation and counseling processes in client representation, it is difficult to ignore the evidence that client-centered advocacy is rare, whether defined as an allegiance to the Binder and Price model of counseling<sup>125</sup> or as a correspondence with the spirit as well as the letter of the American Bar Association's Model Rule of Professional Conduct 1.2.<sup>126</sup> The literature abounds with anecdotal evidence that, away from the watchful eyes of clinical supervisors—and perhaps even then—lawyers and law students dominate the decision-making process during counseling sessions.<sup>127</sup> Professor Spiegel argues

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125. See *supra* notes 40–45 and accompanying text.

126. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983); see also *supra* notes 26–28 and accompanying text.

127. See T. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT 96 (1981); Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1045–46 (1981); Kressel, Hochberg, & Meth, *A Provisional Typology of Lawyer Attitudes Towards Divorce Practice*, 7 L. & HUM. BEHAV. 31 (1983); Spiegel, *supra* note 31, at 1003, 1011–12; Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, quoted in G. HAZARD & D. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 280, 281 (1985).

In addition to the anecdotal testimonials of clinical teachers who find teaching the client-centered model frustrating, a research project conducted by psychologist Algund Hermann substantiates the view that it is difficult to teach law students and lawyers to use the Binder and Price model of counseling. Hermann, *A Study of the Effects of a Legal Interviewing and Counseling Course on Law Students and Their Milieu* (August 1978) (unpublished dissertation on file with author). Hermann analyzed videotaped segments of interviews conducted by law students who had been exposed to a 12-week training program with segments of interviews conducted by a control group of students. See *id.* at 37–68 (detailing research methods and design). The students had been instructed in the use of Binder and Price's three step interview model, *id.* at 57, and also had been exposed to several other interviewing texts, including: A. BENJAMIN, THE HELPING INTERVIEW (1974); G. EGAN, THE SKILLED HELPER (1975); H. FREEMAN & H. WEIHOFEN, *supra* note 2; IVEY & GLUCKSTERN, BASIC ATTENDING SKILLS (1974); T. SHAFFER, *supra* note 19; and A. WATSON, *supra* note 18. Hermann, *supra*, at 56. Hermann found statistically significant changes in the law students' use of interviewing techniques associated with the "interviewing" as opposed to the "counseling" portions of the Binder and Price model. For example, the law students exposed to the interviewing train-

that "lawyers in many cases significantly control their clients' decisions and exert broad discretion over the means necessary to implement decisions."<sup>128</sup>

Open acknowledgment of this reality should not be construed as acceptance of a lawyer-dominated decision-making process. Far too often, professional responsibility and clinical teachers avoid analyzing why lawyer dominance occurs. They assume lawyers and clinical students simply are not motivated to engage in client-centered advocacy, have their own professional or personal interests in dominating the decision-making processes,<sup>129</sup> or have not mastered the use of the client-centered model of counseling.<sup>130</sup> The formal norms of the legal profession and the political origins of client-centered advocacy lead law professors and lawyers to resist admitting the extent of lawyer dominance. Yet, if more satisfactory relationships between attorneys and clients are to be established, the conflicts between clients and even well-intentioned lawyers who accept client-centered advocacy as a goal must be acknowledged.<sup>131</sup>

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ing asked more open-ended questions and used more empathetic responses, at a statistically significant level. *See id.* at 72-77. The students did not, however, decrease in a statistically significant way the amount of "advice" given to the client. *Id.* at 76-77. This last issue most accurately measures the influence of client-centered advocacy which suggests the lawyer should only give the advice under unusual conditions. *See* D. BINDER & S. PRICE, *supra* note 1, at 196-97, 208-10; *see also supra* notes 48-49 and accompanying text. Unfortunately, Hermann's study measured only this one counseling variable, the giving of advice. One can speculate that an empirical study designed to discuss whether law students actually employ the total Binder and Price counseling model would be even more disheartening. *See* Hermann, *supra*, at 121-22.

128. Spiegel, *supra* note 31, at 1003.

129. Some commentators assert that the personality types drawn to the study and practice of law have strong needs to dominate and control their clients. *See* T. SHAFFER, *supra* note 19, at 13-14 (1976) (proposing that professional disciplines encourage dominance). Similarly, in his book, *The Silent World of Doctor and Patient*, Professor Jay Katz views "professional authoritarianism and the mask of infallibility" as responses to the doctor's anxiety stemming from uncertainty. J. KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* 198-99 (1984).

Some clinical teachers suggest that dominance of the client in counseling is a result of a conservative middle-class value system and that financial and professional conflicts of interest lead attorneys to dominate the decisionmaking process. *See* Burt, *supra* note 127, at 1035-36; *see generally* Johnson, *Lawyer's Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 L. & SOC'Y REV. 567 (1981).

130. *See supra* notes 41-45 and accompanying text.

131. Professor Burt views this issue not so much as one of the power relationship between the attorney and the client, but instead as an issue of "mistrust" between the attorney and the client. *See* Burt, *supra* note 127, at 1015, 1041, 1046. According to Professor Burt:

Lawyers probably are inclined to dominate client-counseling sessions in any context to a greater extent than the Model Rules and the Binder and Price counseling model suggest they "should," but lawyer domination is particularly pronounced in counseling clients about negotiations. Ironically, both the lawyer's greater knowledge and expertise, and the lawyer's anxiety caused by the uncertainty of the client's prospects, contribute to her predisposition to dominate client-counseling conferences. The lawyer is generally more capable than the client of predicting the likely outcomes of pursuing various approaches to the negotiations or of foregoing negotiations entirely.<sup>132</sup> The lawyer also is better able to assess the objective or quantifiable aspects of the alternatives to negotiation<sup>133</sup>—whether the alternative is an expected trial outcome or a negotiated deal with another partner in a transactional context. She also frequently can predict, if only approximately, the likely outcome of the negotiation alternative—perhaps she has negotiated similar cases previously or has bargained before with the other party or the other party's attorney. This previous exposure has educated her about both the probable outcome of the negotiations and the negotiation strategies or techniques most likely to be effective. The lawyer finds it difficult to communicate all this information, often because she appre-

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If lawyers in general practice admitted the pervasiveness of conflict with clients, they would confront a more troubling dilemma: how to serve any client as a lawyer. Once pervasive conflict is admitted, the possibility of any proper professional relationship seems to vanish. This is, of course, the ultimate reductive absurdity for the legal profession.

