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Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want"*†

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* THE ROLLING STONES, *You Can't Always Get What You Want*, *on* GIMME SHELTER (Virgin Records 1968).

† Both authors collaborated fully on this paper and in the underlying research. We alternate the order of our names in the papers based on the research. This article grew out of the cooperative efforts of many people, whom we thank more fully in footnote 8. We would also like to thank Constance Bortnick, a Rutgers law school student for her invaluable assistance in preparing this article. Any errors or foolishness, of course, remain our responsibility.

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I. INTRODUCTION

Lawyers control much of what happens in lawsuits. As litigators, they decide when someone's grievance can be turned into litigation. They plan the strategy and make the tactical decisions in the suits that are threatened or filed. Their actions and decisions dominate the pace of litigation and shape its outcome. Because most civil litigation is resolved through negotiated settlement, litigators control most of the timing and terms of settlement as well. Yet, litigators do not share this powerful image of their own control. In fact, we have found that, in certain key respects, litigators do not control the settlement process as they would like. We conducted a study of civil settlement in New Jersey which shows that, in New Jersey at least, civil litigators would like the *process* of settlement negotiation to be substantially different from what it actually is.

The litigators expressed widespread dissatisfaction with the timing of settlements. In the litigators' responses to our mailed questionnaire, the overwhelming majority, 79%, thought that cases should settle sooner than they do ($N = 501$). Although the litigators themselves were handling settlement negotiations, they were not able to control the pace to their liking.

Even more revealing, however, was the litigators' lack of control over the methods they themselves used to settle cases. Although most cases are resolved using one method of negotiation, for which we use the common term "positional," a substantial majority of the litigators instead wanted to use a different method, known as "problem-solving." In the questionnaire, we asked New Jersey lawyers who litigate non-matrimonial civil matters to compare positional methods of settlement negotiation with problem-solving methods. We described the positional method as one in which "the negotiators stake out bargaining positions. Negotiation consists of one or more moves and countermoves in which the parties may grant concessions to the other party, and seek agreement by the reciprocal exchange of positions until an agreement is reached or the matter is resolved in some other way." As described in the questionnaire, the problem-solving method, in contrast,

is characterized by a mutual discussion of the underlying needs and interests of each side. Agreement results not as much from an exchange of concessions as from new proposals that both parties think meet their needs. These proposals can involve the exchange of goods or services in addition to, or instead of money, or tailor the terms and conditions of monetary payments to the unique needs of the parties.

The questionnaire answers indicated that most cases were settled using only the positional method. The mean response of the litigators indicated that the positional method was used entirely or almost entirely in an overwhelming majority of the cases, 71% (*Standard Deviation,* 26.2 percentage points). Their responses showed a range, with 2.8% of the respondents indicating that the positional method was never used and 7.6% of the respondents indicating that it was always used ($N = 498$).

The problem-solving method was as rare as the positional method was common. Fifteen and two-tenths percent of the respondents reported that it was never used, and only one respondent (0.2%) reported that it was always used. The mean response indicated that the problem-solving method was used entirely, or almost entirely, in 16% of the cases ($N = 493$, *S.D.* 16.7).

Similarly, roughly filling the gap between positional and problem-solving methods, by their mean response, the litigators told us that both methods were used together 17% of the time ($N = 492$, *S.D.* 23.7). Twenty-seven and six-tenths percent of the respondents indicated that both methods were never used together. Only 4.5% indicated that both methods were always used together.

The widespread use of positional negotiation methods is not surprising. Positional bargaining is commonly understood to be the usual way in which litigation settlement proceeds.[1] According to our study, the experience of litigators in New Jersey verifies the common understanding.[2]

Many of the responding litigators, however, did not like the overwhelming predominance of positional negotiation methods. Sixty-one percent thought that problem-solving negotiation should be used more than it now is. Thirty-five percent thought it should be used about the same as it is used now, and 4% thought it should be used less ($N = 506$). When the respondents were asked about their attitude towards positional bargaining, their responses were roughly converse to—and consistent with—their

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[1] *See, e.g.*, HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 66-77 (1982).

[2] Although we feel that this verification is quite strong, it should not be taken as airtight. The responses may, to some unknown degree, report what the lawyers believe the common practice to be, rather than what their own observed experience has been. The lawyers may, in part, be simply reiterating the common understanding, without providing an independent verification.

attitude towards the problem-solving method. Forty-seven percent of the respondents thought that positional bargaining should be used *less* than it now is, 49% thought that it should be used about the same and 4% thought it should be used more (N = 506). It seems as if almost half of the civil litigators in New Jersey would like to replace some positional bargaining with a problem-solving approach.

The gap between the method many litigators want and the method they actually use presents us with a puzzle. Why would litigators in such large numbers continue to practice a negotiation method that, by and large, they would prefer to change? It appears they cannot control practices that form an important part of their work. Even more intriguing is the fact that negotiation methods are largely within the litigators' own power. We cannot blame others for the fact that litigators use negotiation methods they dislike. Our study indicates that settlement negotiations are generally carried out simply between litigators with little direct participation by their clients.[3] Judges are frequently involved in settlement negotiations,[4] particularly when the parties and the lawyers have not been able to resolve the matter before trial, but we have no reason to think that judges would force lawyers into positional bargaining if the lawyers would prefer to use problem-solving methods. Judicial involvement seems unlikely to steer litigators away from problem-solving methods if the litigators want to use those methods.[5] It seems that something about negotiation itself, or something about litigators themselves, or some mix of the two, should provide the

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[3] Indeed, it is a matter of some controversy whether lawyers should even involve their clients in the question of what methods of negotiation to use. The techniques of negotiation, like the techniques for pretrial discovery and trial presentation, can easily be understood to be within the special professional competence of lawyers, and thus subject to only the most limited interference from, or involvement by, the client. Rosenthal, however, indicates that clients who are more actively involved in a lawyer's prosecution of a case are likely to obtain a more favorable result. *See* DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 39 (1974). New Jersey has recently adopted new court rules suggesting that lawyers inform their clients about the availability of alternate methods of resolving their legal disputes. N.J. R. CT. 1:40-1 (1995) ("Lawyers should become familiar with available CDR [Complementary Dispute Resolution] programs and inform their clients of them.").

[4] In the Law Division, handling primarily personal injury and contract matters, the lawyers responding to the questionnaire reported that in 49% of the settled cases, judicial involvement in the settlement ranked 3, 4 or 5, on a five-point scale running from 1 ("Not Involved") to 5 ("Extremely Involved") (N = 479). In cases in the General Equity Part of the Chancery Division (such as real-estate and business disputes, but not matrimonial matters), 60% of the cases included judicial involvement ranked 3, 4 or 5 (N = 281).

[5] We will discuss judicial involvement in settlement in more detail later in this paper. *See* discussion *infra* part II.B.2.

most likely explanations for the gap.

The structure of negotiation itself might somehow inevitably force litigators to use positional methods, despite their preference for problem-solving ones. Inspired by the "prisoner's dilemma" of game theory, we consider a model in which positional methods are "stronger" than problem-solving ones. The last decade or so has witnessed an outpouring of theory about the process of negotiation.[6] Theory, however, has tended to run ahead of field research.[7] Our study provides an opportunity to examine the extent to which theory can account for the actual practices of litigators. We find it noteworthy that this theory, rich as it is, does not comfortably explain the discrepancy between the process litigators want and their actual practices.

We also consider several factors that have recently been identified as playing important roles in the negotiated settlement of legal disputes. For reasons we describe, we are not persuaded that these structural descriptions explain why litigators do not practice as they would like.

In the balance of this article, we consider other explanations for this discrepancy, drawing on data from other parts of our study of civil settlement in New Jersey as well as from the questionnaire that revealed this puzzle. We conclude that the persistence of unwanted positional methods is best explained as a combination of persistent litigators' habits, a limited vocabulary of negotiation, and the time and expense necessary to change established practices.

Before we begin our analysis, we will summarize the research that gave rise to these data.

A. *The Study of the Civil-Settlement Process in New Jersey*

Our study was conducted for the Administrative Office of the Courts of New Jersey, with a grant from the State Justice Institute.[8] Our aim was to

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[6] *See generally* ROGER FISHER ET AL., GETTING TO YES (2d ed. 1991); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982); GERALD WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-solving*, 31 UCLA L. REV. 754 (1984).

[7] Some of the leading scholars of our civil justice system have recently reminded us that "[i]mproving the civil justice system requires thoughtful, objective analysis based on sound empirical data" and that we "lack . . . systematic, cumulative data in this area." Marc Galanter et al., *How to Improve Civil Justice Policy*, 77 JUDICATURE 185 (1994). For some important recent contributions to theory, based on detailed empirical analysis, see HERBERT KRITZER, LET'S MAKE A DEAL (1991); Samuel Gross & Kent Sevyrud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991).

[8] We must mention the essential contributions of Kenneth Dautrich, who led us through the design of the questionnaire and compiled and analyzed its results; Harold Rubenstein, of

examine how judges and lawyers settle civil litigation in New Jersey. We are particularly interested in the extent to which problem-solving negotiation methods are used, and whether the process of negotiation contains any key turning points that could be the subject of effective administrative management. In this paper, we report on the former topic.

We focused on settlement practices in two courts: the New Jersey Superior Court, Law Division, Civil Part, which adjudicates actions claiming damages, including personal injury matters; and the New Jersey Superior Court, Chancery Division, General Equity Part, which hears claims for injunctive and other equitable relief.[9] Thus, we excluded from

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the Administrative Office of the Courts, who administered our extensive work and who has demonstrated how important it is to have people with academic training and scholarly interests in administrative positions; and Sanford Jaffe, the Director of the Rutgers Center for Negotiation and Conflict Resolution. We did this work under the auspices of the Center. It was Sandy's vision of the importance of scholarly, empirical work in the field of dispute resolution and his insistence on keeping us focused on the larger picture that made the study happen. Loie Feuerle, Esq., our lead assistant in the research, was particularly instrumental in organizing and administering the interview segment of the study. Pat Falivene of the Rutgers Center for Negotiation and Conflict Resolution, Robert Dupre of the Eagleton Institute on Politics and Jerry Bank of the New Jersey Administrative Office of the Courts were all very helpful in collecting, tabulating and analyzing the questionnaire responses.

Throughout the study we also benefited from the assistance of the following students at Rutgers School of Law and the Rutgers Department of Political Science: Richard Buckingham, Dalton Fine, Kathleen Groom, Sasha Patterson, Linda Schofel and students in Jonathan Hyman's research seminar. Jonathan Hyman, who presented some earlier findings from the study at the David J. Stoffer Lecture at the Rutgers School of Law-Newark, thanks the Law School and the Stoffer endowment for support in analyzing and presenting those findings. An earlier version of this paper was presented at the UCLA-Liverpool International Conference on Lawyers and Lawyering, Lake Windermere, UK, July 1993.

The conclusions and opinions we express in this paper are our own. They do not necessarily represent the opinions or positions of the New Jersey Administrative Office of the Courts, the State Justice Institute or the Rutgers Center for Negotiation and Conflict Resolution.

[9] New Jersey has a unified court system, and both the Law Division and the Chancery Division have the power to grant any kind of relief. Administrative practice separates the law actions for damages from the chancery actions seeking equitable relief. The administrative arrangement has some consequences for the ways cases are managed, which in turn have implications for settlement. For the most part, cases in the Law Division, Civil Part, are managed through a master calendar system, under which they are not assigned to a particular judge for trial until the day of trial. Cases in the Chancery Division, General Equity Part, however, are assigned to a single judge when filed and remain with that judge. Consequently, the judges who host settlement conferences in the Law Division are not likely to be the judges

our study settlement practices in matrimonial matters and plea bargaining in the criminal courts. We also excluded law cases claiming damage not exceeding $5,000.[10] Together, cases in our two target courts handled about 16% of the total Superior Court trial-level caseload in New Jersey.[11]

We used three related research methods: questionnaires to litigating lawyers and sitting judges; open-ended interviews with seventy-eight litigators, in which we asked them to describe the history of settlement negotiations in the two law or general equity civil matters they had most recently resolved; and observations of seventy-one settlement conferences, hosted by seven different judges or lawyers serving as settlement facilitators.

New Jersey encompasses different degrees of urbanization, and, according to local attitudes, is often divided between the North and the South. For our interviews and settlement conference observations, we limited ourselves to a predominantly urban county, a predominantly suburban county, and a court "vicinage" (administrative grouping) made up

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who will try the case, except for the last-minute settlement conferences that occur on the day of trial after a trial judge has been assigned. Judges who hear settlement conferences in the Chancery Division, however, will most likely be the judges who try the case. And unlike the judges in the Law Division, where most of the trials will be decided by juries, the judges in the Chancery Division are required to decide the facts of the case as well as the law, which can constrain the extent of their efforts when conducting settlement conferences.

[10] Such claims are handled by a separate part of the Superior Court, the Special Civil Part.

[11] In 1991, 1,100,199 new cases were filed in the Superior Court. Of these, 169,045 (15.4%) were filed in the Law Division, Civil Part, and 8,071 (0.7%) were filed in the Chancery Division, General Equity Part. The Special Civil Part, comprising civil damage actions not exceeding $5,000, plus small claims and eviction actions, accounted for almost half of the new filings, 46%. Thirty-two percent of the new filings were in the Family Part of the Chancery Division, comprising divorce, matrimonial and child support and juvenile matters. Five percent of the new filings were criminal matters.

New Jersey's population was 7,760,000 in 1991. (Statistical Abstract of the United States, 1992, Table No. 27.) New Jersey ranks fourth in the number of filings as a ratio of population, behind the District of Columbia, Virginia and Maryland.

We did not study cases filed in the United States District Court in New Jersey, nor did we consider traffic matters, small criminal matters or municipal ordinance violations, which are handled in New Jersey's many municipal courts. New Jersey also has an extensive system of administrative adjudications, complete with a separate adjudicatory body, the Office of Administrative Law, from which appeals are taken to the Superior Court, Appellate Division. Although proceedings before administrative tribunals can elicit settlements and can be as complex and even time-consuming as civil litigation in the court system, we did not consider the settlement of matters before the Office of Administrative Law.

of several predominantly rural counties. We chose one in the southern part of the state, one in the central part and one in the north. For the questionnaire, however, we used the entire state. To increase the likelihood of obtaining responses from lawyers with relevant experience, we sent questionnaires to the attorneys of record in the cases listed for trial between September and December 1990 in the Law Division, Civil Part, and the Chancery Division, General Equity Part, alternately selecting the plaintiff attorneys and the defense attorneys as we went through the lists.[12] We adjusted the number of target recipients across the state to reflect caseload and population density. We generally succeeded in obtaining responses from lawyers with relevant litigation experience.[13]

Each part of our research design sheds light on the contrast between positional and problem-solving methods of negotiation. The discrepancy between lawyers' preference for problem-solving negotiation and their practice of positional negotiation appears most vividly in the questionnaire responses. The lawyer interviews and settlement conference observations confirm these results, and we use them as sources of more detailed, more richly textured information to help explore the meaning and implications of the questionnaire numbers.

