1993

Teaching the Skills of Settlement

Roger Fisher

William Jackson

ACQUIRING THE TOOLS OF ADR: TWO VIEWS

TEACHING THE SKILLS OF SETTLEMENT

*Roger Fisher**
*William Jackson***

I. INTRODUCTION—THE REALITY OF INCREASING CONFLICT

TOO many of us there appears to be an increasing gap between what we teach our law students and what most lawyers actually do and ought to be doing. Too often our students learn only the skills of battle. Just as important to them, to their clients, and to the world are the skills of making peace.

The context in which we live today is, to be sure, one of controversy. Within the United States, and all over the globe, interests conflict with each other more and more frequently. As the population increases, the number of interactions also increases. Technology, trade, and travel not only increase the number of those with whom we have contact, they accelerate the pace of life. Airmail has been replaced by the instantaneous "FAX." And we now know that almost every business decision will have some impact on the natural environment and that every regulation designed to protect the environment will have a negative impact on some business. Pressures for democratic processes and participatory decision-making expand the number of those actively involved. Like it or not, active people with differing interests are going to bump into each other ever more frequently.

It would be difficult enough to reconcile such conflicting interests if everyone involved shared the same culture and values and came from the same background. More and more often that is not the case. Ethnic and cultural differences tend to aggravate whatever underlying conflicts of interests there are. Conflict is truly a growth industry. People will inevitably have more conflicts next year than last.

In this conflict-prone world, there is a need for professional help. Parties to a conflict require assistance in dealing with their differences, especially

* Director of the Harvard Negotiation Project and Samuel Williston, Professor of Law, Emeritus, Harvard Law School.
** Special Assistant to the Director of the Harvard Negotiation Project.

since these differences often involve legal issues which the parties do not understand. As they engage legal advice, a lawyer plays several roles.

II. ROLES OF THE LAWYER

A. ZEALOUS ADVOCATE

Those who see their interests as being threatened or damaged want and need a lawyer to take their side, to defend their interests in court, someone ready to pursue legal remedies against anyone whose activities appear to be impinging upon their legal rights. Most clients who feel aggrieved are not looking for a peace-maker, a facilitator, or a mediator. They fear that anyone who is not fully on their side is likely to compromise their rights. Typically, they demand justice, whether or not they also get peace. They are looking for a knight in shining armor, a well-armed gladiator, a tough fighter who will take on their cause and see it through to the bitter end.

The importance and legitimacy of the advocate's role is well established. Each party in a controversy, no matter how guilty or careless they may have been, is justly entitled to competent legal assistance. The fact that some lawyers may "go too far" — may behave illegally or unethically in advancing the cause of some client — in no way undercuts the importance or propriety of the lawyer's role as a zealous advocate.

Further, in fulfilling the role of zealous advocate a lawyer is also advancing society's larger interest in a system of justice in which courts hear competing arguments before deciding who is right and who is wrong. Not every society embraces the adversary system but, by and large, we are convinced of its merits. We tend to believe that decisions are likely to be wiser if opposing ideas are fully explored and persuasively presented by professionals who are relieved of responsibility for weighing the comparative merits of competing arguments.

B. SKILLED RESOLVER OF DIFFERENCES

Most disputes are in fact settled without going to court. Most of those disputes that actually do go to court are settled before there is a final judgment. These facts are well known. Everyone recognizes that lawyers don't just litigate cases, they settle them. Yet, there is reason to believe that most of the public and most of our students think of a lawyer primarily as a litigator. Going to court is seen as the standard method of dealing with a dispute. Doing anything else is described as "alternative" dispute resolution.

It is the hypothesis of this brief piece that our society would be well served if more attention were paid to the role of the lawyer as someone skilled in resolving differences without going to court. If that is to take place, it will be necessary to clarify that role, to understand the skills it involves, and to offset the dominant role of litigation in legal education.