*Id.* at 1041. For an excellent analysis of the economic and noneconomic conflicts that may occur between attorneys and clients, see generally Johnson, *supra* note 129.

132. See D. BINDER & S. PRICE, *supra* note 1, at 166–68.

133. See Johnson, *supra* note 129. Johnson's recent article discussed decisions made by lawyers at various points in litigation. The article lists all the factors a client-centered lawyer who is behaving rationally would need to consider before deciding whether to proceed with the next step in the litigation, such as the taking of a deposition. *Id.* at 574. Johnson concludes that although his model "might well describe how rational lawyers *ought* to make various litigation decisions," the "maze of interdependent probability judgments to be made is so intimidating and inherently imponderable that it would lead even those lawyers committed single-mindedly to their clients' best interests to a different and simpler set of criteria." *Id.* at 575. However difficult or impossible it may be for the lawyer to quantify all relevant factors, it is significantly less likely that they will even be understood by most clients.

ciates it only at a nonarticulable level of understanding, to the client. Conversely, to the extent the lawyer is not able to predict the outcome of the negotiations and the alternatives to negotiations, she may be uncomfortable and compensate for this anxiety by assuming an authoritarian posture that Professor Jay Katz describes as the "mask of infallibility."<sup>134</sup>

The primary explanation, however, for the lawyer's dominance of negotiation counseling is that it is the lawyer and not the client who actively participates in the activity which is the subject matter of the counseling sessions, the negotiations. It is the lawyer who implements at negotiations the decisions reached during the counseling sessions. After the client has related the facts of his problem in the initial interviewing session, and once negotiations have begun, it is the lawyer who provides most of the new information relevant to the counseling process—facts about what has transpired during the negotiations. In this regard, negotiation counseling is inherently different from the therapeutic counseling sessions conducted by psychologists, counselors, or other therapists.<sup>135</sup> In those counseling contexts, it is the patient who, after leaving the counseling session, actively implements the strategy for facing his own problems. This contrast between legal negotiation counseling and professional counseling in most other contexts makes client-centered advocacy even more difficult to achieve.

The client-centered counseling model attempts to eliminate the tendency toward lawyer dominance resulting from the lawyer's direct involvement in the negotiations and her greater knowledge, expertise, and predictive abilities by having the lawyer share her knowledge and predictions with the client.<sup>136</sup> The Binder and Price model, as currently structured, anticipates that the lawyer should relate most of her information regarding the negotiations and the other alternatives to the client during a single counseling session following negotiation.

Two primary questions remain, however. First, is it possible to preserve client-centered advocacy in the face of

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134. See J. KATZ, *supra* note 129, at 198-99.

135. See generally C. ROGERS, *supra* note 38; see also *supra* note 38.

136. See D. BINDER & S. PRICE, *supra* note 1, at 143-44.



the strong pressures toward lawyer dominance in negotiation counseling using any counseling model? And second, can the Binder and Price counseling model be modified to facilitate client-centered advocacy in the negotiation context?

### III. A PROPOSAL FOR PRESERVING CLIENT-CENTERED ADVOCACY IN THE NEGOTIATION CONTEXT

Recognition of the cyclical nature of the negotiation and counseling processes and the lawyer's boundary-role position and her tendency to dominate counseling highlight the inadequacies of the traditional models of legal negotiation and counseling. This realization does little more, however, than to confirm what Professors Bellow and Moulton originally cautioned: "models" are a "set of *simplifying* assumptions."<sup>137</sup>

This section proposes refinements to the existing models to account for the problems posed by the symbiotic relationship between negotiation and counseling.

This section treats negotiation on behalf of clients as an integrated process consisting of both encounters with the other party's lawyer (negotiation) and the client (counseling). These meetings are described sequentially and include a prenegotiation counseling conference,<sup>138</sup> negotiations with the other party's attorney,<sup>139</sup> counseling conferences during the negotiation process,<sup>140</sup> and postnegotiation counseling conferences.<sup>141</sup> The recommended structure for each different counseling conference is based upon Binder and Price's client-centered counseling model, but is varied according to the timing and context of the counseling conference.

The model presented is prescriptive, although it would be unrealistic and probably undesirable to employ all its aspects in every case. The proposal emphasizes that the client should remain active in the negotiation process as a means of mitigating the strains on client-centered advocacy caused

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137. G. BELLOW & B. MOULTON, *supra* note 1, at 445 (emphasis added).

138. See *infra* notes 143-71, and accompanying text.

139. See *infra* notes 172-92, and accompanying text.

140. See *infra* notes 193-201, and accompanying text. Such client participation is, of course, not always feasible or desirable, particularly in routine cases settled often in a single negotiation session.

141. See *infra* notes 202-10, and accompanying text.

by boundary-role conflict and the tendency toward lawyer dominance.<sup>142</sup> Finally, the Section discusses how the lawyer's role as an affiliate alters both the counseling and negotiation models. In summary then, this Section explores how the client's involvement in the negotiation process can increase the quality of the negotiated results and further the goals of client-centered advocacy.

#### A. *Prenegotiation Counseling Conference*

Prior to negotiations with the other party, the lawyer should engage in a significant counseling session with the client. The substance of this conference should include four separate topics. First, the lawyer and client should analyze, with all available information, both the client's Best Alternative to a Negotiated Agreement (BATNA)<sup>143</sup> and the likely outcome and consequences of the negotiation alternative.<sup>144</sup> Second, they should discuss the negotiation "strategy,"<sup>145</sup> and the possible consequences of its choice for the client and his problem.<sup>146</sup> Third, the lawyer and client should explore integrative solutions which would meet both the client's and the other party's needs.<sup>147</sup> Finally, they should decide how much negotiating "authority" the client should grant the lawyer; this decision should consider the implications for both the negotiation process itself and the client's involvement.<sup>148</sup>

Lawyers usually negotiate with the other party's attorney without a substantial prenegotiation conference. Often they only ask the question: "Do you want me to see what I

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142. See *infra* notes 143-210 and accompanying text.

143. See R. FISHER & W. URY, *supra* note 4, at 104-08.

144. See *infra* notes 152-56 and accompanying text.

145. A strategy is a negotiator's planned and systematic effort to move the negotiation process toward a resolution favorable to her client's interests. It consists of the decisions made regarding the opening bid, the subsequent modifications of that proposal, and the various tactics used to induce the other negotiator to offer a proposal favorable to the client. The concept of negotiation strategy is separate and distinct from the personal style of the negotiator. Even the polite, friendly, and courteous negotiator can use competitive strategy negotiation tactics, such as extreme initial offers, reluctance to make concessions, and arguments designed to lessen the other negotiator's confidence in her position. See Gifford, *supra* note 55, at 47-48.