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[12] For the lawyer interviews, we started with lawyers we knew to be litigators of non-matrimonial civil matters, and used their suggestions, and our own courtroom observations, to add to the list of interviewees. For the settlement conference observations, we focused on judges whom we knew to be active in settlement work.

[13] Our respondents spent a mean percentage of 78% of their working time in litigation. Only 18% of the 515 respondents spent less than half their time in litigation. Three-quarters of the respondents (76%) had been in practice more than 10 years. Nineteen percent of the respondents were sole practitioners, and 75% were in private practice with other lawyers. Of those in private practice with other lawyers, two-thirds (68%) were in firms of 10 or fewer lawyers.

Personal injury matters took up the bulk of the litigating time of the respondents. The mean time spent on representing plaintiffs in personal injury matters was 47% (26% automobile-related personal injury and 21% non-automobile-related). The mean time spent on representing defendants in personal injury matters was 48% (21% automobile-related and 27% non-automobile-related). The mean time our respondents spent on litigating contract matters was 16%, on matrimonial matters 12%, criminal matters 6% and on employment matters 4% of their litigating time. (These numbers do not total 100% because they state the means of the percentages given by all the respondents.)

We mailed about 2,591 questionnaires. Our response total—515—was somewhat lower than we would have liked, but was large enough to make us relatively confident about the results.

II. Reasons for the Discrepancy

A. *Strategic Obstacles: Does Positional Bargaining Drive Out Problem-Solving?*

Perhaps litigators' dissatisfaction with their negotiation methods is the inevitable consequence of the strategic nature of negotiation itself. In this section we explore whether the process of negotiation somehow forces litigators to engage in positional negotiation, overpowering their professed desire to use more problem-solving methods. While the strategic demands of negotiation provide a familiar and apparently plausible explanation for this practice, we think that, for reasons we will describe, it is not sufficient.

To understand how negotiation itself might force litigators into using positional methods, we must first make the point that negotiation involves strategic interaction. Negotiators cannot unilaterally reach the results they prefer. They depend on the reactions of the other negotiating parties. Negotiation thus becomes a reciprocal process in which each side acts in response to the other. Some of this responsive action is anticipatory. Each side acts partly in anticipation of what the other side will do in response.

Strategic interaction certainly affects the substantive terms of a negotiation. Each side presents settlement proposals, or makes claims or defenses or gives or seeks information, while keeping in mind what the other side has done or is expected to do in response. For our analysis of negotiation methods, we extend the scope of strategic interaction to cover negotiation methods as well as substantive terms. Under this analysis, it is not just the substantive settlement terms that are influenced by strategic interaction. Negotiators may choose positional or problem-solving methods in response to—or in anticipation of—the negotiation methods used by the other side.

This, by itself, will not explain the failure to use problem-solving methods. Negotiators might be free to use problem-solving methods regardless of what the other side does. We need to introduce two simple assumptions if strategic interaction is to block the desired use of problem-solving methods. The first assumption is that positional methods "work" better than problem-solving ones when the two are deployed against each other in a negotiation. Problem-solving methods of negotiation "work" better than positional methods only when both parties to the negotiation use them. The second assumption is that lawyers will choose to use the methods that "work" better, such as positional methods, regardless of their other preferences, such as their individual preference for problem-solving methods. If both of these assumptions accurately describe what happens in negotiation, litigators will end up using positional methods whenever they find themselves negotiating against a party that is also using positional

methods. Under these assumptions, the raw facts of negotiation itself would explain why our litigators are not negotiating in ways they like.

1. *Negotiating Behavior: Concealment of "Bottom Lines"*

These two assumptions seem plausible. It is common in our culture to think of positional negotiating as powerful and of alternatives as somehow weaker.[14] Moreover, information from our study indirectly supports these assumptions in two different ways. First, our interviews of lawyers contain some vivid examples of how litigators shape their negotiation conduct, against their own will, in order to protect themselves against the powerful actions of their opponents. Second, looked at from certain angles, the very discrepancy between wishes and practice, which we see as a problem to be explained, may actually support the idea that positional bargaining prevails over problem-solving. Taken together, these suggest there is some truth to the idea that positional bargaining dominates problem-solving and forces lawyers to do what they do not want to do.

In their interviews, the litigators gave us vivid examples of how they act against their own preferences because they want to protect themselves against the positional excesses of the other side. Although they dislike it, they told us they must play a highly positional game of concealing their settlement positions. Candor about settlement positions is rarely the best policy. Lawyers learn that they must exaggerate demands and understate offers as part of the settlement ritual. Even when requested to divulge what they "really" want or what they "really" can offer, they learned that their "real" position only became the next starting point for another round of offers and demands. If they were honest about stating their positions and insisted on not budging once they had revealed what they would settle for, they came to be seen as inflexible and as an impediment to realistic settlement of the case.

Some lawyers have rules for "lying" or calculating their settlement demands and offers; *e.g.*, if you are the plaintiff, demand twice what the case is worth; if you are the defendant, offer half. Some lawyers say they always lie: "I spent thirteen years exclusively doing insurance defense work and I learned never to tell the truth." Some say they never lie: "I have a

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[14] So prevalent is the idea of hard positional bargaining that Roger Fisher, William Ury and Bruce Patton start their description of a problem-solving method of negotiation by trying to sidestep that common assumption. They set out a comparison of "hard" and "soft" negotiation, granting to tough positional negotiation the designation "hard," but then introduce their "principled" or problem-solving method of negotiation as a third alternative, different from the common dichotomy. *See generally* ROGER FISHER ET AL., GETTING TO YES (2d ed. 1991).

truly unique approach to settlement. I am absolutely, totally and thoroughly honest. However, this wouldn't work if everybody used it because it throws people off because they aren't prepared for it."

Indeed, it can be troubling that many of the attorneys with whom we spoke gradually recognized that, to some extent, they need to rely on some form of prevarication to function in the court and in the civil bargaining process. We exclude here some of the more clearly dishonest links that are reputed to be occasionally forged, such as between particular doctors and chiropractors, and specific attorneys, which were only rarely mentioned to us in the interviews. We also do not address matters of misleading representations made to clients, an issue rich in ethical dilemmas but one beyond our scope here.[15] What we do briefly report on here are forms of misrepresentation that arise in the negotiation process itself.

We have set out several interview excerpts to illustrate the almost painful way attorneys learn that strategic bargaining is generally linked to some misrepresentation about true bargaining positions. We also include some excerpts from attorneys who found that the adversarial posture itself forced a sort of personal compromise with their own sense of truthful representation and required a slanting of issues with which they were not always comfortable.

> [The practice of law] means never telling the truth; it means using tricks and scams. . . . The instinct [of a new attorney] to be honest is a disadvantage. I had to resort to lying.
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> [I learned to be an advocate, which means] learning to see with blinders. You learn to cloud weak things. . . .
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> [With experience] you become less naive, learn the system. I try to be honest and straightforward, but I've learned that in certain circumstances you can't do that. [For example,] my firm [the insurance company he was representing] asked me to get a demand. I got a letter asking for $750,000, but I valued the case at $500,000 or less, and the insurance company told me to go for a structured settlement of $400,000 or less but that they could go up to $500,000.

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[15] *See generally* Lisa Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990). An example from our interviews illustrates the kind of dissembling that needs further exploration. One attorney told us that he routinely does not tell clients the actual settlement offer made by the other side. Instead, he thinks he "need[s] to work [his] client to get to the point of what the case is worth. You can't give [the settlement offer] to him all at once. The client expects an offer and a counteroffer."

> . . . I wrote a letter [to plaintiff's attorney] saying $100,000 up front, plus $100,000 structured. The plaintiff's attorney called me and said: "The offer is ridiculous. We won't consider it." I told him his 750 was high, and I asked him: "What do you really need?" His answer was "750, my client wants to net half a million and I need $250,000." I responded: "Let's avoid the game, cut through this nonsense, what do you really need." The attorney called me back and said: "Our rock bottom is half a million." I figured now we could settle, since I knew I had this amount. But when I called the insurance company, they now said they didn't want to pay it. Their feeling was that "if he says half a million, he'll take less." [The respondent ultimately went to the president of the insurance company explaining how he had gotten the offer, and the company eventually agreed to settle for the $500,000, but only after more time had elapsed.] [The attorney concluded by observing how] honesty can work against you. People expect you to play the game and if you don't . . . .
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> [I am not fond of the] splitting-the-difference approach [to negotiation]. It builds a lot of deceitfulness and game playing into the process that a lot of people are not comfortable with . . . . Everyone knows that the offers are not serious. . . . Attorneys don't like it. It's very difficult; you're officers of the court from an elite firm, and ingrained in you is the notion that you don't lie to a judge.
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> [Insurance companies are also reluctant to give real numbers.] They think if they offer money too early, you'll think you'll get lots more later if you tried.
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> [Noting that his efforts to be "professionally responsible" cost him money, one attorney nonetheless felt the price worthwhile. In a wonderful kind of balancing he made peace with honesty by observing]: In my opinion, I lose a lot of money, but that's ok with me as long as I make a lot of money.

As suggestive as these examples are, however, we do not think they confirm the working assumption that positional bargaining overwhelms problem-solving whenever the two meet. The lawyers in these excerpts are not describing a conflict between positional and problem-solving methods of negotiation. Instead, they are only describing a tension that inheres in the positional method of negotiating. The concealment or disclosure of

settlement positions is a key issue—perhaps *the* key issue—of positional negotiation strategy, entirely independent of problem-solving strategies. Positional bargaining depends on each side eventually disclosing its settlement position, but it equally depends on each side initially concealing its true settlement positions and disclosing misleading settlement positions instead. Through misleading disclosures, each side tries to convince the other side that there is little left to give and that it would be better to settle for the proposed terms. But the concealment or disclosure of settlement positions forms only a minor sideshow for problem-solving negotiation. In contrast to advancing and defending settlement positions, the key to problem-solving methods of negotiation is maintaining focus on the underlying interests of the parties. At most, the stories we heard describe a conflict that arises within the four corners of the positional bargaining method. They do not describe the exploration of underlying interests or the crafting of mutually satisfactory agreements from those interests.

2. *The Desire for More Problem-Solving Meets the Strength of Positional Bargaining*

These vivid lawyer stories about negotiation emphasize the power of positional bargaining. They suggest that positional bargaining is inherently powerful enough to force problem-solving methods off the negotiating table. When positional bargaining meets problem-solving, positional bargaining wins. A simple thought experiment, however, shows that this implication is probably not correct. Lawyers' inability to use more problem-solving methods cannot just be the result of the special power of positional bargaining. To the contrary, the very discrepancy we are considering suggests that there are factors other than the simple structural power of positional negotiation which prevent lawyers from implementing more problem-solving negotiation.

If we were faced with a simple matter of the superior power of positional bargaining, we should not see the discrepancy reported by our questionnaire respondents. This may seem counter intuitive, but to see why it is so, imagine a world of 100 litigators, of which 60 favor problem-solving methods and 40 favor positional methods. Assume that whenever a problem-solving lawyer finds himself or herself negotiating against a positional lawyer, he or she will recognize the positional approach of the opponent and will abandon problem-solving in favor of the more powerful positional style. Assume that no other factors lead problem-solving lawyers to adopt positional methods except the fact that they are facing a positional lawyer. Positional lawyers, of course, will always use the positional style. Assume further that each lawyer negotiates an equal number of times against each of the ninety-nine other lawyers.

How frequently would we see problem-solving in such a world? More specifically, how often would problem-solving lawyers be forced to choose positional negotiating, and how often would they be able to use the problem-solving methods they prefer? In fact, they would only need to use positional methods about 40% of the time, when they oppose those forty lawyers who use positional methods. In the remaining 60% of their negotiations, they would be facing the fifty-nine lawyers who, like themselves, favor problem-solving. Under our simple theory of the power of positional negotiation, they would have no need to slip into positional methods in these 60% of their negotiations. From the perspective of their own experience, they would observe that problem-solving methods would be used substantially more than half the time.

But the lawyers have reported that problem-solving methods are used, either alone or together with positional methods, only about 30% of the time, and that positional methods are used about 70% of the time. This is a much higher incidence of positional bargaining than would be expected if the only key fact governing negotiation was that positional bargaining is more powerful than problem-solving. It strongly suggests that factors other than the power of bargaining methods account for the lawyers' asserted inability to use problem-solving as much as they would like.

Curiously, there is a way in which a simple explanation relying on the power of positional bargaining produces results similar to those reported by the lawyers. Let us assume again a world of 100 lawyers, of whom 60 favor problem-solving, who will use problem-solving when negotiating against other problem-solving lawyers, but who will switch to positional bargaining, because it is more "powerful," whenever they are faced with one of the 40 positional lawyers in their world. In that world as a whole, about 64% of the negotiations would use the positional methods. Overall, problem-solving would actually occur in only about 36% of settlement negotiations. Overall, that would be the total frequency with which problem-solving lawyers would find themselves negotiating against (or with) lawyers who share their preference for that method.[16] The minority of

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[16] The easiest way to see this is to imagine that the lawyer-to-lawyer negotiations is similar to coin flips. For each pair of negotiating lawyers, there is a 60% likelihood that the first lawyer will favor problem-solving, and also a 60% likelihood that the second lawyer will favor problem-solving. Just as we can calculate the likelihood that two coins will fall heads up by multiplying the likelihood of heads from each, we can calculate the frequency with which both our lawyers will be problem solvers by multiplying the likelihood that the first lawyer will prefer problem-solving by the likelihood that the second will, as well. For fair, two-sided coins, the likelihood of two heads is .5 times .5, or .25. For lawyers in a group in which 60% favor problem-solving, the likelihood of two problem-solving lawyers meeting each other is .60 times .60, or .36.

A similar result follows from calculating the combinations of the possible pairings. For

negotiating lawyers (40%) who prefer positional methods would control the method used in 64% of the entire negotiations in this fictional world.

Now, this is a very tantalizing result. These overall numbers are so similar to the numbers reported by the lawyers in the questionnaire that they seem to suggest our simple explanation—positional bargaining is more powerful than problem-solving—is sufficient to explain the discrepancy, after all. Perhaps our questionnaires simply confirm the common sense notion that positional bargaining will beat problem-solving, and that simple strategic fact explains why there is not more problem-solving amongst litigators.

But why should our two different versions of this positional/problem-solving calculation produce such apparently different results? We think the first way we have discussed, looking at matters from the point of view of individual lawyers, is the better one.

The key to the differences between these two versions lies in the vantage point from which we gather our information. If we look at this world through the eyes of the lawyers who negotiate in it, we will get the first version. As seen by the lawyers themselves, about 60% of the negotiations would use problem-solving. We will only see the second version, with much less problem-solving, if we take a bird's-eye view in which we can see the grand total of all the negotiations at the same time and do not limit ourselves to the perspective of individual lawyers.