The role of the litigator is fairly well understood. A good litigator has a great deal of knowledge and skill. He or she should be adept at using the available judicial machinery, at becoming intimately familiar with the facts

of a case and with relevant precedents and laws, at being creative in generating and organizing ideas, arguments, and possible judicial remedies, and at being highly persuasive with judge and jury. Whole courses are devoted to defining, in greater detail, a litigator's role - going far beyond this one-sentence description. The litigator's goal is to persuade judge, jury or both. Typically, the objective is to win by being persuasive to people who, with respect to this particular situation, are neutral.

A settler is equally zealous in advancing a client's interests. In fact, a settler should never recommend a settlement unless convinced that it would serve the client's interests even better than they would be served by litigation. In most situations this is possible through reducing risks, saving time, minimizing emotional trauma, inflicting less damage on relationships, avoiding the financial costs of litigation, and reaching a result that is demonstrably fair. Courts cannot order parties to be wise or creative. Courts are also precluded in most circumstances from imposing a creative solution. A negotiated settlement can be wiser and more creative than any that a judge could order. Like a litigator, a settler needs to be persuasive — in this case not to those who are neutral, but to those on the other side, both client and counsel.

C. Litigation and Settlement

All litigators settle cases. All lawyers negotiate. Most consider themselves reasonably skilled at negotiation. They rely on their natural ability and typically see no more reason to have a course on negotiation than they would to have a course on how to walk or how to put on their clothes. Litigation is recognized as something special; negotiation is not. Yet resolving differences without a judge is a process no less complex than any courtroom procedure. The very informality of a typical settlement negotiation tends to obscure the many issues of process involved. Nevertheless, the interests in having a fair and effective court procedure and the interests in fair and effective negotiation process are similar.

When establishing or changing some aspect of the judicial process, the government is able to separate general issues of procedure from issues of how best to litigate a given case. Presumably, the government wants the litigation process to be neutral, fair, and efficient whether the government is not involved in a case or whether it will be there as plaintiff or defendant. Written rules are set up in advance; when a case comes along it is played according to those rules.

1. Designing a Settlement Process

When two lawyers are negotiating a settlement, each has a role in designing and implementing the process by which they will play. Many people focus solely on the substantive outcome that they desire. They tend to think, "I care about where we are going, not how we get there." In most cases, however, the destination is likely to depend upon the route that is taken.

As a co-designer of the negotiation process, it would help a lawyer to have

a good idea of a model negotiation process, one that would be neutral, fair, and efficient whatever side of a case that lawyer might be representing. Few lawyers find designing such a process to be an easy task. If, for example, a husband and wife who had decided on a divorce were to ask a lawyer to advise them on the best process by which to negotiate the terms of a separation agreement, how many lawyers would feel well prepared to write out the suggested steps or agenda for such a negotiation? It may well be that in a given case one party or another might not want the process to be fair or efficient. However, whether or not this is the case, certainly one skilled in settling disputes should have in mind some of the critical process variables.

Many lawyers make implicit assumptions about the settlement process. In crude outline it is often as follows:

- each side sets forth an opening position on the main points in controversy;
- each side supports its position with arguments;
- first one side and then the other makes a concession, gradually moving toward the other's position;
- one or both may indicate limits on their authority;
- one may announce a "bottom line," which may or may not be slightly flexible;
- if agreement is reached on the big points, they then go to work on the details;
- if agreement is reached on substance, they draft an operational document;
- they get the approval of their clients;
- the agreement is signed.

One advantage of this frequent approach is that it is widely understood. It is used in a variety of contexts, from business transactions, to inter-governmental agreements or treaties, to labor-management negotiations.

A difficulty with this approach is that the concession stage tends to reward the more stubborn party who makes the smallest concessions and does so more slowly. Parties assume that if they concede more slowly, the settlement (if one is reached) is more likely to look like their position. The process also tends to reward bluffing and misleading behavior, since parties tend to pad their positions in order to be able to make concessions. Finally, it often makes it difficult to negotiate trade-offs where one party cares more about one issue and the other party cares more about a different issue. (If there are more than two parties, the process of exchanging concessions becomes extremely difficult.)