146. See *infra* notes 157-61 and accompanying text.

147. See *infra* notes 169-71 and accompanying text.

148. See *infra* notes 162-68 and accompanying text.

can get for you by talking to the other side?" or enter negotiations without the client's express approval.<sup>149</sup> This approach is ill-advised for the reasons discussed below.

The lawyer should provide the client with a realistic description of the client's BATNA and the prospects for a satisfactory negotiated result at the earliest possible time. This lessens the likelihood that after negotiations, the lawyer and client will have vastly different opinions on the advisability of accepting or rejecting the settlement offer. Lawyers often quite naturally postpone bad news until the last possible moment, and, as a result, they allow their clients to entertain unrealistically optimistic expectations until the negotiations conclude. Reality then intrudes when the lawyer believes settlement is justified, and the client dismisses this option because he still possesses unrealistic expectations about what will happen at trial or about the viability of his other nonlitigation BATNA.<sup>150</sup>

Additionally a substantial prenegotiation counseling session is necessary because the lawyer may be better able to evaluate objectively the negotiated and nonnegotiated alternatives prior to a negotiation session than afterwards. Admittedly, her evaluation may suffer somewhat since less information is available. After the lawyer negotiates, however, it is difficult for her to avoid having her own ideas about the best options for the client. When she describes the negotiated and nonnegotiated alternatives to the client during the postnegotiation counseling conference, her own preferences will likely color, consciously or unconsciously, her descriptions of the options. An initial comprehensive description of the legal consequences of the alternatives to a negotiated agreement dissuades, and possibly prevents, the lawyer from biasing her description of those alternatives af-

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149. The ABA Model Rules of Professional Conduct do not explicitly require an attorney to obtain express approval from a client to initiate negotiations. Rule 1.4(a) specifies that a client must be "reasonably informed" about the status of a matter. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(a) (1983). The comment, however, refers primarily to an attorney's duty to promptly inform a client of offers and other communications from opposing parties. *Id.* Rule 1.4 comment.

150. The opposite situation sometimes occurs in negotiation counseling. The lawyer informs the client prior to negotiations that she only can achieve a minimal result from the negotiations. Later, when the client receives a better proposal than anticipated from the other side, he views the offer as one that cannot be refused.

ter negotiations. Her prenegotiation assessment thus assures the objectivity of her postnegotiation analysis.

As previously noted,<sup>151</sup> any discussion prior to the negotiations of the likely settlement outcome and alternatives is tentative. The lawyer, therefore, should emphasize this when talking with the client. Lawyers typically begin negotiating prior to completing their own investigation of facts, legal research, and discovery. In addition, the lawyer is unaware initially of how the other side views the case and of additional information that will be gleaned during the negotiation process. When the lawyer's evaluation of the case changes during negotiations, however, she should be able to justify during the postnegotiation counseling session how the new information changed her valuation.

The second issue to be discussed during the prenegotiation conference is which negotiation strategy best serves the client's interests. As previously mentioned, the Model Rules of Professional Conduct require the attorney to consult her client regarding the "means" of representation;<sup>152</sup> this requirement suggests that the attorney should consult with the client regarding the negotiation strategy she intends to use. Some clients will decline any interest in their lawyers' negotiating tactics, but each client should reach this decision only after the lawyer outlines how negotiation tactics can affect the client. In particular, the lawyer and client should explore the implications of the lawyer's intended negotiation strategy on future relationships between her client and the other party.<sup>153</sup> If the parties have a continuing relationship, a noncompetitive negotiation strategy is usually preferred.<sup>154</sup> The competitive strategy often generates distrust and ill-will and may alienate other lawyers and invite retaliation for violating fairness norms.<sup>155</sup> On the other hand,

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151. See *supra* notes 90-91 and accompanying text.

152. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 comment (1983).

153. See Gifford, *supra* note 55, at 65.

154. See R. AXELROD, *THE EVOLUTION OF COOPERATION* 129 (1984); D. PRUITT, *supra* note 11, at 39-40, 109-12; Gifford, *supra* note 55, at 65; Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 U. KAN. L. REV. 69, 105-09 (1982); Roering, Slusher & Schooler, *Commitment to Future Interaction in Marketing Transactions*, 60 J. APPLIED PSYCHOLOGY 386, 386-87 (1975); Rubin, *Negotiation: An Introduction to Some Issues and Themes*, 27 AM. BEHAVIOURAL SCIENTIST 135, 137 (1983).

155. Slusher, *Counterpart Strategy, Prior Relations, and Constituent Pressure in a Bargaining Simulation*, 23 BEHAV. SCI. 470, 476 (1978).

some clients prefer the competitive strategy in negotiating with a party with whom they have a continuing relationship, because it establishes a strong bargaining image and discourages future attempts at exploitation by the other party.<sup>156</sup> Because clients have different concerns about how their lawyer's negotiating behavior affects their own relationships with other parties, their input should be solicited prior to the negotiations.

The lawyer and the client also should consider the lawyer's authority to enter into an agreement binding on the client. The type of authority a client delegates to the lawyer ranges from unlimited authority, which gives the lawyer *carte blanche* to enter into an agreement on behalf of the client, to "open authority," which authorizes the lawyer to negotiate, but does not give her any authority to enter into a binding agreement.<sup>157</sup> The type of authority affects both the negotiation process and the prospects for a client-centered counseling process. In simulated experiments, social scientists have found that representatives who are accountable to clients (have limited authority) are more likely to be "tough" and to use competitive tactics under most circumstances.<sup>158</sup> Attorneys merely nominally accountable to the client, whose authority is limited only within the broadest parameters, however, tend to negotiate less vigorously than if they had unlimited authority.<sup>159</sup> One experienced negotiator told Professor Raiffa about his frustrations in negotiating when his client has a very liberal "bottom line": "It's difficult to exaggerate with an innocent face when you know quite well that the numbers say otherwise."<sup>160</sup> In a context in which the lawyer intends to engage in problem-solving bargaining, a grant of unlimited authority gives her greater flexibility to consider integrative proposals and invent solutions for the parties' problems.<sup>161</sup>

Even though granting the lawyer broad authority facili-

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156. See Gifford, *supra* note 55, at 65.