Between these two angles of vision, our questionnaire results more nearly represent the first. Our questionnaires report results from the vantage

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simplicity, imagine a group of 100 lawyers, of whom 60 prefer problem-solving negotiation and 40 prefer positional negotiation. Assume that each lawyer negotiates once with each other lawyer, and each negotiation involves only two lawyers. In this example, 35.8% of the resulting negotiations will use problem-solving. The balance of 64.2% will occur between two lawyers who prefer positional bargaining, or between a lawyer who prefers positional bargaining and a lawyer who prefers problem-solving. All of those negotiations, in accordance with our assumptions, will be positional.

In our group of 100 lawyers, there will be 4,950 negotiations. The formula for calculating the number of ways in which n items can be combined in a group of size r is $C(n,r) = n! / [r!(n-r)!]$. For our example of 100 lawyers combined into groups of 2, we calculate $100! / [2!(100 - 2)!]$, which equals $[100 \times 99 / 2]$ or 4,950 combinations. Problem-solving negotiation will occur only when a problem-solving lawyer is combined with another problem-solving lawyer. Since we have 60 problem-solving lawyers, the number of combinations of those lawyers is $60! / [2!(60 - 2)!]$ or $[60 \times 59 / 2]$, which is 1,770.

Thus, out of 4,950 combinations of lawyers, only 1,770 or 35.8%, will be combinations of two problem-solving lawyers. Only in these instances will the lawyers successfully engage in problem-solving negotiation.

We are grateful to our colleague in the Law School, George C. Thomas, III, and to his collaborator, Barry Pollack, Esq., for their assistance in this analysis.

point of individual lawyers not from some clear overview of the entire negotiating world. In asking about the number of cases settled using positional or problem-solving methods, the questionnaire asked respondents to state percentages "[b]ased on [their] experience in negotiating the settlement of litigated matters." It could not get an overview beyond their own experience and their inferences from it. Despite the limited perspective of each respondent, many lawyers who would have preferred problem-solving negotiation nevertheless reported that it occurred much less frequently than they would have seen it under the simple rules of numerical combination in our hypothetical world.[17]

Thus, we doubt that the predominance of positional negotiation can be explained simply on the grounds that positional methods are, in some simple way, more powerful than problem-solving ones. Something other than, or in addition to, the raw power of positional bargaining seems to be responsible for the low incidence of problem-solving. Later in this article, we will consider other explanations for this phenomenon. We cannot leave our consideration of the strategic nature of bargaining, however, without first examining one other way in which the structure of bargaining itself might be said to account for the failure of problem-solving methods to occur more frequently. In the next section, we will turn to the prisoner's dilemma, a more complex picture of bargaining in which rational choices about how to bargain might drive negotiators to results they do not like and, paradoxically, are not even in their best interest.

3. *Game Theory and Undesired Consequences*

So far, we have looked to lawyers' descriptions of how they negotiate and have conducted a numerical thought experiment to see whether our assumption about strategic interaction—that positional negotiation somehow squeezes problem-solving methods out of the system, despite the desire of many litigators to use problem-solving methods—is correct. We found both lines of analysis insufficient to support the claim that the structure of the negotiation process itself forces lawyers away from problem-solving negotiation. In this part of the paper, we will draw on some concepts of

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[17] We cannot be entirely sure that our respondents expressed an accurate cross section of the views of the litigating bar. Because we had less than a 100% response rate to the questionnaire, we may be observing the results of some selection bias. Those litigators who were dissatisfied with positional bargaining and interested in problem-solving may have been more inclined to answer the questionnaire, inflating the percentage who reported wanting change. We tend to doubt a high degree of such bias, however. Our questions about attitudes towards positional and problem-solving negotiation came towards the end of an eight-page questionnaire. Lawyers would not be so likely to use those questions as their motivation for choosing to answer or not.

game theory to see whether they help us understand the curious situation in which litigators cannot operate in the way they want.

Game theory, for all its limitations in using simplified models of rational thought to shed light on complex human interactions, provides intriguing insights into the conduct and settlement of litigated disputes.[18] The settlement of litigation fits the key concepts of game theory well. Noncooperation, which forms the key assumption of a major branch of game theory, plays a large role in settlement negotiations. In settlement, each side has a strong interest in getting what it wants, often at the cost of depriving the other side of something that it wants. In settlement negotiations, each side is free to conceal both strategically important underlying facts and its own negotiation strategy, forcing the participants to make their own strategic choices in light of their anticipation of what the other side will do, very much in the manner of the players in formal game theory.

Moreover, our data provide an unusual opportunity to hunt for traces of game theory's rules in the actual practices of negotiating lawyers. Applied to litigation and settlement, most game theory focuses on the underlying stakes that are the subject of the litigation: who will prevail in the trial or settlement and on what terms. Of necessity, this kind of analysis generally ignores the other utilities—that is, the additional preferences of the participants—that could influence how the game is played. Our data, however, are *only* about something other than the underlying stakes: litigators' preferences about the methods by which negotiation is conducted. The data give us a very immediate opportunity to see whether the rules and forms of game theory are actually operating in the real world through the problem of choosing negotiation methods.

For the reasons we will describe, we conclude that a well-known strategic game, the prisoner's dilemma, goes a long way in explaining why litigators find themselves caught between their negotiation preferences and their negotiation practices. But to the extent it operates, the prisoner's dilemma plays a different and more limited role than is commonly described. We have not identified any substantive set of rewards or payoffs that would create a prisoner's dilemma and thus trap litigators in methods they do not like. At most, we suggest a reward structure that depends entirely on lawyers' *beliefs* about positional and problem-solving negotiation. If lawyers believe that positional methods will carry the day, they might create a kind of prisoner's dilemma for themselves simply by virtue of that belief. But, as we will see, even that limited explanation is

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[18] *See generally* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 244-267 (1994); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994).

questionable in light of the many ways in which the constraints of the prisoner's dilemma can break down in the real world of repeated interactions among members of a social group. The lack of appropriate language about problem-solving negotiation may be a barrier to the communication needed to overcome the prisoner's dilemma. Similarly, lawyers' negotiation habits may create an additional barrier to the forces that would overcome the prisoner's dilemma. If so, we have observed a complex situation in which any pressures of a prisoner's dilemma have little independent force, but appear within the context of a larger situation best defined by forces other than the prisoner's dilemma or strategic interaction themselves.

To simplify the analysis, let us focus again on our assumption that problem-solving methods only work when both (or all) parties to a negotiation use them. Litigators favoring problem-solving methods would then be faced with a coordination problem. They would have to determine whether the other parties to the negotiation also would use those methods. If so, they could all use problem-solving methods and be satisfied. If not, the problem-solving party would have to abandon the problem-solving method to match the positional method that is chosen by the other party.

This need of each party to coordinate its method to that of the other party (or parties) brings to mind the game known in game theory as the "stag hunt." In the stag hunt, two hunters each have a choice between hunting stag and hunting hare. Successful hunting of a stag requires that both hunters hunt the stag. One can successfully hunt hare alone, however. If both wish to hunt stag, and if both do so, they will obtain the highest return, a stag. If the first hunter decides to hunt hare, however, the second hunter will be left with nothing if he or she tries to hunt stag. In that event, it would be better for him or her to hunt hare as well, because he or she would then at least come away with something, a second-best reward. An example of the stag hunt is set out in a standard form of game theory matrix in Table 1.

TABLE 1

STAG HUNT OR ASSURANCE GAME

Hunting stag or using problem-solving negotiation is worth more than hunting hare or positional bargaining only when both parties cooperate.

Hunter or Negotiator 2			
		Stag or Problem Solve	Hare or Positional
Hunter or Negotiator 1	Stag or Problem Solve	10, 10	0, 5
	Hare or Positional	5, 0	5, 5

The first number in each cell indicates the gain or reward to Hunter 1 if both parties make the choice indicated by that cell, and the second number indicates the gain or reward to Hunter 2. In this example, the results of each hunter hunting stag are set out in the upper left cell. Each would receive a benefit of value 10. If Hunter 1 hunts hare, however, while Hunter 2 continues to go after the stag, we find the results in the lower left cell. Hunter 1 gets 5 from capturing a hare, but Hunter 2, fruitlessly pursuing the stag, is left with nothing.

This game presents a coordination problem because it depends on both hunters coordinating their decisions to hunt a stag. If they cannot communicate or coordinate, each might be better off abandoning the stag hunt and choosing to hunt a hare instead. Without communication, each runs the risk that the other will be hunting a hare, and they will be left out in the cold if they persist in their effort to hunt a stag. Ronald Gilson and Robert Mnookin refer to a version of this game as the "assurance game," because both sides do the best if they can assure each other they will coordinate their actions.[19]

The analogy to our positional/problem-solving situation should be apparent. If we simply substitute problem-solving methods for stags, and positional methods for hares, we can see that coordination is the key to maximizing success. If both negotiators choose problem-solving methods,

[19] *See* Gilson & Mnookin, *supra* note 18, at 516 n.20.

they will both get the method that they value most highly. But if one of them uses positional methods, the most valuable outcome is no longer attainable. If Negotiator 2 uses positional methods, for instance, then it would be poor judgment for Negotiator 1 to stick with problem-solving ones. Like the hunter who tries to hunt stag alone, he or she would be left with the worst possible result. It would be better for Negotiator 1 to use positional methods as well. Both would then receive the moderate result provided by positional methods—a score of 5 each in the figures used in Table 1.

The stag hunt game, however, does not seem to us to be a powerful explanation for why unwanted positional negotiation methods predominate. Coordination should be easier in the real world of legal settlements than in the hypothetical world of stag hunts. The key to successfully hunting stag, or successfully using problem-solving methods under our assumptions, is to make sure that each hunter (or negotiator) knows that the other shares his or her preferences. Then they can both act in the way they prefer and thus obtain the result they both desire most.

In formal game theory, sharing this information can present a problem. One task of game theory is to describe how the game players will coordinate their actions if they cannot communicate their preferences to each other. Each side must then guess whether the other side shares the preference for problem-solving negotiation (or stag hunting) and decide what to do based on that guess. The guessing is further complicated by the fact that each side must try to imagine what the other side thinks of the first. Negotiator 1, for instance, might think that Negotiator 2 would prefer to use problem-solving methods, but might also think that Negotiator 2 will nevertheless refuse to use those methods because he or she (Negotiator 2) mistakenly believes that Negotiator 1 wants to use positional methods. Acting on that mistaken belief, Negotiator 2 would then use positional methods. Fearing that Negotiator 2 might make that mistake, Negotiator 1 might then decide to use positional methods in defense. Of course, that outcome would make Negotiator 2's fear a kind of self-fulfilling prophecy. Such strategic thinking is complex because it can involve so much recursive anticipation.

The easy way to break this Gordian Knot is simply to communicate to the other side that one prefers problem-solving methods of negotiation. While that is not possible under the constrained, simplified assumptions of basic game theory, it should be quite easy in the real world of litigation. Litigators can say to each other, as they said to us on the questionnaire, that they prefer problem-solving methods of negotiation. They can also show each other that they mean what they say by using such methods. It might be risky to use such methods if a litigator had only one chance to do so and had to rely on the other side to understand what was meant without any follow-up. But settlement negotiation usually involves several contacts and presents

opportunities for several moves. If the other side does not get the message that problem-solving methods are preferred the first time, the negotiator can try again. For instance, one can try out problem-solving moves over the course of a negotiation, and revert to positional methods only if they are not reciprocated.[20] We note two instances below in which lawyers we interviewed used problem-solving within an ongoing series of negotiating moves including both positional and problem-solving ones.

Moreover, under the assumptions of the stag hunt game, litigators have every incentive to be truthful when they tell or show the other side that they want to negotiate in a problem-solving manner. It is always better for each if both can be persuaded to use problem-solving methods.

Coordination becomes much more difficult, however, if we change a few assumptions and convert the stag hunt into a prisoner's dilemma. In the reward structure of the stag hunt, each side will obtain the most desirable outcome possible if they both cooperate. The value each side obtained from the upper left cell of the matrix was higher than any other. But what if each side has a strong incentive *not* to coordinate his or her action with that of the other side? In one arrangement of rewards the outcome is simple: Both will refuse to coordinate their actions and do better hunting hare. The prisoner's dilemma introduces yet a further complexity, by giving the parties a strong incentive to coordinate their actions, but also tripping them up on the way to coordination.

In a prisoner's dilemma game, both parties will do well if they coordinate their action. Applying this to the problem of choosing negotiation methods, both prefer problem-solving methods, and both will therefore do "well" if they both use such methods. In a prisoner's dilemma game, both will do "badly" if they both refuse to coordinate. In our application, both will do "badly" if they both use positional negotiation methods. (We use the terms "well" and "badly" simply to indicate the negotiators' preferences for negotiation methods. We make no assumptions about the impact of negotiation methods on the ultimate substantive terms that the negotiation can produce.) The difficulty arises when one of the parties tries to coordinate, and the other refuses. Under the payoff structure of the prisoner's dilemma, the party who refuses then obtains a result that is *even better* than the one that he or she could achieve if he or she had gone along with the coordination. This gives each side a strong incentive to abandon problem-solving methods and use positional ones instead whenever the other side uses problem-solving methods. But if each tries to trip the other side up and get the bigger reward by choosing positional methods, they both will do badly. Both will have lost the advantage gained by using

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[20] *Cf.* DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 160 (1986).

problem-solving methods together, and both will have also lost the extra advantage of using positional methods when the other side uses problem-solving ones. This is the dilemma. When each seeks to pull the trap door from under the other side, both fall through.

This arrangement of rewards in a strategic game acquired its name from the example early game theorists used to describe it.[21] They imagined two prisoners who are held in separate cells and charged with being accomplices in the same crime. Each has a choice of whether or not to confess. They can coordinate their actions to their mutual benefit by both remaining silent. Then the prosecutor will only be able to convict them of a moderate crime. If they both confess, both will suffer a much worse conviction. If, however, one confesses and the other remains silent, the one who confesses will be let off; the one who remains silent will be convicted and will suffer the heaviest punishment of all.

Game theory tells us that rational prisoners may well end up both confessing even though they will suffer for it. If either refuses to confess, he or she runs the very serious risk that the other, tempted by the reward of being the single confessor, will spill the beans and put the silent prisoner away for a long time. To protect against this outcome, a rational prisoner might then decide to confess and either get the reward of being the only confessor or at least get the bad—but not too bad—punishment that results from both confessing. The urge to confess, despite its costs, is further supported by each prisoner's realization that the other prisoner, also being rational, is making the very same calculation and will likely decide to confess, if only out of fear that the first rational prisoner will confess. The recursive reasoning, with each side making rational decisions in anticipation of what the other rational party would do, paradoxically leads to an unfavored result.