2. *Another Approach*

An alternative negotiation process, better in some circumstances but not in others, might be as follows:

- parties explicitly discuss process and agree on an agenda;
- they agree on the status of the document they hope to produce

(e.g., a draft agreement to which neither is committed but which each of the negotiators will recommend to his or her client);
- they jointly prepare a list of all the subjects that either thinks should perhaps be included in an agreement;
- they identify the interests of the parties on each issue (e.g., cash up front; installment payments; right to use the patent; freedom to compete; etc.);
- they generate a range of options and possible ways of handling the different issues;
- they discuss precedents and other relevant external standards of fairness;
- leaving blank areas where they may disagree, they draft a framework agreement, a text which each negotiator would be prepared to recommend as long as they can agree on how to fill in the blanks;
- they jointly try to fill in as many blanks together as possible;
- they exchange contingent offers on the remaining issues, all without legal commitment (e.g., "I will be prepared to recommend a draft that includes your language on clause six if you would be prepared to recommend a draft that includes our preferred way of handling clause twelve.")
- if the process succeeds, negotiators reach agreement on a text which both will recommend to their clients, on the understanding that if any issue in the package is reopened, all issues are open.

In complex negotiations involving multiple parties, public constituencies, and significant distrust, this latter process is likely to be more promising than one that relies upon first reaching agreement in principle. Agreements in principle are often interpreted so differently that each agreement becomes a source of disagreement.

These two process models are not put forward as the best answers to a negotiation process. Rather, they illustrate the kind of process options with which a skilled settler should be familiar.

III. SKILLS OF A SETTLER OF DISPUTES

Regardless of the process chosen for a negotiation, there will be many skills which are necessary to deal with issues outside of litigation. Even if the parties decide to litigate, the prospect of settlement before a final judgement demands that lawyers possess certain skills. It is not enough simply to be able to design an effective negotiation process. It is also important to be able to negotiate for a party. And although many consider negotiation an innate skill, lawyers need to know what it is that they do that makes them successful, in order to broaden their repertoire, and to train less-seasoned colleagues.

A. PREPARATION

One of the most valuable skills for anyone hoping to deal with a dispute is

that of preparing in an organized way. Although there is no single best way to organize ideas, until someone develops for themselves a better method, we and others have found the following seven elements to be a useful way to think about the building blocks of any negotiation:

INTERESTS. What are our interests? What are theirs? What are the hopes, fears, needs, and concerns that underlie our respective positions?

OPTIONS. What are some possible agreements or bits of an agreement that might meet the legitimate interests of both sides? Can we generate more possibilities?

LEGITIMACY. What precedents or other external standards of fairness would be convincing to us? to them? to third parties?

ALTERNATIVES. If we fail to reach agreement, what alternatives do we have? Which is our BATNA — our Best Alternative To Negotiated Agreement? What is their BATNA? Are we proposing something better for them than their BATNA? What is our well-prepared exit line if no agreement is reached at this session?

COMMUNICATION. What do we want to learn from them? What do we want them to hear? Are we listening to them? Are we open to persuasion? Do they know it?

RELATIONSHIP. Can we improve the interaction? What steps might help disentangle people issues ("be soft on the people") from substantive ones ("be hard on the problem").

COMMITMENTS. Do we have carefully prepared drafts of the kind of commitments that we would be prepared to sign? Of those that we would like them to sign? Are they realistic?

B. Relating Internal to External Negotiations

Typically, some of the most difficult negotiations are those with our own clients or constituents. This is particularly true if we represent an organization like a corporation or a government which faces an internal negotiation process. Often the internal negotiations will result in a position which is then conveyed to the negotiator as fixed instructions which seriously limit the chance of settlement. There are several ways to overcome this problem. One is to brief the negotiator fully on the interests of the organization, and give him or her full authority to discuss all issues but no authority to commit to anything until further instructions are issued. The negotiator can also be asked to report back on the external negotiations and recommend granting any further authority that may be desired.

C. Meeting Design

Where a settlement process is extended over time and involves a series of sessions, a lawyer may want to think clearly about the design of each session. In doing so, we have found the following four questions useful:

PURPOSE: What is the purpose of this session?

PRODUCT: What product or products would be realistic goals?

PEOPLE: What people, playing what roles, would be needed?
PROCESS: What process would cause those people to produce the products that would further our purpose?