157. See R. HAYDOCK, *supra* note 63, at 46-47.

158. See D. PRUITT, *supra* note 11, at 42-43, 120-21, 196; Lamm, *Group-Related Influences on Negotiation Behavior: Two-Person Negotiation as a Function of Representation and Election*, in BARGAINING BEHAV., 284, 297-302 (H. Sauermann ed. 1978).

159. See H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 146 (1982).

160. See *id.* at 146-47.

161. See R. HAYDOCK, *supra* note 63, at 47-48.

tates cooperative<sup>162</sup> and problem-solving negotiations, a more restricted grant also has distinct advantages. The advantages of a limited grant of authority as a negotiating technique will be discussed in the next part of this Section.<sup>163</sup> Restricting the lawyer's authority to enter into a binding agreement<sup>164</sup> also aids client-centered advocacy because the client retains greater control over his attorney's conduct during the negotiation. A series of incrementally increasing grants of authority over the course of the negotiation guarantees that the attorney must consult regularly with the cli-

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162. The cooperative strategy is one in which the negotiator seeks to reach an agreement which is fair and just to both parties and to develop a relationship with the other negotiator based upon trust and mutual goodwill. The cooperative negotiator begins the negotiation with a proposal which is favorable to his client, but moderate. He often initiates the concession-granting process and assumes that the other negotiator will feel bound to reciprocate. Arguments in the cooperative strategy are addressed to what is "fair and just," not to disparaging the other negotiator's alternatives to a negotiated agreement; accordingly, the cooperative negotiator frequently refers to objective criteria. See Gifford, *supra* note 55, at 52-54.

Professor Robert Axelrod, in his recent book, *The Evolution of Cooperation*, concludes that "under suitable conditions, cooperation can indeed emerge in a world of egoists without central authority." R. AXELROD, *supra* note 154, at 20. According to Axelrod, the main results of cooperation theory "show that cooperation can get started by even a small cluster of individuals who are prepared to reciprocate cooperation, even in a world where no one else will cooperate." *Id.* at 173. Cooperation will be viable, Axelrod argues, when the cooperation is reciprocal and the parties involved are adequately concerned with the future as well as the immediate consequences of their actions. *Id.* Axelrod believes that "once cooperation based on reciprocity is established in a population, it can protect itself from invasion by uncooperative strategies." *Id.*

163. See *infra* notes 189-92 and accompanying text.

164. The lawyer apparently does not commit an ethical violation when she and the client decide to restrict artificially her authority as a negotiating technique, even though she may inform the other attorney of the limited authority, when she knows that ultimately the client will grant her more settlement leeway. The ABA Model Rules, of course, prohibit a lawyer from knowingly making a false statement of "material fact or law" to a third person in the course of representation. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(a) (1983). The comment to Rule 4.1(a) limits the impact of the Rule by providing that under "generally accepted conventions in negotiation," "certain types of statements ordinarily are not taken as statements of material fact." *Id.* Examples given include "a party's intentions as to an acceptable settlement." *Id.* The Rule and comment, as promulgated, represent a significant departure from the Rule as originally drafted. Rule 4.1 originally required a lawyer not to "knowingly make a false statement of fact or law . . ." MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1981) (emphasis added). The addition of the word "material," along with the aforementioned comment, effectively licenses a lawyer to lie during negotiations if "conventions" allow it. See generally Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99 (1982) (ethical considerations in negotiation).

ent. Presumably, lawyers preface such requests for additional authority with reports on the current status of the negotiations, and thus keep the client better informed about the negotiations and more directly involved in them.

The lawyer and client also should consider together whether they can devise solutions that satisfy the underlying interests of both the client and the other party. The proponents of problem-solving bargaining, including Fisher and Ury<sup>165</sup> and Menkel-Meadow,<sup>166</sup> previously have recognized the ways in which effective client counseling contributes to successful negotiations, at least in the context of the problem-solving approach they advocate. Because problem-solving negotiation stresses creative solutions that satisfy the parties' underlying needs, Menkel-Meadow emphasizes that the lawyer and client should identify the client's needs, look for nonlegal solutions, and ascertain the client's values and preferences regarding potential solutions.<sup>167</sup> The "crux" of the problem-solving negotiation strategy, according to Menkel-Meadow, is the counseling process preceding the negotiation itself.<sup>168</sup> During these planning sessions, lawyer and client should develop proposed solutions to the problem[s] facing the parties, which then will be considered with the other party's lawyer during negotiations.

Both Menkel-Meadow and Fisher and Ury recommend the technique of brainstorming during the counseling sessions.<sup>169</sup> As previously described,<sup>170</sup> "brainstorming" is designed to produce as many potential solutions to the problem as possible. The participants in a brainstorming session are encouraged to articulate whatever possible solutions come to mind, regardless of how ridiculous or non-viable they initially appear. The lawyer and client suspend critical evaluation and judgment until all possible proposals have been listed, and only then do they consciously and systematically consider the viability of each option and its advantages and disadvantages. This technique reduces the

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165. See R. FISHER & W. URY, *supra* note 4, at 73-82.

166. See generally Menkel-Meadow, *supra* note 24, at 801-04, 818-19.

167. See *id.* at 801-04; see *supra* notes 75-80 and accompanying text.

168. Menkel-Meadow, *supra* note 24, at 818-19.

169. See R. FISHER & W. URY, *supra* note 4, at 62-65; Menkel-Meadow, *supra* note 24, at 819.

170. See *supra* notes 81-84 and accompanying text.

possibility that a viable option will not be considered because the participants have excluded it as a result of intuitive or subconscious prejudices that are not valid when carefully considered. Brainstorming also counteracts the tendency of many lawyers to be overly critical and to seek only the "best answer" to a problem as a result of their personalities or their legal training.

Brainstorming prior to the negotiations significantly contributes to both client-centered counseling and negotiation results. Brainstorming actively involves the client in the negotiation process, builds rapport, and often provides the client with a more realistic picture of the difficulties to be faced during the negotiation. Brainstorming with the client also increases the likelihood that negotiations will yield desirable results. Clients, particularly those engaged in businesses or other specialized activities, frequently know more about their problems and possible solutions than do the lawyers. In addition, several individuals brainstorming about a problem tend to generate more potential solutions than only two negotiators, and thus they increase the likelihood of finding a solution that satisfies the underlying needs of both parties.