The reward structure for this situation is set out in matrix form in Table 2. In more general terms, keeping silent is termed "cooperating," because each party cooperates with the other for the mutually beneficial result. Choosing to confess is called "defecting," since it involves defection from apparent cooperation. A prisoner's dilemma arises when the payoff to an individual player is largest—if that player defects while the other cooperates—greater even than if both cooperate. It also requires that the payoff to a player when both cooperate be greater than the payoff if that one player cooperates but is victimized by the other's defection. Furthermore, the total payoff to both, if both cooperate, must be greater than the total payoff to both if one cooperates—and loses—while the other strikes it rich by defecting. The individual payoffs and the total payoffs in each cell of Table 2 follow this pattern.

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21 *See generally* WILLIAM POUNDSTONE, PRISONER'S DILEMMA (1992).

TABLE 2

PRISONER'S DILEMMA

Defecting (confessing or using positional negotiation methods) is better than cooperating (keeping silent or using problem-solving methods) only when the other party cooperates. It is better for both to cooperate than for both to defect, but it is very risky to cooperate when the other party is free to defect.

		Prisoner or Negotiator 2	
		Cooperate (keep silent) or Problem Solve	Defect (confess) or Positional
Prisoner or Negotiator 1	Cooperate (keep silent) or Problem Solve	3, 3	0, 5
	Defect (confess) or Positional	5, 0	1, 1

The litigators who answered our questionnaire seem to be facing a situation similar to the prisoners in a prisoner's dilemma. They very much want to use problem-solving methods, but that requires that they cooperate with each other in their methods. Because of the risk that the other side will not cooperate, and because of the greater benefit they would obtain if they themselves were to defect unilaterally, both sides end up defecting to positional methods.

As suggestive as the prisoner's dilemma is, however, we doubt that it explains the persistence of unwanted positional negotiation. We do not know whether the reward structure of problem-solving and positional negotiation satisfies the narrow constraints necessary for a prisoner's dilemma. Is the reward to a party from using positional methods against problem-solving ones actually greater than the reward that party could obtain when both parties use problem-solving methods together? Is the sum of the rewards to both parties from joint problem-solving greater than the sum to both if one cooperates and uses problem-solving, while the other defects and uses positional methods? We have no direct evidence that this is so—and even have some evidence that strongly suggests this reward structure does not apply. Furthermore, there is good reason to believe that some of the restrictive assumptions necessary to create a prisoner's dilemma break down in the real world.

Neither the questionnaire nor other data from our study indicate how much value litigators put on problem-solving and positional negotiation. All we know is that many of them value problem-solving methods more. Without knowing the magnitude of the values, however, we cannot satisfy the conditions of a prisoner's dilemma.

More importantly, other parts of the questionnaire indicate that litigators think that problem-solving methods can be *more* effective than positional ones. We asked our respondents to score the effectiveness of ten different kinds of actions that lawyers might take in the course of settlement negotiations. Seven of the listed actions are characteristic of problem-solving negotiation. Three are characteristic of highly positional bargaining. Contrary to our posited assumption, the respondents thought that the problem-solving actions were more effective. And they thought that the highly positional actions were less effective. As shown in Table 3, the litigators ranked the three positional actions below all of the problem-solving ones in effectiveness.

TABLE 3

LAWYERS' RANKING OF EFFECTIVENESS OF NEGOTIATION TECHNIQUES

Technique	Effectiveness (overall mean)	Frequency (overall mean)
Problem-solving actions:*		
Listens carefully to the other side to understand its underlying interests	5.3	3.8
Suggests a payment schedule, payment over time or a structured payment schedule	4.8	4.1
Discusses the parties' underlying interests to develop settlement terms that maximize satisfaction	4.6	3.5
Conducts or suggests a 4-way conference for lawyers and parties to discuss issues	3.7	2.5
Suggests appointing a mediator to work with parties to create a settlement package	2.5	1.9
Suggests exchanges of goods or services in place of money as part of settlement	2.5	1.9
Suggests an apology or similar recognition that the other party suffered hurt	2.2	1.8
Positional actions		
Makes no meaningful settlement demands or offers until just before trial	2.1	4.2
Conceals information that might be useful for settlement	1.9	3.0
Makes extreme negotiating demands	1.6	4.3

*We have added the descriptive titles "problem-solving actions" and "positional actions" in this article. These titles did not appear in the questionnaire, and the techniques were not listed in the questionnaire in the order listed here.

To be sure, we view these results as more suggestive than conclusive. The questionnaire was not designed to explore in depth the nuances of belief and action. But these responses seriously undermine the assumption that litigators grudgingly choose the positional approach simply because it "works" better than problem-solving. Without that key assumption, neither the stag hunt nor the prisoner's dilemma would apply.

The effort to see the tension between positional and problem-solving settlement as an instance of the prisoner's dilemma also suffers from ambiguities in the concept of effectiveness. In our analysis of the problem, we have shifted our focus in a subtle but important way from the kinds of issues that are usually studied in prisoner's dilemma analysis. We are using litigators' attitudes about the process of negotiation itself. Reflecting these attitudes, we treat a result as "better" if problem-solving methods are used, and "worse" if positional methods are used. In the questionnaire and in our analysis we have treated the value of these methods as separate and independent from the substantive issues under negotiation or the substantive results obtained for the clients. Usually, however, scholars who analyze strategic interaction use the substantive rewards as their measuring stick. Ronald Gilson and Robert Mnookin, for instance, in their thorough analysis of how strategic interaction and the prisoner's dilemma can cause unwanted and inefficient competitiveness in litigation, build their examples with the dollar values that the parties and their lawyers can expect to get from handling the litigation in different ways.[22] Similarly, Douglas Baird, Robert Gertner and Randal Picker, in their extensive canvassing of the ways that game theory sheds light on legal issues, discuss almost exclusively how the games explain or influence the substantive actions and the substantive outcomes of the parties who must play the games.[23] When they discuss problems of litigation, they limit themselves to games about the concealment or disclosure of information, as that relates to the substantive payouts that will result from the litigation. The value that participants put on using one process or another, for its own sake, is not included in the calculation.

In theory, our shift from substantive outcomes to the subjective values that litigators attribute to different methods should not change the formal analysis. Different kinds of utility are generally fungible for purposes of economic analysis. But our focus on how litigators value process, per se, makes us acutely aware of how much abstracting from the real world we must do to analyze whether the prisoner's dilemma will explain the discrepancy between problem-solving and positional negotiation. In all

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[22] *See generally* Gilson & Mnookin, *supra* note 18.

[23] *See generally* BAIRD ET AL., *supra* note 18.

likelihood, when our respondents were ranking degrees of effectiveness, they were thinking of some combination of a better substantive outcome for their clients, a fairer outcome, a less expensive and more prompt resolution, a more reasonable and perhaps less stressful series of interactions with the other side and other factors that operate in their own professional and personal value systems. We find it difficult to conclude from data that may have so many variables buried behind them that the pristine conditions necessary to support a prisoner's dilemma actually exist and control what lawyers do.[24]

There is another important reason for doubting that some iron rule of strategic interaction, operating through the prisoner's dilemma, forces litigators to ignore the problem-solving methods they prefer. Real-world strategic interaction often simply will not fit into the structural characteristics of simple two-by-two games such as the prisoner's dilemma. Baird et al. caution that such games may not be useful in analyzing dynamic interactions in which people deal with each other over time and make decisions in response to what others actually do, rather than what they could be expected to do.[25] David Kreps notes the ways in which the formal requirements for using non-cooperative game theory break down in situations when the players have relatively direct experience playing the game, when social conventions and social norms influence the choices or "moves" that the participants make and when the players operate from a culturally-derived general sense of how to play, even when they cannot articulate the reasons for their moves in the strictly rational way called for by game theory.[26]

The real-world features that most readily break down the constraints of the prisoner's dilemma are communication and repetition. So long as the parties can communicate with each other about what they are doing and what they would like to do, and so long as the parties negotiate with each other enough so that they can determine whether these assurances are believable, the grip of the prisoner's dilemma will be broken. Robert Axelrod, for instance, has demonstrated through an extensive "tournament" of computers carrying out competing strategies in a prisoner's dilemma game, and through examples from history and biology, how parties can develop effective strategies to cooperate and reduce the risk that they will

[24] We are intrigued by the possibility of designing a follow-up study that could shed more light on what litigators mean by effectiveness in negotiation. Such a study might help us understand better why some settlement actions thought to be less effective are nevertheless used more frequently, as Table 3 indicates.

[25] *See generally* BAIRD ET AL., *supra* note 18, at 45.

[26] *See generally* DAVID M. KREPS, GAME THEORY AND ECONOMIC MODELLING 140-144 (1990).

both become mired in mutual defection by using repeated rounds of play, and by the implicit communication arising from each player's moves.[27] Similarly, Robert Frank shows how cooperative choices can become dominant across a population or social system if a sufficient number of participants wish to cooperate, even though a number of participants will continue to defect, to try to take advantage of the cooperators.[28] Our data are not precise enough to try to map them onto Frank's model, but his model strongly suggests that we should see the predominance of problem-solving methods across the system of settlement, even if positional bargaining "wins" when it meets problem-solving, and even if a substantial minority of litigators continue to use positional bargaining in an effort to take advantage of the problem solvers.

Litigators can communicate their interest in problem-solving methods of negotiation through both words and actions. They can explain to their negotiating counterparts that they want to avoid positional methods, and, because actions often speak louder than words, they can show their preferences by how they conduct their negotiations. Communication could be difficult if litigators were limited to the kind of situation modeled by a pure prisoner's dilemma game: they would know nothing about their opponents (other than that they were rational and understood the payoff structure of the game), and they would only be able to move once during the game. Neither limitation prevails in the litigating world we studied. Over the course of a litigation, the litigators have several opportunities to interact as they go through the work of exchanging pleadings, motions and pretrial discovery. Whether litigators use them or not, these communications could provide an opportunity to communicate about the desired methods of negotiation.

Some of our interviews provided examples of how litigators used the opportunity provided by repeated contacts to shift the negotiation from a more adversarial to a more problem-solving mode. In a personal injury case, for instance, the plaintiff suffered brain damage after being shot as an innocent bystander to a police chase. Negotiations were stalled even though the defense had offered a large structured settlement, under which damages would be paid to the plaintiff over a number of years through an annuity. The plaintiff's lawyer first worked in a positional way to convince the defendant that it faced a risk of liability beyond the limits of its substantial insurance coverage. That persuaded the defendant to put the entire amount of insurance coverage on the negotiating table. The plaintiff's lawyer (our interviewee) then turned his attention to the plaintiff's underlying needs. He

[27] *See generally* ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984).

[28] *See generally* ROBERT H. FRANK, PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS (1988).

determined that the plaintiff rejected the structured settlement in part because he felt insulted by the implication that he could no longer care for his money himself. After having paid attention to these underlying nonmonetary interests, the plaintiff's lawyer was able to settle the case on the basis of a straight cash payment.

Similarly, an interviewed lawyer described a suit by a creditor, his client, for foreclosure in a failed real estate arrangement. The defense resisted at every turn. The lawyer got the attention of the defense when he successfully brought pretrial motions in the Chancery Division. Then, instead of taking advantage of the plaintiff's situation by playing a hard positional negotiating game, the plaintiff's lawyer worked out an arrangement to keep the debtor in possession and extend payments. This lawyer described himself as a "deal maker," rather than a "deal breaker," and said that in settlement negotiation he liked to imagine himself across his desk in the shoes of the other party. He found a way to play a problem-solving game without the explicit cooperation of the other party.

These are examples—though relatively rare—of the fact that real-world negotiation need not follow the simple strictures of a pure prisoner's dilemma. As Lax and Sebenius point out, many negotiation situations present opportunities for both methods to be used, virtually together.[29] For instance, parties who are disputing over an amount of money, which one claims the other owes him, might use problem-solving methods to discover that scheduling payments over time, or linking payments to the occurrence of some relevant external event, may bridge the negotiating gap between them and increase the satisfaction of both parties without detracting from the satisfaction of either party. Once they have put the question of a payment schedule on the table and increased the size of the pie, each party can then use positional methods to try to manipulate the size and timing of the payments to his or her own advantage. Because problem-solving and positional methods can be mixed in a single negotiation, there is no inherent limit on the percentage of instances in which problem-solving methods will be used.

Communication and repetition (or, in more game-theoretic terms, reiteration of the moves of the game) work best to overcome the prisoner's dilemma in relatively small, coherent social groups. Robert Ellickson provides a very interesting example of how communication and reiteration of contacts allow the members of a small group to develop a system of cooperation and avoid the inefficient effects of the prisoner's dilemma. He studied the way ranchers in Shasta Valley, California, used an informal social system of adjusting the damage claims that arose when cattle wandered onto roads or ranges where they did not belong. Although the

[29] *See* LAX & SEBENIUS, *supra* note 20, at 154–182.

formal law had a system for determining how damages would be paid in such a situation, the ranchers ignored it. They also managed to cooperate, despite the strong tendency to defect that the prisoner's dilemma might, in theory, have imposed on them.[30]

We think that civil litigators in New Jersey comprise such a relatively small, coherent social working group. Our study does not provide clear data to prove this perception, but we note that the lawyers in our sample, like lawyers elsewhere, tend to work in segmented, specialized areas. As noted above in our description of our methodology, we drew the names of questionnaire recipients from trial lists in the Law Division, Civil Part, and the Chancery Division, General Equity Part of the New Jersey Superior Court. That number was much smaller than the total number of lawyers in New Jersey, and even within this smaller group we often drew duplicate names. (We disregarded any subsequent occurrence of a name in creating our questionnaire address lists.) The respondents tended to specialize in litigation. Sixty-three percent spent more than 75% of their legal work in litigation, and the mean time spent in litigation was 78%. The largest portion of the respondents' litigated cases was personal injury (mean time spent: nonautomobile personal injury defendant—27%; automobile personal injury plaintiff—26%; automobile personal injury defendant—21%; nonautomobile personal injury plaintiff—21%). A group does not have to be homogeneous or located in a single small geographical area to provide the framework for communication and reiteration. Ellickson, in his discussion of the ways in which groups can overcome the problems posed by the prisoner's dilemma, notes that even law professors comprise a working group for purposes of this kind of analysis, despite the fact that they number in the thousands and they are spread all over the country.[31]

Because civil litigators form a relatively coherent group,[32] whose members deal with each other repeatedly, we would expect that Ellickson's observations about cattle ranchers should hold true for civil litigators as well. Like cattle ranchers, civil litigators should be able to avoid the influence of the prisoner's dilemma and move to the methods of settlement that make more sense to them.

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[30] *See generally* ROBERT ELLICKSON, ORDER WITHOUT LAW—HOW NEIGHBORS SETTLE DISPUTES (1991).

[31] *See* ELLICKSON, *supra* note 30, at 258-264 (describing how law professors have developed a relatively orderly and coherent system of copying materials for class use without reliance on the law of copyright).

[32] Gilson and Mnookin also rely on the fact that lawyers may form a relatively coherent group, characterized by repeated interactions and repeated negotiations, as a way to moderate the highly competitive nature of negotiation that may occur between strangers. *See generally* Gilson & Mnookin, *supra* note 18.