D. TAKING THE LEAD

Research suggests that a majority of lawyers who are asked whether they tend to take a cooperative or competitive approach respond that it all depends on the attitude taken by the other side. The fact that many, if not most, lawyers are waiting for clues from the lawyer on the other side indicates that there is an enormous opportunity to set the tone for a negotiation by taking the lead.

A negotiator should be well prepared to make the most of this opportunity. Often a valuable approach is to indicate by word and conduct that, as fellow professionals working side by side, we face the common task of coming up with something that each of us can convince our client is fair and in their best interests. It is generally a good idea to attack the problem rather than the other negotiator. One can disagree firmly and persuasively on substance without being disagreeable personally. It involves no substantive concession to accept the other negotiator, to be respectful, to listen actively and carefully to what they have to say, to acknowledge their legitimate interests, to be wholly reliable, and to demonstrate an understanding of how things look from their point of view.

E. OBSERVING THE PROCESS

One who is skilled in settling cases is likely to be one who is highly observant. As a negotiator, I first want to observe what is happening to me. For what purpose am I saying what I am saying? Am I speaking too quickly? Am I getting upset? Are my palms sweating? Am I listening carefully? Should we take a break? I am unlikely to be fully aware of my fellow negotiator if I am unaware of what is happening to me.

Second, skilled negotiators will be able to put themselves in the shoes of the person with whom they are negotiating. What would it feel like to be in their chair? Am I able empathetically to understand their point of view? What may be their purpose in saying what they are saying? If they are reasonably saying "no" to what we are asking, how do they probably see things?

The third vantage point from which to observe a negotiation is that of a "fly on the wall" watching the interaction. What is the activity to which these two parties have devoted the last period of time? Have they been arguing, scoring points, debating, criticizing, and judging each other or have they been using their time more constructively toward jointly dealing with a shared problem?

These abilities are often critical in being able to understand the process by which the negotiation is progressing. Regardless of an interest in a specific substantive outcome, the ability to satisfy those interests may depend heavily

on the process used. The skills of understanding and observing of the negotiation process can be learned and practiced.

F. DIAGNOSING THE NEGOTIATING PROCESS

There are no standard remedies that apply to all negotiating problems. On the other hand, if negotiations are going badly — if they seem to be stuck or to be going around in circles — it is often fairly easy to understand what may be going wrong. Most negotiators at any given time tend to be focusing their attention on no more than two or three of the seven elements listed above. Some negotiators, for example, will emphasize how committed they are to their position, and then devote their efforts to "BATNA bashing" — demonstrating how bad things will be for the other side if no agreement is reached. Almost any negotiation can be quickly understood in terms of the elements that are in play, and what the negotiators are doing with those elements.

G. CHANGING THE GAME

Once one understands what is going on in a negotiation it is often comparatively easy to behave in a way that changes the interaction. In the above illustration, for example, the second negotiator might alter the pattern: (1) by acknowledging that a failure to reach agreement would be bad for both parties; (2) by suggesting the interests that may underlie the position of the first negotiator; (3) by putting some fresh options on the table that could meet some of those interests; and (4) by advancing some external standards of legitimacy that deserve consideration.

The above discussion suggests some of the skills that might be helpful to a lawyer seeking to resolve a dispute out of court. To the extent that lawyers do not have those skills, legal education may be at fault.

IV. LEGAL EDUCATION

Apparently the case method was introduced to legal education on the theory that the law as it was actually applied was not to be found in the statutes adopted by legislatures or in the treatises written by academics but in the opinions of judges. Through reading judicial opinions students would come to learn the law as it really was. But whatever the original pedagogical theory, the opinions of appellate courts are marvelous teaching materials for us professors.

First, they involve real people and real facts. And typically, the facts are not muddy, uncertain, or debatable. Whatever the evidence was at the trial, at the appellate level the facts are taken as given. Second, judicial opinions focus our attention on a choice that had to be made at a particular time and place. Third, we have in front of us the written opinion of one or more judges who have decided how to apply the law to those facts, and are explaining to us readers the reasons underlying the decision. Fourth, this frequently elegant legal opinion is a document that is in the public domain.