When the lawyer discusses possible problem-solving approaches to the negotiation with the client, she reduces the client's alienation and increases the effectiveness of the negotiations as well. This interaction is the most important exception to the general thesis that lawyering theorists heretofore have failed to acknowledge the mutually dependent nature of legal counseling and negotiation. Unfortunately, not all negotiable disputes can be resolved through brainstorming or by devising integrative solutions.<sup>171</sup> Predominantly distributive problems, in which the parties must divide a fixed quantity of resources between them, leave the lawyer and client to the less emotionally satisfying tasks of analyzing the alternatives available to the client, discussing the implications of the choice of negotiation strategy, and establishing the limits of the lawyer's negotiating authority.

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171. See Gifford, *supra* note 55, at 46-47, 52, 55-56, 69-71.



B. *Negotiations: The Lawyer's Representative Role*

The effective negotiator uses, for tactical purposes, both the interspersing of negotiation and counseling sessions and the lawyer's role as the client's representative. Interruptions in negotiations can function either as a competitive tactic<sup>172</sup> or as a means of facilitating a problem-solving negotiation process. In addition, these negotiation breaks also allow the lawyer to switch strategies less abruptly. During the course of a single negotiation, a lawyer frequently uses more than one strategy; she may switch from a competitive strategy to a cooperative or problem-solving strategy or vice versa.<sup>173</sup> In many cases, the pattern is for negotiations to progress from a competitive stage<sup>174</sup> to a more accommodative phase; however, early use of competitive tactics often makes this shift difficult. As the competitive negotiator moves "psychologically against the other person"<sup>175</sup> with tactics designed to unnerve or intimidate her,<sup>176</sup> it becomes increasingly diffi-

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172. Competitive tactics are those designed to lessen the opponent's confidence in her case, thereby inducing her to settle for an amount less than she originally demanded. See *infra* note 199; see also Gifford, *supra* note 55, at 48. Examples of competitive tactics include the following: a high initial demand; limited disclosure of information regarding facts and one's own preferences; few and small concessions; threats and arguments; and apparent commitment to positions during the negotiating process. *Id.* at 48-49.

173. See Gifford, *supra* note 55, at 57-58, 67. Social psychologist Dean Pruitt in his strategic choice model of negotiation recognizes that various negotiation strategies will be used within a single negotiation. See D. PRUITT, *supra* note 11, at 15. The strategic choice model suggests that the negotiator at every point in the process must choose between engaging in competitive behavior, making a unilateral concession, or suggesting an integrative proposal. *Id.*

174. See D. PRUITT, *supra* note 11, at 131-35. Professor Pruitt identifies five purposes for the competitive stage: (1) posturing before clients to make it seem that the bargainer is working vigorously on their behalf. This image should make it easier for the bargainer later to recommend a coordinative approach without being labelled as *soft* or *disloyal* by her own clients; (2) clarifying one's own goals and priorities; (3) assessing how far the other side can be pushed into making concessions. Until such a test has been made, at least one of the parties is likely to be unwilling to conclude an agreement because of the belief that more can be achieved through competitive posturing; (4) demonstrating firmness with respect to one's major goals. It is generally believed that the other party will remain in a competitive stance until the bargainer seems unlikely to make further unilateral concessions. Hence, bargainers must establish an image of firmness before switching to coordinative behavior; (5) narrowing the range of possible outcomes to the point where a large perceived divergence of interests no longer exists. *Id.* at 135.

175. G. WILLIAMS, *supra* note 1, at 480-89. See also R. WALTON & R. MCKERSIE, *supra* note 4, at 59-82; Lowenthal, *supra* note 154, at 83-88.

176. See S. SIEGAL & L. FOURAKER, *BARGAINING AND GROUP DECISION MAKING: EXPERIMENTS IN BILATERAL MONOPOLY* 100 (1960); Lowenthal, *supra* note 154, at

cult to change to a more cooperative or problem-solving strategy during the same session. Breaks in the negotiation process and the passage of time between sessions allow tempers and emotions to cool and facilitate changes from competitive to more cooperative or problem-solving strategies.

In the distributive negotiation context, the skilled negotiator can use the termination of the session either offensively or defensively. A competitive negotiator sometimes walks out of negotiation sessions because she anticipates that the other lawyer will make concessions in order to entice her to return to the bargaining table;<sup>177</sup> she gambles on the other negotiator's willingness to make concessions to avoid a deadlock. The competitive negotiator will also threaten a walkout if the other party fails to concede<sup>178</sup> or sets a deadline by which the other party must concede.<sup>179</sup> The competitive negotiator also uses negotiation breaks defensively and recesses the negotiations when one of several situations presents itself: (1) she perceives an emotional shift in the climate of the negotiations against her client; (2) she is confronted with unexpected new information or negotiating positions from the other party; (3) her own negotiating strategies are not having the effects she anticipated; or (4) she is confused or tired. A recess under any of these conditions often breaks the psychological momentum against her client and gives her a chance to reassess her evaluation of the case and the posture of the negotiations.<sup>180</sup>

Strategic negotiation consequences also may result from the reopening of negotiations following a recess, un-

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90; see also C. OSGOOD, *AN ALTERNATIVE TO WAR OR SURRENDER* 53 (1962) (competitive military psychology utilizes a "seesawing" arms race to achieve this effect).

177. See R. HAYDOCK, *supra* note 63, § 5.16, at 140-41.

178. See generally G. BELLOW & B. MOULTON, *supra* note 1, at 559-61 (use of threats generally).

179. See R. HAYDOCK, *supra* note 63, § 5.5, at 129-31. Haydock cautions that the tactical use of deadlines may be counterproductive. A negotiator who sets a deadline accompanied by a threat may be forced to fulfill the threat or lose credibility, unless a good explanation is available. Deadlines also may create counterproductive pressure on a negotiator by inhibiting her flexibility and creativity. A negotiator facing a deadline is less likely to engage in a cooperative strategy because she perceives this approach to be more time-consuming. If a competitive bargaining strategy is used, the negotiator may unreasonably lower her expectations and demands to increase the likelihood of achieving a settlement within the time limitation. *Id.*

180. See *id.* § 15.7, at 132.

less the parties agreed at the time the negotiations broke down to resume bargaining at another time. Unfortunately, as Fisher notes, the party seeking to initiate settlement is often perceived, at least among litigators, as having a weak case.<sup>181</sup> To propose the reopening of negotiations thus may result in "image loss"<sup>182</sup>—the lawyer's willingness to continue negotiating, without a change in circumstances, often suggests that her earlier "toughness" was mere bluffing and she can be pressured into further concessions. To counter this perception, a lawyer should justify the renewal by bringing forth new information, obtained through discovery or investigation, which may change the parties' evaluation of the case. Often, however, the only change since the breakdown of the heated negotiations is that tempers have cooled. Under these conditions, the lawyer proposing the reinitiation of negotiations should forthrightly offer her opinion that the best interests of both parties would be served by continuing the negotiations.<sup>183</sup>

In contrast to the competitive negotiation strategy, the

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181. Fisher, *Faculty Perspectives — He Who Pays the Piper*, 37 HARV. L. SCH. BULL. 2, 23–24 (excerpt from HARV. BUS. REV. (Mar.–Apr. 1985)).