Having provided reasons, from theory and from our study, why strategic interaction itself should not prevent the use of problem-solving methods of negotiation, we must end this section by noting an important barrier to communication. The barrier might be responsible for disrupting problem-solving communication, thereby forcing litigators back into the guessing-game uncertainty of the stag hunt or the prisoner's dilemma. Litigators may lack the vocabulary to communicate effectively to each other their interest in problem-solving negotiation.

In settlement negotiation, it is not enough to say that one wants to negotiate "amicably" or "cooperatively." These words do not by themselves mean that someone wants to negotiate in a problem-solving manner. The words are as applicable to positional negotiation as they are to the problem-solving kind. For instance, one can negotiate positionally by using a pleasant, amicable outward "style" while still using a highly positional "strategy" of making and holding to settlement positions.[33] Being cooperative might mean no more than making concessions to the bargaining positions taken by the other side. Not only is this an entirely positional kind of procedure, but it is also an ineffectual one. The concepts of problem-solving negotiation, based on the underlying real-world needs and interests of the parties, are more complex.

In our interviews, we observed that litigators used a limited vocabulary in settlement. Their terms did not encompass the concepts of problem-solving negotiation. We discuss litigators' vocabulary in section D, *infra*, and offer it as one reason why litigators cannot achieve the problem-solving methods of negotiation they desire. But we can see in the context of strategic interaction that this limited vocabulary may also permit the conundrum of the prisoner's dilemma to persist.

The role of an appropriate settlement vocabulary can be seen in Gilson and Mnookin's recent analysis of strategic interaction and legal settlement.[34] Using the prisoner's dilemma and similar heuristic devices, they show how the strategic consequences of having lawyers act as agents for people with disputes can interfere with efficient and desirable settlement methods. As we do here, they also use the fact that communication can overcome the strategic obstacles created by the prisoner's dilemma. To show how communication might work, they refer to interviews about cooperation among lawyers, and to a definition of adversarial cooperation drafted by the American Academy of Matrimonial Lawyers. Reminiscent of the conflict we found between positional bargaining—which is adversarial and disliked—and problem-solving bargaining—which is desired—they describe

[33] *See* DONALD G. GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS 18-21 (1989).

[34] *Cf.* Gilson & Mnookin, *supra* note 18.

lawyers anxious to develop methods that are not so uncomfortably adversarial. We are struck, however, by how little discussion there is about problem-solving negotiation in these lawyers' descriptions of what it means to be cooperative. In considering ways to reduce unwanted adversarial practices, they seem to limit their discussion of cooperation to the ordinary pretrial work of exchanging discovery information, discussing legal and factual issues, and focusing on relevance, without smoke screens and distractions.[35] Although they want to change the ways lawyers do their business and avoid the competitive warfare that can be brought on by the prisoner's dilemma, these lawyers seem to have little or no vocabulary to describe or deal with the underlying real-world interests and needs of the parties, nor do they have to handle negotiation so that those interests come to the fore.

As we noted at the beginning of this section, the prisoner's dilemma appears to play a limited role in keeping litigators from using the negotiation methods they prefer. To the extent it operates, it does so only as part of a larger context of beliefs and practices that are themselves shaped by other factors. Those other factors may include aspects of the structure of negotiation not captured by traditional game theory, such as agency problems, or the influence of judges or the kinds of stakes that are being negotiated. Other factors may include habit, language and the time and effort required by the negotiation process itself. Indeed, we ultimately conclude that habit, language and time and effort explain the curious situation litigators are in more satisfactorily than either game theory or other ways of looking at the structure of the negotiation process. It is to these other forces, the forces beyond the game board of the prisoner's dilemma, that we turn next.

B. *Other Elements of the Structure of Settlement Negotiation*

If the conflicts created by strategic interaction do not provide a sufficient explanation for lawyers' failure to use more problem-solving negotiation, perhaps other aspects of the negotiation process act as an obstacle. In a recent article, Gary Goodpaster has identified several factors that, in general, appear to be quite important in governing settlement efforts

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[35] One of their interviewees, for instance, described the disliked style as "repetitive nagging." *See* Gilson & Mnookin, *supra* note 18, at 545–546. The standards of the American Academy of Matrimonial Lawyers focus primarily on the processing of all the parts of litigation, such as motion practice and discovery, and not on the process of negotiation itself. *See* Stephen W. Sessums, *Adversarial Cooperation: A Concept That Works*, 9 J. AM. ACADEMY MATRIM. LAW. 61, 62 (1992).

in litigation.[36] Seven of these seem particularly pertinent: (1) the extent to which the negotiation involves "repeat players," who have been in this kind of situation before and expect to be in it again; (2) judges acting as facilitators of settlement; (3) the parties' perceptions of the predictability of the outcome at trial; (4) a cost/benefit analysis that measures the current value of settlement against the costs and risks of continued litigation; (5) whether the stakes in the dispute asymmetrically favor one side or the other; (6) how the litigation is financed; and (7) the effect of allies that the parties have working with or for them.[37] To a varying degree, discussed immediately below, these factors played some role in the negotiations we learned about. They do not, however, shed light on the infrequency of problem-solving negotiation. For the most part, they are neutral on that question, neither encouraging nor inhibiting an increased use of problem-solving.

Our questionnaire and settlement conference observations do not provide direct evidence of how often these factors occur, or how they are used. Instead, to examine them, we rely primarily on our interviews with lawyers about their recently resolved cases.[38] For the interviews, we spoke with 78 New Jersey litigators and learned from them about 131 cases recently resolved in the Law and Chancery Divisions.

1. *Repeat Players*

Goodpaster notes that repeat players, such as insurance defense companies, are relatively risk neutral.[39] Risk-neutral parties are more willing to take firm, ungenerous settlement positions and stick to them. They should be more willing to play "hardball" and take their chances that their firm negotiating position might cause some settlement negotiations to break down and force the case to trial. Because they handle so many cases, they should be less deterred by the risk that any given case could be lost at trial if they fail to settle it. They must also consider how settlements will affect settlement negotiations in future cases, thereby making them less likely to settle on unfavorable terms.

This analysis suggests that negotiations involving repeat players will shift away from problem-solving methods and towards positional methods. The repeat players may be responsible for the high incidence of undesired positional negotiation in New Jersey.

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[36] *See* Gary Goodpaster, *Lawsuits as Negotiations*, 8 NEGOTIATION J. 221 (1992).

[37] *See id.* at 225-228.

[38] The questionnaire was not focused on these factors, and the settlement conference observations covered too short a time in the life of a lawsuit to reveal this kind of information.

[39] *See* Goodpaster, *supra* note 36, at 232.

Insurance companies are repeat players *par excellence*. And insurance companies appeared to be involved in all or almost all of the personal injury cases that the lawyers described to us in our interviews. Consistent with the repeat player theory, some plaintiffs' lawyers insisted vehemently to us that insurance companies play the positional game of delaying settlement. The lawyers pointed out that insurance companies wanted delay to gain interest on the funds they have "reserved" to cover liability in the case, until the case settles or results in a trial verdict. Such a practice could be an indirect indication of risk neutrality. Gaining interest by delaying a large number of cases might be advantageous for an insurance company even if the delay, and the positional negotiating method associated with it, could cause losses in a few cases. The repeat player can ignore the individual cases for the sake of overall gain.

This implication, however, was not strongly supported by our cases. Repetition and risk aversion do not play an observable role in the negotiations about which we were informed. Our lawyer interviewees did not tell us about events in their negotiations that would indicate that the insurance companies' status as repeat players affected their methods of negotiation.[40] In contrast to the plaintiff lawyers' claim that insurance companies delayed on purpose, defense lawyers vehemently denied that such a practice occurred.[41] Sometimes insurance companies seemed more interested in prompt resolution than in delay. In one of the settlement conferences we observed, an insurance company claims adjuster had twenty files that she wanted to settle. In one particular case, she may have agreed to a higher plaintiff's demand while caught up in the effort to settle many. In that instance, being a repeat player would encourage settlement, rather than hinder it.

This example is consistent with a theoretical point: The degree of risk aversion need not influence the extent to which problem-solving negotiation

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[40] It does not appear that any of the lawyers interviewed worked exclusively for insurance companies. No claims adjusters were interviewed. Focusing on independent lawyers may account for the lack of direct evidence on the status of insurance companies as repeat players.

[41] Hazel Genn found similar allegations in her study of the settlement of personal injury matters in England. She disbelieved the defense lawyers. She thought they benefited from delay, despite their protestations to the contrary. *See* HAZEL GENN, HARD BARGAINING, OUT OF COURT SETTLEMENTS IN PERSONAL INJURY ACTIONS 103 (1987). We could not make a determination on this point. Because most cases are settled, and many are settled near the date of trial, plaintiffs' lawyers could in theory capture some or all of the interest gained by delay simply by insisting on a higher settlement amount than they might have settled for at an earlier time. We did not see any evidence, however, that lawyers on either side calculated their settlement values with such a fine-tuned attention to interest rates.

is practiced. A risk-neutral player could just as easily decide to adopt a problem-solving approach as to hold out for a better deal by using a competitive positional approach. As a repeat player, she would not let discomfort at the fear of losing a particular case influence her decision about whether to settle and for what value. In fact, risk-neutral repeat players might find it easier to adopt a problem-solving approach than a risk-averse player who negotiates only once. A one-time player could lose substantially if something went wrong with a less familiar and risky problem-solving method. The repeat player, however, could be more willing to accept the risk of failure in a particular problem-solving negotiation. The loss could easily be justified by the benefits obtained by using problem-solving methods in the many other negotiations she conducts.

2. *Judicial Settlement Efforts*

Judicial involvement in settlement negotiations is common in New Jersey, and lawyers think well of it.[42] When lawyers described settlement efforts in their cases during our interviews with them, judges appeared to be helpful in creating settlements. Judicial contributions reflected several different types of impact, however. Sometimes the judge was influential because of future cases. In a case involving asbestos, for instance, the parties agreed to a settlement suggested by the judge because the judge was soon to take charge of all cases in the county in which the attorneys practiced and they wanted to stay on his good side. Sometimes the judge was inadvertently successful. In a case involving an environmental claim under an environmental cleanup law, the parties settled when the attorneys realized after a settlement conference with the judge that the judge's unfamiliarity with the law would make a trial very risky. Overall, however, the judges seemed to be helpful when they forced the attorneys to be more realistic about their chances of success and suggested reasonable settlement terms.

It should be noted that this kind of intervention is consistent with positional bargaining. The perceived chances of success provide the anchor for a series of offers, demands and concessions because they help establish

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[42] When asked to state the degree to which a judge was involved in their most recently resolved Law Division case, 49% of the questionnaire respondents ranked judicial involvement as 3, 4 or 5 on a five-point scale in which 5 meant extremely involved and 1 meant not involved ($N = 479$). When asked how involved in settlement judges should be, fully 98% of the respondents expressed a preference for 3, 4 or 5. Eighty-eight percent ranked their preference as 4 or 5 ($N = 504$).

Our interviews with lawyers revealed that judges played a role in the settlement of 31 of the 131 cases the lawyers described to us.

the monetary award or other remedy that might follow in the absence of an agreement. Settlement terms can be reasonable in either a positional or problem-solving sense.[43] A reasonable positional settlement would be proportional to the chances of success and would probably represent some kind of numerical compromise between the settlement offers and demands that have been presented. Reasonable problem-solving settlement terms, in contrast, would articulate the various needs and interests of the parties and embody some plausible way to try to meet them. As we discuss in Section D, *infra*, judicial intervention observed in the settlement conferences primarily supported positional bargaining. Very few of the judges strove to create reasonable settlement terms of the problem-solving kind.

Goodpaster notes that the involvement of a judge prior to the start of a trial can influence whether or not a case settles.[44] As a neutral party, the judge can objectively consider the relative strengths and weaknesses of each party's case and offer an experienced opinion about the likely outcome if the case is litigated. Additionally, a judge may be able to create a settlement each side will find fair. From our observations of settlement conferences, we could not draw any firm conclusions about the effect of judges' involvement on accomplishing a settlement. Of the seventy-one conferences we observed, twenty-four resulted in settlements at the conference, and three additional cases seemed very likely to settle once the lawyers had consulted with their clients.[45]

Nor can we say that the judges' actions in the settlement conferences had a strong impact in directing the litigators towards positional methods and away from problem-solving ones. We observed no conflicts between litigators who sought to use problem-solving methods and judges who wished to use positional methods instead. The lack of conflict can be explained by the fact that virtually none of the lawyers in the settlement conferences approached their settlement tasks in a problem-solving way. They gave the judges nothing with which to be in conflict. At most, the judges' influence seemed to be that of confirming the positional approach that the litigators were already inclined to use. As we discuss in section D, *infra* we conclude from this muted judicial role that the predominance of positional methods of negotiation arises primarily from the habits of lawyers

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[43] For an argument that settlement conferences can be conducted in a variety of ways, with different effects on efficiency and on the quality of the settlement process, see Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985).

[44] *See* Goodpaster, *supra* note 36, at 228.

[45] We did not follow the conferenced cases after the conference was over, so we cannot measure whether these conferences may have had a delayed effect on the cases that did not settle at the conference itself.

and judges, and not from something inherent in the structure of negotiation itself. Judges do not enforce some rules about the negotiation process that require litigators to abandon problem-solving in favor of positional methods.

3. *Predictability of Outcome*

According to Goodpaster, cases are more likely to settle if the parties share a common view of the anticipated trial outcome.[46] We found evidence that this factor was at work in the settlement process in 21 of the 131 cases described by our lawyer-interviewees. A closer look at these cases confirms that the predictability factor, while either not often present or not clearly articulated by the responding attorneys, seems to operate as Goodpaster would suggest. In one case, a personal injury recovery for a product defect seemed certain. Because product liability claims often raise strict liability questions, there seemed to be little question about the likelihood of a decision in the plaintiff's favor. In this case, the manufacturer seemed eager to reach a settlement well before trial. Goodpaster's isolation of this factor also appears to be supported on the other end of the scale. In another personal injury case, both sides had vastly disparate notions of the merits of their respective cases. Unlike the example above, settlement in this case only occurred well into trial when testimony and additional factors moved both sides to reevaluate their respective positions. The resulting shifts brought both sides to a much more similar view of the case, and settlement was ultimately possible.[47]

But does this factor influence how often positional bargaining is used? As with the other factors that Goodpaster discusses, this one need not push negotiation methods in only one direction. If a jointly held view of the anticipated trial outcome makes settlement more likely, it might also direct

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[46] *See* Goodpaster, *supra* note 36, at 224.