There are no privacy issues and rarely any copyright issue involved in a professor's collecting various opinions and reproducing them in a case book for student use.

Finally, although judicial opinions provide our students with some knowledge about the law, each opinion also serves as a stimulating starting point for class discussion. Reading a case tells students something about the law. Discussing it gives students a chance to "think like a lawyer." Typically, we may ask our students how they would have argued a case for the plaintiff or the defendant. Then we can ask them to deal with the situation if the facts had been slightly different. Suppose the case had involved personal property instead of real property: "If the dispute had been over a horse instead of a house, how would you have argued for the plaintiff?" In this way, each opinion offers up for analysis an almost endless supply of hypothetical cases.

It turns out that the bountiful supply of excellent teaching materials produced by our judges has not been free of cost. First and foremost, the widespread use of judicial opinions has tended to put litigation at the center of legal education. Whether students are studying criminal law, contracts, property, or torts the context is what judges and lawyers do in court, not what lawyers do in their offices. Rather than design a rehabilitation program for convicted criminals or engage in plea bargaining, students are likely to be arguing about the state of mind required for negligent homicide. Rather than negotiate a contract, draft a purchase and sale agreement, or scrutinize an auto-insurance policy, the content of our courses is likely to be more judicial opinions. In recent years, major attempts have been made to include a greater variety of legal materials in more and more courses. Generating such non-litigation materials, however, is hard work.

A second cost of using judicial opinions so extensively in our legal education lies in the extent to which it directs attention to either/or choices, to winning and losing, and to debate between opposing points of view. To avoid turning a large class into a bull session it is almost necessary to have a clear point of focus. A teacher would like every student to understand the question that is now being discussed and would like them to advance only points that are relevant to that question. In this context it is not only the judicial process being discussed that is adversarial. The classroom process itself tends to become adversarial as students argue with each other and often all students are defeated in the end by a teacher's telling comment.

Rarely does a judicial opinion suggest that a controversy should have been settled long before or indicate just how such a settlement might well have been brought about. Rarely in class do students have the opportunity to consider whether or how lawyers tried to settle a case, what kind of settlement they explored, and why they were unable to reach agreement. Almost without exception, every case that was successfully settled is eliminated from student consideration. Lawyers who won an appellate case are the heroes. Situations in which lawyers for two sides got together and quietly settled a major problem without going to court, or before trial, or before consideration by an appellate court are understandably ignored. While it is impera-

tive that we teach students to be zealous advocates through the case method or other means, we also need to reinforce this with the settlement skills discussed earlier. This will not be easy, as it involves studying issues in quite different contexts. Typically, the facts in situations such as these are confidential, the process used is private, the choices made by counsel are spread over time, and there is no simple document which tells the story of the settlement. Yet this effort to broaden the repertoire of lawyering skills is a worthwhile investment.

V. CONCLUSION

If lawyers are to know more about resolving differences without judges, law schools should help. Much is being done. More can be done.

For example, it might help if first year students had substantial exposure to settlement skills and the importance of settlement before they become absorbed in litigation. A key step would be to launch an organized effort to produce good teaching materials relating to the settlement of cases in court. It should not prove too difficult to find cases — some that were settled, some that were not — where either the materials are public or the parties are willing to make them so. This is likely to be true where a case was settled late, after substantial litigation. One student could be given an edited version of the plaintiff's file; one an edited version of the defendant's file. They could meet and seek to negotiate a settlement. Thereafter they could be given a copy of the settlement agreement, if one was reached, or a copy of the final judgment if no settlement was reached. Access to such cases might be found through mediators now working in many circuit courts. The fact that a mediator settled a case should not damage its relevance for students trying to settle the case without mediation.

The adversarial confrontational climate of law school might be reduced by having more joint activities in which two or more students work with each other, perhaps as at the Harvard Business School on written projects on which the students receive a joint grade. Not only would they be working together toward a goal, they would also learn a great deal from each other in the process. As every teacher knows, having to explain an idea to someone else helps the explainer better understand the idea in question. Teaching is likely to be a greater educational experience for the teacher than for the student. We should not deprive our students of that opportunity for learning.