182. See G. BELLOW & B. MOULTON, *supra* note 1, at 537–39; R. HAYDOCK, *supra* note 63, at 170. Bellow and Moulton refer to "image loss" as "unwanted changes in the way the concession maker is perceived by his opponent, third parties, his constituents or himself." G. BELLOW & B. MOULTON, *supra* note 1, at 538. In addition to image loss, a negotiator may also incur "position loss" by making concessions. "Position loss" results because of an implicit rule in negotiations against withdrawing a concession once it has been made. The portion of the bargaining range which is conceded cannot be regained and cannot be traded for additional concessions from the other party at a later point in the negotiations. *Id.*

183. See R. HAYDOCK, *supra* note 63, at 170–71. Haydock suggests that to renew discussions either party may attempt to: (1) interpret the statement in a way that makes the position a firm offer or demand, but not a final one; (2) provide the negotiator with an opportunity to restate the position to eliminate its finality; (3) suggest a new perspective that should cause the other side to reconsider its position; (4) explain that the best interests of both parties will be served by continuing negotiations; (5) ask the other negotiator to listen even if she does not want to negotiate; (6) ignore the statement and shift to another topic; (7) directly suggest that the negotiator reconsider the previous irresolute position; (8) recommend that additional authority be obtained from a client; (9) employ some tactic, like splitting the difference if the existing gap is not large, or indicating that it is the other side's turn to make a concession; (10) suggest that negotiations be continued at a later date after both sides reassess their positions. *Id.*

The party who reopens the negotiations, however, may have at least one advantage if she chooses to communicate by telephone. By choosing the timing of her call, she has had time to review the case and the negotiation history and is probably better informed and able to discuss the case. *Id.* at 40. The most effective countertactic to this approach is for the party receiving the telephone call to

problem-solving approach is premised on the assumption that negotiators consult regularly with their clients.<sup>184</sup> When the lawyer and client brainstorm prior to the negotiations, they often cannot devise solutions that meet both parties' needs, because they are not fully aware of the other party's needs and priorities. After the lawyers negotiate and discuss their clients' interests and needs, brainstorming by the lawyer and her client is more likely to be successful. The additional information gleaned during the negotiations assists each of the negotiating dyads in generating more solutions and in evaluating them more accurately. Further, a client's own needs and preferences often require reevaluation in response to new information or proposals from the other side.<sup>185</sup>

Just as the cyclical nature of the negotiations affects the process, so does the representative function of the lawyer as negotiator, and this role also can be used both offensively and defensively as a negotiation technique. If the negotiating lawyers obey the directives of Model Rule of Professional Conduct 1.2, then the ultimate authority to accept or reject settlement proposals lies with the clients. This suggests a lawyer should address her arguments not solely to the other lawyer with whom she is directly negotiating, but also to the absent "other party." The lawyer should assume her arguments will be passed on to the other client, and she should frame her arguments in a manner designed to affect the other client's perception of the relative value of the settlement proposal as compared with his BATNA.<sup>186</sup> Frequently, the lawyer profits by reminding her negotiating counterpart that he is acting as a representative for his client: "My proposal satisfies your client's interests," or even "It would not be in your client's interests to turn down this offer and subject him to the risks of litigation."<sup>187</sup> The law-

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simply refuse the call—"I'm sorry, he's in consultation with a client right now"—until after she has had an opportunity to prepare herself. *See id.*

184. *See generally* Menkel-Meadow, *supra* note 24, at 817-29.

185. *See* D. PRUITT, *supra* note 11, at 153-54.

186. For a general discussion of the role of argument in negotiation, see Condlin, "Cases on Both Sides": *Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65, 80-89 (1985).

187. The competitive response to this tactic, of course, is "I'll decide what's in my client's best interest." The point has been made, however, and it can be assumed that the other attorney probably would have responded competitively to

yer can use this same type of client-based argument defensively when she rejects the other lawyer's settlement offer: "That would not be acceptable to my client because he thinks that . . . ." or counters his argument without suggesting that she personally finds it ill-conceived: "That would not be convincing to my client." Often a lawyer even can blame her competitive tactics, such as refusing a settlement offer, on her recalcitrant client and thereby maintain a cordial personal working relationship with her negotiating counterpart.<sup>188</sup>

One specific way that the lawyer's representative function can be used as a negotiating tactic is for the client to limit her authority to enter into a binding agreement. If the client grants his attorney only limited authority to enter into an agreement, the lawyer can claim that she is unauthorized to accept the other negotiator's proposal, without facing the difficult ethical question posed by a false denial of authority. Denying she has authority to do so is an excellent means of justifying why a concession cannot be made or why a concession must be limited in amount.<sup>189</sup> Claims adjusters or attorneys representing insurance companies in personal injury negotiations frequently use this technique.<sup>190</sup> Their clients, the insurance companies, set their "reserves"<sup>191</sup> on cases unrealistically low so that plaintiffs' demands can be met with statements such as "our reserve is only \$45,000."<sup>192</sup>

### C. *Client-Counseling Conferences During the Course of the Negotiations*

The lawyer should confer often with her client during

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whatever direct argument was made that did not refer to the other lawyer's representative role.

188. See 3 A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 212 (1978).

189. See H. EDWARDS & J. WHITE, *supra* note 1, at 119-21. This technique may also leave the lawyer a graceful way out by saying, "Well I would be willing to go along with that proposal, but I will have to get the approval of my client and I am sure that he won't approve that unless you change the proposal as follows." *Id.* at 119-20.

190. See A. CONE & V. LAWYER, THE COMPLETE PERSONAL INJURY PRACTICE MANUAL 164-65 (1983).

191. A reserve is the amount an insurance company sets aside after receiving a claim to pay the eventual settlement or judgment. 4 J. KELNER, PERSONAL INJURY: SUCCESSFUL LITIGATION TECHNIQUES 1469 (1986).