[47] These are only small anecdotes in a field that has been extensively studied. The so-called "selection hypothesis" posits that lawyers will select cases for settlement when the lawyers can agree on their predictions of the outcome at trial, but will tend to try those cases they cannot predict. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEG. STUDIES 1 (1984). Samuel Gross and Kent Sevyrud have shown, however, that the rates at which cases settle depend at least as much on the kind of case as on discrepancies in information and prediction. *See* Samuel Gross & Kent Sevyrud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991). While our anecdotes do not add significantly to this knowledge, we have a substantially different purpose. We are trying to assess the extent to which the predictability of outcome affects how frequently lawyers use problem-solving or positional negotiation methods.

parties towards positional bargaining. Particularly in Law Division actions, any adjudicated outcome would most likely be a dollar amount, because that is the only kind of verdict a jury is allowed to render. This dollar amount becomes a "position" around which the lawyers can frame their negotiation strategies. This effect, however, need not occur. If lawyers largely agree about the anticipated outcome, they might be able to spend more time considering the parties' underlying interests. Each would need to spend less negotiating time trying to persuade the other party that her prediction was wrong. Our data do not reveal what the actual relationship is in New Jersey between predictability of outcome and the method of negotiation.

4. *Cost/Benefit*

When negotiators analyze their task by weighing the benefits of an anticipated judgment against the costs of getting to that judgment, they should, in theory, tend towards positional rather than problem-solving methods. As Goodpaster uses the cost/benefit concept, it reduces each party's interest in the dispute to a single number or position derived from weighing costs against benefits.[48] Problem-solving tends to avoid single numbers and instead focuses on multiple costs and multiple benefits; the goal is to construct mutually advantageous agreements by using the variety of costs and benefits relevant to the dispute.

But even if the theory of cost/benefit analysis would encourage the use of positional bargaining, we observed such analysis too seldom to think that it plays a major role in tying lawyers to positional methods. Lawyers described using a cost/benefit analysis in only 21 of the 131 cases they described to us. In one environmental liability case, for example, the new owners of the defendant company wanted to cut their losses and get on with their new business. Implicit in the lawyer's description of the settlement procedure was the notion that the defendant thought there was little to be saved in either time or money in opposing the claim when settlement was possible. Similarly, the parties to one of the personal injury cases described to us centered their negotiations on reaching a mutually acceptable value without incurring the costs of protracted litigation.

These were cases in which the lawyer explicitly weighed costs and benefits in making settlement decisions and then told us about the weighing. Undoubtedly, there were other cases in which the lawyer or the litigant made such calculations implicitly, or in which the lawyer had forgotten about such calculations by the time she reported the case to us. However, the nondisclosure of this information prevents us from attributing the prevalence of positional bargaining to cost/benefit thinking by lawyers.

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[48] *See* Goodpaster, *supra* note 36, at 230.

5. *Asymmetric Stakes*

As Goodpaster uses the term, *asymmetric stakes* refers to the reasons a party may have for preferring settlement that are quite out of proportion to the reasons held by the other party.[49] For example, a repeat player defendant may wish to settle to avoid the risk of setting a dangerous precedent, while the plaintiff is only interested in gaining the largest possible number of dollars in the case. Alternatively, a party against whom a defamatory statement was made may wish that a case go to trial in order to clear his or her name in a public manner, while the defendant simply seeks to minimize damages.

Asymmetric stakes seemed to be a factor in the decision whether to settle or litigate in seventeen of the cases described by lawyers. One case involved a wrongful employment termination suit against a bank. The bank was concerned about exposure of market secrets and agreed to a settlement with a secrecy provision. In another case, a manufacturer charged with producing a defective car seat settled before trial to avoid a possibly damaging precedent.

Asymmetric stakes might contribute to problem-solving negotiation because they can make it easier to identify settlement terms that benefit one party without symmetrically harming the other party. The relative infrequency of asymmetric stakes cases might help explain the preponderance of positional bargaining.

We would not rest on these data, however, to conclude that symmetry of legal stakes fosters positional bargaining. We only noted those cases in which the lawyers told us about asymmetric stakes. In other cases, the lawyers may not have noticed the asymmetric nature of the stakes or may have forgotten that element by the time they reported the case to us. As described below, we think that habit and language account in large measure for the failure of lawyers to use problem-solving negotiation as much as they would like. Both of those factors would tend to obscure the existence of asymmetries when lawyers described their cases to us.

6. *Litigation Financing*

This point supposes that when a litigant has substantial financial backing to press a case, settlement is less likely. It was only clearly observable in one of the cases the lawyers described to us. In this employment discrimination case, settlement appeared unlikely because the plaintiff had the full financial support and resources of the union to which she belonged. The lawyer's comments suggested that without her

[49] *See id.* at 231.

sponsoring union, this plaintiff would have accepted a settlement or dropped the suit for lack of financial resources with which to pursue her claim. Litigation financing may have been a common but invisible factor in many of the personal injury cases described to us. In such cases, the plaintiff's lawyer typically advances the costs of litigation and bills with a contingency fee, thereby becoming the source of the plaintiff's financing. The defense expenses are covered by the insurance company that is defending the matter.

While undeniably present, it is not clear how, if at all, these financing arrangements affected the negotiation methods used in the cases we studied. In theory, we might expect that cases financed through contingent fees would more likely be handled through positional methods. Plaintiffs' lawyers would have an interest in maximizing the dollar recovery obtained in settlement, because the recovery determines the size of their fees, and they would be reluctant to negotiate for nonmonetary terms. Defense lawyers and others handling cases on an hourly fee basis, in contrast, could be indifferent to the form of the settlement since their fees would depend simply on the amount of time they worked.

Herbert Kritzer's analysis of settlement terms and fee structures, using data from the Civil Litigation Research Project, suggests this relationship. Kritzer notes that lawyers using a contingent fee system were more likely to settle cases strictly for monetary terms than were lawyers working for an hourly fee. The differences were not overly large. For instance, 19% of the negotiations handled by lawyers using an hourly fee resulted in nonmonetary settlement terms, while only 3% of the contingent fee lawyer settlements did.[50] But they were statistically significant.

We did not ask about fee terms in our study, but our lawyer interviews showed a similar disparity between the terms of settlement in personal injury cases, other actions at law involving damages and cases in chancery. Sixty out of the sixty-six personal injury cases (91%) settled for a single payment of dollars only, and four such cases settled through a structured settlement providing for payment over time. Twenty-seven of the thirty-nine non-personal injury damage cases (69%) settled for a single payment of dollars only, while only eight (21%) settled for dollars plus other terms or nonmonetary terms only. Only a minority of the chancery cases, two out of ten, settled for dollars only. Five of the ten we learned about settled for

[50] *See* KRITZER, *supra* note 7, at 46. Kritzer reports that 31% of the hourly fee lawyer settlements involved mixed monetary and nonmonetary terms, while only 21% of the contingent fee lawyer settlements did. This relationship persisted even when he excluded from the calculation settlements in which the lawyers were unable or unwilling to express the stakes in wholly monetary terms. With this modification, 5% of the hourly fee lawyer settlements were in nonmonetary terms, and only 1% of the contingent fee lawyer settlements were. *See id.* at 102.

dollars plus other terms. Obviously, we learned about too few chancery cases to draw confident conclusions, but if we assume that most personal injury cases are financed by the plaintiff's lawyer through a contingent fee, and if we further assume that dollar-only settlements are more likely to indicate the presence of positional bargaining, we can see an apparent relationship in New Jersey between lawyer fee arrangements and the methods of negotiation used.

We do not think, however, that this relationship satisfactorily explains the discrepancy between the lawyers' preference for problem-solving and their practice of positional negotiation. Liability insurance may have as much to do with encouraging positional methods of negotiation as do contingency fees. In most personal injury cases in which the plaintiff's lawyer uses a contingency fee, an insurance company provides the defense and pays any monetary judgment or settlement. Insurance companies may have their own institutional needs to frame matters entirely in terms of dollars. They provide dollars for the insured and are not organized to provide services to the plaintiff in place of dollars. The insured defendant has purchased an insurance contract from them, and it may seem odd for the insurance company to request the defendant to do something for the plaintiff directly as part of the settlement in lieu of, or in addition to, the dollars provided by the insurance. Our study does not provide the information necessary to try to distinguish the effect of contingency fees from the effect of insurance contracts in supporting settlements that are exclusively monetary.

Similarly, Hazel Genn's study of personal injury settlements in England suggests a weaker relationship between contingent fees and positional negotiation.[51] Although lawyers in England do not use the contingency fee arrangement that is so prominent in the United States, their practices strongly resemble the positional methods that loom so large in our study. The negotiations that Genn studied were largely positional.[52] She noticed some variation in negotiation styles, but these were simply variations on the theme of positional bargaining. Some were adversarial and contested, and some were marked by quick and easy positional concessions by the plaintiff's side.[53] Problem-solving methods did not play a part.[54]

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[51] *See* GENN, *supra* note 41, at 31.

[52] *See* KRITZER, *supra* note 7, at 135.

[53] *See id.* at 123, 132-133 (1991).

[54] Kritzer points out that fee arrangements in England are too varied to make a simple comparison between contingency fees in the United States and lack of contingency fees in England. Nevertheless, English fee practices are still sufficiently different from those in the United States to rebut any simple assumption that contingent fees drive lawyers to positional methods of bargaining. *See* Herbert M. Kritzer, *A Comparative Perspective on Settlement and*

Moreover, even if contingency fee arrangements encourage the use of positional negotiating, they do not explain why New Jersey lawyers expressed such a discrepancy between the negotiation they did and the negotiation they wanted to do. If it were their contingency fees that were forcing lawyers to avoid the problem-solving methods they prefer, we could expect to see them try to use problem-solving methods more, and stop only when their income began to suffer. No one told us that they had tried this, or had even thought about it. If contingency fees are responsible, we could also expect to see greater efforts by insurance defense lawyers to introduce problem-solving methods, because they are usually paid by the hour and not subject to the monetary demands of maximizing their contingent fee. We also did not see that kind of effort from the defense bar. In fact, our most vivid story of an effort to introduce problem-solving methods into personal injury settlements came from a plaintiff's lawyer, who unsuccessfully sought to get the defendant's insurance company to provide some therapy and training for the plaintiff who had lost some fingers in an industrial accident. The plaintiff's lawyer did not express any concern about jeopardizing his fee (he sought some money damages as well as training), and the defense rejected his proposal.

7. *Ally Effects*

Allies include attorneys and insurance companies who comprise "litigation teams" with the parties. The members of the litigation team may have similar or competing interests that affect if, when and how a case settles. As an example, Goodpaster notes that a plaintiff's attorney with a contingent fee contract may prefer litigating in the hopes of a large award, while the plaintiff would be more likely to accept a settlement offer of a lower, but guaranteed, amount.[55] Robert Mnookin also notes that the "agency" problem, arising from the fact that in legal negotiation agents are conducting negotiations on behalf of their principals, can interfere with reaching a settlement.[56]

Using Goodpaster's definition, ally effects were necessarily present in all the cases. All the negotiations we dealt with were conducted by agents. Conflicts between the agent litigators and the principal parties rarely seemed to play an important role in settlement, however. The factor became explicit in one case when one of two plaintiffs' attorneys agreed to waive a portion of his fee as an incentive for the plaintiff to accept a settlement offer. We

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Bargaining in Personal Injury Cases, 14 LAW & SOC. INQUIRY 167, 173-177 (1989).

55 *See* Goodpaster, *supra* note 36, at 234.

56 *See* Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 242 (1993).

did not observe any ways in which the agency relationship forced the litigators to abandon problem-solving negotiation for positional methods.[57]

C. *Habits*

In light of the information we obtained from our three linked methods of investigation, it seems to us that habit provides the strongest explanation for the persistence of positional settlement negotiations in the face of a desire to use more problem-solving. Litigators handle settlement negotiations in a positional manner largely because that is what they have always done, that is what they expect to do and that is what many of their fellow lawyers do.

Our concept of "habit" is broad. Rather than identifying a few distinct factors that explain when problem-solving methods appear and when they do not, habit is an imprecise category that includes a wide range of specific actions, reactions and interactions that can occur in settlement negotiations between lawyers, or between lawyers and judges. As we use the term, habits exercise their power moment by moment during settlement work, as lawyers face a constant stream of decisions about what topics to raise, what facts to mention and how to respond to the things said by the other negotiating parties or the judge.

A concept this broad is difficult to pin down in the specifics of our data. The role of habit becomes clearest to us in our analysis of the settlement conferences we observed. In the settlement conferences, we were not constrained by the limited information that can be gleaned from a questionnaire or by perceptions and memories that filtered the lawyers' descriptions to us of their work and their cases.

In particular, we can use the conferences to see whether problem-solving methods of negotiation are as rare as the questionnaires report, and

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[57] We did not observe or ask about any interactions between the lawyers and their clients, so there may have been client pressures on the methods of negotiation of which we were unaware. We doubt, however, that such pressures had any substantial effect. If they had, we would have expected the litigators to complain about the impact of their clients either during our interviews or during settlement conferences. So far as we could tell, the litigators had the choice of method of negotiation pretty much to themselves. Our observations thus confirm for civil litigation what William Felstiner and Austin Sarat observed about the negotiated settlement of matrimonial matters: "In general, lawyers try to maintain control over negotiations with the other side, except in discussions about personal property." William L.F. Felstiner & Austin Sarat, *Symposium: Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1467 (1992).

The distribution of personal property, such as furniture, books, linens and clothing, is not generally an issue in civil litigation, though it often looms large in divorces.

to see if we can identify any particular forces or factors that could be preventing litigators from using problem-solving methods more often. Although we only observed seventy-one settlement conferences, too few to independently verify the perceptions of the questionnaire respondents, our observations were consistent with the questionnaires: Problem-solving negotiation rarely occurred in the settlement conferences. To identify problem-solving negotiation, we looked beyond the explicit and direct use of problem-solving methods. We also sought to identify those conferences in which the real-world interests and needs of the parties were discussed. It is usually out of those interests and needs that problem-solving negotiators construct problem-solving agreements. Without the discussion of such interests and needs, it is difficult for problem-solving negotiation to take place. In our seventy-one observations, we noticed mention of the parties' real-world interests and needs (which we called "interest stories")[58] in only seven cases.

More importantly, we did not observe in the conferences themselves the kinds of tensions or conflict that would explain why problem-solving methods are so seldom used. If the lawyers conducting the settlement conferences were forced away from problem-solving methods by some pressures of strategic interaction or by other factors of the negotiation process, we would have expected to see instances in which lawyers raised problem-solving ideas, only to be chastised, or ignored or otherwise required to abandon their efforts in that direction. We did not see that kind of tension or conflict in the conferences. Instead, for the most part, they exhibited a routine-looking processing of settlement positions emanating without discussion or concern from the lawyers' and judges' own control of the conference agendas.

The lack of attention to interests or problem-solving became most interesting when discussion did indeed briefly touch on the parties' underlying interests, but problem-solving negotiation never developed. Rather than make those interests the subject of explicit attention and discussion, the lawyers and judges moved on to other matters. In a settlement conference about a "rear-end hit" automobile accident, for instance, the judge excused the defense counsel and, in a private caucus, asked the plaintiff's lawyer for the lowest demand for which he would

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[58] We take from Jerome Bruner the idea of calling the verbal exchanges in the settlement conferences—whether long or very short—stories. *See* Jerome Bruner, *A Psychologist and the Law*, 37 N.Y.L. SCH. L. REV. 173 (1992). "Interest stories" were usually little vignettes describing some aspect of the real-world interests or needs of one or more of the parties. For our purposes, even a brief reference to, or question about, such interests and needs would count as a story.

settle.[59] The lawyer shifted slightly from this highly positional question by mentioning that he knew the plaintiff, and the plaintiff had a problem with his house, implying that the plaintiff had some kind of real-world problem that was influencing his judgment about a reasonable settlement figure. Neither the judge nor the lawyer, however, continued with this topic. The lawyer immediately went on to say that there was a $15,000 workers' compensation lien against any recovery the plaintiff would obtain in the case,[60] that he would have to threaten the defense insurance company with the possibility of suffering a judgment larger than the amount of insurance coverage,[61] and that it would cost him $5,000 to try the case. The judge persisted in asking for the plaintiff's true minimum settlement demand. The plaintiff's lawyer then said $85,000. The judge said they had no deal, because the plaintiff and the defendant (who had offered $30,000) were worlds apart. The judge subsequently scheduled the parties to return at a later date.

It can be seen from this example that the participants did not spend time trying to think through what the real-world interests of the plaintiff were and what effect those interests might have on the terms of the settlement. Instead, both the lawyer and the judge turned to positional matters, calculating what the net recovery of the plaintiff might be as a way to justify a larger settlement demand and trying to increase the perceived likelihood of a large award, thereby increasing the reasonableness of a high settlement

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[59] Caucusing separately with the lawyers for each side occurred frequently. We observed it in twenty-six of the seventy-one settlement conferences we attended. In answering the questionnaire, lawyers gave a mean frequency ranking of 4.9 to judges talking to each lawyer separately, on a 7-point scale in which 7 meant "always" and 1 meant "never." Judges who sat in the law or chancery divisions gave that practice an even higher frequency ranking, 5.9 on the same 7-point scale.

[60] The plaintiff had been injured on his job, and so had obtained an award to cover the injury from the New Jersey workers' compensation system. Such awards are typically smaller than personal injury awards. However, the insurance carriers that fund workers' compensation also obtain a reimbursement of their payments from any tort award the plaintiff receives from the third party that caused the damage. Negotiations with the workers' compensation insurance carrier about the size of the lien to be placed against the tort settlement sometimes figured in the settlement negotiations we observed.

[61] The lawyer said he would have to try "Rova Farms," referring to the New Jersey decision *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474 (1974), which held that an insurance carrier could be liable to pay a judgment against an insured that was even larger than the maximum coverage provided by the insurance policy if, in defending the suit on behalf of the insured, the insurance company acted in bad faith in refusing to settle a suit against an insured, and if the plaintiff obtained a judgment in excess of the coverage provided by the insurance policy.

demand. We saw no apparent necessity for taking the conversation in this direction. Because the conversation took place outside the defense lawyer's presence, the plaintiff's lawyer could have revealed more about his client's problem with his house without the risk of exposing damaging information to the defendant. The judge and the plaintiff's lawyer simply were more interested in setting out the positional settlement numbers.

Several other aspects of this conference support our view that the participants moved away from a possible discussion of interests out of habit, rather than because of some external pressure. In introducing the question of the plaintiff's problem with his house, the plaintiff's lawyer indicated that he knew the plaintiff personally. He thus categorized the plaintiff's underlying interests as belonging to a personal realm that was distinct from the professional realm of a lawyer's knowledge. Without that personal knowledge, it apparently would have seemed inappropriate for the lawyer to know about his client's house problems.

This particular judge's interest in finding out settlement positions, rather than exploring house problems, was consistent with the style in which he conducted most of his settlement conferences. He made extensive use of the technique of caucusing separately with the lawyers for each side, using the caucuses to discover settlement numbers. His goal was to determine if the parties' settlement positions overlapped, using his role as a judge to discover what the lawyers may have been unwilling to reveal directly to each other. This judge was such a consistent exemplar of this method that we dubbed his style "matchmaker." Through caucusing with each side, asking each to disclose his or her negotiation positions in confidence, he sought to determine whether the parties could be matched in an agreement.[62] To get on with that work, he had little interest in, or need to learn about, the personal underlying interests of the parties.[63]

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[62] This style contrasted with another exemplar, which we termed "minitrial." The judge who exemplified the minitrial style used less caucusing. He relied instead on pointed questioning to the lawyers about the legally relevant facts in the case, coupled with reasoning about how a jury would react to the evidence, to give his own opinion about the value of the case. Although cases sometimes settled at figures different from the one the minitrial judge gave, the opinion set the framework for the final steps of positional bargaining by which the lawyers reached agreement. Most of the judges we observed used a mixture of the styles we termed matchmaker and minitrial. We discuss these methods of conducting settlement conferences more fully in Jonathan M. Hyman & Milton Heumann, *Minitrails and Matchmakers: Styles of Conducting Settlement Conferences*, 80 JUDICATURE 123 (1996).

[63] Another positional factor may have contributed to the judge's disinterest in the plaintiff's personal situation. The judge told our research project investigator, when both lawyers were out of the room, that the defense lawyer had a reputation of never taking a case to trial. This meant that the defense lawyer would be likely to raise his offer and settle even if

The longest settlement conference we observed, conducted by two senior members of the bar serving as volunteer settlement facilitators for the chancery division,[64] provided numerous opportunities to observe the participants turn away from the underlying interests of the parties, even after some of those matters had been brought to the surface. The plaintiff was the widow of a partner in a small business. She claimed that she was entitled to have the business repurchase her stock at a certain price and pay her the proceeds of certain life insurance policies. The matter was factually and legally complex, raising questions about the enforceability and meaning of the repurchase agreement, the valuation to be given the company stock and the purpose and function of the insurance policies. The conference lasted for six hours. The lawyer-mediators spent a substantial part of this time analyzing the legal and factual points of the case, often in ways that called the factual and legal strength of each side's case into question, making each side less certain of obtaining a favorable judicial decision.

After the lawyers and mediators had spent time discussing several of the factual and legal issues, one of the mediators asked what was "really" at issue. Instead of describing the real-world needs of the parties, one of the plaintiff's lawyers immediately responded by recounting the prior history of the settlement talks and the settlement positions taken by the parties. A variety of interests, however, became evident later in the session, including strong antipathy between close family members, the expectation of the plaintiff-widow that she would be cared for by the business and by insurance arrangements that her husband had made,[65] her need for support[66]

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the plaintiff did not lower his demand. This expectation helps explain the judge's apparent equanimity when faced with a $55,000 gap between the plaintiff's demand and the defense offer and his scheduling the matter for a subsequent conference. He probably saw little reason to explore the plaintiff's personal situation, because he would not have expected such an exploration to produce terms that the defense would be willing to accept at that time.

[64] Several chancery courts had programs in which experienced lawyers, rather than judges, hosted settlement conferences and tried to facilitate a settlement. The lawyers acted as a judge might in a settlement conference, but without the full power that a judge implicitly carries.

[65] Late in the session, the defense lawyer told the mediators that the plaintiff had mentioned in a deposition that her deceased husband had told her the dollar value of the terms he had arranged for her in the event of his death. That figure was substantially larger than the one offered by the defense and substantially larger than the final agreement. This could help explain why settlement was difficult: The plaintiff was being asked to abandon what her deceased husband had worked so hard to provide for her.

[66] At one point, someone mentioned the name of the street on which the plaintiff lived. The street had a reputation of substantial affluence. The plaintiff's lawyer was quick to point out, however, that the plaintiff lived at a less elegant part of the street, and one of the lawyers

and the difficulty faced by the defendant business in raising cash for a settlement. But none of these were mentioned as explanations for what was "really" at issue. When this question was asked, these other factors were never brought out in a systematic way, but simply appeared from time to time during the remainder of the session. Some of them, such as strong family antipathy, were treated by the parties as obstacles to settlement rather than as part of the problem with which the settlement had to deal.[67]

Judges did play a role in supporting the tendency of the conferences to focus on routine positional bargaining rather than on interests and problem-solving. We looked for the number of conferences in which judges took a rather active role in shaping the negotiation style of the conference by their comments about the negotiation process itself. We called these instances "negotiation stories." We noted statements about negotiation itself in thirty of the conferences, somewhat less than half of the total.

The statements often focused on the positional aspects of the negotiation process. For instance, in advising the lawyers how they should proceed in their settlement work, one judge agreed that a lawyer should not bid against himself. In another conference, it was made clear that each side's settlement positions should only move in one direction which is a

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mentioned that his daughter lived on the same less elegant part of the street when starting her career. This fact only implied a need for support, and the true address was apparently mentioned to counteract the impression that the plaintiff was well-off and only suing out of greed or vindictiveness, and not out of true need. Thus, the question of the plaintiff's real-world needs only played a role by suggestion and inference. Any such needs were not explicitly discussed as a problem to be solved in the settlement.

[67] The role of family antipathy was never made clear. At one point, one of the mediators characterized this kind of dispute as more similar to a matrimonial matter than a business dispute, because the parties did not want to give and take. But he never sought to draw out the possible reasons for family antipathy. At another point, the defense lawyer blamed the antipathy on the plaintiff's brother, but said he could not explain where it came from.

That strong feelings played a role became apparent at the end of the session. The lawyers, after a series of private consultations with their clients, had reached terms for payments combining some cash payment with some payment over time. A younger man, who was apparently the plaintiff's brother, came into the room and angrily denounced the mediators, saying he did not want the plaintiff to be "screwed" any more, that this was a waste of time and (sarcastically) that the mediators had been "beautiful." The plaintiff's lawyer rather heatedly defended the settlement, noting some concessions he had obtained from the defendants. The plaintiff herself, accompanied by another woman whose identity was not made clear but who seemed to be a relative, then intervened to tell the plaintiff's brother that it was time to be done with the dispute. Their action seemed to resolve the matter, and it was left to the lawyers to put the terms into writing. The settlement seemed complete once strong feelings, which had been ignored, were expressed and explicitly addressed.

typically positional outlook. In yet another conference, the judge indicated that a party was bound by prior settlement offers, which is another highly positional rule of thumb. "Splitting the difference" between settlement positions is a common way of overcoming stalemate in positional bargaining. One judge introduced his advice to split the difference in a humorous way: "I say this respectfully: I never say split the difference except when certain elements are present. Those elements are: subrogation, two carriers, or a case that could go either way—when you are both shooting the dice. Here they are all present."

Although one might suspect from this kind of judicial intervention that judges are the ushers of the process, steering the lawyers away from the problem-solving methods they would prefer and towards the positional methods they dislike, we cannot conclude that the judges are responsible. They shared the lawyers' preference for problem-solving methods. In our questionnaire, which was sent to all the judges who had served during the prior three years in the civil part of the law division or the general equity part of the chancery division, we asked about positional and problem-solving negotiation. With responses quite similar to the responses of the lawyers, the judges thought that the positional method of settlement was used in 69% of the cases, the problem-solving method was used in 14% and a combination was used in 22% (*N*=55; the percentages are the mean responses from all the judges). Fifty-seven percent of the judges thought that problem-solving methods should be used more, and 44% thought that positional methods should be used less. It seems as if judges are in as much conflict as lawyers in conducting settlement discussions by methods they do not prefer.

Furthermore, the tone of the settlement conferences indicates to us that the tendency towards positional methods results from the habitual actions of the lawyers and the judges and not from a conflict in which the judges force the method on unwilling lawyers. We did not observe tension or hostility in the judges' negotiation stories. The stories seemed directed towards making the positional method work more quickly or more smoothly, not towards forcing the lawyers to turn away from problem-solving. In fact, the highest tension we observed about the settlement process occurred in a case in which a plaintiff's lawyer was playing the positional game too vigorously. Both the judge and the other lawyers were displeased with his style.[68]

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[68] The plaintiff's lawyer in this personal injury case kept driving the settlement figure higher through a series of refusals to concede. He insisted on adding his filing fees to the final settlement figure, a practice we did not observe in any other case. His first positional move in this negotiation had been to drop his demand from the $45,000 that a pretrial arbitrator had awarded, to $11,564.65, which he explained was necessary for his client to obtain a net recovery of $7,500, the figure which the settlement judge had indicated was reasonable in

In a few settlement conferences, the judge or the lawyers paid more consistent attention to the parties' real-world interests and to ways to solve them. An experienced chancery lawyer acting as a mediator also handled a litigation between a developer, who claimed that he had title to land through adverse possession, and the adjoining property owner, who did not want to give up for development the land he claimed was his. The underlying interests of the parties figured prominently in the discussions and settlement. The developer promised to hook the property owner's plumbing to the municipal sewer system so that he would not need the adjoining land for a septic field, and he promised to keep some land open and undeveloped. In another matter, a dispute between a business owner and a contractor over the delivery of gravel for a parking lot, the judge directed the lawyers to the question of whether a new delivery of proper gravel would solve the issue. The lawyers left to consult with their clients, reasonably hopeful that a settlement could be reached. In an employment dispute, the judge asked whether re-employment of the plaintiff was an option. The plaintiff's lawyer responded that, in this particular case, it was not an option because the plaintiff was an itinerant plumber who spent half the year in Florida. Although, in this case, paying explicit attention to underlying interests did not result in a problem-solving settlement, the conference was noteworthy because the judge elicited a description of the parties' interests, together with an explanation of how those interests might or might not relate to a settlement.

We can speculate about what factors may have contributed to the discussion of real-world interests and a problem-solving approach in these few cases, setting them off in contrast with most settlement conferences. The parties to some of these cases had a relationship that would continue past the resolution of the case. The developer and the landowner had a continuing relationship, since they would continue to be neighbors whatever the outcome of the lawsuit. The plumber might have been in a position to work again for his employer, giving them a continuing relationship. None of these three cases in which interests figured so prominently were personal injury matters, nor, apparently, were they defended by insurance carriers who organize their entire business in terms of the dollar cost of payments for settlements or adverse verdicts.

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light of the damages in the case. His version of being conciliatory consisted of reluctantly dropping $64 from this claim. He had first offered to drop $14 from his demand, but then went along with the somewhat larger $64 reduction, indicating that he would make it up another time. The judge rather derisively referred to this case as using "Chinese numbers," meaning numbers that were worked down to the last dollar or last cent to extract a more favorable settlement, rather than numbers that were reasonably general in an imperfect world of compromise.

But we do not think such factors as personal injury or insurance defense provide a powerful explanation for the relative paucity of problem-solving. The family members in the suit between the widow and the surviving business owner, described above, would have a continuing relationship, both because they were family and because any payment over time by the defendant would require a continuing relationship of sorts. Yet problem-solving was extremely muted and subordinate to positional bargaining in that session. Another chancery matter, involving a dispute between two adjacent businesses who were fighting over the ownership and use of a thin tract of land and a building that one of them had purchased from a bankrupt former owner, also involved neighbors who would have a continuing relationship. It did not, however, focus on underlying interests in a systematic or explicit way, even though the judge made some effort to direct the settlement discussions towards interests and practical needs, and the parties did not settle.