192. *Id.* at 1470.

the course of the negotiations, preferably after each contact with the other lawyer.<sup>193</sup> Frequent client contacts between negotiation sessions facilitate both client-centered advocacy and negotiation results which maximize the interests of the parties.

In many instances, these client conferences may be brief and conducted either on the telephone or in writing. The lawyer, at a minimum, should inform the client about any negotiation proposal made by either party that conceivably could lead to agreement. In a distributive bargaining context, the lawyer should relate the last offer made by both parties; in the problem-solving context, she should describe any proposed solutions to the parties' problems which are arguably viable.<sup>194</sup> The lawyer also should inform the client about any new material facts learned during the negotiations. Finally, she should share with the client whatever she discovered during the negotiations about how the other party values the issues at stake. As previously discussed,<sup>195</sup> early in a negotiation the client only vaguely understands how the other party views the situation. The lawyer, there-

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193. Model Rule of Professional Conduct 1.4 suggests that regular communication with the client during the negotiation process may be ethically required. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983). The text of the rule provides:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

*Id.* There has been little commentary about the rule generally, and even less about its possible application in the negotiation process. In a sense, the model presented in this section can be viewed as a means of implementing Model Rule 1.4 in the negotiation context.

194. The letter of Model Rule of Professional Conduct 1.2 would appear implicitly to require an attorney to communicate all settlement offers to the client, because the client possesses the sole authority to accept or reject a settlement offer. If, however, the attorneys for both parties actually engage in brainstorming as described above, see *supra* notes 81-84, 169-71 and accompanying text, the process may produce a number of "off the wall" proposed solutions which no lawyer or client would regard as viable settlement proposals. Under these circumstances, it is nonsensical to require the lawyer to communicate each and every proposed option generated during a brainstorming session to the client. Lawyers, however, should err on the side of disclosure of options to clients and should communicate to clients any proposed option which appears even remotely feasible.

195. See *supra* notes 90-91 and accompanying text.

fore, needs to correct any earlier errors in diagnosing the problem or assessing the other party.

During the next segment of an intranegotiation counseling conference with the client, the lawyer should determine how the information gained during the negotiation process affects the client's assessment of his alternatives to a negotiated agreement. In a multiple issue negotiation, she also should explore whether the client has changed his relative priorities among the various issues. Traditional negotiation models fail to recognize that clients legitimately may change their minimum disposition points during the negotiations; when confronted with new information, the client may reassess his bottom line and his priorities among the issues.<sup>196</sup> Similarly, in negotiations offering significant problem-solving opportunities, the lawyer frequently becomes aware of additional potential solutions during the negotiation sessions which she previously had not considered. Conversely, the negotiations many times demonstrate that some options, which were regarded as feasible during prenegotiation counseling conferences, are either unfeasible or unacceptable to the other party.

Once the negotiations begin, it is particularly important for the lawyer and the client to discuss the client's relative preference among the issues. One problem-solving bargaining technique, "log-rolling," consists of one party conceding on some issues while the other party concedes on others.<sup>197</sup> To the extent that the parties place differing emphasis on the various issues, log-rolling increases the joint benefit to the parties beyond what would be accomplished if each party conceded an equivalent amount on each individual issue. To be effective, log-rolling requires that the lawyers clearly understand their clients' "preference-sets" for the multiple issues at stake in a negotiation. The client frequently finds it impossible to decide, prior to the negotiations, which issue he is willing to concede; such choices often must wait until after he knows which issues the other party values most highly. Professor Druckman has developed a bi-directional model of bargaining that describes negotiation movement as a response to inputs from both the other party and one's

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196. See P. GULLIVER, *supra* note 4, at 100-07; R. WALTON & R. MCKERSIE, *supra* note 4, at 321-22; Druckman, *supra* note 11, at 660-61.

197. See D. PRUITT, *supra* note 11, at 153-54; Gifford, *supra* note 55, at 55-56.

client.<sup>198</sup> According to Druckman, the *timing* of a concession or other adjustment to a proposal is most often a response to the other side's negotiating behavior, while the *choice* of which issue to concede, and the *amount* of the concession, are determined by the client.

The process of log-rolling has not received the attention in the legal negotiation literature which it deserves, perhaps because it does not fit neatly within the core of either the competitive<sup>199</sup> or problem-solving<sup>200</sup> strategy. In actual legal negotiations, however, the differing priorities which the parties place on the various issues help explain why agreements are reached in most cases. The lawyer should not underestimate the importance of either the log-rolling technique or the accompanying need to counsel continually with the client regarding his relative preferences among the various issues.

The alternation between negotiation and counseling sessions may repeat itself any number of times. To stress what was previously stated,<sup>201</sup> the frequency of client-counseling sessions during the negotiation breaks is more important to achieving client-centered counseling and desirable negotiation outcomes than is the exact structure or substance of the intranegotiation counseling sessions.

#### D. *Postnegotiation Counseling Conference*

Following the repetition of the alternating negotiation and counseling sessions, the lawyer concludes at some point that she has received the last, best possible outcome from the negotiations and that further bargaining will not yield better results for her client. At this time, lawyer and client face the prototypic client counseling situation as described

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198. Druckman, *supra* note 11, at 660-61.

199. See D. PRUITT, *supra* note 11, at 15; R. WALTON & R. MCKERSIE, *supra* note 4, at 59-81; G. WILLIAMS, *supra* note 1, at 48-52; Gifford, *supra* note 55, at 48-52. The competitive negotiation strategy is premised on the concept that all concessions gained are obtained at the other party's expense. The competitive negotiator employs strategies designed to undermine her opponent's position and confidence and to convince her to settle for less than she would have prior to the negotiations. See R. WALTON & R. MCKERSIE, *supra* note 4, at 48-52. See *supra* note 172.

200. See R. FISHER & W. URY, *supra* note 4, at 10-11; D. PRUITT, *supra* note 11, at 137-200; G. WILLIAMS, *supra* note 1, at 76-77; Gifford, *supra* note 55, at 54-57.

201. See *supra* notes 193-94 and accompanying text.



by Professors Binder and Price:<sup>202</sup> the lawyer and client are now ready to discuss together the advantages and disadvantages of the negotiated agreement and the alternatives to agreement to enable the client to make an informed decision.<sup>203</sup> This section argues that implementing the client-centered model during counseling sessions following negotiations is more feasible when the lawyer and client already have conducted counseling sessions both before and during the negotiation process.

When the lawyer and the client confer regularly before the negotiations begin and between negotiation sessions, the client is better informed about the substance of the negotiations and more accustomed to participating in the decision-making process. By the time of the postnegotiation conference, the client already should be aware of his nonsettlement alternatives, because his lawyer has discussed these with him prior to the negotiations and kept him informed during the negotiations of any new information affecting his BATNA. Further, because the lawyer constantly updated the client on the actual content of the negotiations, the client has become gradually aware of the substance of the negotiated option.

The client's greater understanding of the alternatives available to him, prior to the postnegotiation counseling conference, favorably affects the counseling conference and makes the client-centered decisionmaking more feasible. First, the amount of new information the lawyer must convey to the client regarding the available alternatives and the consequences of each option is considerably less, because of the client's familiarity with most of this information. Conversely, the lawyer enters the conference more knowledgeable about the client's attitudes and preferences regarding the various options. Thus, the postcounseling conference is likely to be less unwieldy, since the lawyer and client can consider much of the information regarding the alternatives and the client's preferences by summarizing earlier discussions. With less new information to be considered, a somewhat less structured and more informal format than the one Binder and Price outlined probably can be used.

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202. See D. BINDER & S. PRICE, *supra* note 1, at 156-65; see also *supra* notes 41-45 and accompanying text.

203. See D. BINDER & S. PRICE, *supra* note 1, at 166-72.

The second advantage of the ongoing counseling process is that it is less likely the lawyer and client will disagree vehemently and unexpectedly about the relative desirability of the remaining alternatives. As previously discussed,<sup>204</sup> the lawyer's comprehensive discussion with the client prior to the negotiations about the client's BATNA serves as a check on the lawyer's tendency to present the BATNA in a biased manner after negotiations in order to substantiate her own opinion that one alternative is preferable. More importantly, however, ongoing counseling makes it less likely the client will form unrealistic expectations about the results of either the negotiation or the alternatives to negotiations. With the traditional counseling model, a client frequently strongly objects to both the negotiated settlement and the BATNA because the lawyer failed to foster realistic expectations in her client. Ongoing negotiation counseling means that the client's unrealistic expectations will be challenged and adjusted incrementally during the negotiation process itself and will not be abruptly destroyed during a power struggle between lawyer and client following negotiations. Clients no longer will be confronted unexpectedly following negotiations with what Binder and Price call a "lose-lose" choice;<sup>205</sup> lawyers will not need to lower dramatically the expectations of their clients in order to bring them face-to-face with the choice realistically available to them—their involvement in the negotiation process itself will have accomplished that.

Finally, counseling sessions with the client during the negotiation process contribute to client-centered advocacy by building a relationship with the lawyer in which the client actively participates in the decisionmaking process. This experience, combined with the client's greater understanding of the available alternatives and their consequences, lessens the inherent power differential between the client and the "professional" or "expert" lawyer. The client's experience as an active participant during the negotiation process more

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204. See *supra* note 150–51 and accompanying text.

205. See D. BINDER & S. PRICE, *supra* note 1, at 193–94. A "lose-lose" conflict occurs when the client views each available alternative as having very negative consequences. In this situation, Binder and Price suggest the lawyer should attempt to articulate the inherent conflicts to aid the client in making his decision. *Id.*

likely will result in true client-centered advocacy than more subtle techniques, such as allowing the client to choose which alternative should be discussed first so that the lawyer's sequencing of alternatives does not implicitly suggest the lawyer's preference.<sup>206</sup> This is not to say such a technique is not beneficial, but only that its use probably has a fairly marginal impact on the allocation of authority between lawyer and client when compared with a continuing relationship in which authority is shared.

Regular consultation with the client during negotiations also reduces the risks inherent in having the lawyer make recommendations during the postnegotiation counseling conference. This is a controversial suggestion, because Binder and Price suggest that lawyers should avoid answering a client's request for advice.<sup>207</sup> Yet, as previously discussed,<sup>208</sup> lawyers frequently make recommendations. Advice from the lawyer is less troubling when the client and lawyer already have established a pattern of client-centered counseling during negotiations. If the lawyer's prior counseling contacts with the client suggest that the client is an "independent decisionmaker," instead of a passive client who believes his role is to do what the lawyer recommends, then the lawyer's advice probably will not impair the client's ability to make his own decisions.<sup>209</sup> The lawyer certainly should not hesitate to point out an inconsistency between the client's tentative decision and his previously expressed preferences or values.<sup>210</sup> These inconsistencies more often will be apparent to the lawyer following an ongoing process of negotiation counseling, because she will have appreciably greater awareness of the client's preferences. Finally, because the client has known his lawyer's analysis of the available alternatives for a longer period of time, the client is better able himself to evaluate this information and advice carefully. With more time to consider the lawyer's analysis

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206. *Id.*

207. *See id.* at 197-200.

208. *See supra* notes 127-28 and accompanying text.

209. *See* D. BINDER & S. PRICE, *supra* note 1, at 197-98. The "independent decisionmaker," according to Binder and Price, is the client who seeks the lawyer's recommendation to obtain maximum information before reaching a decision, but remains able to clarify his own areas of agreement and disagreement and to make an independent decision. *Id.* at 198.

210. *See id.* at 154.

away from her office, the client finds it easier to disagree with her recommendation and to reject it when appropriate. Thus, if the lawyer explains the choices available to the client at the earliest possible time and otherwise demystifies the negotiation process, the client is empowered to make his own decisions.

#### CONCLUSION

The purpose of prescriptive lawyering models is to assist lawyers in achieving their goals—to maximize client satisfaction through competent legal representation and to accomplish this in a manner that preserves the autonomy of the client. An effective counseling model must reflect the realities of the negotiation process: the lawyer's boundary role position as a negotiator, the intermittent nature of the negotiations, and the tendencies toward lawyer dominance of decisionmaking during negotiation counseling. Similarly, negotiation models should recognize both the opportunities and the dangers that these same realities pose.

The refinements of the Binder and Price counseling model and the existing negotiation models suggested here do not pretend to be talismanic solutions to the complexities resulting from the interplay between the two processes. These refinements, like the earlier models from which they are derived, also are based upon simplified assumptions about myriad human reactions. Nonetheless, it is hoped that these suggestions will provide a starting point for further dialogue about the need to improve the generally accepted counseling and negotiation models.