The recent study of lawyers and divorce mediation in Maine, conducted by Craig A. McEwen, Lynn Mather and Richard J. Maiman, provides an indirect example of how lawyers persist in their habitual behavior despite an opportunity to change.[69] Maine adopted a requirement that most divorcing couples use mediation to try to resolve their differences over the terms of the divorce. Divorce lawyers might have been expected to resist mediation because it might dislodge them from their positions of power and their habitual ways of operating. Yet, they did not resist. McEwen, Mather and Maiman found that they generally favored the use of mediation.

In a part of their study most suggestive for our analysis, McEwen and his colleagues noted that, despite the lawyers' acceptance of mediation, they did not significantly change their own practices. Mediation was good, but the lawyers left mediation to the mediators rather than try to integrate it into their own habits of work. Some of them even expressed relief that it would be the mediators, rather than the lawyers, who would now have to attend to some of the gritty details of the lives of the divorcing couples.[70] Although mediation might be a welcomed addition to the arsenal of techniques to deal with matrimonial legal conflict, the lawyers did not adopt the technique as one of their own. They held on to their own habits of work.[71]

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[69] *See* Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 L. & SOC'Y REV. 149 (1994).

[70] "What's a lawyer going to do with pots and pans? Why should a lawyer get involved whether it's Friday at five or Sunday at six? That's ridiculous. I mean clients aren't babies, but the trend is more and more [lawyers] going [to mediation]." *Id.* at 171.

[71] The similarities between Maine matrimonial lawyers and New Jersey civil litigators are imperfect, at best. We did not study mediation, and we did not obtain information about the attitudes or practices of matrimonial lawyers in our study. (Our questionnaire respondents

The failure of lawyers to use problem-solving, even though our questionnaire showed a widespread preference for it, might be seen as the result of habitual actions that constitute the lawyer's "role." Lawyers may stake out settlement positions, resist concessions at first and then concede, because that is the pattern of action their role entails. We take a broader view of habit, however, one not limited to patterns of action. The lack of problem-solving might as easily be explained by habits of mind as by habits of action. So far as we can tell from our observations, it simply did not occur to the lawyers and the judges to handle their discussions in any other way.

Leonard Riskin's analysis of mediation and lawyers provides an intriguing suggestion for how habits of thought might prevent litigators from adopting problem-solving methods of negotiation.[72] He argues that litigators[73] carry out their work within the framework of two assumptions—which he calls the lawyer's "standard philosophical map"—that prevent them from using mediation as a method to resolve disputes. The two assumptions limit litigators to an adversarial choice between winning and losing and force them to rely on the external application of legal rules to resolve disputes. While Riskin draws his distinction between litigation and mediation, rather than between different kinds of litigation work, his categories are remarkably similar to the distinction we have drawn between positional negotiation and problem-solving. Many of the characteristics he attributes to mediation appear in our definition and observation of problem-solving negotiation. The standard philosophical map may explain why litigators continue working in the same patterns and why, to continue the metaphor, they continue treading the same paths.

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spent a mean amount of only 12% of their time on matrimonial matters.) Mediation is not the same as problem-solving methods of negotiation, although they can share many characteristics. Nor is it clear that Maine's matrimonial lawyers favored mediation with the same intensity that New Jersey lawyers favor problem-solving methods of negotiation. Nevertheless, we think that the positive attitude of Maine's matrimonial lawyers towards mediation indicates an interest in resolving disputes in ways other than adversarial-positional settlement negotiations. Despite that interest, Maine's lawyers apparently did not change their own ways.

[72] *See* Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982).

[73] Riskin refers to "lawyers," rather than litigators, but from his description it is apparent that he means primarily litigators. The two assumptions that he attributes to lawyers apply much more readily to adversarial legal disputes than to transactional work in which lawyers try to make deals. *See id.* For another description of differences between negotiation in a dispute resolution context and in a transaction-creating or "rule-making" context, see Melvin Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

Our observations suggest, however, that the image of a standard philosophical map, however useful it is to crystallize the issue of positional and problem-solving negotiation, is not sufficiently nuanced to explain how litigators act in New Jersey. The image of the map suggests that the travelers who follow the map are only aware of what the map shows. Other things are beyond their professional consciousness and not part of their professional mental lives. Our observations indicate, however, that many litigators in New Jersey are very aware of highways and byways that they do not travel. The interesting fact is that they would like to travel the other roads but do not travel them. In light of their knowledge, we do not think we can explain their inability to use more problem-solving simply on the grounds that it is not part of the mental world within which they work. The habit that prevents them from using more problem-solving methods is more complex and probably more multi-faceted.

We think it is more useful to focus more directly on language, rather than trying to boil down habits of language to some "basic" assumptions or conceptions that underlie the language. By paying attention to the language of the settlement discussions we observed, or the language in which lawyers described their cases to us, we can see more clearly how styles of thought or habits of language can contribute to the perpetuation of practices that lawyers would prefer to change. We turn to language in the next section.

D. *The Language of Problem-Solving*

We think that the other parts of our study suggest an additional reason for the discrepancy between wish and action. This obstacle to problem-solving lies in the language of settlement. Through our interviews and observations of settlement conferences, we became quite aware of the specialized language of litigating lawyers. Children were "dart-outs" when they appeared from between parked cars, and drivers were "short-stops" when they hit their brakes too fast. A plaintiff suffered a "wrist-drop" when, in a medical malpractice case, an allegedly misplaced injection caused her wrist to lose strength. Plaintiffs paid medical bills to "ky-roes" (phonetic), that is, chiropractors, and to "orthopods" (orthopedic medical personnel). A baker suffered a "puff-back" when his gas oven blew up and burned his toupee.[74] A "flipper" got into trouble when he bought land on

[74] In another vivid case described to us, a dentist was too successful in replacing a patient's removable bridge with a permanent one. The replacement over-corrected the patient's buck teeth and gave his mouth a sunken look. The patient wanted his removable bridge back, but the dentist had lost it. When the dentist sued for his fee, the patient counterclaimed for malpractice and won $35,000.

speculation and tried to "flip" it to a buyer to develop it further.[75]

The specialized language extended to the process of settlement as well as to the real-world events that give rise to litigation. Insurance company lawyers were asked what they "had on the case." Opposing lawyers and judges were concerned whether a lawyer had "control" of a client. Lawyers were cautioned against "bidding against themselves."

This language both reflects and, in the process of reflection, reconstitutes the world in which litigating lawyers operate. But the language does not have terms that reflect or constitute problem-solving negotiation. This gap is most apparent in the most ubiquitous words we heard used in the negotiation process: *demand* and *offer*. The plaintiff "demands." The defendant "offers." While both of these acts could be called settlement proposals, or settlement suggestions, they instead are labeled by terms that connote confrontation, position and concession. Even the word "need" was turned to positional, not problem-solving, use. From time to time, a judge in a settlement conference would ask a lawyer what he "needed" to settle the case. While need could be taken in a broad problem-solving sense to include all the real-world concerns, desires and interests of the parties that were affected by the litigation, in the settlement conferences it was given a much narrower job to do. It merely inquired what dollar amount would be sufficient to settle the case. In other words, it asked at what settlement position the positional negotiating game would stop.

In general, the specialized language that we heard had only two points of reference: the historical events that gave rise to the litigation, and the process of negotiation itself. Furthermore, the colorful language used to describe the historical events usually carried some implications that a party was, or was not, to blame for what occurred. Those topics, however, leave out a large set of facts important for problem-solving negotiation: the real-world situation in which the parties find themselves and their real-world interests and needs that could be served by the litigation or its resolution.

Just as the settlement conferences seldom generated stories about the interests of the parties, the lawyers we interviewed told us little about the underlying real-world interests of their clients and the opposing parties. We asked whether they had learned more about the interests of the opposing party during negotiations. If their negotiations had used problem-solving methods, we would have expected them to have discovered more about the interests of the parties than they knew when the negotiations began. New knowledge about interests, however, hardly ever appeared in the lawyers' descriptions.

Actually, we expect that the lawyers knew more about the real-world situations of the litigating parties than their descriptions of the negotiation

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[75] This term apparently is used in real estate law as well as in litigation.

would suggest. They sometimes described the parties in vivid terms. One personal injury plaintiff, for instance, was suing for a back injury allegedly caused when he jumped out of the way of the defendant's truck, even though the truck never touched him. His lawyer told us that the plaintiff had been convicted of fraud, a background fact that made the negotiation more of a challenge. The lawyer attributed his negotiating success in part to the fact that the defendant's truck driver was an unattractive character. Another case involved siblings feuding over the house that had been left to them by a deceased parent. Yet, even in these cases, the personal situations and real-world needs of the parties did not figure into the story of the negotiation, except to the extent they affected the parties' positional negotiating positions. We are necessarily speculating here, because we can only guess what lawyers knew if they did not tell us. But we think that the lawyers did not see the parties' real-world interests as relevant to the task of settling the case. Consequently, they saw no point in telling us about the parties when they described what happened during settlement. The lack of a negotiation language that included the parties' real-world interests kept the lawyers from noticing the role of those interests in the settlement of cases, as well as from describing those interests to us.

As we noted in section C, *supra*, people who continually act in ways that do not provide them with optimum benefits might be caught in the grip of a prisoner's dilemma situation. Litigators might be acting rationally in continuing to use positional methods of negotiation because the risks of unilaterally trying to use problem-solving methods may be too high. In a prisoner's dilemma, however, communication can enable the parties to change their actions, permitting them to use the norms that they prefer rather than practices they dislike. Our analysis of the language in New Jersey settlements suggests why litigators remain locked in positional methods: Their settlement negotiations lack the language they would need to substitute a norm of problem-solving for a practice of positional bargaining.

E. *Time and Energy*

Identifying habit and lack of language as the best explanations of why litigators do not use the negotiation methods they prefer leads us to the question of stability and change in social practices. Habits can change. Language can be learned. Why haven't lawyers adopted the changes needed to create a system more to their liking? In considering why change has not occurred, we inevitably are required to indulge in some speculation, but the contrast between what litigators say they want and what they actually do invites us to continue. We think that litigators might be held back from changing their methods in part by the time and energy entailed in moving to and operating in a new system.

Litigators desiring to use more problem-solving methods face the risk of being required to use more time and more energy in two different ways. Learning new methods of negotiation, and teaching other litigators to use them as well, requires litigators to take time they do not have to use in the habitual repetition of established ways of acting. Even if they succeed in increasing the use of problem-solving methods, they may find themselves spending more time and energy settling individual cases through problem-solving rather than through positional bargaining. After all, positional bargaining not only does not depend so heavily on discovering and trying to coordinate the idiosyncratic interests and needs of the parties, but it also can be more easily routinized.

We are instructed here by the difficulties that have been experienced by those who have tried to introduce problem-solving methods of negotiation into collective bargaining. Labor negotiation shares with legal settlement negotiation a reputation for being confrontational and positional. Both labor negotiation and legal negotiation have developed through decades of repeated practice, training new participants in traditional ways as they become involved. Recently, however, various groups have made concerted efforts to introduce problem-solving methods into collective bargaining. They have used the term "mutual gains bargaining" (MGB) to describe their purposes and methods. The success and limits of MGB in labor negotiations can foreshadow the fate of similar efforts in settlement negotiation.

The advocates of MGB have not had an easy time. Introducing such practices, and changing the way labor and management have previously negotiated, has required long-term commitments and immense amounts of time. MGB plans have required labor and management to engage in extensive training sessions before beginning any bargaining. During bargaining itself, MGB often requires the constant participation of third party "coaches" to guide the process and keep the participants from falling into their old positional ways. Even with such extensive support, and the time and money it requires, MGB often fails to take hold.[76]

The difficulties encountered in introducing MGB indicate how entrenched existing negotiation patterns can be. We imagine that it would be even more difficult to introduce similar systemic changes in civil litigation. Labor negotiators have the continuing relationship necessary to develop new methods in a systematic way. In the legal setting, however, the frequency and nature of future contacts between negotiating lawyers is uncertain.

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[76] *See* Larry W. Hunter & Robert B. McKersie, *Can 'Mutual Gains' Training Change Labor-Management Relationships?*, 8 NEGOTIATION J. 319 (1992); Raymond A. Friedman, *From Theory to Practice: Critical Choices for 'Mutual Gains' Training*, 8 NEGOTIATION J. 91 (1992); Lawrence E. Susskind & Elaine M. Landry, *Implementing a Mutual Gains Approach to Collective Bargaining*, 7 NEGOTIATION J. 5 (1991).

Lawyers have less incentive to sit down together to learn new methods of negotiating.[77]

III. CONCLUSION

We started this paper with an apparent paradox in the practice of civil settlement in New Jersey: Lawyers would prefer to use more problem-solving methods of negotiation than they do. While 61% of the lawyers would like to see more problem-solving negotiation methods, about 71% of negotiations are carried out with positional methods instead. The lawyers seem unable or unwilling to bring their practices into line with their preferences.

We used data from two other parts of our study of civil settlement—lawyers' descriptions of their efforts to resolve particular cases, and observation of settlement conferences hosted by judges or judge-substitutes—to explore possible explanations for the discrepancy. We tried to isolate particular factors in the structure of legal negotiation that could explain the result. Is positional bargaining inherently more powerful? Are lawyers blocked by a prisoner's dilemma when they try to use problem-solving? None of these explanations were satisfactory. Turning away from depicting negotiation as a kind of economic game that holds unwilling lawyers firmly to its rules, we then framed the issue as one of habitual social practice. We found this approach more satisfactory. It took on added force when we considered the role of language. Lawyers seem to lack a rich vocabulary of problem-solving that would enable them to implement that method. And they may also be blocked by the time and energy they would have to use to change their positional negotiating habits. What this model gained in explanatory power, however, it lost in detail and precision.

As researchers in this field, we also face a kind of dilemma. The empirical data seem too rich and complex for the economic or structural theory with which we tried to understand it. We may have misconstrued or oversimplified the theory, or the theory of legal settlement may not yet have been grounded in enough empirical research to develop sufficient explanatory power. We suspect that further empirical research that generates

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[77] We have stressed the costs—in time and energy—required to move from positional negotiation to problem-solving, and suggested that similar costs have hindered the adoption of MGB in labor-management relations. But even in the field of labor-management relations, there is no consensus that time and energy costs prevent the move to MGB. Commentators continue to address different kinds of obstacles to adopting MGB, obstacles that rest in concepts, social roles and power relationships. *See* Joel E. Cutcher-Gershenfeld, *Bargaining Over How to Bargain in Labor-Management Negotiations*, 10 NEGOTIATION J. 323 (1994); Friedman, *supra* note 76.

even more detail than we have been able to capture with our three methods may reveal ways in which the structure of negotiation itself plays a more powerful role, or may reveal elements of habitual social practice that stand out as being particularly responsible for the existing state of affairs. More detailed or focused studies, however, may simply drive our empirical understanding yet further away from theoretical structure. In any event, we look forward to further developments of both theory and fact.